

BRITISH COLUMBIA LABOUR RELATIONS BOARD

HEALTH EMPLOYERS ASSOCIATION OF BRITISH
COLUMBIA ON BEHALF OF
VANCOUVER COASTAL HEALTH AUTHORITY (VANCOUVER HOSPITAL – 12TH
AND OAK PAVILLIONS /VANCOUVER HOSPITAL) -and-
CHILDREN'S AND WOMEN'S HEALTH CENTRE OF BRITISH COLUMBIA -and-
VANCOUVER COASTAL HEALTH AUTHORITY (LIONS GATE HOSPITAL)

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

-and-

THE PULP, PAPER AND WOODWORKERS OF CANADA,
LOCAL NO. 5

(the "PPWC")

-and-

HOSPITAL EMPLOYEES' UNION

(the "HEU")

PANEL:	Ken Saunders, Vice-Chair and Registrar
APPEARANCES:	Jennifer Lamont, for HEABC and the Employers Bruce Laughton Q.C., for PPWC David Tarasoff, for HEU
CASE NOS.:	66040, 66042 and 66204
DATE OF DECISION:	February 14, 2014

DECISION THE BOARD

I. INTRODUCTION

1 This decision concerns three raid applications filed by the PPWC under Section
19(2) of the *Labour Relations Code* (the "Code").

2 In each case, the PPWC seeks to expand its representational base at a worksite
to include additional employees who are members of larger units represented by the
HEU.

3 For example, at Vancouver Hospital ("VGH"), the PPWC seeks to carve off of the
HEU's larger unit, the representation of planners, carpenters, electricians, tech e
workers, machine shop workers, hvac mechanics, plumbers, maintenance worker 5,
locksmiths and painters. At Children's and Women's Health Centre of British Columbia
("C&W"), the PPWC seeks to carve off of the HEU's larger unit, the representation of
carpenters, painters, electricians, plumbers, refrigeration mechanics, locksmiths and
maintenance workers. At Lions Gate Hospital, ("LGH") the PPWC seeks to carve off of
the HEU's larger unit, the representation of maintenance workers including the
classifications of maintenance worker, millwrights, plumbers, carpenters, painters,
electricians, refrigeration/hvac mechanics and tech workers.

4 The issue in this case is whether the appropriate constituency for a raid may
consist of fragments of the HEU's larger unit.

5 In this context, the unit means the group of employees HEU represents at each
of the worksites where the facilities collective agreement is administered. I will briefly
elaborate. These raids arise in the health sector. This gives rise to a number of unique
considerations stemming from the two tier representational model that is established
under Part 3 of the *Health Authorities Act*, R.S.B.C. 1996 c. 180 (the "Act"). Under that
regime, the first tier of certification concerns collective bargaining, which is conducted
for each of the five bargaining units established by the Act through associations of
unions and HEABC. The second tier of those certifications relates to the day-to-day
administration of the collective agreement in the workplace between each collective
agreement employer and constituent unions in each association. At this tier VGH, C&W
and LGH administer the collective agreement for units held by each constituent union:
British Columbia Nurses' Union, BCLRB No. B44/2011, at paras. 9-12 ("*BCNU*").

6 The parties primarily joined issue on the question of whether the appropriate unit
for a raid may consist of fragments of HEU's larger second tier units. The alternative
issue is whether a rational line can be drawn around each of the proposed units. I have
decided the applications on the basis of the parties' submissions concerning the first
issue. The material facts are not contentious in that regard. Therefore, I find it
unnecessary to convene an oral hearing. Given that the facts are not in dispute, I have
reproduced parts of the parties' submissions in setting out the background.

II. BACKGROUND

7 The representational model in the health sector is the product of consultation and legislative reform aimed at rationalizing labour relations in that sector: See *Public Sector Employers Act*, R.S.B.C. 1996, c. 384; the Act; James E. Dorsey, Commissioner (June 30, 1995), *Reshaping B.C. Health Sector Appropriate Bargaining Units, Report and Recommendations* (the "*Dorsey Report*"); and the Report of the Commission of Inquiry into the Public Service and Public Sector.

8 The Act establishes five appropriate bargaining units for the purposes of Parts 4 to 7 of the Code. The units sought by PPWC fall within the health services and support – facilities subsector bargaining unit (the "FBU" or "Facilities Subsector"). The FBU is a single province-wide, multi-employer, multi-union bargaining unit, mandated by the Act and deemed the appropriate unit for collective bargaining for thousands of workers in a variety of classifications in the FBU.

9 The HEU represents the vast majority of employees in the FBU employed in over 270 job classifications including care aides, power engineers, trades and maintenance workers.

10 C&W, VGH and LGH are collective agreement employers within the Facilities Subsector. HEU is certified to represent all Facilities Subsector employees of those employers with the exception of power engineers (PPWC also represents a millwright/welder and a refrigeration mechanic at C&W). The power engineers were originally represented by the International Union of Operating Engineers ("IUOE"). IUOE was later replaced by PPWC as a result of a raid. PPWC's units are described as follows:

employees of the employers listed in the attached Appendix (represented by the Health Employers Association of British Columbia) in the health services and support – facilities subsector (as defined in Section 19.1 of the *Health Authorities Act*) except those employees represented by other trade unions.

11 HEU and PPWC (and others) are members of the Facilities Bargaining Association ("FBA"). The FBA is an association of trade unions mandated by the Act. PPWC is one of the 7 unions who form the "other unions" single voting seat in the FBA negotiating committee. As at the June 2013 meeting of FBA, PPWC represented approximately 160 workers.

12 FBA and HEABC bargain the Health Services and Support – Facilities Subsector Collective Agreement (the "Facilities Agreement"). The Employers are members of HEABC and each is a party to the Facilities Agreement.

13 The vast majority of certifications in the FBU at the second tier are for "all employee" type units. Only 24 out of a total of 278 worksites have multiple bargaining agents certified to represent employees at a worksite. These 24 worksites are exceptional within the framework of the Code and the Act. They reflect bargaining

structures that pre-dated the modernized 1995 Act and—as such—have been consistently described as historical anomalies: *Kelowna Hospital Society*, 30/77, [1977] 2 Can LRBR 58 at p. 61, *Burnaby Hospital Society*, BCLRB No. B353/95 (Upheld on Reconsideration in BCLRB No. B441/95 and on Judicial Review [1996] B.C.J. No. 1330) at para. 11; *Chara Health Care Society*, BCLRB No. B107/97 (Leave for Reconsideration Denied in BCLRB No. B180/97) ("*Chara*"). Having said that, no one asserts that the mere existence of those anomalous units has led to difficulties administering the Facilities Agreement at the affected worksites.

III. POSITIONS OF THE PARTIES

A. The HEU

14 HEU submits that the unit sought by PPWC is not an appropriate bargaining unit as it seeks an outcome that is contrary to the policy of the Code, and inconsistent with the Code and the Act because:

- a. it amounts to a partial raid application and consequently, PPWC must establish that there are "compelling reasons" to fragment the existing unit when none exist and when in fact:
 - i. the Raid Application fragments the existing HEU unit at C & W in a manner that will not will not augment or foster or promote industrial stability;
 - ii. it fragments the existing HEU unit at C & W such that it results in an impermissible expansion of the historical anomaly that is the PPWC certification;
 - iii. it fragments the existing HEU such that it will result in industrial instability at C & W and within the FBU generally; OR,
- b. no rational, defensible line can be drawn around the unit sought by PPWC at C & W and in any event, the Raid Application gives rise to industrial instability concerns. (emphasis in original)

15 HEU submits that raid applications in the health sector may be placed on a five point continuum beginning at one end with those that: 1) seek to represent all employees of an employer (e.g. *Dufferin Care Centre*, BCLRB No. B303/2003) ("*Dufferin*"); to 2) seek to represent all employees of an employer in the FBU represented by a particular incumbent trade union but not those represented by other trade unions; to 3) seek to represent all employees of an employer in the FBU represented by a particular incumbent at a particular worksite of the employer; to 4) seek to represent all employees of an employer in the FBU *in a particular classification* represented by a particular incumbent (e.g. *Health Employers Association of British Columbia*, BCLRB No. B62/2009) ("*Power Engineers*"); and at the opposite end, 5) seek

to represent some employees of an employer in the FBU represented by a particular incumbent at a particular worksite, but not all of them.

16 HEU argues that in cases at the fourth point of the spectrum, such as *Power Engineers and Interior Health Authority (East Kootenay Regional Hospital)*, BCLRB No. B109/2013, 228 CLRBR (2d) 1 (Reconsideration Denied in BCLRB No. B139/2013, 230 CLRBR (2d) 307) ("*IHA*"), the raiding union sought to represent *all* employees represented by the incumbent at the particular worksite(s). Those cases can be described as involving straight substitutions for the incumbent at the second tier and at one particular worksite.

17 HEU submits that the applications in the case at hand lie at the fifth point on the foregoing spectrum, in that PPWC seeks to represent some but not all of the employees represented by HEU. It argues that unlike the case in *Power Engineers* and *IHA*, the result is to fragment HEU's unit *at each worksite*. In HEU's submission this gives rise to appropriateness concerns. Due to these concerns, HEU argues that the Board should not allow PPWC to fragment its unit constituency in the absence of very compelling reasons. HEU describes the resulting appropriateness concerns in part as follows:

41. A more relaxed or less stringent approach in these circumstances encourages incessant raiding on a job by job, or classification by classification, basis and internecine industrial conflict in health care facilities. This impairs the ability of the Association to function and the Board must therefore be more stringent in its approach.

42. To put it another way, it is one thing to supplant a bargaining agent at a worksite in the health sector through a partial raid, but quite another to "pick off" a classification or two at a time and fragment an existing unit through a partial raid. This leads to industrial instability concerns at the worksite (incoherence, added complexity in collective agreement administration etc.) and in the Facilities Subsector (encourages raiding) and a more stringent test must therefore be brought to bear. Enough is enough.

43. For all these reasons, HEU submits that the PPWC must demonstrate very compelling reasons to fragment the existing unit. The Raid Application is a partial raid application in the true sense (not an artificial sense) and the usual "relatively stringent test" ought to apply; see *Dufferin* at paragraph 36.

18 HEU adds the fact PPWC is certified for a handful of employees at the three sites does not assist the PPWC. HEU submits that the application does not serve any labour relations purpose (related to the ongoing appropriateness of its unit), and the existing PPWC unit is recognized as a historical anomaly to be contained rather than expanded to the detriment of the broader HEU unit: *Chara*, para. 27. HEU adds that this result would be contrary to the Board's policy in favour of broader all employee units. HEU submits in reply as follows:

12. If PPWC's position is accepted, then there are few, if any, limits on partial raids on a job-by-job or classification-by-classification basis in the health sector. HEU submits that the Board should not permit it and ought to apply a rigorous test when faced with an application of this type.

19 Finally, HEU submits that permitting a raid based on fragments of its unit would lead to a form of industrial instability by undermining the orderly day-to-day administration of the collective agreement and run contrary to the broader policy goal of rationalizing health sector units. HEU submits in part:

56. Trade unions in the health sector must often make difficult choices in bargaining and collective agreement administration between employees with competing or conflicting interests and cannot effectively do so if they are constantly threatened with partial raids mounted by disaffected classifications or groups. By analogy, see *White Spot Ltd.*, BCLRB No. B16/2001, 65 CLRBR (2d) 161 at paragraph 90.

. . .

74. Quite apart from the incoherence of the bargaining unit sought by PPWC, HEU submits in addition that the Raid Application gives rise to industrial instability concerns. To permit bargaining unit accretion through raiding on a classification by classification basis in a particular worksite promotes nothing but disruption and tension where none need exist. In large, broad based unit, some tension will inevitably arise between employee groups but a series of raids is not the answer. HEU and all other unions involved must be able to address these competing interests and administer the collective agreement without constantly fighting a rear guard action.

75. HEU submits that industrial instability arises because the Raid Application does not further the Code objective of simpler bargaining structures and indeed, the unit sought by PPWC “would unnecessarily and potentially unproductively complicate collective agreement administration and certification matters,” and “would run counter to the rationalizing in the health industry” and the Board’s policy in IML; *Sunshine Coast*, BCLRB No. B80/96.

B. The HEABC

20 HEABC also opposes the raid applications. HEABC adopts HEU's submission that the application would fragment HEU's representation of the respective second tier units.

21 HEABC acknowledges that a raiding union does not have to show compelling reasons when it seeks substitute itself for an incumbent at a worksite: *Dufferin, IHA* at paras. 63 and 69. In that case, there is no fragmentation of an incumbent's unit at the second tier of certification. HEABC submits that is not the situation in the cases at hand

because the result would be to carve off the representation of some, but not all of the employees in HEU's unit. HEABC submits allowing such an application would expand the historically anomalous PPWC unit one or more classification at a time, and thereby add to the instability that is presumed where there are multiple rival unions administering the same collective agreement: *BCNU*, at para. 11. Accordingly, HEABC submits that PPWC must establish compelling reasons to raid on the basis of the proposed constituencies.

C. The PPWC

22 PPWC submits that where a raiding union is certified for a unit at a worksite in the health sector, that the expansion of its representation to include employees represented by another union cannot be characterized as fragmentation. That is because granting the raid will not add to the number of agents either administering the Facilities Agreement or participating in bargaining.

23 PPWC argues that its unit is described as "employees of the Employers in the attached Appendix (represented by the Health Employers Association of British Columbia) in the health services and support – facilities subsector (as defined in Section 19.1 of the Health Authorities Act) except those employees represented by other trade unions". PPWC adds that HEU and HEABC have not pointed to problems arising from the fact that PPWC and HEU have administered the same collective agreement. Moreover, granting the application would not fragment any of the units as they are described.

24 PPWC agrees that a raiding union seeking to replace the incumbent for all employees of a collective agreement employer is not required to show compelling circumstances to fragment the unit at the first tier. That is because the instability associated with the proliferation of bargaining units does not arise at the first tier of the health sector bargaining regime: *Dufferin*, at para. 39. PPWC submits however, that this does not mean that raids are limited to straight substitutions at the second tier, particularly where the incumbent's unit has not been fragmented, there is no proliferation of agents administering the collective agreement and the result is to simply add to an existing second tier unit.

25 PPWC submits that in these circumstances there is no concern about industrial instability that might offset the value given to the employees' freedom to change their bargaining agent. PPWC further submits that any concern about the broadened scope for raids and intensified union rivalries ignores the Code's rigid timing requirements for raids, as well as Board policies that confine raiding unions to either expanding an existing unit (as in this case) or attempting to step into the shoes of an incumbent.

IV. ANALYSIS AND DECISION

26 This case illustrates the tension that arises between giving effect to employee choice with respect to changing the identity of their bargaining agent and attendant concerns about the instability occasioned by raids.

27 The Code addresses those instability concerns in two central ways. First, there are timing constraints on raid applications. For example, a raid application may only be filed during the seventh and eighth months of a collective agreement, and not during the 22 month period after a previous raid is dismissed on its merits: Section 19 of the Code. Second, a raid application must be for unit that is appropriate for collective bargaining.

28 The issues in the present case arise under the appropriateness heading. This calls for discretionary judgment encompassing both health sector labour relations policy objectives, and the probable effects of allowing PPWC's applications in the circumstances at hand: *Hospital Employees' Union v. British Columbia (Labour Relations Board)*, 2013 BCSC 1516, at para. 65.

29 The proposition advanced by HEU and HEABC is that permitting raid applications based on pieces of HEU's existing unit will likely result in adverse labour relations consequences, and therefore PPWC should be required to establish compelling reasons in order to proceed. Unlike many previous health sector raid cases, the problem is not whether the applications will result in a proliferation of agents administering the Facilities Agreement at the respective worksites. Rather, the question is whether the threat of raids on less than a unit-wide basis will lead to instability in the administration of the collective agreement at the affected worksites. The second question is whether raids which result in the piecemeal disintegration of the HEU's larger unit are incompatible with broader policy objectives that have shaped the boundaries of health sector bargaining units. I find for the following reasons that HEU and HEABC have advanced compelling arguments on both fronts.

30 I begin with the question of whether the raids fragment HEU's second tier units. PPWC is correct that its unit description is worded broadly enough to encompass the addition of new employees (who are presently represented by HEU) at each affected worksite. Thus the raids fit comfortably with the form of the respective unit descriptions. However a deeper examination reveals a resulting impact of the raids that is not evident on the face of the unit descriptions. That impact is to remove small groups of employees currently represented by HEU and assign them to PPWC. It is in that very real sense that the raids seek to deconstruct or fragment the HEU unit as it is presently constituted. The result would be the piecemeal expansion of the PPWC unit at the expense of the HEU unit.

31 In assessing PPWC's argument in favour of employee choice, it is necessary to appreciate the pivotal role that a "bargaining unit" plays in the statutory scheme. The unit plays a crucial role because it defines the constituency for which a union acquires and stands to lose the legitimacy of its mandate to represent employees. Just as important, the unit defines the constituency for which a union is tasked with the statutory duty to administer a collective agreement.

32 The foregoing points are equally applicable to unions that acquire, lose and administer second tier representational rights in the health sector. It follows that the HEU's established second tier units form the benchmark constituencies for resolving representational contests at the affected worksites: *IHA*, para. 50. That approach

mirrors the foundation on which the incumbent HEU has held and administered the Facilities Agreement at each of the affected worksites.

33 In the present case, it is fair to infer that the large and diverse group of employees who comprise the HEU unit share a unified community of interest, despite any differences that might divide occupational groupings. The answer might be different if it were established that HEU's units at the affected worksites are no longer appropriate due to changed circumstances, or where there are other exceptional reasons for deconstructing HEU's unit at a worksite. However that is not the case here. This consideration weighs against the appropriateness of the proposed units in the case at hand.

34 The Board's preference for the established unit as the benchmark for resolving representational contests also dovetails with the goal of rationalizing bargaining unit structures in the health sector. As noted above, the Act is the result of recommendations issued in the *Dorsey Report*. With respect to what is now the Facilities Subsector, the Commissioner observed the existence of representational fragmentation of this group among several unions and bargaining units, and concluded that consolidating these units was the foundation for a manageable association of bargaining agents in the subsector.

35 The Dorsey Report also concluded that unit boundaries "encircling groups of employees, create turf and invite employees, employers, managers and union representatives to jockey to be on one side or the other of them for some reason in one situation or other and to distinguish why one side is appropriate in one situation and the opposite side in another situation." *Dorsey Report*, at p. 24. The Commissioner also observed as follows:

Labour relations boards have sought to contain the proliferation of units. In the health sector, a 1970's decision limited bargaining units in hospitals. (*Kelowna Hospital Society*, [1977] 2 Can LRBR 58) *When a situation presents itself, the board has said it will actively reconstruct units to reduce fragmentation. (Island Medical Laboratories Ltd. (1993), 19 CLRBR (2d) 161). (emphasis added) (at p. 15)*

36 Accordingly, a longstanding policy objective in the health sector has been to rationalize unit structures, in part by fostering the single "all employee" unit represented by a single agent, such as one finds at the vast majority of FBU worksites. Thus the Board has curtailed the piecemeal expansion of PPWC's (formerly held by the IUOE) existing units on the basis that they are historical anomalies to be contained, rather than expanded at the expense of the broader HEU unit: *Chara*, para. 27. This consideration also weighs against the appropriateness of the proposed units in the case at hand.

37 I now turn to HEU's and HEABC's submission concerning instability concerns. The Board has recognized that different unions will take different approaches, adopt different interpretations and develop different policies when administering the same collective agreement with the same employer: *BCNU*, at para. 11. Hence the Board

presumes that the proliferation of agents undermines the orderly and constructive administration of a collective agreement.

38 Building on that underlying rationale, I find that the threat of raids on the basis of individual classifications at a worksite also serves to inhibit the day-to-day informal give-and-take that marks successful labour relations. This in turn presents an additional layer of complexity and uncertainty for decision-makers administering the collective agreement at the affected worksites. The greater the likelihood of partial raids at that worksite, the greater the risk an incumbent union will flinch from making difficult decisions to the detriment of a particular job classification in pursuit of its duty to represent the interests of the unit *as whole*. I note that a similar mischief is illustrated in the context of partial decertification in *White Spot, supra.*, at para. 90. For these reasons, I accept HEU's and HEABC's submission that raids based on fragments of HEU's existing units are inherently destabilizing. This is another consideration weighing against the appropriateness of the proposed units.

39 In this particular context it may be possible for PPWC to demonstrate majority support in any one of a number of potential communities of interest within HEU's larger and more broadly based unit. However I conclude that processing the applications on that basis would not adequately account for a number of important policy considerations which taken together, favour using the HEU's respective second tier units as the benchmark constituency for deciding representational contests. In the absence of compelling reasons to depart from that approach, I conclude the proposed units are not appropriate.

V. CONCLUSION

40 The applications are dismissed.

LABOUR RELATIONS BOARD

"KEN SAUNDERS"

KEN SAUNDERS
VICE-CHAIR AND REGISTRAR