BRITISH COLUMBIA LABOUR RELATIONS BOARD

HEALTH EMPLOYERS ASSOCIATION OF BRITISH COLUMBIA ON BEHALF OF FORENSIC PSYCHIATRIC SERVICES COMMISSION, CHILDREN'S AND WOMEN'S HEALTH CENTRE OF BRITISH COLUMBIA BRANCH, PROVIDENCE HEALTH CARE SOCIETY, VANCOUVER COASTAL HEALTH AUTHORITY, BRITISH COLUMBIA MENTAL HEALTH SOCIETY BRANCH (FORMERLY KNOWN AS VANCOUVER COASTAL HEALTH AUTHORITY (BURNABY CENTRE FOR MENTAL HEALTH AND ADDICTIONS SERVICES)), FRASER HEALTH AUTHORITY AND VANCOUVER ISLAND HEALTH AUTHORITY

(collectively, "HEABC" or the "Employers")

-and-

BRITISH COLUMBIA NURSES' UNION

("BCNU")

-and-

HEALTH SCIENCES ASSOCIATION OF BRITISH COLUMBIA

("HSA")

-and-

PROFESSIONAL EMPLOYEES' ASSOCIATION

("PEA")

PANEL: Koml Kandola, Vice-Chair

APPEARANCES: Erin Cutler, for HEABC on behalf of the Employers
Pamela R. Costanzo, for BCNU
Randy Noonan and Tonie Beharrell, for HSA
Leo McGrady, Q.C. and Sonya Sabet-Rasekh, for PEA
David Tarasoff, for Hospital Employees' Union ("HEU")
Martina Boyd and Carmela Allevato, for Canadian Union of Public Employees ("CUPE")
Thom Yachnin and Meghan Ashbury, for B.C. Government and Service Employees' Union ("BCGEU")

CASE NOS.: 69112, 69114, 69115, 69116, 69117, 69119 and 69120

DATE OF DECISION: April 11, 2016

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DECISION OF THE BOARD

I. NATURE OF APPLICATIONS

1 BCNU filed seven applications under Section 19 of the *Labour Relations Code* (the "Code") to represent seven separate units composed of employees in the classification of "Psychologist", or "Psychologist or Testing Technician – Psychometrist", employed by each of the Employers (the "Applications").

2 The psychologists and psychometrists in question fall within the paramedical professionals subsector, a single, province-wide, multi-employer, multi-union bargaining unit under the *Health Authorities Act*, R.S.B.C. 1996, c. 180 (the "Act"). The incumbent unions affected by the Applications are HSA and PEA (the "Incumbents").

3 Specifically, the units applied for in each Application are as follows:

a. "Employees in the classification of Psychologist employed by the British Columbia Mental Health Society Branch in the [paramedical] professionals subsector". HSA is the incumbent union (Case No. 69117).

b. "Employees in the classification of Psychologist or Testing Technician – Psychometrist employed by Children's and Women's Health Centre of British Columbia Branch in the [paramedical] professionals subsector". HSA is the incumbent union (Case No. 69114).

c. "Employees in the classification of Psychologist employed by Forensic Psychiatric Services Commission in the [paramedical] professionals subsector". PEA is the incumbent union (Case No. 69112).

d. "Employees in the classification of Psychologist or Testing Technician – Psychometrist employed by Providence Health Care Society in the [paramedical] professionals subsector". HSA is the incumbent union (Case No. 69115).

e. "Employees in the classification of Psychologist employed by Fraser Health Authority in the [paramedical] professionals subsector". Both HSA and PEA represent psychologists in Fraser Health Authority (Case No. 69119).

f. "Employees in the classification of Psychologist or Testing Technician – Psychometrist employed by Vancouver Coastal Health Authority in the [paramedical] professionals subsector". HSA is the incumbent union (Case No. 69116).

g. "Employees in the classification of Psychologist or Testing Technician – Psychometrist employed by Vancouver Island Health Authority in the [paramedical] professionals subsector". Both HSA and PEA are incumbents in this application (Case No. 69120).

4 An initial hearing was held on December 8, 2015. Due to the content of the notices of hearing, there was some debate amongst the parties as to whether the Applications were only for certain worksites within the health authorities, or whether they were health authority-wide. At the December 8, 2015 hearing, BCNU stated the Applications were health authority-wide. The Incumbents argued this was a substantive amendment to the Applications and objected. By letter dated December 23, 2015, after considering the parties' submissions, I found that the Applications were made on a health authority-wide basis in the first instance, and that BCNU was not attempting to amend the Applications.

5 In its submissions, PEA continues to assert that, based on the notices of hearing, the Applications are for certain worksites only and BCNU is attempting to amend its

Applications to be on a health authority-wide basis. I find this issue was fully disposed of on December 23, 2015, and it will not be addressed further in this decision.

6 The Incumbents oppose the Applications on a number of grounds and ask for the Applications to be dismissed. In brief, the Incumbents say that the units applied for are inappropriate, are contrary to the Board's law and policies regarding partial raids in the health sector, and would create industrial instability. BCNU says the objections are without merit and should be dismissed. HEU, BCGEU and CUPE sought and were granted intervenor status (the "Intervenors"). The Intervenors also oppose the Applications.

7 Voting on the Applications occurred by mail ballot. The ballot boxes are sealed, subject to challenges and pending the outcome of this adjudication.

8 While this matter is vigorously contested, the material facts are not in dispute. I find I am able to address the issues on the basis of the parties' written submissions and attachments. I thank all parties for their thorough and extensive submissions. I have reviewed them carefully.

II. REPRESENTATION MODEL IN THE HEALTH SECTOR

9 It is helpful at the outset to identify the unique representational model in the health sector, in the context of which the Applications are to be assessed.

10 Collective bargaining in the health sector is on a multi-employer basis. There are six health authority Employers in the health sector: Fraser Health Authority, Interior Health Authority, Northern Health Authority, Vancouver Coastal Health Authority, Vancouver Island Health Authority, and Provincial Health Services Authority (the "Health Authorities"). With the exception of Provincial Health Services Authority ("PHSA"), Health Authority worksites are geographically defined. Considerations involving PHSA are discussed further below. In addition to the Health Authorities, there are other employers referred to as affiliates. Providence Health Care Society ("Providence Health Care") is one such affiliate, and like the Health Authorities, has multiple worksites.

11 In 1995, a commission headed by James E. Dorsey, Q.C. published a report that set out recommendations for appropriate bargaining units in the health sector, in the interests of rationalizing labour relations in the sector. The Act largely reflects those recommendations, and reduced to five the number of appropriate bargaining units in the health sector: residents; nurses; paramedical professionals; health services and support – facilities; and health services and support – communities.

12 As stated, the Applications relate to employees employed by Employers in the paramedical professionals subsector bargaining unit. As members of that bargaining unit, these individuals are covered by a single collective agreement negotiated between the Health Science Professional Bargaining Association ("HSPBA") and HEABC. The current collective agreement is dated April 1, 2012 to March 31, 2019 (the "Collective

Agreement"). Among other things, the Collective Agreement sets out various classifications within the paramedical professionals subsector.

13 All unions that represent employees in the paramedical professionals subsector belong to the HSPBA. HSA is the largest constituent union in the HSPBA, representing about 16,000 members who fall within 67 different health science professions, including psychologists and psychometrists. PEA represents a variety of paramedical professionals, including psychologists. PEA does not represent psychometrists. HEU, CUPE and BCGEU are also members of the HSPBA.

14 Pursuant to Section 19.9(3) of the Act, the bargaining agents in each of the legislated appropriate bargaining units must agree to articles of association. Among other things, the articles of association must provide the association with the exclusive jurisdiction to bargain on behalf of the bargaining units for which the association is certified (Section 19.9(3)(b)). They must also provide the association with the right and obligation to resolve differences among its members with respect to the administration of the collective agreement, including differences with respect to the right or obligation to belong to a particular trade union within the association (Section 19.9(3)(c)).

15 The articles of association for the HSPBA identify the purposes of the HSPBA, which include the promotion of cooperation among the constituent unions with regard to collective bargaining and the administration of the Collective Agreement (the "Articles of Association"). The Articles of Association also provide for a dispute resolution process for disputes among constituent unions regarding the interpretation, application or administration of the Articles.

16 On many occasions, the Board has discussed the representational model in the health sector that results from the statutory regime provided for in the Act. For example, in *British Columbia Nurses' Union,* BCLRB No. B44/2011, 192 C.L.R.B.R. (2d) 302 ("*BCNU*"), the Board explained as follows:

> The representation of employees in the health sector falls under two tiers. The first tier concerns collective bargaining. The reforms reduced the number of bargaining units for that purpose. That meant affected unions could no longer bargain on their own with each employer. Instead, they bargain with other unions under the auspices of bargaining associations. Each bargaining association bargains a single collective agreement for employees in each unit. So, for example, the Health Services and Support - Facilities Subsector Bargaining Association (the "FBA") bargains a collective agreement for employees in the Facilities Subsector unit. The CBA bargains a collective agreement for employees in the Communities Subsector unit as does the Nurses Bargaining Association (the "NBA") for the Nurses' Subsector unit, and so on.
>
> The second tier concerns the day-to-day administration of the Collective Agreement. At this level, unions affected by the reforms retained an individual role in the workplace. (paras. 9-10)

17 HSA holds a consolidated certification as the bargaining agent for employees in a unit composed of "employees of Employers listed in the attached Appendix (represented by the Health Employers Association of British Columbia) in the paramedical professionals subsector" except employees represented by other trade unions and excluded individuals. PEA has a similarly worded consolidated certification. HSA says the wording of its consolidated certification is typical of health subsector certifications, in that it sets out the general group (paramedical professionals) and then appends the list of worksites of the particular employer at which those workers are employed. In this regard, HSA explains:

> In short, HSA is certified for all Health Science Professionals at all of the worksites listed in the certification. For primarily historical reasons, the other unions in the HSPBA represent some Health Science Professionals at worksites where HSA does not have a bargaining certificate. For example, the PEA represents Psychologists at non-HSA sites covered by the [BCNU] applications. However, generally there is only a single HSPBA bargaining agent at any given worksite.

III. THE PARTIES' SUBMISSIONS

A. THE INCUMBENTS

18 The Incumbents raise several objections to the Applications. While the Incumbents filed separate submissions, they raise many of the same issues. Accordingly, I will discuss their submissions together where they overlap. Also, I note that the Incumbents have used the phrases "paramedical professionals" and "health science professionals" interchangeably.

1. OBJECTIONS RELATING TO APPROPRIATENESS AND INDUSTRIAL INSTABILITY

19 The bulk of the Incumbents' objections fall under this heading. Specifically, the Incumbents say the proposed units are inappropriate because: a rational and defensible line cannot be drawn around them; the Applications constitute partial raids and are inappropriate in the absence of compelling circumstances; and the Applications are for classification-specific units. They also say the Applications, if allowed, would lead to significant industrial instability. The Incumbents say that, as the employees at issue already have access to collective bargaining, industrial stability concerns, in their various forms identified below, are paramount. The Incumbents say these concerns militate against granting the Applications.

20 I turn now to the specific objections in this regard.

a) RATIONAL AND DEFENSIBLE LINE AROUND THE PROPOSED UNITS

21 PEA says there is functional integration between the separate locations within each Health Authority. According to PEA, the affected employees work across worksites within the Health Authorities, and also work with other paramedical professionals. PEA says all of the employees covered by its consolidated certification in the paramedical professionals subsector share a community of interest. Similarly, HSA says the affected employees share a community of interest with other paramedical professionals. The Incumbents say that, accordingly, a rational and defensible line cannot be drawn around the proposed units.

b) PARTIAL RAID

22 The Incumbents say the Applications constitute partial raids. They submit the Board's policy is that partial raids in the health sector will not be allowed unless there are compelling reasons to fragment the existing unit or to allow for a proliferation of bargaining agents. The Incumbents say no compelling reasons exist in this case.

23 The Incumbents say the benchmark for determining representational disputes is the existing bargaining unit, not some smaller division of it. The Incumbents say that allowing the Applications would result in carving up large and stable bargaining units into several small and disparate groups. They say this would result in an inappropriate proliferation of bargaining agents within a health subsector, which inherently raises industrial instability concerns. In the Incumbents' submission, the Employers would not only have to negotiate the Collective Agreement with an additional bargaining agent in the HSPBA (proliferation at the first tier), but will also have to deal with an additional bargaining agent in administering the Collective Agreement at the worksite level (proliferation at the second tier). They say this breeds industrial instability.

24 The Incumbents refer to the Board's preference for larger bargaining units, as expressed in *Island Medical Laboratories Ltd.,* BCLRB No. B308/93 (Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), 19 C.L.R.B.R. (2d) 161 ("*IML*"). They say there is no compelling reason in the present case to depart from the Board's preference for larger bargaining units. In particular, HSA submits:

> In the years following *IML*, the Board decided a number of cases involving raid applications in the health sector. At one point, it appeared that the policy of favouring one large bargaining unit was being relaxed in the health sector. In a line of cases starting with *Grouseview Care Home,* BCLRB No. B403/97, leave for reconsideration denied, BCLRB No. B49/98, the Board determined that concerns regarding industrial instability were somewhat ameliorated in the health sector by the existence of bargaining associations, and that there could be multiple bargaining agents administering the same collective agreement at the same worksite. However, that line of cases has been overtaken with the current Board policy. ...

25 The Incumbents say the Board's current policy is reflected in cases including *Certain Biomedical Engineering Technologists,* BCLRB No. B126/2005, 119 C.L.R.B.R. (2d) 186 ("*Certain Biomeds*") (Application for Reconsideration Dismissed, BCLRB No. B2/2006, petition for judicial review dismissed *British Columbia (Hospital Employees' Union) v. British Columbia (Labour Relations Board)*, 126 C.L.R.B.R. (2d) 53, 2006 BCSC 1334), *BCNU*, and other cases following *Certain Biomeds.*

c) RAIDING BY CLASSIFICATION

26 The Incumbents say the Applications are for classification-based units, which would result in the creation of new "craft" or technical units at worksites within a health subsector. The say such a result is contrary to Board policy on bargaining unit appropriateness, which generally precludes certification of single classifications. The Incumbents say the Board's policy is based on concerns for industrial stability, as classification-based units would lead to an inappropriate proliferation of bargaining agents: *BCNU*; *Health Employers Association of British Columbia*, BCLRB No. B29/2014, 241 C.L.R.B.R. (2d) 130 ("*HEABC*"). In particular, the Incumbents submit that if the Applications are allowed, the entire subsector could be carved into dozens of such craft or technical units represented by any number of agents at the same worksite, leading to inherent industrial instability.

d) BCNU PRESENCE IN THE HSPBA

27 The Incumbents say that, in past years, BCNU has had a history of regularly raiding other health sector unions, and has been found to have committed unfair labour practices in its raiding conduct. They say the Board should take into consideration BCNU's conduct and behaviour when assessing the Applications.

28 The Incumbents say that allowing the Applications would give BCNU a significant presence in the HSPBA. The Incumbents say BCNU is perceived as being a "predatory" union by the members of HSPBA and in the union movement in general. According to the Incumbents, BCNU's presence in the HSPBA would disrupt the cooperative and trusting relationship that currently exists within the HSPBA and which is necessary for its effective functioning. They say this will result in significant industrial instability within the HSPBA and between its constituent unions.

29 The Incumbents say that while some cases have recognized the Articles of Association as a means of ensuring industrial stability, the effect of the Articles of Association will be tenuous in the present circumstances given BCNU's raiding history and hostile relations with the Incumbents.

e) CONSEQUENCES OF RAIDING

30 The Incumbents submit that allowing the Applications would encourage widespread raiding on a worksite-by-worksite and classification-by-classification basis and, as a result, would raise significant concerns regarding industrial stability within the health sector. They say allowing the Applications will result in ongoing tensions in

worksites, and will require bargaining agents to spend enormous amounts of time and resources in fighting raids.

f) Employee Choice not Determinative

31 In making the above objections, the Incumbents acknowledge that employee choice is at issue. However, the Incumbents say employee choice is significantly outweighed by the policy concerns that arise pursuant to the Applications. They say employee choice must be balanced with the need for functionality and industrial stability.

2. Other Objections

a) Unidentifiable/Unspecified Unit

32 HSA says four of the Applications are for a unit of employees in the classification of "Psychologist or Testing Technician – Psychometrist". HSA says no such classification exists and these Applications do not disclose an identifiable unit. HSA says psychologists and testing technicians - psychometrists are two entirely different classifications, with different roles and qualifications.

33 Alternatively, HSA says BCNU is applying for one unit consisting of one classification or another classification (i.e., psychologists or psychometrists), and that allowing such an application is unprecedented, as it is not clear what BCNU is applying for. Further, HSA says this would allow BCNU to sweep in the minority group without having to show majority or even any support among that group.

34 Similarly, PEA says the use of the word "or" carries uncertainty regarding the scope of the unit applied for, and could mean that the proposed unit includes either one of the classifications or the other, or both – creating three possible options. PEA says clarity with respect to the scope of the unit applied for is critical to ensuring a fair hearing.

b) Combined Voters' Lists

35 PEA says the Applications regarding Fraser Health Authority and Vancouver Island Health Authority, where both PEA and HSA are incumbents, include members of two different unions on the same voters' list. PEA says each of these Applications in effect concern two units – one PEA and the other HSA. However, threshold support for BCNU was determined by combining the two units, and the voters' lists also combine the two units. PEA says the Code requires threshold support to be determined, and the representation vote be counted, separately between the two units; otherwise, one of the Incumbent's members will be disenfranchised.

c) IDENTITY OF EMPLOYER – PHSA

36 HSA says the Applications involving Children's and Women's Health Centre of British Columbia Branch ("C&W") and British Columbia Mental Health Society Branch ("BC Mental Health Society") misidentify the employer. HSA says the proper employer in each of those cases is PHSA, and that the entities which are named are simply agencies of PHSA. It says failure to name the proper employer is fatal.

37 In this regard, HSA also refers to Appendix 19 of the Collective Agreement, which provides for the consolidation of seniority lists on a health authority-wide basis. HSA says Appendix 19 defines the health authorities, and not their agencies, as the employer. In addition, HSA says that the employer for the purposes of representational rights under the Code is the health authority.

d) MISREPRESENTATIONS

38 PEA alleges that, in meetings with the affected employees in mid-November 2015, BCNU made improper statements and misrepresentations, including that: once the Applications are granted, psychologists will be moved to the Nurses' Bargaining Association; and BCNU will negotiate a separate collective agreement for psychologists. PEA says it has been expressed or implied that BCNU will be able to obtain better wages and working conditions with these changes to the collective bargaining scheme. PEA submits that these are flagrant misrepresentations which taint the validity of BCNU's membership support and evidence.

B. HEABC

39 At the initial hearing, HEABC advised it takes no position on the appropriateness issues, but reserved the right to respond to facts outlined in the parties' submissions.

40 HEABC made submissions regarding the proper employer for the Applications involving C&W and BC Mental Health Society. HEABC says BCNU has correctly identified the Employers in these Applications. Both Applications relate to PHSA. HEABC says PHSA has a unique structure and was incorporated as a society, with branch societies. HEABC says that while both C&W and BC Mental Health Society are associated with PHSA, they are separate legal entities. HEABC relies upon a practice within the health sector of listing PHSA's agencies as separate employers on the consolidated certifications. HEABC says this practice has continued despite the consolidation of seniority under Appendix 19 of the Collective Agreement.

C. BCNU

41 BCNU says the units applied for are appropriate and the objections should be dismissed.

42 Relying on *IML,* BCNU submits that it must only apply for an appropriate bargaining unit, not the most appropriate one. BCNU says the Board's assessment of appropriateness must be based on each situation on its facts, and not on the basis of an inflexible approach.

43 BCNU says the employees in the units applied for share a community of interest, and share skills, duties and working conditions. According to BCNU, psychologists are not subject to employee interchange and they do not move between sites. BCNU says psychologists and psychometrists are functionally integrated with each other, and also work closely with nurses and physicians. BCNU says a rational and defensible line can be drawn around the proposed units, whether the unit is of psychologists alone or psychologists and psychometrists.

44 BCNU says the Board's policy of requiring compelling reasons for a partial raid "should not be applied at all in the context of modern labour relations in the health care sector". BCNU relies upon the Board's decision in *4020 Investments Ltd. (Dufferin Care Centre)*, BCLRB No. B303/2003 ("*Dufferin Care Centre*").

45 Alternatively, BCNU says employee choice constitutes a compelling reason for allowing partial raids in this case. BCNU says employee choice is the foundation of collective bargaining and is enshrined in Section 2 of the Code. Among other things, BCNU relies on *Interior Health Authority*, BCLRB No. B97/2012, 212 C.L.R.B.R. (2d) 164 ("*Interior Health Authority*") (Leave for Reconsideration Denied, BCLRB No. B127/2012, 214 C.L.R.B.R. (2d) 119, petition for judicial review dismissed 2013 BCSC 1516), in which BCNU says the Board found employee choice to be a compelling reason to allow a partial raid.

46 BCNU says the Incumbents have, to date, been representing psychologists between themselves, cutting across classification lines. BCNU says that if the Applications are granted, it would represent the entire profession and would thereby reduce industrial instability. In this regard, BCNU says there is no reason to believe the Employers would experience difficulty in administering the Collective Agreement with BCNU, as BCNU is not a stranger to health care collective agreements.

47 BCNU also submits that the proposed units are not for a single classification, and, accordingly, the Board's policy against classification-based units is irrelevant. BCNU says the Applications are for psychologists and psychometrists, which is not a single classification or craft unit in the sense that Board policy has warned against. BCNU says the Act created an artificial division among health care workers which prevents BCNU from representing these employees in the same bargaining unit as their nurse colleagues, with whom BCNU says the employees share a community of interest.

48 Alternatively, BCNU says the Board's policy against certifying classification-specific units is "dated and should not be blindly applied, but considered in a careful and reasoned manner". BCNU says the Incumbents rely on *IML* in support of the policy. BCNU describes *IML* as a decision that is "now more than 20 years old", and says "there is no clear basis for the policy against single-classification units directly linked to

the policy statement in *IML*". BCNU characterizes the policy as a "stand–alone statement" in *IML,* and says there is a "dearth of consideration of the policy against single classification bargaining units in the authorities since *IML*". According to BCNU, *Interior Health Authority* is a "rare occasion" in which the Board explained the principles behind the policy, but nevertheless allowed the certification of a single classification unit of licensed practical nurses ("LPNs"). BCNU says it would not be conducive to fostering positive labour relations for the Board to deny the Applications "based on application of policy alone, without considering the principles underlying those policies".

49 BCNU says many of the Incumbents' objections relating to industrial instability are based on concerns about BCNU gaining membership in the HSPBA. BCNU says the Incumbents have ignored the fact that BCNU is already a member of the HSPBA, because it holds a certification at Trail and District Hospice Palliative Care Program with the Interior Health Authority.

50 Further, BCNU says concerns over industrial instability at the second tier level can be dealt with under the Articles of Association. In BCNU's submission, the Board "has failed in recent cases to give appropriate consideration to the Articles of Association when considering second tier issues". BCNU relies on statements in *Dufferin Care Centre*; *Grouseview Care Home Inc.*, BCLRB No. B403/97 ("*Grouseview*"); *Central Vancouver Island Health Region*, BCLRB No. B29/2002 ("*CVIHR*"); and *Health Employers Association of British Columbia on behalf of Vancouver Coastal Health Authority*, BCLRB No. B62/2009, 175 C.L.R.B.R. (2d) 139 ("*VCHA*") for the proposition that articles of association alleviate concerns about industrial instability. Further, BCNU says the decisions in *HEABC* and *Certain Biomeds,* as cited by the Incumbents, are distinguishable. BCNU says *Certain Biomeds* is distinguishable because that case was not about employee choice. BCNU says *HEABC* is distinguishable because that case concerned a raid application by a union that did not have "the long history and established relationships in health care" held by the BCNU. BCNU says HEABC is the party that would be the subject of second tier concerns, but HEABC has not taken any position on the Applications.

51 Last, BCNU submits that allegations relating to BCNU's conduct are not relevant. BCNU also denies the allegations of misrepresentations. BCNU notes the Incumbents have not pointed to any breach of the Code.

52 With respect to the remainder of the Incumbents' objections, BCNU says it has named the correct employers in the applications involving C&W and BC Mental Health Society. BCNU relies on *Interior Health Authority* in this regard. BCNU also submits that C&W and BC Mental Health Society receive funding from PHSA but operate separately. BCNU also refers to PEA's and HSA's consolidated certifications which list C&W as a separate employer.

53 BCNU also says it has applied for identifiable bargaining units, composed of employees in one of two classifications: psychologist or psychometrist. BCNU says if it had used the word "and", it would have constituted an application for employees who occupy both classifications, and there are no such employees. Further, BCNU says it

did not apply for psychometrists at every Employer because not every Employer employs or uses psychometrists.

54 In terms of PEA's argument on the voters' lists, BCNU says that, if the bargaining unit encompassing PEA and HSA members is found to be appropriate at the two health authorities in question, the voters' list will be based on the employees within that unit, who will be able to vote. BCNU says, as a result, no disenfranchisement will occur.

D. INCUMBENTS' REPLY SUBMISSIONS

55 In reply, the Incumbents say BCNU's submissions regarding community of interest are irrelevant, because the Act has determined the communities of interest within the health sector by establishing the five appropriate bargaining units. Accordingly, the Incumbents maintain that a rational and defensible line cannot be drawn around the proposed units.

56 In response to BCNU's arguments regarding industrial instability, PEA says that even if the Applications were successful, the Incumbents would still represent the remaining paramedical professionals covered by their certifications at the Employers' worksites. As a result, the Employers would have to negotiate and administer the Collective Agreement, at both the first and second tier, with an additional union (BCNU).

57 The Incumbents repeat their view that the Applications constitute partial raids and attempt to carve up existing bargaining units; they say such applications are inappropriate in the absence of compelling reasons, which BCNU has failed to identify. The Incumbents say employee choice does not constitute compelling circumstances in the present case. They say compelling circumstances must address concerns regarding partial raids and the resulting industrial instability, beyond and apart from employee concerns.

58 The Incumbents says the Applications are clearly classification based. They say BCNU has not provided any reason to depart from the Board's policy against classification-specific units.

59 In terms of BCNU's certification at Trail and District Hospice Palliative Care Program, the Incumbents say there is no evidence there are any health science professionals working there. In any event, they rely on *HEABC* as recognizing such situations as being historical anomalies.

60 The Incumbents submit they are not asking for a bald application of policy, but rather are arguing the circumstances of this case fall within the very situations the Board wishes to avoid regarding industrial instability.

E. INTERVENORS

61 HEU says the current law and policy on partial raids in the health sector is set out in *HEABC*. HEU submits the units applied for are inappropriate because they serve to

fragment the existing second tier units held by the Incumbents at the worksite level. In HEU's submission, raid applications that would fragment the established second tier unit are inappropriate and must be dismissed in the absence of compelling reasons for the fragmentation. HEU says BCNU has not established compelling reasons. In HEU's submission, the Board is not content to rely on the articles of association to maintain order and stability when faced with a partial raid. HEU says that where the Applications result in an additional bargaining agent who administers the Collective Agreement at a given worksite, they must be dismissed.

62 Further, HEU says that even if the Applications do not result in the proliferation of agents at a worksite, they must still be dismissed absent compelling reasons because they are for classification-specific units. Relying on *HEABC*, HEU says such applications give rise to instability in the negotiation and administration of the Collective Agreement: if a classification can be raided, unions cannot bargain or administer the Collective Agreement effectively and make tough decisions for the benefit of the unit or association as a whole that might be perceived as detrimental to a particular classification. Again, HEU says BCNU has not established compelling circumstances in the present case.

63 Similarly, BCGEU opposes the Applications because of the negative impact of classification-based raiding on labour relations. BCGEU says allowing the Applications would encourage piecemeal raiding in health care, which would divert the unions' resources and undermine industrial stability. Further, BCGEU submits that allowing the Applications would lead to fragmentation of bargaining units in the health sector, which would lead to the proliferation of bargaining agents at the worksite, and would undermine the orderly and constructive administration of the Collective Agreement. Like HEU, BCGEU relies upon *HEABC*, and also cites *Health Employers Association of British Columbia*, BCLRB No. B31/2014, 241 C.L.R.B.R. (2d) 144 *("Providence Health Care").*

64 CUPE says that, in general, there is only one HSPBA bargaining agent at a worksite. According to CUPE, the only union that holds classification-based certifications in the HSPBA is PEA, which is historical. CUPE says BCNU is seeking to expand the narrow exception to the Board's policy not to permit raids by classification, and that the Applications would fracture existing bargaining units. In CUPE's submission, if the Applications are allowed to proceed, piecemeal raids in the health sector will become pervasive, diverting unions' resources and undermining cooperative participation between incumbent unions and employers. CUPE says employee choice should not come at the expense of industrial stability.

F. BCNU Response to Intervenors

65 BCNU says the Intervenors' submissions do not add any new perspectives or arguments and the issues raised in their submissions were already canvassed by the Incumbents. In this regard, BCNU relies upon its submissions in response to the Incumbents' objections.

66 Further, BCNU says the concerns raised by the Intervenors relate to proliferation at the second tier, which is only a concern because of its impact on employers. BCNU says the employer in this case (as represented by HEABC) has "taken no position on the matter, and has not made submissions in support of the Intervenors". BCNU says that, as a result, "[t]he Board must presume that no such concerns exist in this case".

G. Intervenors' Reply Submissions

67 HEU disagrees with BCNU's assertion that the Intervenors have not added new perspectives or arguments. In particular, HEU relies upon its discussion of *HEABC*. Similarly, BCGEU says the fact that all of the Intervenors have raised concerns regarding industrial instability, in itself, is a valuable perspective.

68 In its reply, CUPE says BCNU has mischaracterized its submission. CUPE says industrial instability is not just due to fragmentation of the existing bargaining unit; if the Applications are successful, industrial instability would also result at the bargaining association level. CUPE says BCNU has ignored this aspect of industrial instability. Further, CUPE says the fact that HEABC has not taken a position does not mean there are no concerns regarding proliferation. CUPE notes the Applications also affect other unions, who have an interest in the administration of the Collective Agreement. Accordingly, CUPE says HEABC's failure to take a position is not determinative, and the Board must address the issue of industrial instability at the second tier.

VI. ANALYSIS AND DECISION

A. Appropriateness and Industrial Stability Concerns

69 Section19(1) of the Code provides as follows:

> If a collective agreement is in force, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may apply to the board to be certified for the unit during the seventh and eighth months in each year of the collective agreement or any renewal or continuation of it.

70 Raids are recognized as being inherently disruptive in the workplace to employers, unions and employees; accordingly, the Code limits the time and the manner in which raids can occur, as set out in Section 19(1) above: *Interior Health Authority (East Kootenay Regional Hospital)*, BCLRB No. B109/2013, 228 C.L.R.B.R. (2d) 1 (Leave for Reconsideration Denied, BCLRB No. B139/2013) ("*East Kootenay Regional Hospital*"), para. 46.

71 The Board's leading decision on appropriateness is *IML*. In *IML,* the Board expressed its preference for larger units, in furtherance of industrial stability: p. 170. Once collective bargaining has been established, rather than creating new bargaining units, existing units will either be enlarged or merged: p. 170.

72 The determination of an appropriate bargaining unit involves a balance between two objectives: access to collective bargaining and industrial stability. While access to collective bargaining is the primary factor in the initial stage of certification, industrial stability is the most crucial factor at the second or additional stage: *IML,* p. 187. A key factor in this respect is the simplification of the administration and negotiation of collective agreements. In *IML,* the Board held it is axiomatic in labour relations that a proliferation of bargaining units increases the potential for industrial instability. Accordingly, there is a presumption against multiple bargaining units, which markedly increases with the number of units: *IML*, pp. 187-188.

73 In determining the appropriateness of a unit, the Board in *IML* explained it will not cut across classification lines, nor certify a single classification. An exception is if the majority of bargaining unit members in a single classification are at a certain location, or the employees are traditionally difficult to organize: *IML*, p. 184. In this respect, it is important to remember that *IML* itself involved applications for reconsideration of two decisions. One decision related to an application by HSA for certification of a bargaining unit of medical laboratory technologists employed by Island Medical Laboratories Ltd. at various sites. In this regard, the reconsideration panel stated as follows at pages 198-199:

> ...HSA has not applied for its standard bargaining-unit description. That is understandable because this is a private medical laboratory, not a public health-care facility. However, this Board will not create new technical units representing a single paramedical group in the health-care industry. It has been the policy of the Board to include, as the HSA standard description reveals, all paramedical professions within one bargaining unit.
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> * * *
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> It should be remembered that crafts are a historical anomaly. They preceded the development of the concept of appropriateness. They are therefore to be restricted, not expanded. This is equally true of the creation of new technical units.

74 The Board in *IML* had before it a situation in which a party sought to apply for a technical unit of a single paramedical group or classification. I cannot agree with BCNU's submission that the Board's policy against classification-based units is not clearly discussed in *IML*. In addition, I will discuss this policy further below.

B. RAID APPLICATIONS IN THE HEALTH SECTOR

75 The Board has held that, in the context of a raid application in the health sector, the incumbent's established second tier unit forms the benchmark constituency for resolving representational contests at the affected worksites: *HEABC*, para. 32; *Providence Health Care*, para. 28; *East Kootenay Regional Hospital*, para. 50. In *Providence Health Care,* the Board explained the rationale for this approach, stating that the established second tier unit:

> ...is the constituency around which a rational line has already been drawn for the purpose of collective agreement administration. Accordingly, the appropriate constituency for a raid at the second tier is not simply resolved by identifying any one of a number of potential communities of interest that might be found within the incumbent's unit. Rather, the question is whether there are compelling reasons to fragment the second-tier unit as it is structured. (para. 28)

76 Accordingly, where a union applies under Section 19 for less than the entire bargaining unit held by the incumbent (i.e., a partial raid), in general the applicant must establish compelling circumstances to justify fragmenting the bargaining unit: *BCNU,* para. 14; *East Kootenay Regional Hospital,* para. 49; *Providence Health Care,* para. 30. This requirement will be discussed further below.

77 The Board's jurisprudence on raids within the health sector is extensive and has evolved over time to address the numerous different factual circumstances that have come before it in any given case. In the present case, the parties have each relied upon cases that they say support their respective positions regarding the appropriateness of the units applied for and on concerns regarding industrial instability in the health sector.

78 Specifically, BCNU relies upon *Grouseview, Dufferin Care Centre, CVIHR* and *VCHA*. I discuss each case in turn.

79 *Grouseview* involved an initial application for certification that would have resulted in two bargaining agents representing nurses within the nurses' bargaining unit (HSA and BCNU). The Board acknowledged and affirmed its policy in respect of the presumption against multiple bargaining units, describing it as "well-founded": para. 45. However, the Board held that the Act allowed for multiple bargaining agents in each of the appropriate bargaining units and contemplated more than one bargaining agent representing employees in a bargaining unit at a single employer: paras. 41-42. In this regard, the Board held that concerns over collective agreement administration issues were addressed through the Act's requirement that the articles of association contain a provision dealing with the resolution of such issues: para. 46. The Board allowed the application to proceed.

80 *CVIHR* involved the transfer of employees in a program from one location, where they were covered by HSA's certification, to another location that was not covered by HSA's existing certification, but where BCGEU held a paramedical professionals certification for other employees. The Board allowed the application to proceed, echoing the conclusion in *Grouseview* that industrial instability concerns in contract administration could be addressed under the articles of association: para. 64.

81 In *Dufferin Care Centre,* the Pulp, Paper and Woodworkers of Canada, Local No. 5 ("PPWC") applied under Section 19 of the Code to represent employees in the facilities subsector at Dufferin Care Centre, who were already represented by the International Union of Operating Engineers, Local No. 882 ("IUOE"). The Board held

that because PPWC sought to fully supplant IUOE, PPWC did not have to demonstrate compelling reasons before its application could proceed: para. 43.

82 In *VCHA,* power engineers in the facilities subsector were represented at four sites within Vancouver Coastal Health Authority by IUOE, and at two sites within the health authority by HEU. PPWC applied under Section 19 of the Code to represent some of the power engineers represented by IUOE, but at only two sites. HEU's consolidated certification also included those two sites. PPWC was a member of the Facilities Bargaining Association ("FBA"). At issue was whether the applications were inappropriate partial raids.

83 The Board noted that, given the historical certification structure for power engineers, HEU's and IUOE's certifications at the health authority already cut across classification lines. The Board held there were no concerns regarding proliferation because both IUOE and HEU represented facilities subsector employees at the worksites in question: if PPWC's application was successful, it would simply replace IUOE at those sites: para. 79. Accordingly, the applications were allowed to proceed.

84 In many other cases, the Board has recognized that industrial instability concerns can arise where there is an increase in the number of bargaining agents at a single location at the second tier. This recognition started with the Board's decision in *Certain Biomeds*. These cases are relied upon by the Incumbents and the Intervenors.

85 In *Certain Biomeds,* Biomedical Engineering Technologists ("BMETs") applied for an order that they should be moved from the facilities bargaining unit to the paramedical professional bargaining unit. The parties agreed the BMETs should be moved to the paramedical professional bargaining unit. The issue was which union should represent them at the second tier. Certain BMETs took no position on this issue. HEU, which represented BMETs in the facilities bargaining unit, argued it should continue to represent them once they were transferred to the paramedical professional unit. HEU did not represent paramedical professionals at any of the locations where BMETs worked. In contrast, HSA already represented paramedical professionals at all of the locations where BMETs worked, with one exception.

86 The Board noted that, while there were some sites where more than one union represented paramedical professionals, this was not the norm; in general, there was only one union representing paramedical professionals at a particular site: para. 21. Accordingly, the Board raised the following concerns:

> ...If HEU's position were accepted, employers would be administering the PPBA [now HSPBA] collective agreement at a given worksite on a day-to-day basis by dealing with two unions. For example, for the BMETs the employer would have to contact HEU, but for all other employees, it would have to contact HSA. I acknowledge, as noted above, that multiple unions representing employees at a particular site exists in a limited number of circumstances. However, I conclude that proliferating that structure is not conducive to resolving workplace issues nor would it promote

> industrial stability: Section 2 of the Code. (para. 23, emphasis added)

87 Accordingly, the Board found that the BMETs should be represented by HSA in the paramedical professionals bargaining unit. HEU applied for reconsideration of this decision, which was dismissed: B2/2006. Among other things, the reconsideration panel held the fact that HEU was one of the constituent unions in the HSPBA did not entitle it to represent BMETs at sites where it held no certification: para. 48.

88 As BCNU points out, *Certain Biomeds* did not raise a question about employee choice as the BMETs took no position on the representation issue. However, the Board has specifically applied the principles and concerns raised in *Certain Biomeds* in the context of certification and raid applications, i.e., where employee choice was at issue.

89 In *Health Employers Association of British Columbia (Fraser Health Authority)*, BCLRB No. B132/2010, 182 C.L.R.B.R. (2d) 277 (Leave for Reconsideration Denied, BCLRB No. B155/2010) ("*Emergency Room Attendants*"), BCNU applied under Section 18 of the Code to represent emergency room attendants in the facilities subsector bargaining unit at Royal Columbian Hospital and Surrey Memorial Hospital. HEU represented all unionized employees in the facilities bargaining unit at Royal Columbian Hospital (except for a group of power engineers represented by IUOE) and at Surrey Memorial Hospital. For various reasons, HEU did not claim to be currently certified to represent emergency room attendants at either hospital. HEU opposed the application, among other things, on the basis that it would result in the proliferation of bargaining agents at the two hospitals.

90 The Board in *Emergency Room Attendants* dismissed the application. The Board held the reasoning in *Certain Biomeds* was compelling and applicable to the case before it. Specifically, the Board found that, with the exception of IUOE's representation of power engineers, the employees of the two hospitals in the facilities bargaining unit were represented by one bargaining agent, HEU. Allowing the application would result in the employer contacting HEU for day-to-day matters for most employees in the facilities subsector bargaining unit, but BCNU for the emergency room attendants: para. 28. The Board found this would constitute an inappropriate proliferation of bargaining agents. With respect to the IUOE's presence, the Board held as follows:

> I recognize the employer already has to contact IUOE rather than HEU for the small group of power engineer employees in the FBA. However, I do not believe this circumstance justifies granting certifications to further bargaining agents, simply to reflect employee wishes with respect to their choice of bargaining agent. (para. 29, emphasis added)

91 The Board also found that the FBA's articles of association were not an entire answer to industrial instability concerns that would arise by adding another bargaining agent:

> I accept that problems could conceivably be controlled or minimized by way of the mechanisms contained in the FBA Articles of Association. However, I agree with the observation in *Certain Biomeds* that proliferating a multiple bargaining agent structure within a single subsector at a single location is not conducive to resolving workplace issues or promoting industrial stability (para. 23). I accept HSA's argument that the Board's policy is generally not to encourage proliferation of bargaining agents in such circumstances. (para. 30)

92 Last, the Board noted that concerns regarding industrial instability were not solely related to the employer:

> My decision is not based solely on the considerations for the employer in dealing with multiple unions in the workplace. It is also based on considerations for employees covered by the FBA who work alongside each other. To have multiple union representatives in one workplace administering the same collective agreement may lead to confusion and introduce industrial instability. Here the sub-unit for which BCNU applies to represent constitutes a single classification. <u>While there may be circumstances where the Board has certified a single classification as a sub-unit within a province-wide health sector bargaining unit, I find that to do so here, merely because the ERAs may prefer one bargaining agent over another, is insufficient reason to introduce a new bargaining agent into the facilities subsector at RCH and SMH</u>. Such a decision will introduce multiple union representatives in the workplace for one collective agreement. (para. 31, emphasis added)

93 In *BCNU,* the Board applied the policy concerns outlined in *Certain Biomeds* in the context of partial raid applications, and dismissed the applications based on those concerns. In that case, BCNU filed three applications to represent licensed practical nurses ("LPNs") employed by Interior Health Authority. These LPNs worked with community health workers at a number of worksites, all of whom fell within the communities subsector and were already represented by UFCW, within the Community Bargaining Association ("CBA"). UFCW objected to the applications on the basis that they would fragment the unit, would result in inappropriate proliferation of bargaining agents, and were classification-based.

94 Relying on *Certain Biomeds* and *Emergency Room Attendants,* the Board held that "the Board's policy is not to add bargaining agents in the health industry within a subsector at a single location"; exceptions may be granted, but only in "compelling circumstances": *BCNU*, para. 5. The Board described the presence of multiple

bargaining agents at the second tier, as contemplated under the Act, as an "exceptional result":

> This is an exceptional result when measured against the Board's policies for determining an appropriate bargaining unit. That is because it is inherently problematic to have two unions administer a single collective agreement with a single employer. Different unions will take different approaches, adopt different interpretations and develop different policies to meet their members' needs. Moreover, managers and union representatives administering a collective agreement are encouraged to cooperate by making complicated trade-offs in order to adapt to an evolving workplace: s. 2(d) of the *Labour Relations Code*, R.S.B.C. 1996, c. 244. The presence of multiple bargaining agents presents an additional layer of complexity and uncertainty for decision-makers on both sides of the table. That inhibits the day-to-day informal give-and-take that marks successful relationships between first-line managers and union representatives. (para. 11, emphasis added)

95 The Board in *BCNU* further noted that the articles of association established a "compromise solution": para. 12. However, the articles of association did not justify additional proliferation:

> It is in view of the foregoing considerations that the Board has developed a policy to restrict the addition of bargaining agents within a single subsector at a worksite. The Board acknowledges that there are multiple bargaining agents within a subsector at some worksites. I find that structure is best understood as a vestige of the reforms. The articles of association allowing for multiple agents at a worksite represent a compromise. They do not provide a sound basis to permit the additional proliferation of bargaining agents within a subsector at a worksite. (para. 13, emphasis added)

96 In this regard, the Board noted that while BCNU was a member of the CBA, BCNU did not represent employees in the communities subsector unit at the worksites in question. Accordingly, the Board held that BCNU's membership in the CBA was not a fact that assisted BCNU: para. 15.

97 Further, the Board held that, even assuming a line could be drawn around LPNs based on their unique skills, and acknowledging that employees were entitled to a reasonable opportunity to change their bargaining agent, such factors did not adequately respond to the concerns underlying the policy against proliferation: para. 23.

98 Last, the Board held that granting the applications based on the LPNs' unique qualifications would amount to certifying a classification-specific unit, which was contrary to well-established appropriateness principles: para. 24.

99 The policy considerations outlined in *Certain Biomeds* were also adopted in *Interior Health Authority*, though leading to a different result on the facts. In that case, BCNU filed seven applications under Section 19 of the Code to represent seven separate units composed of LPNs employed by each of the seven health authorities. At that time, the LPNs were in the facilities subsector bargaining unit. BCNU conceded its applications would require an exception to the Board's policy against proliferation, but submitted there were compelling circumstances for doing so.

100 The Board in *Interior Health Authority* noted partial raids had been allowed in cases such as *Dufferin Care Centre.* However, the Board found its approach had evolved from that point:

> In subsequent decisions, the Board either modified, or provided a gloss on, this approach by finding that industrial stability concerns do arise where there is an increase in the number of bargaining agents at a single location within a health authority. Thus, as set out in [*Dufferin Care Centre*] and the previous Board decisions it cites, increasing the number of bargaining agents within a statutorily mandated bargaining agent such as the FBA will not create industrial instability concerns at the "first tier" level of collective agreement negotiations. However, as set out in subsequent Board decisions such as *Certain Biomeds, Certain ERAs,* and *BCNU,* it will give rise to industrial stability concerns at the "second tier" level of day-to-day collective agreement administration.
>
> Accordingly, as all parties acknowledge, the Board has developed a general policy against the proliferation of bargaining agents at a single site within a health authority. BCNU argues the rationale is primarily administrative inconvenience to the employer as distinct from true industrial stability concerns. It notes that, given the statutory bargaining unit structure, adding bargaining agents with the FBA does not give rise to any greater likelihood of traditional industrial stability concerns such as whipsawing or multiple strikes or lockouts. While this is true, the Board has described the concern as being one of "industrial stability", broadly speaking. I accept the submission of HEABC and others that this is not merely a matter of administrative inconvenience for the employers. Multiple bargaining agents at a single site affect not only the employer but also other unions and employees when issues to do with the administration of the collective agreement arise. (paras. 137-138, emphasis added)

101 The Board found that, in the circumstances of that case, BCNU had established compelling reasons to justify an exception to the Board's general policies. The Board referred to the vastly large number of employees at issue as well as the resultant industrial instability that could arise from the dissatisfaction of many LPNs that had demonstrated majority support for BCNU's applications but would not be permitted to vote on them: para. 144. Accordingly, the Board found that compelling circumstances

had been established on the facts: para. 148. However, in doing so, the Board cautioned as follows:

> Having said that, I agree with HEU, BCGEU and IUOE that it would not be desirable for existing broad-based sub-units within the health sector to be "splintered" by applications to represent individual classifications. Decisions applying the Board's general policy such as *Certain Biomeds, Certain ERAs* and *BCNU* indicate that generally such applications will not succeed because the interest in giving effect to employee wishes is outweighed by industrial stability concerns. Accordingly, the fact that this case has been found to be an exceptional circumstance should not be taken to suggest that an attempt to hive off the representation of other classifications would likely be successful. On the contrary, the Board's decisions show that generally such applications will be unsuccessful. Exceptionally, on the particular facts of this case, I find industrial stability concerns do not outweigh employee wishes. In this unusual circumstance, I find a compelling reason to make an exception and allow employee wishes to be expressed through a vote on the Section 19 applications. (para. 150, emphasis added)

102 The requirement for the applicant in a raid application to demonstrate compelling reasons to fragment the existing unit was further discussed in *East Kootenay Regional Hospital.* In that case, the Board held that, in the health sector, it is not necessary for an applicant to demonstrate compelling reasons to fragment a bargaining unit if the raiding union seeks to replace the incumbent union: (a) for all employees employed by an affiliate in a subsector, or (b) for all employees employed at geographically separate worksites within a health authority around which a rational line can be drawn: para. 63.

103 In that case, BCNU applied under Section 19 of the Code to represent registered psychiatric nurses employed by Interior Health Authority in the nurses subsector at East Kootenay Regional Hospital, and registered psychiatric nurses employed by Fraser Health Authority in the nurses subsector at Royal Columbian Hospital. HSA represented these employees. BCNU already held a consolidated certification at those specific locations in the nurses subsector, and was seeking to wholly replace HSA at the worksite level in the subsector. Accordingly, the Board found there was no proliferation of bargaining agents in the nurses subsector at the sites in question, and BCNU did not need to demonstrate compelling circumstances: para. 70.

104 The Board's most recent decisions discussing its law and policy on partial raids in the health sector are *HEABC* and *Providence Health Care*. In both cases, the Board applied the policy concerns identified in *Certain Biomeds* and cases following it, and dismissed the partial raid applications on those bases.

105 In *HEABC,* HEU represented large units of employees in the facilities subsector bargaining unit at the employers in question. PPWC applied under Section 19 of the Code to carve off certain employee classifications from HEU's larger unit. The issue

was whether the appropriate constituency for a raid could consist of fragments of HEU's larger unit.

106 The Board in *HEABC* noted that most certifications in the facilities bargaining unit at the second tier were for all-employee type units. The Board characterized the small minority of worksites that had multiple bargaining agents as "historical anomalies" that reflected bargaining structures pre-dating the Act: para. 13.

107 Turning to the appropriateness issue, the Board in *HEABC* held that a consideration of appropriateness called for "discretionary judgment encompassing both health sector labour relations policy objectives, and the probable effects" of allowing the applications in the circumstances at hand: *HEABC*, para. 28. Specifically, the Board found that the result of the applications would be to remove small groups of employees represented by HEU and assign them to PPWC. In that sense, the raids sought to deconstruct or fragment the HEU unit, and the result would be the piecemeal expansion of the PPWC unit. The Board held HEU's established unit was the benchmark for determining constituency; PPWC had not put forth any bases to demonstrate that the existing unit no longer had a community of interest. Accordingly, this factor weighed against the appropriateness of the proposed units: para. 33.

108 The Board in *HEABC* explained that its preference for the established unit as the benchmark for resolving representational contests also dovetailed with the goal of rationalizing bargaining unit structures in the health sector: para. 34. That objective could be met, in part, by fostering the single all-employee unit represented by a single agent, as was the case in the majority of worksites within the facilities subsector bargaining unit. This consideration also weighed against the appropriateness of the units: para. 36.

109 With respect to industrial instability, the Board in *HEABC* reiterated the concern identified in *BCNU* that different unions will take different approaches and interpretations when administering the same collective agreement with the same employer. As a result, the Board "presumes that the proliferation of agents undermines the orderly and constructive administration of a collective agreement": para. 37.

110 Building on that rationale, the Board held that classification-based raids also inhibit the "day-to-day informal give-and-take that marks successful labour relations":

> ...This in turn presents an additional layer of complexity and uncertainty for decision-makers administering the collective agreement at the affected worksites. The greater the likelihood of partial raids at that worksite, the greater the risk an incumbent union will flinch from making difficult decisions to the detriment of a particular job classification in pursuit of its duty to represent the interests of the unit *as whole*. ...For these reasons, I accept HEU's and HEABC's submission that raids based on fragments of HEU's existing units are inherently destabilizing. This is another consideration weighing against the appropriateness of the proposed units. (para. 38, emphasis in original)

111 For these reasons, the Board in *HEABC* found the proposed units were not appropriate and dismissed the applications.

112 The Board applied similar policy concerns to dismiss a partial raid application in *Providence Health Care.* In that case, PPWC applied to represent a unit of employees of Providence Health Care (Mount St. Joseph Hospital) within the facilities subsector. PPWC was not certified to represent employees of Providence Health Care. Both HEU and IUOE represented facilities subsector employees at Providence Health Care. IUOE's representation rights were discrete and limited to power engineers at two locations: Mount St. Joseph Hospital and St. Paul's Hospital. PPWC's application was only for Mount St. Joseph Hospital; accordingly, granting the application would result in an increase in the number of bargaining agents administering the collective agreement for power engineers at Providence Health Care worksites.

113 The Board noted that, while Providence Health Care is an affiliate, it operated a number of worksites akin to a health authority. Accordingly, the Board found the issue at hand was similar to that confronted in *VCHA*: whether a line could be appropriately drawn around Mount St. Joseph Hospital: para. 17. The Board made the following findings regarding *VCHA*:

> With respect, I find that the scope of the incumbent's second tier unit was not given appropriate emphasis in *VCHA*. It is one thing for the Board to allow raids based on second tier units in order to give reasonable effect to employee choice of bargaining agent. It is going a critical step further, to allow raids that fragment a multi-site constituency for which an incumbent has acquired second tier representation rights and has administered the collective agreement. I find that result to be incompatible with the broader policy objective of rationalizing bargaining unit structures described above. (*Providence Health Care*, para. 30)

114 According to the Board, PPWC's application sought to depart from the existing structure by removing employees from the IUOE unit and introducing another second tier unit represented by PPWC. The Board held this was a significant consideration weighing against the appropriateness of the proposed unit: para. 34.

115 In addition, the Board considered and applied the policy concerns raised in *Certain Biomeds*, (which the Board referred to as the "*BMETs*" decision):

> The *BMETs* policy is aimed at the mischief arising from a collective agreement employer administering the same collective agreement with multiple unions: *BCNU,* at paras. 10-15. The policy concern expressed in *BMETs* and followed in subsequent decisions is axiomatic; it presumes that a proliferation of bargaining agents at the second tier is inappropriate: *Health Employers Association of British Columbia,* BCLRB No. B157/2013, at para. 79.
>
> I find that the panel in *VCHA* did not apply the *BMETs* policy with appropriate regard for the mischief it is intended to

> address. Accordingly, I accept the proposition advanced by HEABC and IUOE that the *BMETs* policy applies not simply to the proliferation of bargaining agents at a single worksite, but more fundamentally to a proliferation of bargaining agents administering the collective agreement on a day-to-day basis with the collective agreement employer. ... (*Providence Health Care*, paras. 35-36, emphasis added)

116 The Board found that the mischief underpinning the policy outlined in *Certain Biomeds* was engaged in the case before it, in part, because Providence Health Care already dealt with two bargaining agents representing power engineers. The Board held it would not be conducive to the orderly administration of the collective agreement to introduce a third bargaining agent at Mount St. Joseph Hospital: para. 37. Accordingly, the application was dismissed.

C. THE CASE AT HAND

117 The majority of the objections to the Applications relate to appropriateness and industrial stability concerns. Accordingly, I address those issues first.

1. PARTIAL RAID

118 Both HSA and PEA hold broad consolidated certifications in the paramedical professional subsector bargaining unit, which cover multiple groups of employees of several different employers. The Applications are for a subset of the Incumbents' respective existing units. As a result, the Applications constitute partial raids.

119 I find that the policies outlined in *Certain Biomeds,* and applied in subsequent cases to partial raid cases in the health sector, apply with equal force in the present case. Specifically, I find the Board's law and policy regarding partial raids in the health sector, and the underlying rationale for those policies, have been soundly identified and explained in recent cases such as: *Emergency Room Attendants*; *BCNU*; *HEABC*; and *Providence Health Care.*

120 These cases clearly identify the Board's approach in partial raid applications in the health sector: by definition, such applications lead to fragmentation of the existing bargaining unit and result in a proliferation of bargaining agents.

121 As the Board has repeatedly explained in these cases, and for the reasons set out in those cases, it is inherently problematic to have multiple bargaining agents administer a single collective agreement with a single employer, and the presence of multiple bargaining agents inhibits the day-to-day informal give-and-take necessary for successful labour relations.

122 BCNU says the Board's policies in this regard should not be applied in the context of modern labour relations in the health sector. BCNU relies upon *Dufferin Care Centre* in making this argument. As noted above, the applicant union in *Dufferin Care Centre* sought to fully supplant the incumbent union. In contrast, in the present case,

BCNU is not seeking to fully supplant HSA or PEA: even if the Applications are successful, HSA and PEA would continue to be certified to represent other paramedical professionals covered by their respective consolidated certifications with the Employers. Accordingly, the Applications would result in the addition of another bargaining agent representing employees in the paramedical subsector at the Employers' worksites.

123 In addition, in more recent cases, the Board has expressly stated that the approach in *Dufferin Care Centre* has been subsequently modified, and the Board has repeatedly recognized that industrial stability concerns do arise where there is an increase in the number of bargaining agents at a single location in a subsector within a health authority.

124 Further and in any event, BCNU's argument on this issue does not address the policy concerns relating to proliferation and fragmentation that arise in partial raid situations, which were identified in cases such as *Emergency Room Attendants*, *BCNU*, *HEABC*, and *Providence Health Care*. In my view, in these cases, the Board has carefully shown how and why the policy concerns identified in *Certain Biomeds,* and further expanded upon in these cases, continue to apply in the health sector and, in particular, in cases involving partial raids. Accordingly, I find the policy and underlying rationale set out in *Certain Biomeds* and the cases following it are persuasive and applicable to the present case, and there is no reason to depart from them.

125 In this regard, I disagree with BCNU's attempts to distinguish the policy concerns raised in *Certain Biomeds* on the basis that that case did not involve employee choice. As discussed above, the Board has expressly applied the principles and policy concerns raised in *Certain Biomeds* in cases involving employee choice, and specifically in partial raid cases. BCNU also says *HEABC* is distinguishable because that case concerned a raid application by PPWC, whom BCNU says does not have "the long history and established relationships in health care" held by BCNU. In my view, this does not constitute an adequate basis to distinguish *HEABC*.

126 BCNU says HEABC is the party that would be the subject of second tier concerns, but HEABC has not taken any position on the appropriateness of the proposed units. BCNU says that, as a result, the Board must assume no such concerns exist.

127 I decline to make that inference. First, HEABC says it takes "no position"; it does not say it agrees that the proposed units are appropriate. Second, and in any event, industrial instability concerns are not based solely on administrative convenience for the employer in not having to deal with multiple unions in the workplace. As stated in *Emergency Room Attendants*, the Board's concerns are also based on considerations relating to employees covered by the same collective agreement who work alongside each other. As the Board stated in that case, having multiple union representatives in one workplace administering the same collective agreement can also lead to confusion and introduce industrial instability in that sense: *Emergency Room Attendants*, para. 31.

128 The Board made similar statements in *Interior Health Authority,* expressly stating that industrial instability concerns are not merely a matter of administrative inconvenience for the employer. Instead, the presence of multiple bargaining agents at a single site also affects "other unions and employees when issues to do with the administration of the collective agreement arise": *Interior Health Authority*, para. 138.

129 Likewise, in *BCNU*, the Board found that multiple bargaining agents administering the same collective agreement with the employer adds uncertainty and complexity for front-line decision makers on both sides of the table, thus inhibiting the day-to-day informal give-and-take that marks successful labour relations: *BCNU*, para. 11.

130 Accordingly, the Board has recognized that industrial instability concerns at the second tier not only impact the employer, but also other unions administering the same agreement, and the employees who are covered by that agreement.

131 For all these reasons, I find that HEABC's silence on the issue is not determinative, and I must consider the policy concerns identified in the case law and how they apply in the circumstances of the present case.

132 The Board has found that, in the context of a raid in the health sector, the incumbent's established second tier unit forms the benchmark constituency for resolving representational contests. This is the constituency around which a rational line has already been drawn: *Providence Health Care,* para. 28. Thus, while BCNU may submit that there is community of interest between the affected employees themselves and between them and nurses in the nurses subsector, this does not resolve the issue.

133 In each of the Applications, BCNU has applied for a unit that is less than the unit held by the Incumbent(s). Accordingly, consistent with Board policy, I find that BCNU must establish compelling reasons to justify fragmenting the Incumbents' existing second tier bargaining units.

134 BCNU says that, in the present case, employee choice constitutes compelling circumstances to depart from the Board's policies. I find this issue has been addressed in the case law. For example, in *BCNU*, a similar argument was made regarding the importance of employee choice in a partial raid context. While acknowledging that employees were entitled to a reasonable opportunity to change their bargaining agent, the Board held that employee choice "is not determinative", and this consideration does "not adequately respond to the concerns that inform the Board's policy against the additional proliferation of bargaining agents": *BCNU*, para. 23. Similar conclusions were reached in *Emergency Room Attendants,* para. 31, quoted above.

135 BCNU relies upon *Interior Health Authority* in support of its argument that employee choice constitutes compelling circumstances to justify making an exception to the Board's policy against proliferation. However, in *Interior Health Authority,* employee choice was not the only basis for the Board's finding that compelling circumstances had been established in that case. As explained above, the Board found that, "[o]n the

particular and unusual facts" of the case, significant industrial stability concerns arose if the applications were denied: para. 146. Further, as discussed above, the Board in that case repeatedly characterized its decision as being based on the "exceptional", "unusual" and "particular" facts before it. I find the particular facts in the present case are not unusual in this sense, for reasons set out. Accordingly, I find the result in *Interior Health Authority* is distinguishable on the facts. I find that, in the circumstances of the present case, a bald assertion by BCNU that employee choice should trump industrial instability concerns in a partial raid context, without more, is not sufficient to establish compelling reasons in this case to depart from Board policy.

136 Accordingly, based on the facts and submissions before me, I find that BCNU has not established compelling circumstances to justify making an exception in this case to the Board's policy regarding partial raids in the health sector.

2. CLASSIFICATION-SPECIFIC UNITS

137 In addition to my findings above, I also find that the units applied for in the Applications are classification-specific. The Applications are for units of employees "employed in the classification of Psychologist" or "employed in the classification of Psychologist or Testing Technician-Psychometrist". Clearly, the proposed units are classification-based. Contrary to BCNU's submissions, I find the proposed units are the type of "technical unit" that the Board has warned against.

138 As the Board has explained in *BCNU* and *HEABC*, classification-based units run afoul of the Board's well-established appropriateness principles, would lead to the inappropriate proliferation of units within the subsector, and give rise to industrial instability. As explained in *HEABC*, the threat of classification-based raids inhibits the informal give-and-take that marks successful labour relations: the greater the likelihood of such partial raids, the greater the risk an incumbent union will flinch from making difficult decisions that may be to the detriment of a particular classification in pursuit of its duty to represent the interests of the unit as a whole: *HEABC*, para. 38.

139 As discussed, even in *Interior Health Authority,* where the Board found BCNU had established unusual and compelling circumstances to allow for an exception to Board policy, the Board held this fact "should not be taken to suggest that an attempt to hive off the representation of other classifications would likely be successful. On the contrary, the Board's decisions show that generally such applications will be unsuccessful": para. 150. For reasons discussed above, I find that BCNU has not asserted any facts that would establish exceptional or compelling circumstances in the present case.

140 BCNU says the Incumbents are already cutting across classification lines, with both Incumbents representing psychologists as between themselves. However, as submitted by HSA, generally there is only a single bargaining agent representing employees in the paramedical professional subsector at a given site: it is only for historical reasons that other unions, such as PEA, represent paramedical professionals at worksites where HSA does not have a bargaining certificate. Similarly, CUPE says

the only union that holds classification-based certifications in the HSPBA is PEA, which is historical. Neither of these points were disputed by BCNU. Similarly, the Board has recognized that, in general, only one bargaining agent represents employees in a health subsector at a given site. Situations where this is not the case have been characterized by the Board as historical anomalies that reflect bargaining structures pre-dating the Act, which should not be further expanded: *HEABC*, para. 13; *Certain Biomeds*, para. 21. Accordingly, I find BCNU's argument in this regard is not an adequate response to the concerns associated with allowing further proliferation of bargaining agents within a subsector at a site.

141 BCNU also submits that if the Applications are successful, it would actually decrease the number of bargaining agents representing psychologists and psychometrists. However, this does not address the fact that, even if the Applications were successful, HSA and PEA would continue to be certified to represent other paramedical professional employees at the Employers' worksites. As a result, at a given worksite, this would result in the introduction of another bargaining agent (BCNU) within the paramedical professionals subsector.

142 For all these reasons, I find the Applications are inappropriate because they are for classification-based units.

3. INDUSTRIAL INSTABILITY

143 BCNU says the Incumbents' arguments regarding industrial instability ignore the fact that BCNU is already a member of the HSPBA, because it holds a certification at Trail and District Hospice Palliative Care Program with the Interior Health Authority.

144 The mere fact that a union is a member of a particular bargaining association does not entitle it to represent employees at worksites where it has no presence; the Board's focus is on the consequences of the raids at the worksites where the collective agreement is administered: *Certain Biomeds*, para. 48; *BCNU*, para. 15. In the present case, while BCNU may hold a certification at a site or program in the Interior Health Authority, that Health Authority is not one of the Employers in the Applications. There is no dispute that BCNU is not certified to represent any employees in the paramedical professionals subsector at the Employers who are the subject of these Applications. Thus, the fact that BCNU may be a member of the HSPBA in this sense does not assist its position in the present case.

145 BCNU submits that concerns over industrial instability at the second tier level can be dealt with under the Articles of Association. In this respect, I disagree with BCNU's submission that the Board "has failed in recent cases to give appropriate consideration to the Articles of Association when considering second tier issues". To the contrary, in recent cases the Board has expressly referred to the articles of association of the various health sector bargaining associations, and has concluded that the articles of association do not provide a sound basis to permit the additional proliferation of bargaining agents within a subsector at a site. Such proliferation is not conducive to resolving workplace issues or promoting industrial stability: *Emergency Room*

Attendants, para. 30; *BCNU*, para. 13. Further, as already discussed, the Board has expressly found that the approach taken in the cases that BCNU relies upon on this point has been modified by such subsequent cases: e.g., *Interior Health Authority.*

VII. CONCLUSION

146 For the reasons given, I find the Applications are contrary to established Board policy on partial raids in the health sector, and would result in an inappropriate proliferation of bargaining agents within the paramedical professionals subsector at a site. On the facts and submissions before me, I find no compelling circumstances have been established in this case to make an exception to these policies. I further find that the units applied for are inappropriate because they are classification-specific. Given these findings, I find it is not necessary to address the further technical objections made by the Incumbents.

147 The Applications are dismissed.

LABOUR RELATIONS BOARD

KOML KANDOLA
VICE-CHAIR