BRITISH COLUMBIA LABOUR RELATIONS BOARD

RICHMOND OLYMPIC OVAL CORPORATION

(the "Employer")

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 882

(the "Union")

PANEL:	Jitesh Mistry, Vice-Chair
APPEARANCES:	Michael Kilgallin, for the Employer Richard L. Edgar and Tamara Ramusovic, for the Union
CASE NO.:	67410
DATE OF DECISION:	October 28, 2014

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Union is currently certified to represent:

> all operations staff, including operating engineers, building service workers and facility attendants at 6111 River Road, Richmond, BC

2 The Union has applied under Section 142 of the *Labour Relations Code* (the "*Code*") to vary the bargaining unit to add Sport Attendants:

> all operations staff, including operating engineers, building services workers and facility attendants and sport attendants at 6111 River Road, Richmond, BC (emphasis added)

3 The Employer opposes the application on the basis that it would produce an inappropriate bargaining unit. I have received extensive written submissions from the parties on the appropriateness issue, and find I am in a position to make a decision on the issue based on those submissions.

II. BACKGROUND FACTS

The Richmond Olympic Oval

4 The Employer is a municipally owned sport and recreation facility (the "Oval") operated by an independent Board of Directors. The Oval has multiple ice surfaces, a variety of courts, an indoor track, a climbing wall, and a broad range of wellness and fitness equipment as well as program space. It operates in a highly competitive sport and fitness market offering personal and group training classes, high performance training, wellness and fitness programs, personal training, weight training and sport-specific training. The Employer also hosts local and national events.

5 The Union states there is little or no union penetration in private recreational facilities, particularly for recreational staff. In particular, the Union says it is unaware of any Sport Attendants, Sport Instructors, Sport Leaders or comparable positions at other private recreational facilities that are unionized. The Union further states that almost all of the Sports Staff at the Oval are demographically similar; in particular, they are young (i.e., under 30) and none of them work full-time hours. The Employer does not dispute these statements.

Prior Certifications/Variances

6 On April 5, 2011, the Union was certified to represent the operating engineers and building service workers at 6111 River Road, Richmond, BC.

7 On April 6, 2011, the Union applied for a variance of the bargaining unit to add Facility Attendants.

8 In response to the application to add Facility Attendants to the unit, the Employer took the position in an April 27, 2011 written submission to the Board (the "2011 Submission") that the proposed bargaining unit was inappropriate. The Union expressly relies upon the following passages from that 2011 Submission:

> Several employees at the Oval hold more than one position. For example, Timothy Tsui was originally hired as a Coach by the Oval. Given the seasonal nature of this work, Mr. Tsui also works as a Facility Attendant. Nilvan Krishna works primarily as a Facility Attendant. He has also engaged in the work duties of an Oval Operations Worker.
>
> […]
>
> The day to day activities of the Facility Attendants support programs and events taking place at the Oval, and provide back-up and support to the customer service team when required.
>
> […]
>
> With respect to Facility Attendants, it is clear that they share the same skills, interest, duties and working conditions as the Sports Attendants. The two classifications have primarily the same job responsibilities, with the exception of cash [handling] and direct customer interaction, as noted above.
>
> […]
>
> In light of the similarity of their respective roles, duties and working conditions, the Facility Attendants' "community of interest" lies with the Sports Attendants. By comparison, a rational, defensible line cannot be drawn around the Facility Attendants, BSWs and Operations Workers, whose responsibilities and terms of employment do not share the same similarities.
>
> At the Oval, there is regular and consistent interchange of employees in the different divisions and positions, as well as job duties between various positions.
>
> […]
>
> As highlighted above, Facility [A]ttendants and Sports Attendants essentially share the same job duties. In this way, the two positions perform the job duties of one another on a daily basis.
>
> Additionally, employees may be employed [as] Facility Attendants for one shift, and a different position for their next shift. Examples

> of Facility Attendants who work at the Oval in more than one capacity include Timothy Tsui and Nilvan Krishna. This interchange occurs on a regular and consistent basis.
>
> There are various other examples of auxiliary Oval employees working shifts in different classifications (outside of the specific classifications at issue in the present Application) based on the Oval's operational need.
>
> The Employer has operated in this manner since opening to the public in April 2010. It is in the Employer's interest to engage in this practice in order to ensure it is able to retain all of its employees when there are ebbs and flows in workload in the various departments and operations of the Oval, and to accommodate the fluctuating staffing needs of the facility on a day-to-day basis.
>
> […]
>
> The Facility Attendants do not share a community of interest with the Operations Workers and BSWs, nor can a rational and defensible line be drawn around this group. The Facility Attendants share a community of interest with Sports Attendants, who perform essential[ly] the same job duties and have substantially the same terms and conditions of employment. The Sports Attendants are not in the existing bargaining unit, nor are they included in this variance application. On this basis, the Employer submits the proposed bargaining unit is inappropriate.

9 On February 28, 2012, the Employer withdrew its objection to the appropriateness of the proposed varied bargaining unit. The Board ordered the ballots cast at the representation vote to be unsealed and counted. A majority of ballots cast voted against the variance. Consequently, on March 5, 2012, the Board dismissed the proposed varied bargaining unit.

10 On November 12, 2013, the Union again applied for a variance of the bargaining unit to add Facility Attendants. No objections were raised. The Board ordered the ballots cast at the representation vote for the varied group to be unsealed and counted. A majority of ballots cast voted in favour of the variance. Consequently, on November 26, 2013, the Board varied the bargaining unit to the current description.

11 On June 17, 2014, the Union first applied for a variance of the bargaining unit to add Sport Attendants. On June 27, 2014, the Union applied to withdraw the application. On June 30, 2014, the Board granted the withdrawal.

12 On June 27, 2014, the Union filed the variance application that is the subject of this decision, seeking to add Sport Attendants to the bargaining unit.

The Current Bargaining Unit

13 As of the date of the Union's variance application, the Employer had 239 or 240 employees:

(a) 37 excluded employees, as per Section 1 of the *Code*;

(b) 149 or 150 non-union employees, 47 or 48 of which are Sport Attendants sought to be varied into the bargaining unit by the Union; and

(c) 53 employees represented by the Union under the existing bargaining unit, 11 of which are Facility Attendants.

Facility Attendants

14 To review, Facility Attendants were varied into the bargaining unit on November 26, 2013. For the purposes of this section, "Operations Workers" have been members of the bargaining unit since the Union was initially certified.

15 The Union states that, prior to the Facility Attendants being added to this bargaining unit on November 26, 2013, Majid Zachery, Soroush Safari and Nilvan Krishna worked both for approximately two years as non-union Facility Attendants, and inside the bargaining unit as unionized Operations Workers. The Union asserts that no known problems occurred as a result of these employees working both inside and outside the bargaining unit.

16 The Employer states that after the Facility Attendants were varied into the bargaining unit on November 26, 2013, the practice of having them work in and out of the bargaining unit ended. There are no other instances of employees working in and out of the bargaining unit.

17 With respect to Zachery, Safari and Krishna, in particular, the Employer states:

(a) Zachery was a non-union Facility Attendant who also performed work as a unionized Operations Worker within the bargaining unit starting in July 2012. From July 1, 2012 to November 26, 2013 (when the Facility Attendants were varied in), he worked 60 shifts as a non-union Facility Attendant and 91 shifts as a unionized Operations Worker. During this 16-month period, there was only one occasion where he worked both positions in the same day.

(b) Safari was a non-union Facility Attendant who also performed work as a unionized Operations Worker within the bargaining unit starting in January 2013. From January 2, 2013 to October 29, 2013 he worked 63 shifts as a non-union Facility Attendant and 15 shifts as a unionized Operations Worker. During this 10-month period, he never worked both positions in the same day.

(c) During the period that Krishna was a non-union Facility Attendant, he only worked one shift (April 7, 2011) as a unionized Operations Worker within the bargaining unit. He never worked both positions in the same day.

18 In its sur-reply, discussed later in this decision, the Union does not dispute these assertions by the Employer.

Sport Attendants

19 The Sport Attendant position that the Union has applied to vary into the bargaining unit is a customer service based role, in which the employees help meet the needs of Oval members and user groups by addressing inquiries, conducting equipment rental/set-up and take-down, administering first aid and enforcing the facility schedule. They are expected to communicate to Oval patrons with respect to an array of Oval programs and events. As a result, they are trained to have past and current knowledge of Oval program and event offerings (spanning multiple departments). Sport Attendant shifts are generally 7.5 hours, or 4 hours during peak times.

Sport Instructors

20 The Union has not applied to vary Sport Instructors into the bargaining unit.

21 Sport Instructors are expert coaches who are hired to provide specialized sport instruction for intermediate to advanced clients. They implement a curriculum that is in keeping with the Oval's *Sport for Life* mandate and track/evaluate the skills progression of Oval clients. They deliver sport instruction and respond to questions pertaining to the program. Sport Instructor shifts are 1-2 hours per course or program offering.

Sport Leaders

22 The Union has not applied to vary Sport Leaders into the bargaining unit.

23 Sport Leaders provide foundational sport instruction to clients ranging from beginner to intermediate, in various formats, including camps, birthday parties, corporate team-building activities and introductory sport classes. They deliver sport instruction and respond to questions pertaining to the program. Sport Leader shifts are 1-7.5 hours per course or program offering.

The Sports Staff, Overall

24 Collectively, the Sport Attendants, Sport Instructors and Sport Leaders constitute the "Sports Staff". The Employer attached to its written submission an unchallenged summary of shifts worked by the Sport Attendants from March 27 to June 27, 2014:

(a) Collectively, there were 62 Sports Staff employees performing work as Sport Attendants, Sport Leaders or Sport Instructors;

(b) 47 of those 62 employees were classified as Sport Attendants; and

(c) 36 of the 47 Sport Attendants also worked as Sport Leaders and/or Sport Instructors.

Further analysis of this data will be set out later in this decision.

Facility Attendants and Sports Staff, compared

25 There is significant overlap in duties and responsibilities of Facility Attendants and Sport Attendants, including: performing first aid for their work areas; reporting to manager Christine Long; inputting their time with the same time code; working closely together, including sharing duties for the set-up of the various areas; working under a wage scale that varies between $14.25 and $17.97 per hour; typically working regular shifts throughout the year; having responsibility for the Oval for their specific area of work; and, more generally, having a job focus on the space as opposed to the people using it.

26 That said, Facility Attendants and Sport Attendants also have independent duties and responsibilities unique to their jobs. For example:

(a) Unlike Facility Attendants, Sport Attendants also have primary responsibility for areas of the Oval that are used by the public, as well as responsibility for equipment rentals, the loaning and security of equipment and, on occasion, cash and credit payments. None of these duties and responsibilities are performed by Sport Instructors and Sport Leaders.

(b) In contrast to Sport Attendants, Facility Attendants work on shipping and receiving, laundering services, parking services, meeting room maintenance, and provide general help to all staff (e.g., transporting heavy items).

27 Sport Instructors and Sport Leaders, by contrast, have minimal overlap in duties or responsibilities with the Facility Attendants. In particular, unlike the Facility Attendants, the Sport Instructors and Sport Leaders are: generally temporary or seasonal without a continuous employment relationship; report to different managers than the Facility Attendants; code their time differently than the Facility Attendants; have a highly variable wage scale between $13.00 and approximately $30.00 an hour; do not have any responsibility for the Oval, only the participants; in the case of Sport Instructors, are often scheduled for one- or two-hour instructional shifts; and, generally, do not share work duties with the Facility Attendants.

Recent Events

28 On July 3, 2014, prior to the representation vote in this matter, the Employer sent an email to all "sport" employees advising of its position that the employees should not be unionized and the difficulties they may encounter if they were to vote in favour of unionization and provided the employees with a link to "labourwatch.com", a website the Union describes as "anti-union".

29 On July 24, 2014, the Employer forwarded correspondence to the Sport Attendants that the Union describes as "intended to dissuade their staff people in these classifications from pursuing unionization".

30 At no point has the Union filed an unfair labour practice complaint with respect to the July 3 and 24, 2014 communications from the Employer to its employees.

III. THE PARTIES' POSITIONS

The Employer's Position

31 The Employer objects to the Union's variance application on the basis that the resulting bargaining unit would be inappropriate. The Employer says that the four primary factors relevant to questions of bargaining unit appropriateness -- similarity in skills, interests, duties and working conditions, geography, the Employer's physical and administrative structure and functional integration -- all point to this conclusion.

32 The Employer submits it is not possible to draw a rational and defensible line around the existing bargaining unit and the Sport Attendants. The Sport Attendants share a community of interest with employees not included in the proposed bargaining unit (Sport Leaders and Sport Instructors). In particular, there is a significant, long-standing and *bona fide* functional integration among the Sports Staff.

33 The Employer submits the nature and extent of the problems arising from the functional integration factor, alone, weighs in favour of denying the Union's application. The Employer further submits the other factors also support its objection. In such circumstances, the Employer submits the Union's application must fail.

34 The Employer also submits, in the alternative, that if the Board finds that the variance of only the Sport Attendants is appropriate then a new vote should be ordered pursuant to Section 24(3) of the *Code* because less than 55 percent of Sport Attendants cast ballots in the representation vote.

The Union's Position

35 The Union submits that, by its statements in its 2011 Submission to the Board, the Employer has admitted that a bargaining unit that includes the currently certified staff, along with the Sport Attendants, is an appropriate bargaining unit. The Union submits that where the Employer has made such a representation in a formal submission, the doctrine of election requires the Board to hold the Employer to its prior submission on the appropriateness of the proposed bargaining unit. The Union says the doctrine of election is a long-standing principle that requires parties to adhere to positions they take both within and between legal actions. Submissions to the Board take the place of pleadings in the civil courts. Parties are not permitted to change their positions in subsequent actions based on whatever is to their strategic advantage at the time.

36 The Union says it is notable that the Employer made submissions about an interchange of employees at the time it made its 2011 Submission. The Union says that the Employer earlier submitted that it would be an appropriate bargaining unit if that unit also included Sport Attendants despite knowing of, and noting that, employees worked in more than one position. The Union submits the Employer cannot make that submission in its prior application and ask this Panel to find that the unit it said in its 2011 Submission was appropriate is now not an appropriate bargaining unit. The Union says nothing has changed with the way this work is organized, or the way the employees do the work, that would justify a change in the Employer's position.

37 The Union submits this is a "difficult to organize" sector with little or no union penetration and, as a result, access to bargaining should be the most important criteria and community of interest factors should be relaxed. The Union further submits that the Employer's July 3 and 24, 2014 communications to the employees, make it "clear to the Sport Attendants that it does not wish them to unionize, and has broadcast to all of its employees both in the bargaining unit, and those in the proposed bargaining unit, that there are […] negative consequences to joining the [Union], suggest that this is a particularly compelling case to apply [the 'difficult to organize'] approach".

38 In further support of its "difficult to organize" argument, the Union submits:

> […] we are dealing with a young, part-time staff, working in an industry which is typically non-union, many of whom have little or no security of employment, who are being told by their Employer that problems will exist […] should they unionize, in the fifth application for certification that [the Union] has made for this employer, suggests, in our submission, that this is a compelling case to ensure that access to collective bargaining is available to these employees should they vote in favour.

39 The Union submits that, in any case, the unit applied for is appropriate for collective bargaining. The Union says there is a clear distinction between the work performed by Sport Attendants, and that of Sport Instructors and Sport Leaders. The Sport Attendants are in charge of the Oval itself, while Sport Instructors and Sport Leaders are responsible solely for participants in Oval courses and programs. Their wage scales are different, they perform different duties, they address different issues, they report to different managers, they input their time differently, and they work all year round as opposed to the seasonal work performed by the other two categories.

40 The Union submits there can be no doubt that the community of interest of the Sport Attendants is with the currently certified employees, highlighted by the identical duties they perform as those performed by the Facility Attendants. The Union says that the Sport Attendants' differences in security and length of employment, wage scale, reporting structure and employee codes compared to other Sports Staff, as well as their common duties (including responsibility for the Oval as opposed to the program participants) with the Facility Attendants, make it clear that their community of interest rests with the staff that are currently unionized.

41 The Union submits the case law relied upon by the Employer does not stand for the proposition that, in every circumstance, performing work in and out of the bargaining unit will defeat an application for certification. The Union says, in contrast to those earlier cases, in the case at hand the same employees are performing different jobs at the same location, the proposed bargaining unit does not cut across classification lines and at all times when Sport Attendants perform Sport Attendant work they will be in the bargaining unit. It is only when they are not performing that work (which is coded differently making it easier for the Employer to administer the work and the different functions) they will not be covered by the bargaining unit certification.

42 The Union submits there are many circumstances where employees work both in and out of the bargaining unit. Sometimes employees working for the same employer are members of a different union when they work in different work locations. The Union notes that one example where this is common is in health care, yet bargaining is not only viable but thriving in that sector.

43 The Union says the Employer has not provided any evidence, nor made any concrete assertions, that the viability of the proposed collective bargaining relationship is rendered problematic by work being performed both in and out of the bargaining unit. There is no factual basis upon which the Board could conclude that a viable collective bargaining relationship cannot be established if the Sport Attendants are included in the bargaining unit, and the Sport Instructors and Sport Leaders are not. For example, if a Sport Attendant is disciplined for conduct while in one of the other Sports Staff positions the Union will not be able to assist them under the Collective Agreement. If conduct occurs while a Sport Attendant, then the Collective Agreement will apply.

44 The Union submits the Employer's alternative position that a new vote should be ordered is without merit and should be rejected.

The Employer's Position in Reply

45 With respect to the relevance of the 2011 Submission and the Union's reliance on the doctrine of election, the Employer notes that the 2011 Submission was withdrawn by the Employer and no decision was made by the Board. The Employer further submits the Union's position should be ignored because: the Sport Attendants' community of interest with groups other than the Facility Attendants and the functional integration of the *Sport Attendants* were not live issues in the 2011 variance application; the level of functional integration cited in the 2011 case was not nearly as significant as that which exists at hand; the 2011 Submission cannot be construed as an eternal concession that the Sport Attendants, alone, would always be an appropriate unit; and, the facts have evolved since 2011.

46 Regarding the Union's claim that this variance deals with a group that is "difficult to organize", the Employer submits these are merely bald statements without the necessary factual data to support such allegations.

47 The Employer submits the Union has almost entirely focused on the community of interest factor, but failed to address the fact that a rational and defensible line cannot be drawn around the proposed bargaining unit. The Employer says any community of interest between Sport Attendants and Facility Attendants, assuming there is one or there is deference under the "difficult to organize" approach, will be trumped by significant functional integration issues that threaten viability of the proposed unit. The Employer says the Union is effectively requesting the Board abandon its jurisprudence regarding the presumption against collective bargaining viability where sufficient functional integration is present, simply because the Union thinks the parties could potentially work out the concerns. The Employer submits that such a request cannot be accepted, especially in light of the significant nature and extent of the functional integration present in the current facts.

The Union's Sur-reply

48 After the close of submissions, the Union filed an unsolicited sur-reply submission. The Employer objected to the Union's submission as not falling within the scope of proper sur-reply. In light of my final conclusion in this matter, I have considered the Union's sur-reply submission.

49 In its sur-reply, the Union submits:

a) Contrary to the Employer's attempts to distance itself from its 2011 Submission in its final reply submission in the current proceedings, the fact is that the Employer did take the position that a unit with Sport Attendants in it would be appropriate for collective bargaining.

b) The Employer's ability to marshal statistics demonstrating that various people perform work in various jobs underlines the fact that the Employer has the ability to easily administer employees whether they are inside or outside the bargaining unit.

c) There is no onus on the Union to rebut a presumption that bargaining will not be viable when there are employees working both within and outside the bargaining unit. Rather, it is for the Employer to establish that bargaining is not viable. The problem suggested by the Employer in this respect is merely speculation and not based on the historical realities of this workplace.

IV. ANALYSIS AND DECISION

50 The issue before me is whether the variance the Union seeks would result in an appropriate bargaining unit. The Board's leading decision on bargaining unit appropriateness is *Island Medical Laboratories Ltd.*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), 19 C.L.R.B.R. (2d) 161 ("*IML*"). Before setting out my analysis and decision on the *IML* factors, I will address the Union's "doctrine of election" and "difficult to organize" arguments.

The Doctrine of Election

51 The Union submits the Employer, by its 2011 Submission, has admitted that the proposed varied bargaining unit is an appropriate bargaining unit. The Union further submits that where the Employer has made such a representation in a formal submission, the doctrine of election requires the Board to hold the Employer to its prior submission on the appropriateness of the proposed varied bargaining unit. In support of its position, the Union relies upon a number of court decisions from Great Britain, Alberta and British Columbia: *Scarf v. Jardine*, (1882) 7 H.L. (E.) 345 ("*Scarf v. Jardine*"); *United Australia, Limited v. Barclays Bank, Limited*, [1941] A.C. 1 (H.L.); *Mystar Holdings Ltd. v. 247037 Alberta Ltd.*, 2009 ABQB 480 ("*Mystar Holdings*"); *Pepper's Produce Ltd. v. Medallion Realty Ltd. (c.o.b. Sutton Group Medallion Realty)*, 2012 BCCA 247 ("*Pepper's Produce*"); *Stewart v. Clark*, 2013 BCCA 359, ("*Stewart v. Clark*"); and *Halagan v. Reifel*, (November 25, 1997), Vancouver C945038 (BCSC).

52 The essence of the doctrine of election, in the Union's view, is captured in the following passage from *Scarf v. Jardine*:

> [w]here a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted. (p. 360)

53 The Union submits that, in *Mystar Holdings*, the Alberta Court of Queen's Bench stated:

> […] a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims. (para. 49, emphasis in original)

54 For two reasons, I am not persuaded by the Union's argument. First, the 2011 Submission was not squarely directed at the appropriateness of the currently proposed unit. Indeed, I am unable to find the 2011 Submission to constitute an admission that the currently proposed unit is appropriate, as the Union suggests. The thrust of the Employer's earlier argument was simply that the Facility Attendants and Sport Attendants share a community of interest and, as such, it was not possible to draw a rational, common defensible line between these groups. Put another way, the 2011 Submission was directed at proving a narrow, negative proposition (that a rational, defensible line could not be drawn between the Facility Attendants and the Sport Attendants), rather than the broader, positive proposition that a varied bargaining unit including Sport Attendants would be appropriate for collective bargaining. At no point in the earlier submission did the Employer expressly and unequivocally concede that a bargaining unit with both Facility Attendants and Sport Attendants (i.e., the currently proposed bargaining unit) would be appropriate for collective bargaining. More to the point, the position taken by the Employer in its 2011 Submission is not "fundamentally inconsistent", "diametrically inconsistent" or "irreconcilable" with its position in the current proceedings: *Stewart v. Clark*, para. 50; *Pepper's Produce*, para. 28; and *Mystar Holdings*, para. 49.

55 Second, the 2011 Submission was more than two years old at the time the current variance application was filed by the Union. Not only is the Union requesting the Board infer that the Employer conceded in its 2011 Submission that the currently proposed bargaining unit is appropriate for collective bargaining, but that this inferred concession should continue into the indefinite, long-term future.

56 This is not to say that a long-standing agreement between parties or express commitment by an employer would not be a significant factor in another bargaining unit appropriateness case; however, those are not the facts before me. In the particular circumstances at hand, I am not persuaded by the Union's doctrine of election argument.

"Difficult to Organize"

57 The Board's leading decision on bargaining unit appropriateness, *IML*, summarizes the "traditionally difficult sector to organize" issue at pp. 40-41.

> 4. In a traditionally difficult sector to organize, the community of interest factor on an initial application for certification is "relaxed".
>
> 5. To establish that a sector or industry or group of employees is traditionally difficult to organize, the evidence can include the following:
>
> (a) the Board's own records - i.e., collective agreements and certifications.
>
> (b) evidence of individuals with experience in the sector or industry.
>
> (c) expert evidence concerning the sector or industry.
>
> The evidence should establish a low-union density either in the particular industry or among the group of employees which reflects structural or systemic aspects of the workforce which have made it difficult to organize.

58 I find the Union's submission has not set out sufficient evidence to meet the test discussed in the above-captured passage from *IML* to warrant further inquiry into this argument. The Union points to the demographics of the Oval staff (e.g., young, part-time and with little experience being represented by a union), as well as alleged statements made by the Employer to members of the proposed bargaining unit. However, the Union's submission on the "difficult to organize" issue does not take the further step of providing particulars regarding the private recreational facility sector at large. Even if I were to accept the Union's position that there is little or no union penetration in private recreational facilities, particularly for recreational staff, the Union has not established in its submission that such low-union density "reflects structural or systemic aspects of the workforce which have made it difficult to organize" with respect to the private recreational facility sector at large: *IML*, p. 41.

The Proposed Varied Bargaining Unit

59 In *IML*, the Board set out the four main factors with respect to determining bargaining unit appropriateness:

> 1. There are two fundamental principles in the Code regarding the determination of appropriate bargaining units, access to collective bargaining and industrial stability. These principles are always present in any determination of appropriateness.
>
> 2. Community of interest is the test for determining an appropriate unit. An appropriate unit must have a rational and defensible boundary.
>
> 3. On an *initial* application for certification, community of interest is determined by the following factors:
>
> (a) **similarity in skills, interests, duties and working conditions.**
>
> (b) **the physical and administrative structure of the employer**.
>
> (c) **functional integration**.
>
> (d) **geography**. […]
>
> (pp. 39-40, italics in original, boldface added)

60 As noted by the Employer, and not disputed by the Union, the Board has held that in circumstances such as those at hand, where the application seeks to vary in additional employees into a *single* existing bargaining unit, the fifth and sixth factors noted in *IML* (i.e., the practice and history of the current collective bargaining scheme and the practice and history of collective bargaining in the industry or sector) do not require consideration: *Finning Ltd.*, BCLRB No. B92/95 at paras. 34-35.

61 I begin my analysis with the first *IML* factor of "similarity in skills, interests, duties and working conditions". I find the interchangeability of Sport Attendants with other Sports Staff demonstrates a real-life commonality in skills, interests, duties and working conditions between groups inside and outside the proposed varied bargaining unit. There are also a number of aspects of Facility Attendants' and Sport Attendants' working duties that are dissimilar.

62 That said, there are also numerous skills, interests, duties and working conditions shared by Facility Attendants and Sport Attendants. Both groups focus their responsibilities on the Oval, rather than the people using it. They work closely together, have a comparable wage scale and typically work regular shifts throughout the year. In light of these countervailing facts, I find the first *IML* factor to weigh slightly in favour of the Union.

63 With respect to the second and fourth factors -- geography and the physical and administrative structure of the employer -- I note the Employer's operations are all within

a single geographical location. While there are 12 separately managed departments, there is no evidence that they have not been sufficiently coordinated to allow a viable collective bargaining relationship since the initial certification. I find this factor to also weigh slightly in favour of the Union.

64 Moving on to the third factor, functional integration, the Board in *IML* discussed this factor in the following passage:

> The third factor is functional integration. This was first identified by Chair Munroe in *Canadian Kenworth, supra*. A distinction was made between functional *relationships* between *departments* and functional *integration* of *employees* (p. 68; italics in original). Any employer concerned with productivity and efficiency will, of course, try to achieve as much functional integration, coherence, or relationship as possible. In that sense these terms tend to overlap, but for the purposes of defining community of interest Chair Munroe's distinction is helpful. **A functional relationship between departments is to be expected in any business and would in itself not prevent a community of interest being found in any single department.** (And of course it goes without saying that it would not prevent a finding of a larger community of interest). **However, the functional integration of employees in several departments - employee interchange, shared duties, etc. - would require all such departments within one unit. This functional integration - employee interchange, job duties integrated - must be on a day to day basis, reflecting a consistent managerial policy of functional integration**, and not simply amount to holiday relief or the replacement of sick employees. There are also the integrated work processes that go beyond a functional relationship between departments. A continuous work process (e.g. assembly line), overlapping and shared duties, team processes, all require a single bargaining unit. The focus of this criterion is therefore upon how the employer has organized itself operationally. (p. 27, italics in original, boldface added)

65 The labour relations problems posed by employees working both within and outside the bargaining unit are not merely hypothetical, as the Union suggests. In *Lifestyle Retirement Communities Ltd.,* BCLRB No. B452/97 (Leave for Reconsideration of BCLRB No. B163/97), 39 C.L.R.B.R. (2d) 202 ("*Lifestyle Retirement*"), the reconsideration panel discussed these difficulties:

> […] while the scope of representational rights may be discussed [in collective bargaining], the issue cannot be taken to impasse in the event the parties disagree. […] This inability to take to impasse matters beyond the representational rights granted in a certification stands as a potential obstacle to complete resolution where some employees work both in and out of the bargaining unit. **If the parties cannot reach agreement in collective bargaining on issues that flow from this dual existence, then the inability to**

> **achieve finality under the Code is problematic to viable collective bargaining**.
>
> **One potential problem arising from functional integration is the negotiation of provisions dealing with hours of work, overtime and seniority -- i.e. given the fact that some employees will work both within and outside the bargaining unit.**
>
> **Another serious area of difficulty is discipline and discharge where the Employer might rely on employee conduct at both the Union and a non-union facility.** A series of questions immediately arises, including some recognized by the original panel: Would there be recourse to the grievance and arbitration procedure if an employee was disciplined while working at the non-union facility? If a culminating incident occurred at the Union facility, could the Employer rely on conduct at the non-union facility (where there was no ability to grieve earlier discipline when it was imposed)? What jurisdiction would an arbitrator have to deal with matters which did not occur during the employment relationship governed by the collective agreement?
>
> The original panel, while vexed by these potential problems, determined that they could be resolved at collective bargaining and if not, by an arbitration board. We agree that a solution might be reached by agreement. However, it is also necessary to consider what will happen if there is no such agreement. That issue was not addressed in the original decision. Thus, the concern about potential problems of having no Code means of resolution in such situations was included in assessing the potential viability of collective bargaining. **Nor was consideration given by the original panel to how the parties might address the impact of external legislation (such as the Employment Standards Act) where the overall relationship of several employees would be subject to both a collective agreement and an individual contract of employment.** (paras. 38-41; boldface added)

66 In *Community Living Society*, BCLRB No. B9/2013, 221 C.L.R.B.R. (2d) 213 ("*Community Living Society*"), the union applied for an initial certification of a bargaining unit that would have resulted in 39% of the employees working within and outside of the unit. In the Board's view, this was not *de minimus* and therefore the concerns noted in *Lifestyle Retirement* concerning the viability of the collective agreement arose. The proposed bargaining unit was found to be inappropriate: *Community Living Society*, para. 69.

67 In the case at hand, the level of functional integration is even more significant and extensive than *Community Living Society*. For the period of March 27 to June 27, 2014, 36 of the 47 employees classified as Sport Attendants also worked as Sport Leaders and/or Sport Instructors. Even more relevant is the profound amount of interchange within and outside the proposed varied bargaining unit by the Sport Attendants during this recent period:

(a) 26 of the 47 Sport Attendants spent at least 20 percent of their hours worked as Sport Leaders and/or Sport Instructors;

(b) 15 of the 47 Sport Attendants spent the *majority* of their hours as Sport Leaders and/or Sport Instructors;

(c) 6 Sport Attendants worked *90 to 100 percent* of their hours as Sport Leaders and/or Sport Instructors; and

(d) 24 of the 47 Sport Attendants worked as a Sport Attendant and Sport Leader or Sport Instructor *on the same day*.

These facts demonstrate a "consistent managerial policy of functional integration": *IML*, at p. 27.

68 I further note this is not a case where employees would be working within and outside the bargaining unit at discrete and separate operations with distinct human resources and management. The vast majority of Sport Attendants would find themselves working both within the unit and outside the unit at the same worksite and within the same department, sometimes in the same day.

69 I find the case authorities relied upon by the Union particularly, *North Shore Disability Resource Centre Association*, BCLRB No. B284/95 ("*North Shore Disability")* and *The City of Surrey*, BCLRB No. B51/2012, 207 C.L.R.B.R. (2d) 146 ("*City of Surrey*"), to be distinguishable. The panel in *North Shore Disability* based its finding of appropriateness, in part, upon the fact that the multiple jobs within and outside the proposed unit were "highly independent" of each other: para. 17. Here, the Sport Attendants are regularly scheduled to work as Sport Leaders and Sport Instructors, including on the same day. The three Sports Staff positions, while different, cannot be described as highly independent of each other.

70 In *City of Surrey*, the history of work within and outside the bargaining unit prior to the variance application was comparable to the interchange expected to result from the proposed variance:

(a) Prior to the variance application in *City of Surrey*, 450 of 1,080 employees were unionized. Approximately 80 of those 450 unionized employees worked within and outside the bargaining unit. Put another way, 18 percent of the bargaining unit also worked in non-union positions.

(b) Of approximately 100 employees the union in *City of Surrey* sought to vary into the bargaining unit, 26 employees would have also worked outside the bargaining unit.

Accordingly, the amount of functional integration anticipated by the variance application in *City of Surrey* represented a continuation of an existing state of affairs of employees working within and outside the bargaining unit.

71 The same cannot be said of the circumstances at hand. Unlike *City of Surrey*, the amount of functional integration that would result from the proposed variance of Sport Attendants into the bargaining unit is not at all comparable to the historical functional integration. In the case at hand:

> (a) The historical functional integration involved only three employees, Zachery, Safari and Krishna, for 16 months, 10 months and one day, respectively. One of those employees, Krishna, only worked *one* shift as a unionized Operations Worker while employed as a non-union Facility Attendant. Between the other two employees, Zachery and Safari, there was only *one* occasion where an employee worked both as a non-union Facility Attendant and unionized Operations Worker on the same day. There has been no functional integration since November 26, 2013.
>
> (b) Based on recent history if the variance is granted, the number of employees working inside and outside the bargaining unit would explode from a previous high of 3 (and zero at present) to 36 Sport Attendants. For the first time, the bargaining unit would have unionized employees who spend *90 to 100 percent* of their working hours outside the bargaining unit. A bargaining unit that has only had one day on which employees worked within and outside the bargaining unit would see this become a regular occurrence.

It is apparent that, unlike *City of Surrey,* the proposed variance represents a sea change in scope and frequency of functional integration.

72 Furthermore, the Board in *City of Surrey* suggested the employees in that case had historically worked within and outside the bargaining unit for an extended and uninterrupted period of time: para. 76. Specifically, the Board in that case noted "there was no suggestion that [the history of functional integration] was a recent or short-lived circumstance […] this was simply a reality of the nature of this particular workplace": *City of Surrey*, para. 76.

73 In the case at hand, there are presently no employees working both inside and outside the bargaining unit. The history of functional integration at the Oval is limited to a brief period ranging from one day to 16 months, with none since November 26, 2013.

74 In light of the significant and extensive functional integration at hand, this factor weighs heavily against a finding of bargaining unit appropriateness. Taking the *IML* factors in their entirety, I find that Sport Attendants share a community of interest with the remaining Sports Staff such that a rational and defensible line cannot be drawn around them. The proposed varied bargaining unit is inappropriate for collective bargaining and, as such, the Union's application is dismissed.

75 Given my conclusion on bargaining unit appropriateness, it is not necessary to address the Employer's alternative position that a new representation vote should be ordered.

V. CONCLUSION

76 The Union's Section 142 application is dismissed.

LABOUR RELATIONS BOARD

"JITESH MISTRY"

JITESH MISTRY
VICE-CHAIR