BRITISH COLUMBIA LABOUR RELATIONS BOARD

INTERIOR HEALTH AUTHORITY, NORTHERN HEALTH AUTHORITY, PROVIDENCE HEALTH CARE SOCIETY, PROVINCIAL HEALTH SERVICES AUTHORITY - CORPORATE SERVICES UNIT, FRASER HEALTH AUTHORITY, VANCOUVER COASTAL HEALTH AUTHORITY, AND VANCOUVER ISLAND HEALTH AUTHORITY

(collectively, the "Health Authorities")

-and-

BRITISH COLUMBIA NURSES' UNION

("BCNU")

-and-

HOSPITAL EMPLOYEES' UNION

("HEU")

-and-

B.C. GOVERNMENT AND SERVICE EMPLOYEES' UNION

("BCGEU")

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 882

("IUOE")

PANEL:	Elena Miller, Vice-Chair
APPEARANCES:	Delayne M. Sartison, Q.C., for Health Employers Association of British Columbia ("HEABC"), representing the Health Authorities Bruce Laughton, Q.C. and Leah Terai, for BCNU David Tarasoff, for HEU Kenneth R. Curry, for BCGEU Richard L. Edgar and Jessica L. Derynck, for IUOE
CASE NOS.:	62899, 62900, 62901, 62902, 62903, 62904 and 62905
DATE OF DECISION:	May 9, 2012

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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 Licensed Practical Nurses ("LPNs") employed by each of the seven Health Authorities. Although one of the seven entities whom the BCNU names as the employers of the LPNs in question is a society rather than a health authority, for convenience I have used the term "Health Authorities" to describe them collectively.

2 The LPNs in question work at numerous different sites within each of the Health Authorities. However, they all fall within the Health Services and Support – Facilities Subsector (the "Facilities Subsector"), a single, province-wide, multi-employer, multi-union bargaining unit mandated by the *Health Authorities Act*, R.S.B.C. 1996, c. 180

(the "Act"). As members of that bargaining unit, they are covered by a single collective agreement negotiated by the Facilities Bargaining Association ("FBA"). The Facilities Subsector Collective Agreement covers not only LPNs but also all other employees employed within the Facilities Subsector. HEU, BCGEU, IUOE, and other unions who are certified to represent sub-units of employees within the Facilities Subsector are the member unions which comprise the FBA.

3 If BCNU's Section 19 applications are granted, the LPNs in question would still be employed within the Facilities Subsector and covered by the Facilities Subsector Collective Agreement. However, instead of being represented by the FBA member union that currently represents them (HEU, BCGEU or IUOE), they would be represented by BCNU (as an FBA member). Furthermore, instead of being in a sub-unit which includes various employee classifications, they would be in a sub-unit consisting only of LPNs.

4 The vast majority of the approximately 6,650 LPNs covered by the BCNU's applications are currently represented by HEU. A relatively small number are currently represented by BCGEU at several sites within three of the Health Authorities, and an even smaller number are currently represented by IUOE at a single site within one of the Health Authorities. Those three unions oppose BCNU's applications on a number of grounds.

5 The parties agreed to a written submissions process to address the respondent unions' objections to BCNU's applications, and another issue that has arisen. At the completion of the written submissions process, I offered the parties an opportunity to engage in informal discussions regarding the issues, to see if some or all of them could be resolved without the need for formal adjudication. However, the parties did not engage in such informal discussions, and accordingly all outstanding issues require adjudication.

6 The parties indicated they wanted this matter decided as expeditiously as possible. No party indicated it thought an evidentiary hearing was required. I find I am able to address the issues on the basis of the parties' written submissions.

II. ISSUES

7 The parties raise the following four issues in their written submissions on this matter.

1. Withdrawal of BCNU's PHSA Application

8 After filing the seven applications, BCNU sought to withdraw one of its applications, for a unit of LPNs employed by Provincial Health Services Authority ("PHSA"). The withdrawal was based on information provided by HEABC that PHSA is not the employer of any LPNs (they are employed by agencies within PHSA). The application to withdraw is opposed by HEU, which submits the Section 19 application for PHSA should be dismissed and a time bar imposed under Section 19(2).

2. Employer for the Purpose of Threshold Support

9 BCNU takes the position that the employer for purposes of determining threshold support for each of its applications is each of the Health Authorities named in each of its applications. This position is supported by HEABC and not disputed by HEU or BCGEU. However, IUOE takes the position that, at least with respect to the LPNs it represents, who are all employed at a single site within the Interior Health Authority ("IHA"), a determination must be made of whether BCNU's application has threshold support at that site. IUOE's position is based on an assertion that the worksites, not the Health Authorities, are the employers for purposes of determining threshold support.

3. Membership Evidence

10 HEU submits that BCNU made material misrepresentations which rendered the signing of its membership cards conditional or equivocal such that the validity of a substantial majority of the membership cards is undermined. Consequently, it submits, BCNU's Section 19 applications should be dismissed. BCNU disputes that it made misrepresentations such that its applications should be dismissed.

4. Bargaining Unit Appropriateness

11 HEU, BCGEU and IUOE submit the applications should be dismissed because the units applied for are contrary to established Board policy not to permit an increase in the number of bargaining agents who represent employees at a given site within a subsector. BCNU concedes its applications would require an exception to the Board's policy, but submits there are compelling circumstances for making an exception in this case. The respondent unions dispute that compelling circumstances exist for making an exception.

12 HEU, BCGEU and IUOE also submit that a unit consisting only of a single classification (LPNs) is not appropriate for bargaining, an argument BCNU disputes. BCGEU further alleges the proposed units are inappropriate on the basis of alleged functional integration, an allegation BCNU disputes.

III. ANALYSIS AND DECISION

1. Withdrawal of PHSA Application

13 As noted above, BCNU applied to withdraw its application for LPNs employed by PHSA after being advised by HEABC that PHSA does not directly employ LPNs (they are employed by the agencies affiliated with PHSA). HEU submits that BCNU should not be permitted to withdraw its Section 19 application but instead the application should be dismissed and a 22-month time bar imposed under Section 19(2). It submits that a failure to correctly identify the employer does not amount to a valid or compelling labour relations reason to withdraw that overcomes or outweighs the prejudice it would suffer if withdrawal of the application were permitted.

14 HEU notes that BCNU did not apply to amend its application to name the agencies which employ the LPNs after it was advised by HEABC of the correct names of the employers. It submits that BCNU is intimately familiar with the health sector and BCNU's failure to correctly name the employer(s) of the LPNs it was seeking to represent, and lack of effort to fix the error once it was pointed out, should not be excused.

15 HEU submits that in *4020 Investments Ltd.* (*Dufferin Care Centre*), BCLRB No. B398/2002 ("*Dufferin*"), the Board indicated that the reason a union proffers for withdrawing a Section 19 "raid" application must be a compelling one:

> A fairly consistent theme emerges from this review of the authorities: in the context of a raid application, a request to withdraw will not be granted unless the reasons advanced by the applicant outweigh the prejudice caused by the loss of the time bar in Section 19(2) of the Code. A raiding union must act with due diligence and take all reasonably available steps to determine the scope of the bargaining unit. Further, while the purpose of the time bar is to avoid disruption in the workplace, the incumbent union will suffer prejudice even in the absence of disruption because it will lose the statutory protection from a subsequent raid. (para. 28)

16 HEU further submits that a dismissal due to a failure to correctly identify the employer is "a decision by the board on the merits of the application" within the meaning of Section 19(2) of the Code, and therefore results in the imposition of a 22-month time bar. It relies on *EllisDon Corporation,* BCLRB No. B14/2009 (Leave for Reconsideration of BCLRB No. B171/2008), 164 C.L.R.B.R. (2d) 311 in support of the proposition that a decision on the merits is one that addresses the substance of the matter and not mere process, and it submits Board decisions indicate that correct identification of the employer is a substantive, not merely procedural, matter in this context (*Union Pipeline Contractors Ltd.,* IRC No. C168/90, 10 C.L.R.B.R. (2d) 20; *Cenalta Well Services Inc.*, BCLRB No. B40/98).

17 HEU submits that if BCNU is permitted to withdraw its PHSA application, HEU suffers prejudice because it will lose the protection of the 22-month statutory time bar against further raiding activity: *Dufferin*. It notes that at present PHSA does not directly employ any LPNs, but it submits that this may change. HEU submits it would be entitled to the protection of the time bar if PHSA were to employ LPNs within that period.

18 HEU further submits that it is entitled to the protection of the time bar if BCNU applies to represent the LPNs currently employed by some or all of the PHSA branch agencies or affiliates. It submits that, if BCNU were to make such an application, HEU would be entitled to argue that the unit sought is substantially the same as that sought in the PHSA raid application, and that in the circumstances the application should be considered equally time barred. However, HEU further submits the Board need not decide this issue now (as there is currently no application for LPNs employed by PHSA agencies or affiliates).

19 In response, BCNU submits that, because PHSA does not employ LPNs, HEU is not an "incumbent" union for purposes of its PHSA Section 19 application, and will not suffer any prejudice if a time bar is not imposed. Further, BCNU submits that, as there is no collective agreement in force between HEU and PHSA which covers LPNs, the application it seeks to withdraw is not in fact a "raid" application.

20 BCNU notes that in *Health Employers Association of British Columbia*, BCLRB No. B28/2010, the panel stated (after quoting *Dufferin* at para. 28):

> Thus, in effect, prejudice to the incumbent union is assumed even in the absence of disruption in the workplace. The onus is therefore on the applicant to show why withdrawal should be granted and the incumbent union should thereby lose the statutory protection from a subsequent raid. At a minimum, the raiding union must show that it acted with due diligence and took all reasonably available steps to determine the scope of the bargaining unit. Even then, its application to withdraw will not necessarily be granted, unless the reasons advanced by the applicant outweigh the prejudice caused by the loss of the time bar. (para. 5)

21 BCNU submits that the prejudice caused by a raid application can only be felt by an incumbent union, and as HEU does not represent any LPNs employed by PHSA, it cannot claim to have suffered any prejudice from loss of a Section 19(2) time bar if BCNU were permitted to withdraw its PHSA application.

22 BCNU further submits that a time bar cannot apply to employers for whom it did not apply (that is, the PHSA agencies who do employ LPNs). It submits that a unit of LPNs employed by such agencies would not be substantially the same as a unit of LPNs employed by PHSA, since they would involve employees employed by different employers. BCNU submits HEU is trying to use its status as the certified bargaining agent for employees of PHSA affiliates as the equivalent of being certified to PHSA. It submits HEU is not certified to PHSA, and it is therefore not the incumbent union and BCNU's application did not in fact amount to a raid. Accordingly, it submits, relief under Section 19(2) is not available in the circumstances.

23 In its final reply, HEU notes that it is in fact certified to represent employees of PHSA covered by the Facilities Subsector Collective Agreement. It says the bargaining agent for those employees is named as "HEU/BCGEU", but that poly-party has been extinguished and HEU is now the sole bargaining agent for those PHSA employees. HEU further submits that whether or not a future application for LPNs employed by the agencies of PHSA would be substantially the same as BCNU's application for LPNs employed by PHSA is something that can be decided when such an application is filed.

24 Having considered the arguments of the parties, I find first that BCNU's Section 19 application for a unit of LPNs employed by PHSA does amount to a raid application. The fact that BCNU mistakenly thought the LPNs in question were employed directly by the PHSA, when in fact they are employed by agencies affiliated with PHSA, does not,

in my view, change the nature of the application. I find BCNU cannot rely on its mistake in naming the employer of the LPNs in question to argue that its application, filed under Section 19 with the intent of displacing HEU as the certified bargaining agent of those LPNs, is not a "raid" application.

25 I therefore find, second, that the onus is on BCNU to establish a valid or compelling labour relations reason for why it should be permitted to withdraw its Section 19 application. BCNU does not dispute HEU's position, which I find is supported by the Board authorities it cites, that absent a valid or compelling reason for allowing a raiding union to withdraw its Section 19 application, the Board's law and policy is to the effect that such withdrawal should not be permitted.

26 Rather than advancing a valid or compelling reason for granting withdrawal, BCNU argues that HEU is not an incumbent union entitled to claim that it would suffer prejudice in the form of a denial of the Section 19(2) time bar if a withdrawal were permitted. However, I find, third, that HEU is the incumbent union with respect to BCNU's Section 19 raid application, notwithstanding that currently PHSA does not in fact employ any LPNs. There is no dispute that BCNU intended to apply to displace HEU with respect to the LPNs whom it thought were employed by PHSA (but who were in fact employed by agencies affiliated with PHSA). It is only because of its mistake in naming their employer that BCNU now seeks to withdraw that application. I find that, in these circumstances, BCNU cannot rely on its mistake to argue that HEU is not entitled to the protection of a Section 19(2) time bar.

27 On that issue, I find, fourth, that the Board authorities cited by both HEU and BCNU support HEU's position that a failure to correctly name the employer is a substantive error, and a rejection of the application on the basis of this error would therefore constitute a decision "on the merits" within the meaning of Section 19(2). I further accept HEU's argument, which BCNU does not dispute, that BCNU is intimately familiar with the health sector structure and should have been in a position to correctly name the employer(s) of the LPNs it intended to seek to represent in place of HEU.

28 I therefore find, fifth, that BCNU has not provided a compelling reason for being permitted to withdraw its PHSA application, and accordingly it should not be permitted to withdraw it. Instead, the application should be dismissed and a time bar imposed pursuant to Section 19(2). The effect of this time bar on any future applications is something that does not need to be decided at this time. It can be argued and decided if and when any such application is filed.

2. Employer for Purposes of Threshold Support

29 IUOE is the certified bargaining agent for Facilities Subsector employees who work for the IHA at the David Lloyd-Jones Home in Kelowna, B.C. (the "Home"). Some of these employees are LPNs, and those LPNs are covered by BCNU's application for LPNs employed by IHA. IUOE submits that BCNU's application to represent just the LPNs seeks an inappropriate bargaining unit. It submits that if BCNU seeks to raid

certifications covered by the Facilities Subsector Collective Agreement, it must apply to represent all such employees covered by an existing certification.

30 For example, it submits, IUOE's certification at the Home currently covers 107 employees. IUOE submits that if BCNU wishes to displace it as the certified bargaining agent, it must apply to represent, and have the required support of, those 107 employees. It submits that this position is consistent with *4020 Investments Ltd. (Dufferin Care Centre)*, BCLRB No. B303/2003 ("*4020*"), in which the applicant was successful in substituting itself as the certified bargaining agent for all Facilities Subsector employees working at a particular location. IUOE submits that this is the appropriate manner in which to raid a certification in the Facilities Subsector.

31 IUOE further submits that the bargaining unit of LPNs sought by BCNU is inappropriate because it carves out a single classification of employees and is contrary to the Board's policy against proliferation of the number of bargaining agents representing employees at a particular site within a health authority. This is an appropriateness argument also raised by HEU and BCGEU, and I will address it separately under issue 4, "Bargaining Unit Appropriateness". For the moment, I will address the argument raised by IUOE alone, which is that raids in the Facilities Subsector must be by certification or location, not by health authority.

32 In its submissions, IUOE makes clear its primary position is that BCNU must apply to represent all employees at an individual certified location covered by the Facilities Subsector Collective Agreement. It cannot apply to represent just one classification of Facilities Subsector employees, such as LPNs. In the alternative, however, if the Board finds it is appropriate to carve out the classification of LPNs in applications for certification, then IUOE submits BCNU must apply to represent, and must demonstrate majority support among, the LPNs working at each individual certified location.

33 Thus, for example, IUOE submits BCNU should not have made one application to represent all LPNs employed by IHA, on the basis that it has demonstrated majority support amongst that group of employees. Rather, it should have applied to represent, for example, the 21 LPNs employed by IHA at the Home, and it should have demonstrated majority support among that group of 21 LPNs.

34 IUOE submits that if majority support is determined not on a certified location basis but rather on a health authority basis, BCNU could sweep in the LPNs currently represented by IUOE at the Home, without having demonstrated majority, or even any, support among that group of employees. IUOE submits that this would not be right, and accordingly majority support must be demonstrated at each certified location BCNU wishes to raid within a given health authority.

35 In response, BCNU submits that (with the exception of PHSA) the Health Authorities, not individual worksites within each authority, are the employers of the LPNs in question. Accordingly, it submits, it has properly applied to represent LPNs employed by the six Health Authorities other than PHSA, and has demonstrated

majority support among each group of LPNs employed by each of the Health Authorities.

36 BCNU submits that IUOE seeks to transform each location within each of the Health Authorities into a separate employer, but the Board has considered the issue and concluded that it is the health authority, not the individual locations within it, which is the employer. In support of this position, BCNU relies on *Central Vancouver Island Health Region*, BCLRB No. B29/2002 ("*CVIHR*"), in which the Board stated in part:

> In summary, we find that under the consolidated certifications in the health sector, the location where work is performed may be a factor in defining the extent of representational rights conferred upon the union, but it does not serve to define the employer, as HEABC argues, for purposes of representational rights under the Code. For that reason, we do not accept HEABC's characterization that CVIHR Nanaimo & District Home Support is a different employer from CVIHR Nanaimo Community Mental Health Services and Parksville Community Mental Health Services. We are not persuaded that each listing on a separate line of a consolidated certification is a separate employer for purposes of the Code. (para. 53)

37 BCNU says that this position was affirmed in *Health Employers Association of British Columbia*, BCLRB No. B232/2002, in which the Board again concluded that the health authority, not the individual locations within it, was the employer. It says that determination was untouched on reconsideration (BCLRB No. B353/2002).

38 BCNU submits that it has not applied to represent LPNs employed at one or two locations within a health authority but rather to represent all LPNs employed by each of the six Health Authorities in the Facilities Subsector. It will either represent all of the LPNs employed by a given health authority in that subsector, or none of them. In these circumstances, it submits, threshold support is determined by measuring support among LPNs employed by a given health authority, not by whether there happens to be majority support among LPNs employed at a given location within the health authority.

39 Neither HEU nor BCGEU made written submissions expressly addressing this issue. HEABC submits that membership support must be measured on the basis of the employer, that is, each of the six Health Authorities. However, it further submits that any certification granted to BCNU as a result of these applications must indicate the sites at which it represents LPNs, relying on a passage in *CVIHR* which states in part:

> The practice of the Board in defining the unit in the certification is to reflect accurately the work locations actually covered by the certification. ...
>
> In the health sector, the Board attempts in the same way, to use language in the consolidated certification that clearly defines the scope of the representational rights conferred so as to avoid confusion. The consolidated certifications are a shorter version of

> the regular form of certification. The scope of the union's representational rights are [sic] given precision through the addition of a facility or program to which the representational rights attach. (paras. 50-51)

40 HEABC submits that LPNs are not employed at each and every site operated by each health authority, and the affected employers and other unions operating within the Facilities Subsector need to know the precise scope of any certifications granted to BCNU in these cases.

41 HEABC further submits that it and the FBA agreed in the last round of bargaining to consolidate seniority within each health authority. Accordingly, the Facilities Subsector employees within each health authority are treated as unified workforces for the purpose of seniority. For example, it says, vacancies at the Home or any other IHA worksite are posted across the IHA, and employees at the Home are eligible to apply for any IHA Facilities Subsector posting. HEABC submits that, in light of this seniority consolidation, threshold support for these applications is properly determined on an employer by employer, not worksite by worksite, or union by union, basis.

42 In its final reply, IUOE relies on a passage in *British Columbia Nurses' Union,* BCLRB No. B44/2011, 192 C.L.R.B.R. (2d) 302 ("*BCNU*") at paras. 14-15, in support of its position that the individual worksite is the employer. In that passage, the panel describes the worksite entity administering the collective agreement under certification with a specific union member of the FBA as the "employer". IUOE further submits that extending seniority rights to employees within a health authority at different locations does not change the identity of the employer for Code purposes. It submits it is improper to seek to raid a health authority without showing support within each existing certification for a given worksite, which it submits is the employer.

43 Having considered the arguments of the parties, I begin by observing the following. In a number of Board decisions cited by the parties, panels have used the word "employer" to refer to the particular worksite or location within a health authority where health sector employees work. For example, as IUOE points out, this usage of the term "employer" can be found in *BCNU*. However, as BCNU and HEABC point out, the Board has also consistently held that the health authority, not the particular worksite or location within a health authority, is the juridical employer for Code purposes.

44 In my view, the usage of the term "employer" in some Board decisions to refer to the worksite is understandable when one considers the two-tiered nature of representation in the health sector imposed by statutory reforms. As explained in *BCNU*:

> 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 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)

45 Thus, under the unique, statutorily mandated system of bargaining relationships in the health sector, bargaining associations such as the FBA negotiate collective agreements with the Health Authorities (represented by HEABC), who are the juridical employers of the employees in each of the five statutorily mandated bargaining units. However, individual unions in the bargaining associations retain their right to represent employees at the worksite or location for which they are individually certified, in terms of day-to-day contract administration. In that sense, the particular worksite or location could be described as the "employer": functionally, it is the employer for day-to-day contract administration purposes. However, for purposes of representational rights under the Code, the employer is the health authority: *CVIHR* at para. 53.

46 Accordingly, while it is apparent from the decision in *4020* and in other Board decisions that the Board will permit partial raids of locations within a health authority, that does not mean a raid which encompasses all locations within a given health authority at which employees work is not also permissible. In my view, based on *CVIHR* and other Board decisions finding the health authority to be the employer for Code representation rights purposes, it clearly is permissible (subject to appropriateness issues to be discussed below under issue 4).

47 IUOE argues that if BCNU is permitted to apply to represent LPNs on a health authority basis, rather than a location basis, then the LPNs it represents at the Home could be "swept in", regardless of whether a majority, or even any, of them prefer to be represented by the BCNU. I agree that this outcome is possible. However, it is equally possible at any other location at which LPNs work within a given health authority. For example, at two locations where LPNs are currently represented by HEU, there may be majority support for BCNU's application at one location but not at the other. Nonetheless, LPNs at each of those locations would not get a separate say (vote) on BCNU's application. The outcome for all locations with the health authority would be determined by the wishes of the majority of LPNs employed by the health authority regarding the application.

48 In my view, this is an inevitable, and appropriate, consequence of the fact that BCNU's applications are for all LPNs employed by a particular health authority. As noted earlier, I find on the basis of the Board's existing law that each of the six Health Authorities, and not the individual worksites within them, is the employer for Code representation rights purposes. The result of this finding is that the wishes of employees measured on the basis of individual locations are not relevant in this case, where the applications are for all LPNs employed by each of the Health Authorities.

49 This means, for example, that even if a majority of employees at one or more individual locations within a given health authority favour BCNU's application, the application will fail (and BCNU will represent no LPNs within that health authority, even at those locations where it may have majority support) unless a majority of all the LPNs covered by the application favour BCNU's application. Each application in this case will produce an "all or nothing" result for each of the six Health Authorities applied for, regardless of the level of support at individual locations within the Health Authorities.

50 In summary on this issue, for the reasons given above, I am not persuaded that the employer for purposes of determining threshold support in this case is the individual worksite at which LPNs work. I find the employer for purposes of determining threshold support is each of the six Health Authorities. I further find that, given the scope of BCNU's applications in this case, it is not necessary or appropriate to measure support for the applications on a location by location basis. As the applications are for all LPNs employed in the Facilities Subsector by each of the six Health Authorities, threshold support for each application is determined on an authority-wide basis.

51 I note, as an aside, that neither BCNU nor any other party takes issue with HEABC's observation that, if any of BCNU's six applications were to succeed, the resulting certification would list the specific location(s) at which LPNs represented by BCNU work within that health authority. This would be in keeping with the Board's current practice regarding bargaining unit descriptions for health sector certifications.

3. Membership Evidence

52 As noted earlier, HEU submits that BCNU made material representations which render the signing of the membership cards conditional or equivocal such that the validity of a substantial majority of the membership cards is undermined. HEU submits that consequently BCNU's Section 19 applications should be dismissed.

53 Specifically, HEU alleges that BCNU's "pledge" to LPNs includes a "no risk guarantee" that the *status quo* can be restored on the basis of a "referendum". It submits this aspect of the "pledge" was, and continues to be, widely disseminated on BCNU's website and through extensive leafleting and campaigning. It submits the claim is false and amounts to a material misrepresentation. It further submits that, through the "pledge" and otherwise, BCNU promised and continues to promise that "only [a BCNU constituted] LPN Committee can finalize a tentative agreement and recommend its acceptance". It submits this claim is directly contrary to the Articles of Association in the Facilities Subsector and BCNU accordingly knows or ought to know that it is false. HEU submits this too amounts to a material misrepresentation.

54 In making these claims, HEU attaches copies of leaflets disseminated by BCNU to its submission. Among the statements made in a BCNU leaflet is the following:

> **BCNU gives you a no-risk guarantee**
>
> **LPNs will be able to change their minds**
>
> BCNU believes that nurses will always be stronger together. But after two collective agreements, if irresolvable differences emerge between members, LPNs will be free to leave BCNU through a province wide secret-ballot referendum. (emphasis in original)

55 This statement (or a very similar statement) is made in several other BCNU leaflets that HEU attaches to its submission. Those leaflets also contain the following statement (or a very similar statement):

> **BCNU will start improving your contracts & practice conditions**
>
> **We will start your bargaining process**
>
> BCNU will initiate the election of an LPN bargaining committee. 100% of the committee will be LPNs, and it will be elected only by other LPNs. Only this committee can finalize a tentative agreement and recommend its acceptance.
>
> We will ask the government to put all nurses (LPNs, RNs & RPNs) in the Nurses' Bargaining Association. You will have strong contracts by negotiating together. (emphasis in original)

56 With respect to the "no risk guarantee" statement, HEU submits the statements that LPNs "will be able to change their minds" and will be free, after two collective agreements, to leave the BCNU through a province-wide secret ballot referendum amount to a promise that signing a card and membership in BCNU is conditional and therefore equivocal. It sends the message: "don't worry about signing because all will go back to normal if you wish", HEU submits.

57 HEU relies on *Royal City Taxi Ltd.*, BCLRB No. B266/94 (upheld on reconsideration in BCLRB No. B447/94) ("*Royal City Taxi*"). In that case, a union organizer obtained cards through an assurance to employees that the union would schedule a meeting and canvass their views before an application for certification was filed. However, the union filed an application on the basis of the cards that were obtained. The panel found on the facts of the case that the organizer's misrepresentation went to "the heart of the meaning of the cards, because the misrepresentation could, and did for many of the witnesses before me, make the signing of the cards conditional and equivocal" (p. 10). The panel further found it was not necessary to show coercion or fraud in order to establish a material misrepresentation which renders the cards equivocal such that their validity as membership evidence is undermined:

> The true issue was whether the membership cards could be accepted as accurately reflecting the employees' wishes. It was the nature and effect of the misrepresentation on the cards and

> those wishes which was important, not necessarily whether there was fraud or coercion. ... (p. 13)

58 HEU submits that in this case the so-called "no risk guarantee" undermines the required unequivocal nature of the membership cards as evidence of the true wishes of the employees who sign them to be represented by BCNU. HEU submits that there is no need for an evidentiary hearing to determine subjectively the wishes of individuals who signed BCNU cards. The test is objective: what would a reasonable LPN conclude in the circumstances. It submits that, as stated in *Ainsworth Lumber Co. Ltd*., BCLRB No. B143/2009, 168 C.L.R.B.R. (2d) 137 ("*Ainsworth*") at para. 108, "*Royal City Taxi* stands for the more general proposition that where a material misrepresentation renders the signing of the membership card conditional or equivocal, the union's membership evidence may be impugned".

59 Here, it submits, the representation of a "no risk guarantee" renders the signing of BCNU membership cards conditional or equivocal such that they cannot be relied on as valid membership evidence, and accordingly the applications must be dismissed: *Royal City Taxi; G.B. Mécanique Ltée,* BCLRB No. B196/94, 23 C.L.R.B.R. (2d) 76. HEU further notes that BCNU does not explain who decides if "irresolvable differences" arise or what that means, or how the *status quo* would be restored by way of a "province wide, secret-ballot referendum", a process it submits is unknown under the Code.

60 Regarding BCNU's statement about an LPN Committee, HEU submits BCNU solicited membership cards by promising LPNs that in bargaining in the Facilities Subsector, the BCNU would create an LPN Committee and that only this committee could finalize a tentative agreement and recommend its acceptance. HEU submits this statement is false and contrary to the Articles of Association, and that it too is a material misrepresentation that makes the signing of the cards equivocal such that the validity of a substantial majority of the membership cards signed is undermined.

61 In response, BCNU begins by noting that in *Ainsworth* the panel stated that the Board presumes that signed and dated membership cards that meet the requirements of Section 3 of the *Labour Relations Regulation*, B.C. Reg. 7/93 (the "Regulation") are *bona fide* evidence of membership support. The presumption may be rebutted in certain circumstances, including where there are "misrepresentations during the course of the organizing which render a signed membership card conditional or equivocal" (para. 104). BCNU submits that, when considering the two statements made by BCNU to which HEU takes objection, it is important to remember that they were made in the context of a raid. It submits in *Ainsworth* the panel stated that, in this context, the Board "often makes allowance for puffery, promises and representations", adding:

> The Board generally does not police these types of interactions between unions and employees. Employees may make inquiries about such puffery, promises and representations, speak to their co-workers, speak to union representatives, conduct online research and take whatever steps they deem necessary to evaluate and assess such information. (para. 117)

62 BCNU submits its statements to which HEU objects fall into the category of representations, and do not result in the membership cards having been obtained through misrepresentation. It submits that its views with respect to how it will conduct bargaining are honestly held, and that the establishment of an LPN bargaining committee is completely within its rights and an internal union matter. It submits BCNU will give that committee the authority to determine BCNU's position in bargaining and its recommendations to its members.

63 With respect to the no-risk guarantee statement, BCNU submits that it recognizes that unionized workers can change unions through a raid under Section 19 of the Code, or through a decertification application under Section 33. Further, a union may abandon its representational rights under Section 33(11) of the Code. It submits the fact that these statutory provisions exist does not render membership cards conditional or equivocal. It submits that the commitments were made within the existing legal framework and BCNU will work within that framework to keep those commitments.

64 BCNU submits the statements it made to which HEU objects say nothing about the meaning or purpose of the membership cards, and do not in any way undermine the wording on those cards required by Regulation 3(b). It submits the statements were made in the context of an organizing campaign for the purpose of persuasion and do not constitute a violation of the Code.

65 In its final reply, HEU submits that BCNU in its response attempts to recast its statements to mean something different from what was actually stated. For example, BCNU submits that what it promised to give the LPN Committee was "the authority to determine BCNU's position in bargaining and its recommendation to its members", but what it actually stated was "only this committee can finalize a tentative agreement and recommend its acceptance" (which HEU submits is false in light of the Articles of Association). Similarly, HEU submits that BCNU asserts that its reference to a "province wide referendum" was merely a reference to Sections 19 and 33 of the Code, but HEU submits that neither of these provisions contemplates such a referendum. It further submits that BCNU appears to concede that the statements constitute at least "puffery". It submits that in fact they are misrepresentations which render the validity of the membership cards equivocal and therefore unreliable.

66 Having considered the arguments of the parties on this issue, I begin by noting the following. First, I agree with HEU (and the point is not disputed by BCNU) that the test for validity of membership evidence as a reflection of the true wishes of employees is objective, not subjective. As stated in *Londsdale Hotels Inc.*, BCLRB No. B130/95 (Leave for Reconsideration of No. B459/94):

> A panel should look at the objective evidence before it, not the subjective beliefs of an individual, to determine whether a signed membership card is valid. In considering an employee's true wishes the Board must look at the objective evidence. ... (para. 27)

67 Second, I agree with BCNU that, in looking at the objective evidence, the Board will bear in mind that, particularly in the context of Section 19 raid applications, reasonable employees would expect a certain amount of campaign "puffery" to occur, as the vying unions seek to gain or maintain the employees' support by making promises and representations as to what they can and will do for them. As noted in *T. Jordan Inc. (Service Provider at Granville House)*, BCLRB No. B51/96 ("*Jordan*"):

> In *North Shore Home Support Services Society*, BCLRB No. B366/95, (Leave for Reconsideration of BCLRB No. B307/95), the Board confirmed that a union is entitled to some latitude, indeed, considerable latitude, with regard to puffery and promises which it can make during the course of an organizational campaign. The limits placed on that latitude are in the area of coercion and intimidation: a union is not permitted to coerce or intimidate employees into signing membership cards: *Dencan Restaurants Inc.* BCLRB No. B113/93 and *Dencan Restaurants Inc.*, BCLRB No. B255/93 (Leave for Reconsideration of Decision dated March 31, 1993). In addition, the Board will carefully scrutinize membership evidence to include instances of alleged misrepresentation. However, before misrepresentation vitiates a card, it has to be material and has to have a direct effect on the meaning of the card or the freedom of choice of the employee to select union membership. (para. 5)

68 In the present case HEU does not allege the statements to which it objects were coercive or intimidating. However, it points out that BCNU itself appears to characterize the statements as "puffery" and to attempt to explain their meanings in ways which HEU submits demonstrate their inaccuracy or falseness.

69 I agree that BCNU appears to defend its statements, at least in part, on the basis that puffery is permitted. I further agree that its explanations of the statements' meanings tend to indicate that what was said is arguably somewhat different from what BCNU now says it meant. However, the mere fact that a representation made by a union during the course of a raid campaign is inaccurate does not necessarily mean that the misrepresentation vitiates the freedom of choice of employees to select union membership. As further stated in *Jordan*:

> ...in every case where employees are presented with cards to sign for unionization, there is bound to be peer pressure and there is going to be puffery and there are going to be representations made. There is an obligation on each employee (because after all, employees are adults and we are not dealing with children here), to ask questions, to contact other employees, to do some research and to find out exactly what is going on. ... (para. 9)

70 Similar views have been expressed in other Board cases. Objective evidence of inaccurate or exaggerated statements made by a union during the course of an organizing campaign can potentially cast doubt on the validity of membership cards signed during that campaign. However, the mere fact that a representation is an

exaggeration or inaccurate does not necessarily establish that it vitiates the freedom of choice of employees to select union membership. The Board must consider the nature and context of the representation, and must bear in mind that reasonable employees can and should ask questions or otherwise investigate claims and promises made by unions seeking their support.

71 I find in the present case that the two statements made by BCNU to which HEU objects were inaccurate. With respect to the "no risk guarantee", BCNU has indicated in its response submission that it was merely referring to standard procedures available under the Code – raids under Section 19 and decertification under Section 33 – in promising that LPNs could "change their minds" with respect to representation by the BCNU. While the BCNU may choose to hold some sort of province-wide, secret ballot referendum after two collective agreements, such a procedure would not result, without more, in representation of LPNs reverting to what it presently is. Accordingly, the "no risk guarantee" statement is, on its face, inaccurate.

72 Similarly, as HEU points out, the statement that only an LPN Committee formed by the BCNU could "finalize" a tentative agreement and recommend its acceptance to members is inaccurate. Under the Articles of Association it is the FBA, not individual member unions, which negotiates and finalizes proposed terms of the FBA Collective Agreement. While an LPN Committee could, as BCNU submits, be given authority to determine BCNU's position in bargaining with respect to LPNs, this is not necessarily the same as finalizing a tentative agreement or recommending its acceptance to FBA members. Accordingly, this statement too is inaccurate.

73 In *Royal City Taxi*, the panel found that the representation in that case – that the union would hold a meeting to explain the benefits of unionization and a vote would be taken amongst the employees to determine if they wanted unionization before the cards would be submitted – went "to the heart of the meaning of the cards", making the signing of the membership cards conditional or equivocal (p. 10). The nature and effect of the misrepresentation in that case was also described as "fundamental". I find the present facts, and the objective nature and effect of the representations complained about here, are very different.

74 Although I find the BCNU statements to which HEU objects are inaccurate, I further find they do not go to the heart of the meaning of the cards. The nature and effect of the impugned representations in the present case, considered in context, are not fundamental. The statements were made in written raid campaign materials and on the BCNU's website, and there is no reason to think the incumbent unions would not have had a chance to respond to them, or LPNs would not have had a reasonable opportunity to question or investigate them. Furthermore, the statements were made in circumstances and in a context (in BCNU raid campaign leaflets and on its website) where a reasonable employee would expect a certain amount of puffery, and would take steps to investigate any statements he or she considered of particular importance in deciding which union to support.

75 In these circumstances, I am not persuaded there are material misrepresentations which render the signing of the membership cards equivocal, such that the validity of a substantial majority of the membership cards is undermined. Accordingly, I decline to dismiss BCNU's applications on this basis.

4. Bargaining Unit Appropriateness

76 HEU, BCGEU and IUOE raise several bargaining unit appropriateness objections to BCNU's applications. The objections can be summarized as: (a) the applications are contrary to established Board policy discouraging proliferation of bargaining agents at single sites within the health sector, and no compelling circumstances exist to make an exception to this policy; (b) a unit consisting of a single classification (LPNs) is inappropriate; and (c) the unit is inappropriate due to functional integration between LPNs and care aides.

77 I will outline the parties' arguments on each of these issues and then address the issue of bargaining unit appropriateness in light of those arguments.

a) Contrary to Board policy

78 HEU notes that in *4020*, the Board indicated that it would, in appropriate circumstances, permit partial raids in the health sector:

> In my view, the approach charted by *Grouseview Home Care Inc.*, *supra*, and later decisions removes from the health sector the underlying rationale for the Board's usual policy regarding partial raids where an applicant union seeks to represent all employees of a single employer. The normal concerns for industrial instability do not arise. There will not be an increase in the number of bargaining agents conducting negotiations and there is no potential for an additional labour dispute. The newly-added union will become a member of the applicable association that will, in turn, negotiate with HEABC on behalf of all its member unions for a single collective agreement covering the entire bargaining unit.
>
> HEABC concurs with this assessment when it says that the substitution of one bargaining agent for another with a particular employer is not inherently destabilizing and does not raise appropriateness concerns. ... (paras. 39-40)

79 HEU further notes that, in *4020*, the Board found the raiding union therefore did not need to meet the Board's usual "compelling reasons" requirement for granting partial raid applications:

> Any "fragmentation" of the IUOE's existing unit results from the bargaining unit structure imposed by the Act, and will not cause proliferation of bargaining units in the workplace. ... (para. 43)

80 However, HEU submits, here BCNU is not seeking to represent "all employees of a single employer", as described in *4020* (at para. 39). Nor, it submits, do BCNU's applications involve "the substitution of one bargaining agent for another with a particular employer", as was the case in *4020* (at para. 40). Here, if BCNU's applications are successful, it would become an additional bargaining agent representing only LPNs within the Facilities Subsector, and HEU would continue to represent other Facilities Subsector employees of the Health Authorities. Therefore, BCNU's applications would cause a proliferation of units and bargaining agents in relation to each of the individual worksites at which LPNs work. Accordingly, HEU submits, the present case is distinguishable from the circumstances in *4020*.

81 HEU further submits that, since *4020*, the Board has released decisions which indicate that the test for granting partial raid applications in the health sector has become more onerous. In *4020* the Board indicated that, in the health sector, the Board's usual "relatively stringent test" for granting partial raid applications did not apply because "fragmentation" was not a concern. However, in more recent decisions, the Board has recognized that fragmentation is a concern even in the health sector: *Certain Biomedical Engineering Technologists*, BCLRB No. B126/2005, 119 C.L.R.B.R. (2d) 186 (upheld on reconsideration, BCLRB No. B2/2006, 119 C.L.R.B.R. (2d) 191) ("*Certain Biomeds*"); *Health Employers Association of British Columbia (Fraser Health Authority)*, BCLRB No. B132/2010 (upheld on reconsideration, BCLRB No. B155/2010) 182 C.L.R.B.R. (2d) 277 ("*Certain ERAs*"); *BCNU*.

82 HEU notes that in *Certain Biomeds* the panel expressed a concern, echoed in *Certain ERAs* and *BCNU*, that if the union's application were granted, the number of unions representing employees at a single site would increase, a result which the panel in *Certain Biomeds* said would not be conducive to resolving workplace issues and would not promote workplace stability. HEU says the panels in *Certain ERAs* and *BCNU* followed and applied this analysis in rejecting the applications in those cases. It says the same concern would arise in this case: if the BCNU's applications were allowed and succeeded, there would be a proliferation in the number of bargaining agents at all affected worksites, as the BCNU does not seek to supplant but rather to be added as an additional bargaining agent representing only LPNs, who are currently already represented within units that include other Facilities Subsector employees.

83 HEU notes that in *BCNU* the panel stated:

> I have assumed that a line can be drawn around LPNs based on their unique skills and professional qualifications. I will also assume for present purposes that there is no functional integration between LPNs and other support workers. I further acknowledge that employees are entitled to a reasonable opportunity to change their bargaining agent, albeit employee choice is not determinative. In my judgment, these considerations taken individually and together, do not adequately respond to the concerns that inform the Board's policy against the additional proliferation of bargaining agents. In sum, I find the BCNU has not

> provided compelling reasons to fragment the existing units. That is a complete answer to the BCNU's applications. (para. 23)

84 HEU submits that accordingly the test is whether BCNU has provided "compelling reasons" to fragment the existing bargaining units. It submits that BCNU has not.

85 BCGEU concurs with HEU's argument on this point, noting that in the reconsideration decision (BCLRB No. B155/2010) on *Certain ERAs*, the reconsideration panel stated:

> We confirm that it is the general policy of the Board not to encourage proliferation of bargaining agents in the health industry within a single subsector at a single location. We agree with the policy reasons for that approach set forth in *Certain Biomeds* and the Original Decision. (para. 3)

86 IUOE's arguments on this point mirror those of HEU and BCGEU, citing and relying on the same decisions and analysis, and submitting BCNU's applications should be dismissed as inappropriate in light of the Board's established policy against the proliferation of bargaining agents at individual locations within the health sector.

87 In response, BCNU submits that there are compelling reasons in this case to make an exception to the Board's general policy against increasing the number of bargaining agents at a single location within the health sector. BCNU submits first that this case affects the rights of approximately 7,000 LPNs and these employees are entitled to a reasonable opportunity to change their bargaining agent. Second, BCNU submits the Board's policy is based primarily on concerns arising from administrative inconvenience rather than true industrial instability concerns. Third, BCNU notes that its applications are to represent all LPNs in a health authority, not just at a handful of facilities, and the application of the policy must be considered in light of that fact. Fourth, BCNU submits that the role of LPNs has changed since the James E. Dorsey, Commissioner (June 30, 1995) *Report and Recommendations on Reshaping B.C. Health Sector Appropriate Bargaining Units* (the "1995 Dorsey Report"), and they now share a closer community of interest with Registered Nurses ("RNs") and Registered Psychiatric Nurses ("RPNs").

88 BCNU submits that Sections 2(c) and 4 of the Code recognize the right of employees to belong to trade unions of their choosing. That right must be balanced against the provisions of the Code which encourage industrial stability; however, the value attached to stability must be weighed alongside other legitimate interests under the Code, such as employee choice. BCNU submits that this is particularly so in the present case, where the interests of thousands of LPNs are at stake. It submits that the Board's policy was developed in the context of small groupings of employees, and should not therefore automatically be applied to this case. BCNU submits that the Board's previous decisions are factually distinguishable from the present case. In those cases, the Board was dealing with a small number of employees at one or two facilities,

not thousands of employees affected by applications seeking representation on a health authority-wide basis.

89 BCNU further submits that, because of the structure of the health sector, the Board has recognized that partial raids are not as destabilizing as they would otherwise be: *CVIHR* at para. 59; *4020* at para. 37. Although the Board subsequently developed a policy, beginning in *Certain Biomeds*, against proliferation of bargaining agents at a single location within the health sector, BCNU submits the policy is based more on what it terms "administrative inconvenience" than true industrial instability concerns. BCNU further submits that the level of administrative inconvenience that may be tolerable in order to accommodate employee wishes must be assessed on the particular facts of the case. It submits this was recognized in the following passage from *Certain ERAs*:

> Rather, the issue is balancing employee wishes as to their choice of bargaining agent with industrial stability concerns. While the Board has indicated in decisions such as *Grouseview* and *CVIHR* that multiple bargaining agents can co-exist at single locations within the health sector, *Certain Biomeds* indicates that the Board may not find proliferating bargaining agents to be appropriate in all cases, depending on the particular factual circumstances. (para. 33)

90 BCNU submits that in this case the Health Authorities would be required to deal with more than one union; however, there would be only one bargaining agent for the LPNs. It further notes that currently the structure accommodates approximately 21 out of approximately 1,700 LPNs employed by the IHA being represented by the IUOE, and it submits that if the structure can accommodate separate representation for those 21 LPNs, it can surely accommodate separate representation for 1,700 LPNs.

91 BCNU further submits that LPNs have a "community of interest" with other nurses and should be permitted to choose to be represented by BCNU if they wish. It submits that the logic of having LPNs represented by the same bargaining agent as other nurses was recognized in the 1995 Dorsey Report. It further submits that the Board has jurisdiction to consider not only the appropriateness of the bargaining unit but also of the bargaining agent (*International Association of Machinists and Aerospace Workers, District Lodge 692 v. United Brotherhood of Carpenters & Joiners of America (CJA), Local 2736 (Millwrights)*, [1993] B.C.J. No. 2673 (B.C.C.A.)).

92 In its response, HEABC disagrees with BCNU that the Board's policy is concerned only with "administrative inconvenience" and not with industrial stability concerns. It notes that the policy is concerned with the proliferation of bargaining agents at a single worksite or location. Accordingly, it submits, the industrial instability that may arise from this proliferation is what the Board must consider. It submits that the presence of multiple bargaining agents at multiple locations of a health authority is not relevant to the Board's consideration and application of the policy.

93 HEABC submits that it continues to support the Board's policy against the proliferation of bargaining agents within a bargaining unit at a single location in the

health sector, with exceptions to be permitted only in compelling circumstances. It submits that the policy is rooted in industrial stability concerns, and is therefore consistent with the Code. It further submits, however, that in this case the Board must take into account the industrial instability that would flow from a decision to dismiss the applications without regard to the results of a representation vote.

94 HEABC submits that the Board must, in adjudicating the appropriateness objections in this case, "balance the risk of industrial instability that would flow from granting the applications against that which would flow from dismissing them without holding and considering the results of representation votes". HEABC submits that if the applications are dismissed as inappropriate without regard for the results of representation votes, "[e]mployers will face instability and disruption in the workplace flowing from the perceived disenfranchisement of 7,000 employees (a group larger than many bargaining units in the province)". It submits that a decision dismissing the applications "without regard to the LPNs' collective view regarding their community of interest with BCNU member nurses will certainly lead to ongoing instability as a result".

95 HEABC notes that the applications appear to be a stepping stone to the BCNU's ultimate goal of uniting LPNs with RNs in a single bargaining unit. However, BCNU cannot simply apply to include the LPNs within the nurses bargaining unit because of the unique bargaining unit structure established under the Act and the narrowly defined scope of the nurses' unit under that legislation.

96 HEABC submits that the Board should "follow its existing policy and jurisprudence in determining appropriateness in this matter, but with due regard to the unique circumstances at play" in this case. It notes that in *BCNU*, the panel found that the BCNU's application to represent LPNs within the communities subsector bargaining unit at various locations within the IHA did not satisfy the "compelling circumstances" exception. In *Certain ERAs* the Board held that the mere fact that employees in the classification of Emergency Room Attendant preferred the BCNU over bargaining agents already certified for the Facilities Subsector at their worksites was "insufficient reason to introduce a new bargaining agent" for the unit at those locations (*Certain ERAs* at para. 31).

97 Accordingly, HEABC submits, similar factors in the present case (such as the unique role of LPNs and their potential preference to belong to BCNU) do not, without more, satisfy the compelling circumstances test: "It is not enough that LPNs may be a cohesive group and prefer BCNU to other unions". HEABC submits that the "potentially distinguishing features" in the present case, "if any", may be:

- the industrial instability risks at hundreds of worksites operated by five health authorities and Providence Health Care that would flow from the perceived disenfranchisement of such a large group of LPNs; and

- the fact that this employee group's ultimate goal is a single nurses bargaining unit given their perceived community of

> interest with RNs, with these applications apparently representing a first step toward that goal.

98 HEABC submits it takes no position whether those factors constitute compelling circumstances to depart from the Board's anti-proliferation policy in this case. It submits that its members "face significant industrial instability regardless of the outcome of the Board's deliberations". It concludes on this issue by confirming that it supports the Board's anti-proliferation policy, and urges the Board "to apply the policy with due regard to unique circumstances in these applications and in a manner that is generally consistent with the Board's *Code* section 2 duties".

99 In reply to the submissions of BCNU, HEU submits that, in asking the Board to make an exception to its anti-proliferation policy in this case, BCNU is effectively asking the Board to overturn or ignore the rule, not make an exception to it. With respect to BCNU's argument that an exception should be made because of the number of LPNs affected by the applications, HEU submits that this is not a reason to make an exception but rather a reason to ensure that the policy is applied "with particular vigour". It is all the more important to apply the policy, HEU submits, given the amount of proliferation that would occur if the applications were allowed to proceed and succeeded.

100 With respect to BCNU's argument that the policy is based merely on concerns about administrative inconvenience and not true industrial stability concerns, HEU submits the Board's recent decisions clearly indicate the concern is industrial stability. With respect to the argument that if the current structure can handle separate representation for 21 LPNs, then it should be prepared to handle separate representation for 1,700 LPNs, HEU submits that the current structure is a historical remnant or artefact that survived the creation of the province-wide, multi-employer bargaining units under the Act, and the existence of these remnants does not mean that they should flourish.

101 With respect to BCNU's argument that LPNs share a community of interest with RNs, HEU submits that while LPNs and RNs share a community of interest to some degree, LPNs and other members of the health care "team" in their current bargaining unit also share a community of interest. HEU further notes that the Board has recognized that an appropriate bargaining unit can span a wide variety of employee classifications, and therefore the question of who has the closest community of interest is of limited assistance in deciding bargaining unit appropriateness.

102 With respect to BCNU's argument that it is the most appropriate bargaining agent for the LPNs, HEU disagrees and notes that, other than with respect to craft units, it is for employees to choose which union they wish to represent them.

103 In reply to the submissions of HEABC on this point, BCGEU submits there is no evidence that instability will result from dismissing BCNU's applications on the basis that the proposed unit is inappropriate. It further submits that the Board's long-standing policy is not to determine appropriateness on the basis of employee wishes. In *British Columbia Ferry Corporation,* BCLRB No. B257/97, 39 C.L.R.B.R. (2d) 61, for example,

the Board did not allow an application by the Canadian Merchant Service Guild to carve out a unit of 535 employees from an all-employee bargaining unit in a partial raid application. BCGEU submits that in that case, the Board confirmed its long-standing policy that employee wishes for separate representation is not a determinative factor upon which the Board will fragment an existing all-employee bargaining unit.

104 BCGEU also cites and relies on two other decisions in which the Board declined to grant partial raid applications by the BCNU on the basis that the wishes of the employees did not constitute compelling reasons for allowing fragmentation of the bargaining unit by a partial raid application: *Garden Manor Intermediate Care Home Ltd.*, IRC No. C23/89 and *German Canadian Benevolent Society of B.C.*, BCLRB No. B163/94 (Leave for Reconsideration of BCLRB No. B72/94).

105 The reply submissions of IUOE to the submissions of BCNU and HEABC are congruent with those of HEU and BCGEU. IUOE submits, in addition to the points raised by HEU and BCGEU, that even if BCNU's ultimate goal is a single nurses bargaining unit, this goal is impossible to realize without legislative change. It therefore does not constitute a "compelling circumstance" justifying an exception to the Board's anti-proliferation policy in this case.

b) Single classification unit

106 HEU, BCGEU and IUOE all submit that the bargaining unit sought by BCNU, of employees in the classification of LPN, is inappropriate for bargaining on the Board's established law and policy with respect to bargaining unit appropriateness.

107 HEU notes that not only does BCNU seek to represent only the classification of LPNs, but also it does not seek to represent all LPNs employed in the health sector, only those employed directly by Health Authorities. Accordingly, LPNs employed by health authority "affiliates" are excluded from the applications. HEU submits that therefore, although BCNU claims to want to unite LPNs, in fact the effect of the applications would be to divide LPNs employed by Health Authorities from those employed by affiliates. HEU further notes that BCNU seeks to represent LPNs at one affiliate (Providence Health Care Society) but not others. It submits that this contributes to fragmentation and inappropriateness.

108 HEU further submits that, even leaving aside the question of LPNs employed by health authority affiliates, BCNU's applications cause fragmentation of representation within the Health Authorities, because they seek to carve out a "craft" bargaining unit consisting of only one classification of employee (LPNs). HEU submits that, within the Facilities Subsector, LPNs have been included without exception in the health services and support bargaining unit, along with many other classifications. It submits that BCNU seeks to introduce a new and hitherto unknown craft-type bargaining unit into health care. It further submits that if these applications are permitted, it could promote and encourage a proliferation of units based on classification or job title within the Facilities Subsector, thereby fostering fragmentation of the existing, broad-based unit. HEU submits the Board has said it will not certify a single classification in *Island Medical*

Laboratories Ltd., BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), 19 C.L.R.B.R. (2d) 161 ("*IML*") and will not recognize new and previously unknown "craft" units: *Canadian Kenworth*, *Division of Paccar of Canada Ltd.*, BCLRB No. 22/79, [1979] 2 Can LRBR 64 as cited in *British Columbia Place Ltd.*, BCLRB No. 44/87 (reconsideration of No. 346/84).

109 HEU submits:

> ...the Raid Applications seek units which are at odds with the entire scheme created under the *Health Authorities Act*. The Board prefers broad based units for the purposes of collective bargaining. Moreover, the Board's policy is to restrict the addition of bargaining agents for employers and worksites within the Subsectors. While there may be examples within the Facilities Subsector, the Board has said that these represent a "vestige of the reforms" address[ed] through the *Health Authorities Act*. The *Act* does not contemplate a plethora of units of LPNs consisting of 9 or 44 or 223 employees. This extraordinary proliferation of "craft" units is not consistent with the *Act* or IML principles.

110 BCGEU's and IUOE's arguments on this issue mirror those of HEU. BCGEU notes the panel in *BCNU* stated in part:

> Separate and apart from the foregoing assessment, I find the respondents have raised a powerful argument that granting the applications based on the LPNs' unique qualifications would amount to certifying a "classification-specific" or new "craft type" unit. That result is contrary to well-established appropriateness principles.
>
> From an even broader policy perspective, I find the BCNU's analysis lacks a principled basis to stem the additional fragmentation of existing units along classification lines. I say that because it is fair to infer that the lines between classifications in the health sector are marked by distinct skill sets and qualifications. Examples in the present case include audio metric technicians, support workers, activity workers and administrative support. I accept the UFCW's submission that adopting the BCNU's approach would lead to the inappropriate proliferation of bargaining agents in the health sector. (paras. 24-25)

111 BCGEU endorses this analysis of the issue: a classification-specific unit is inappropriate under *IML*, and permitting it in this case would open up the possibility of additional fragmentation of existing broad-based units along classification lines, an undesirable outcome as it would lead to a proliferation of bargaining agents in the health sector.

112 In response, BCNU disputes that it is seeking to create some new form of "craft unit". It notes that the Act establishes five mandatory bargaining units in the health

sector, and its applications have no effect on that structure. Rather, its applications affect how employees within one of those bargaining units, the Facilities Subsector, are represented and by which bargaining agent. BCNU submits that employees within the Facilities Subsector are already represented by a multiplicity of bargaining agents, including currently three bargaining agents (HEU, BCGEU and IUOE) representing LPNs. It submits that its applications seek to replace those three agents with one agent (BCNU) representing all LPNs employed by a given health authority.

113 BCNU submits a rational and defensible line can be drawn around a sub-unit of LPNs: they have the same skills, interests, duties and working conditions; they are all members of the same profession and operate under the code of ethics and standards of the College of Licensed Practical Nurses of British Columbia; and it is only registrants of the College who may hold the title of "licensed practical nurse". BCNU submits that, in the context of the health sector, the sub-unit of LPNs it seeks is appropriate.

114 In its final reply submission, HEU notes that in *IML* the Board stated in part:

> Indeed, today in British Columbia, an all-employee bargaining unit will include within one collective agreement widely different skills and terms and conditions of employment. ...Within the health-care industry, there are different professional groups with their own self-governing bodies (some national in scope and some established by statute), all included in the same bargaining unit. ... (p. 181)

115 The Board also stated (at p. 184 of *IML*) that it was not appropriate to certify a single classification.

c) Functional Integration

116 BCGEU submits the proposed bargaining units are also not appropriate due to functional integration. It submits that in *Sterling Health Services Corp.*, BCLRB No. B281/2005 ("*Sterling*"), the panel found a unit of LPNs was inappropriate due to functional integration with care aides. BCGEU submits that, for the same reasons as given in *Sterling*, the units applied for here should be found to be inappropriate due to functional integration between the LPNs and nursing assistants/care aides.

117 In response, BCNU submits that "functional integration" is not a relevant consideration because the proposed bargaining units are sub-units of an appropriate bargaining unit (the statutorily mandated Facilities Subsector bargaining unit), and all employees within that unit are represented by the FBA and subject to the Facilities Subsector Collective Agreement. In these circumstances, there is no potential for multiple strikes or lockouts or any of the other industrial stability concerns which would ordinarily arise and which the *IML* criteria, including functional integration, are intended to address.

118 In its final reply, BCGEU does not agree that functional integration is not a relevant factor in determining bargaining unit appropriateness in this case.

d) Analysis and decision on appropriateness issue

119 HEU, BCGEU and IUOE have raised a number of powerful arguments concerning the appropriateness of the bargaining units sought by BCNU in these applications, in particular the argument regarding the Board's general policy against the proliferation of bargaining agents at single sites and the argument regarding the appropriateness of certifying a single classification.

120 With respect to the argument regarding functional integration, I accept that functional integration is ordinarily an important factor in determining bargaining unit appropriateness. However, in the health sector, the unique statutory context must be considered. As indicated above, and as explained in *BCNU* at paras. 9-10, statutory reforms have created a unique, two-tiered bargaining structure in the health sector. The first tier consists of broad, multi-union, multi-employer bargaining units, such as the Facilities Subsector bargaining unit, which are statutorily determined to be appropriate for collective bargaining. Bargaining on behalf of the employees in these units is carried out by statutorily mandated bargaining agents, such as the FBA. The FBA negotiates a single collective agreement which covers all the employees in the Facilities Subsector bargaining unit, regardless of which sub-unit they are in and which union is their second-tier bargaining agent.

121 As explained in *BCNU*, "[t]he second tier concerns the day-to-day administration of the Collective Agreement" (para. 10). Thus, although second-tier bargaining agents administer the Collective Agreement, they are subject to the Articles of Association of the FBA. The FBA, not its individual member unions, controls and negotiates the Collective Agreement. Accordingly, there is no possibility of multiple strikes or lockouts, whipsawing, or other similar forms of industrial instability that would normally result from a multiplicity of bargaining agents.

122 For a time, the Board's decisions suggested that, accordingly, the proliferation of bargaining agents within the first-tier bargaining associations did not raise industrial stability concerns. Subsequently, beginning with the *Certain Biomeds* decision, the Board recognized that some industrial stability concerns do arise where there is a multiplicity of bargaining agents at a single location. However, those concerns do not arise because of functional integration among members of different sub-units. Rather, they arise from the presence of multiple bargaining agents, each attempting to administer the Collective Agreement for its sub-unit of employees on a day-to-day basis.

123 Here, BCGEU makes a bald assertion that there is functional integration between the LPNs covered by BCNU's applications and care aides. It does not present any particulars of this alleged functional integration, instead quoting a passage from *Sterling* in which the panel in that case found, on the particular facts before it, that there was functional integration between LPNs and care aides such that a unit of only LPNs was inappropriate.

124 To the extent BCGEU is submitting that *Sterling* stands for the proposition that functional integration between LPNs and care aides is axiomatic or occurs in every

case, I do not agree with that submission. The decision in *Sterling* is clearly based on the particular facts of that case and does not purport to make any broader finding regarding functional integration between LPNs and care aides in other workplaces. The employer in *Sterling* was a nursing, care and support services contractor whose employees were working in a long-term care facility. There is no reason to assume that the ways LPNs and care aides were integrated in that particular workplace is necessarily representative or identical to how LPNs and care aides work in the many workplaces covered by BCNU's applications. I find I cannot rely on the findings of fact made in *Sterling* to assume functional integration in the present case. In the absence of any particulars or factual assertions to support the claim of functional integration here, I cannot find that it exists.

125 I am prepared to assume that health sector employees, including LPNs, work closely together in providing care and services at the various worksites within the Health Authorities at which LPNs covered by BCNU's applications work. I further assume there is a great deal of team work and co-operation among all employees with respect to ensuring that patients are cared for and other work duties fulfilled. However, in the absence of any factual assertions or particulars of actual instances of functional integration, I am not prepared to infer, merely from the decision in *Sterling*, that there is functional integration between LPNs and care aides in this case, such that BCNU's applications should be found inappropriate on this basis.

126 I turn next to the arguments that it is inappropriate to certify a single classification and that there are no compelling circumstances here to justify an exception to the Board's general policy against proliferating bargaining agents at a single site within a health authority. As noted above, BCNU concedes that it is seeking to certify a single classification, and that it is seeking an exception to the Board's general policy first enunciated in *Certain Biomeds* and subsequently applied in *Certain ERAs* and *BCNU*. It submits that compelling circumstances exist for making an exception to both policies in this case.

127 In my view, the essential policy concerns engaged in this case are the Board's concern for industrial stability, on the one hand, and employee choice as to bargaining agent, on the other. Broadly speaking the Board's appropriateness policies are designed to allow access to collective bargaining while still maintaining industrial stability: *IML*. In this case, LPNs have access to collective bargaining regardless of whether BCNU's applications are allowed. Accordingly, it is not their access to collective bargaining which is being weighed in the balance, but rather their ability or entitlement to choose their bargaining agent.

128 Under the Code, there is recognition that unions should be, as stated in Section 2(c) the "freely chosen representatives of employees". However, this general principle of employee choice as to bargaining agent is to be balanced against other, sometimes conflicting Code principles. There are many circumstances where limitations are placed on the ability of employees to choose to be represented by the union of their choice. Under Section 21, for example, only the recognized craft union can represent employees in a craft bargaining unit. In other cases, employee choice may be limited

by Board policies as to bargaining unit appropriateness, which may require employees to join an existing unit rather than be represented in a separate unit by a different bargaining agent. As stated in *IML*:

> The wishes of employees is [sic] not determinative of the extent of the bargaining unit. The desire of employees to have additional groups included or excluded will not be determinative of bargaining-unit appropriateness... (p. 184)

129 Accordingly, like any Code principle, employee choice as to bargaining agent is limited and constrained by the operation of other competing Code principles. Nonetheless, it is a factor or principle the Board will consider in deciding whether, for example, a raid application should be permitted to proceed. The very presence of Section 19 in the Code clearly indicates there are circumstances in which employees will be permitted to choose to change their current bargaining agent.

130 In the present case, BCNU's Section 19 applications meet statutory requirements in the sense that they are timely and have the requisite threshold support. The only statutory requirement at issue is that they be for "a unit appropriate for collective bargaining", as set out in Section 19(1). That issue boils down to a question of whether they should be barred by Board policies which generally preclude certification of single classifications and proliferation of bargaining agents at a single worksite in the health sector. These policies are based on industrial stability concerns, and the Board has indicated that they are subject to exceptions in compelling circumstances.

131 In the present case, HEABC's position in respect to the applications is based on its overarching concern for maintaining industrial stability at the workplaces of the health sector employers it represents. However, it does not argue for a strict or rote application of the Board's policies to this matter. Rather, it asks the Board to consider whether, in light of arguably unique industrial stability concerns which it submits arise in the particular circumstances of this case, compelling reasons exist to make an exception. It submits (paragraph numbering omitted):

> HEABC continues to support the Board's policy against the proliferation of bargaining agents within a bargaining unit at a single location in the health sector with exceptions permitted only in "compelling circumstances". This policy is firmly rooted in the preservation of industrial stability, and therefore consistent with the *Code* and the priorities of HEABC members impacted by these applications.
>
> However, the Board must also account in these cases for the industrial instability that would flow from a decision to dismiss these applications without regard to the results of a representation vote. In other words, HEABC submits that the Board must, in its adjudication of appropriateness objections in these cases, balance the risk of industrial instability that would flow from granting the applications against that which would flow from dismissing them without holding and considering the results of representation votes.

> In particular, HEABC submits that, should the applications be dismissed as inappropriate without or regardless of the results of representation votes, Employers will face instability and disruption in the workplace flowing from the perceived disenfranchisement of 7,000 employees (a group larger than many bargaining units in the province). The IRO has reported that it appears that threshold has been met at six of the Employers. A decision that dismisses these applications without regard to the LPNs' collective view regarding their community of interest with BCNU member nurses will certainly lead to ongoing instability as a result.
>
> This "catch 22" flows in large part from the fact that these applications appear to be only a stepping stone to the BCNU's ultimate goal to unite LPNs with RNs in a single bargaining unit. ...However, the BCNU cannot simply apply to include the LPNs within the nurses' bargaining unit because of the unique bargaining unit structure established by the *Health Authorities Act* and the narrowly defined scope of the nurses unit under that *Act*.

132 HEABC therefore submits that the Board should "follow its existing policy and jurisprudence in determining appropriateness in this matter, but with due regard to the unique circumstances at play reviewed above". It specifically declines to take a position on whether those circumstances do constitute compelling reasons to make an exception to the Board's existing policies in this case; however, it submits that the "potentially distinguishing features of these applications, if any" are:

- the industrial instability risks at hundreds of worksites operated by five health authorities and Providence Health Care that would flow from the perceived disenfranchisement of such a large group of LPNs; and

- the fact that this employee group's ultimate goal is a single nurses bargaining unit given their perceived community of interest with RNs, with these applications apparently representing a first step toward that goal.

133 In response to these submissions, HEU, BCGEU and IUOE submit that HEABC has provided no factual basis for its concern about alleged industrial instability arising from LPNs being denied an opportunity to vote on BCNU's applications. They further submit that BCNU's "ultimate goal" of uniting LPNs with RNs in a nurses bargaining unit would require legislative change and should not be a basis for finding exceptional circumstances justifying an exception to Board policies in this case.

134 HEU, BCGEU and IUOE further submit that, if BCNU's applications are permitted to proceed, they will encourage further splintering of the existing, broad-based bargaining units in the health sector, which comprise a large number of classifications, into a multitude of sub-units consisting of single classifications. They submit that this will lead to a vast proliferation of bargaining units and agents at single locations, contrary to the Board's general appropriateness policies and principles, which generally

favour broad-based bargaining units encompassing employees in a variety of classifications. They further argue that, far from supporting an exception to the Board's policies in this case, the large number of employees at issue is all the more reason why the Board's policies should be adhered to. If the proliferation of bargaining agents is unacceptable at one or two sites, how much more unacceptable must be the proliferation of bargaining agents at many sites within a health authority.

135 The arguments made by all parties in this matter are lucid and compelling, and the decision is difficult. I find it must turn on the particular – and in my view unique – facts of this case, and how the Board's law and policy under the Code applies to those facts.

136 There is no dispute that, under the Act, the statutorily mandated bargaining units such as the Facilities Subsector can and do contain a multiplicity of bargaining agents representing sub-units of employees at various locations within a health authority. Generally, these sub-units reflect the state of certifications at the time when the Act came into effect. The Board has held that "partial raids" are permitted in these circumstances. Thus, for example, in *4020*, the Board permitted a raid by the Pulp, Paper and Woodworkers of Canada, Local No. 5 on a certification held by IUOE for employees at Dufferin Care Centre working within the Facilities Subsector. The panel in *4020* stated in part:

> Under the statutory scheme created by the Act, industrial instability concerns are addressed through the articles of association: *Central Vancouver Island Health Region*, BCLRB No. B29/2002, at para. 59. The panel in that case went on to comment that the legislative scheme of the Act permits the proliferation of bargaining agents within a unit.
>
> In my view, the approach charted by *Grouseview Home Care Inc.*, *supra*, and later decisions removes from the health sector the underlying rationale for the Board's usual policy regarding partial raids where an applicant union seeks to represent all employees of a single employer. The normal concerns for industrial instability do not arise. There will not be an increase in the number of bargaining agents conducting negotiations and there is no potential for an additional labour dispute. The newly-added union will become a member of the applicable association that will, in turn, negotiate with HEABC on behalf of all its member unions for a single collective agreement covering the entire bargaining unit. (paras. 38-39)

137 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 *4020* 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.

138 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.

139 Thus, as stated in the original decision in *Certain ERAs*:

> ...the issue is balancing employee wishes as to their choice of bargaining agent with industrial stability concerns. While the Board has indicated in decisions such as *Grouseview* and *CVIHR* that multiple bargaining agents can co-exist at single locations within the health sector, *Certain Biomeds* indicates that the Board may not find proliferating bargaining agents to be appropriate in all cases, depending on the particular factual circumstances. (para. 33)

140 Further, as stated in the reconsideration decision in *Certain ERAs*:

> We confirm that it is the general policy of the Board not to encourage proliferation of bargaining agents in the health industry within a single subsector at a single location. ... (para. 3)

141 The general policy is based on the assumption that a proliferation of bargaining agents within a single health subsector at a single location will tend to give rise to some industrial instability. In the past, the Board has found (in *Certain Biomeds*, *Certain ERAs,* and *BCNU*) that this concern outweighs the wishes of the group of employees in those cases to be represented by the bargaining agents of their choice. However, each of those cases turned on its particular facts.

142 Here, BCNU provides a number of arguments as to why exceptional circumstances or compelling reasons exist to make an exception to the policy in this case. Among other things, it argues that the other cases involved small groups of employees whereas in the present case the wishes of thousands of LPNs are at issue. It further argues that this case is different because there is a purpose to its applications beyond merely acquiring representation rights for employees who may prefer its representation to that of their current bargaining agent. The purpose is to take a step in

the process towards its goal of uniting the representation of all nurses in a nurses bargaining unit.

143 HEU, BCGEU and IUOE argue that the difference in numbers cannot justify a departure from the Board's policy. If anything, they submit, the larger numbers are all the more reason why the Board should adhere to its policy in this case. They further submit that BCNU's "goal" of uniting all nurses will not be achieved by these applications and would require legislative amendment. They submit this is an irrelevant consideration.

144 I accept that the vastly larger number of employees at issue in this case might not, in itself, justify an exception to the Board's policy if, as those opposed to the applications argue, that would merely mean a vastly larger amount of industrial instability due to the proliferation of bargaining agents at single sites. However, I find that in this case the vastly larger number of employees creates another sort of industrial instability, identified by HEABC, which must also be taken into account. HEABC submits that industrial instability arises whether the Board allows or dismisses the applications. If the applications are allowed, and a majority of LPNs at a given health authority vote in favour of BCNU, the result will be an additional bargaining agent at many sites within the health authority. On the other hand, if the applications are not permitted to proceed to a vote, industrial instability will arise from the dissatisfaction of many LPNs at having achieved and demonstrated majority support for BCNU's applications, yet not being permitted to vote on them.

145 HEU, BCGEU and IUOE submit that HEABC has provided no factual basis for its assertion that industrial instability will arise if the applications are dismissed without a vote. However, I am not persuaded that HEABC's concern is fanciful or speculative. I find it reasonable to assume that where, as here, a majority of almost 7,000 LPNs have expressed an interest in changing union representation, and BCNU has achieved threshold support by gathering membership evidence (signed membership cards) from thousands of them within the Code's 90-day time limit, in part on the basis of a promise to seek to include them in a nurses bargaining unit, there may be "industrial instability", broadly speaking, if votes are not permitted on the applications. I therefore accept that there is a counterbalancing industrial instability concern that arises on the particular facts of this case.

146 Thus, I find this case is distinguishable from previous cases such as *Certain Biomeds*, *Certain ERAs*, and *BCNU*. In those cases, industrial stability concerns weighed entirely against employee wishes. On the particular and unusual facts of this case, however, I find industrial stability concerns, as submitted by HEABC, arise whether the applications are granted or denied. If they are granted, the concern arises from the addition of a bargaining agent at single sites within the Health Authorities. If they are denied, the concern arises from the dissatisfaction of LPNs in not being given an opportunity to vote on a change of representation and, potentially, an opportunity to seek united representation with other nurses in a nurses bargaining unit.

147 Thus, it cannot be said in this case, as it could in previous cases, that the interest of employee choice is outweighed by industrial stability concerns. I find the industrial stability concerns in this case neither favour nor outweigh the applications; they are evenly balanced and therefore neutral with respect to granting or denying the applications. As industrial stability concerns are the reason under the Board's "non-proliferation" policy why employee wishes would not be given effect by giving them a chance to vote under Section 19 as to their choice of bargaining agent, I find this is a compelling reason which justifies making an exception to the Board's general policy in this case.

148 With respect to the argument that the Board will not certify a single classification, I again find this case to involve unique circumstances which justify an exception to the Board's general policy. Because of the two-tiered structure of bargaining in the health sector, the primary bargaining unit for collective agreement negotiation purposes remains the FBA. It is essentially unaffected by the number and nature of the sub-units within it. Whether LPNs are represented within a broad-based sub-unit or a sub-unit based on the single classification, their bargaining agent for purposes of collective agreement negotiation, strikes, lockouts, etc., remains the FBA. At the second-tier level of collective agreement administration, there would be an additional bargaining agent administering the collective agreement for LPNs only, if BCNU's applications succeed. However, the terms being administered will be the same, whether they are administered by a bargaining agent representing one classification or many.

149 In these circumstances, I am not persuaded that the applications should be denied merely because of the nature of the bargaining unit applied for (that is, a single classification sub-unit). I am not persuaded this is sufficient reason to deny LPNs the opportunity to vote, as permitted under Section 19, on representation at the second-tier or sub-unit level by either their existing bargaining agent (HEU, BCGEU or IUOE, as the case may be) or BCNU.

150 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.

IV. SUMMARY AND CONCLUSION

151 BCNU's Section 19 applications raised a number of issues and objections which I have considered and decided for the reasons given above. My conclusions can be summarized as follows:

- BCNU is not permitted to withdraw its PHSA application. That application is dismissed and a time bar imposed under Section 19(2) of the Code.

- The employers for purposes of determining threshold support in this case are the Health Authorities, not the individual locations within the Health Authorities for which FBA member unions are certified.

- There were not material misrepresentations which rendered the signing of BCNU membership cards conditional or equivocal.

- The particular factual circumstances of this case give rise to a compelling reason to make an exception to the Board's general policies, and the unit applied for is therefore appropriate for collective bargaining.

152 Accordingly, the objections of HEU, BCGEU and IUOE to BCNU's six applications are dismissed. As it has been determined that there is threshold support for each of BCNU's six applications as required by Section 19(1), a mail ballot vote shall proceed on each of those applications and be counted subject to challenges.

LABOUR RELATIONS BOARD

"ELENA MILLER"

ELENA MILLER
VICE-CHAIR