

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

P. SUN'S ENTERPRISES (VANCOUVER) LTD.  
(CLARION HOTEL GRAND PACIFIC)

(the "Employer")

-and-

NATIONAL AUTOMOBILE, AEROSPACE,  
TRANSPORTATION AND GENERAL WORKERS UNION  
OF CANADA (CAW-CANADA), LOCAL 4234

(the "Union")

PANEL:	Laura Parkinson, Vice-Chair
COUNSEL:	Lorene Novakowski, for the Employer John Bowman, for the Union
CASE NO.:	43198
DATE OF HEARING:	August 18, 30, 31 and September 25, 2000
DATE OF DECISION:	November 10, 2000

**DECISION OF THE BOARD**

I. **NATURE OF APPLICATION**

1 The Union applies under Section 18 for certification for a bargaining unit of employees described as "all hotel employees at 450 Quebec Street, Victoria, BC except management, office staff and sales staff".

II. **ISSUES**

2 The Employer opposes the application on the basis that it is premature under the build-up principle as the number of employees in the hotel will increase substantially after an expansion to the hotel is completed in May 2001. The Employer also maintains that the bargaining unit sought is inappropriate as it excludes employees in the accounting department. (An issue was originally raised by the Employer about the appropriateness of the exclusion of the fitness instructors in the Health Club, but that objection was not pursued). The Employer further takes issue with the exclusion of four individuals from the Tentative Voter's List: Kim Sandberg, Sous Chef; Bruce Corbett, Night Manager; Jeanette Wong, Reservations Manager; and Chris Muller, Construction Project Coordinator. The Employer asserts that none of these individuals are properly characterized as management as they have no effective determination in disciplinary matters and do not provide any labour relations input. The Employer also asks for the exclusion of the following eleven individuals on the ground that they are casual employees hired only for the summer season:

Jaswinder Randhawa

Sarah Mayes

Raj Birk

Dolores Boado

Yam Yam Chow

Deborah Cox

Ryan Fennell

Inder Gill

Linda Madsen

Maria Martinez

Melinda Van Rheenen

Malcolm Wong

3 The Employer had initially also challenged the inclusion of Deborah Cox on the same basis that she was a casual employee, but at the conclusion of the hearing, withdrew that challenge. It advised the Board that it now has sufficient work for Cox so her employment will continue. As another category for exclusion, the Employer asks that six other individuals who have submitted letters of resignation be excluded:

David Clifford

Pamela Emery

Andrea Farkas

John Gillingham

Gursharan Singhera

Duane Marsh

4 Of those six, the Union agreed that Emery, Farkas and Gillingham should be excluded as they had provided a letter of resignation before the filing of the application. However, they disputed the exclusion of the other three - Clifford, Singhera and Marsh.

5 The Union also sought the exclusion of James Kopplin, Assistant Building Maintenance Manager, on the basis that he was employed in a management position excluded from the scope of its proposed bargaining unit.

### III. FACTS

#### A. Expansion of Hotel

6 The Union applied for certification on August 10, 2000. The employees it seeks to represent work at the Hotel Grand Pacific. The Quality Inn Harbourview and the Hotel Grand Pacific were two adjacent properties that used to be operated by the same business entity. Although the two properties were run as two separate hotels, there was one payroll. There were approximately 145 hourly employees working in total on the two properties.

7 The Quality Inn was demolished in the fall of 1999 to make way for construction of an expanded Hotel Grand Pacific. Some of the employees who formerly worked at the Quality Inn have since worked at the Hotel Grand Pacific. At the time of the hearing, the Hotel Grand Pacific was ten months into a seventeen month construction project. The construction is scheduled to be completed by the spring of 2001, with the "substantial performance date" set for April 30, 2001. At present, the project is on target for reaching that schedule. After construction is completed, the hotel will have 308 rooms for rent and 9566 square feet of conference space. Currently, the hotel had 128 rooms that are considered "rentable" (some of the other rooms are not offered for rent

because of the effect of the surrounding construction). At present, the hotel has 3134 square feet of conference space of which 674 is currently rentable and the remaining 2640 feet is not usable.

8 The expansion of the hotel will lead to the need for the hotel to hire more employees in the spring of 2001. Recruitment of more hourly staff is not actively underway at this point; the hotel is only at the planning stage and has not yet placed any advertisements for hourly paid staff. The first stage of the hiring plan was to identify whether there was any interest in the supervisory and management positions from among the current employees. A posting was circulated in July 2000 soliciting interest by potential applicants. By October or November, the hotel expects to hire internally about 5 or 6 of the approximately 9 additional supervisory and management positions. After that, the hotel will start to screen applications for the hourly positions sometime in early December and expects to have the majority of employees trained and started in April 2001.

9 A Staffing Forecast Model prepared by the Employer predicts that the total number of hourly employees will grow from roughly 72 in August 2000 to 207 by April 2001. The number of employees in those estimates includes casual employees. That document was prepared by Ann Nykamp, the Controller, with assistance from Stephen Webb, the General Manager. The document that was entered into evidence was generated on August 15, 2000. Previous versions of the document existed at one point, but copies were not kept. Hotel management also put together the numbers of staff for the budget for the next year sometime earlier in July. As Webb described it, they put together a "ballpark figure" at that time.

10 The projections in the Staffing Forecast Model are based on the volume of business the hotel anticipates it may get as a result of its expansion. Webb testified that the projections for additional hiring were based on a 75% occupancy rate. Webb acknowledged in cross-examination that the predictions in the Staffing Forecast Model are dependent on external market forces, but he indicated he was confident the marketing plan will be successful. In expanding its conference space and the size of the hotel, the hotel is targeting the higher end of the market. He testified that there are different occupancy rates in each market segment, and occupancy is traditionally higher in the higher end of the market. While he expressed optimism, he also acknowledged that the staffing projection in some areas was driven by the amount of bookings that the hotel would receive in banqueting. If the hotel does not get the business anticipated, it would not be employing the 30 part-time banqueting employees it predicts will be needed.

11 In the Staffing Forecast Model, the number of employees in the maintenance department was doubled from its current complement based on the number of additional rooms, growing from 2 full-time and 1 part-time to 4 full-time and 2 part-time employees. Two new positions in groundskeeping are to be created; those types of duties are currently handled by maintenance. A full-time and a part-time groundskeeper would be employed. The janitorial and house person positions will be expanded from 4

full-time and one part-time to eight full-time and three part-time due to the expansion of the amount of public space that needs to be maintained.

12 Under those projections, the size of the front desk staff is increased slightly in the Staffing Forecast Model, but not in proportion to the increase in the number of rooms. In switchboard and reservations, a large number of positions are projected, from two full-time to six full-time and one part-time to two part-time employees. That projected increase was justified on the basis that they would be needed to handle group bookings and tours. The figures for the bell desk show only a slight increase from three full-time and three part-time to four full-time and three part-time employees.

13 The kitchen staff is projected to grow from five full-time and four part-time to fifteen full-time and 8 part-time staff members. Webb indicated that more staff would be required in the kitchen to deal with increased business once the marketing promotions are underway and the additional banqueting facilities are open. Room service and mini-bar are projected to have four full-time and two part-time employees. No one is currently employed specifically in those positions and room service is presently offered through the kitchen. With the addition of new rooms, the hotel anticipates room service will increase significantly. The hotel has had one person doing the mini-bar function in the past, but that position was discontinued and put into the Food and Beverage department. As the function of checking the mini-bars is very labour intensive and has to be done every day, the number of staff working in this area is expected to increase.

14 The number of staff working in the restaurant and lounge is predicted to rise from seven full-time and seven part-time to fifteen full-time and eight part-time. During the construction the hotel's meeting space had been used as a restaurant. The restaurant opened on June 9, 2000, although it is not yet complete and there are further expansion plans. The hotel hired seasonal staff around that time to work in the restaurant. The hotel is not doing any marketing of the restaurant yet as it overlooks the construction site, but has plans to promote it later in the fall. The Employer anticipates hiring some people in December to handle the increase in business due to those promotional efforts and to Christmas parties. Webb's expectation is that in the future the restaurant will be busy as a stand-alone operation given its location.

15 The hotel currently does not have a dedicated banquet department; the food and beverage department covers the restaurant and banquets as required. The number of staff anticipated to be hired in banquets is 5 full-time and 30 part-time. The hours expected for the part-time staff would be around 20 hours a week. As Webb acknowledged in cross-examination, the banquet department would have a significant number of casuals, but casuals would be a minority in the rest of the departments. The hotel also plans to open a deli café; there is currently no type of fast-food outlet. The hotel expects to hire 4 full-time and 2 part-time staff to work in that café.

16 Under the Staffing Forecast Model, the new positions to be created include a valet, door person, concierge and security. At present, a minimal amount of valet parking is done by the bell person. After construction is finished, there will be more demand for valet parking due to the reconfiguration of the entrance and the access to

parking. The hotel plans to hire 5 full-time and 4 part-time valets. Three full-time door person positions will be added as part of the hotel's plan to offer a higher level of guest services. Three full-time concierges will be hired; the concierge function is currently handled by the front desk. At present, there is not anyone hired specifically to perform security functions. In the past, the hotel has contracted with an outside firm for a security guard for a special event. The bell persons also now do routine security patrols during their shift, but given the increase in the size of the hotel, one full-time and one part-time security employees will be hired.

17 The number of room attendants is predicted to grow from 12 full-time and 4 part-time to 30 full-time and 6 part-time. That increase is purely a function of the number of additional rooms. The "turn-down" positions would be increased from 1 full-time to 2 full-time and 2 part-time. Currently the hotel only offers a turn-down service to VIPs. The number of room checkers would increase from 1 to 2 full-time.

18 There are no increases forecasted in two areas. The Staffing Forecast Model contains no figures for any increase in the accounting staff. It is unlikely that there would be any increase in accounting staff as although business volumes would increase, the transactions processed in this area are computerized. No change is expected either in the number of attendants employed in the Health Club.

19 In cross-examination of Webb, the Union sought production of the background documents and business plan supporting the predictions in the Staffing Forecast Model. In response to that request, the Employer produced a copy of the valuation study that the hotel commissioned from a firm of chartered accountants in November 1998. That report was prepared to justify the financing sought for the expansion, but the payroll portion was not detailed in that study. It was based instead on industry standards. In its analysis of market performance, the valuation study states that market occupancy levels will drop beginning in 2000, due to the addition of new hotel rooms to the upper tier market. The study gives the projected market performance occupancy rates of 70.3% for 2000, 67.1% for 2001, 68.4% for 2002, and 69.8% for 2003. It also states that market occupancy levels will drop beginning in 2000, due to the addition of new hotel rooms in the upper tier market.

20 On the issue of the projected performance of the expanded property, the valuation study states that it is projected to maintain its present share of the upper tier market and realize occupancy levels above the competition. In its discussion of average room rates, the study suggests that there may be some delay in the hotel's "penetration rate" at the higher end of the market. It states that the hotel "is projected to realize rooms rates slightly above the competitive market until it has established a strong market presence in the higher quality group market segment by 2002 and 2003". For this property, it projects occupancy performance rates of 85% for 1999, 72.0% for 2000 and 70.0% for 2001, 73.0% for 2002 and 75.0% for 2003. (Mention is made in the valuation study that the Hotel Grand Pacific has traditionally had a higher occupancy rate than other hotels, but also notes that the projection of occupancy levels for the Hotel Grand Pacific for 1999 was unusually high at 85% because of the limited number of rooms available for rent during the construction period.)

21 In its review of the seasonal characteristics of the hotel demand analysis, the valuation study states that the Victoria market still has seasonal fluctuations in the demand for accommodation, but the swings in demand are not as dramatic for the properties in the upper tier market. Victoria's busy season extends from March to mid-October with demand reaching supply capacity, particularly during the months of June to September. The upper-tier properties tend to be relatively busy during the traditional shoulder periods of April, May and October as convention demand is growing during these periods. Average occupancies range from 73% to 89% for the upper-tier properties. During the remaining months, November to February, room demand is significantly lower than during the summer months, with occupancies ranging between 40% and 72% for the upper tier properties. The report also notes that tourism is fuelled largely by the increase in numbers of U.S. visitors, driven in part by the combination of a robust U.S. economy and the relative value of the U.S. dollar.

22 Webb testified that the hotel intends to sell the convention space as part of its strategy to secure more bookings for the guest rooms for the shoulder season and off season. Through that strategy, the hotel hopes to extend its peak season into February, March and April and September and October. The slowest period for the hotel has been between November and February. The past figures for occupancy, however, reflect the result of marketing initiatives taken by the industry to promote tourism generally in Victoria. Major exhibitions in the past have attracted more visitors and resulted in increased occupancy during traditionally slow periods. Webb acknowledged that the predictions for 2000 are down from what was expected, but Webb attributes that decline to the effect of the construction. Webb testified that the hotel has achieved its budget every year but one in the five years he has been at the hotel.

23 The Union led evidence to establish that the level of business of the hotel is dependent on outside forces. It produced a copy of a memo sent by Webb to the staff in August 2000 encouraging them to lobby politicians to end the then pending threat of a ferry strike. In that memorandum Webb alluded to the possibility that a ferry strike might lead to the temporary closure of the hotel.

24 The Employer submitted in evidence a chart showing statistics for staffing for comparably sized hotels based on square footage and number of rooms. That evidence is not described more fully as without further details of the number of full-time, part-time and casual staff or better particulars on the type of hotel and level of services offered, I found that evidence to be of little assistance.

B. Managers in Dispute

i) Discipline and Hiring Policy

25 There is a written progressive discipline policy in place with different levels depending on the nature of the employment offence. That policy is described in the Employee Handbook. Under that policy, a first line supervisor may give a verbal

warning after consultation with the next level of management. Anything beyond a verbal warning must be discussed with Webb or with his delegate in his absence.

26 Before hiring may be undertaken, approval is required first from Webb. He does all the final interviews of candidates and makes all the decisions on hiring.

ii) Night Manager

27 Bruce Corbett as Night Manager works 11 p.m. to 7 a.m. He previously worked briefly in accounting and as Night Auditor. He reports to Colin Mantell, Guest Services Manager. When Corbett is off work two days a week, a senior Night Auditor takes over his responsibilities. Corbett is a salaried rather than an hourly employee. Corbett, like the other managers in dispute, is covered by the salaried benefit plan. The only other perk associated with his position is complementary use of the Athletic Club. His salary translates into an equivalent hourly rate of \$15.31 an hour. (By way of contrast, the hourly rate for those within the proposed bargaining unit varied from \$7.65 an hour to the top rate of \$15.00 an hour.)

28 The job description for the Night Manager position describes the job as that of a "working supervisor" assisting the Guest Services Manager in running the front office on the graveyard shift. That position is described as handling guest complaints, assisting the front office as needed, maintaining key control, handling security and reporting of incidents. Although that job description states that the position is responsible for "maintaining a balanced float and monitoring all the front desk floats", Corbett testified that has not been part of his job.

29 Corbett has the authority to give a meal voucher to resolve a guest complaint as do the Duty Manager and the Food and Beverage Manager. As there is no one else in the hotel on his shift, he is by default the Duty Manager on his shift. If the Duty Manager does not show up in the morning at 7 a.m. at the conclusion of his shift, Corbett stays on until someone with that authority to act appears.

30 Webb testified that the Night Manager fulfills exactly the same duties as the Night Auditors (although the job descriptions for the two positions differ in part to reflect the added duties of the Night Manager). Webb also testified that the Night Manager has no involvement in hiring or screening candidates, performance evaluations or authorization of leaves. The Night Manager has no authority to discipline or discharge.

31 In his testimony, Corbett confirmed that he does not screen job applications or interview candidates for vacancies. He is not involved in the preparation of postings and does not make any final hiring decisions. In terms of any authority over the other employees on his shift, he understands that he has the authority to send someone home if they showed up to work intoxicated. However, that problem has never arisen.

(iii) Sous Chef

32 The Sous Chef, Kim Sandberg, reports to the Executive Chef. Sandberg does not usually prepare job postings unless the Executive Chef is away. Once or twice he

may have screened job applications at the request of the Executive Chef. He may also interview applicants if that is required; that event has happened once over the course of his two years of employment. The ultimate decision on hiring is made by the General Manager. Sandberg has no authority to promote. Leave requests would be addressed to the Executive Chef. Sandberg supervises the cooks and dishwashers, the number of which may vary from shift to shift. Sandberg has some involvement in scheduling in the absence of the Executive Chef. Sandberg is able to deal with verbal warnings, but anything more serious would have to be addressed to the Executive Chef. In the absence of the Executive Chef, Sandberg attends the operational meetings that are held weekly to discuss such matters as business forecasts and the efficient operation of the various departments. The position is salaried, with an equivalent hourly wage of \$16.11.

(iv) Assistant Building Maintenance Manager

33 Kopplin has worked for the last five years in the position of Assistant Building Maintenance Manager. About 95% of his time is spent doing maintenance work. When the Building Maintenance Manager is away, Kopplin spends more time on supervisory duties, ranging between 40 - 50% of his time. In the department in which Kopplin works there are a total of 4 individuals: a Maintenance Helper, a Technician, the Assistant Building Manager and the Building Maintenance Manager. The organizational chart shows the Maintenance Engineers reporting to the Assistant Building Maintenance Manager who in turn reports to the Building Maintenance Manager.

34 The Assistant Building Maintenance Manager is not involved in hiring. He does not have the authority to grant a leave of absence and does not have the ability to authorize vacation. He has no involvement in hiring. He does not prepare job postings or conduct interviews. Decisions on layoff and hiring of additional staff would be made by the Building Maintenance Manager and those above that position.

35 The Assistance Building Maintenance Manager does not establish work schedules or order overtime. He does not do evaluations on employees.

36 In his capacity as Assistant Building Maintenance Manager, Kopplin has no authority to suspend, give written warnings or otherwise impose discipline. He may give verbal warnings, but that is as far as his disciplinary authority extends. On one occasion, Kopplin did speak to an employee who had caused some water damage by leaving a sprinkler on all night. That individual did not receive any discipline from Kopplin for this incident. As far as Kopplin is aware, that individual did not receive any discipline at all for that event.

37 Kopplin has acted as the Building Maintenance Manager when that manager has been off on vacation or on medical leave. On one occasion when the previous Building Maintenance Manager, Joe Tomlinson, was away on leave in the summer of 1995, Kopplin received authorization from the General Manager to terminate a probationary employee before the end of his probationary period. The probationary period would have ended before the Building Service Manager returned from leave. Kopplin raised

the problem with his superiors, but acknowledged that he had some input into the decision to terminate and he recommended that the individual be terminated. Kopplin and the Duty Manager met with that probationary employee about the dismissal; Kopplin was the one who conveyed the reasons for the dismissal to the employee.

38 In 1995 when Tomlinson was off on leave, Kopplin also hired one individual, Doug Rutherford. Before doing so he spoke to Tomlinson and the General Manager. He interviewed Rutherford; no one else was present. He recommended that they hire Rutherford on the basis of their interview.

39 Kopplin only attends the weekly operational meetings if the Building Maintenance Manager is away. In the last five years he has been in the position of Assistant Building Maintenance Manager and he has attended only four to five of those operational meetings. There is no discussion of personnel matters in those meetings, only issues relating to the daily operations of the department. Kopplin has never seen any hourly paid employees in attendance at those meetings.

40 The position of Assistant Building Maintenance Manager is salaried. Kopplin was given a choice when he started of going on salary or remaining hourly. While this position is salaried, the equivalent hourly rate is \$17.79.

41 Kopplin has had business cards in the past bearing his former title of Assistant Chief Engineer. (At that time the position which was the functional equivalent of the Building Service Manager was known as the Chief Engineer).

(v) Reservations Manager

42 The Reservations Manager handles group bookings and liaises with front desk employees. That position is responsible for the daily supervision of the reservations and switchboard clerks. The Reservations Manager directs their work on a day-to-day basis, but any special projects would be assigned by the Guest Services Manager. Mantell also schedules the employees. The Reservations Manager also on occasion acts as Duty Manager responsible for handling guest complaints. The salary for this position is the equivalent of \$14.66 an hour.

43 The current incumbent, Jeannette Wong, has business cards with her name and title on them in the same way as other managers, such as the Building Maintenance Manager, the Food & Beverage Manager, the Guest Services Manager and the Sales Manager. Bell persons within the proposed bargaining unit also have business cards, but those cards refer only to them by their first name and departmental affiliation, with no title given. The bell persons have those cards to give them to guests so that they may call and make arrangements for pick-up and drop-off for rides within the downtown area.

44 The Reservations Manager has given verbal warnings in consultation with the Guest Services Manager. However, the other disciplinary matters that have arisen in this area have been dealt with by the Guest Services Manager. That Manager handled

three incidents with one employee in April through June of this year dealing with two incidents of guest complaints and a failure to punch in. The letters sent over his signature refer to the potential for future disciplinary action.

(vi) Construction Project Coordinator

45 Muller was formerly part of the Executive Committee before he left on medical leave in December 1999. He used to be employed in the position of Rooms Manager. That position would have been excluded from the bargaining unit had it continued to exist; under the existing operational chart, it would have had the same reporting status and the same level of responsibility as the Director of Sales and Marketing. The subsequent addition of another senior management position of Director of Operations involved a change of status for his position. Since Muller's departure on medical leave, there has been some discussion with him about changes in his job responsibilities and the availability of the position of Construction Project Coordinator upon his return to work.

46 The organizational chart currently shows Muller's name on it by the position of Construction Project Coordinator with an asterisk by his name. A footnote on that chart indicates that he is an Executive Committee Member along with the General Manager, the Financial Controller, Director of Operations, Director of Sales & Marketing and Food & Beverage Manager. Notwithstanding that entry on the organizational chart, Webb testified that when Muller returns from leave and takes the job he has accepted as Construction Project Coordinator, Muller will have no role on the Executive Committee. Webb indicated that Muller has not attended an Executive Committee meeting since he left on leave in December 1999.

47 On April 26, 2000 Webb circulated a memo to all staff about the position of Construction Project Coordinator. That memorandum stated that "upon his return, Chris Muller will assume the responsibility of this new position. As the project proceeds there is a great deal more input required from the management of the Hotel and this will be Chris' primary focus. As soon as an effective date is established for this position, you will be notified accordingly".

48 Muller has never actually worked in the position of Construction Project Coordinator. Webb did not have an "update" on when Muller was expected to be back at work, but acknowledged that, unless he returned to work shortly, he would probably have to hire someone else to do the job. When questioned about the anticipated length of the position, Webb indicated that it would probably be converted into a full purchasing position.

49 Muller was on the Executive benefit plan when he went on leave; that plan has benefits that are superior to those for regular hourly or salaried employees. Webb testified that when Muller returns, he would not be on that level of plan. When asked which plan would apply, Webb testified "that conversation had not yet taken place". The salary for that position translates into an equivalent hourly rate of \$20.67 an hour.

50 There is no job description for the position of Construction Project Coordinator, but Webb described it as primarily a purchasing function. The Coordinator would be responsible for obtaining the necessary equipment, materials and furniture for refurbishing of the hotel. It involves taking inventory and projecting the amount of items required such as telephones and lamps to refurbish the newly constructed areas. No one reports to that position. It does not have any disciplinary or discharge responsibilities.

C. Resignations

51 The circumstances of the three individuals in dispute who have tendered resignations follow. David Clifford initially gave verbal notice of his intent to return to school. In response to the Employer's request for written confirmation, Clifford wrote a letter on August 8, 2000 addressed to the Guest Services Manager. That letter states: "I will be returning to school on September 11/00. This program is one year in length". Clifford has worked for the hotel for a number of years. Webb testified that in September 2000 Clifford is to start attending school taking a compressed course of studies over a one year period. The demands of that course had left him with no availability for work. According to Webb, Clifford is aware that there is no likelihood of any work for him when he finishes his studies in the middle of September 2001. He also testified that Clifford has expressed to him that he has no intention of returning to the hotel.

52 Gursharan Singhera worked as a front desk agent. He submitted two letters of resignation, both dated August 15, 2000. In the first letter he states that he would not be available for full-time work after September 4, 2000 as he is going back as a teacher on call and had to make himself available full-time. In another letter on the same date, he advised he was not available for full-time work after August 26 as he had to look for a place to live. That letter also stated that he would be starting as a teacher on call in Surrey as of September 5 and would not be able to work for the hotel after that date.

53 Duane Marsh was employed as a bell person. He had worked on a part-time basis for several years. He advised of his resignation in a letter dated August 25 and he stated that his last day of work would be September 9, 2000. In that letter he refers to his three years of employment with the hotel, and notes that he will be attending university as a full-time student. He also states in his letter that working a part-time job while attending school may seriously interfere with his objectives of attaining high marks. Webb testified that he had had a conversation with Marsh earlier in the year in which he indicated his intent to devote himself exclusively to his studies. Webb did not discuss with him his intentions, but in his testimony expressed his own view doubting that Marsh would want to return as a bell person after obtaining his business degree.

D. Casual & Seasonal Employees

54 A memorandum dated March 8, 2000 sent by Nykamp to all employees set out the various employee status classifications. Casual employees in that memorandum were described as: "All employees who are seasonally employed for a specific term, working relief, regularly restrict their availability, or are on an on call basis. Seniority is

defined as an employee's total length of continuous service identified in hours worked within his/her classification, within a particular department. Casual employees are not eligible for benefits coverage".

55 Some of the seasonal casual staff in dispute had previously worked for the Employer. Webb acknowledged that the hotel does recall people after a layoff. When the employees who worked at the Quality Inn were laid off, they were given pay in lieu of notice or a combination of pay and notice depending on the length of their service. Many of those employees permanently laid off were not successful in finding permanent work elsewhere. The Food and Beverage Manager called them at the beginning of the season to see if any were interested in working in temporary positions and many of them were.

56 Most of the casual seasonal staff at issue are employed in the Food and Beverage area. Melinda Van Rheenen had previously worked at the hotel between July to October 1999. She was hired again to work two days a week as of June 2000 after the renovations were complete on the restaurant and more staff were required. Webb testified that she has a full-time position elsewhere and has no expectation of any hours after September 30.

57 Linda Madsen was also employed as a server. Her previously issued Record of Employment shows that she had worked between December 1996 through to October 1999 when she was permanently laid off at the time of the demolition of the Quality Inn. Nykamp believes that she had also worked for some period before 1996, but did not have the documentation. The personnel records admitted into evidence indicate that she was hired again on March 20, 2000 as a "casual seasonal wait person". Madsen had not received layoff notice by the time of the hearing at the end of August, but was likely to receive that notice within the next two to three weeks.

58 The evidence led specifically about two other Food and Beverage employees, Pamela Emery and Andrea Farkas, was limited. Payroll Action Forms for each of them were offered in evidence. The form for Emery is dated August 2, 2000 and the boxes for "casual" and "seasonal" are both checked off. Under the heading "Termination", the box for "casual/seasonal" is ticked off and the last day worked is listed as August 31, 2000. The box for "notice given" was not filled out. The Payroll action form for Andrea Farkas shows that it was signed on August 8, 2000. It states her last day worked was August 23 and notice was given.

59 Raj Birk worked in the kitchen as a dishwasher. Her Record of Employment shows she worked previously for the Employer between June 1998 to November 1999. Her Employee Information Form shows her as a "rehire" as of April 3, 2000 and the boxes "seasonal" and "casual" are filled out. The payroll records show her working 68 hours in the two week period between July 16 and 29 and 55 hours between July 30 to August 12. On August 18, the Executive Chef in a letter advised of her scheduled layoff from the hotel on September 15, 2000. The letter stated "[there] is a chance the hotel may extend this date if business volumes stay at a reasonable level".

60 Jaswinder Randhawa started as a dishwasher on July 30, 2000. She received a similarly worded letter dated August 18, 2000 from the Executive Chef referring to her scheduled lay off on September 1, 2000 and the potential for extension of this date depending on business volumes. Although Randhawa was initially slated for layoff, Randhawa's situation had subsequently changed as she was terminated for performance issues. By August 31 when Webb testified, Randhawa had already worked her last shift. After Randhawa was laid off, she was advised that she would not be eligible for recall due to performance issues. She did not have the opportunity to complete her probationary period.

61 John Gillingham worked in Food & Beverage. His Payroll Action form indicates that he was "casual" and "seasonal". That form indicates a "return to university" and the last day worked of August 24, 2000 with notice given. That form is signed August 5. He worked around 40 hours in each of the last two pay periods between July 16 to August 12, 2000.

62 Ryan Fennell had previously worked as a grill cook from June 1998 to November 1999. That position was eliminated with the demolition of the Quality Inn. His Record of Employment indicates a layoff due to shortage of work, and the date of recall is left blank. He was rehired on July 30, 2000. Webb testified that he is only working part-time at the hotel and has a full-time position elsewhere. Nykamp believes Fennel is still working for the hotel as of the time of the hearing and did not know if he had yet been given layoff notice. She believes he will be laid off by the end of September.

63 The Record of Employment for Yam Yam Chow, also known as Julie Chow, shows that she had previously worked for the Employer from 1983 to October 1999. An Employee Information form tendered shows that she started again as a Server on March 30, 2000. On that form the boxes for "rehire", "seasonal" and "casual" are checked off. Close to the "rehire" box on that form, there is an additional handwritten comment: "first time - no long-term". Nykamp testified that Chow would received her notice of layoff within two to three weeks of the end of August.

64 Sarah Mayes had not previously worked for the hotel and began her employment on May 1, 2000 in the Food and Beverage Department. She was in a motor vehicle accident in July and was absent from work due to medical reasons. The last day she is believed to have worked was July 15. Mayes has no hours shown in the extracts from the payroll records for the period July 16 to 29, nor for the following two week period. After her motor vehicle accident, the Employer believed she was unable to work because of medical reasons. On August 25, 2000 her manager attempted to contact her about her return to work and was advised that she was working elsewhere. Her personnel file has since been amended to show that she had abandoned her position.

65 Inder Gill had not previously worked for the hotel. She began work as a Room Attendant on June 21, 2000. Nykamp was unsure whether she had already been given notice, but if not, she would receive her notice sometime before the end of September. She worked 23 hours in one pay period at the end of July and 30 hours in the first part of August.

66 Dolores Boado worked in housekeeping as a Room Attendant. The Employee Information form indicates that she was a first time hire as of May 8, 2000 and was entered on the Employer's records as a "seasonal" "casual". The payroll records reveal that she worked 33 hours between July 16 to 29 and 53 hours from July 30 to August 12. Webb testified that she would be laid off no later than September 30. Nykamp's testimony was to the same effect that she would be probably be laid off by the end of September.

67 Maria Martinez previously worked between June and October 1999. She was hired again in the same capacity as a Room Attendant in April 2000. Nykamp believes she will receive her layoff notice towards the end of September.

68 Malcolm Wong worked as a Night Cleaner between April 1998 to August 1999, at which time he left on an extended leave of absence. While he was on that leave, his former position was abolished upon demolition of the Quality Inn. He returned on March 13, 2000 and received six week layoff notice. He was advised at that time that the hotel would be hiring full-time positions probably in the spring of 2001 and he was encouraged to apply for any suitable temporary positions. He was subsequently rehired as a House person in April 2000.

69 At the continuation of the hearing in September the Union tendered a copy of a recent job posting for a server in the Food and Beverage Department seeking applications by the closing date of September 18. The experience and qualifications required included being "currently a f & b [food and beverage] casual server at the Clarion Hotel Grand Pacific".

70 In her testimony, Nykamp acknowledged that it is possible for a casual employee to end up in another position if a regular employee moves on. It has also happened that a casual employee would work beyond the original date scheduled for layoff. While there is a possibility of recall, it is not automatic. If the individuals are laid off, and more work becomes available, they would need to apply.

E. Accounting Staff

71 The evidence led on the issue of the appropriateness of the exclusion of the accounting staff follows. A number of collective agreements from the hotel industry were tendered as evidence. Some of those show accounting staff included within the bargaining unit; others do not. Various explanations were offered by witnesses as to the reasons for their inclusion or exclusion, depending on the nature of the hotel and the services offered. In the interests of brevity, I do not set out this documentary evidence more fully as I do not find it to be of much significance as titles alone do not assist without supporting evidence as to the actual job duties performed.

72 Some of the accounting staff initially began their employment in other areas of the hotel. Mira Westby, the Accounts Receivable Clerk, started as a part-time switchboard operator and worked at the front desk as a Night Auditor. She moved into accounting and has worked there since 1996. She is currently also handling benefit

administration as the benefit administrator is on medical leave. Another accounting staff member, Michael Fischer, initially worked on call at the front desk as a Night Auditor before becoming an accounting clerk in 1996. He is now the Senior Accounting Clerk.

73           Vacation relief in the accounting department is generally covered from within the department, but on one occasion when it was very busy, Laurel Unwin, a server from the Food and Beverage department, worked for one month as vacation relief in the accounting department. That type of vacation coverage does not occur very often.

74           Under the organizational chart, all of the accounting staff report to Nykamp. She testified as to the duties they perform under her supervision. The Senior Accounting Clerk has the primary responsibility for purchasing systems, cashier and accounting. The Senior Accounting Clerk also prepares the bank deposits and reconciles the receipts. That position also does the monthly float counts. That position reconciles receipts and where there are discrepancies or missing documents seeks clarification from the front desk clerks, Food and Beverage employees or the Health Club attendants. The Senior Accounting Clerk also does the inventory control and assesses the inventory levels in conjunction with the departments. That particular clerk identifies the items that need to be purchased and generates the purchase orders to replenish the stock.

75           The General Accounting Clerk/Receivables prepares the daily bank deposit, looks after the house floats and ensures the availability of sufficient change to replenish the various individual floats. She also processes the "due backs" to reimburse the staff for cash and credit card tips. That individual prepares and mails out the actual invoices to the clients that have private billing arrangements with the hotel. The position also verifies the accounts prepared by the Night Auditors who are responsible for submitting documents to the accounting department to back up the transactions for the day. The Night Auditors summarize the information, most of which is automated and done by computer.

76           One of the General Accounting Clerks counts all in-house floats. There are various employees within the hotel that handle floats, such as servers and front desk clerks. The accounting department employees perform the count and provide a report to Nykamp of any shortfall, and she determines what action is required on any discrepancy.

77           Although employed as a general accounting clerk with primary responsibility for handling accounts receivables, Westby at present has further duties. As already mentioned, Westby currently has access to documents in personnel files as part of a temporary assignment. She performs that function to cover for the absence of the Payroll Benefit Administrator who is off on leave.

78           The accounting staff work on a regular hourly basis, not shift work. The hourly rates for accounting staff range from \$12.86 an hour to \$14.22 an hour. The accounting staff is covered under the benefit plan for salaried employees. There are four divisions to the Employer's benefit plan. One division covers hourly employees with less than

four years service, the second covers hourly employees with four years or more service, the third is for salaried employees and the fourth is for executive level positions. The differences between the plans are in the length of LTD coverage, and eligibility and percentage coverage with the dental plan.

79 The other position identified by the Employer as inappropriately excluded is that of the Executive Administrative Assistant. That job is a new position that started at the beginning of this year. The position is salaried with an equivalent rate of \$15.26 an hour. The current incumbent, Elizabeth Grubb, was recruited from the front desk of the hotel. Previously, when the administrative offices were more centralized, one assistant did all the coordination of the work for sales and catering. The administrative assistant now reports to Webb. That assistant deals with the large volume of correspondence about the construction project. Although the job description states that the purpose of the position is "to take care of the secretarial needs of the General Manager in a confidential manner", Webb testified that individual is not privy to any confidential information about personnel or labour relations. Should the need to arise with that type of issue, he handles it himself or asks Nykamp for assistance.

80 The job description describes the position of Executive Administrative Assistant as being responsible for clerical duties as required, producing various human resources publications, sharing in Duty Manager shifts, covering shifts for the Sales Administrative Secretary in her absence and participating on the health and safety and at least one other Executive committee.

#### F. Employee Council & Draft Agreement

81 To refute the Employer's argument that the Union's organizing campaign was premature under the build-up principle, the Union led further evidence to establish that the Employer was willing at about the same time to recognize another form of employee representation. An Employee Council was recently formed at the hotel. That initiative arose after an earlier unsuccessful organizing campaign by the Union in the fall of 1999. The process to form the Employee Council and to negotiate an agreement was started after that initial certification drive.

82 A notice to employees was sent out by Webb on June 15, 2000 describing the elections for employee representatives for the Employee Council and giving an overview of their duties. That notice also stated that the first term for the Council representatives would expire on May 31, 2001. Events culminated in a general staff meeting which was held on July 7, 2000 at which time a copy of the draft agreement was circulated. The version of the draft agreement entered into evidence was the third draft. Webb and Nykamp prepared that document using agreements from other properties, both union and non-union hotels, as a model.

83 In total, there were three meetings of the Employee Council held; a fourth one that had been scheduled was cancelled because of the application for certification that had been filed. The preparation of the draft agreement was also put on hold when the Union's application for certification was filed. According to Webb, there was a list of

about seven to eight items that needed further discussion before the agreement could be concluded.

84 The Union called as a witness Peter Becker, a maintenance helper who has been involved in the Employee Council since July 2000. Becker's view was that although no specific date was set for finalizing the agreement, there was discussion about expediting the conclusion of the agreement. By his recollection, there was never any discussion about waiting until all employees were hired next year before concluding the agreement.

85 The term of the document is stated on its face to be March 1, 2000 to February 28, 2002. The minutes of the Employee Council meeting held on July 17, 2000 indicate some discussion about the term of the agreement. In response to an inquiry about the number of representatives, Webb is quoted in those minutes as stating "this agreement expires on May 31, 2001, should the # need to increase when the hotel grows, that would be the time to add more". At that same meeting, Nykamp also advised the Employee Council of the possibility of obtaining voluntary recognition under the *Labour Relations Code*.

86 Nykamp testified that the intention was to have the agreement in effect until May 31, 2001. When questioned about the contradiction between her testimony and the duration of the agreement specified in Article 2.01 as concluding on February 28, 2002, Nykamp testified that the two year period was put in there initially. In subsequent discussions, the decision was made this May 2001 date was not appropriate, but that date was not edited out. Nykamp agreed that the date of May 31, 2001 mentioned in the minutes of July 17, 2000 was the date Webb was proposing, not a date the employee representatives had agreed to. The explanation offered by Webb in his testimony for the choice of that date was it would coincide with the annual wage review in June. Becker disputed Webb and Nykamp's understanding as to the proposed term of the agreement. Becker does not say that the minutes of the Employee Council meeting are wrong, but asserts that Webb misspoke when he made that statement about expiry on May 31, 2001.

87 Apart from the controversy over the effective term of the agreement, there was also a dispute among the witnesses as to the intended scope of coverage of the draft agreement. Webb testified that the draft agreement was intended to apply to all employees. Nykamp echoed the same view, and when questioned about its applicability to her circumstances, she indicated that she likes to think she is covered by the minimum standards in the agreement. Becker's view was the opposite. He testified that he was never told that there were any employees included in the agreement beyond those listed in the wage appendix. He did not expect that any others would be covered; nor did he expect that any terms and conditions for managers would be covered in that document.

88 The version of the draft agreement entered into evidence has a list of wage rates for full-time employees. The wage classification appendix contains no wage rates for the positions of Sous Chef, Assistant Building Service Manager, Reservations Manager,

Construction Project Coordinator, or the Night Manager. Webb's explanation for their omission is that a number of salaried positions are not listed. Nykamp, who generated the document, testified that no decision had been made on the disclosure of the salaries for salaried employees as they have always been maintained as confidential. There are also no rates for the accounting staff set out in that wage classification appendix. However, one of the accounting staff, Westby, was on the Employee Council.

89 There was also some uncertainty about who was able to vote when balloting was done to seek approval for the draft agreement. Becker was not told who was eligible to vote. Kopplin, who voted on the issue, did not know if the position of Assistant Building Maintenance Manager would be included under the draft agreement.

#### G. Other Evidence

90 The Union pursued an issue relating to the credibility of Webb on a collateral point arising out of a disciplinary meeting held on August 25, 2000 with Becker. Becker testified that Webb stated to him in that meeting that the hotel's owner "would prefer us to be a non-union property, so we have to do our job to do anything we can to make sure that we're non-union". He also testified that he had tape-recorded that conversation, with the tape-recorder left out in full view. When questioned, Webb did not recall that the conversation was tape-recorded and did not specifically recall making that comment. Nykamp who was also present on that occasion acknowledged that the tape recorder was visible, and while she had no specific recollection of that statement, she did not challenge the assertion that Webb had made that comment.

### IV. POSITIONS OF PARTIES

#### (a) Employer

91 The Employer argues that under the build-up principle the application is premature. The hotel's operation is expanding with a one-time increase in the size of staffing to accommodate the growth of its business. It argues that the build-up principle can apply to an operation in the course of an expansion: *Sears Canada*, BCLRB No. B500/98, 48 CLRBR (2d) 284. The Employer maintains the build-up is certain and imminent. It notes that other cases where the build-up extended over two years, the Board found the build-up to be imminent; *B.C. Coal*, BCLRB No. 36/82, [1982] 3 Can LRBR 177; and *Noranda Mines Ltd.*, BCLRB No. 26/82, [1982] 2 Can LRBR 475. Given the projected expansion from 72 to 207 employees, the Employer argues that the 50% rule of thumb on the representative number of employees has not been met. The Employer argues that its staffing projections are consistent with other similarly sized properties of the same quality and with similar levels of service.

92 The Employer also argues that the application should be dismissed because of the functional integration that is present. It contends that the unit as sought is inappropriate as the accounting staff work closely together on a daily basis with the other employees in the hotel. It asserts that they have continual contact with one another and share common facilities in one geographical site.

93 Should neither the build-up nor the appropriateness objection prevail, the Employer submits that the seasonal casual employees should not be included in the unit. As its primary position on the status of these seasonal casual employees, the Employer says that all eleven of them should be removed from the Voters List as they do not have a sufficient continuing interest: *Waldun Forest Products Ltd.*, BCLRB No. B158/93. In the alternative, if the Board finds that some of the casual employees do have a continuing interest, the Employer asks the Board to find that certain specific employees of that group should be excluded. It asks that Boado, Mayes and Randhawa not be counted as there is no evidence Boado will be returning to work, Mayes has resigned her employment, and Randhawa would not be rehired on the basis of her performance.

94 The Employer further submits that the three individuals who submitted their resignations do not have a sufficient continuing interest under the test in *Surtek Industries Ltd.*, BCLRB No. B109/95 (Reconsideration of BCLRB No. B346/94), (1995) 27 CLRBR (2d) 64.

95 The Employer argues that none of the individuals bearing the title of "manager" meet the test for exclusion under *Highland Valley Copper*, BCLRB No. B289/98, (1998), 45 CLRBR (2d) 1. The Employer says that these individuals are shift supervisors that do not exercise any authority that amounts to effective determination of issues of discipline or discharge.

(b) Union

96 The Union asks the Board to view with skepticism the Employer's build-up objection in light of the evidence about the potential for voluntary recognition of the Employee Council and the negotiation of the draft agreement. If the Employer was prepared to recognize a different form of collective representation by the current complement of employees, it should be a sufficient complement for the Board to certify. The Union maintains that there is in fact a sufficient number of employees present and not all departments need to be present for a group of employees to be representative.

97 The Union argues that the build-up is not imminent as there will be a lengthy delay of about nine months before the build-up occurs. In arguing that the rights of the current employees should not be disenfranchised for a lengthy period of the time, the Union points to the origins of the build-up doctrine in the mining industry where the dispute was historically over the choice of union. As the Union characterizes it, the mischief addressed was avoidance of any preference to a "favoured" union at an early stage of an employer's operation. No such issue of choice of union arises here, only the issue of access to the collective bargaining.

98 The Union also argues that the Employer's plans for hiring are not firmly in place and that the employment projections cannot be viewed as certain. It distinguishes past authorities where the build-up objection prevailed as cases where advertisements were already placed, individuals were already hired or detailed hiring plans had been established *cf. Sears, supra*, and *Noranda, supra*.

99           The Union urges the Board to be cautious in accepting the staffing estimate figures given the seasonal nature of the work and the obvious incentive for the Employer to maximize the numbers to defeat this application. The number of employees needed will be driven by business levels, a matter beyond its control. The Union notes that the documents tendered in support of the staffing estimates are self-serving documents which were all created after the Union's application for certification. The projected numbers may be easily manipulated by hiring more part-time employees for a fewer number of shifts for discrete tasks. That may not reflect the reality as shown in the recent posting where experience is sought for servers in the restaurant from many areas, such as banqueting and mini-bar.

100           The Union also notes that the staffing estimates are all based on Webb's predictions. In asking the Board not to accept those at face value, the Union points to Webb's statement in the Becker disciplinary meeting about concerns over the Union and Webb's lack of recall on this point as a general reflection on his lack of credibility.

101           On the exclusions, the Union maintains that the disputed managers should be excluded on the basis of its proposed bargaining unit description, whether or not they meet the test for management under the Code. The Union also notes that these salaried employees with different benefits were excluded from the scope of the draft agreement. Even if these individuals were not excluded by the language of the bargaining unit description, the Union takes the position that the involvement of these immediate supervisors in disciplinary matters invokes a conflict of interest that renders their exclusion appropriate.

102           In relation to the Construction Project Coordinator specifically, the Union notes that no person has ever performed that job. At best, the dispute is over the position, not a person. Muller has never worked in that position and may never start work on it unless his return to work happens soon. Apart from arguing that the position is effectively empty, the Union also argues that the position is part of management. It relies on the wording of the July memo to the employees announcing the position and explaining its duties.

103           On the appropriateness issue, the Union argues there is no evidence of any functional integration between the accounting staff and the other hotel employees. It also remarks that it is not unusual in this industry to exclude office administration from a unit of hotel employees. In this case a rational and defensible line can be drawn around the unit where there are no overlapping duties and the community of interest of these salaried employees differs from that of the hourly paid employees.

104           The Union argues that the two individuals, Singhera and Marsh, who submitted their resignation after the date of application should remain on the list. The Union acknowledges that Clifford's resignation was submitted before the date of application, but, on its face, it does not clearly indicate a resignation and it is not effective for a considerable period of time after the date of application.

105 The Union takes the position that all the seasonal casual employees should be included as they have been working for a considerable period after the date of application for certification. In the Union's view, it is ironic that the Employer invokes the build-up principle relying on future employees who have not yet worked, but yet seeks to disenfranchise employees actually working on the date of application. The Union notes the absence of any documentary evidence to establish the Employer's claim of a fixed term of employment; no such fixed date appears on any of the personnel forms. The Union urges caution in applying authorities from the industrial sector, such as *Edoco Heal Technical Products*, BCLRB No. 81/79, [1980] 1 Can LRBR 570, where the use of casuals is rare. In the hospitality industry, the nature of the work is somewhat seasonal and casual seasonal workers are commonly used.

106 The Union asserts there is no reason to distinguish some of the casuals from others, as the Employer does in its alternative ground, based on the absence of any prior work record. If those individuals did their job well, presumably they would be called back to work.

## V. ANALYSIS

### (a) Appropriateness of Unit

#### (i) Build-Up Principle

107 As its primary argument on appropriateness, the Employer maintains that the application for certification is premature under the build-up principle. It argues that the current employee complement is not representative of the complement to be ultimately hired.

108 The mischief the build-up doctrine is designed to avoid is disenfranchisement of employees. The premise of the build-up doctrine is that it would be undemocratic to permit the smaller group of current employees to determine the representational rights of the future larger group. One of the policy concerns underlying the build-up doctrine is the desire not to impose a union on a group of employees who may not favour that choice; that rationale is founded in the basic majoritarian principle of the Code that the choice of a bargaining agent should be the decision of the majority. To certify a unit prematurely may exclude employees who are hired later from having a say on the representational choice. However, one countervailing factor weighing against adoption of the build-up principle is that its application would at the very least delay collective bargaining rights to an existing work force. The build-up principle may also in some circumstances deny existing employees the opportunity to obtain collective representation and deprive them of the benefits of collective bargaining.

109 As that restatement of the principles suggests, the Board must in its application of the build-up doctrine balance the rights of present and future employees to decide upon collective representation. Which factor is given predominance depends on the relative force of the length of delay, the representative character of the current employees, and the certainty and imminence in the plan for expansion. Where a

significant build-up is imminent and certain, the Board may be more inclined to side with delaying the exercise of collective bargaining rights by the present employees so as not to discount the rights of future employees. However, the Board is less inclined to delay certification and deprive existing employees of their bargaining rights when there is no firm plan for expansion and the build-up will not happen until some distant time.

110 The factors the Board considers in determining whether to apply the build-up principle are: the nature of the employer's organization, the nature and degree of build-up, its imminence and certainty, and the representativeness of the existing employee complement: *Kingfisher Sales Inc.*, BCLRB No. 73/86. On the factor of the nature and degree of build-up, the expansion of the workforce must be "overwhelming" or "significant": *Noranda Mines Ltd.*, *supra*. The factors of imminence and certainty of the build-up contemplate a "firm plan" for expansion of future operations. In reconciling the competing interests of the present and future employees, the Board needs also to balance the rights of these two groups against the likelihood that the build-up will take place. The plan for expansion must not be speculative in nature, nor should they be dependent on market forces outside the control of the employer: *Dynamar Energy Ltd.*, BCLRB No. 429/83 (Reconsideration dismissed BCLRB No. 128/84).

111 While those factors guide the Board in its analysis when attempting to reconcile the competing interests, they are not absolute. Flexibility in the application of the build-up principle is necessary to balance the competing interests at stake: *Cheni Gold Mines*, IRC No. C28/89. As the Board's predecessor has cautioned, the guidelines should not be too strictly followed and decisions must be made on a case-by-case basis: *Wastech Services Ltd.*, IRC No. C308/88; and *Weyerhaeuser Canada Ltd.*, IRC No. C150/89, at p. 4.

112 In this case there is certainty of some build-up, but there are issues over the extent and imminence of the build-up. There is no question in this case that there are firm plans for expansion. Rather the question is how realistic the predictions are for the number of employees required at the time of opening upon substantial completion of the renovations.

113 Beginning with the issue of imminence, one of the pivotal factors the Board considers is the period of time over which the build-up is projected to occur. In other cases where the build-up doctrine has been applied, the period of time before the build-up became effective was known and was short. In *Dynamar Energy*, *supra*, the panel commented that the event of build-up has to occur "within a relatively short period of time from the date of application for certification" (at p. 4). In that case, the primary reason for not applying the build-up principle was the absence of a firm plan. However, the panel observes that the employer's plans to operate the mine did "not disclose the kind of firm, definite plan for imminent build-up which justifies the application of the build-up principles" (at p. 5). The period of time in that case extended roughly 8 months from the date of the original decision and the predicted date of the opening of the expanded business.

114 With some exception in the case of mine start-ups, the usual range of time over which the build-up is projected has ranged from as little as a few weeks to six months. In *Weyerhaeuser Canada Ltd.*, IRC No. C150/89, an application for certification was dismissed when the workforce would double within two to four weeks (at p. 4). In *Sears Canada*, BCLRB No. B500/98, 48 CLRBR (2d) 284, the full extent of the build-up was evident roughly two months after the date of application. In *Daesung Canada Inc*, IRC No. C3/91, the build-up that was projected to occur in the three and a half months after the application led to the dismissal of the application as premature (at p. 6). In *APS Architectural Precast*, BCLRB No. L51/83, the build-up principle was applied where the increase in employees took place over roughly four to five months. In *Bullmoose Operating Corporation*, BCLRB No. 337/83, the Board took into account the build-up that occurred over the period of four months as one of the factors influencing the decision to conduct a vote. In *Golden Bear Operating Co. Ltd.*, IRC No. C147/89 (Reconsideration of C91/89), the application was dismissed as premature where there was a five month interval between the time of application and the build-up.

115 In *Wastech Services Ltd.*, IRC No. C2/89 (Reconsideration Dismissed IRC No. C34/89), the build-up doctrine was applied where the period of time over which the build-up would occur was known and was "short". The date of the original application is not set out expressly in that decision, but a review of the other decisions in this series shows that from the date of hearing in the end of September 1988, there was a period of about three to four months before the first phase of build-up, and another three months or so until April 1989 when the final build-up was predicted. It is arguable whether the panel's reference to the "short" period of the build-up referred to the first phase or the final phase. At the very outside, the period of time for the build-up was roughly 6 months: *Wastech Services Ltd.*, Letter Decision October 24, 1988 and *Wastech Services Ltd.*, IRC No. C308/88.

116 The instances where the period of time for the build-up was longer than these examples arose in the mining industry where there may be great divergence in the numbers and types of employees employed in the different phases of the operation. The Employer in its argument invoked *Noranda, supra*, and *B.C. Coal, supra*, as examples of cases where the imminent build-up took place over a period of some 18 to 24 months.

117 The facts of *Noranda* are somewhat unusual in that the Board first considered the build-up issue at the reconsideration level when a bargaining certificate had been in place for some time. The original panel had granted a pre-production certificate in November of 1981 at a time when only 13 of the total projected number of employees of 150 were present. As the reconsideration decision recounts, the detailed manpower build-up schedule showed that a "dramatic build-up" was anticipated over the upcoming summer of 1982 with the total number of employees projected at 155 by November 1, 1982 (at p. 477). The reconsideration panel deciding the matter in June 1982 noted that, as of that date, 72 of the projected 155 employees should have been in place and that only one department would be unrepresented until November 1. In those circumstances the reconsideration panel ordered a vote "among the employees presently in place" (at p. 486).

118 In its analysis, the reconsideration panel in *Noranda* commented that the Board would apply the build-up principle where the anticipated build-up was "near at hand", but not when it was projected "far in the future" (at p. 485). It also stated that build-up which is to take place over a more substantial length of time is not treated in the same fashion as an imminent build-up. It commented further that it would not be good labour relations policy to hold up the collective bargaining process indefinitely or for a long period of time just to make sure all classifications are represented. In the circumstances before it, the reconsideration panel found it appropriate to apply the build-up principle because "within a relatively short period of time" an overwhelming build-up was firmly scheduled to take place (at p. 485). It found that the case before it was not an instance "where an inordinate amount of time is involved". It noted that a full complement of employees would be present sometime that fall, and by early that summer, there would be a substantial number of employees (at p. 485). Those comments about imminence appear to indicate that the time period was measured from the time of the reconsideration decision, not the time of the original application.

119 In *B.C. Coal* the original panel had granted certification in March of 1982. At the time of the application for certification in the fall of 1981 only 10 employees were employed (the actual date of application is not set out in the decision). The reconsideration panel considered the issue of build-up in July 1982 and set aside the certificate finding the original application had been premature since the employee complement was not representative of the numbers or classifications of the anticipated workforce. In its reasoning, the reconsideration panel notes that the build-up principle should be applied in cases "where the anticipated build-up is near at hand and is of such a magnitude that the interests of future employees must be given a great deal of weight" (at p. 185). It also commented that the Board would not be willing to recognize the build-up principle in cases where the build-up is projected at a "very distant date in the future" or when the build-up will not include a dramatic increase in the workforce. On the facts before it, it noted that since the date of application the work force "has increased to some appreciable degree and it is anticipated that the majority of the ultimate operational workforce of some 400 employees will be employed by mid-1983" (at p. 185). The reconsideration panel also observed that there had already been as of July 1982 a substantial increase from the fall of 1981 to be followed by a further dramatic increase. The reconsideration panel concluded by stating that it was not aware of the composition of the present workforce in terms of numbers and classifications and could not judge if a certification application was then appropriate. It invited submissions from the parties on that issue of an appropriate date when a certification application could be properly entertained. In a subsequent decision issued in September 1982, *B.C. Coal*, BCLRB L268/82, the reconsideration panel considered the submissions advanced and found it appropriate "in the unusual circumstances of this case" to determine November 1, 1982 as an appropriate date for an application for a representative complement.

120 The Employer characterizes *B.C. Coal* as an example where the period of build-up spanned 18 to 24 months, but from that limited description of the facts in the decision it is hard to glean what period of build-up was used to assess the appropriateness issue - the initial build-up in the summer of 1982 or the ultimate build-up in 1983, or both.

121 Both *B.C. Coal* and *Noranda* are examples where the magnitude of the build-up was extreme shifting from 10 to 400 employees and 13 to 155 employees, respectively. In both instances the classifications present in the pre-production phase were also not representative of those present in the operation phase of the mine. Where there is such a dramatic increase in the numbers and types of employees, the period of time may play a greater part in the weighing of the factors and suggest that a delay in representational rights is appropriate. That same outcome may not invariably follow where there is no such great divergence in the numbers and positions. As was noted in *Wagner & Teldon Publishing Ltd.*, IRC No. C149/89, the imminence of the build-up has to be weighed relative to the significance of the other factors. It should be defined with reference to the size of an operation and, in particular, with the ratio of current employees to prospective employees (at p. 8 - 9).

122 In this case the build-up is more remote than in most cases outside of the mining context. For purposes of deciding this case, I will assume for purposes of argument that the delay in this case could be considered within the realm of "imminent" and proceed to consider the effect of the other factors. Before doing so, I make the observation that the time period in this case is roughly 9 months from mid-August to at its earliest, May 1. I use the phrase "at its earliest", as I am not convinced that all the new employees will be actually working on May 1. While the hotel plans to hire some employees then, I consider it more probable that some of them, such as the banqueting employees, may not start until somewhat later. I conclude that the actual build-up may in practice take somewhat longer. The period of build-up may be closer to ten months or even eleven months, further into the summer high season when the demand rises.

123 In making that finding, I do not question that there are firm plans for expansion; the only question is how many more employees will actually be hired and how soon. As the Employer properly acknowledged in argument, the Board does not always accept at face value the staffing estimates provided. The Board looks at those estimates to see if the predictions are realistic or inflated: *Great Canadian Casino Co.*, BCLRB No. B181/97. Applying that objective test, I find that the numbers of staff predicted by the Employer in its staffing forecast may be higher than could reasonably be expected to be required.

124 The Employer's projections assume there would be sufficient immediate demand to attain 75% occupancy. But that is not what its own consultants predicted. A more realistic prediction is found in the valuation study which projects that business will decline slightly in the first year of expansion. That business plan forecasts a dip in the upcoming year, but predicts occupancy levels will be better in the year following.

125 The estimates in the staffing forecast prepared by Webb are based on a 75% occupancy rate. However, the occupancy figure used for the staffing estimate is 5% higher than that used in the hotel's valuation study. The figures used in the business plan project occupancy rates for this hotel at 72% for 2000 and 70% for 2001 with a projected increase in 2002 to 73% and 75% in 2003. The projections in the valuation study are less optimistic for 2001 and use a more conservative figure than the 75% occupancy rate used by Webb. Presumably, that more conservative estimate for 2001,

and a more generous estimate for 2002, reflect the likelihood that it may take a while to increase the business. To borrow a phrase from the Employer's valuation study, it depends on the hotel's "penetration" into the market and on the share of the convention market which it captures.

126 Not only are the occupancy figures somewhat inflated from what its own consultants predict, but the Employer's predictions are speculative on other grounds. Its estimates of the amount of staff required in May 2001 are based on the best case scenario that the hotel can attract bookings for conferences for the opening of the hotel. Given the shortage of meeting space in Victoria, the hotel may succeed over the long-term in attracting that business, but I doubt that it is as likely to secure all that business immediately.

127 It is optimistic to assume that the hotel will attract a large amount of convention business and group bookings as of May 1. That scenario depends on no delays in the construction schedule postponing the completion date. That prediction assumes not only that the expanded operations will open at the scheduled time, but that the bookings will come in immediately. It assumes that those organizing conventions and meetings are willing to take the chance on booking the conference space so close to the scheduled completion time and would not be hesitant to book those facilities in the event it does not open on time. So far the hotel is on target with construction, and it may be that it does ultimately complete right on schedule. What is more speculative is that the projections assume that those making the bookings would share that confidence and be prepared to take the risk that construction will be completed on time. There is less certainty in that outcome.

128 Not only do the Employer's staffing figures assume an immediate growth in convention business, they assume almost full operation of the banquet operations. For some of the same reasons, I do not think demand would be as immediate in the start-up phase of the expanded facilities as Webb so optimistically predicts.

129 Another factor in assessing the certainty of the build-up is whether the plans for expansion of the business are subject to matters beyond the employer's immediate control. As already noted, the Board has not applied the build-up principle where the employer's plans are dependent on market forces outside its control: *Dynamar Energy, supra* and *Kingfisher, supra*, at p. 6. Part of the difficulty in forecasting accurately in this case is that the business is demand driven. Where there is such dependency on external market factors, forecasting the level of business and the required level of staff for that business is not an exact science. As the hotel's business plan for expansion notes, that evaluation was based on the present economy of the area and did not take into account any sharp change in economic conditions. As that disclaimer suggests, the level of business is not entirely within its control and is subject to many variables, such as the value of the Canadian dollar relative to the American dollar and such vagaries as ferry strikes.

130 Apart from such inherently unpredictable trends or events, there are normal fluctuations in its business due to seasonal demand and a corresponding fluctuating

staff complement on a seasonal basis. The Board has noted in the past the difficulty in applying the build-up principle in industries that are subject to seasonal employment: *Kingfisher Sales Inc.*, BCLRB No. 73/86. By its nature, the hotel business is subject to variation depending on the season. As the valuation study recognizes, seasonal fluctuations are inherent to the hotel industry in Victoria, with higher occupancy levels (and consequently higher staffing levels) in the peak tourist summer season.

131           Assessing the certainty and extent of the build-up under all these factors, I find there is less certainty than portrayed by the Employer given that the projected build-up is dependent on the project being completed on schedule and the banquet and convention facilities being booked with guest rooms at the predicted level of 75% occupancy. Taken as a whole, I think the projected work force of 207 may be an accurate prediction for 2002 and for later in 2001, but it is overly optimistic for May 2001.

132           I move to consider the next factor of the representativeness of the existing employee complement. On the issue of representativeness generally, the Union urges the Board in its consideration of the build-up principle to consider the Employer's conduct in forming the Employee Council and engaging in negotiations for a voluntary recognition collective agreement immediately before the application for certification. The Union asserts that conduct amounts to an acknowledgement that the current complement of employees is representative. The Employer disputes the relevance of that conduct arguing that intent of an employer is not relevant and the principle the Board must protect is the choice of future employees on the issue of representation. In considering this issue, I have not found it necessary to rely on the evidence led by the Union and the argument it advanced based on the apparent willingness of the Employer at the time of application to engage in another form of collective bargaining. I prefer to rest my decision instead on the basis of the usual qualitative and quantitative factors reviewed below.

133           In assessing the factor of the representative character of the unit, the Board looks to the composition of the workforce in terms of the numbers and classifications to determine if the employee complement at the date of application is representative quantitatively and qualitatively of the ultimate workforce.

134           To begin with the qualitative aspect of the representative test, the Board looks to the current complement of employees to see if the classifications represented are sufficiently representative of those to be found among the expanded workforce. Not all departments or classifications need be represented by employees at the time of application: *Cheni Gold Mines Inc.*, IRC No. C284/88, (Reconsideration dismissed IRC No. C28/89).

135           In this case, there is no dramatic increase in the types of job classifications. The few new classifications to be created of security, valet parking, door persons, mini-bar attendants and concierge are not so different from employees in current classifications; some of them perform similar duties now, although those duties may not be their primary function. The banquet employees are also not substantially different in nature

than the servers who currently work in other areas of the hotel. I find that the current workforce is sufficiently representative as almost all contemplated classifications are present. The composition of the current workforce is generally reflective of that to be employed in the expanded hotel. To the extent there are any new classifications, the existing employees are doing some of the same work. That similarity of work undercuts any concern about a diversity of interest leading to a lack of representativeness.

136 Having found the current classifications of employees are sufficiently representative, I turn to consider whether the number of employees present at the time of application is representative of the anticipated number among the expanded work force. Normally the Board will not entertain an application for certification where the employees present number less than half of the full anticipated complement and most of the classifications are not represented. However, that 50% "rule of thumb" is not applied as a rigid formula, but from the perspective that this "rule of thumb" is a guidepost, not an invariable rule. It is one yardstick to measure the representative character of the existing work force, but it is not solely an arithmetic exercise. It is a factor that weighs in the balance, but the force of which depends on the relative weight of other factors.

137 The combined effect of other factors, such as the relative impermanence and the speculative nature of the increase, may prevail over the 50% rule of thumb: *Sears, supra*, at para. 35. In some cases, the numbers present figure more prominently when the build-up is both certain and very near in the future: eg. *Sears, supra*, where the build-up was more imminent and had actually already occurred by the time of the hearing. Where the build-up is more distant, that prospect raises concerns about whether that remote event should deny employees the opportunity to select a bargaining representative when the classifications are representative and the numbers of employee border on 50% of the ultimate complement.

138 Here the numbers are close to the half-way measure when the figures are adjusted to a more reliable figure. The current complement of 75 employees is on the margin of the 50% mark. If the Employer's projected figure of 207 employees were accepted at face value, it would be below the 50% mark. However, that number more closely approaches the 50% mark when the Employer's projected figure of 207 employees is discounted to reflect the staffing required for a more realistic occupancy figure than what it has used in its projections. The possibility of staff working in more than one capacity leads to a further discounting of that projected number. That figure taken at the start of the high season would also be the absolute highest of the annual complement and would be subject to some seasonal fluctuation. As these considerations indicate, calculation of the precise number is not an exact science, but I find that the current complement is sufficiently close to the half-way mark to be considered a representative sampling.

139 After reviewing all of the factors, I find that there is a substantial and representative complement of the ultimate workforce present and the application is not premature. I add that although I am persuaded that the present employees' majority wish for union representation should prevail, their wish is not an irrevocable choice. It is

a choice made in the backdrop of rights afforded employees under the Code to divest or change bargaining rights. If the support for the Union does not grow along with the planned build-up, disaffected employees may exercise the choice of a raid to displace the Union with another bargaining agent or decertification to cancel the Union's bargaining rights. Weighing the competing interests of the existing employees and the future employees against the certainty, imminence and extent of the build-up, I find the application is not premature. In these circumstances where the projected build-up is farther in the future and less dramatic than others, I consider the interests of future employees who may not be satisfied with union representation are adequately protected by the provisions of the Code: *Noranda, supra*, at p. 485.

(ii) General Appropriateness Principles

140 Having found there is not an imminent build-up of such certainty and magnitude so as to invoke the build-up principle to deny the application, I move to consider the other appropriateness objection based on the exclusion of the accounting staff and the Executive Administrative Assistant. The principles guiding the determination of appropriateness of bargaining units are set out authoritatively in *Island Medical Laboratories*, BCLRB No. B308/93, 19 CLRBR (2d) 161 ("*IML*"). As this is an application for an initial bargaining unit, facilitating access to collective bargaining is the predominant concern. The unit sought does not have to meet the test of the most appropriate unit, but rather one that presents a rational and defensible line and lays the groundwork for viable collective bargaining and collective agreement administration. In determining whether a community of interest is present at the stage of an initial certification, the Board considers four factors:

- (a) physical and administrative structure of employer;
- (b) similarity in skills, interests, duties and working conditions;
- (c) geography;
- (d) functional integration.

141 In terms of the first factor of the Employer's administrative structure, the accounting department has a separate reporting scheme under the organizational chart. The accounting staff reports directly to Nykamp. By comparison, other departments report to the Director of Operations. That different reporting structure suggests an internal division to some extent between the general operations of the hotel and accounting.

142 On the second factor, the terms and conditions of employment of the accounting staff differ somewhat from the other employees. The salaried wage structure differs from the hourly wage rates of those within the proposed bargaining unit. The benefits are somewhat superior. Those differences in employment conditions, although not hugely significant, do suggest some distinction in their treatment.

143 The Employer rightfully points out that there is not a great divergence in skills and working conditions between the accounting staff and the other hotel employees and they work in the same site; however, I do not find those similarities and the proximity in which they work make the unit inappropriate where there is otherwise a rational and defensible line around the unit. A single geographical site does not demand an initial bargaining unit of all employees; the boundaries of a bargaining unit can be more narrowly drawn. It may well be more appropriate to draw the boundary wider, but the Board's task is only to determine an appropriate bargaining unit, not necessarily the best one.

144 Of more importance is the last factor of functional integration. The purpose of the inquiry is to determine if functional integration is present to such degree and extent that the structure of the bargaining unit would not foster viable collective bargaining and collective agreement administration. To amount to functional integration, the shared duties must be regular in nature and exhibit more than simply a functional relationship between departments.

145 In this case the Employer argued in general terms that the accounting staff and other hotel employees "work together on a daily basis" and are in "continual contact with one another", but there was no evidence of any actual cross-over or overlap in job duties. The accounting staff performs discrete functions. Their job duties do not overlap with employees in the proposed bargaining unit. They count cash other employees may turn in, reconcile the cash to the receipts submitted and report on discrepancies. There is some interaction between employees from different departments when the accounting staff has to make inquiries about the money and bills handed in to them to be reconciled. That type of contact is more illustrative of the coordination of departmental functions, than of functional integration in the strict sense. The duties of the accounting staff may bring them into contact with employees in other departments, but there is no interchange of duties nor do they share duties: *Paul's Restaurant Ltd.*, BCLRB No. B298/94.

146 The Employer relies upon the examples of transfers into the accounting department from other areas of the hotel. There were at least two examples of transfers in the form of employees from the proposed bargaining unit moving over to positions in accounting. However, those types of permanent transfers from one position to another receive little weight as the interchange of employees is not present on a day-to-day basis as contemplated in *IML* as part of functional integration: *International Paper*, BCLRB No. B462/99, at para. 76; and *Pan Pacific Hotel*, BCLRB No. B119/2000, at para. 54. This is not a case where employees are permanently assigned to work both in and out of the proposed bargaining unit.

147 In further support of its argument, the Employer relies upon the one incident of vacation relief within the accounting department. That one time event of a month's relief work by a front desk employee does not establish functional integration. To qualify as functional integration, the interchange must be on a day-to-day basis reflecting a consistent managerial policy of functional integration, not simply holiday relief or the replacement of sick employees: *IML*, at 181-182.

148 Nor is there any evidence of functional integration with the other administrative position the Employer argues should have been included. The Executive Administrative Assistant position was lumped in with the accounting staff for purposes of the appropriateness objection, but the job duties do not align that position with the accounting staff or even with the remaining hotel employees. The organizational chart shows a different reporting relationship with that position reporting directly to Webb. As the job description reveals, that position is primarily secretarial with responsibility for various administrative tasks and human resources matters. There is nothing in those duties that suggests any cross-over with employees in the proposed bargaining unit.

149 The Union argued, as it did with the disputed management exclusions, that the Employer's dealings with the Employee Council in bargaining the draft agreement excluding the accounting staff amount to an acknowledgment by the Employer of the appropriateness of their exclusion. In light of the conclusion I have reached on the issue of functional integration and the other community of interest factors, it is unnecessary for me to rely on this evidence or line of argument. On *IML* principles of appropriateness alone, I find the unit meets the appropriateness test for an initial bargaining unit as a rational and defensible line can be drawn around it.

(b) Resignations

150 I turn to consider the issue of the resignations lodged by the three individuals, Singhera, Marsh and Clifford. As stated in *Surtek*, *supra*, there is a reluctance on the part of the Board to exclude individuals working at the time of application unless there are exceptional circumstances. One exceptional circumstance contemplated for exclusion in *Surtek* is where employees would not be working in the bargaining unit "very shortly after" the date of application. In *Surtek* the resignations were effective three to four days after the date of application. In those exceptional circumstances, the individuals submitting those resignations were not included in the unit.

151 The rationale for such a rule is founded on the need to draw a line to ensure certainty as a specific date is needed on which to assess membership support: *Naya* BCLRB No. B294/98, at para. 64. In *Naya* the Board ruled that one exception to the usual rule that employees in the unit on the day of application will normally be included in the calculation of membership support is when an employee tenders a resignation before the application is filed and will not be working in the unit shortly after the date of the certification application. As the panel stated in *Naya*, a resignation tendered after the date of the certification application will not affect the calculation of membership support. To rule otherwise would mean the date for considering membership evidence would be constantly shifting.

152 Under the analysis used in *Naya*, I find that Singhera and Marsh should be considered employees within the bargaining unit. They were employed at the date of the application and did not submit their resignations until after the application for certification was filed.

153 Clifford is in a different category. His resignation was submitted before the date of application and he continued his employment for roughly a month after. His intent to resign was crystallized before the application was filed; however, it was not effective for roughly a month. That length of time poses the question whether the effective date of resignation is "very shortly" thereafter.

154 From a strict numeric perspective, the cases on pending resignations are not necessarily consistent on what length of time amounts to a "very short time". In some cases involving post-application resignations, the period of time between when notice is first given and its effective date has been less than a month and the employee has been included. In *Canpro Investigative Services*, BCLRB No. B40/97 (Reconsideration dismissed B154/98) an employee whose resignation took effect 12 days after the application was not excluded as that length of time was not considered "a very short time after the date of application". By contrast, in *Royal Oak Mines*, BCLRB No. B269/98 two employees who had resigned 18 days after the first application for certification, and 13 days after the second competing application, were excluded. However, those two individuals had also been previously laid off two days before the first application (at para. 25). Even setting aside that layoff, and assuming they were notionally considered employees in the unit at the date of application, the panel in *Royal Oak* excluded those two under the *Surtek* test (at paras. 26 and 27).

155 The same general principles used in determining employee status for purposes of determining threshold support for the application have been followed in determining who is eligible to be included for purposes of a representation vote, with different outcomes depending on the timing of the resignation. In *Walmart*, BCLRB No. B110/98, employees who tendered their resignations before the vote and would remain only 12 to 16 days thereafter were not included. However, in two other cases involving resignations tendered after a vote the individuals tendering resignations were included. In *Certain Employees of Pacific Undersea Gardens Ltd.*, BCLRB No. B275/2000, a ballot cast by an individual who tendered a resignation effective a month or so after the date of vote was counted. In *Zellers*, BCLRB No. B418/99 the employee in dispute had resigned 35 days after the date of application and about two weeks after the vote. That employee's ballot was included.

156 As that conflict in the outcome of those cases indicate, this case is on the line and ultimately calls for a judgment call. Mindful of the direction in *Naya* and *Surtek* that the exclusion of an employee working on the date of application should be an exceptional event, I find that a resignation effective roughly a month after the date of the application to be too remote in time to be considered "relatively short" thereafter. I find the policy rationale identified in *Naya* of certainty to be best served by treating Clifford as included. To consider post-application events so distant in time from the time of application would mean that the date of applying the sufficient continuing interest test would shift depending on each individual circumstances: *Pacific Undersea Gardens*, *supra*, at para. 16.

(c) Casual Seasonal Workers

157 I move to consider the status of the eleven casual workers that remain in dispute. The test adopted by the Board for assessing the employee status of casuals is found in *Edoco Healey Technical Products Ltd., supra*. It sets out the following factors for determining the status of individuals hired in a temporary or casual position:

- (a) the permanence of employment;
- (b) the proportion of casual/temporary employees in the total workforce;
- (c) the nature and organization of the employer's business; and
- (d) an assessment of the particular employment circumstances of each individual

158 On the first factor, for the most part, subject to the comments below on individual cases, the casual staff show a pattern of continued employment or some link with the Employer through past work at the Quality Inn. They have a general pattern of continued employment on a seasonal basis or otherwise have shown an attachment to the employer through past work. History suggests that they have a likelihood of return to work in the future, particularly given the testimony by management as to the hotel's past practice in recalling staff. From the limited information available from the payroll records, it also appears that most of them, although not all of them, worked almost full-time hours during the time they worked this season.

159 The second factor is of lesser importance in this case. The Board looks to the proportion of casual employees in the workforce out of a concern that if a large proportion of the work force is casual, their numbers may disproportionately alter the balance by potentially outweighing the wishes of the smaller number of regular workers. The numbers here of 11 casuals out of an approximate employee complement of 75 do not raise that concern to any great degree. This factor is neutral in its application on this case.

160 The third factor provides some recognition of the demands of the type of business and the particular operation. This hotel has a tradition of using casual seasonal labour. Given the fluctuations in market demand, casual labour will continue to be required in the business. History suggests a reasonable expectation on the part of these casuals of obtaining some seasonal employment in the following year.

161 Given their history of employment, I consider it likely that they would be given more work if business volumes increase or if relief workers are required. The example of Cox reinforces my conclusion as she was in the original group of casuals under challenge, but was subsequently kept on. She was initially challenged by the Employer as she was slated to be laid off at the end of September, but was later offered further work at the end of September. That example shows that the Employer draws upon the casual pool when business levels demand.

162 The last factor in *Edoco* involves an assessment of the particular circumstances of the individual. For the most part, subject to the comments that follow in a few cases, I find nothing in the employment circumstances of the larger group of casual employees that would call into question the likelihood of their continued association with the Employer. The frequency of their employment and their work patterns suggests otherwise. As a group, they should properly be considered as part of the bargaining unit. However, I will consider the particular circumstances of the three other individuals the Employer argues should be excluded as part of its alternative position. The Employer argues that Mayes, Randhawa and Boado display less of a link in terms of their employment relationship than do the others.

163 Mayes had not worked for the hotel previously and only worked briefly between May 2 and July 15. Because of her injury in a motor vehicle accident, she had no hours of work for almost one month immediately before the application and no hours after that date. Although in other circumstances, an individual off work for an injury may retain employee status, I consider her inclusion inappropriate. I base that conclusion on the cumulative factors of her limited tenure at the hotel, the absence of any hours for the month preceding and the fact that the Employer subsequently terminated her for abandonment of her position for working elsewhere. In these unusual circumstances, I find that she does not have a sufficient continuing interest.

164 Randhawa is again in a different category. She has not worked previously for the hotel, but shortly after the application for certification received a letter dated August 18 confirming her scheduled layoff and referring to the possibility of extension of that date if further work became available. Between the date of that letter and the hearing, she was terminated for performance issues and did not pass her probationary period. Given those performance issues, I do not consider it likely that she will be recalled to work. I find she does not have a sufficient continuing interest.

165 As for the alternative argument advanced to exclude Boado, the Employer submits that Boado should not be included as she has not worked for the hotel in the past. Curiously, the Employer does not advance that alternative argument in relation to Gill who also has not worked previously. I see no reason to distinguish between Boado and Gill. There was no mention in the evidence of any performance issues that would put into question the likelihood of Boado being recalled to work, and I find no reason to depart from my analysis given above as to the inclusion of the casual group generally based on her individual employment circumstances.

(d) Exclusion Issues

166 In light of the outcome I have reached on the other issues, it is unnecessary for me to decide the remaining disputed positions - the four positions the Employer seeks to add and the one position the Union asks to be removed from the list. Whether or not the positions of Reservation Manager, Sous Chef, Night Manager and Construction Project Coordinator should be properly included, as the Employer contends, and whether or not the Assistant Building Service Manager is removed from the list, as the Union seeks, their inclusion or removal would not affect the level of membership

support. The Union would have sufficient support for certification without a vote in any event. Consistent with the Board's practice, those outstanding issues are left to the parties to deal with in negotiations, and failing resolution, through a Section 139 application to the Board.

VI. CONCLUSION

167

The Employer's objections to the appropriateness of the bargaining unit based on the build-up principle and the presence of functional integration do not prevail. The three individuals in dispute who submitted resignation letters, Singhera, Marsh and Clifford, are included within the bargaining unit. The group of employees identified as casual seasonal workers is included in the bargaining unit with the exception of Mayes and Randhawa, who were excluded on the basis of their individual employment characteristics. The status of the other positions said by the Union to be managerial, and by the Employer to be either front-line supervisors or non-managerial, is left undecided. As there is sufficient membership support for certification without a representation vote regardless of the status of those positions, any continuing dispute over their status is left to the parties to resolve in negotiations. A certificate of bargaining authority will be issued by the Registry shortly.

LABOUR RELATIONS BOARD

**"LAURA PARKINSON"**

LAURA PARKINSON  
VICE-CHAIR