LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION DECISION

PROFESSIONAL EMPLOYEES ASSOCIATION

UNION

BC PUBLIC SERVICE AGENCY representing the
GOVERNMENT OF THE PROVINCE OF BRITISH COLUMBIA

EMPLOYER

(Re: Applicability of Collective Agreement – Lawyers and Articled Students)

Arbitrator:	James E. Dorsey, K.C.
Representing the Union:	Jodie Gauthier and Kyleen Wong
Representing the Employer:	Donald J. Jordan, K.C.
Case Management Conferences:	October 27, 2023 and February 15, 2024
In-Person Hearing:	February 20 and 21, 2024
Decision:	March 8, 2024

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1. Dispute, Jurisdiction and Threshold Question

[1] The Legislative Assembly included most civil lawyers and articled students employed by the provincial government, who were previously excluded from collective bargaining, in a statutorily designated bargaining unit of government licensed professional employees for whom there is an existing collective agreement with a term expiring March 31, 2025.

[2] The union says the collective agreement applies to the newly included employee group. The employer says, without its agreement, no provision of the collective agreement applies to the newly included employees.

[3] The *Public Service Labour Relations Amendment* Act, 2023[1] (Bill 5) was introduced February 9, 2023; received Royal Assent May 11; and on July 10, 2023 was ordered to be brought into force effective July 14.[2] The original Bill provided coming into force on the date of Royal Assent. It was amended May 9 to come into force by regulation of the Lieutenant Governor in Council.

[4] On July 14, without union agreement, the employer declared as an interim measure that it will apply to the newly included employees certain provisions of the collective agreement and other transitional measures, which include wages and benefits, professional requirement allowance, joint education committee, earned days and time off, allowances, leaves, vacations, statutory holidays, relocation, maternity, parental and adoption leave, hours of work, and disability and health and welfare benefits.

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[1] S.B.C. 2023, c. 27. On November 29, 2022, the British Columbia Government Lawyers Association had applied to the Labour Relations Board for certification under the *Labour Relations Code* as the exclusive bargaining agent for a unit of employees of the Government of British Columbia employed as lawyers to provide legal service in relation to civil matters.

[2] B.C. OIC 0435-2023

[5] On July 21, the union gave notice under Article 32.10 of the collective agreement of referral to arbitration the rates of pay of the newly included employees on the premise the employer had introduced new classifications of employees.

> **32.10 New Classifications**
> Management retains the right to introduce new classifications whose rates of pay will be negotiable. If the parties are unable to agree on the rate of pay for the classification within 10 days of their first meeting or within such other period agreed to by the parties, the Employer may implement the classification and attach a salary and the matter may then be referred to a mutually agreed arbitrator for a final and binding decision.

[6] The union's notice recites there had been unsuccessful negotiation in June and July for an agreement on the terms and conditions of the employees, including classification level and salaries. Because the employer acted unilaterally, the union was referring the matter to arbitration.

[7] The employer's response was Article 32.10 does not apply. It accepts that many provisions of the collective agreement are "inherently capable of applying to the newly included group" but Article 32.10 is not. Alternatively, it does not apply. Further if an arbitrator were to set rates of pay "the other elements of the overall compensation package, which we are currently honoring, will be terminated." The union advanced the grievance to arbitration.

[8] Separately, on September 13, the union grieved the master collective agreement covering employees in the licensed professional bargaining unit applies to the lawyers and articled students as of July 14 when the union became their exclusive bargaining agent; the employer unilaterally imposed transitional measures for these employees on July 14 without recognition of the union's exclusive bargaining authority; and the employer's imposition of transition measures is a "unilateral restriction of access to the bargained rights found in the Collective Agreement" to the newly included employees.

[9] I was notified of my appointment as arbitrator on October 18.

> The Parties in the above-noted matter have agreed to your appointment as sole arbitrator to address a number of grievances that have arisen with respect to the recent inclusion of lawyers employed by the Government of BC into the PEA's Government Licensed Professionals ("GLP") bargaining unit.
>
> A preliminary issue in these matters will be the applicability and extent of applicability of the GLP collective agreement to this group. The Parties are hopeful that we can obtain a decision on this preliminary matter quite quickly to facilitate the timely adjudication of the related grievances.

[10] The union and employer agree I am properly appointed as arbitrator under their collective agreement and the *Labour Relations Code* with jurisdiction to finally decide the merits of the September 13 grievance.

[11] By agreement, this hearing is limited to the threshold issue whether the collective agreement applies to the newly included employees. The decision on this issue has distinct consequences for the union's exclusive representation of the lawyers and articled students.

[12] If the collective agreement applies, differences about whether specific provisions apply and the extent to which they apply to the lawyers and articled students are to be resolved between the union and employer and, if necessary, arbitration. None of those differences, like the one on Article 32.10, is part of this proceeding. If the collective agreement does not apply, the employer says the union and employer can continue discussion, negotiation and problem solving about interim measures for the lawyers and articled students until collective bargaining next year.

[13] The evidence includes an agreed statement of facts, books of documents and the testimony of union Labour Relations Officer Melissa Moroz and Geoff Holter, the first union Executive Director for fourteen years.

2. PSLRA Licensed Professional Unit: Brief Background (1974 - 2023)

[14] Collective bargaining was extended to provincial public service employees in the 1973 *Public Service Labour Relations Act* (PSLRA). It continued the exclusion of several members of the public service from collective bargaining, including "a person qualified under the *Legal Professions Act,* or an enrolled student under such Act, who is engaged and working in the practice of such profession." [3] While the language was amended, the exclusion continued until 2023.

[15] For collective bargaining, all employees must be included in one of three bargaining units – a nurses' unit, a licensed professional unit and a public service unit which does not include employees in the first two units. (s. 4) A "bargaining unit" is defined as a unit of employees appropriate for collective bargaining "referred to in section 4."

[3] S.B.C. 1973, c. 144, s. 1(1) "employee" (ii)

[16] The licensed professional unit includes “all employees in a professional classification in the public service classification structure who are members of an association that had, before July 1, 1998, statutory authority to license a person to practise that profession” other than nurses. (s. 4(b))

[17] Because of diversity among occupational groups of employees in the designated bargaining units, the PSLRA provides for a specific form of master and subsidiary collective agreement for each unit.

> **Form of collective agreements**
>
> **10**(1) Two collective agreements are to apply to each bargaining unit, as follows:
>
> (a) a master agreement including all the terms and conditions of employment common to all employees in the bargaining unit or to 2 or more occupational groups in the bargaining unit;
>
> (b) a subsidiary agreement for each occupational group, including the terms and conditions of employment that apply only to employees in a specific occupational group in the bargaining unit.
>
> (2) Specific occupational groups under subsection (1) (b) must be determined by negotiation between the parties.

An “occupational group” is “a group of employees in a bargaining unit with a similar occupation, trade, profession or activity as determined under section 10.” (s. 1(1))

[18] For its application, administration and interpretation of the PSLRA provides: “Unless inconsistent with this Act, and for the purposes of this Act, the board has all the powers of the Labour Relations Board under the *Labour Relations Code*, and a union under this Act is deemed to be a trade union within the meaning of the *Labour Relations Code*.” (s. 2(1)). The PSLRA sets the requirements for the Board to certify a trade union as the bargaining agent for one of the three bargaining units. (s. 5)

[19] The union was founded 50 years ago as “The British Columbia Government Professional Employees’ Association” for the specific purpose of seeking certification and representing the employees in the licensed professional unit. It obtained certification on May 3, 1974. Its current certification issued July 14, 1980 is for a bargaining unit of:

> employees in a professional classification in the Public Sector Classification structure who are members of an association that has statutory authority to license a person to practice that profession, other than those persons described in clause 4(a) of the Public Service Labour Relations Act.

This varied certification identifies the union as “Professional Employees Association.”

[20] While the certification implies on its face that the Board determined the appropriateness of the bargaining unit, the PSLRA designated the unit. The Board's form of varied certification is the one its used at the time for certification under the *Labour Code of British Columbia Act*,[4] not certification under the PSLRA. Likely, the Board did not consider it necessary to prepare a separate form for three certification orders under the PSLRA.

[21] The union and employer have negotiated seventeen master agreements since 1974. Despite the varied education; training; special skills; regulatory regimes; indoor, outdoor, remote, solitary and interactive work environments; public communities serviced; hours of regular or on-call work; and workloads of the licensed professionals, from the first collective agreement, the employer and union negotiated a master agreement with terms and conditions applicable to all licensed professional employees. A limited number of issues specific to a professional group have been addressed in master agreement negotiations.

[22] Only salaries were left to be addressed in negotiation of subsidiary (sometimes called component) agreements for each licensed profession. This is captured in a June 20, 1975 press release issued by Mr. Holter and Staff Officer Judi Korbin.

> The B.C. Government Professional Employees Association and the Public Service Commission of B.C. today signed the first Master Collective Agreement between the Association and the Government. The agreement covers all conditions of employment for licensed professional employees of the B.C. Government except salaries which will be negotiated in separate component agreements.
>
> Included in the agreement are clauses affecting prepaid medical-dental coverage for professional employees, an Optional Selection of Benefits Plan to compensate for overtime, substitution, shift differentials etc. worked by professional employees, a thirty-five hour flexible working week, a wide range of educational and career-development benefits, a full cost-of-living adjustment clause and a four week basic vacation entitlement.
>
> The contract represents the conclusion of sixteen months of arduous, and often difficult negotiations. As the first major collective agreement dealing exclusively with licensed professionals, it has come to terms with many of the peculiar problems facing professionals in collective bargaining. Included in the professional bargaining unit are some eleven hundred (1,100) Accountants, Architects, Agriculturalists, Dentists, Engineers, Geologists, Foresters, Forest Agrologists, Land Officers, Land Surveyors, Pharmacists, Physiotherapists and Veterinarians.
>
> Negotiations are expected to commence shortly on the component agreements dealing with salaries.

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[4] S.B.C. 973, c. 122

[23] Internally, the union ensures governance and negotiating committees include a balanced representation from the professional occupation groups.

[24] The press release list of professions does not include Physicians because the PSLRA definition of employee was amended in 1975 to exclude “a person qualified under the Medical Act who is engaged in and working in the practice of his profession.”[5] Although the amendment was not assented to until June 26, the union and employer anticipated Physicians would be excluded and listed them as excluded persons in the agreed description of the bargaining unit in Article 2.1.

[25] The agreed bargaining unit description in the second master agreement was more succinct than the first which listed all exclusions in the PSLRA. Article 2.01 states: “all employees for whom the Association has been certified to bargain collectively pursuant to the Public Service Labour Relations Act, except those employees in positions or classes of positions specifically names in Appendix B.” This is essentially the agreed description in the current collective agreement concluded October 28, 2022.

[26] Today, the subsidiary agreements are simply assignments to the salary grid of forty-two specific classifications for seventeen licensed professional occupational groups. (Addendum A – Subsidiary Agreement) Article 7.01 of the collective agreement states, in part:

> **7.01 Subsidiary Agreement**
>
> (a) In accordance with the provisions of the *Public Service Labour Relations Act* there shall be a Subsidiary Agreement for the occupational group which shall form part of this Agreement. The Subsidiary Agreement shall be negotiated by a separate Subsidiary Agreement Bargaining Committee.
>
> (b) The parties agree that the occupational group shall be composed of the following occupations, subject to Section 4 of the *Public Service Labour Relations Act:* … [seventeen listed]

[27] The classifications include two Licensed Psychological Associate and four Licensed Psychologist classifications not listed in the 1974 press release when psychologists were in the public service employee unit represented by the BCGEU. Their bargaining unit status changed with licensing. In January 1978, they transferred to the licensed professional bargaining unit.

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[5] *Public Service Labour Relations Amendment Act, 1975*, S.B.C. 1975, c. 61, s. 1(a)(iib)

[28] The union reported to its members the Psychologists would be covered by the master agreement and salaries would not change pending negotiations. In March 1978 the employer and union entered an agreement on Licensed Psychologists "exclusions and vacation retention." For 1978, the Licensed Psychologists retained any vacation benefits under the BCGEU master agreement in excess of their entitlements under the PEA master agreement.

[29] In 1988, professional licensing of Teachers resulted in their transfer from the public service bargaining unit to the licensed professional bargaining unit.[6] There were three classifications of Teachers – Instructor, Correspondence School; Instructor, Technical Classes; and Teacher 3 to 6.

[30] An orderly transfer was accomplished by an agreement between the employer and union. The salary schedule in the BCGEU and employer collective agreement for both Instructors classifications were included in the PEA and employer collective agreement. With limited exceptions, the PEA master agreement did not apply and the BCGEU agreement continued to apply to the Teachers 3 - 6. In March 1989, the employer and union agreed to exceptions to the master agreement for Teachers. Today, that agreement is Memorandum of Agreement #3 in the master agreement and there are two Teacher classifications in the subsidiary agreement.

[31] The union and employer have statements about a collaborative relationship in the current master collective agreement. The preamble includes: "It is further agreed that where the language of this Agreement is not specific or wherever there may be ambiguity or omission, every effort will be made by both parties to find a solution within the spirit and intent stated above."

[32] Recognizing the employer is the Government of the Province of BC represented by the BC Public Service Agency; the constitutional separation but operational connection between the Government and Legislative Assembly; the advance knowledge the Government has about legislative proposals; and the legislated context within which the collective bargaining relationship exists and under which the collective agreement is negotiated, the collective agreement provides:

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[6] See *British Columbia*, [1988] B.C.L.R.B.D. No. 117; *Teaching Profession Act*, S.B.C. 1987, c. 19

1.02 Future Legislation

In the event that any future legislation renders null and void or materially alters any provision of this Agreement, the remaining provisions shall remain in effect for the term of the Agreement, and the parties hereto shall negotiate a mutually agreeable provision to be substituted for the provision so rendered null and void or materially altered.

1.03 Notice of Legislative Change

The BC Public Service Agency agrees that no proposal to amend, repeal, or revise the *Public Service Labour Relations Act,* the *Public Service Act,* or regulations made pursuant thereto, which would affect the terms and conditions of employment of employees covered by this Agreement shall be put forward without first notifying the Union in writing of the nature of the proposal.

1.04 Union Hearing on New Acts

Insofar as it is consistent with current Parliamentary practice, the BC Public Service Agency agrees to afford the Union, at its request, a hearing to comment upon, or propose change to, after First Reading, any Bill or Act which bears directly upon the bargaining unit. The Agency further agrees to convey any written information to the Minister responsible for the Act under which the Union is certified.

[33] In 2023, the exclusion of all lawyers and articled students from the definition of "employee" in the Act was narrowed to:

> 1(1)(b) a practising lawyer or articled student as defined in section 1 (1) of the *Legal Profession Act*, who is engaged in the practice of law and who is
>
> (i) employed in the Criminal Justice Branch of the Ministry of Attorney General,
>
> (ii) employed in the Office of Legislative Counsel, or
>
> (iii) employed as a member of the staff of a court in British Columbia;

A new subsection 1(3) states: "For the purposes of this Act, the Office of the Legislative Counsel is not considered to be in the Legal Services Branch of the Ministry of Attorney General."

[34] The effect is that over 300 lawyers and articled students previously excluded gained inclusion in public service collective bargaining. Because of the scope of the three designated bargaining units, the lawyers and articled students are included with approximately 1,000 other employees in the licensed professional bargaining unit and represented by the union.

[35] The Legislative Assembly and Lieutenant Governor in Council knew the effect of the amendments and the timing of the July 10 order. As with legislation changing the status of Psychologists and Teachers, the employer and union are left to sort out the application of the master and subsidiary agreements to the newly included lawyers and

articled students and the impact on these employees' existing and diverse mix of terms and conditions of employment.

[36] The employer and union met on June 6 in anticipation of Bill 5 coming into force on June 22, which the union thought was recklessly too early to agree to excluded positions under section 11 of the PSLRA; the application of the terms of the collective agreement to the lawyers and articled students; and to agree to some transition provisions. The union requested a delay to September 22. The Minister of Finance decided to delay to July 14.

[37] On June 7, the employer, without consultation with the union which was not yet the bargaining agent, posted an updated Frequently Asked Questions statement about Bill 5. At the time, the British Columbia Government Lawyers Association represented lawyers to be included in the licensed professional bargaining unit. The FAQ states, in part:

> The natural operation of the PSLRA would place BC Government Lawyers Association (GLA) in the professional employees bargaining unit represented by the Professional Employees Association (PEA). The PSLRA offers a two-tier collective agreement approach through the mechanism of a component agreement. The PSLRA was designed with the flexibility to create and add new occupational groups. This means the interests and unique work needs of the members of the GLA can be negotiated in their own component agreement which would be a subsidiary of the PEA main agreement. It will be up to the PEA, most likely in consultation with the GLA and its members, to decide how it chooses to incorporate government lawyers into its bargaining unit. It is important to keep in mind, however, that the Employer believes the lawyers' unique conditions can be addressed even without a component.
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> **********
>
> Once Bill 5 comes into force, the PEA collective agreement will apply to the government lawyers. However, it is the Employer's understanding that the PEA and PSA can decide to additional terms on a temporary basis until the next round of collective bargaining. The PSA is prepared to discuss these matters with the PEA.

[38] There was no transition agreement by July 14. Without union involvement, the employer issued a fact sheet on transition matters. It states, in part:

> Bill 5 took effect on July 14 …. Normally this would mean those covered by Bill 5 would automatically be subject to the full provisions of the existing PEA collective agreement. At this time, the PEA collective agreement does not adequately account for the unique ways legal counsel are compensated.
>
> However, the employer remains committed to maintain existing legal counsel terms and conditions of employment considering the unique ways legal counsel

> are compensated. Therefore, we are implementing a series of transition measures to achieve that outcome in the absence of an agreement.
>
> Under these transition measures, there is no impact to lawyers' existing pay and benefits when Bill 5 takes effect and until the parties have had the opportunity to negotiate final details of transition. Except for those issues addressed by the transition measures outlined below, all other provisions of the PEA collective agreement will apply effective July 14.

[39] Using this lengthy document, Ms Moroz tried to map the employer's view of the applicability of the collective agreement so she could respond to inquiries from affected employees the union now represents. There were challenges for her to administer the collective agreement and members to understand the situation. One example was the application of the STIIP and LTD benefit plan for excluded employees to bargaining unit employees. Another was the union's successful, longstanding choice to build bargaining unit solidarity by seeking improvements for all members and not negotiate extensive subsidiary or component agreements.

[40] Ms Moroz describes the impact as "messy." The union says the employer's unilateral transition measures are confusing and, in many instances, inconsistent with the collective agreement. The challenge is greater than in 1978 and 1988 when the Psychologists and Teachers had common terms and conditions under a collective agreement covering the public service bargaining unit they were leaving. Perhaps, as the union submits, this is inevitable because:

> When a non-unionized group enters an existing union it almost inevitably presents challenges; you are taking a group without experience in the union movement, whose work is governed by managers who are not used to applying a collective agreement in their management of members work, and placing them into a unionized setting.[7]

[41] Article 39.05 of the current collective agreement states: "This Agreement may be varied or modified at any time as agreed by the parties in writing." Negotiations for an agreement for the lawyers and articled students began December 18, 2023 and is scheduled to resume April 23. During negotiations, the employer tabled an Information Sheet which outlines the employer's current position on (1) the articles of the collective agreement the employer could apply on the basis their terms are inherently capable of applying; (2) the articles it would not apply; and (3) the articles addressing subjects which the employer will not apply and until the next round of collective bargaining will

[7] Union's Argument, ¶ 157

maintain or bridge the existing terms and conditions from outside the collective agreement applicable to the lawyers and articled students.

[42] The union says the employer's identification of articles inherently capable of application to the newly included lawyers and articled students is flavoured by a choice of what is beneficial for the employer. Many more articles should be included for the time until the next round of collective bargaining in 2025 when the employer can propose that specific articles in the master agreement should not apply to this newly included eighteenth occupational group of licensed professionals.

3. LRB: Existing Agreement Application to Bargaining Unit Expansion

[43] Under the *Labour Relations Code*, the situation of a new group of employees being included in a bargaining unit covered by an existing collective agreement is not uncommon. Trade unions often obtain a Board variation of an existing certification to include a new group of employees during the term of a collective agreement. Sometimes, both the union or employer want this. Sometimes, the union wants a separate bargaining unit and the Board orders a variance.

[44] If the variation is to include dependent contractors with a group of employees covered by a collective agreement who are not dependent contractors, the Board has express responsibilities and powers with respect to the operation of the collective agreement in section 28 of the *Code*.[8]

[45] In other circumstances, the Board has the power to impose conditions and undertakings before or after it makes the bargaining unit variance decision and order.[9]

> **Conditions and undertakings**
>
> **134** (1) If the board makes or may make a designation, decision or order under this Code, it may require, at any time before or after or both before and after the making of the designation, decision or order, that
>
> (a) certain conditions specified by the board be observed or performed, or
>
> (b) the applicant or complainant undertake to act or refrain from acting in a manner specified by the board.
>
> (2) A breach of an undertaking or a refusal or neglect to observe or perform a condition specified by the board under subsection (1) is a contravention of this Code.

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[8] See *West Fraser Mills Ltd. (Re)*, [1994] B.C.L.R.B.D. No. 50

[9] See *North Shore Union Board of Health (Re)*, [1996] B.C.L.R.B.D. No. 326, ¶ 39-52

[46] Often the group of newly included employees have employment circumstances similar to the employees for whom the existing collective agreement was negotiated. The extent of application of the collective agreement to the newly included employees is not contentious between the employer and union and there are few terms to be adjusted or added.

[47] For the licensed professional bargaining unit under the PSLRA, this was the experience in 1978 with the Psychologists for whom there was brief transitionary agreement. The 1988 agreement for the Teachers was more extensive and continues in the current collective agreement.

[48] For situations when an employer and union could not achieve agreement after Board bargaining unit expansion under the *Code*, the Board began in 1976 to develop an adjudicative approach to guide arbitrators deciding a union grievance that an employer is not agreeing to apply all or specific provisions of the collective agreement to the newly included employees.

[49] The Board's initial approach was that the newly included employees were usually not covered by the current collective agreement, but were covered if the agreed "ambit of coverage" under the collective agreement was broad enough to include the newly included employees.

> If the composition of a bargaining unit has been altered, what then are the rights of the newly-included employees. In most instances they will not be covered by the collective agreement. Most collective agreements (such as the Berryland one) defines the ambit of coverage under the agreement in terms identical to the original certificate. Where new additions to a unit are excluded from the ambit of the collective agreement, the union, by virtue of its certification becomes the exclusive bargaining agent (c.f. s. 46(a)). The union may give notice to bargain in respect of those employees and the employer has an obligation under s. 6 of the Code to commence bargaining in good faith.
>
> Where the collective agreement provides coverage for employees 'for whom the union is certified', then the employer must conclude an agreement concerning their terms and conditions of employment and, failing agreement, the matter is arbitrable either under the terms of the agreement or the operation of s. 93(2).[10]

[50] In 1977, a union which represented a certified bargaining unit of warehouse employees for fourteen years applied for a second, separate unit of office and inside sales employees. The Board denied the application because of its policy preference for

[10] *Standard Bus Contracting Ltd.*, [1976] 1 Canadian LRBR 30, pp. 35-36

single units at an industrial enterprise. On its own initiative, the Board added the office and inside sales employees to the existing warehouse employee bargaining unit. The Board denied the employer and employee appeals, but allowed the employer to increase the rates of pay and certain other conditions of employment.

[51] The union sought to have the collective agreement applied and negotiate certain allowances and additions. There were differences over the extent to which the collective agreement applied to the new group of employees. The union grieved to enforce articles on compulsory union dues deduction. The employer said the collective agreement did not apply.

[52] The collective agreement included a provision that the employer recognized the union "as the sole collective bargaining agency of all employees, as set out in the Certificate of Bargaining Authority and shall include temporary or so called casual employees in the unit." The union took the dispute to the Board, which decided the collective agreement applied to the office employees.

> Whether or not the parties were particularly alive to the presence of the office staff at the time of executing the Agreement, they must be taken to possess an awareness of the Board's power to vary a certification pursuant to Section 36 of the Code (or Section 47), and of its powers under Section 37. It was open to the parties to define employees as being those covered by the current Certificate of Bargaining Authority, or to otherwise restrict the scope of the coverage. This they did not do - rather they chose language which, on its face, is wide enough to embrace any employee included by a change in the certification. In the absence of clear and compelling evidence that such was not or could not have been the intent of the parties, we believe that the employees added to the Certificate are covered by the existing Collective Agreement. We also believe that this conclusion is rooted in common sense and is consistent with the Board's earlier decision that the two groups share a sufficient community of interest to be included in one unit.[11]

[53] The Board declined to decide whether a specific collective agreement provision applied to the newly included employees. That was for negotiation and arbitration.

> Even if the employees in question are included in the scope of the existing Collective Agreement, what is the extent of that coverage? Clearly there are blanks in the Collective Agreement vis-a-vis office employees, and these will have to be completed through negotiation. Other parts of the Agreement may also have to be modified or revised in their application to office employees. We are not in a position to judge what amendments to the Agreement the parties should introduce. That is a subject for the bargaining table, and, failing that, arbitration.[12]

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[11] *W.G. McMahon Ltd. (Re)*, [1977] B.C.L.R.B.D. No. 80, ¶ 15
[12] *W.G. McMahon Ltd. (Re)*, [1977] B.C.L.R.B.D. No. 80, ¶ 18

[54] The employer applied for reconsideration. The reconsideration panel identified three issues arising from the Board's policy and actions. The wishes of the smaller group of newly included employees who would prefer their own, smaller, separate bargaining unit are not relevant.

> The issues raised by this appeal can be simply stated but not so simply decided. The first issue is this: Where the Board acts under Sections 34 or 36 of the Code and makes a significant alteration to the composition of a bargaining unit, are the newly included employees covered by any existing collective agreement? The second issue is of equal practical importance: Assuming that the new group is covered by the contract, to what extent is it covered? It often occurs, as it did here, that one or both parties will insist that modifications are necessary to suit the particular circumstances of the freshly injected group. The third issue follows from the second: If disagreements persist, how are they to be resolved and on what criteria?
>
> In order to respond to these questions it is helpful to stand back and consider how and why they arise. A frequent example is found in the circumstances of the instant case. A trade-union applies for certification. Its application is investigated and appears to meet all of the Code's requirements for the issuance of a certificate. The one snag is the fact that the trade union is already certified for another unit of the same employer. In the result, the Board rejects the application for a separate certificate and, instead, varies the pre-existing certificate so as to include within its boundaries the employees in question. As often as not, this action by the Board is contrary to the wishes of the employees who would much prefer to have their own, small unit.[13]

[55] In balancing the policy preference for single, enterprise bargaining units and the effect of leaving newly included employees with access to collective bargaining in a "fractional way",[14] the reconsideration panel's approach was not to presume for or against application of the collective agreement, but to make a reasoned judgment "about the expectations of both parties when any pre-existing collective agreement was initially negotiated" considering four factors.

> That judgement can and should be based on a number of factors and should not be encumbered by any artificial presumption against the sorts of conclusions under appeal. First of all, a fair reading should be given to the bargaining agency provision - sometimes called the recognition or scope clause - of the agreement in question. Does the language on its face give an indication one way or another? Secondly, is there any extrinsic evidence about what went on in negotiations which would cast light on the issue under consideration? Thirdly, what has been the practice of the parties in the past? If they have been faced with this problem before, the way they handled it then is a good indication of how they expected it should be handled in the future. Fourthly, what is the inherent capability of the earlier collective agreement to reasonably define for the time being some or all of the terms and conditions of employment of the newly included group? This, it

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[13] *W.G. McMahon Ltd. (Re)*, [1978] B.C.L.R.B.D. No. 13, ¶ 14-15
[14] *W.G. McMahon Ltd. (Re)*, [1978] B.C.L.R.B.D. No. 13, ¶ 21

> seems to us, is the sensible approach to the problem. It is one which helps to preserve the benefits of the Board's policies about appropriate bargaining units and yet will not unduly distort any collective bargaining relationships.[15]

[56] Applying this approach to the application of the warehouse collective agreement to the office employees, the panel did not reverse the original decision and dismissed the reconsideration application.

> As the original panel observed, the bargaining agency provision of the current collective agreement is broad enough on its face to embrace the newly included office and inside sales staff. As well, one sub-clause of the bargaining agency provision specifically contemplates the possibility of new classifications being created, and further, the possibility of arbitration to determine the wage rates for these positions. That sub-clause may have been negotiated with different or less dramatic circumstances in mind; however, it does illustrate a judgment that the collective agreement should be sufficiently flexible to encompass more kinds of employees than actually existed within the bargaining unit at the precise moment that the agreement was negotiated. Finally, there was no suggestion in any of the submissions that the pre-existing collective agreement is inherently incapable of reasonably defining, for the balance of its term, a great many of the terms and conditions of employment of the newly included group. Given all of the background policies and factors we have articulated, as well as the matters just mentioned, we are not prepared to cancel the original panel's decision that the office and inside sales staff are covered and bound by the present collective agreement.[16]

[57] The panel agreed arbitration under the collective agreement was the forum for determining whether specific provisions of the collective agreement apply to the office employees and "what additions or alterations can or should be made."

> The next question is the extent to which the newly included group is covered by the agreement - i.e., which of the clauses of the agreement apply to them and what additions or alterations can or should be made? That is something which the original panel left to the parties and, failing agreement, to arbitration under the grievance and arbitration procedure of the collective agreement itself. Once again, we can find no basis for interfering with that judgment. The conclusion that arbitration is the means for breaking any impasses is pre-ordained by the conclusion that the employees in question are covered and bound by the collective agreement which now exists.[17]

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[15] *W.G. McMahon Ltd. (Re)*, [1978] B.C.L.R.B.D. No. 13, ¶ 25
[16] *W.G. McMahon Ltd. (Re)*, [1978] B.C.L.R.B.D. No. 13, ¶ 26
[17] *W.G. McMahon Ltd. (Re)*, [1978] B.C.L.R.B.D. No. 13, ¶ 27. This approach was not adopted under the *Canada Labour Code* for British Columbia collective bargaining relationships. See *Premier Cablesystems Ltd. (Re)*, 82 CLLC para. 16,140; 45 di 221, ¶ 29 "Turning now to the question of the applicability of the collective agreement to persons added to an existing unit. In our view this is a matter solely between the parties. The practical realities of the situation dictate that "bargaining" in some form take place as it did in this case. The union and employer tentatively agreed on most provisions and there was little except money issues left. This particular agreement was styled for craft or technical functions rather than administrative. There were obviously provisions that were never contemplated nor suitable to be extended to the newly added employees. Adjustments have to be made and included in an addendum to the agreement. There are certainly some differences related to the application or interpretation of some provisions that would be resolvable through the arbitration mechanisms of the agreement or the Code. But, it is here that we vary

[58] In 1993, a group of pool employees of a recreation club, who were included in a larger bargaining unit of plant and catering employees covered by a collective agreement, voted to strike after the employer would not resolve differences through arbitration. The employer relied on the collective agreement scope clause: "all employees within the plant operations and food and beverage departments except office employees." This was the first factor and had been a central focus of in reasoning whether an existing collective agreement applied since 1977.

[59] The union argued:

> … this is a highly technical approach which ignores the reality that parties primarily negotiate collective agreements for the people covered by the certification at the time of bargaining. In the main, they do not put their minds to future configurations of the bargaining unit and should not be deemed to have done so on the basis of technical wording in, or absent from, the scope clause.
>
> The Union says the Employer's highly technical approach should be rejected because, as in the case here, it undermines the Board's policy objective of industrial stability when it varies existing units rather than certifying separate units. The realization of this policy objective should not hinge on the presence or absence of highly technical language in the scope clause of the agreement, where certain words are deemed to include future employees and other words, or lack thereof, are deemed to exclude them.[18]

[60] Based on recent Board policy on appropriate bargaining unit configuration, the Board was prepared to impute that a variation in a bargaining unit in a Board certification impacted the scope clause in the collective agreement so that the agreement automatically applied to the newly included employees. The Board did not because it found "on the basis of the former Board's policy, set out in *McMahon*" that the pool employees were covered and bound by the collective agreement.[19]

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slightly from the British Columbia Board. Differences arising from items which are not included in the agreement, the most obvious being a wage rate for a given classification, are only resolvable through arbitration if the parties so agree. To say otherwise would be to impose "binding arbitration" in an area in which it is not contemplated by the Code, that is in determination of conditions of employment. In the absence of agreement, resolution of such matters must await the appropriate time for revision of the collective agreement. Existing conditions such as wage rates would have to prevail until that time."

[18] *Arbutus Club (Re),* [1993] B.C.L.R.B.D. No. 444, ¶ 19-20

[19] *Arbutus Club (Re),* [1993] B.C.L.R.B.D. No. 444, ¶ 31; Employer application for reconsideration denied *Arbutus Club (Re),* [1994] B.C.L.R.B.D. No. 3

[61] The Board has not applied a presumptive or automatic coverage approach[20] and arbitrators have not embraced or considered they are compelled to apply automatic coverage in place of a reasoned judgment.[21]

[62] In 1998, the Board was asked to revisit the union's submission in the pool employees' case. It stated:

> We agree with the Union that when a disparate group of employees is varied into an existing bargaining unit, consideration of the parties' intent at the original negotiations is artificial. It is unlikely that a collective agreement would be negotiated with the intent that a disparate group of employees would eventually be covered by it. However the consideration of extrinsic evidence relating to negotiations is only one of the McMahon factors. In assessing whether a collective agreement should apply to [a] varied in group of employees, the four McMahon factors are considered when applying reasoned judgment to the circumstances of the case.
>
> We disagree with the Union that McMahon needs to be updated. It has been applied for many years, both pre and post - IML. Given the number of variances granted by the Board versus the small number of cases where the parties have been unable to resolve terms of employment for varied in employees, the principles in McMahon have served the community well.[22]

[63] In the 25 years since 1998, the 1977 *McMahon* approach and its four factors has persevered.

4. Submission Summary

A. Union Submissions

[64] The union submits the context of the statutory provisions and collective bargaining regime in the PSLRA require the application of its collective agreement, except for profession-specific salary, to all employees in the licensed professional bargaining unit, including the recently added lawyers and articled students.

[65] Under the PSLRA, unless agreed otherwise, the common collective agreement addressing professional responsibility and other issues for licensed professionals

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[20] E.g., *Shuswap Community Health Care Society (Re)*, [1995] B.C.L.R.B.D. No. 13, ¶58-60

[21] See Ainsworth Lumber Co. Ltd., [1994] B.C.C.A.A.A. No. 317 and [1995] B.C.C.A.A. No. 678 (Germaine) where the union and employer agreed to interest arbitration if the collective agreement did not apply. He found there was no expectation or hypothetical intention to have the base rate and job evaluation plan apply to the office employees added to a unit of mill and plant production employees ; *Canadian Forest Products Ltd.*, [1995] B.C.C.A.A.A. No. 397 (Dorsey); *Nanaimo Daily News*, [1997] B.C.C.A.A.A. No. 622 (Dorsey) appeal dismissed *Nanaimo Daily News, a Division of Thomson Canada Ltd. (Re)* [1998] B.C.L.R.B.D. No. 67

[22] *Nanaimo Daily News, a Division of Thomson Canada Ltd. (Re)* [1998] B.C.L.R.B.D. No. 67, ¶ 37-38; See also Ainsworth Lumber Co. Ltd., [1994] B.C.C.A.A.A. No. 317 (Germaine), ¶ 42

applies to the lawyers and articled students and is the baseline for any interim agreement until the next round of collective bargaining. Some differences can and might have to be resolved by arbitration under the terms of the collective agreement, such as Article 32.10.

[66] The union is the exclusive bargaining agent for all employees in the licensed professional bargaining unit. The employer cannot negotiate with bargaining unit employees or unilaterally impose terms and conditions of employment on some or all employees for which the union is the exclusive bargaining agent. In addition to this well recognized foundational principle of collective bargaining law,[23] the employer's unilateral actions contravene Article 2.02:

> **2.02 Bargaining Agent Recognition/No Other Agreement**
>
> (a) Bargaining Agent Recognition
>
> The Employer recognizes the Union as the exclusive bargaining agent for all employees for whom the Union has been certified as bargaining agent.
>
> (b) No Other Agreement
>
> No agreement with any individual employee or other organization shall supersede or contravene the terms of this Agreement, and, no employee covered by this Agreement shall be required or permitted to make a written or oral agreement with the Employer or its representatives which may conflict with the terms of this Agreement

[67] The effect of the foundational principles and Article 2.0 is that the employer cannot unilaterally decide the terms and conditions of employment for employees in the newly included occupational group of licensed professionals. The union and employer must jointly decide. If they disagree, they have recourse to grievance-arbitration. For this to happen, the existing collective agreement must apply to these employees.

[68] If the collective agreement does not apply to the lawyers and articled students, they are left without bargaining agent representation. The union cannot exercise its responsibilities as the "exclusive" bargaining agent. The employees are in a nether world with no meaningful process for enforcement of their rights or access to an independent tribunal for dispute resolution either outside or under the collective agreement, PSLRA and *Code*. The employer can continue to act unilaterally, which is the antithesis of granting the employees collective bargaining rights under the PSLRA.

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[23] See *Syndicat Catholique des Employés de Magasins de Québec Inc. v. Cie Paquet*, [1959] S.C.R. 206; *Ainscough v. McGavin Toastmaster Ltd.*, [1976] 1 S.C.R. 718; *Westar Timber Ltd. (Re)*,[1986] B.C.L.R.B.D. No. 58, ¶ 48; 51; *Bell Canada (Re)*, [2003] C.I.R.B.D. No 1, ¶ 120

[69] This is not the circumstance of a Board variance of a certified bargaining union under the *Code* for an exclusive bargaining agent which a new group of employees choose to be their bargaining agent. This is a legislated inclusion in a legislatively designated bargaining unit without any accompanying conditions or limitations to the application of the existing collective agreement. It is achieved by a change in the statutory definition of "employee" without any need for the change in any definition in Appendix A or other provision in the collective agreement. Therefore, the collective agreement applies to all, including newly added, employees in the bargaining unit.

[70] Alternatively, the union submits the collective agreement applies under either the four-factor reasoned judgment approach or automatic coverage approach the Board has taken under the *Code* to determine whether an existing collective agreement applies to employees newly included in a bargaining unit when the Board varies the scope of the unit.

[71] Applying the four-factor reasoned judgment approach, the scope clause in the collective agreement clearly and unambiguously expresses a mutual intention that future employees included in the bargaining unit are to be covered by the collective agreement. There is no misalignment between the scope of the designated bargaining unit and the provisions of the collective agreement as there can be when the Board expands the scope of a certified bargaining unit during the term of an existing collective agreement.

[72] Both the union's certification order and Article 2.01 are broad and aligned with the scope of the legislatively designated bargaining unit. Either the legislative definition of "employee" or the absence of licensing requirements excludes public service employees. The exclusion is not because of any employer and union agreement in the collective agreement. When the basis for either statutory exclusion changes, new professional occupational groups are covered by the collective agreement.

> … the scope clause of the Collective Agreement is clear and unambiguous that the Parties intended for future employees who are included in the GLP bargaining unit (presumably due to legislative or other changes outside of the PEA's control) to be covered by the Collective Agreement.[24]

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[24] Union's Argument, ¶ 103

[73] The employer's repeated public statements about Bill 5 reflect the flexibility in both the PSLRA and the collective agreement to encompass new occupational groups of licensed professional employees in the bargaining unit. With no employer explanation of the authorship or intention of their public statements, they must be read plainly for the employer's intention with respect to the application of the collective agreement. For example, "once Bill 5 comes into force, the PEA collective agreement will apply to the government lawyers."

[74] This is not a circumstance where the negotiation of a collective agreement was structured for a typographical craft group of employees with no indication other occupations would be covered before the Board added editorial employees into the bargaining unit.[25] On a "fair reading" the "bargaining agency provision" in the collective agreement for the licensed professional bargaining unit is not neutral. It indicates and contemplates coverage of newly included groups of licensed professionals.

[75] The extrinsic evidence of negotiations from Mr. Holter on the recognition and bargaining unit scope clause in the first two master agreements is that the both were tied to the "employee" definition and bargaining unit designations in the PSLRA.

[76] With the PSLRA legislative regime and its designated bargaining unit, why would the union and employer negotiate what is in the control of the legislature? This is a relevant question in the application of the first factor to a change in those included in a bargaining unit under the PSLRA. What fairer reading could be given to the "bargaining agent provision" than it is what the PSLRA says from time to time?

[77] In the two past instances of new groups of licensed professional employees being added to the bargaining unit, the evidence is clear the parties' approach was that the collective agreement applied and a limited number of provisions were quickly negotiated to bridge the time to the next round of full collective bargaining. This pattern can continue with lawyers and articled students.

[78] On the fourth factor, the union notes that:

> In *McMahon*, the Board found that the bargaining agency provision of the collective agreement was broad enough to include the newly included members, and also that a sub-clause of the bargaining agency provision contemplated the possibility

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[25] See *Nanaimo Daily News*, [1997] B.C.C.A.A.A. No. 622 (Dorsey) appeal dismissed *Nanaimo Daily News, a Division of Thomson Canada Ltd. (Re)* [1998] B.C.L.R.B.D. No. 67

> of new classifications and how to determine wage rates for those positions. It was also found that there was no suggestion in submissions that "the pre-existing collective agreement is inherently incapable of reasonably defining, for the balance of its term, a great many of the terms and conditions of employment of the newly included group." As such, the Board did not overturn the original panel's finding that the office and inside sales staff were covered and bound by the present collective agreement.[26]

[79] The union submits the existing collective agreement can "reasonably define for the time being some or all of the terms and conditions of employment of the newly-included group." There are no meaningful barriers to its application. The employer's "voluntary" application of many provisions based on its limited view of inherent capability is evidence the collective agreement can apply "for the time being." This is because the work of the lawyers and articled students fits comfortably with other licensed professionals, who share more in common than any differences they have.

[80] At its root, the true difference between the union and employer is not about the general application of the collective agreement until the next round of collective bargaining, but the application of some specific provisions.

[81] The union submits that the Board's automatic application approach in the context of the PSLRA is a presumption for application fostering predictability and industrial stability giving an arbitrator all the jurisdiction required to resolve differences which emerge. This presumption fosters moving to the second phase of dispute resolution – having the union and employer determine the applicability of specific provisions of the collective agreement to the lawyers and articled students and enabling either the union or employer to invoke arbitration on a specific provision. This will not "unduly distort" their collective bargaining relationship.

[82] The union seeks to have the collective agreement apply in order to help the parties, who have worked tirelessly to navigate the challenges presented by Bill 5, "to get to the next step."[27] The union seeks:

1) A declaration that the Collective Agreement and all of its terms and conditions apply to the Government Lawyers;
2) A declaration that the Collective Agreement and all of its terms and conditions applied to the Government Lawyers as of July 14, 2023;
3) An order that the Employer apply the terms and conditions of the Collective Agreement to the Government Lawyers;

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[26] Union's Argument, ¶ 85
[27] Union's Argument, ¶ 160

4) An order that any harms or losses resulting from the delayed application of the Collective Agreement be remedied and that members be made whole; and
5) Any other orders or declarations that the arbitrator deems just.

The PEA is open to a request from the Employer that, if the above remedies are awarded, the requested remedies be suspended for a period of time to allow the Parties to negotiate.

B. Employer Submissions

[83] The employer submits the Legislative Assembly's addition of a new group of employees in a designated bargaining unit in the PSLRA to which the *Code* applies is identical to the Board expanding the scope of a certified bargaining unit. Although the issue for the Board arises when it acts under the *Code* and "makes a significant alteration to the composition of a bargaining unit,"[28] the same principles comfortably fit and apply in both situations.

> … it is not logical to apply different principles for the application of an existing collective agreement to a newly included group of employees under the *PSLRA* from those principles applicable to employees included in an existing unit by way of variance under the *Code*. There is no inconsistency between the *Code* and the *PSLRA* in this regard. The principles applied under the *Code* to the issue of whether an existing collective agreement applies to a newly included group of employees apply with equal vigor to employees included in a unit under the *PSLRA*. It would be inconsistent with the principles of the *Code* and, in particular, section 2(e) of the *Code,* for different principles to apply to newly included groups of employees under the *PSLRA*.[29]

[84] Section 2(e) states that persons must exercise powers and perform duties under the *Code* in a manner that "promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes."

[85] Application of the settled law in the *McMahon* approach and four factors determines the employer is not legally bound to apply the collective agreement to the lawyers and articled students newly included in the licensed professional bargaining unit on July 14, 2023, which is when the union became their bargaining agent. None of the collective agreement's provisions apply unless the employer agrees otherwise.

[86] This body of law exists because an existing collective agreement does not automatically apply to groups of employees newly included in an existing bargaining unit of employees for whom the collective agreement was negotiated.

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[28] *W.G. McMahon Ltd. (Re)*, [1978] B.C.L.R.B.D. No. 13, ¶ 14
[29] Outline of Argument, ¶ 17

[87] The starting point is that when the renewal of the current collective agreement for employees in the licensed professional bargaining unit was concluded on October 28, 2022, the union was not the bargaining agent for lawyers and articled students who were excluded from collective bargaining. When the existing collective agreement was entered into after ratification there was no mutual intention that it applied to the lawyers and articled students. Before July 14, 2023, under Article 1.2 of the union's bylaws, the lawyers and articled students could not be union members: "Membership will not be open to persons excluded from collective bargaining." There can be no intention the collective agreement will apply to persons not entitled to engage in collective bargaining.

[88] The employer submits the language of Article 2.02(a) – "has been certified" – is in the present perfect tense with no intended future implications. The union was not certified for persons excluded from collective bargaining.

[89] The lawyers and articled students were not part of the "bargaining unit." The union was not their "bargaining agent." It could not have been "bargaining collectively" for them for a "collective agreement." All of the applicable definitions in the PSLRA, the best indicator of legislative intention, is also the best indicator of the parties' intentions when negotiating the collective agreement. It could not apply to the lawyers and articled students in 2022 and there could not have been a mutual expectation that it did.

[90] There is no extrinsic evidence about negotiations which "would cast light" on the parties' expectations.

[91] The older past practice involving Psychologists and Teachers is that the parties met and bargained on the application of the existing collective agreement. It was not automatically applied without change to the newly included group of licensed professionals.

> In each instance, the terms and conditions of the newly included employees arose out of a negotiation between the Employer and the PEA pursuant to which the employer agreed to the application of provisions of the PEA agreement to the newly included group of professional groups, including agreed upon amendments to their existing terms and conditions of employment. There are no instances where the existing PEA collective agreement was simply applied, without change,

> to a newly included group of professionals. In each instance, the parties met to bargain a bridging agreement to the next round of collective bargaining.[30]

[92] The circumstances of the newly included lawyers and articled students, who did not previously have collective bargaining rights or a collective agreement, is distinct and more complex than the transition of a group from one bargaining unit and collective agreement to another. There is a need for some negotiation from the status quo, perhaps like with the Teachers, but not from the automatic application of the collective agreement. The employer will maintain many existing terms and conditions for the lawyers and articled students, which is not prohibited unilateral employer action.

[93] On the fourth factor, the employer submits:

> As we have outlined above, and with particular regard to the language of the scope clause; and existing statutory matrix, the proper application of the legal principles arising from the *PSLRA* extant at the time the agreement was negotiated, cannot be ignored to the extent they could be said would give any party a signal that the other party's intentions were to have the collective agreement apply to a group of employees who were not members of the bargaining unit at the time it was negotiated. In addition, the agreement was not "inherently capable" of applying to persons excluded from collective bargaining.[31]

[94] Therefore, the current collective agreement does not apply to the newly included group of lawyers and articled students.

[95] The employer submits if there is an order for any compensation to bargaining unit members, as requested by the union, there must be an accounting of the continued payment of wages and benefits in excess of collective agreement entitlements.

5. Discussions, Analysis and Decision

[96] The PSLRA enshrines a structure of public sector collective bargaining and prescribes the scope of three bargaining units. The Board has no authority to vary the scope of these units.

[97] While inviting, it is not necessary to examine whether the Board's *McMahon* approach to dealing with consequences of its reconfiguration of a certified bargaining unit under the *Code*, which it cannot do under the PSLRA, is distinguishable from the approach to be taken when the Legislative Assembly changes the definition of "employee" in the PSLRA or licensing requirements change so that a new group of

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[30] Outline of Argument, ¶ 14
[31] Outline of Argument, ¶ 32

professional employees is included in the designated licensed professional bargaining unit during the term of a collective agreement.

[98] The threshold issue whether the collective agreement applies to the newly included licensed professional group of lawyers and articled students can be resolved within the *McMahon* approach and reasoned analysis of its four factors.

[99] Whether a newly included occupational group of employees were not "employees" before inclusion, were in another PSLRA designated bargaining unit or were covered by another collective agreement before inclusion will impact the complexity of the transition, but is not material to the application of the Board's *McMahon* approach and factors.

[100] The reconsideration panel in *McMahon* addressed the position the employer takes here and found it overreaches.

> That is a partial statement of the legal and policy background against which the issues in this case should be decided. It is fair to say that it argues in favour of the kinds of conclusions reached by the original panel. Any other conclusions could well encourage the development of collective bargaining differences which might be insoluble through legal means. Indeed, the position of the Employer in this case illustrates why that is a very real possibility. It is important to recall that the Employer has not attacked the Board's general preference for employer-wide units -- i.e., its preference for variances to pre-existing certificates instead of grants of separate certificates. Rather, counsel for the Employer submits that when a variance is granted, there is no collective bargaining relationship vis-a-vis the newly included employees until and unless the parties have sat down, negotiated, and reached an agreement. While that position appears on the surface to be consistent with the Code's object of free collective bargaining, in many cases it would really mean this: The employees in question, having met all of the Code's conditions, would be allowed to enter the collective bargaining regime but only in a fractional way. They would be entitled to the benefit of the "bargaining in good faith" provisions of the Code. However, unless they could muster the support of persons having no stake in the outcome of their bargaining difference, they would be denied the use of those provisions which permit the imposition of economic sanctions. Moreover, they could not get the matter determined by arbitration: if they are not covered by a collective agreement, any dispute they may have with their employer would not be arbitrable. (underlining added)
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> Undoubtedly, as counsel for the Employer has observed, the conclusions of the original panel did deviate to some extent from the normal collective bargaining pattern. But the true source of that divergence is the more fundamental principle of the Code that bargaining units must be structured in such a way as to be appropriate for collective bargaining purposes. It was because of that principle that the application for a separate certificate was denied. It can also be said that any interference with the usual bargaining process will be of relatively short duration – i.e., for only a part of a contract term.

> Perhaps the most serious "industrial relations" consideration raised by counsel for the Employer was expressed in these terms:
>
>> Whether or not the Collective Agreement's "scope" clause deals with the "current" certificate of bargaining authority or not is irrelevant as the parties are dealing only with the bargaining certificate as it then exists. Only with the clearest, most explicit language should a bargaining certificate change be automatically deemed to be part of an existing collective agreement. Otherwise, the uncertainty, as in any similar contractual situation, would be so great as to render the agreement unworkable."
>
> That submission has an initial attraction. However, in our view, it is stated far too generally. The fact of the matter is that employers, when engaged in collective bargaining, often have an eye on persons outside the unit description on the trade-union's certificate. That could be for a number of reasons. First of all, when an employer agrees to alter terms of employment of its unionized employees (e.g., plant employees), it will frequently be compelled in a practical sense to make similar alterations to the terms of employment of its non-unionized employees (e.g., office employees). Secondly, many employers have some branches which are unionized and some which are not. It is quite artificial to say that in every case such employers will be concerned "only with the bargaining certificate as it then exists" when they are engaged in collective bargaining with respect to the unionized branches. There is every likelihood that that collective bargaining will have a ripple effect on management decisions about the non-unionized branches; and employers are aware of this fact from the beginning. Other examples could be given but those should suffice. Really, then, it is far too broad to say that the conclusions arrived at by the original panel will inevitably confuse the collective bargaining process.
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> All of this suggests that a rejection of the "presumed awareness" theory – which is the part of the original panel's reasons for decision which is most strenuously attacked – does not necessarily mean that the decision under appeal should be reversed. What the Board must do in cases such as this one is make a reasoned judgement about the expectations of both parties when any pre-existing collective agreement was initially negotiated.[32]

[101] The "presumed awareness" the panel was referring to was the Board's power to vary bargaining units in existing union certifications of exclusive bargaining authority. The original panel wrote:

> On its face, the Collective Agreement does extend to cover the office employees, for it refers to an employee as someone covered by the Certificate of Bargaining Authority (through the operation of Clauses 1(a) and (b)).
>
> However, Counsel for the Employer says that the Collective Agreement can apply to the office employees only if that was contemplated by the parties at the time of entering into the Collective Agreement and there is evidence to support this. He submits that to otherwise include persons under the Agreement could have the anomalous result of causing the procedure designed for grievance arbitration to be used for interest arbitration.
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> We cannot agree with either proposition. Whether or not the parties were particularly alive to the presence of the office staff at the time of executing the Agreement, they must be taken to possess an awareness of the Board's power to

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[32] *W.G. McMahon Ltd. (Re)*, [1978] B.C.L.R.B.D. No. 13, ¶ 21-25

> vary a certification pursuant to Section 36 of the Code (or Section 47), and of its powers under Section 37. It was open to the parties to define employees as being those covered by the current Certificate of Bargaining Authority, or to otherwise restrict the scope of the coverage. This they did not do – rather they chose language which, on its face, is wide enough to embrace any employee included by a change in the certification. In the absence of clear and compelling evidence that such was not or could not have been the intent of the parties, we believe that the employees added to the Certificate are covered by the existing Collective Agreement. We also believe that this conclusion is rooted in common sense and is consistent with the Board's earlier decision that the two groups share a sufficient community of interest to be included in one unit.[33]

[102] The reconsideration panel did not adopt an assumption that the existing collective agreement applied to the newly included employees or make a presumption about the union and employer's intention in negotiating the bargaining agency provision in the existing collective agreement. However, its analysis exhibits a clear policy preference that the existing agreement apply and a predisposition to an outcome that provides an avenue for resolution of differences by legal means.

> We return to a consideration of the case at hand. As the original panel observed, the bargaining agency provision of the current collective agreement is broad enough on its face to embrace the newly included office and inside sales staff. As well, one sub-clause of the bargaining agency provision specifically contemplates the possibility of new classifications being created, and further, the possibility of arbitration to determine the wage rates for these positions. That sub-clause may have been negotiated with different or less dramatic circumstances in mind; however, it does illustrate a judgment that the collective agreement should be sufficiently flexible to encompass more kinds of employees than actually existed within the bargaining unit at the precise moment that the agreement was negotiated. Finally, there was no suggestion in any of the submissions that the pre-existing collective agreement is inherently incapable of reasonably defining, for the balance of its term, a great many of the terms and conditions of employment of the newly included group. Given all of the background policies and factors we have articulated, as well as the matters just mentioned, we are not prepared to cancel the original panel's decision that the office and inside sales staff are covered and bound by the present collective agreement.[34]

[103] In the end, a renewed collective agreement negotiated for warehouse employees was decided to apply to newly included office and inside sales bargaining unit employees because the language of the bargaining agency provision was: "The Employer recognizes the Union as the sole collective bargaining agency of all employees, as set out in the Certificate of Bargaining Authority and shall include temporary or so called casual employees in the unit."[35]

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[33] *W.G. McMahon Ltd. (Re)*, [1977] B.C.L.R.B.D. No. 80, ¶ 13-15
[34] *W.G. McMahon Ltd. (Re)*, [1978] B.C.L.R.B.D. No. 13, ¶ 26
[35] *W.G. McMahon Ltd. (Re)*, [1977] B.C.L.R.B.D. No. 80, ¶ 11

[104] There was no extrinsic evidence "about what went on in negotiations which would cast light on the issue under consideration." There was no past practice of any new group of employees being included in the bargaining unit. There was "no suggestion" the collective agreement was "inherently incapable of reasonably defining, for the balance of its term, a great many of the terms and conditions of employment of the newly included group."

[105] The conclusion was the collective agreement applied despite the newly included employees could and sometimes are appropriately placed in separate plant and office bargaining units because of distinct communities of interest.[36]

[106] The language of the bargaining agency provision was given a fair reading to identify any indication of the parties' "expectations" of the ongoing, future application of the collective agreement to employees newly included in the bargaining unit. It was not read as limited to employer recognition of union bargaining agency.[37]

[107] The Board reached the same conclusion fifteen years later when swimming pool employees were newly included in a bargaining unit of "employees within the plant operations, catering and beverage facilities."[38]

[108] The judgments at arbitration have varied. Arbitrator Germaine dismissed a grievance deciding an existing collective agreement negotiated for employees in a mill and plant did not apply to a newly included Payroll Clerk, Shipping and Receiving Clerk and Receptionist when the collective agreement bargaining agency provision incorporated the terms of the union's certification – "The Company recognizes the Union

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[36] The *Code* s. 1(1) definition of "unit" "means an employee or a group of employees, and the expression "appropriate for collective bargaining" or "appropriate bargaining unit", with reference to a unit, means a unit determined by the board to be appropriate for collective bargaining, whether it is an employer unit, craft unit, technical unit, plant unit or another unit, and whether or not the employees in it are employed by one or more employers."

[37] For comparison see the approach in *Ainsworth Lumber Co. Ltd.*, [1994] B.C.C.A.A.A. No. 317 (Germaine), ¶ 45: "The language of the clause undoubtedly does reflect an intention to accommodate revisions to the Union's bargaining authority. So, whatever its obligations may be under the Labour Relations Code, the Company is also obliged by the collective agreement to recognize the Union as the bargaining agent for the office employees. But that is not the same thing as an intention to extend the collective agreement to the newly-included employees, and the language of the clause does not provide any basis for concluding that the parties were expressing such an intention."

[38] *Arbutus Club (Re),* [1993] B.C.L.R.B.D. No. 444; Employer application for reconsideration denied *Arbutus Club (Re),* [1994] B.C.L.R.B.D. No. 3

as the sole collective bargaining agency of the Employees of the Company as set out in the Certificate of Bargaining Authority."[39]

[109] I dismissed a grievance that a collective agreement applied to newly included office employees when the collective agreement's bargaining agency provision was for all employees except "office employees" and others.[40] I dismissed another grievance when editorial employees were added to a craft bargaining unit of typographical employees.[41]

[110] Arbitrator Kelleher decided a collective agreement negotiated for paramedic employees applied to clerical and other employees newly included in the bargaining unit. He characterized the task as determining "… in a hypothetical or constructive way what the parties would have agreed to if the clerical and support employees had been the subject of collective bargaining in 1992."[42]

[111] In this collective agreement for the licensed professional bargaining unit, the bargaining agency recognition provisions in Articles 2.01, 2.02 and 7.01 and the definitions are encompassing of all employees in any licensed professional occupation who could not be included in another bargaining unit under the PSLRA. The agreement expressly recognizes the possibility of future legislative change in Articles 1.02 and 1.03, which includes the "employee" composition of the licensed professional bargaining unit. The negotiators clearly had an eye on persons outside the bargaining unit at the time the agreement was negotiated.

[112] The extrinsic evidence is that originally the bargaining agency language was negotiated to reflect the legislated bargaining unit scope. In the face of an imminent exclusion of Physicians from the definition of "employee", the union and employer wrote the collective agreement to reflect this. Similarly, with express knowledge of the imminent inclusion of an excluded group, that eventuality would have been addressed in collective bargaining.

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[39] *Ainsworth Lumber Co. Ltd.*, [1994] B.C.C.A.A.A. No. 317 and [1995] B.C.C.A.A. No. 678 (Germaine)
[40] *Canadian Forest Products Ltd.*, [1995] B.C.C.A.A.A. No. 397 (Dorsey)
[41] *Nanaimo Daily News*, [1997] B.C.C.A.A.A. No. 622 (Dorsey) appeal dismissed *Nanaimo Daily News, a Division of Thomson Canada Ltd. (Re)* [1998] B.C.L.R.B.D. No. 67
[42] North Shore Union Board of Health, [1995] B.C.C.A.A.A. No. 181 (Kelleher),¶ 44 appeal dismissed *North Shore Union Board of Health (Re)*, [1996] B.C.L.R.B.D. No. 326

[113] The past practice evidence is primarily about negotiated outcomes not shared expectations, intentions or understandings on the application of the existing collective agreement. It is that for occupational groups of licensed professional employees newly included in the bargaining unit because of changes in licensing requirements, the collective agreement was applied for a "great many" of the terms and conditions of their employment for the balance of the term of the agreement.

[114] This was possible in 1978 and 1988 because the terms of the master agreement were negotiated for a diverse group of licensed professionals in a broad range of working environments and circumstances serving diverse communities. The current collective agreement is the product of negotiations over 50 years and applicable to seventeen licensed professional occupational groups.

[115] I find the current collective agreement is inherently capable of application to the eighteenth occupational group of lawyers and articled students.

[116] I declare the current collective agreement applies and has applied to the lawyers and articled students since their inclusion in the designated licensed professional bargaining unit as of July 14, 2023.

[117] The manner of the application of each of the provisions of the collective agreement is for resolution by the union and employer and, if necessary, arbitration of specific differences. Any specific harms or losses for the union, employer or individual employees can be identified, addressed and resolved by the union and employer or at arbitration.

MARCH 8, 2024, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

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