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: Article 32.10 – Employer Preliminary Jurisdictional Objection)

Arbitrator:	James E. Dorsey, K.C.
Representing the Union:	Jodie Gauthier and Henry Goddard-Rebstein
Representing the Employer:	Gradin D. Tyler
Case Management Conference:	June 21, 2024
Written Submissions:	July 31; August 16 and 26, 2024
Decision:	August 30, 2024

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1. Grievance, Jurisdiction Objection and Hearing Process

[1] Can rates of pay for classifications of newly included government civil lawyers and articled students be arbitrated under Article 32.10 of the collective agreement?

> **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.

[2] The union grieved on July 21, 2023 that the employer had introduced a new classification in the collective agreement. The grievance letter states, in part:

> It is clear from our perspective that the lawyers are a new classification in the GLP [Government Licensed Professionals] Collective Agreement as there is no reference to lawyers' classification or compensation in the Agreement. The lawyers' rates of pay are significantly different than compensation grids in Addendum A of the Agreement. Addendum A also sets out assignments of classifications to salary grid for various PEA professions, but not for lawyers. …
>
> The parties attempted without agreement to negotiate terms and conditions for the lawyers, including classification level and salaries, during four weeks in June and July this year. We take the position that this should satisfy the requirements of Article 32.10 for the parties to attempt to negotiate rates of pay. Furthermore, the Employer has now unilaterally implemented a salary for this new classification. The PEA asserts that the matter may now be referred to a mutually agreed arbitrator for decision with respect to rate of pay/salary.

[3] The employer responded, in part, on August 11:

> 1. Article 32.10 does not apply to the newly included employees. While many provisions of the PEA collective agreement are inherently capable of applying to the newly included group, Article 32.10 is not such a provision. We are of the view that a grievance arbitrator has no authority to apply article 32.10 to the newly included group.
> 2. In the event an arbitrator was to rule they had authority to consider the application of Article 32.10, the provision, properly interpreted, does not apply to the newly included group. The current wage rates enjoyed by the newly included group are but one part of an integrated overall compensation package. In the event the arbitrator were to set the wage portion of that

> integrated package aside, the other elements of the overall compensation package, which we are currently honoring, will be terminated.

The union referred the dispute to arbitration on August 17.

[4] A separate dispute over the application of the collective agreement was decided March 8, 2024 with a finding "the current collective agreement is inherently capable of application to the eighteenth occupational group of lawyers and articled students" and a declaration "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."

> 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.[1]

[5] The employer says Article 32.10 is not applicable in this circumstance. Therefore, the grievance is inarbitrable and must be dismissed on a preliminary basis.

[6] The union and employer agree I am properly appointed with jurisdiction under their collective agreement and the *Labour Relations Code* to decide their difference over the application of Article 32.10 and, if applicable, make a final and binding decision on the merits of the grievance. A hearing is scheduled for November 20 and 21.

[7] The employer's preliminary objection is being heard on the basis of written submissions. There is no evidence of negotiating history or past practice. The task is to determine the mutual intention of the union and employer in Article 32.10 applying rules of interpretation for collective agreement language.[2]

2. Lawyers Legislated Inclusion in Licensed Professional Unit (2023)

[8] The union is certified to represent the "licensed professional bargaining unit" designated in the *Public Services Labour Relations Act* (PSLRA):

> 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 those persons described in paragraph (a).[3]

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[1] *British Columbia (Public Service Agency) (Applicability of Collective Agreement Grievance)*, [2024] B.C.C.A.A.A. No. 34 (Dorsey), ¶ 115-117
[2] See the commonly accepted rules in *Pacific Press*, [1995] B.C.C.A.A.A. No. 637 (Bird), ¶ 27-28
[3] R.S.B.C. 1996, c. 388, s.4

[9] From 1973 to 2023, the definition of "employee" in the PSLRA excluded lawyers and articled students licensed and enrolled under the *Legal Professions Act*.[4] Lawyers designated as Crown Counsel are in a separate bargaining unit represented by the British Columbia Crown Counsel Association.[5]

[10] The excluded government lawyers formed a voluntary association in 1992 to represent them in discussions with the employer about terms and conditions of employment. In 2015, the BC Public Service Agency (BCPSA or PSA) expressed willingness to engage in a meaningful collective bargaining process with a dispute resolution process, but not with the lawyers in a stand-alone bargaining unit – perhaps by inclusion in the Crown Counsel or licensed professional bargaining unit. All options required legislation.

[11] In early 2018, the BCPSA told the BC Government Lawyers Association (BCGLA or GLA) the lawyers and articled students would be given full collective bargaining rights by including them in the licensed professional unit represented by the union. The BCGLA responded its members wanted to be in a bargaining unit represented by the BCGLA. The employer was undeterred from its decision.

[12] On June 4, 2020, Treasury Board established a Crown Counsel classification series separate from a Legal Counsel classification series. It contemplated Legal Counsel being represented by a designated bargaining agent. The order states, in part:

> As of April 1, 2019, Treasury Board approves the Legal Counsel Classification Series established by Treasury Board Order no. 258 being divided in two:
>
> 1) Crown Counsel covered by Treasury Board Order no. 329 shall be covered by the Crown Counsel Classification Series and are no longer part of the Legal Counsel Classification Series; and
> 2) Legal Counsel who are not Crown Counsel shall be covered by the Legal Counsel Classification Series.
>
> As of April 1, 2019, Treasury Board Order no. 258 applies to the Crown Counsel Classification Series. As a result of the 2019 Hall Arbitration Award, Treasury Board Order no. 329 continues to apply to the Crown Counsel Classification Series.
>
> As of April 1, 2019, Treasury Board Order no. 329 does not apply to the Legal Counsel Classification Series. …
>
> All other terms and conditions for Legal Counsel employees covered by the Legal Counsel Classification Series that were previously linked to the Agreement between the BC Crown Counsel Association and the government in accordance

[4] S.B.C. 1998, c. 9
[5] *Crown Counsel Act*, R.S.B.C. 1996, c. 87

> with s. 4.1(2) of the Crown Counsel Act (the "Agreement") shall continue as per the specific terms and conditions that were [in] effect on March 31, 2019.
>
> Except as modified by this order, or as negotiated between the employer and any designated bargaining agent for Legal Counsel, there shall be no other changes applied to the terms and conditions specified above during the April 1, 2019 to March 31, 2022 period. [6]

[13] The BCGLA was determined in its aspirations. On November 29, 2022, it applied for certification under the *Labour Relations Code* to represent lawyers employed by the Government of BC to provide legal services in relation to civil matters.

[14] On February 9, 2023, the Minister of Finance introduced *Bill 5-2023 PSLRA Amendment Act, 2023*, which received Royal Assent May 11, 2023 and was brought into force on July 14.[7] On February 9, the Assistant Deputy Minister, Employee Relations wrote the union Executive Director to inform of the introduction of the bill. She wrote, in part:

> This legislation will not require all government lawyers to be in a bargaining unit. Two groups of lawyers, those in the Office of the Legislative Counsel and those who give legal advice to a Justice or Judge of a Court of British Columbia, will remain statutorily excluded from belonging to a bargaining unit. This legislation will include government lawyers in organizations such as the Legal Services Branch, the Justice Services Branch, and the Public Guardian and Trustee.
>
> Further, these amendments will have no impact on Crown Counsel lawyers as those lawyers are already represented by the BC Crown Counsel Association pursuant to the *Crown Counsel Act* RSBC 1996, c.87.
>
> If this legislation passes, it is the Employer's operating assumption that unless we hear contrary, that under PSLRA Section 4 – Bargaining Units, this group of public service employees would fall under the licensed professional bargaining unit as represented by the Professional Employees Association. At such time, we are prepared to arrange to meet with you to discuss the process of implementation.

[15] In addition to the government lawyers excluded in Bill 5, others are excluded under s. 11 of the PSLRA.

> (1) A collective agreement concluded under section 8 or 9 may exclude from its application certain employees or classes of employees.
>
> (2) Employees or classes of employees to be excluded from the collective agreement may be determined by negotiation between the parties, but if the parties are unable to agree, either party may refer the matter to the board for a final and binding decision.
>
> (3) In making its decision under subsection (2), the board must exclude those employees or classes of employees who are employed
>
> (a) to exercise the functions, and do exercise the functions, of a manager or superintendent in the direction or control of employees,

[6] BC Treasury Board Order No. 2020 - 0603
[7] S.B.C. 2023, c. 27

(b) in a confidential planning or advisory position in the development of management policy for the government, or

(c) in a confidential capacity in matters relating to labour relations or personnel.

[16] On June 7, the employer issued an *Updated Frequently Asked Questions About Bill 5*, which includes:

> *3. New*: When will Bill 5 come into force and what impact will that have for government lawyers' terms and conditions of employment?
>
> It is up to Cabinet to decide when Bill 5 will come into force. However, in the interim, the Employer is prepared to have discussions with the PEA and GLA about what immediate changes would take place on the effective date of Bill 5.
>
> The Employer's intention is to maintain existing legal counsel terms and conditions of employment, including salaries and extended health benefits, during the immediate transition period. If the PEA and GLA agree, this means no change to salaries and benefits coverage will happen on the day Bill 5 comes into force and until the parties negotiate a more formal transition plan for incorporating legal counsel terms and conditions into the PEA collective agreement where appropriate. Ideally, if the PEA and GLA are willing, the goal would be to reach an interim agreement before Bill 5 comes into force. However, the Employer is committed to maintaining existing legal counsel terms and conditions of employment even if a memorandum of agreement is not reached right away and will work with the PEA and GLA to ensure that is the case.
>
> To be clear, it is the Employer's intention to maintain legal counsel salaries in all transition negotiations with the PEA.
>
> The Employer also recognizes that there are certain union rights, such as protection from without cause termination, that should be extended to legal counsel once Bill 5 comes into force. If the PEA agrees, we are prepared to also include such matters in the memorandum of agreement so that legal counsel have certainty over their rights and terms and conditions of employment during the transition period.

[17] The union and employer had been negotiating a transition agreement for coverage of the newly included group under the various provisions of the collective agreement whose term expires March 31, 2025.

[18] After the legislation came into force, the employer unilaterally adopted transition measures communicated in a *Fact Sheet on Transition Measures* dated July 14. It states, in part:

> Bill 5 took effect on July 14, further to the regulation recently approved by the Lieutenant Governor In Council. 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 maintaining 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.
>
> *********
>
> Transition Measures: …
>
> 3. Until compensation for the newly included employees in the bargaining unit is incorporated into the PEA collective agreement as negotiated by the Union and the Employer the following transition terms shall apply: …
>
> a. Wages: Employees who are Legal Counsel will continue to receive wages paid according to their existing Legal Counsel Classification series salary grids. Salary assignment for legal counsel according to Terms and Conditions for Excluded Employees Part 04 Clause 16.4 Salary assignment: legal counsel. Movement through LC1 to LC3 classifications according to the Employer's Policy Legal Counsel Job Evaluation Plan. …
>
> 4. The general wage increases for the Employees covered by the existing Legal Counsel Classification series will be the same as the general wage increases applicable to the PEA bargaining unit effective April 07, 2024.
>
> 5. The general wage increases for included Articling Students covered by Treasury Board Order No. 2022-0401-01 will also be the same as the general wage increase applicable to the PEA bargaining unit effective April 07, 2024.
>
> **********
>
> 9. As a result of the transition measures 3 to 8 above providing for the total compensation for the employees, articles within the PEA collective agreement related to hours of work, pay, overtime (OSS), allowances and reimbursable expenses, statutory holidays, vacation, re-location, leave entitlements including pre-retirement leaves (except for union leaves) do not apply. For clarity, the following PEA collective agreement articles do not apply: … Article 32 …

[19] Currently, the union and employer are negotiating both a transition agreement for the newly included group and a subsidiary agreement under section 10(1) of the PSLRA. There is no agreement on rates of pay for the new Legal Counsel and Articled Students classifications, which are not in the collective agreement.

3. Summary of Submissions on Employer's Preliminary Objection

a. Employer Objection

[20] The employer submits Article 32.10 is not applicable to the rates of pay for the lawyers and articled students because management did not introduce new bargaining unit classifications. Article 32.10 is not triggered and does not apply when an exclude group is added to the bargaining unit and coverage of the collective agreement through statutory amendment. Therefore, an arbitrator has no jurisdiction to set rates of pay when the union and employer have not negotiated them.

[21] The employer submits employers are generally entitled to set pay rates for new bargaining unit positions and classifications. This management discretion is only eroded or inhibited to the extent agreed in specific provisions in a collective agreement.[8] Absent such a provision, an arbitrator cannot intervene and has no jurisdiction to make an agreement for the parties.[9] There must be clear language for an arbitrator to go beyond interpreting provisions of a collective agreement and to settle terms of employment.[10]

[22] Discerning the mutual intention of the employer and union in negotiating Article 32.10 begins with the context in which they bargained and the purpose for the provision. The context is that the employer through management has traditional rights to manage, direct the workforce and set pay rates.[11] It is exceptional for rate setting to be done by interest arbitration under a collective agreement provision. For an arbitrator to assume jurisdiction, the application of the provision to a set of circumstances must be clear.

[23] The situation of the government lawyers and articled students is unique.

> It is not uncommon for collective agreements to contain language addressing how wage rates will be set if and when an employer introduces new classifications to a bargaining unit – but that is not what has occurred here. The PSA has not added new classifications to the bargaining unit; instead, lawyers and articled students, existing excluded classifications, were added to the bargaining unit as a result of a statutory amendment implemented by the Legislature.
>
> The present circumstances are akin to a variance, where a group of existing non-union employees with existing wage rates are added to an existing bargaining unit as a result of an application pursuant to Section 142 of the Labour Relations Code. The lawyers and articled students are not "new classifications" – they are existing classifications with existing wages rates that were previously excluded from the bargaining unit under the PSLRA, which have now become included in the existing PEA bargaining unit as a result of Bill 5.
>
> Article 32.10 contains clear language dictating the scope of its application: "Management retains the right to introduce new classifications whose rates of pay will be negotiable." Each of those words must be given their plain meaning.[12]

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[8] See *British Columbia Forest Products Ltd.*, [1998] B.C.C.A.A. No. 1 (Hope); *Fittings Ltd.* (1967), 18 L.A.C. 391 (Morley); Brown & Beatty, *Canadian Labour Arbitration*, 5th Ed., at §8.1; *British Columbia Gas Utility,* [2001] B.C.C.A.A.A. No. 272 (McPhillips)

[9] See *Health Employers Assn. of BC*, (1995) 40 C.L.A.S. 132 (Kelleher); *Townsend, Division of Textron Canada Ltd.*, [1986] O.L.A.A. No. 101 (O'Shea); *Cu&C Health Services Society*, [1996] B.C.C.A.A.A. No. 197 (Gordon); *British Columbia Public School Employers' Assn.*, [2018] B.C.C.A.A.A. No. 70 (Jackson); *Viterra Inc. (Job Classification Grievance)*, [2010] S.L.A.A. No. 28 (Hood)

[10] *Dominion Citrus Ltd.*, [2001] O.L.A.A. No. 419 (Newman)

[11] Brown & Beatty, *Canadian Labour Arbitration*, 5th Ed., at §4.39

[12] Employer Written Submission, July 31, 2024, ¶ 35-37

[24] No new classifications have been introduced by management. The classifications are not new and are not in the bargaining unit through any action by management.

> While government lawyers may be "a classification that is new to the GLP and is not currently found in the Collective Agreement", that does not make them a "new classification". The simple fact is that this classification has existed within the PSA for many years – it was simply an excluded classification prior to Bill 5. The inclusion of this classification in the bargaining unit as a result of a statutory amendment does not make this a "new classification".
>
> It is hardly surprising that the classification is not currently found in the Collective Agreement, given that these classifications only became included in the Collective Agreement as a result of Bill 5. There is a clear distinction between existing classifications that are new to the PEA bargaining unit and the Collective Agreement, and "new classifications". As noted in our initial submission, new classifications require negotiation of their rate of pay because they are new positions that do not have an existing rate of pay.
>
> If the parties intended Article 32.10 to apply to "a classification that is new to the GLP", they would have included language providing for such application. They have not done so. Instead, Article 32.10 is limited to new classifications introduced by management that did not exist previously. That is the clear intent of the provision based on a plain reading of the language chosen by the parties.[13]

[25] Article 32.10 makes no reference to existing classifications being moved into the bargaining unit from outside the bargaining unit.

> The intent of Article 32.10 is clear. It applies when new classifications, which, by virtue of being new, do not have established wage rates, are introduced to the bargaining unit by management during the term of the Collective Agreement. It provides the PEA with a right to negotiate the establishment of wage rates for those new classifications in circumstances where wage rates did not previously exist for the new bargaining unit employees who will work in those classifications.
>
> Given the words chosen by the parties, Article 32.10 language was not intended to apply when an existing occupational group, with existing wage rates, are added to the bargaining unit as a result of a decision by the Legislature, rather than one made by management. If that were the intent of the provision, it would require express language to be added to Article 32.10 to capture this distinct event – such language does not currently exist.
>
> Article 32.10 would be equally inapplicable in the event of a variance. This language would not be triggered because a variance – the addition of an existing excluded occupational group to the bargaining unit based on an application by the PEA pursuant to the *Code* – would not amount to the introduction of new classifications to the bargaining unit by management.[14]

[26] If the parties intended Article 32.10 to apply to existing classifications added to the bargaining unit by way of statutory amendment, variance, or otherwise, the provision

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[13] Employer Reply Submission, August 26, 2024, ¶ 10-12
[14] Employer Written Submission, July 31, 2024, ¶ 41-43

would include language clearly identifying it is applicable in such circumstances. It does not include such language and does not apply in this circumstance.

> If management were to introduce new classifications that fall within the scope of the PEA bargaining unit, there is no question Article 32.10 would apply. This sort of event could, and regularly does, occur in a unionized workforce where the employer sees fit to create a new classification to meet the needs of their operation. If PSA were to determine, for example, a new type of Forester or Pharmacist was required, and created that new classification, then Article 32.10 would determine how the rate of pay for the new classification would be determined. That is the very purpose of this sort of provision (which is relatively common in collective agreements), and that is not what occurred in the circumstances before you.[15]

[27] Application of Article 32.10 is dependent on an action by "management", a term infrequently used in the collective agreement compared to "employer" which appears over 500 times. They must be given different meanings. In this circumstance, the classification inclusion was an act of the Legislature, not the employer or management.

> The simple fact is that government civil lawyers and articled students are not "new classifications", and "management" did not "introduce" them. The Legislature, which has the ultimate responsibility for and control over Bills and Acts that result in statutory amendment, is not "management". ….
>
> PSA is not seeking to "hide behind" an act of the Legislature. It merely seeks proper recognition that an act of the Legislature does not trigger Article 32.10, because the language chosen by the parties does not include reference to or contemplate such action.
>
> While the "Employer" admittedly has a broad definition that includes the Government of British Columbia, "management" is not defined and cannot be ascribed the same meaning when it is a different term. The Government of British Columbia has the power to implement statutory amendments through its actions – "management" does not.[16]

[28] The PSLRA has no applicable provision. There is no other applicable collective agreement provision. There is no jurisdiction for an arbitrator to set pay rates for these classifications of employees newly included in the bargaining unit by legislation, not management.

> The discretion of management to determine wage rates, like all other elements of management rights and discretion, is only eroded by specific rights negotiated and included in the Collective Agreement. Article 32.10 does not establish any such rights, and the Collective Agreement does not contemplate arbitral intervention and amendment of the Collective Agreement, in the present circumstances.[17]

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[15] Employer Reply Submission, August 26, 2024, ¶ 36
[16] Employer Reply Submission, August 26, 2024, ¶ 27-29
[17] Employer Written Submission, July 31, 2024, ¶ 51

[29] Finally, the employer submits, although the union does not have access to interest arbitration during the term of the collective agreement because Article 32.10 does not apply, the union and its new members' aspirations for rate changes can be addressed in collective bargaining next year.

b. Union Response

[30] The union submits the usual principles of collective agreement interpretation apply.[18] There is no additional interpretive standard with respect to a requirement for "clear language" conferring interest arbitration jurisdiction. It can be inferred "arbitration was intended in the event of unsuccessful negotiation."[19] In 2001, Arbitrator McPhillips found arbitrability can arise from inference.

> Therefore, from these cases it is clear that the question of whether a matter is arbitrable is a function of the wording of the particular collective agreement. For example, in the forest industry cases, the matter of marshalling points was "to be agreed upon" and it was held that there was no jurisdiction for an arbitrator to impose his/her own "agreement" on the parties. Similarly, in *Health Employers Assn. of B.C. (Arbutus Vocational Society)*, *supra*, the collective agreement only provided that "the parties shall commence collective bargaining to establish wage rates". In *CU & C Health Services Society*, *supra*, the provision stated that "the parties recognize ... the responsibility to negotiate the details ... including wage rates and wage grades". I agree with the rationale of these decisions that there was no scope for an arbitrator to intervene as, in each of those cases, it would have required an infusion of new terms into the collective agreement.
>
> However, in *District of Abbotsford*, *supra*, which on the facts is somewhat similar to this case, the arbitrator did assume jurisdiction in the face of language which stated that "where new categories of employment for which rates of pay are not established by this Agreement are put into use, rates governing such categories of employment shall be subject to negotiations between the parties. The rates established shall be retroactive to the date of implementation." The Labour Relations Board twice upheld that decision in noting that, although there was no clear reference to arbitration, it was proper for an arbitration board "to imply that power" from the wording (B.C.L.R.B. No. L86/81, at p. 3). In the subsequent reference to this decision in *MacMillan Bloedel Ltd.*, the Labour Relations Board indicated that if Arbitrator Peck had declined jurisdiction the parties "would have no method of resolution in the absence of the parties' agreement" (p. 7).
>
> In our case, Article 5.01 expressly states that "... if no agreement is reached before work commences, the results of the final settlement shall be retroactive ...". The key words here are final settlement which is the term used in s. 84(2) of the *Labour Relations Code* where it states that every collective agreement "must contain a provision for final and conclusive settlement ... by arbitration or another method agreed to by the parties". In my view, arbitrability arises by inference in Article 5.01 as there must be a "final settlement" and not simply an attempt to agree through negotiation. This Collective Agreement establishes a right to have the pay

[18] *Pacific Press*, [1995] BCCAAA No. 637 (Bird), ¶ 27
[19] *Fittings Ltd.*, (1967) 18 L.A.C. 391 (Weatherill), ¶ 11

> rates settled and to have them applied retroactively. The parties have agreed in Article 5.01 to "settle" the matter and having failed to do so by themselves, the dispute must be settled otherwise pursuant to Section 84 of the *Labour Relations Code*.[20]

[31] The language of the collective agreement will be determinative of whether an interest arbitration remedy is intended and available.[21]

> … the language of Art. 32.10 of the Collective Agreement is express and clear. In the absence of agreement between the Parties it provides for the matter of rate of pay to be "referred to a mutually agreed arbitrator for a final and binding arbitration", which, as in *Dominion Citrus*, means that an interest arbitration remedy is within the jurisdiction of the Arbitrator.[22]

[32] The union submits the rates of pay for government lawyers and articled students unilaterally set by the employer are undervalued in relation to their peers. Although the lawyers and articled students are now covered by a collective agreement, the employer continues to "seek to evade any outside influence of rate of pay even when prescribed by the Collective Agreement."[23] The employer's proposed interpretation of Article 32.10 reads in restrictions that do not appear on the face of the language by excluding any employee group newly included in the bargaining unit and covered by the collective agreement.

> Given the longstanding collective bargaining structure of the PSLRA, which places "employees" in one of three bargaining units, it must have been in the contemplation of the Parties that amendment of the definition of "employee" was one of the ways that management might introduce a new classification to the GLP bargaining unit.
>
> The Employer's interpretation would restrict the Parties from accessing a mutually agreed dispute resolution mechanism that was bargained to address the issue of salary when a new classification is introduced. This interpretation is at odds with not only the language of, but also the purpose of this provision, which provides a method for the resolution of a key issue in advance of bargaining.[24]

[33] The union submits the employer is seeking to "hide behind an act of the legislature, which is itself an arm of management, and which acts in association with and on advice from the PSA."[25] The employer was involved at every step on the path to granting collective bargaining rights to government lawyers and articles students. It was

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[20] *BC Gas Utility*, [2001] B.C.C.A.A.A. No. 272 (McPhillips), ¶ 31-33
[21] See *Dominion Citrus Ltd.*, [2001] O.L.A.A. No. 419 (Newman), ¶ 26 "…I do not consider either interest arbitration or a remedy in the nature of an interest result beyond the appropriate scope of this arbitration"
[22] Union's Response – Preliminary Objection, August 16, 2024, ¶ 53
[23] Union's Response – Preliminary Objection, August 16, 2024, ¶ 68
[24] Union's Response – Preliminary Objection, August 16, 2024, ¶ 72-73
[25] Union's Response – Preliminary Objection, August 16, 2024, ¶ 88

involved in developing, communicating and implementing the decision taken and legislated.

> The interplay and participation of a variety of actors in the management of the employment relationship with members of the GLP bargaining unit is evident in the Collective Agreement, which expressly defines the Employer as meaning either "the Government of British Columbia represented by the BC Public Service Agency" or "a ministry of the Government of British Columbia", "as the context may require" (see Art. 13 of Appendix A – Definitions).
>
> The Collective Agreement does not treat the Employer as separate or distinct from the Government – rather, the PSA is a representative of the Government, and the Employer is the Government itself.
>
> This interpretation is reinforced by Article 1.03 of the Collective Agreement, which provides that "no proposal to amend, repeal, or revise" the PSLRA or PSA or relevant regulations which would impact the terms and conditions of employees covered by the Agreement "shall be put forward without first notifying the Union in writing of the nature of the proposal," and Article 1.04 of the Collective Agreement, which provides that the PSA "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" and "to convey any written information to the Minister responsible for the Act under which the Union is certified".
>
> These provisions reflect the Parties' understanding that while the Government, as an Employer, can implement legislative changes which impact the bargaining unit, the PEA has rights of participation in that process, which the PSA as the Government's representative must facilitate. … these provisions recognize…:
>
> > …. 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.[26]
>
> Where the PSA is referred to in the Collective Agreement, the term "Public Service Agency" specifically is used (i.e. see Arts. 1.03, 1.04, 8.01, 8.07(a)) – consequently, where the terms "management" (i.e. see Arts. 1.09(c)(iii), 3.03(b), 7.04, 13.05, 36.12(b)) or "employer" (i.e. see Art 1.01(a) and (d), 1.08, 2.02) are used instead, they must be given a separate and distinct meaning.
>
> This interpretation is further reinforced by the specific language used to describe "management" under the Collective Agreement. The Collective Agreement refers to various "levels" of management, which start with personnel excluded from the bargaining unit and move up to higher levels of government. As demonstrated by Art. 36.12, these levels do not remain only within the PSA – they begin with "the next level of excluded management" (36.12(b)), then the Deputy Minister (36.12(e)), then the Deputy Minister to the Premier (36.12(f)).
>
> Furthermore, the PSA itself is not a distinct entity from the Government. The Head of the PSA is the Minister of Finance, the Hon. Katrine Conroy, a member of the legislative and executive branches of government. Minister Conroy determined the date of the coming into force of the inclusion of lawyers and articled students in the bargaining unit (Applicability Grievance at para. 36), and thus arguably

[26] *British Columbia (Public Service Agency) (Applicability of Collective Agreement Grievance)*,[2024] B.C.C.A.A.A. No. 34 (Dorsey), ¶ 32

> implemented the introduction of lawyers and articled students into the GLP bargaining unit.
>
> Article 32.10 does not state that where the "Public Service Agency" introduces a new classification, and the Parties fail to agree on rates, the remedy will be final and binding arbitration. Rather, it uses the terms "management" and "the Employer", which are separate and distinct terms under the Collective Agreement. As noted above, the terms "management" and "the Employer" are inclusive of the Government beyond the PSA itself.
>
> The fact that an act of the legislature has an influence on or directs the decision making of management with respect to an employee group does not shield management from the consequences of its own resulting actions.[27]

[34] While there is a separation of powers between the legislative and executive branches of government, the reality is the same individuals control both branches of government so that there is a "considerable degree of integration." "The separation of powers is not a rigid and absolute structure. The Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and *de facto* controls the legislature."[28]

[35] The union submits it is disingenuous and legally impermissible for the employer to seek to evade any responsibility for a chain of decisions and events in which the Legislature acted as an arm of government management and facilitated the decision by enacting Bill 5 and adding new classifications of employees to the bargaining unit covered by the collective agreement.

[36] Alternatively, the union submits management introduction of a new classification of employees covered by a collective agreement does not require that the employer place them in the bargaining unit for provisions like Article 32.10 to apply.:

> … even if the legislature, as an entity entirely separate and apart from the Employer, placed lawyers and articled students in the bargaining unit, this is akin to the inclusion of a new classification in the bargaining unit based on a legal determination as to the scope of a recognition clause. Even if the Employer did not intend, in employing a classification of workers, to introduce them to the bargaining unit, this was the effect of the Employer's actions as a consequence of the legislature passing Bill 5.
>
> There is nothing in the Collective Agreement that would suggest that Article 32.10 does not apply if the introduction of a new classification by management is a result of a legislative change. The Article is silent with respect to the impetus of the management action at issue.[29]

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[27] Union's Response – Preliminary Objection, August 16, 2024, ¶ 77-85
[28] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, ¶ 53-54; See also *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, [2024] S.C.JO. No. 5, ¶ 57
[29] Union's Response – Preliminary Objection, August 16, 2024, ¶ 90-91

[37] In 1982, the scope of a recognition clause in an existing collective agreement was interpreted to include previously excluded employee who were in a new classification and the union had the right under a provision of the collective agreement to involvement in the negotiation of the wage rate for the employees.[30]

> While a legislative act was required to facilitate the introduction of the Government Lawyers into the GLP bargaining unit, they remain a new classification introduced by the Employer, by virtue of the fact that they have been hired by the Employer and perform work in the GLP bargaining unit. As a result of the legislature's actions, the Government Lawyers are now performing bargaining unit work. In employing lawyers and articled students to do this work, the PSA has introduced a new classification …[31]

[38] The union submits that contrary to what the employer asserts, inclusion of a new group of employees in a bargaining unit through a Labour Relations Board expansion or variance of an existing bargaining unit certification is not analogous because the initiative for inclusion does not come from the employer. Article 32.10 and similar collective agreement provisions would apply when the employer "developed and introduced a set of classifications for the newly included workers."[32]

4. Discussion, Analysis and Decision

[39] Article 32.10 does not address the manner of inclusion of new employees to the existing licensed professional bargaining unit and coverage by the current collective agreement – whether the new employees are hired individually or collectively, the employer acquires or reorganizes their past employer and they become employees of the employer or the Legislature amends the definition of employee in the PSLRA to be

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[30] See *City of Thunder Bay*, [2000] O.L.A.A. No. 177 (Sarra), ¶ 22: "The parties have a long history in classification and bargaining unit disputes. In the early 1980s there was a dispute regarding marina employees. The matter went to arbitration and Arbitrator Rubenstein issued an award in July 1982. The language of the collective agreement before the arbitrator was virtually identical to the language in dispute in this case, except for a change in article number and the opening sentence (*Re Thunder Bay (City) and C.U.P.E., Loc. 87*, unreported decision of Arbitrator Rubenstein dated July 16, 1982). The Rubenstein Award found that the marina employees were in the bargaining unit, notwithstanding the fact that the employees had been employed for some years in their current positions, had not been union members, and did not have a specific wage rate set out in the collective agreement. The arbitrator found that Article 32.02 (now 36.05) was incorporated into the collective agreement to take care of situations where employees are not fully classified or listed in the classification schedule. The arbitrator directed the parties to include the marina positions in the applicable schedule and directed them to negotiate wage rates and job descriptions as set out in (then) Article 32.02." See also District School Board of Niagara, 2012 CanLII 6444 (ON LRB)

[31] Union's Response – Preliminary Objection, August 16, 2024, ¶ 95; See *Chevron Canada Co*., 1986 CarswellBC 2831, 6 C.L.A.S. 10 (Kelleher), ¶ 71-72; *Ottawa-Carleton Regional Transit Commission*, [1986] C.L.A.D. No. 76 (Foisy), ¶ 7, 13 and 16

[32] Union's Response – Preliminary Objection, August 16, 2024, ¶ 98

more inclusive. It does not address the nature of the employment status of newly included employees – full-time, part-time, term, auxiliary, casual, on-call, dependant contractor, etc.

[40] Employers have the right to organize, reorganize and structure work. When they do, they employ job classifications to categorize work positions based on the similarity and complexity of the work assigned, the skills, abilities and knowledge required to perform the work and the scope of responsibility and authority of positions. There can be steps or levels with a classification. Rates of pay for work performed are attached to job classifications and levels or steps within classifications.

[41] Building on this employer practice, collective agreements frequently provide for classification schedules, job evaluations, position reclassifications and appeals and temporary payments at a rate of pay for work at a higher classification. The endeavour underlying these several classification related provisions is to ensure employees are paid at rates appropriate for the work they perform and the responsibility they discharge.

[42] In collective bargaining under the PSLRA, there are limits on the extent to which these matters can be negotiated. Section 12(d) states:

> Every collective agreement must include all matters affecting wages or salary, hours of work and other working conditions, except the following: …
>
> (d) the application of the system of classification of positions or job evaluation under the *Public Service Act*;

Section 5(3)(e) of the *Public Service Act* delegates to the BCPSA responsibility "for personnel management in the public service including but not limited to the following: … developing, establishing and maintaining job evaluation and classification plans." Cabinet may make regulations regarding "job evaluation and classification" (s. 25(1)(f)).

[43] "Classification" is not defined in this collective agreement, but recurs frequently throughout in connection with rates paid to employees in a classification and other classification and reclassification matters. For this bargaining unit composed of groups of licensed professionals, their job classifications are central to the structure, application and administration of the collective agreement. Under the agreement, there are no free floating, unclassified employees with a job position in the bargaining unit. Every employee must have a classification.

[44] Article 32.10 addresses what is to happen when management exercises its retained and legislated management rights to introduce new job classifications for bargaining unit employees for which there are no rates of pay in the collective agreement. The employer structures the work using job classifications and the union negotiates rates of pay for those classifications.

[45] New classifications do not have rates of pay in the collective agreement because they did not exist in the bargaining unit when the collective agreement was negotiated. Under Article 32.10, management introduces new classifications "whose rates of pay will be negotiated." The union and employer have a short period of time to agree on the rates of pay. The union cannot deny or delay the introduction interminably. The employer must get on with its business. If there is no agreement, the employer "may implement the classification and attach a salary." The union can accept the salary or it can refer the matter to arbitration for a final and binding decision. In the meantime, the new classifications and rates of pay/salaries will be in effect.

[46] For the newly included lawyers and articled students, the executive and legislative branches collaborated and acted hand in glove to adopt and implement a decision to grant some lawyers and articled students collective bargaining rights under the PSLRA. This decision meant their inclusion in the licensed professional bargaining unit represented by the union and coverage by the current collective agreement between the union and employer, whose terms were known.

[47] By amending the definition of "employee" in the PSLRA, the Legislature included a new group of licensed professional employees in the bargaining unit. It did not assign them job classifications. The new employees had job classifications in the public service classification structure and accompanying rates of pay or salaries. However, no classifications for them existed within the collective agreement and there were no negotiated rates of pay for them in the collective agreement.

[48] One challenge in implementing the consequences of the Legislature's enactment of May 10, 2023 was to manage the time at which it came into effect and what had to be put in place as soon as it came into effect. A transitional agreement with the union would facilitate a smooth implementation. Efforts were made, but no agreement was achieved. The employer had to act unilaterally.

[49] The real substance of the matter in dispute is not the role the legislative and executive branches of government played in the steps to amend the PSLRA to include the lawyers and articled students in the licensed professional bargaining unit. The real substance is an interpretive issue under the collective agreement. Did management introduce new classifications and rates of pay for the newly included employees which are operable and enforceable under many provisions of the collective agreement?

[50] The government as employer party to the collective agreement acts through the BCPSA, which provides Human Resource leadership supporting the performance of Ministries across the public service. BCPSA is not the employer. Under the collective agreement, "employer" means "either the Government of British Columbia represented by the BC Public Service Agency or a ministry of the Government of British Columbia, as the context may require."[33]

[51] Which level of management within the employer organization was to make and communicate implementation decisions affecting lawyers and articled students in several branches of the government, such as Legal Services Branch, Justice Services Branch, and the Public Guardian and Trustee?

[52] These were human resource, not operational, decisions. All levels of management from supervisors to deputy ministers make and implement human resource decisions. This is highlighted in *Updated Frequently Asked Questions About Bill 5*.

> 7. What is the role of ministry management representatives and supervisors in managing their workforce?
>
> All deputy ministers, associate deputy ministers, executives, senior officials, supervisors, and human resource professionals in the BC Public Service are accountable for carrying out specific human resource management functions.
>
> Deputy ministers, senior officials and supervisors are responsible for managing their human resources within the context of:
>
> - Applicable legislation
> - Collective agreements
> - Contracts of employment
> - The Corporate Human Resource Management Policy Framework
>
> The Accountability Framework for Human Resource Management (PDF, 286KB) establishes the context within which the agency head of the BC

[33] Appendix A, Definitions, ¶ 13

> Public Service Agency delegates authority, under the Public Service Act, to deputy ministers or other senior officials for human resource management.

[53] The high profile human resource management decisions on implementing Bill 5 in the absence of agreement with the union were delegated to the Assistant Deputy Minister, Employee Relations in the BCPSA. In 2020, the government had uncoupled the Crown Counsel Classification Series from the Legal Counsel Classification Series.

[54] The decision was to import classifications and rates of pay from the Legal Counsel Classification Series for application to employees covered by the collective agreement. The same classifications and rates of pay would continue to apply outside the collective agreement to lawyers and articled students excluded from the definition of "employee" in the PSLRA and to those excluded from the bargaining unit under section 11 of the PSLRA.

[55] The employer, through Treasury Board, established these classifications and rates of pay, but senior management imported "the existing Legal Counsel Classification series salary grids" into coverage by the collective agreement where they became subject to several provisions and processes under the collective agreement. Management also decided that while covered by the collective agreement there will be: "Movement through LC1 to LC3 classifications according to the Employer's Policy Legal Counsel Job Evaluation Plan."

[56] This was done by management because there were no existing classifications and rates of pay under the collective agreement that were applicable or suitable. The collective agreement could not operate in its application to the lawyers and articled students performing job duties new to the bargaining unit if there were no new classifications and rates of pay to be administered under the collective agreement. Management had to act to operationalize the legislative change by introducing new classifications under the collective agreement.

[57] The word "introduce" appears twice in the collective agreement. In both instances, its use is the ordinary meaning of bringing something into operation or use for a first time. Article 20.1(c) states, in part:

> Notwithstanding (a) above, should the Government of the Province of British Columbia introduce a statutory holiday to honour Indigenous reconciliation (even if not titled "Day of Truth and Reconciliation") on a date other than September 30,

> employees shall be entitled to the new Provincial holiday but not the Federal holiday.

[58] Article 32.10 states, in part: “Management retains the right to introduce new classifications whose rates of pay will be negotiated.” This provision was negotiated within the scope of permissible collective bargaining under the PSLA.

[59] In collective bargaining under the PSLRA, professional classifications in the public service classification structure cannot be negotiated. In this context, the mutual intention of the language of Article 32.10 encompasses the creation and introduction of new classifications specific to the licensed professional bargaining unit. To have a meaningful operation, it also encompasses the introduction into the bargaining unit of existing professional classifications not previously covered by the collective agreement.

[60] The management decision to bring existing classifications with accompanying qualifications, duties, rates of pay and job evaluation plan into the realm of a new collective bargaining relationship covered by an existing collective agreement for the first time was to introduce new classifications under the collective agreement. It was also the first introduction of these classifications and rates of pay to the union as exclusive bargaining agent and provided the first opportunity for the union to negotiate rates of pay for the classifications, regardless whether the expiration of the term of the collective agreement is in the immediate or distant future.

[61] The lawyers and articled students were included in the bargaining unit by decisions of the Legislature and executive branch of government. The decision to introduce their job classifications as previously excluded employees for the first time under the collective agreement was a management human resource decision which triggered the application of Article 32.10.

[62] The employer’s preliminary objection is dismissed.

AUGUST 30, 2024, NORTH VANCOUVER, BRITISH COLUMBIA.

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