IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia Nurses' Union v. Health Sciences Association of British Columbia,* 2017 BCSC 1758

Date: 20170929
Docket: S165982
Registry: Vancouver

Between:

British Columbia Nurses' Union

Petitioner

And

Health Sciences Association of British Columbia, Professional Employees' Association, Health Employers Association of BC and British Columbia Labour Relations Board

Respondents

And

Canadian Union of Public Employees

Intervenor

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. August 28 and 29, 2017
Place and Date of Judgment:	Vancouver, B.C. September 29, 2017

[1] On or about November 30, 2015, the petitioner British Columbia Nurses' Union ("BCNU") filed seven applications with the respondent British Columbia Labour Relations Board under section 19 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*Code*] seeking certification as the bargaining agent for psychologists and psychometrists employed by seven employers. Four of those applications were for units comprised of "employees in the classification of Psychologist or Testing Technician-Psychometrist in the paramedical professionals subsector" (the Children & Women's Health Centre of British Columbia Branch, Providence Health Care Society, Vancouver Coastal Health Authority and Vancouver Island Health Authority ("VIHA")) and the other three for Psychologists only for units comprised of only Psychologists in the paramedical subsector (Forensic Psychiatric Services Commission, British Columbia Mental Health Society Branch and Fraser Health Authority ("Fraser")).

[2] The respondents Health Sciences Association ("HSA") and the Professional Employees' Association ("PEA") both represented psychologists and psychometrists employed by VIHA and Fraser, through worksite specific certifications.

[3] The respondent HSA was the incumbent union at Providence Health Care Society, the British Columbia Mental Health Society Branch, the Children's and Women's Health Centre of British Columbia Branch, and VIHA. On the evidence before Ms. Kandola, the Vice-Chair of the Labour Relations Board who determined the petitioner's applications ("Vice-Chair"), HSA represented approximately sixteen thousand members in about 67 different Health Science professions.

[4] The PEA was the incumbent union at Forensic Psychiatric Services Commission.

[5] No oral hearing was conducted into these matters. On March 7, 2016, the Hospital Employees' Union ("HEU"), Canadian Union Public Employees ("CUPE") and the BC Government and Service Employees' Union ("BCGEU") were granted intervenor standing by the Vice-Chair in reasons indexed at B.C.L.R.B.

No. 36/2016. The Vice-Chair then issued her decision ("the Original Decision") indexed at B.C.L.R.B. No. B49/2016 on April 11, 2016.

[6] The BCNU applied under section 141 of the *Code* for reconsideration of the Original Decision. On May 2, 2016, in a one paragraph decision, a Reconsideration Panel of the Board denied leave for reconsideration (indexed B.C.L.R.B. No. B60/2016), on the basis that the application did not disclose a good, arguable case of reviewable error.

[7] The petitioner seeks a judicial review of both the original and the reconsideration decisions of the Labour Relations Board (the "Board").

Background

[8] I adopt the following helpful background information from the PEA's response to the petition:

- The Health Sciences Professionals Bargaining Unit ("HSPBA") is a statutorily mandated bargaining association in the health sector that represents the paramedical professional bargaining unit (also referred to as the health science professionals bargaining unit). It consists of 5 member unions who represent paramedical professionals in the health sector.
- The Incumbent Unions are members of the HSPBA. BCGEU [British Columbia Government and Service Employees' Union], HEU [Hospital Employees' Union] and CUPE [Canadian Union of Public Employees] are the other constituent unions of HSPBA.
- The Petitioner, BCNU is not a member of the HSPBA. In the event that the BCNU holds a certification in the HSPBA, there are no particulars as to whether it currently represents any paramedical professionals at that certification.
- The Respondents, the BC Mental Health Society Branch ("Mental Health"), the Children's and Women's Health Centre of British Columbia Branch ("Children's") and FPSC (together, the "Agencies") are agencies of the Provincial Health Services Authority ("PHSA"), who is an employer in the case at hand.
- Section 19(1) of the *Code* provides for applications to change union membership, which are also known as raid applications.

The *Code* requires that applications pursuant to Section 19(1) must only be made for a unit that is "appropriate for collective bargaining."

- A brief history of the paramedical professional unit is important to the issue of appropriate bar-gaining units in the health sector before the Labour Relations Board.
- In 1994, amendments to the *Health Authorities Act* R.S.B.C. 1996, c. 180 [*Act*] provided for the appointment of a Commissioner to inquire into trade union representation and jurisdiction in the health sector. The Commissioner was empowered to make recommendations regarding the composition of appropriate bargaining units. The amendments also empowered the provincial government to enact regulations implementing the recommendations of the Commissioner.
- James E. Dorsey, Q.C. was appointed Commissioner by the Government. His recommendations included five sector-wide bargaining units each covered by a multi-employer master agreement: residents, nurses, paramedical professionals, health services and support - facilities subsector, and health services and support - community subsector. Much of what he recommended was implemented by the government and survives to this day with some adjustments.
- The Government enacted all of the Commissioner's recommendations in 1995 in the form of the *Health Sector Labour Relations Regulation*, BC Reg. 329/95 [the *Regulation*]. In August 1997, the Government passed the *Health Authorities Amendment Act*, which repealed the *Regulation* and replaced it with Part 111 of the *Health Authorities Act.*
- The *Health Authorities Act* mandates five appropriate bargaining units to include all employees of a given description of all health care employers. One of the five appropriate bargaining units was described as "paramedical professionals."
- The paramedical professionals bargaining unit is a single province-wide, multi-employer, multi-union bargaining unit, mandated by the *Health Authorities Act* and deemed the appropriate bargaining unit for thousands of paramedical professionals in a variety of classifications. There are currently 5 member unions of the HSPBA: HSA, PEA, BCGEU, HEU, and CUPE.
- As members of the paramedical professionals bargaining unit, paramedical professional employees employed by health sector employers are covered by a single collective agreement

negotiated between the HSPBA and the Health Employers Association of BC ("HEABC").

- There are approximately 140 professions and classifications that are represented by the HSPBA. Approximately 183 of the paramedical professionals are represented by the PEA, approximately 35 of whom are Psychologists.
- On February 24, 1998, the HSPBA member unions entered into Articles of Association, as required under section 19.9(3) of the *Health Authorities Act.*
- The PEA is certified to represent all paramedical professionals in a consolidated certification. It represents a variety of paramedical professionals, including, but not limited to, psychologists, physiotherapists, pharmacists, and public health engineers.

[9] In the health care sector, raid applications are also limited by statutory requirements in the *Health Authorities Act,* R.S.B.C. 1996, c. 180 [*Act*]*.* Part 3 of the *Act,* "Health Sector Labour Relations" places restrictions on union activity in the health care sector. Section 19.2 states that Part 3 governs where there is a conflict between Part 3 and the *Code*, and that the Board has exclusive jurisdiction to determine matters arising under Part 3.

[10] Section 19.4 of the *Act* defines the appropriate bargaining units in health care. There are five: residents, nurses, paramedical professionals, facilities services and support, and community services and support. These bargaining units may be multi-employer units.

[11] While there are only five bargaining units in the health sector, there are more than five bargaining agents (i.e., trade unions) who represent health sector employees. Therefore, unlike in other sectors, health sector trade unions do not bargain directly with the employer on behalf of their member employees. Instead, unions must join together with other unions to form a bargaining unit, which then represents the employees in collective bargaining.

[12] Section 19.9 of the *Act* governs how multiple unions work together to compose one bargaining unit. Trade unions that represent employees belonging to

one of these five bargaining units must join an association composed of all the unions who represent employees in that bargaining unit. Each association is governed by articles of association, which were subject to approval by the Board. Section 19.9(3) of the *Act* requires that these articles:

> (a) are consistent with this Act and the Code,
>
> (b) provide the association with the exclusive jurisdiction to bargain on behalf of the bargaining units for which the association will be certified and to conclude a single collective agreement with respect to those units,
>
> (c) provide the association with the right and obligation to resolve differences among its members with respect to the administration of the collective agreement referred to in paragraph (b), including differences with respect to the right or obligation to belong to a particular trade union within the association,
>
> (d) include provisions with respect to ratification and other collective bargaining processes that reflect the relative membership size of trade union representation in the bargaining units within the association, while ensuring that no member or group of members of a constituent trade union is treated in a manner that is arbitrary, discriminatory or in bad faith by the association,
>
> (e) provide for the future addition into the association of any other trade unions that the labour relations board may certify to represent an appropriate bargaining unit, and
>
> (f) include any other provisions that the labour relations board determines may be necessary in order to ensure that the association can function as a bargaining agent and administer the collective agreement on behalf of the employees within its jurisdiction.

[13] HSPBA is a bargaining association formed under s. 19.9 of the *Act*. It represents the employees in the paramedical professionals bargaining unit and is governed by articles of association (the "Articles").

[14] Weighted voting is the system used for bargaining decisions, through the Association Negotiating Committee (Article 5). The strong control held by larger unions is in accordance with Article 2(e), which sets, as one purpose of the HSPBA, "to protect the larger constituent union in the Association by adopting a voting system on decisions to be made that reflects the relative size of the membership of the trade unions within the Association".

Orders Sought by the Petitioner

[15] The orders sought by the petitioner include:

1. A declaration that the British Columbia Labour Relations Board's decisions in the Original Decision and the Reconsideration Decision were patently unreasonable;
2. A declaration that the British Columbia Labour Relations Board breached the rules of natural justice and procedural fairness;
3. An order quashing the Original Decision and the Reconsideration Decision of the Labour Relations Board;
4. An order that the Labour Relations Board order the votes be counted, or in the alternative, an order remitting the matter to the Labour Relations Board for a full rehearing on the merits;
5. Costs.

Standard of Review

[16] The parties agree, and I accept, that the applicable standard of review is set out in s. 58 of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 [*ATA*]*,* which provides, in part, the following:

> (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

[17] Section 115.1 of the *Code* states that s. 58(1) and (2) of the *ATA* apply to the Board.

[18] The *Code* contains a broadly worded privative clause. Section 138 of the *Code* provides that a decision of the Board "on a matter in respect of which the board has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds."

[19] Section 139 of the *Code* states in part that:

> 139 The board has exclusive jurisdiction to decide a question arising under this Code and on application by any person or on its own motion may decide for all purposes of this Code any question, including, without limitation, any question as to whether
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> …
>
> (i) an employee or a group of employees is a unit appropriate for collective bargaining.

[20] In *Office and Professional Employees' International Union, Local 378 v. Labour Relations Board (B.C.)*, 2001 BCCA 433 at para. 16, 258 W.A.C. 1, Madam Justice Huddart explained that:

> [20] Under the *Code*, not only does the Board perform a managing and supervisory function in the context of the highly regulated, complex field of labour relations, but as part of its broad oversight mandate the Board is expressly charged in s. 2 with policy responsibility and development in a polycentric context, a context that demands a delicate balancing between different constituencies with different and competing interests. Through ss. 136-138, and s. 139(1)(q) in particular, the Legislature has recognized that, in discharging its oversight function, the Board is best equipped to resolve ambiguities and fill voids in the legislative language governing replacement workers in a way that makes sense in the factual context, in the context of the *Code* as a whole, and in the field of labour relations overall in the province.

a) The Appropriateness of Bargaining Units

[21] Pursuant to the provisions of s. 58 of the *ATA,* the court must not interfere with an exercise of the Board's discretion in respect of a finding of fact or law or an exercise of discretion in respect of a matter over which it has exclusive jurisdiction, unless the finding or exercise of discretion is patently unreasonable.

[22] The issue of the appropriateness of the proposed bargaining units, determined by the Vice-Chair is a matter that falls within the expert knowledge, skill and experience of Labour Board tribunals and is, therefore, reviewable only on a standard of patent unreasonableness: *United Steel, Local 2009 v. Ledcor*, 2015 BCSC 622 at para. 43, 2015 C.L.L.C. 220–043.

[23] In *Speckling v. British Columbia (Workers' Compensation Board),* 2005 BCCA 80 at para. 33, 46 B.C.L.R. (4th) 77, the British Columbia Court of Appeal referred to a number of formulations of the "patently unreasonable standard", including:

> a. "Patently unreasonable" means openly, clearly, evidently unreasonable.
>
> b. The review test must be applied to the result not to the reasons leading to the result.
>
> c. A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not.

b) Procedural Fairness

[24] A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the courts will determine whether the procedures that the tribunal adopted conformed with the requirements of procedural fairness. In making that assessment, the courts do not owe deference to the tribunal's own assessment that its procedures were fair: *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.,* 2013 BCCA 55 at para. 52, 42 B.C.L.R. (5th) 243.

[25] A reviewing court looking at the reasoning that was provided by the tribunal and the record before the tribunal should review a tribunal's reasons as a whole to see if there is any rational or tenable line of analysis supporting the decision and "to assess whether the pathway to the conclusion is reasonable": *Kenyon v. British Columbia (Superintendent of Motor Vehicles),* 2015 BCCA 485 at paras. 53–56, 82 B.C.L.R. (5th) 266.

c) Reconsideration Hearings

[26] Section 141 of the *Code* reads in part as follows:

> (1) On application by any party affected by a decision of the board, the board may grant leave to that party to apply for reconsideration of the decision.
>
> (2) Leave to apply for reconsideration of a decision of the board may be granted if the party applying for leave satisfies the board that
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> > (a) evidence not available at the time of the original decision has become available, or
> >
> > (b) the decision of the board is inconsistent with the principles expressed or implied in this Code or in any other Act dealing with labour relations.

[27] Where, as here, the reconsideration decision is denied without considering the merits of the original decision, it is the original decision that is to be considered on judicial review: see Y*ellow Cab Company v. Passenger Transportation Board*, 2014 BCCA 329 where Mr. Justice Groberman held, at para. 44:

> [44] Where a denial of leave does not constitute a determination that the request for reconsideration lacks merit, it is my view that the initial administrative decision, and not the denial of leave, will be the appropriate target for judicial review.

Grounds for Judicial Review

[28] The petitioner asserts that the Vice-Chair:

a) fettered her discretion by applying the Board's own policy as if the policy limited the statutory requirements of the *Labour Code*, thereby rendering her decision patently unreasonable; and

b) ignored evidence before her that would rebut the presumption it made, in breach of natural justice and procedural fairness.

The Original Decision

[29] In the Original Decision, the Vice-Chair referred, with approval, to the following passage from *British Columbia Nurses' Union*, B.C.L.R.B. No. B44/2011, 192 C.L.R.B.R. (2d) 302 at para. 16:

> [16] … 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)
>
> 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.

[30] The Vice-Chair listed the objections she was asked to consider as follows:

a) Rational and Defensible Line Around the Proposed Units;

b) Partial Raid;

c) Raiding by Classification;

d) BCNU Presence in the HSPBA;

e) Consequences of Raiding;

f) Employee Choice not Determinative;

g) Unidentifiable/Unspecified Unit;

h) Combined Voters' Lists;

i) Identity of Employer – PHSA; and

j) Misrepresentations.

[31] Given her other findings, the Vice-Chair found it unnecessary to address the objections listed as e) through j).

[32] At paras. 70–73 of the Original Decision, the Vice-Chair addressed the first listed objection as follows:

> [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. 8109/2013, 228 C.L.R.B.R. (2d) 1 (Leave for Reconsideration Denied, BCLRB No. 8139/2013) ("*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. 17. 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.
> >
> > * * *
> >
> > 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.

[33] At paras. 76, 119, 125, 127, 134 and 135–136 of the original decision, the Vice-Chair resolved the objection with respect to partial raids as follows:

> [76] … 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.
>
> …
>
> [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*.
>
> …
>
> [125] … 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*.

> …
>
> [127] … 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.
>
> …
>
> [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] … 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.

[34] At paras. 137, and 140–142 of the Original Decision, the Vice-Chair addressed the objection with respect to raiding by classification as follows:

> [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.
>
> …
>
> [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.

[35] The Vice-Chair addressed the issue of the BCNU's presence in the HSPBA at paras. 144–145 as follows:

> [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*.

[36] At paras. 146–147, the Vice-Chair dismissed the petitioner's applications holding:

> [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.

Discussion

a) Fettering of Discretion

[37] Section 2(c) of the *Code* requires that unions be the freely chosen representatives of employees. One fundamental democratic principle of the *Code* is that unions only gain representation rights when they have the majority support of the employees they seek to represent. Unionized employees may choose to leave their union and join another union.

[38] Section 19(1) of the *Code* says:

> 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.

[39] However, in the health care sector, employee choice is limited by the *Act*, since it determines which bargaining unit health care employees belong to, by

profession. Thus, while health care employees cannot choose their bargaining unit, they can still choose their bargaining agent, subject to the oversight of the Board.

[40] The *Act* does not require that any particular union represent employees in a unit. Rather, it contemplates multiple unions working together to represent each bargaining unit, through an association.

[41] The parties agree that what the petitioner sought to achieve is properly described as a partial raid, in that it did not seek to take over an entire bargaining unit. Instead, its aims were only the psychologists and psychometrists within the larger paramedical professional subsector of the single province-wide, multi-employer, multi-union bargaining unit under the *Act*, who, at the time of the petitioner's attempted partial raid were represented by the HSA and the PEA.

[42] Any determination by the Board, including whether a bargaining unit is appropriate, is subject to s. 2 of the *Code*:

> 2 The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that
>
> …
>
> (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees...

[43] But the determination of an appropriate bargaining unit within the health care sector is governed not only by the *Code,* but by the *Act.* The *Act* determined that the appropriate bargaining unit in this case, is the HSPBA.

[44] The petitioner contends that in reaching her decision, the Vice-Chair based her conclusions upon what she perceived to be "established board policy", without considering any of the evidence or other circumstances of its application. It says that such policies do not have the force of law, and that no provision in the *Code* requires the Board to develop and follow such policies.

[45] It offers the example of the Vice-Chair addressing its submissions on employee choice as an issue addressed in the case law without consideration of the evidence or circumstances that pertained to its application.

[46] The Board is free to apply and change its past law and policy as it sees fit, subject only to the requirements of procedural fairness and the fact that its decisions must not be patently unreasonable: see *White Spot Ltd. v. British Columbia Labour Relations*, 1999 BCCA 93, 171 D.L.R. (4th) 131. While there is no requirement on the Board to observe *stare decisis*, if it has established a policy, the object of certainty in labour relations would benefit from the consistent application of the policy, unless the Board sees reason to depart from it.

[47] Clearly a tribunal cannot fetter its discretion, by the blind application of its own or any policies: *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2 at 6–7, 137 D.L.R. (3d) 558. However, I agree with the view expressed by Associate Chief Justice Scott, as he then was, in *Manitoba Paramedical Association v. St. Boniface General Hospital* (1986), 46 Man. R. (2d) 194 at 198 (Q.B.), that:

> The authorities are clear that so long as the panel addresses its minds to the merits of the case before it, no jurisdictional error is committed in following guidelines or precedents previously adopted ....
>
> It is not for this court to say whether the Board's guidelines or policy is the preferred one or not .... The Board must have policy issues in mind at all times, and so long as it considers each case before it on the merits and facts of that particular case, it does not commit jurisdictional error by ultimately deciding that the facts do not warrant a deviation from its normal stated policy. For the review panel to adhere to previous practice, where the existing unit was *prima facie* an appropriate unit, is not patently unreasonable.

[48] I do not accept that the Vice-Chair blindly applied Board policies. To the contrary, she discussed the policies that she felt might be applicable to the applications before her, and set out the positions of the applicant and those opposing the applications before deciding that there was no exception to the application of those policies on the applications before her.

b) Natural Justice and Procedural Fairness

[49] The petitioner asserts that the Vice-Chair's decision was governed by a policy presumption that proliferation of units within the sector will tend to give rise to some industrial uncertainty. It contends that if a tribunal determines that a presumption applies, it must still consider whether the evidence and circumstances before it overcome the application of the presumption: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 22, [2011] 3 S.C.R. 708 [*Newfoundland*].

[50] In its petition, the petitioner asserts that the Vice-Chair failed to consider the following evidence:

a) the statutory declaration of Dr. De Gagne, the Psychology Practice Leader for Vancouver Coastal Health (incorrectly described as his affidavit), concerning the functional integration of psychologists with other health professionals;

b) the fact that its applications were health authority-wide;

c) the existing bargaining unit structure, which already had multiple bargaining agents within a single health authority; and

d) the effect of the Articles of Association of the Health Science Professionals Bargaining Association.

[51] I am not persuaded that the Vice-Chair's reference to the information contained in the statutory declaration of Dr. De Gagne as submissions by the petitioner rather than as evidence is of any importance. The Vice-Chair addressed the petitioner's submissions, which were based upon the information in that statutory declaration, and while her description might have been better phrased, I am satisfied that she considered the information in the statutory declaration in reaching her decision.

[52] Moreover, the criticism of Vice-Chair's language is essentially a complaint about the adequacy of her reasons and the adequacy of reasons is not a question of procedural fairness, but rather a question of substantive review: see *Newfoundland*, at para. 22.

[53] In *Newfoundland*, at para. 16, Madam Justice Abella also stated that:

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[54] This concern does not arise in this case, as it can be determined from her decision whether it is within the range of acceptable outcomes.

[55] Insofar as the scope of the applications is concerned, it is clear from para. 4 of her decision that the Vice-Chair was aware that the applications were health authority-wide:

> [4] … 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.

[56] Similarly I am satisfied from the recitation at para. 3 of her decision that the Vice-Chair was well aware that the existing bargaining unit structure, already had multiple bargaining agents within a single health authority, and there was no evidence presented to her by the petitioner that there were multiple bargaining agents within a bargaining unit at one worksite within the bargaining unit.

[57] Insofar as the Articles of Association are concerned, the petitioner did not refer me to any evidence before the Vice-Chair on the effect of the Articles. Nonetheless, the Vice-Chair recognized that the Articles were not an entire answer

to industrial instability where she stated at para. 91 of her decision, in reference to the earlier decision of the Board in *Health Employers Association of British Columbia (Fraser Health Authority)*, B.C.L.R.B. No. B132/2010, 182 C.L.R.B.R. (2d) 277 (Leave for Reconsideration Denied, B.C.L.R.B. No. B 155/2010) that:

> [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)

Conclusion

[58] The petitioner has failed to persuade me that the decision of the Vice-chair was patently unreasonable or that it was made due to any breach of natural justice or procedural fairness, and its application for judicial review of the decision is therefore dismissed.

Costs

[59] The petitioner submitted that in the event it was unsuccessful on this judicial review, neither the Board nor the intervenor CUPE should recover any costs, and that HSA, PEA, and HEABC should share in but one set of costs.

[60] The Board does not seek any costs, and will not therefore be awarded any.

[61] While CUPE did seek costs of the application, I do not consider that its role in the Judicial Review was of sufficient importance to warrant an award of costs to it.

[62] As for HSA, PEA, and HEABC, they were each named as respondents on the petition, and each retained separate counsel. While I appreciate that the

proceedings obliged the petitioner to name the respondents separately, the fact remains that they each had separate counsel, and faced exposure to the costs claimed by the petitioners in the petition. In the circumstances, I order that they each recover a separate set of costs from the petitioner on Scale B under Appendix B to the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

"The Honourable Chief Justice Hinkson"