ARBITRATION

BETWEEN:

CITY OF KAMLOOPS

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 900

Concerning a grievance regarding reorganization of employees within the Community Protection Services Department

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AWARD

BEFORE:

Andrew C.L. Sims, K.C. .... Arbitrator

REPRESENTATIVE FOR CITY OF KAMLOOPS

James Kondopoulos .... Counsel
Brandon Hillis .... Counsel
Andrew Peng .... Co-Counsel
Colleen Quigley .... Director, H.R. & Safety
Jennifer Howatt .... Human Resources
Tammy Blundell .... Client Services Manager

REPRESENTATIVE FOR CANADIAN UNION OF PUBLIC EMPLOYEES

Charles Gordon, K.C. .... Counsel
Michelle DeCambra .... Co-Counsel
Ken Davis .... Acting President, Local 900
Harry Nott .... CUPE National Rep.
Carmen Sullivan .... CUPE National Rep.

THIRD PARTY INTERVENORS

Richelle Meixner .... Community Services Officer
Jordan Thompson .... Community Services Officer

HEARD via video conference on August 16, 2021, March 28 to 31, April 1, 2022
September 26 to 28 and 30, 2022, October 4 and 11, 2022 and written submissions on October 24, 2022, November 8, 2022 and November 15, 2022

AWARD ISSUED on August 14, 2023

Our file: 8412

AWARD

In July 2008 the City of Kamloops announced it was restructuring the work done within its Community and Protection Services Department. This involved eliminating two established job classifications; the Bylaw Enforcement Officers and the RCMP cells Custodial Officers. They were replaced with a single new classification for Community Services Officers ("CSO").

The approximately 35 employees working in the two former jobs were part of a bargaining unit represented by the Canadian Union of Public Employees, Local 900. There was a collective agreement in place.

The City's plan raised concerns for the Union and its affected members. First, there was to be a significant net reduction in the number of employees. Second, the Employer introduced requirements for the new position that virtually none of the incumbents possessed. These included physical ability testing and a new and elevated educational requirement. Third, by combining the two former positions, the City proposed the elimination of previously agreed upon shift schedules. Fourth, from the Union's perspective, what was being proposed was that employees would keep doing the same work they had done before with only minor modifications, but for the future being obliged to rotate between bylaw enforcement and custodial duties.

The City takes the position that it has the fundamental management right to eliminate the existing positions, and agreements related to them, and to unilaterally establish the one newly combined position. The Union argues that management's rights in this respect are subject to processes and limitations within the collective agreement and that the City required the Union's agreement or an arbitrated solution in order to eliminate the old and create the new classification.

As the process unfolded, subject to the Union's objections, each affected employee was given a letter, to use the City's unique phrase "placing them in motion". Those letters offered the affected employees a series of mutually exclusive options which, in the Union's view, and in many cases, were in effect notices of layoff or termination. The Union's position is that these options failed to respect several of the employees' rights under the collective agreement.

Many sub-arguments emerge from these two basic complaints; that the City lacked the unilateral right to eliminate the old and create the new classification and that it essentially terminated all or many of the incumbents without doing so properly, or in order of seniority and without any just cause.

Kamloops is a City of about 100,000 citizens. Its policing is provided by the RCMP, but it also employs support personnel directly through its Community Protection Services Department. It has about 650 unionized employees and all but its 125 firefighters are represented by Local 900. The current collective agreement ran from January 1, 2019 to December 31, 2023.

Many factors led to the City's decision to reorganize its bylaw and RCMP support services. Policing by RCMP police officers is expensive and there is an attractiveness to municipalities to saving money by civilianizing as much of the related work as possible. What is often called "two-tier policing" with Peace Officers supplementing Police Officers became a topic of interest. Over the last few years RCMP obtained the right to unionize and the prospect of higher costs played into municipal thinking, along with the retroactive costs of RCMP pay negotiations. The RCMP was experiencing a shortage of officers throughout the Country with vacancies, and a consequent diminution in service. Alberta recently expanded the use of Peace Officers with greater powers for law enforcement. Submissions were being made to encourage B.C. to do the same. However such proposals raise issues like empowering municipal officers to carry weapons, or the need for additional training. Retired police officers who possessed the training and experience were sometimes available to accept such positions. Automation could be used to reduce the human cost of parking and traffic enforcement.

Kamloops, like other cities, increasingly found itself having to deal with the side effects of homelessness. Encampments emerged which resulted in public pressure for more vigourous enforcement.

The City as well as other municipalities and related organizations carried out studies to find ways to address their challenges. In Kamloops, these pressures and studies led to a decision to reorganize. In the process, it decided to eliminate all the Bylaw Enforcement Officers and the RCMP jail guard positions and create the new CSO position.

The categories of Custodial Guard and Bylaw Services Officer are both listed in Schedule A of the collective agreement. The former was at pay grade 3 ($25.72) and the latter at pay grade 11 ($33.50). Broadly speaking, the Bylaw Services Officers were responsible for enforcing certain municipal bylaws, as well as managing city parking spaces, preparing court files, handling animals and patrolling city streets and parks. The Custodial Guards, working with the RCMP, had responsibility for overseeing prisoners in the RCMP jail, enforcing surveillance and security, performing custodial work, completing forms and logs, and handling inventory.

There were extensive discussions between the Union and the City and efforts to reach agreement. This included the *Labour Code* Section 54 process described below. The Union described what it learnt of the City's approach in the following way.

(a) Community Services Officers would rotate in and out of Custodial Guard work and Bylaw Services work, for a period of up to two years.

(b) Community Services Officers would be required to obtain qualifications, training and certificates that were not required either of the Bylaw Services Officers or Custodial Guards classifications, including the completion of two years of post-secondary education in certain eligible subject areas; a physical abilities testing requirement; the completion of British Columbia Auxiliary Constable Training Program or Police Officer Training or equivalent; and the Completion of the Justice Institute Level I and II Enforcement Certificates or equivalent.

(c) The Community Services Officer was a new classification, and current employees in the City would have no rights to the classification, such as through the grandfathering of incumbents or a closed competition for the new positions that would be restricted to incumbents (the Training Opportunity for the CSO position was, however, posted as a closed competition for affected employees only, i.e. those who held Bylaw Services Officer and Custodial Guard positions).

(d) Current Bylaw Officer Lead Hands and Custodial Guard Crew Leaders would have no claim on CSO – Crew Leader positions or any other enhanced claim on a CSO position.

(e) CSO positions would all be on a rotating shift schedule (with the exception of two cell-block shifts from 6:00 am to 2:00 pm and 12:00 to 8:00 pm). While in the cell block, a CSO would rotate through 8-hour shifts that were on a 24/7 rotation (8:00 am to 4:00 pm; 4:00 pm to midnight and midnight to 8:00 am). While in the community, a CSO would rotate through 8-hour shifts (6:00 am to 2:00 pm, 9:00 am to 5:00 pm, and 2:00 to 10:00 pm). The City has since announced plans to transition community-based CSOs to a 24/7 schedule, something that it had indicated during the s. 54 meetings was a possibility sometime in the future.

(f) On call CSOs are required to be available all week, Sunday to Saturday inclusive, as work arises, unless they are on other City on-call lists.

Ms. Sullivan testified that the Union was not opposed in principle to the reorganization concept but found the proposals lacked detail. Her main concern was to ensure that all the incumbents “had somewhere to land”.

During this process the City modified its proposals somewhat by agreeing that training would take place on paid time, that the physical testing would be one-time not continuing, and that the initial CSO job posting would be restricted to the affected incumbents.

The attractiveness of these changes amongst the incumbents varied depending on their circumstances. The RCMP cell guards stood to gain a larger pay increase then the Bylaw Services Officers. Things like the training, physical testing and change in schedules affected each person differently, particularly given their age, family responsibilities, and physical condition.

Issues in Dispute

The initial grievance, once revised, read:

> I/We the undersigned claim that:
>
> The City cannot reorganize the existing classifications in the collective agreement absent the consent of the Union, and the Union does not consent. In addition, the Employer cannot, in the guise of a layoff, terminate or demote employees in existing classifications absent just cause.
>
> Therefore I/We request that:
>
> The City immediately cease from its reorganization and from purporting to layoff any employees. In the event that the City proceeds, the Union will seek a orders to reinstate the classification scheme mandated in the Collective Agreement, that all employees affected be made whole, and special damages for employees who were given notice of layoff or were in fact laid off, including for intentional infliction of mental suffering and any other heads of damages that may pertain.

The matter was set for hearing on August 16 to 18, 2021. Prior to that, the Employer and the Union raised some issues about particulars, disclosure, and the scope of the dispute. For now, it is sufficient to say these were resolved, in part, when the Union gave the following clarification on August 6, 2021.

> Scope of the Grievance
>
> 29. The grievance, as amended, advances two claims:
>
> > a. The City cannot reorganize the existing classifications in the Collective Agreement absent the consent of the Union, which consent is withheld; and
> >
> > b. The City cannot, in the guise of a layoff, terminate or demote employees in existing classifications, absent just cause.
>
> 30. Both claims relate to the same underlying dispute, being the re-organization of the Community and Protective Services Department whereby existing classifications, most notably those of Bylaw Services Officer and Custodial Guard, were eliminated and combined into a single new classification of CSO. Further to that, the Employer purported to lay-off the incumbent employees in those positions, who then either lost their employment with the City or who were compelled to take lesser positions with the City than they had previously held.
>
> 31. The Union's grievance did not and does not focus solely on the Employer's alleged right to create new classifications without the Union's consent, as alleged by the Employer. The "real substance of the matter in dispute" in relation to the first claim is that the terms of the Collective Agreement prohibit the Employer from both unilaterally eliminating classifications and creating new ones. This necessarily involves addressing the proper construction of the Collective Agreement, not merely by reference to the provisions most directly implicated (in this case, Article 20), but by reference to the terms of the agreement as a whole.

At times an important point got lost in the "need for consent" versus "unilateral right" arguments. Even with a unilateral right to create a new position, such new non-managerial positions still fall within the

bargaining unit and as such remain subject to the terms of the existing collective agreement. Any right to create a new job or classification is only the right to do so subject to the terms of the collective agreement, not free of those terms.

Differences remain about how these issues should be framed, but they still breakdown into the two basic areas:

> 1. The scope of and any limitations on the City's ability to eliminate the two classifications and replace them with one classification subsuming the work of the two previous classifications; and
>
> 2. The legality of the City's "placing the incumbents in motion", its characterization and whether it is a termination, layoff or demotion

The Employer asserts that the following six issues are not in dispute.

> **(a) any alleged contravention of s. 54** of the *Labour Relations Code*, R.S.B.C. 1996, c. 244;

This is not in dispute. Nonetheless the Section 54 process provides relevant background as described below.

> **(b) the appropriate rate of pay** for the CSO position;

This dispute is not about the appropriateness of the rates of pay assigned to the City's description of the position. However, the issue is tied to the meaning of Article 20.

> **(c)** except for the apparent suggestion that the decision to undergo the reorganization was arbitrary, **the *bona fides* of the Reorganization itself**;

On this point, the parties specifically stipulated:

> 1. In making the decision to reorganize the Bylaws Department by eliminating the classifications of Bylaw Services Officer and Custodial Guard and replacing them with the single classification of Community Services Officer, the Employer considered various factors it considered relevant to its needs and to service delivery, including by consideration of the documents found in the Employer's Book of Documents at tabs 1 to 11. While the Union disputes the City's assessment of at least some of those factors, it does not allege that the decision to initiate a reorganization of the Bylaws Department was made discriminatorily, in bad faith, or otherwise for another improper purpose. (*emphasis added*)

The Employer asserts that some of the Union's arguments attempt to resile from this position. Whether that is so is addressed specifically in relation to specific points.

> **(d) alleged breaches of bumping rights** under the Collective Agreement which are the subject of a separate grievance (Grievance 2020-23)

There is indeed another grievance (2020-23) which reads:

> The Union grieves that the Employer's offered placements of employees are a violation of Article 9 of the Collective Agreement, which provides for seniority protections in event of layoff, including the protection that employee's be laid off in the reverse order of their seniority, provided that those employees retained are qualified to do the work.
>
> It is the Union's position that the Employer's planned reassignment of employee's, and its offered placements to date for the employee's affected by the Community and Protective Services re-organization, did not follow the requirement that seniority, subject to qualifications, be the paramount concern when placing an employee into a new classification. This includes violating the employee's protection of seniority-based priority in the determination of the employee's new classification, and the employee's right to placement in a classification that is secure and not conditioned on a later determination of the employee's qualifications and eptitude [sic] that would pose a risk of an employee losing their seniority contrary to the terms of the Collective Agreement. In addition to Article 9, we grieve under Articles 8, 27, and any other Article of the Collective Agreement that may apply.
>
> Therefore I/We request that:
>
> The Union seeks as a remedy all appropriate relief, including declaratory relief and, upon consultation with the affected employee's and the Union, placement of the employee's into a classification consistent with their seniority and qualifications.

Here specifically the Employer argues that the Union is seeking to resile from the position it took in its opening statement which was:

> 37. The Union subsequently filed a further grievance alleging that employees who took the bumping option had their seniority rights violated when they were only given the option of bumping into vacant positions, excluding positions for which employees were qualified and occupied by more junior employees. That grievance is not before you and would only need to proceed if the present grievance fails.

The Union's reply to the objection to this issue forming a part of the dispute reads:

> 24. With respect, <u>the Union's decision to initiate proceedings in other matters does not allow the Employer to now erect a firewall with respect to evidence and argument relating to bumping and the physical test used by the Employer in furtherance of the reorganization that has always been in dispute</u>. The Union is not attempting to have this Arbitration Panel adjudicate and determine the issue of discrimination under the *Human Rights Code*. Nor is it asking you to act as arbitrator in the bumping grievance. To the extent the Union has raised the issue of accommodation in the CSOPAT, and the bumping options given to Affected Employees, it has done so in support of the main issues in this Grievance, namely whether the reorganization had the effect of demoting or terminating Affected Employees. (*emphasis added*)
>
> …

> 26. Further, the Union does not seek to have the bumping grievance determined by this Arbitration Panel. The Union has led evidence in regard to the bumping process in support of its argument that the reorganization amounted to a termination without just cause. The Union did not lead evidence of its understanding of how the bumping process works, or how it should work under the Collective Agreement, because it understands that this is not the proper venue for that grievance to be addressed.
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> 27. This Arbitration Panel confirmed the foregoing in hearing when he stated that the bumping evidence was relevant to a determination of the Union's argument that the reorganization amounted to a termination. To decide whether a termination has occurred, this Arbitration Panel does not need to determine whether the particular bumping procedure violates the Collective Agreement. This Arbitration Panel need only determine if the bumping options provided to Affected Employees – in violation of the Collective Agreement or not – had the effect of compelling them to leave their employment or take a demotion.

I am mindful of the scope of the grievance before me and have no inclination to adjudicate the details of the subsequent grievance. However, I agree with the Union that the filing of this further grievance does not create an "evidentiary firewall". Should findings arise in this case, the Union may subsequently be faced with issue estoppel or abuse of process arguments, since it cannot relitigate things already decided, but that is for the future.

> **(e) allegations of discrimination**, including in particular the allegation that the CSOPAT is discriminatory on the basis of age, disability or gender and therefore contrary to the *Human Rights Code*, R.S.B.C. 1996, c. 210;

CSOPAT is the physical testing requirement adopted for the new position. The Union, in its reply brief, confirms that it is not asking that I decide whether the CSOPAT is discriminatory, and as a result, contrary to the *Human Rights Code*. Its position on this is similar to its position on (d) above. The Employer refers to paragraph 41 of the Union's opening submission which closes with the words: "The application of that test by the City is the subject of a complaint to the BC HRT which is obviously not before you".

In its reply (in addition to that referred to under (d) above) the Union says:

> 25. This Arbitration Panel is not required to make a determination on whether there is discrimination in order to show that the Affected Employees were compelled to not take the CSO TO position on the basis of the information they were receiving.

> **(f) the bona fides of the qualifications put into place for the CSO position**, which was the focus of a separate grievance (Grievance 2020-13) that was filed on September 9, 2020 but withdrawn on September 29, 2020.

In its objection to this as an issue remaining in dispute, the Employer says:

> Grievance 2020-13 set out, among other things, the following: "The employer developed qualifications for this position [the CSO position] that the union has always maintained are not bona fide." The Union withdrew this matter on September 29, 2020 by way of email and, on September 30, 2020, sent a letter confirming the withdrawal and requested written confirmation of the same from the Employer. The Employer provided that confirmation on October 13, 2020.

The withdrawn grievance, dated September 9, 2020, read:

> In recent months the employer has been developing a restructuring program for the Community and Protective Services Department. During this process the employer developed a new position, Community Service (CSO), which will encompass the bylaw officers, property use Inspector, and the custodial guard duties. The employer developed qualifications for this position <u>that the union has always maintained are not bona fide</u>. On August 31, the employer offered the union a modified tiered qualification proposal that proposed to breach the seniority rights as outlined in Article 10(B) of the collective agreement. This offer clearly demonstrates that the qualifications initially presented by the employer are in fact not bona fide.

An email exchange from September 10-13, 2020 between Ms. Howatt and Mr. Ken Davies of CUPE describes what that grievance was about:

> The Employer originally proposed that acceptance into the CSO-training opportunity would happen in a three tiered format. After discussions, we are of the understanding that the CSO training opportunity had its requirements lowered to the bottom tier outlined in the recruitment process originally provided to the Union. Now, all members who meet the minimum requirement will be able to apply and use their seniority.

This particular grievance was withdrawn, on a "without prejudice and precedent basis" on September 29, 2020. The Union's reply to this scope objection reads:

> … the withdrawal of Grievance 2020-13 does not exclude the *bona fides* of the qualifications put in place for the CSO position from the scope of the present Grievance. It is clear from Grievance 2020-13 that it did not encompass an objection to the *bona fides* of all of the qualifications of the CSO position. Grievance 2020-13 specifically states that "the employer developed qualifications for this position [the CSO position] that the union has always maintained are not *bona fide*. The Grievance goes on to state that the modified tiered qualification proposal by the Employer is what is in issue in that grievance. Grievance 2020-13 was specifically to address the two-tiered qualification issue.
>
> 30. What the Union withdrew in Grievance 2020-13 was its objection to the tiered qualifications whereby Custodial Guards were qualified to be a CSO, but Bylaw Service Officers ("BSO") were not (what the Union referred to as two tiered qualifications). In response, the Employer changed the job description to be singled tiered so employees could use their seniority, and the Union withdrew the grievance.
>
> 31. The Union has at no point agreed that the CSO position qualifications are *bona fide* …

I find that neither grievance 2020-13, nor its without prejudice withdrawal, supports the Employer's scope objection over this issue.

Scope Issues Generally

The Employer cited the following cases that caution against parties expanding their grounds during a hearing, or an arbitrator's, to use the now popular term, "not staying in their own lane". I have considered these cases in making the observations above.

> *Halifax (Regional Municipality) v. CUPE Local 108* (2011) 303 N.S.R. (2d) 156 (NSCA)
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> *Fincore Industries Inc. v. USWA* [2000] O.L.A.A. 41 (Newman)
>
> *Pacific Press v. Vancouver Newspaper Guild* [1995] B.C.C.A.A.A. No. 650 (Bruce)
>
> *Insurance Corp. of British Columbia v. CUPE Local 378,* 2014 B.C.C.A.A.A. No. 132 (McEwen)

Halifax (supra) was a judicial review decision of an award upholding a dismissal, but allowing the grievor, after the ruling, to apply to reopen should he present evidence of a disability that might raise a duty to accommodate. The arbitrator did this without any request from the Union or grievor. The Court, after referring to Brown and Beatty, *Canadian Labour Arbitration*, 2:1300 The Submission to Arbitration, went on to say:

> 38 This is not a case where the arbitrator interpreted the grievance, the employer's response, or the parties response, or the parties' agreement at the hearing to determine that the parties intended to include the issue in the submission to arbitration. When asked on December 19 if evidence with forthcoming on the issue, the griever said "no" and confirmed he had "no" intention to generate such evidence in the future. The award (para. 44) acknowledged: "It is true that he was "thrown a life-line" which he may have refused to grasp". The arbitrator specifically itemized the Union's closing submissions, which did not cite disability or accommodation. There is no illusion that accommodation for disability what is the "real complaint" which was intended to be included in the submission to arbitration under *Parry Sound*, paras. 68 and 69.
>
> …
> [42] This unique defeasible disposition with the condition subsequent was a well intended effort to influence the Union's trial strategy. There is no difficulty with the arbitrator's advice on September 26. A frank conversation with both counsel in mid-trial may channel the ongoing hearing to an expedient resolution. But once the parties have closed their evidence and argument, the arbitrator should not be moulding one side's trial strategy, and his award should reflect the arbitrator's role as the objective decision maker.
>
> [45] I disagree that Article 16.04 allows an arbitrator, on his own initiative, to inject an issue that the parties have decided to exclude from the submission to arbitration. In this respect I reiterate the principles from Brown and Beatty quoted earlier (para 37). Neither do I accept that the article allows an arbitrator to transform what the parties expected to be the final award into a message with ongoing trial advice to one of the parties. Nor should the arbitrator supplant or compete with the Union as the grievor's strategic counsellor. In my view, no reasonable interpretation of "arrangement which [the arbitrator] deems just and equitable" in Article 16.04 authorizes such a substantial departure, in these respects, from fundamental principles.
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> *Halifax (supra)* paras. 38-45

In a similar vein, Arbitrator Newman has said:

> **17** Although the parties may, for example, have other disputes which address similar issues or similar facts, one board of arbitration will not acquire jurisdiction over those matters unless such matters are specifically referred.
>
> **18** Even where one board of arbitration is asked to join or consolidate grievances of similar fact, unless there is agreement between the parties, that board will require some clear authority to make an order impacting upon a matter within the jurisdiction of another board or another arbitrator…
>
> **19** Without a completed referral from the parties, I have no jurisdiction to make an order which has impact upon any other matter. I am charged only with the responsibility of hearing and disposing of that which is has been referred to me.
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> *Fincore Industries Inc. v. USWA* [2000] O.L.A.A. 41 (Newman)

These more specific cautions must be weighed against the well-known principle from *Blouin Drywall (infra)*, endorsed by the Supreme Court of Canada in *Parry Sound (infra):*

> 68 As a general rule, of course, it is important that the parties to a collective agreement comply with the procedural requirements set out therein. If a union intends to plead that the employer has breached the employee's statutory rights, it should, as a matter of general practice, specify the statutory provision that the employer is alleged to have breached. That said, it is important to acknowledge the general consensus among arbitrators that, to the greatest extent possible, a grievance should not be won or lost on the technicality of form, but on its merits. In *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 1975 CanLII 707 (ON CA), 8 O.R. (2d) 103 (C.A.), at p. 108, for example, Brooke J.A. wrote as follows:
>
> > Certainly, the board is bound by the grievance before it but the grievance should be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provisions and this whether by way of declaration of rights or duties, in order to provide benefits or performance of obligations or a monetary award required to restore one to the proper position he would have been in had the agreement been performed.
>
> 69 This approach has been adopted by numerous arbitrators. … These cases reflect the view that procedural requirements should not be stringently enforced in those instances in which the employer suffers no prejudice. It is more important to resolve the factual dispute that gives rise to the grievance.
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> *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324* [2003] 2 S.C.R. 157 at 68-69

Section 82 of the B.C. *Labour Relations Code* reflects a similar approach:

> An arbitration board, to further the purpose expressed in subsection (1), must have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and must apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute.

The two British Columbia cases address Section 82 specifically:

> **8** It is trite to say an arbitrator derives his or her jurisdiction from the terms of the collective agreement between the parties. This is true whether the arbitrator is appointed under Section 104(4) of the Code or by mutual agreement pursuant the terms of the contract. No where in the Collective Agreement between the parties is there an express or implied provision that allows one party to unilaterally consolidate grievances before an arbitrator. Nor is there such authority reposed in an arbitrator absent mutual agreement. It is also true that an arbitrator pursuant to Section 82(2) of the Code, has a mandate to address the real substance of the issues in dispute and is not bound by a strict legal interpretation of the grievance submissions. However, an arbitrator cannot clothe herself with jurisdiction to determine the issues underlying a different grievance from that which has been submitted to arbitration. Accordingly, I would require clear evidence of a mutual intent to consolidate these grievances for all purposes before drawing the conclusion urged by the Union.
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> *Pacific Press v. Vancouver Newspaper Guild,* [1995] B.C.C.A.A.A. No. 650 (Bruce)
>
> **10** Both fairness and efficiency dictate that parties are restricted from expanding a grievance to encompass issues not grieved: *Toronto (City) v. CUPE, Local 79 (Ramnarine Grievance)*, [2007] O.L.A.A. No.169 (Luborsky), at para. 20. Further, for an arbitrator to expand the scope of a grievance without agreement of both parties would be contrary of Section 82 of the *B.C. Labour Relations Code*. As the B.C. Labour Relations Board said in the *Goodbrand and Teamsters, Local 213* case (BCLRB No. 53/79), [1979] B.C.L.R.B.D. No. 53 at page 3:
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>> I do not think that the statutory mandate to "have regard to the real issue" can be interpreted so widely as to permit an arbitrator, without agreement by both parties, to embark upon a wholly different arbitration than that agreed to by the parties. Small variations in the issues will be differences in degree, but at some point larger variations become differences in kind.
>>
>> It is also appropriate to note that the mandate of Section 92 [now s. 82(2) of the *Labour Relations Code*] is expressly made subject to the "terms of the collective agreement. Most collective agreements provide for the appointment of ad hoc arbitrators or arbitration boards, chosen separately for each new grievance. It would be contrary to such appointments to add a different grievance... to one grievance which itself was before an agreed board. ... To force one or both parties to place a completely different issue before such an arbitrator does not seem to be consistent with the spirit of the collective agreement and hence Section 92 of the *Code*. ...
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> *Insurance Corp. of British Columbia v. CUPE, Local 378*, 2014 B.C.C.A.A.A. No. 132 (“ICBC”) (McEwen)

The Union in this case is not seeking to consolidate other matters into this one. Nor, it asserts, unlike in *Halifax (supra),* is it seeking a resolution of issues outside of these proceedings. Once again, the Union’s reply to these issues, from paragraph 24 of its Reply Brief, is:

> With respect, the Union's decision to initiate proceedings in other matters does not allow the Employer to now erect a firewall with respect to evidence and argument relating to bumping and the physical test used by the Employer in furtherance of the reorganization that has always been in dispute. The Union is not attempting to have this Arbitration Panel adjudicate and determine the issue discrimination under the *Human Rights Code*. Nor is it asking you to act as arbitrator in the bumping grievance. To the extent the Union has raised the issue of accommodation in the CSOPAT, and the bumping options given to Affected Employees, it has done so in support of the main issues in this grievance, namely whether the reorganization had the effect of demoting or terminating Affected Employees.

Procedural Matters

The City recognized that it had an obligation to give a notice and follow the process towards an adjustment plan under Section 54 of the *British Columbia Labour Relations Code*. It did so as described in a separate section below. While no adjustment plan was reached, no objection is raised about Section 54 compliance.

When the matter first came on for hearing it became clear that, if the Union succeeded in its grievance, there was a potential that the City's actions might be unwound with implications for those persons occupying the newly reorganized jobs. They had not, to that point, been given notice of the proceedings, which was then done. As a result, Mr. Thompson and Ms. Meixner came forward asking to participate in the proceedings as affected employees and spokespersons for some other affected employees.

In this decision, reference is made to Bylaw Enforcement Officers and Custodial Guards. Having just one Bylaw Enforcement Officer category is recent; in the past there had been two, but they were merged in 2018. Within the new single category there were Lead Hand positions. Similarly, the Custodial Guard reference includes crew leaders. These and a few other related jobs do not alter the legal arguments and I will simply refer to the two principal categories.

In advance of the hearing the parties agreed to a comprehensive set of facts with related documentation. That full statement is attached as Appendix A. In some cases, "will say statements" were prepared by persons who might testify and present evidence.

The Union called the following witnesses:

- Ms. Carmen Sullivan: Ms. Sullivan is a National Representative for the Canadian Union of Public Employees. She is on leave from the City and is a former Local 900 President.

- Mr. David Jones: Mr. Jones, now retired, worked for the City for 25 years. As shop steward he assisted employees going through this process, particularly with their individual interviews.

- Mr. Rajan Gill: Mr. Gill was a Bylaw Services Officer for 19 years. He resigned in December 2020.

- Ms. Elin Jahn-Edwards: Ms. Jahn-Edwards had worked as a Bylaw Services Officer and a Bylaw Services Officer Lead Hand. She became a CSO TO in January 2021 where she worked until she left the City in April 2021.

The Employer called:

- Ms. Jennifer Howatt: Ms. Howatt is the City's Human Resources Manager.

- Ms. Tammy Blundell: Ms. Blundell previously worked as a Bylaw Enforcement Officer, became the Bylaw Services Manager and is now, following the reorganization, the Community Services Manager.

- Mr. Kevin Beeton: Mr. Beeton was the City's Police Support Services Supervisor, and prior to that he spent 10 years as an RCMP Auxiliary Constable. He is now the Community Services Supervisor, Training and Admin Support.

The interested parties each gave evidence:

- Ms. Richelle Meixner: Ms. Meixner is now a CSO working in the RCMP cells. In the past she worked as a Bylaw Services Officer.

- Mr. Jordan Thompson: Mr. Thompson is the CSO crew leader in the RCMP cells and has worked in the cells throughout his entire time with the City.

A Brief Chronology

In summary, events unfolded as follows.

- Around May or June, 2022, City Management decided to pursue a reorganization with the elimination of the two positions in favour of a new CSO position. Legal advice was taken and City Council approval sought.

- The City was advised that this would be an event requiring a notice and negotiations under s. 54 of the B.C. *Labour Relations Code*. It gave the Union a notice of its intention under that Section on July 8, 2020.

- On June 13, 2020 the Union received the first of four drafts of the proposed new CSO classification and the related Crew Leader position.

- On July 13, 2020 the Employer met with the affected employees.

- Over the next four months the Union and the City met over these issues, but failed to reach agreement.

- On August 7, 2020 the City sent each affected employee a letter, based on a template, advising them that their position was eliminated then setting out certain options.

- On August 24, 2020 the Union grieved. It amended this grievance on August 31, 2020.

- Between September 8 and 15 Human Resource Representatives for the Employer met individually with each affected employee.

- On October 9, 2020 the City posted a notice seeking applications for the new positions, with a closing date of October 23. Applications were restricted to the 34 affected employees. The number of full-time positions to be filled was about 17-21, with the City intending to offer part-time or on-call positions should there be a surplus of applicants.

- In November and December and into January and February 2021 one-on-one meetings were held with employees where they were given fixed options of positions available to them, with a short deadline to reply.

- The City began implementing the changes as of January 1, 2021. Some proceeded into the new "CSO Training Opportunity" position. Some employees were placed elsewhere. Some retired, some took severance, and some left work but maintained one year's seniority.

The Employer's October 9 posting was restricted, at the Union's urging, to the affected employees. The Employer notes that the two-week open period was twice as long as the contractual requirement in Article 10(a). Further, it says, affected employees who had expressed an interest in applying, but had not done so during the open period, were allowed to apply as late as November or December.

Section 54 Notice

Section 54 of the British Columbia *Labour Relations Code*, provides in part:

> **Adjustment plan**
>
> **54** (1) If an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies,
>
> > (a) the employer must give notice to the trade union that is party to the collective agreement at least 60 days before the date on which the measure, policy, practice or change is to be effected, and
> >
> > (b) after notice has been given, the employer and trade union must meet, in good faith, and endeavour to develop an adjustment plan, which may include provisions respecting any of the following: …
> >
> > > (i) consideration of alternatives to the proposed measure, policy, practice or change, including amendment of provisions in the collective agreement;
> > >
> > > (ii) human resource planning and employee counselling and retraining;

(iii) notice of termination;

(iv) severance pay;

(v) entitlement to pension and other benefits including early retirement benefits;

(vi) a bipartite process for overseeing the implementation of the adjustment plan.

The parties never did agree on an adjustment plan. Such a plan, had it been agreed to, would become enforceable as if it were a part of the collective agreement. Instead, it appears that the Union's view was that the new classification and the proposed layoffs were unlawful under the collective agreement. The Employer at the same time appears to have operated on the view that, despite the flexibility suggested by 54(1)(b)(i), it had no obligation to alter its view of its collective agreement right to create a new position or eliminate existing positions, or its view of the appropriate bumping process.

The City's notice, sent on July 8, 2020 to the President of Local 900 by the City's Human Resources and Safety Director, reads:

> This letter shall serve as notice pursuant to Section 54 of the Labour Relations Code, R.S.B.C. 12996 c. 244 (*Code*) that the City of Kamloops intends to implement a measure, policy, practice or change that will affect the terms and conditions and security of employment of a significant number of employees to whom our collective agreement applies.
>
> The matter at hand contemplates change involving a significant restructuring of the Community and Protective Services Department workforce. Specifically, the classifications of Bylaw Services Officer, Lead Hand – Bylaw Services, Crew Leader – Bylaw Services, Custodial Guard (as well as Custodial Guard red circled), Crew Leader – Custodial Guard, Property Use Inspector and Court Information Coordinator are to be eliminated, <u>and the incumbents placed in motion</u>. In response to public demand, and the Union's requests for change, the Employer intends, as per Article 20(a) – 'New or Changed Classifications', to institute newly developed classifications in an effort to develop a new and more responsive organizational structure.
>
> Please consider this letter to initiate full sixty (60) days' notice as contemplated under section 54 of the *Code*, after which time, we hope to begin restructuring efforts. We expect these changes to begin on or about September 8, 2020. We are pleased to have previously worked collaboratively with the Union in developing the recently signed Bylaw services Letter of Understanding. In accordance with Section 54(1)(b) of the *Code* we are available to further meet with you to discuss the development of an adjustment plan. Please kindly advise when you are available for such a meeting. (*emphasis added*)

This letter was the source of the phrase "placed in motion". It is unfortunate that no adjustment plan was reached, but no complaint is advanced in these proceedings over section 54 compliance. The Union's position is that a section 54 notice does not give the Employer rights it does not have, or free it from restrictions it does have, under the collective agreement.

For clarity, I note that Article 24 of the collective agreement refers to Section 54 of the *Labour Code*. No argument is made that what the City has done amounted to a technological change, or that is somehow a matter that triggers the right to arbitrate under Article 11.

The Affected Employees

There were 32 affected employees; 10 had been Custodial Guards, 21 Bylaw Enforcement Officers and one a Bylaw Services Clerk. Eventually 17 were accepted into the CSO Training Opportunity position. Of those, seven became CSO's and one remains in the training opportunity position. Seven employees were placed in other positions, one resigned with severance, two retired with severance, one retired without severance and four resigned or bid out to other positions before the CSO-TO position was posted.

Of the 32 affected employees, 22 had full-time permanent status. Six had over 20 years seniority and a further 6 had over 10 years. They ranged in age from 25 to 71, with 5 being 60 or older, 10 in their 50's and 11 in their 40's. A few employees had some form of disability. The Employer believes this information is not relevant to this decision.

Management Evidence on the Job's Creation

Three management witnesses testified to what prompted the decision to combine the two positions and how they went about the incumbents being "put in motion". Ms. Howatt became H.R. Manager in 2020. Previously she had dealings with both Bylaw Services and the Custodial Guards and was familiar with their roles. She described being approached by City officials who were interested in restructuring the two divisions due to the demands on the RCMP and changing community needs.

Ms. Blundell has worked the City since April 1996 and has held a number of different positions over time. In particular, she worked as a Bylaw Officer from 2003 to 2006. She was a member of the bargaining unit from April 1996 to mid-May 2015. In February 2019, and after working in a number of other departments, Ms. Blundell returned to the Bylaw Services Division as the Acting Bylaw Services Manager. In November 2020, the "Acting" title was dropped and she became Bylaw Services Manager under the Community and Protective Services Department. In January 2021, when the Bylaw Services Division was replaced by the Community Services Division, Ms. Blundell became the Community Services Manager, responsible for that Division under the Community and Protective Services Department. This included Community Services Officers ("CSOs").

Much of the evidence on the decision to require the CSOPAT test came from Mr. Kevin Beeton. He was the City's Police Support Services Supervisor until he became the Bylaw Services Supervisor. Under the reorganization he became the Community Services Supervisor, Training and Admin Support.

All three in the past, and now under the reorganization, worked closely together in the Department. They fell within the area of Mr. Byron McCorkell's responsibility as Director of Community and Protective Services.

Ms. Blundell described the vision; the thought processes that led to the decision to combine the two positions. She described seeking a "more holistic approach" through combined positions. They intended to have just one on-call list. They were hoping for better, well-rounded officers, and officers, who though on-the-street plus in-the-cells experience, would get to know and develop stronger relationships with their "frequent flyers", often vulnerable citizens who they had to deal with often.

She says they sought to add to the existing duties of Bylaw Officers by having them engage in more mediation and conflict resolution, crime prevention and enforcement of business and zoning bylaws.

Ms. Blundell testified that "we knew that the *Police Act* was going to be changed". This, she said, held out the prospect of CSO's being able to take on some of the lower end policing work. She noted that currently their officers "do not have authority to have defensive tools" which translates to the broader discussion about municipalities being able to create and employ Peace Officers and potentially have them armed. She noted their current inability to require individuals to provide Bylaw Officers with identification, an authority that too might well come with Peace Officer status.

Ms. Blundell testified that the existing relationship with the RCMP was not good, lacking the mutual trust necessary to have them to respond to Bylaw Enforcement Officers when asked. She saw the reorganization as being one way of improving that relationship. She also noted the fact the RCMP had recently unionized, which placed, or might place, added financial burdens on municipalities. She felt the work in the cell block was not appealing to staff and there would be benefits for them being able to rotate out into the community.

Ms. Blundell's testimony was an amalgam of a "Will Say" statement and direct evidence. The Will Say statement was redacted by agreement, to remove paragraphs 1 plus 5-12. The Union agreed not to call evidence on those points. Instead, the parties stipulated:

> 1. In making the decision to reorganize the Bylaws Department by eliminating the classifications of Bylaw Services Officer and Custodial Guard and replacing them with the single classification of Community Services Officer, the Employer considered various factors it considered relevant to its needs and to service

delivery, including by consideration of the documents found in the Employer's Book of Documents at tabs 1 to 11. While the Union disputes the City's assessment of at least some of those factors, it does not allege that the decision to initiate a reorganization of the Bylaws Department was made discriminatorily, in bad faith, or otherwise for another improper purpose.

Tabs 1-11 include the various studies done in Kamloops and elsewhere and some examples from other municipalities.

The balance of Ms. Blundell's Will Say statement provides:

A. Important Changes in the Community

2. Kamloops is one of the fastest growing communities in British Columbia, has a population of approximately 100,000 people and is the service centre for many smaller surrounding communities.

3. As the community has grown, so too has the local homeless population. Over the past decade or so, it has doubled from approximately 100 in most of the 2010s to approximately 200 in 2018. Many of these individuals tend to have significant substance abuse or mental health issues. Homelessness issues have become increasingly challenging to address in the community.

4. Another challenge that the City is facing is the increased cost of policing. This is primarily the result of:

a. increases (including large retroactive payments) following the unionization of the RCMP; and

b. a need for more officers (during a recent City Council meeting, the Officer in Charge of the Kamloops RCMP Detachment requested additional funds to support the hiring of an additional 5 officers each year for the next 5 years).

…

B. CSO Training Position

13. Over the course of several months, representatives of the City and the Union met on a number of occasions to discuss the reorganization.

14. One of concerns raised by the Union was what would happen to existing Bylaw Officers and Custodial Guards. This was in turn based on the fact that many such individuals did not have the qualifications that had been set for the CSO position.

15. In an effort to address the Union's concern, over the course of many meetings with the Union, a CSO Training position was created.

16. The qualifications for the CSO Training position were eventually set so that any of the individuals working as a Bylaw Officer or Custodial Guard would be able to meet them. Specifically, the City required a CSO Trainee to have:

a. two years of post-secondary education; or
b. completed BC Auxiliary Constable Training or Police Officer Training; or
c. a minimum of one year of experience in bylaw or as a custodial guard.

> 17. The City would also provide extensive training to CSO Trainees and, once they completed that training and passed a physical test known as the "CSOPAT", they would become fully-qualified CSOs. Put another way, a person who became a CSO Trainee, completed the in-house training and passed the CSOPAT would become a CSO without needing to meet the other requirements of the CSO position.
>
> 18. The CSO Training position was initially offered as a "closed posting". This meant that only individuals who were Bylaw Officers or Custodial Guards at the time of the posting would be able to apply for the position.
>
> 19. Every former Bylaw Officer or Custodial Guard who applied for a CSO Training position received one.
>
> 20. We initially set the duration of the CSO Training opportunity at up to two years. We did this because we did not know how long it would take employees to complete their training, and we preferred to err on the side of caution. In reality, most people are completing CSO Training in less than a year.
>
> 21. We continue to hire people into the CSO Training position.

Questions about the CSOPAT testing requirement were deferred to Mr. Beeton. Again, some of his evidence was set out in a will say statement. Both of the earlier positions involved physical work within an element of danger, and was becoming more so. He attested to the view that "it would be beneficial to introduce a physical fitness test" "… to be better able to perform the duties of their job and would be better able to do so safely". He says he would have recommended the introduction of the test even without the reorganization. He particularized his thinking on the Custodial role as follows:

> i. Custodial Guards were responsible for the safety and security of prisoners in the RCMP jails. After a prisoner was brought in and the RCMP officer completed the required administrative procedures, the prisoner became the Custodial Guard's responsibility to monitor.
>
> ii. The responsibilities of the Custodial Guards were fairly "hands off". It was the RCMP officer's responsibility to physically control the prisoner and keep him or her under control.
>
> iii. Most of our issues arose during the hand-off process, which was the time when the paperwork was finished and the handcuffs were being removed. This was when prisoners most often became aggressive and physically resisted, particularly if they were brought in while intoxicated or in a disturbed mental state.
>
> iv. During the hand-off process, the Custodial Guard was present to monitor and could hit a panic button to call for additional RCMP support if needed. However, there was often a delay between hitting the panic button and help arriving.
>
> v. The staffing levels of RCMP officers within the RCMP detachment and in the RCMP jails was constantly in flux. Particularly in recent years, we have experienced periods of low staffing levels for RCMP officers, particularly when there are leaves of absence.
>
> vi. During these periods, the delay between using the panic button and receiving help is exacerbated.
>
> vii. It also resulted in more hand-offs being completed with one RCMP officer only.
>
> viii. In some instances, the Custodial Guard had to act, either by assisting the RCMP officer in physically controlling the prisoner, or escaping to wait for backup.

b. Bylaw Services Officers

i. A significant part of the job of Bylaw Services Officers included interacting with homeless individuals and dealing with homeless camps.

ii. Interacting with homeless individuals can be dangerous, as many can be quite unstable owing to a number of different issues.

iii. With respect to homeless camps, Bylaw Services Officers were primarily responsible for attending at the camps, issuing notices to vacate and providing security while the contractor (Royce Schmidt) took down the camp.

iv. These camps are often located in areas that are, owing to the topography of Kamloops, difficult to access. They are often in remote areas, down steep embankments and near riverbanks. These areas can be difficult to reach, and also difficult to leave.

v. In recent years, the City's homeless population has increased considerably, and so too has the amount of time devoted to dealing with these issues. In addition to this being something of which I am directly aware based on my position, this is also something that has been made evident in a number of City and employee reports.

Meeting with the Union

While there were some exchanges following the City's initial announcement, the most significant introductory meeting occurred on July 29th. The announced target date for implementation was September, which left very little time.

However, the evidence makes it clear that, while the City launched the process in May or June, gave its s. 54 notice on July 8, and first met with employees July 13, the plans were very much an uncertain work in progress. Clear indications of this are contained in the notes of July 29, 2020 Union-Management meeting, held only a few days before the Employer sent the letter set out below to each affected employee.

Mr. McCorkell's initial comment was:

> … not easy process, not enter into lightly, getting outlines of JD, wage, schedule, biggest thing is only have so much money, wage increase = more $, less number of chairs, at around 17 FTE mark, we'll have more details later, transition = things happening rapidly, all munic struggling to address, we're on front end, process is challenging, done cause saddling up for future, help Kam address issues being pushed down to us.

Ms. Sullivan replied:

> … appreciate attendance, hoping today beginning of providing info, got sec 54 but no details, hoping provided today, 3 weeks of time had very little info, members in limbo, we're feeling that too, FTE's were told at second meeting that it was going across/no change, to say that it's a money issue, can't imagine you didn't think about an increase in pay, changes to the job make that clear – asked you to break down FTE's and provide to us, surprised that FTE's changing.

Ms. Colleen Quigley, Kamloop's Human Resources and Safety Director, said:

> Since beginning this is a fluid process, not sure what final looks like, no time did we think all FTE's were there, did hear some things so here to clarify, its fluid so may change again, going to depend on budget, etc.

Ms. Sullivan said the change was impacting 44 people and only 28 or so will land, to which Ms. Blundell replied:

> "all land in org but may not in our dept. exercise bumping"

Ms. Sullivan went on to express concern about existing staff, saying:

> … some ppl may not make it through qual's, understood exceptions made for existing staff, want to make sure we don't have only option to grieve, problem for us if hearing that existing staff is not making through process because of education, our understand would have different exemptions than new hires, referring to grandfathering, all current staff have a place.

Ms. Howatt then explained that their intent was to offer training opportunities, saying:

> … your saying staff not make through process but they'll have ability to do train op, don't have details of what the qual's will be, working on it now, making fair, accessible to as many as possible through process, some staff may not want to go through process, some may ask to bump or retire or look at other opportunities, when a group applies, goes through recruit process, have to pass all stages like physical component, clearance, there may be people who aren't successful, not have details of train op today.

Further discussions followed on what the training opportunity would look like, Ms. Blundell said:

> … very clear, looked at qual's of current staff, only one person fully qual's, physical still up in air, recognize cell block can't be disrupted, promised that to RCMP service level maintained, BSO can change service level, can wait 6 mo. to go through train op to get right people.

to which Ms. Howatt added:

> … these are details for next meeting, looking for JD [job description], pay rate and schedule today, TO and recruitment process details next meeting.

The discussion indicated that budget restrictions were playing a large part in management's decision making. This is self evident from the fact that the work of the 35 or so incumbents might end up being done by 17 or so CSO's in the future. There was also a worry that an increased pay level could impact the number (then 17) of CSO positions.

The Union then raised concerns about going to a rotating shift.

Mr. McCorkell then alluded to changes coming:

> … is changing with what officers doing with covid response, soc distancing, etc., changes regularly, become the one stop shop, respond to what community needs, change to police act will impact us as well, may be dramatic, positioning selves to respond to whatever comes, fluid measure, have to be able to modify as needed, as expectations change. (*emphasis added*)

Ms. Blundell added:

> … setting bar to establish if police act changes, need to be able to support RCMP members as required, doing joint patrols, camps, able to be phys able to protect self or member.

Mr. McCorkell then advised:

> … what have now wont exist, CSO will be trained to do what we need done, have looked at other communities and BSO report about tools needed, were setting a bar, put people through training, need to set bar first, set JD, and stuff and then have to adjust as situation changes.

Discussions followed on when all this might be implemented, the time needed for the Employer to clarify the uncertainties and so on. The Union expressed concern that the message being given to employees did not match what they were being told. Specifically, Ms. Sullivan said they thought there would be some "red-circling" but now understood there would be none.

Several times during the discussion there was mention of the fact that unqualified employees would have the bumping option, but there was no discussion on what that might look like. What was noticeably missing from the discussion, although it was running parallel to the Section 54 process, was any recognition of the collective agreement provisions on scheduling or probation periods and the need for Union agreement on these points. Mr. Quigley at one point made a comment which suggested they would write a new LOU, but again without any expressed recognition that that could only be done with Union consent.

Ms. Quigley made a couple of comments which were seen as dismissive of, or perhaps showed a lack of awareness of, the rights of the current employees. More likely it meant current staff had no rights to the new job.

> … new JD, classification, current ee's have no rights to, have to be qual'd and apply, seniority comes into it, senior qual'd language as stated in the CA.
>
> …
>
> … no obligation to current staff.

Further discussions focused on the need for clarity, particularly on things like scheduling and rotations. It was recognized that the September date was unrealistic. A meeting was set for the next week. Ms. Sullivan explained that the Union wanted further conversations on these issues and did not want a letter going out to staff with options while the Union lacked the needed information to be able to respond to employee's questions.

Putting Employees "in motion"

In fact, a letter went out to all affected employees on August 7th. Throughout this process, the meaning of the phrase "putting employees in motion" has been ill-defined, particularly in relation to job security issues like scheduling, seniority and bumping. According to Ms. Sullivan and Mr. Jones this lack of clarity continued to cause anxiety. Questions posed during meetings had not clarified several important issues. The Union's view on this was expressed in an email to affected members in anticipation of the letter they were about to receive.

> To date, the Union has met with the Employer four times to discuss this upcoming change; however, many details around this restructure are still unclear. The Union is feeling very frustrated with the lack of information provided and has expressed this concern to the Employer. We continue to assert that a restructure of this magnitude is extremely disruptive to our members' lives, and details should be provided with the utmost urgency.

Each affected employee then received a letter advising them that their existing position was being eliminated, based on the following template:

> Dear Employee Name:
>
> This letter is to inform you that the City of Kamloops served the Union with notice pursuant to Section 54 of the Labour Relations Code, on Wednesday, July 8, 2020, to restructure the Community and Protective Services Department, specifically Bylaw Services and the RCMP Custodial Guard Divisions. We expect this restructuring to begin on, or about September 8, 2020.

> Management met with staff on Monday, July 13, 2020, advising that this restructuring will result in the elimination of the following job descriptions: Bylaw Services Officer; Lead hand – Bylaw Services; Crew Leader – Bylaw Services; Custodial Guard; Crew Leader – Custodial Guard; Property Use Inspector; Bylaw Services Clerk and Court Information Coordinator.
>
> The restructuring of work in the Bylaw Services and RCMP Custodial Guard divisions will be amalgamated and a new job classification called "Community Services Officer" will be created. This restructuring is due to operational requirements and a response to public demand for a new and more responsive organizational structure.
>
> One effect of this restructuring is the elimination of your full time/part time/on call position as Position. We greatly regret that our business decision has this unfortunate impact on you.
>
> We will be setting up a meeting with you during the week of August 10th, 2020 to review your options under the Collective Agreement. The following options available are:
>
> > 1. Be placed in an alternate position at your equivalent pay grade, for which you meet the required qualifications, if this is available (Human Resources to investigate and provide options if available); OR
> >
> > 2. Be placed in an alternate position at a lower pay grade, for which you meet the required qualifications, if this is available (Human Resources to investigate and provide options if available); OR
> >
> > 3. Accept a severance package as per Article 27 in the Collective Agreement if you are eligible. As per Article 27(d), to be eligible you must have completed not less than ten (10) years of continuous service with the City of Kamloops. If you meet this condition, you can receive pay equivalent to one (1) week's pay for each year of service (up to a maximum of 10 weeks); OR
> >
> > 4. Apply for a Community Services Officer – Training Opportunity position if you meet the required qualifications for this training opportunity and your seniority allows you to be considered. Minimum required qualifications will be specified on the job posting and successful candidates will be required to complete various components of the training opportunity over a select period of time to eventually become full qualified for the new Community Services Officer position.
>
> We will contact you to schedule your meeting to review this further, and the union has been invited to attend. After the meeting, you will have approximately one week to follow up on these options. If you require any further information or have any questions, please let us know.

The Union's summary of what this letter meant to incumbent employees was that:

> … "placed in motion" meant … that Affected Employees no longer held a position, but would have to apply for, or be placed into another job selected by the City. Failing those, they could retain their seniority for one year and apply on any positions which might come open and for which they held the qualifications, or they could choose simply to leave employment of the City altogether.

The affected employees each had the option of quitting voluntarily or, if old enough and eligible, taking pension and retirement. The Union's position is that those who did so really faced no realistic alternatives and did so in the face of what was, for them, effectively a refusal to continue to employ them. The Union argues that the following features of the "placed in motion" option, for many incumbents, removed any viable option for them to continue working with the City:

> i. Introducing new qualifications, which none of the Affected Employees had, in order to continue to perform work duties they were already performing;

ii. Use of the CSOPAT physical fitness test, including without accommodation for age or disability;

iii. Failure to obtain the new qualifications results not only in a loss of the CSO position, but in a loss of any position with the City;

iv. Imposing an extended probationary period in the absence of any authority or agreement for doing so;

v. Imposing a new rotating shift schedule without regard for the existence of negotiated schedules;

vi. Restricting bumping or placement options to a very few positions selected by the City, a number of which required obtaining new qualifications failing which any position with the City was lost; and

vii. Requiring Affected Employees to make a final choice, sometimes within 24 hours, without allowing them to revisit that choice;

These features, the Employer's justification for them, and the Union's objections, are assessed below. This is done recognizing that, for each individual, the effect may have been cumulative and different depending on their particular circumstances.

Management's Rights and Restraints on those Rights

The City's position is that it has the right, as management, to restructure and reorganize the workplace.

> Article 2: Management Rights
>
> Except as otherwise provided in the agreement, the management, supervision, and control of the Employer's operation and the direction of the working force remain the exclusive function of management.

It acknowledges the longstanding arbitral rules on the exercise of such rights:

> 54. An employer's right to manage its affairs is subject only to the constraints of the Collective agreement and the obligation to exercise such rights in good faith and for valid business reasons.
>
> *Wire Rope Industries Ltd. and USW Local 3910* [1982] BCCAAA 317 (Chertkow)
>
> *Alcan Smelters and Chemicals Ltd. and C.A.S.A.W. Local 1* [1979] BCCAAA 6 (Hope) at paras. 45-47

On July 6, 2021 the City particularized its position as follows:

> … the Employer takes the position that it has and always has had the management right to restructure and reorganize its workforce, including to institute new classifications (or to institute changes to existing classifications). The only constraints set out in the Collective Agreement are:
>
> a. the Union may ask to meet with the Employer to review the classification and rate; and

> b. if agreement is not reached on classification or rate, the Union may seek changes to rates through the arbitration process …
>
> Put another way, the Employer's right to introduce new classifications is subject only by the Union's right to seek through arbitration, changes to rates of pay. This is made clear by:
>
> a. the language of, and in particular, the second to last sentence of, Art. 20(a) of the Collective Agreement, which was not included in the Union's particulars and reads as follows:
>
> > … Any change in rate resulting from discussion between the parties, or following reference to arbitration, shall be retroactive to the date of the new classification was instituted by the Employer. Discussion between the parties and any rulings of the arbitrator will be guided by the Job Evaluation Program.
>
> b. the past practice of the parties with respect to negotiating new or changed classifications.

Both evidence and argument confirm that, in the City's view, "the right to reorganize" is all encompassing, included the ability to define shift arrangements, qualifications, probationary terms and so on notwithstanding specific collective agreement terms. It argues that any collective agreement provision that did not accord to its plans could not reduce its broad management right to reorganize unless that provision itself "speaks of reorganization". See for example, the Employer's arguments at paragraph 110 of its brief.

The City describes this as a presumptive right, with the onus falling to the Union to show provisions in the agreement that constrain that right.

> **20** The arbitral authorities are virtually unanimous in the approach I must adopt in resolving this type of dispute. That is, <u>one starts with the presumptive right of management to manage and then one proceeds to a determination of the extent to which the parties have expressly limited that right in the collective agreement</u>.
>
> …
>
> **21** The arbitral authorities recognize that the viability of an Employer's business depends upon management having the flexibility to organize and change its work processes to adapt to changing conditions. As stated above, such ability "lies at the heart of management's reason for being". The management of the business enterprise including the right to plan the structure of the work force with the right to change and adapt as business exigencies require is an inherent function of management. Poor business management can put an enterprise out of business with consequent loss of jobs. Good management hopefully maintains even increases the business which results in enhanced job security. But the bottom line is that management must have the right to manage and to introduce bona fide change unless that right has been specifically bargained away. (*emphasis added*)
>
> *North Central Plywoods v. Pulp and Paper Workers of Canada Local 25 (Gullacher Grievance)* [2000] BCCAAA 85 (Greyell)

Both parties referred to case law, beyond *North Central Plywoods (supra)* over the scope of and limits on this management right. Those cases are reviewed more fully below.

In its written submissions (paragraphs 103-104) the Employer argues that the focus of this decision should not be on whether the Employer breached sections of the collective agreement, but instead only on whether any such sections restrict the Employer's right to reorganize. It argues:

> 104. In determining whether those provisions of the Collective Agreement constrain, as the Union suggests, "the Employer's ability to impose job descriptions and requirements by classifying, or … reclassifying positions set out in the Collective Agreement", the focus must be on the provisions themselves and *not* on whether they have been breached. Stated otherwise, the question for this Arbitration Panel – at least at this stage of the analysis – is not whether those provisions have been breached, but rather whether the provisions somehow restrict or limit the Employer from engaging in the Reorganization. In that respect, certain of the cases upon which the Union relies are of no assistance at all:

With respect, I only partially agree with this proposition. First, in my view there are aspects of the CSO and CSO-TO position that do include terms and conditions of employment that the collective agreement restrains.

What is lost in the Employer's point of view is that, even with the freedom to reorganize, the newly created position will still be governed by the existing terms of the collective agreement. This might, with negotiation, be overcome by new Letters of Understanding, but that too would be dependent on Union agreement. The Employer cannot at the same time say the existing exceptions negotiated for the newly eliminated positions are null and void, but that it is unilaterally entitled to impose similar collective agreement exceptions for the new position without similar Union consent.

Secondly, whether the Employer's unilateral right to reorganize is fettered by the agreement's existing terms is one question. But anticipated or actual breaches of the collective agreement are nonetheless relevant to whether what was offered to the existing employees, violated or ignored their existing contractual rights both generally and specifically under Article 25.

The City categorizes the Union's various arguments as asserting a right to "veto" the City's actions. I find that description unhelpful. As *North Central Plywoods (supra)* and other cases acknowledge, provisions within a collective agreement may limit what otherwise may seem to be an unfettered right. Asserting that is so is not demanding a veto, but a call for a consideration of the collective agreement as a whole; an interpretative exercise as to the intended scope and any limitations on reserved management's rights.

Similarly unhelpful was the Union's frequent assertion that the City could not proceed at all without the Union's consent. That is clearly not the case if proceedings under Article 20 are involved, since,

whatever that Article means, the City could proceed but subject to the Union's right to seek arbitration. In other situations what the Union actually asserts is that the agreed upon terms of the collective agreement prohibit or circumscribe what the City proposed. While the parties can always agree to change the agreement's provisions, it is once again properly a question of collective agreement interpretation, not the giving or withholding of consent that is the real issue.

This is particularly so in relation to Article 20. The parties have a set of job descriptions, a classification system and related pay scales. Article 20 is entitled "Job Classification and Reclassification". It is discussed more fully below. I find more precise the Union's description of its final position set out in its Reply Brief at paragraphs 32 and 33.

> 32. With respect, the Employer has entirely misconstrued the Union's argument. The Union is not claiming that it has a veto right over the elimination of classifications or the creation of new ones. Nor is the Union denying that the Employer is the one that "institutes" the new classifications and sets the wage rate.
>
> 33. The Union's position is that the classification and wage rate is subject to the mutual agreement of the Employer and the Union and barring the Union's consent the difference is referred to arbitration. The Union submits that the parties clearly bargained restrictions on the Employer's ability to eliminate, introduce and vary classifications in Article 20 of the Collective Agreement.

The 2004 Germaine Decision

There is a sense of déjà vu to these arguments; they were canvassed before, but for procedural reasons, not in a way that provided definitive answers over Article 20.

> *Kamloops (City) v. Canadian Union of Public Employees Local 900*, [2004] BCCAAA No. 228 (Germaine)

That case involved the RCMP's decision to civilianize the Records Reviewer. The City posted two positions, within the Local 900 bargaining unit, to do essentially the same work as RCMP officers had done. The posting and the related job description required completion of formal police training and a "minimum of five years of working police experience". The Union grieved, alleging the policing experience requirements were not reasonably related to the work to be performed in the new position.

The decision reviews some of the history of the Job Evaluation Committee discussed more fully below. For now, it is sufficient to say the Union called for a committee meeting to deal with its objections to the specified qualifications. The employer replied to this saying (at para. 22):

> Article 20(a) of the collective agreement requires the parties to review the classification and rate at the Union's request. This review is to achieve mutual agreement on the classification and pay rate. I do not

> believe the job qualifications identified by the Employer in order to establish the classifications are subject to mutual agreement.

At the hearing, the Union put forward the proposition that the job requirements management set (using its management's rights power) were not *bona fides* and reasonably related to the job. However, as the award notes at paragraph 32, it also argued (as it does now):

> … the Union submits that Article 20(a) provides that the parties must agree on a new classification and, failing agreement, the difference may be referred to arbitration. The Union argues this obligation encompasses all aspects of a new classification, including the stipulated qualifications. The Union's position is of course contrary to the position of the City set out in Ms. Belaforte's letter dated March 29, 2003, which position was reiterated by counsel for the City when the hearing convened in December 2003.

The arbitrator continued at paras. 34-35:

> The City concedes the Union is entitled to arbitrate an allegation that the qualifications set by management for a new position are not reasonably related to the work involved, and the Union concedes that an arbitration under Article 20 (a) would still entail the "reasonably related" test.
>
> **35** The problem with the Union's Article 20(a) argument is that the Union has not been consistent about the extent to which it relies on the provision. In a letter dated November 29, 2003, in response to a demand for particulars, counsel advised: "The Union's position is that the required qualifications of formal police training and working police experience are not reasonably related to the duties of Records Reviewer". The Union at that time did not refer to Article 20(a) or assert the qualifications were not valid because the Union had not agreed to them. When the hearing convened on December 1, 2003, the Union's opening statement alluded to the necessity for agreement between the parties under Article 20(a), and the right of the Union to arbitrate if "mutual agreement cannot be reached". The City maintained its position that Article 20(a) does not interfere with the management right to establish qualifications. The City acknowledged, however, that arbitral jurisprudence required qualifications to be "reasonably related" and, since that was the nature of the complaint particularized by the Union, the parties joined issue on that question.

After documenting some back and forth, it continued:

> **39** As we understand the Union's ultimate position, it is prepared to restrict the issues before the board to the "reasonably related" principles of arbitral jurisprudence, but only if the grievance is successful on that basis. The implication is that the Union relies on its interpretation of Article 20(a) if the grievance fails on the "reasonably related" test.

The Board ruled, at paragraphs 40 and 41, that the Union was not at liberty to invoke its interpretation of Article 20(a) because of the way it had earlier defined the scope of the proceedings. It ruled at paragraph 41:

> **41** We conclude the interpretation of <u>Article 20(a) is not within the jurisdiction of this board. We hasten to add that it would be equally unfair to construe this finding as prejudicial to the Union's position on the meaning of Article 20(a) in other proceedings. Indeed, our determination that this board does not have</u>

> jurisdiction to decide the meaning of Article 20(a) is without prejudice to the position of either party. In this case, however, the validity of the disputed policing qualifications for the Records Reviewer position must be determined according to the collective bargaining law that qualifications must be reasonably related to the work of the position. And, as we have seen, the applicable principles are premised on the right of management to set qualifications for a posted job, subject only to the "reasonably related" test. Since the issue of whether Article 20(a) affects that right of management is outside the scope of this dispute, our analysis must proceed from the same premise. (*emphasis added*)

In this way, the Germaine board accepted that job qualifications could be challenged under general arbitral law, but declined to rule on the Article 20(a) arguments. They are now raised directly in these proceedings. That result is summed up in the Board's conclusion at paragraph 89:

> **89** To summarize, this award does not address an interpretive issue between the parties. It is the Union's position that Article 20(a) of the collective contemplates agreement between the parties on all aspects of a new classification, including the qualifications which are required for positions in the classification, and the right to arbitrate if agreement is not achieved. The City disputes that interpretation, but did not call evidence in respect of the issue because it was reasonably led to believe that the Union was not relying on its interpretation in this proceeding. Without prejudice to the position of either party with respect to Article 20(a) in other proceedings, we have concluded it would be unfair to the City to permit the Union to invoke its interpretation in this case. The validity of the two policing qualifications attacked by the grievance has been determined according to the principles of collective bargaining law and, more specifically, the principles surrounding the necessity for qualifications to be reasonably related to the work of the job.

In the case at hand, the Union raises both arguments: "reasonably related" and perhaps the "*bona fides*" of the new requirements as well as Article 20(a). It is therefore important to review how the Germaine Board addressed the first issue. It dealt with these issues as follows. First, at paragraph 44, it recognized the importance of seniority.

> **44** Even so, there is merit in the Union's submission on one level. Because the policing qualifications effectively restrict the jobs to retired policemen, the issue before this board impacts the promotional opportunity for other employees in the bargaining unit. If the qualifications are not reasonably related to the Records Reviewer job, the effect is to improperly exclude a number of long-term employees who are not former policemen from any opportunity to compete for the job. The seniority rights of those employees therefore define an important contextual consideration, and it is incumbent on the arbitration board not to lose sight of those rights. As the Union submits, seniority is a vitally important collective bargaining right: United Electrical Workers, Local 512 and Tung Sol of Canada Ltd. (1964) 15 LAC 161 (Reville).

In discussing, but ultimately rejecting, the argument that the police qualifications were adopted in bad faith, the Board noted the following passage from *Union Carbide Canada (infra)*

> … the company's right to establish the qualifications necessary for any job is limited, as are all the rights of both parties to the collective agreement, by the requirement that in purporting to establish qualifications necessary for a job the company must be genuinely doing what they purport to do. They may not, in other words, act arbitrarily, unreasonably, or in bad faith, and use "establishing qualifications" as a guise in defeating employee rights under the agreement. … if job qualifications were set at a level quite

> unreasonably high an arbitrator might be justified in concluding that the company was using this as a means to escape the restrictions of, for example, the seniority provisions of the agreement.
>
> …
>
> I feel constrained to add that bad faith in the setting of qualifications might be indicated not only by the fact that those requirements were in themselves unreasonable; but also by the fact that they were imposed, without consultation with the union, upon a job which had been performed in the past, to the apparent satisfaction of the company, by men lacking those qualifications. In such a case the company could, of course, justify the change in required qualifications by showing that the job had changed or that requirements for the job had only been increased in keeping with a general increase in qualification requirements in the industry. (page 173-4, as quoted in Surrey School District, supra, at pages 359-60) (*emphasis added*)
>
> *United Cork, Linoleum & Plastic Workers, Local 389 and Union Carbide Canada Ltd.* (1966) 17 L.A.C. 171 (Christie)

The Germaine award discussed the onus question at paragraphs 56-58:

> The Union clearly does bear the onus of proof but, at the same time, we appreciate that the Union may prove facts which are sufficient to shift an evidentiary burden to the City. The point is illustrated by the Delta School District award, in which the trade union's evidence suggested the employer had introduced unnecessary and therefore unreasonable qualifications. Arbitrator Laing found the employer had not offered a reason to support the recently increased qualification, "other than a general assertion of the right of management to make this determination" (page 229). The implication of an onus on the employer to justify the qualifications arose from the evidence of the trade union in that case; it was sufficient to impose an evidentiary burden on the employer to explain the basis for the challenged qualifications.

The Germaine Board concluded that the Union had failed to prove that the policing qualifications were not reasonably related to the job and dismissed the grievance. It summarized its conclusion at para. 92:

> **92** The Union's case erroneously assumes that if a person who does not have policing qualifications is capable of performing the job duties at any level of competence, the policing qualifications must not be reasonably related to the work. The flaw in this assumption is that it would transform the job into an essentially administrative position. <u>But the Union does not have the authority to unilaterally fix the essential nature of the job by determining the level of skill and ability at which it is to be performed</u>. The City posted quite a different job, combining administrative responsibilities with oversight responsibility for the quality of the investigational activities of the RCMP members. The Records Reviewers are required to perform the investigation-related responsibility at a level of skill and ability that assures the quality of the detachment's investigations. The capacity to monitor and oversee investigations at that level of performance is a function of the training and experience in police investigations provided by the disputed policing qualifications. The policing qualifications are therefore reasonably related to the position. (*emphasis added*)

In the present case the Union relies heavily on the Article 20 argument it was unable to pursue before. However, it has other arguments also suggesting limitations on the City’s right to proceed unilaterally as it did. The City argues that past practice and estoppel preclude the Union advancing its Article 20 approach, but given the conclusion I have reached I find it unnecessary to canvas those matters.

Principles of Interpretation

In interpreting the collective agreement, I have considered the modern rules of interpretation.

> 40 The modern Canadian approach to interpreting agreements (including collective agreements) and legislation, is encompassed by the modern principle of interpretation which, for collective agreements, is:
>
> In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.
>
> 41 Using this principle, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional intention of the parties where none existed, but recognizes their intention if an intention can be shown. The principle also looks into the entire context of the agreement to determine the meaning to be given to words in dispute.
>
> *CEP Local 777 v. Imperial Oil Strathcona Refinery* (2004) 130 L.A.C. (4th) 239 (Elliott) at paras. 40-41

Imperial Oil describes the proper approach extensively at paras. 42-47. Arbitrator Bird summarized the more significant rules in the following way:

> 1. The object of interpretation is to discover the mutual intention of the parties.
> 2. The primary resource for an interpretation is the collective agreement.
> 3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
> 4. Extrinsic evidence may clarify but not contradict a collective agreement.
> 5. A very important promise is likely to be clearly and unequivocally expressed.
> 6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
> 7. All clauses and words in a collective agreement should be given meaning, if possible.
> 8. Where an agreement uses different words one presumes that the parties intended different meanings.
> 9. Ordinarily words in a collective agreement should be given their plain meaning.
> 10. Parties are presumed to know about relevant jurisprudence.
>
> …
>
> Not all rules of interpretation are rigidly binding. Common sense and special circumstances must not be ignored.
>
> *Pacific Press v. G.C.I.U. Local 25-C* [1995] 41 C.L.A.S. 488 (Bird)

The parties referred to the Germaine award and two other awards between these parties on related issues. I accept that considerable respect is due to such rulings. See, for example:

> It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of the agreement. Nonetheless, if the second Board has the clear conviction that the first award is wrong, it is its duty to determine the case before it on principles that it believes are applicable.
>
> *Brewers' Warehousing* [1954] 5 L.A.C. 1797 (Laskin)

Important Features of this Agreement

Issues of interpretation under this agreement must be resolved in the context of the entire agreement. That obligation is particularly strong when assessing the scope of, and any limitation upon the management's rights clause, as shown by the case law discussed below. Article 20 is central and is dealt with separately below. The agreement contains other specific provisions that do, or might be seen as, touching on these circumstances, and particularly on the choices the incumbents were each required to make.

Seniority

The first is seniority. Article 9(b) reads:

> b. Layoffs and Rehiring Procedure
>
> The Employer and the Union recognize that job security should increase in proportion of length of service. Therefore in the event of a layoff, employees shall be laid off in the reverse order of their seniority, provided that those employees retained are qualified to do the work.
>
> The parties agree the following procedure shall apply in the event of Layoffs and Recalls:
>
> i. The Employer will notify the Union of the number of employees who are to be laid off, who will then be laid off in reverse order of their seniority, in accordance with the following:
>
> ii. 1. In the event of a layoff, seniority shall govern provided the employee is qualified to do the work. An employee may choose to be laid off with the consent of the employer and the executive of the unit.
>
> 2. Should a full time employee elect to bid on and secure a traditionally seasonal position they shall forfeit the right to be placed in a full time position upon layoff from the traditionally seasonal position.
>
> iii. In the case of layoffs the Union agrees that where the next junior employee is retained, to complete a job in progress, the retaining of their service for a period not exceeding five (5) working days shall not be considered a violation of the agreement and provided also that employees laid off have not been doing similar work.
>
> iv. Except in case of redundancy, as defined in Article 27(a) or a layoff in excess of eight (8) months, inside and outside positions shall be separated for the purpose of layoff and recall.
>
> v. Employees shall be recalled from layoff in order of seniority provided they are qualified to do the work.

vi. Those employees who are recalled from layoff shall return to their former job and classification held prior to layoff, consistent with their seniority, when the job is refilled.

Seniority has long been recognized as one of the most important collective agreement protections. The off-quoted passage from *Tung-Sol of Canada (infra)* reads:

> Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.
>
> *Tung Sol of Canada v. United Electrical Workers, Local 512*, 15 L.A.C. 161 (Reville)

A decision of the Ontario Court of Appeal recognized the importance of seniority provisions.

> *Teamsters Union, Local 938 v. Lakeport Brewing* (2005) 143 L.A.C. (4th) 149

Lakeport (supra) affirmed a lower court decision overturning an arbitration award. The facts were that the employer faced a downturn and as a result laid off sixty-eight permanent employees. The collective agreement contained a provision that allowed the employer, during busy periods, to hire “seasonal employees” at a significantly reduced wage rate, listed in the wage schedule along with the wage rates for seniority valid employees. When business picked up the employer tried to recall the laid off permanent employees but only as seasonal employees at the lower rate. The arbitrator upheld that decision and dismissed the grievance. The arbitrator viewed “seasonal employee” as just another classification. The Court found that patently unreasonable because it was clearly an employment status, without collective agreement rights, not simply a lower paying classification.

What the employer purported to do was recall permanent seniority rated employees into jobs where they would not have access to the benefits of their seniority or other agreement rights. The Court ruled, at para. 46-47:

> [46] Further, relying on Article 20.02(b), the arbitrator held that in recalling the laid-off seniority employees as seasonal employees, "there is no intention that such employees will become seniority employees". This holding makes no sense because the laid-off employees already were seniority employees. Indeed, Article 20.02(b) emphasizes that the parties never contemplated, much less agreed, that recalled seniority employees could be reclassified as seasonal employees.
>
> [47] Moreover, Article 20.02(c) and (d) stipulate that seasonal employees are not entitled to the benefits given to seniority employees under the collective agreement. These provisions reinforce the conclusion that

> employees who have already attained seniority and already have rights and benefits under the collective agreement do not fit the concept of "seasonal employee" in Article 20.02.
>
> *Lakeport (supra)* at paras. 46-47

and then, at paragraph 51:

> [51] Overall, Article 20.02 demonstrates that "seasonal employee" is an employment status, not an employment classification, and that laid-off seniority employees cannot be recalled as seasonal employees. Unquestionably, laid-off seniority employees could be recalled to a different job classification and paid the rate corresponding to that classification. For example, a brewhouse operator paid $22.15 an hour before being laid-off could be recalled to the classification of filler operator and paid $21.90 an hour. But this does not have the effect of transforming the employee's job status and depriving that employee of previously acquired collective agreement rights. The arbitrator's interpretation does not merely change a seniority employee's job classification. It takes away all the rights he or she acquired under the collective agreement. (*emphasis added)*
>
> *Lakeport (supra)* at para. 51

The Court concluded:

> [56] Finally, although in his decision the arbitrator referred to the importance of seniority, in my respectful view he paid no more than lip service to it. Seniority, of course, is vital to employees, a cornerstone of the collective bargaining relationship. A long-established principle of labour law is that seniority can only be affected or altered by express language in the agreement. Arbitrator Reville put it this way:
>
> [*the Court then quoted the Tung Sol extract set out above*]
>
> [57] In the light of this principle, Lakeport cannot rely on its general authority in the management rights clause to deprive seniority employees of the rights they have already attained. Express language, not just the general management rights clause, would be required to alter their seniority status. No such language can be found in this collective agreement. (*emphasis added*)
>
> *Lakeport (supra)* at paras. 56-57

Lakeport (supra) is particularly significant to this case because the City's primary offer to incumbents was the CSO or CSO-Training Opportunity positions. However, it was anticipated there were too few such positions. The City's position was that it would offer full-time positions first, then part-time positions. If there was still a surplus of applicants, it would provide them with on-call positions. Beyond the obvious uncertainty as to what might end up being available to applicants, there is the fact that on-call employees have no seniority rights under Article 9.

Seniority rights are very closely related to bumping rights. Throughout the process, the City recognized and purported to offer bumping rights. However, throughout the parties' dealings there appears to have

been no detailed discussion of what the City felt it meant. A decision between these parties includes some history on Article 9(a) and reviews the seniority-bumping rights connection.

Kamloops and CUPE 900 [1998] BCCAAA 700 (Devine)

A Sanitary Landfill Clerk was made redundant when her duties were distributed elsewhere. The City, in seeking to place her elsewhere in its employ "worked up to find a suitable position in terms of qualifications and seniority which was the least disruptive. The Union grieved on the basis that her seniority entitled her to bump down to any position for which she was qualified, based on her choice. Arbitrator Devine acknowledged the *Tung Sol* proposition that seniority is one of the fundamental rights a collective agreement protects. However, he went on to say:

> **33** … it is clear that the Union negotiated bumping rights which were based on employee choice in the Letter of Understanding dated January 24, 1987. The Union approached the Employer subsequently to negotiate a recission of the bumping language. The parties agreed to a new Letter of Understanding which was signed on October 9, 1987. Instead of the previously-agreed mandatory bumping procedure, the parties agreed that in the event of a layoff, seniority shall govern provided an employee is qualified to do the work. Further, employees were to be laid off in reverse order of seniority.
>
> **34** The effect of this change was significant as a practical matter because the Employer now was in charge of administering the layoff procedure. The Employer advised that the Union on November 19, 1987 that employees would be reassigned provided they were qualified to do the work.
>
> **35** What remains in issue is how the reassignment procedure was to be implemented in practice. One interpretation is that full bumping rights remain with the Employer in charge of the process. At the other end of the scale, operational concerns of the Employer are paramount. It is clear the parties did not define in exact terms how the procedure was to be carried out. It follows logically from the seniority language contained in the Collective Agreement, however, that seniority is the paramount consideration subject to qualifications.
>
> **36** This does not mean that operational considerations play no role in the ultimate decision. It is only logical that as the Employer is in charge of the process, it will be aware of and act upon operational considerations whenever possible.
>
> **37** The Employer described the process as an amalgam of competing interests which are balanced one against the other. The difficulty with that approach is the paramouncy of seniority is lost in the mix and can be easily subsumed by other considerations.
>
> **38** In our view, the process does not allow for working up from the bottom of the seniority list. This process gives paramouncy to operational considerations instead of seniority. Instead, the Employer should work down from the seniority list looking for positions where qualifications and seniority might allow an employee to be placed. Once a classification is determined, it may be feasible for the employee to be placed in the classification by bumping the junior employee. This would give scope to the Employer's operational concerns and minimize a "waterfall" effect.
>
> **39** To this extent, there is a balancing of interests. Where the Employer's approach fails is the process of moving to the bottom of the seniority list upwards gives paramouncy to operational concerns. The Collective Agreement and practice of the parties is to give paramouncy to seniority. This dictates moving down the seniority list. Bumping upwards is not specifically excluded by the Collective Agreement but would likely be a rare occurrence. (*emphasis added*)

The events of the second half of 2020 suggest Arbitrator Devine's concerns in paragraph 37 were prescient. It is difficult to see where seniority considerations were applied, in a significant way, in determining who was offered what job, or denied the right to bump into a job the City had chosen not to offer. There was no express reference to the City's approach to its obligation under Article 27(b).

Wage Scales

The collective agreement contains wage scales. Both the affected classifications fall into the outside part of the schedule. Each schedule has a Pay Grade Column followed by a list of positions, grouped by pay grade, and then four columns of wage rates covering the term of the agreement.

Employee Status

The parties' collective agreement includes many letters of understanding. Subject to their own terms, these provisions are just as binding as the main articles in the agreement. The Letter of Understanding Re: Employee Definitions provides:

> An employee owns a position at the City when they successfully bid on a posting for a regular full-time or part-time, seasonal, temporary, or on call position.
>
> **1. Regular full-time employees have:**
>
> > <u>a. The normal work week as stated in Article 13 or as modified by mutual agreement for their position</u>.
> >
> > b. No fixed term of employment.
> >
> > <u>c. Rights to all terms of the Collective Agreement.</u>
>
> **2. Regular part-time employees have:**
>
> > a. Hours of work as established for their position, which are less than the normal work week stated in Article 13.
> >
> > b. No fixed term of employment.
> >
> > c. Rights to all terms of the Collective Agreement except where modified to apply to part-time employees (for example – Articles 14[f], 19[g], and 19[h]).
>
> …
>
> **6. On Call employees have:**
>
> > a. No guarantee of daily or weekly hours.
> >
> > b. No fixed term of employment.

> c. Rights to all terms of the Collective Agreement except Article 9 Layoffs and Rehirings.
>
> d. The right to hold more than one permanent on call position, but may not work more than thirty-five (35)/forty (40) hours in a normal work week without supervisory approval.
>
> e. Benefit entitlement calculated as per Article 19(g) – Benefit Eligibility for Part-time and Temporary Employees.

> On call employees may be used to relieve permanent and seasonal employees during vacation, health leave, or other paid or unpaid leaves of absence, or to provide extra workers to meet operational demands.
>
> Relief work that is known to exceed sixty (60) working days at the beginning of the assignment will be posted as a temporary position. (*emphasis added*)

These provisions are relevant to the issue of scheduling and to the Employer's expressed intention to offer surplus applicants for the CSO-TO provisions "on-call" status. Article 13 is described below.

Article 25

The Union says Article 25 provides a further restriction on management's rights. It reads:

> **ARTICLE 25: PRESENT CONDITIONS AND BENEFITS**
>
> All rights, benefits and working conditions which employees now enjoy, receive or possess as employees of the Employer shall continue to be enjoyed and possessed insofar as they are consistent with this Agreement but may be modified by mutual agreement between the Employer and the Union.

There is no evidence in this case of the Employer even seeking, much less the Union agreeing to, any change in rights, benefits, or working conditions for the incumbents. Again, the Employer sees this Article as irrelevant since it includes no express words overriding what it views as its unfettered management right to reorganize.

Severance Pay

The collective agreement provides severance rights for employees unable to continue in their jobs because of "mental or physical conditions", or who "became redundant due to the introduction of new methods, equipment or organization". Again the Union argues severance pay would only be taken by employees who were unable to, or not allowed, to keep working in the new, or other, positions. The language of the severance benefit is not controversial and is set out in Article 27:

ARTICLE 27: SEVERANCE PAY

a. Conditions for Severance Pay

Subject to the conditions set out in Sections (b) to (f) inclusive, the Employer will provide severance pay equivalent to one (1) week's pay for each year of service to employees who are unable to continue in their jobs because of non-compensable injury or illness, mental or physical conditions, or who become redundant due to the introduction of new methods, equipment or organization.

b. Placement, Training, and Retraining

The Employer will endeavour to place an employee referred to in Section (d) in other work consistent with their mental or physical condition or other qualifications and will endeavour to provide any necessary training or retraining. Except for the situation referred to in Section (c), should the employee refuse to be placed in such other work or to undergo training, they shall not be entitled to severance pay.

c. Severance Pay on Redundancy

Notwithstanding the provisions of Section (b), an employee who becomes redundant due to the introduction of new methods, equipment or organization, shall be entitled to severance pay if the only other work in which they can be placed or for which they can be trained falls within a lower rated classification than the job they held at the time they became redundant.

d. Eligibility for Severance Pay

To become eligible for severance pay an employee must have completed not less than ten (10) years of continuous service in the employ of the Employer.

The Employer will provide severance pay to non-continuous employees who have completed not less than ten (10) years of service on the following basis:

i. The employee's months of service are totalled and divided by twelve (12) to get the actual worked years/months. The employee is then eligible to be paid one (1) week's pay for each full year of service. Partial years of service shall be paid on a pro rata basis.

e. No Severance Pay on Layoff Due to Shortage of Work

The provisions of this Article do not apply to employees who are laid off due to shortage of work and not because of redundancy as defined in Section c.

f. The amount of severance pay to which an employee shall be entitled shall not exceed ten (10) weeks. (*emphasis added*)

In my view the Employer's obligation under (b) does not replace or limit seniority or bumping rights nor does it modify Arbitrator Korbin's award. It does imply that there is to be an assessment of "other work in which they can be placed or for which they can be trained".

Some incumbents had insufficient service to qualify under (d). To the extent a severance payment capped at 10 weeks may seem low, it is a consequence of what has been negotiated. To the extent that

is significant, it is perhaps testimony to the assumption that seniority will serve to protect longer serving employees in the event of redundancies.

Just Cause Protection

b. Dismissal Only for Just Cause

An employee with seniority may be suspended or dismissed only for just cause. Such employee and the Union shall be advised promptly in writing by the Employer of the reason for such dismissal or suspension.

It is common ground that no just cause is alleged in respect to any incumbent.

Probation Periods

The Collective Agreement includes specific provisions governing probationary periods, and addressing probationary failures. Leaving out the specific provisions for apprentices, it provides in Article 10(c):

c. Probation Periods

i. Crew Leader and Union Supervisory positions:

Employees selected for Crew Leader and Union Supervisory positions shall have a probation period of four (4) months. External hires for these positions shall have a probation period of six (6) months.

The positions to which the extended probation period applies are those with fifty-six (56) points or more allocated for supervisory duties in the Job Evaluation Plan, and the Crew Leader – Bylaw Services.

…

iii. All other positions:

Employees selected for all other positions shall have a probation period of thirty (30) worked days. External hires for these positions shall have a probation period of four (4) months. Employees shall be confirmed in the position conditional on satisfactory completion of the probation period.

d. Probation Failure

i. For existing employees, in the event the successful applicant proves unsatisfactory in the position during the aforementioned probation period, they shall be returned to their former position without loss of seniority or previous salary, and any other employee promoted or transferred because of the rearrangement of positions shall also be returned to their former position without loss of seniority and previous salary.

…

> iii. The employment of externally hired employees may be terminated at any time during the probation period at the absolute discretion of the employer, provided however, that such discretion is not used in an arbitrary, perverse, or capricious manner. (*emphasis added*)

Work Schedules

The City and the Union negotiated a specific Letter of Understanding for Bylaw Enforcement Shifts as referred to below. However, with the reorganization, the City's position is that the Letter became "null and void". However, if that is the case, the default position is that set by the Employee Definition Letter of Understanding quoted above. For a regular full-time employee they are to have:

> … the normal work week as stated in Article 13 or as modified by mutual agreement for their position. (*emphasis added*)

Article 13 itself provides:

> **a. Hours**
>
> SCHEDULE 'A' OUTSIDE CLASSIFICATIONS
>
> The normal work week for outside staff shall consist of five (5) eight (8) hour days, from Monday to Friday inclusive. The normal work day for outside staff shall not commence before 8:00 am nor finish later than 4:00 pm. No eight (8) hour shift for outside staff shall be spread over a period longer than eight (8) hours. Outside staff will be required to adhere to 'lunch on the fly' herein defined as a break no longer than thirty (30) minutes (including wash up time), where the employee is required to be available for work during that lunch break if required. Lunch on the fly shall be taken at a time least disruptive to the operation.
>
> SCHEDULE 'A' INSIDE CLASSIFICATIONS
>
> The normal work week for inside staff shall consist of five (5) seven (7) hour days, from Monday to Friday inclusive. The normal work day for inside staff shall not commence before 8:30 am nor finish later than 4:30 pm. No seven (7) hour shift for inside staff shall be spread over a period longer than eight (8) hours, with one unpaid hour off for lunch.
>
> Seasonal variation of the normal work day may be made by mutual agreement of the parties to this agreement.
>
> Except as hereinafter provided, the hours of work shall be:
>
> Outside Staff - 8:00 am to 4:00 pm
> Inside Staff - 8:30 am to 12:00 noon
> \- 1:00 pm to 4:30 pm
>
> **b. Work Schedule Posting**

> The Employer and the Union agree to set forth the work schedule for each Department and any changes to work schedules shall be by mutual agreement of the parties. Such mutual agreement shall not be unreasonably withheld. Agreed upon work schedules shall be posted conspicuously in each Department.
>
> The Employer will provide the Union by January 30 each year a listing of the approved variations to the hours of work throughout the City.
>
> It is agreed that various hours of work, whether covered by Letters of Understanding or not, can be implemented or changed consistent with the guidelines outlined below.

The only evidence of mutual agreement to a variation for these provisions for the Bylaw Enforcement Officers was the Letter of Understanding the Employer maintains is null and void. The same is true for the RCMP Custodial Guard Letter of Understanding. There is no evidence of any Union agreement to the proposed hours of work or rotation for the CSO or CSO-TO position. Indeed, all the evidence shows the Union's ongoing opposition to the proposed schedules and rotations.

Training Opportunities

The City knew that only one employee in the two classifications possessed the qualifications it established for the CSO position. That person would still have to pass the physical.

The City sought to address this by proposing and creating a "Community Services Officer Training Opportunity". This was said to fall within the scope of a 2012 agreement over training opportunities.

> The City of Kamloops encourages career development and respects that employees may want to pursue more than one career. The general intent when offering training opportunities is to allow staff an opportunity to move into an area of the City operations that they may not have the experience or the qualifications to bid into. In order to minimize the disruption to the organization caused when these opportunities are not successful, the following guidelines shall apply to all posted training opportunities and will be reviewed with interview candidates.
>
> 1. Employees to access a maximum of three of the training types (training opportunity and in-training only) during their employment with the City. For example an employee can access two training opportunities and one in-training or one training opportunity and two in-training.
>
> …
>
> 3. Employee to commit to the training term stated on the posting.
>
> 4. Employee to commit to remain in position for a minimum of one year and to a maximum of two years upon completion of the training.
>
> 5. For a period of one year after completing the training or in-training opportunity, employees, unless they are otherwise employed outside of the classification, must accept any vacant shifts that should arise in the classification they have been trained in if that shift has remained vacant after a posting or bid meeting process.

6. Training opportunities may vary in length, based on the amount of experience that the successful qualified applicant brings to the position.

…

Employees who do not fulfill the commitments as stated above will incur the following consequences:

1. Employee cannot access any other training types in the future.

2. Employee forfeits the right to return to his/her former position but is allowed to use seniority for one year to bid on another position (as per the Collective Agreement); or Employee goes on a 6-month unpaid leave immediately after vacating the training opportunity/position and is not able to bid on other postings for that 6-month period.

The Policy Document adopted by the City called “Training Opportunity Terms and Conditions” ended up using somewhat different language. Significant parts of that document read:

Training Opportunity
Terms & Conditions

The City of Kamloops encourages career development and professional growth for its employees. Training postings (including training opportunities and "in-training" postings) allow staff the prospect of moving into an area of the City operations that they may not otherwise have the experience or qualifications to bid into.

To support this, the parties have adopted the following terms and conditions for training postings. To illustrate your acceptance of the terms and conditions, please initial each item and date and sign at the bottom.

…

6. LAYOFF AND RECALL FOR TRAINEES

The trainee will be laid off before junior, fully qualified incumbents in the classification. The trainee will be recalled last after junior, fully qualified incumbents in the classification.

7. TRAINEE PROBATIONARY PERIODS

…

<u>Employees with seniority who do not fulfill the commitments of a training posting or who are deemed unsuccessful after passing probation will forfeit the right to return to his/her former position but will be allowed to use his/her seniority for one year to bid on another position</u>.

The Union has agreed to consider requests for longer probationary periods based on the length of the training term and/or a trainee's progress. (*emphasis added*)

These many collective agreement provisions have been reviewed (a) because they may be relevant to the broad argument over the Employer’s right to create this new job under its management rights clause

and (b) because they relate to the options offered to individual employees during this "placing in motion" process and to the Employee's concerns about and responses to their mutually exclusive options.

Before addressing these questions, I turn first to the significant difference between the parties over the scope of and any limitations imposed by Article 20. As noted above this involves arguments that were put before the 2004 Germaine Arbitration but not decided, on a without prejudice basis.

The Article 20 Process

Much of what has separated the parties through this process is their diametrically opposed views on the meaning of Article 20. This is the issue that remained undecided following the Germaine award and unfortunately that has remained unaddressed despite several rounds of bargaining.

The Union says this agreement specifically provides processes for new or altered classifications in Article 20 which reads:

> **ARTICLE 20: JOB CLASSIFICATIONS AND RECLASSIFICATIONS**
>
> **a. New or Changed Classifications**
>
> The Employer may institute new classifications in addition to those listed in Schedule "A". Should any such new classification be instituted, the Employer shall establish the rate for same and shall submit the classification and rate to the Union in writing and, in addition, shall post the classification and rate in the manner required by Article 10(a). The posting shall indicate that the new classification and rate of pay is subject to agreement between the Union and the Employer. Within thirty (30) working days of such submission and posting, the Union may, if it deems necessary, request to meet with the Employer to review the classification and rate and if mutual agreement cannot be reached, the difference may be referred to an arbitration under the provisions of Article 11. Any change in rate resulting from discussion between the parties, or following a reference to arbitration, shall be retroactive to the date the new classification was instituted by the Employer. Discussion between the parties and any rulings of the arbitrator will be guided by the Job Evaluation Program.
>
> **b. Changed Classification**
>
> If the Union claims that the duties of an existing classification have been significantly changed, the Union may request to meet with the Employer to review the classification and/or rate. If within thirty (30) working days of the submission of such request, which shall be in writing, and the request shall specify any changes in duties and any proposed change in the rate of pay, mutual agreement cannot be reached, the difference may be referred to arbitration under the provisions of Article 11. Any changes in rate resulting from discussion between the parties, or following a reference to arbitration, shall be retroactive to the date the Union submitted its request to the Employer. Discussions between the parties and any rulings of the arbitrator will be guided by the Job Evaluation Program.

The Employer says that what the arbitration option in Article 20 provides is limited to the wage rate. This, it argues, follows from the limited description of the remedy, "any change in rate … shall be retroactive to the date the new classification was instituted by the Employer." The Union sees it as extending to the entire job description put forward for the new classification. The question is what is meant, in 20(a) by "shall submit the classification and rate to the Union …" Given its centrality to the parties' arguments, I have had to consider carefully just how this Article fits into the scheme of the collective agreement.

If this indeed provides a full mechanism to arbitrate an Employer's new classification, it would speak against a unilateral unfettered right to create a position. If it provides a right to arbitrate something short of that, then the words "the Employer may institute new classifications …" indicate that a unilateral right to create a new position is intended, subject to that limited right to arbitrate.

As well as the Korbin award (*infra*) I am influenced particularly by the words in the last sentence of 20(a). Discussions between the parties and any rulings of the arbitrator must be guided by the Job Evaluation Program. This helps define what an arbitration under Article 20 is designed to do.

While written by management, I find the 2021 workshop presentation called "CUPE Job Evaluation Program" helpful. Ms. Howatt led the presentation, but the Union invited her to do so and apparently, over several years, took no objection to her description of the process. What it describes is a very typical job evaluation system. It defines the process as follows:

> Job Evaluation is a systemic procedure for determining the worth of a job <u>within</u> an organization relative to all other jobs in that organization.

It defines the purpose of the process as follows:

- Attempts to achieve <u>internal</u> equity in the pay structure.
- Creates a hierarchy of jobs, where all jobs of a similar value are on the same level.
- Provides a reasonably objective assessment of job worth, free of gender bias.
- Provides a mean of ranking new and changed jobs.
- Provides basic information for wage negotiations and wage determination.

It notes the system's origin in efforts to rectify gender discrimination between jobs. It says:

> Job Evaluation occurs in three circumstances:
>
> 1. A new union job is created (by management).
>
> 2. An existing union job is updated by management, and it is determined that *significant change* has occurred in the job ("employer/management request").

> 3. An employee feels that *significant change* has occurred in his/her job and submits it to the union for review ("incumbent request").

It notes, as do prior awards between these parties, that the parties once had an agreed upon joint labour/management job evaluation committee. That was abandoned, apparently due to an unacceptable backlog of reviews, in favour of the current Article 20 process. It notes, significantly as to the role of an arbitrator, that the focus of job evaluation is on equity within the City, not external equity.

Arbitrator Korbin's 1990 award between these same parties discussed the Article 20(a) arbitration process.

> *Kamloops v. Canadian Union of Public Employees, Local 900* [1998] BCCAAA 573 (Korbin)

The Union was seeking to ensure that job descriptions were classified in a gender neutral way. They retained an expert to help. After receiving an agreed upon expert report, the City unilaterally made changes to job descriptions. In an initial award, Arbitrator Korbin left it to the parties "to negotiate the specific wage rates that reflect internal equity within the pay schedules [established in the report]." (See para. 3). The Union objected (at para. 5) that the City … took unilateral action, contrary to the mutual process required by the Collective Agreement and made changes to job descriptions, evaluated or rated jobs and/or assigned pay rates …

The arbitrator concluded that while the expert had the authority to establish some matters under the agreement, he had only done so in some, but not others. The arbitrator concluded from this that the City had, in some respects inappropriately, acted unilaterally, saying at paragraph 22:

> 22 In respect of the maintenance of the Pay Equity plan, Dr. Shetzer's Report specifically recommends the maintenance procedure "follow implementation of the plan." As a result, prior to the implementation, new and changed positions must be dealt with in accordance with Article 20 of the Collective Agreement, and the existing Job Evaluation manual.

Arbitrator Korbin then ruled:

> 24 Notwithstanding these conclusions, <u>I agree with the Employer that it maintains the right to institute new or changed job classifications and set pay rates for these new classifications</u> under the terms of the parties' Collective Agreement. On this point, Article 20(a) and (b) read as follows:
>
> *[she then set out this Article which was at the time, in the same form as now]*

She continued at paragraph 26:

> 26 The Employer, therefore, maintains its right to introduce new and changed positions in accordance with Article 20, <u>and the Union maintains the right to challenge such changes up to and including arbitration</u>. To ensure a practical result, the arbitrator must be guided by the Job Evaluation Program in effect at the time of adjudication. (*emphasis added*)

My reading of the award suggests that, while it is up to the City to craft the job description, the Union is entitled to challenge, and if necessary, arbitrate not only the pay, but the process of evaluation. It does not say that the Section 20 process can be used to challenge the initiation of a new job description. Nothing suggests the Union cannot challenge the way it is classified which includes a "second look" at the factors that influence the job's position within the classification system. This is not limited to the wage rate, but includes those factors that, once assessed, establish the classification and thus the wage rate.

I have considered that Board's analysis. The alternate interpretation is that what the parties negotiated is a finite list of jobs within the bargaining unit which the City is able to use. Beyond that, should the City wish to add a new job, it can only do so following a proposal, discussions and (should agreement not be reached) an arbitrated result under Article 20 of: (a) the right to create the job (b) its content and required qualifications, (c) the weighing of the value of the content and qualifications and (d) (based on (c)) the appropriate pay grade for the position.

Such an interpretation would limit management's right to create a new position to either a renegotiation upon the collective agreement's expiry, or by mid-contract proposals subject to the Article 20 arbitration process. The Germaine award establishes that, without consideration of the Article 20 process, issues like the *bona fides* of a new position, questions like - has there been a substantial change in duties? or - is management's action within or contrary to the collective agreement? can all be arbitrated under general arbitral law. Therefore, it is not a case of being unable to challenge such matters unless an Article 20 arbitration can be used to do so.

Much of the difference of views now before me comes from the use of the word "classification" in two ways. The parties use the term as a descriptor for the various jobs – "classifications" – covered by the collective agreement. However, a job or position is at its heart a set of duties, responsibilities, and qualifications customarily (as here) set out in a job description. A job description itself is not a classification. The parties have established, as do many, a system for assessing the elements of a job; weighing the job's features and assigning points under various categories. This process is an essential part of a "classification system". When an employer, in this case the City, wants to create a new job, or alter an existing job's content, it will begin by putting forward a proposed new or altered job description. This is customarily discussed between the parties and the exchange of views often leads to amendments. Once that is done, the proposal is then subjected to an agreed upon classification process. The job description is reviewed and points assigned based on the complexity involved, any prerequisites, the

working conditions, and so on. This process yields a point rating. That point rating is used to assign the job to a pay grade within the collective agreement's various levels. Forms put in evidence illustrate that process is used in this bargaining unit, and the resulting Schedule A shows the resulting ranking system.

It is my experience of such job evaluation systems, and my conclusion from reviewing the processes set out for this bargaining unit, that the classification process and its pay consequences focus on what the Employer puts forward as the job, not on what the Union thinks the job should be. I say that recognizing that very often the Employer will modify its proposed job description to meet any Union objections or suggestions it is prepared to accommodate. However, the process of classifying the job involves taking that job description and evaluating it for the purpose of arriving at a suitable classification level.

It is in this light that I interpret what is meant in Article 20. What can be subject to its processes is the appropriate classification of the job. That involves an ability to have the arbitrator assess the various points awarded ("… guided by the Jobs Evaluation Program"), which includes an assessment of the relative demands on the job, as set out in the job description. It is not authority to alter that description, only to fairly assess it, to arrive at a classification level, and to determine the appropriate pay grade at that level. Thus it involves more than just pay because, under this system, the pay follows from the objective assessment of points, a task assigned to the arbitrator. This interpretation overcomes my initial concern with the Employer's "pay rate only" argument.

Without going into detail as to how these factors are weighed, it is useful, to show the scope of the exercise, the list of factors to be considered. They are:

- Job Knowledge
- Education
- Physical Effort
- Disagreeableness
- Relationships
- Supervision of Others
- Skills
- Supervision Received
- Personal Hazard
- Accountability
- Safety of Others

There is much to be assessed in these questions beyond the resulting rate. I find the Korbin award (*supra*) consistent with and, when read alongside the earlier Germaine award, supportive of this analysis.

This conclusion on Article 20 makes it unnecessary to address the argument that the Union is estopped from raising its view that Article 20 allows it to arbitrate the creation, content, and qualifications required for the newly proposed position. Similarly, it makes a review of the parties' past practice over past

dealings over Article 20 unnecessary. Such evidence as I received on this question does not alter my conclusion.

This leaves me in much the same position as Arbitrator Germaine; dealing with the Union's objection to the Employer's ability to create a new classification based on general arbitral law. His analysis of that law is helpful and the parties have each alluded to additional authorities. Before moving to that topic, one distinction is very important.

Saying the Employer can create a new classification and describing any limits the collective agreement imposes on that authority is a somewhat different (although interrelated) question to what the Employer can or must do with the incumbents of the positions it decides to eliminate. That concern flows over to the second question involving the choices given to, or withheld from, the various incumbents.

Employer Right to Create a New Classification

In addition to the *North Central Plywoods (supra)* decision the City refers to several other authorities to support its right to reorganize, to create a new position, and to eliminate existing positions. An often referred to authority on this issue is:

> *Auto Haulaway Inc. and Teamsters Local 927* (1995) 47 L.A.C. (4th) 301 (Outhouse)

The issue in that case was described at paragraph 3.

> The union alleges that the employer cannot abolish any of the categories of employees set forth in art. 2.01, at least not while there remains work to be done of the type historically performed by those employees. The employer, on the other hand, maintains that it has the inherent management right, as reflected in art. 4.01, to organize and direct its workforce, including the reassignment of work from one employee classification to another, even if it results in the elimination of one or more of the affected classifications.

Arbitrator Outhouse reviewed the leading authorities and texts at the time and concluded, at paragraph 24:

> Article 4.01 requires restrictions on management rights to be specific. As is apparent from arts. 4.02 and 21.13(d), the agreement does specifically limit management rights in certain respects. However, there is nothing in the collective agreement which specifically purports to prevent or restrict management from abolishing classifications or reassigning work from one classification to another. Absent any such provision, it seems readily apparent from the Court of Appeal's decision that there is simply no room for implied prohibitions or limitations.

The reference to specificity in that case comes from the wording on the management right's article. The Court of Appeal decision alluded to was:

> *Maritime Telegraph and Telephone Co. v. T.W.U.* (1994) 119 D.L.R. (3d) 634 (N.S.C.A.)

That case held that an implied term cannot amount to an express provision of an agreement.

Management's right to change or eliminate classifications may be restrained by provisions within the collective agreement intended to protect employee rights such as seniority, posting, or scheduling provisions, many of which are set out above.

> *Rolland Paper Co. Ltd. And Canadian Paperworkers Union, Local 1284,* [1981] 28 L.A.C. (2d) 321 (Adams)

Rolland Paper involves many similar circumstances. The Employer employed eight people in jobs called rawstock inspector and process control inspector. The employer changed this by folding them into a single process control job. They were all placed on shifts and, over the course of a month, rotated so as to spend two weeks on the day shift, one on afternoons, and one evenings. Each employee spent one full week doing the rawstock inspector's function. The collective agreement in question had customary hours of work, job posting and seniority provisions. It also included a caveat to the management's rights article:

> 7.02 Management rights as set out in this collective agreement must be exercised fairly without discrimination, and in accordance with the collective agreement.

At paragraph 11, Arbitrator Adams accepted the Employer's argument on several significant points:

> 11 A review of the evidence satisfies us that the employer instituted the contested changes in good faith and for reasons of business efficiency. We are also satisfied that the terms of art. 1.02 were complied with. The changes were not implemented until the union had been notified and matters had been reviewed at the meeting between the parties on February 7, 1980. ... In addition, there is no basis to the argument that the employer instituted a "fourth shift" contrary to art. 8 or that it instituted regular hours contrary to this provision. The evidence establishes that the rawstock inspector and quality control technician performed work within the process control and quality control departments and that these duties are not performed on an eight-hour day shift between the hours of 8:00 a.m. to 4:00 p.m. Article 8.01 provides that 40 hours a week is the standard work week for these departments and art. 8.02 stipulates that "the second shift" shall be from "8.00 hours to 16.00 hours". Accordingly, nothing in what the employer has done violates the terms of this article. However, the matter cannot rest here.
>
> *Rolland Paper (supra)* para. 11

The Board found, at para. 13:

> 13 On the evidence the board is satisfied that the work of both the rawstock inspector and quality control technician, as discrete sets of job duties and occupying two employees on a regular basis for eight hours a day, continued to exist.

It then asked:

> … whether or not the employer was and is entitled, on the wording of this agreement, to group existing jobs together and rotate encumbent employees through the jobs so grouped as if they constituted duties falling within a single classification as claimed where the collective agreement does not contain descriptions of the jobs or their classifications, arbitrators have looked to evidence establishing the work commonly performed by employees working within the subject classifications: see *Re U.S.W. and Outboard Marine Corp.* (1968), 19 L.A.C. 62 (Weiler). Finally, the integrity of a job classification system may relate not only to proper payment but as well to the proper application of seniority and job posting rights: see *Re U.S.W. and Algoma Steel Corp.* (1968), 19 L.A.C. 236 (Weiler), and *Re Air Canada and Canadian Air Line Employees' Assoc.* (1974), 7 L.A.C. (2d) 420 (Huband).
>
> 15 On the evidence before us, we are unable to find that the occupations or classifications of rawstock inspector and quality control technician have in fact been abolished or that their duties have been distributed over other existing classifications. These jobs consisted of a discrete set of job duties occupying an employee on a regular basis for the better part of a day and these duties continue to exist in identical form. The only difference is that employees are now rotated through these jobs on a weekly basis and, therefore, we would find that the attempt to "reclassify" the two jobs on a temporal basis, *i.e.*, over the course of a month, violates the job posting, seniority, wage and management rights provisions of the collective agreement.
>
> 16 In our view, an occupation or job is generally understood to constitute a discrete and related set of job duties performed on a regular basis over the course of a day. Not all of the job duties may be performed in a single day but it is understood that the duties functionally relate to each other and, as a whole, deserve the full attention of an employee. Related arbitral jurisprudence to this effect can be found in those cases dealing with what constitutes a job vacancy: see for example *Re Metropolitan Toronto and C.U.P.E., Local 43* (1975), 10 L.A.C. (2d) 247 (Adams), and the cases cited therein. Collective agreements are structured on this understanding of what a job entails with wage rates specified for groups of tasks and the jobs, so identified, are usually allocated by job posting procedures which test competing employees' claims on the basis of ability and seniority. This collective agreement is no exception. Appendix "A" sets out the occupations and arts. 14.08 and 21 make it clear the non-temporary promotions and transfers to jobs are to be based on seniority provided the skill and ability of the employee is sufficient. Indeed, it was on the basis of these two articles that Gertrude Taylor and Joan Wilding were initially allocated their former jobs. It is our view that the employer's actions constitute a unilateral and periodic transfer between jobs without regard to fluctuations in work and that the collective agreement clearly does not contemplate this kind of unilateral management initiative. If such transfers were possible, an employee could, as a matter of right, obtain a posted job one day only to find herself being transferred out of it and replaced the very next day. (*emphasis added*)
>
> *Rolland Paper (supra)* at paras. 14-16

The Board at para. 17 recognized that the consolidation provided a benefit to the Employer.

> 17 We recognize that it can be a real benefit to an employer to have his employees capable of performing related jobs and for many of the reasons outlined by Mr. Joseph. But in trying to achieve its management objectives, this employer has committed itself to respect the terms of the collective agreement and, specifically, to act fairly. We have indicated how the agreement has been violated. We would also find that given (a) the absence of any real change in the employer's methods of production, etc.; (b) the

> continuation of the jobs in question; (c) the impact of the change on the employees, and (d) the ability of the employer to obtain many of the same benefits through the thoughtful assignment of employees on the occasion of temporary vacancies due to illness and vacation, the employer has acted unfairly within the meaning of art. 7.02.
>
> *Rolland Paper (supra)* at para. 17

It is clear from paragraphs 14 and 17 that Arbitrator Adams' findings involved substantive breaches of the specific provisions of the agreement, not just of Article 7.02.

The Union also relies on the decision in:

> *IPSCO Inc. and U.S.W.A. Locals 5890 and 9061* (1993) 38 L.A.C. (4th) 100 (Ish)

As here, it dealt with an employer decision to unilaterally combine two jobs into one. The Union established that combining the two jobs, without a change in the nature of the work being done, altered the right of incumbents under Article 12.10 to waive a movement in the line of progression. Arbitrator Ish held:

> **29** It is my conclusion that the Union has established that the change in job titles brought about by the combination was in fact more form than substance. The Company's own evidence supported the view that none of the job functions associated with the two previous positions changed after March, 1991. What seems to have occurred is that the Company was of the view that the functions of the two previous positions were very similar and interchangeable. In the words of witness Harriet Dutka "the jobs were indistinguishable". This might be the case. However, a line of progression had been established in the start-up agreement which was continued to March 1991. Without a change in the nature of the operations or a change in the job functions, to unilaterally make a change in the line of progression appears to be contrary to the intent of art. 12.10. It will be recalled from the Spiral Mill grievance that I did not take the view that art. 12.10 had the effect of locking in all the positions in the line of progression but changes can only be made if they fit the principles of the arbitral jurisprudence. There must be some change in the job functions, perhaps brought about by change in the operations of the company, which would justify a change in the classification of the jobs in the line of progression. The arbitral jurisprudence is clear that without such justification changes which may have a negative impact on the rights of employees, most commonly the rate of pay although that is not an issue in the current case, are seen to be improper as infringing upon rights established in the collective agreement. (*emphasis added*)
>
> *IPSCO (supra)* at para. 29

I have reviewed the cases referred to by the parties and a number of other authorities. Many of those authorities are canvassed in a decision of this arbitrator cited by the Employer.

> *Enersul Limited Partnership v. Unifor Local 686-B* [2018] BCCAAA 71 (Sims) at paras. 47-48

Enersul involved the out of seniority layoff of three employees. The Employer had restructured its workplace due to reduced supply eliminating two classifications, but requiring all those covering the ongoing work thereafter to have the fourth class certification. Three junior employees retained possessed fourth class Power Engineer Certificates while the three laid off employees did not.

The award framed the issue as an interpretation issue between a broad management's rights clause and a layoff and recall clause. The Union challenged the Employer's right to reorganize as it did saying (see para. 46) "… the Employer cannot maximize its flexibility by making the job qualifications of all employees interchangeable at the expense of the grievors' careers". It argued that the reorganization and change in required qualifications were not accompanied by any significant change in production or technology. The Union relied on the following passage from *Simon Fraser* (*infra*):

> … a clear principle which arises from Part 6 of the Code may be expressed as follows: within the context of a collective agreement, a party who has a discretion must exercise it "reasonably" so as not to defeat the legitimate rights and expectations of the other parties to the collective agreement. A party who, in the exercise of its discretion, acts in a manner that is arbitrary, discriminatory or in bad faith, does not act reasonably. Reasonableness also includes, by its very nature, an element of fairness. This principle is all pervasive in the arbitrable jurisprudence which has developed throughout Canada over the last 30 years. A lengthy line of arbitral jurisprudence has noted a general presumption that in organizing the work force, including the assignment of work, filling of vacancies, making of transfers, promotions and demotions, management initiative is subject to an overriding qualification that its decisions be in good faith, and not be arbitrary or discriminatory. This presumption exists notwithstanding management's ability to be fettered only by clear and express language.
>
> *Re Simon Fraser University* [1983] B.C.L.R.B.D. No. 169 (Black Vice-Chair)

See also:

> *Bell Canada and Unifor Local 34-0* (2016) 127 C.L.A.S. 1 (Surdykowski) at para. 46

The *Enersul* award then went on to canvas another case, *Bethany Care (infra)*, again by this arbitrator, relied on by the Union here. The Employer purported to eliminate all its nursing positions, but then recalled the same employees to work in "new positions". The award said:

> … indeed gives management the right to decide that a position has become redundant. It also gives management the right to decide on the number of employees needed in its workforce. It can create new classifications and work units and so on. However, management has also agreed to certain protections for employees. These protections may in certain cases limit or qualify its management rights. What management cannot do is use the guise of 4.01 (c) to avoid or work around its other obligations.
>
> Any time two sets of rights sit in juxtaposition to each other decisions have to be made as to what is really taking place and as to which of two seemingly conflicting rights prevails in the circumstances. In deciding such points it is not uncommon for words like unreasonable to creep into the discussion. This does not mean the arbitrators who use those terms are imposing a general duty of reasonableness on one party or the

> other. Instead, the arbitrator may just be weighing which right applies to the circumstances at hand, taking a reasonable and objective view of the facts. Saying particular actions are unreasonable in the circumstances is often just a way of saying that a party purporting to rely upon one right is in fact undermining another right and that it is unreasonable (meaning legally inappropriate) to allow the claim of the first right to prevail over the second right.

And further:

> If one were to view a position just as a series of slots on a shift schedule then one could easily argue that the ability to declare positions redundant must include the ability to eliminate an old "series of slots" and replace it with a new "series of slots". But a position involves more than just the slots assigned to it. It includes the work done and the function served. It is on the scheduling side that the Employer has agreed to restraints on its powers, though Articles 7, 15, 30 and so on. In assessing whether positions are genuinely being eliminated or whether they are just being changed to avoid the restraints imposed by the contract, arbitrators have looked to see if the underlining work continues essentially in its same form, or whether it has been genuinely (or reasonably) eliminated. In doing so they have implicitly rejected reliance on 4.01(c) in situations where the job is patently not "redundant".
>
> *Bethany Care Society and UNA Locals 91 and 173* (1997) 87 L.A.C. (4th) 216 (Sims)

Enersul (supra) also canvassed *Rolland Paper (supra)* and *Auto Haulaway (supra).*

The end result in *Enersul (supra)* from paragraphs 93-98:

> **93** The Employer in this case invoked several "management rights" to reduce its employee complement and thus its costs, and to increase its flexibility when operating its plant with a significantly reduced throughput and thus revenue. The essence of what it did was (a) reorganize the allocation of work to positions, ceasing to use two positions and (b) laid off persons who lacked the qualifications to perform the more limited positions to be used going forward. … it essentially made possession of the 4th class ticket mandatory of all its employees.

The reasons asked whether this new requirement was *bona fide* and reasonable and found that it was reasonably related to the work and a reasonable requirement to impose. At 96 it noted "this plant cannot run without a person with a class 4 ticket". It continued:

> **98** The second management right invoked was a reorganization so as to use only the higher classifications requiring the qualification. The cases like *Auto Haulaway* (*supra*) support the view that management can so reorganize, even in the face of negotiated position lists, again subject to bad faith and *bona fides* tests. Had this reorganization simply happened while production and staffing levels remained the same, at the 2000 tons level, I might question the *bona fides* of the changes. The scale of past activity, both cumulatively and on each shift, justified dividing the work into the more responsible operations levels and the levels where less qualifications were needed to do the moving, clean-up and other activities the grievors performed. But the admitted reality is that the plant's throughput declined drastically, justifying more integrated crews with less specialized tasks -- what the parties referred to as "flexibility".
>
> **99** My conclusion is that the steps the Employer took to reorganize, and to promote qualified people where a *bona fide* exercise of management authority and a realistic way to face the challenges caused by the ongoing supply problem.

Having reviewed all the authorities cited by the parties and others. I accept that the management's rights article, notwithstanding Article 20, preserves to management the right to establish new and eliminate old classifications subject to the customary restraints. Such action, to use the City's own words, at paragraph 54 of its written argument, is "… subject only to the constraints of the Collective Agreement and the obligation to exercise such rights in good faith and for valid business reasons".

I also find however that the creation of a position that purports, without any Union consent, to override specific provisions of the collective agreement, to be beyond management's rights. I find nothing in the case law that supports the view that the right to reorganize, to create, or eliminate positions allows the creation of a position fundamentally at odds with an express collective agreement provision. I reject the argument that an express provision cannot take priority over a management right's claim, or the right to reorganize unless it says it does so expressly.

The agreement imposes a serious limitation on management's rights in respect to scheduling. The CSO and CSO-TO provisions, as proposed and as posted specified:

> Hours of Work
>
> Non-normal shift; including shift work and rotating shifts.

The collective agreement is very specific about work schedules. Article 13 and the Employee Definition Letter of Understanding set out above each specify normal hours of work, and provide for a jointly agreed upon and posted schedule.

> The Employer and the Union agree to set forth the work schedule for each Department and any changes to work schedules shall be by mutual agreement of the parties. Such mutual agreement shall not be unreasonably withheld. Agreed upon work schedules shall be posted conspicuously in each Department.

The Employee Definition letter is very explicit:

> (a) The normal work week as stated in Article 13 or as modified by mutual agreement for their position.

The parties each knew of the need to obtain, and the mechanism to be used for getting, this type of mutual agreement. They had very recently been through just such an exercise, specifically over hours of work and scheduling, when the Bylaw Officer I and II positions were merged. They required and negotiated a Letter of Understanding; the one now characterized by the City as "null and void".

Whether that is so or not, it is clear they do not serve since they only refer to the new eliminated position, to modify the contractually agreed upon "normal hours of work" for the new CSO or CSO-TO positions.

This is no mere implied limitation. Management expressly agreed to these provisions. Further, I find that having other than normal hours of work goes to the core of what the City was trying to achieve through its reorganization. The Proposed Community Services Schedule given to the Union on July 29, involves a wide variety on both non-normal and rotating shifts. Beyond that, the "flexibility" rationale the City advances for the changes cannot work under this agreement unless the Union agrees to its scheduling aspects. This is not an ancillary, severable part of the posted jobs. It is not a sidewind that can simply be read down. It purports to ensure terms and conditions of employment that, absent consent, are expressly contrary to the agreement and thus cannot be overcome by an overly broad interpretation of a management right to create a new classification.

The Employer's argument gives only scant attention to this issue. It says:

> 110. The provisions in the Collective Agreement related to hours of work, seniority or probationary periods do not create a requirement for the Employer to obtain the Union's consent prior to engaging in a reorganization of its operations, or otherwise limit the Employer's ability to implement a reorganization. This is for the simple reason that *none* of those provisions speak to reorganizations in any way:
>
>> (a) Art. 13 outlines hours of work. Art. 13(a) sets out the normal workweek and hours of work for inside and outside classifications, and Art. 13(c) sets out a detailed process for addressing work schedule changes, including the use of a "Preventative Mediator". It says nothing about the introduction, elimination or alteration of classifications.

I find this approach unconvincing. The parties can and should use preventative mediation, but they did not. The job was posted with non-normal hours. The default position under the agreement and Letter of Understanding remained normal hours of work.

Real and Substantial Change

A common theme in the cases reviewed above is that, to eliminate one classification in favour of another, there must be a real and substantial change in the job and its duties. This is largely because the parties have already negotiated binding terms and conditions for the existing jobs and often, as in this case, also provided for a method of reviewing the job's classification if circumstances change in ways short of substantial. The same and other cases reviewed above suggest that when consolidating two classifications into one, with the duties essentially unchanged, but with a rotation, this may in reality be viewed as rotating between the two prior classifications rather than a new classification.

Arbitrator Brandt addressed the need for a real and substantial change:

> 12 However, it is also well established in the case-law that management must make "real" changes in the nature of the work assignment in order to exclude the operation of the established job classification and, as long as the same work is being performed, management has no right arbitrarily to reclassify the employees performing it. It has also been held that an old classification cannot be said to be "discontinued" by the distribution of its duties elsewhere if the other employees spend substantially all of their time performing all the duties of the earlier classification (see *Re U.S.W. and Algoma Steel Corp*. (1968), 19 L.A.C. 236 (PC. Weiler), and cases cited therein).
>
> 13 Concerns that the right of the employer to assign or "realign" work not be used in such a way as to interfere with a negotiated classification structure are of greater moment where the parties have specifically turned their minds to the question of changes in job duties and have purported to limit the otherwise unrestricted right of the company in that regard. In *Re Windsor Public Utilities Commission, supra*, the board states [at p. 385] that:
>
> > ... where an employee claims that management has created a new classification — a particularly potent claim if the collective agreement requires the employer to negotiate with the trade union over the wage rate and working conditions of a new classification ... arbitrators have required a real and significant change in job duties and responsibilities to warrant the finding of a new classification.
>
> *General Chemicals Ltd. and C.A.W. Local 89* (1993) 38 L.A.C. (4th) 24 (Brandt)

I note however, that in the result the arbitrator gave only a limited remedy given the way the job duties of the discontinued jobs were distributed to other positions (see paragraphs 15-17).

The Union asserts that the duties performed by the new "Community Services Officer" position are virtually the same as before, and still largely separate although the individuals are now rotated through the two former sets of duties. It argues that the lack of any real and substantial change can be seen from Agreed Fact 16:

> … The restructuring would introduce a single position in place of these positions and would perform the duties historically performed by these classifications: the Community Services Officer ("CSO"). The parties dispute whether the CSO performs additional duties other than those historically performed by the Bylaw Services Officer and Custodial Guard. One of the goals of the CSO position was to produce an interchangeable role between Custodial Guard duties and Bylaw Services Officer duties with "better trained officers".

The stipulations confirm:

> There is no dispute that CSOs perform duties formerly performed by Bylaw Officers and Custodial Guards at a minimum.
>
> The job function of guarding the RCMP cell block formerly performed by the classification of Custodial Guard remained unchanged when that function became included in the newly created CSO classification as part of

> the reorganization, nor did the shift schedule for that job function change. The only change was that the CSOs were required to periodically rotate between the custodial guard job function and the bylaw officer job function.

I have considered whether the Union's agreement as to the *bona fides* of the reasons for the reorganization precludes reliance on its arguments about a lack of significant change. In this respect I find that the stipulations set out above over the continuity of conditions in the cell block make it clear the Union's stipulations left it free to rely upon that evidence.

The City's position is that there is indeed such a real and substantial change and that the new position is markedly different from the two prior positions. In one respect; the qualifications required for the CSO job involve real and substantial changes. Going forward, whether through the Training Opportunity or by direct hire, the City now requires post-secondary police training and the passing of the CSOPAT fitness test. In other respects, the changes in the work actually being done are less obvious.

My conclusion is that some of the changes described were a sign of increases in the volume of demands being placed on the City rather a fundamental change in the duties themselves.

The CSOPAT physical test is a variant of a testing protocol used by B.C. Corrections for prison guard applicants. The Union summarized the requirements:

> It includes timed sprints, stair runs, a timed run of an obstacle course, "push" and "pull" drills requiring candidates to push weights and pull a 50 pound weight off the floor and carrying a 70 pound weight for 25 feet.

The tests are time limited. An individual would have only three chances to pass and there was to be no allowance made for age or disability. Several incumbents asked whether they could do a test run, but were told they could not. Mr. Beeton's evidence is that this testing is important even for the incumbents in their former jobs given the increasing difficulties in dealing with the homeless, their camps and so on, and given the inherent dangers of working in the cell block.

The City notes to the introduction of CSOPAT or similar tests as a required or preferred qualification for recent job descriptions for Community Police Officers in Chestermere and the M.D. of Greenview. However, both locations are in Alberta where such positions are, or are eligible to become, Peace Officers under Alberta's legislation. Mr. Beeton's reliance on these examples and other references in the meetings supports the view that much of this educational and physical upgrading was being done more in anticipation of B.C. enacting similar legislation, and less so based on any pressing existing need.

The City's action required any employee who wanted an ongoing job to have or obtain post-secondary police training. If they were willing to take training towards that qualification, they had to apply for the Training Opportunity Position, with its job insecurity due to ongoing probationary status lasting until the City believed they had finished their training. The City's suggestion, in argument, that the reference to probation was a mistaken use of the term does not, in my view, alter the fact that the way the new positions were structured, posted, and offered indeed violated the collective agreement's probationary language. It left the Employer with the ability to truncate or eliminate an applicant's basic acquired rights to their seniority status.

All incumbents had been performing much of the work to be done by CSO's in one or other positions; bylaw enforcement or RCMP cell duty, without these qualifications and with little evidence of inadequacy. The new requirement was:

- Completion of two years' post-secondary education in one of the following (or a combination of the following):
    - police and justice
    - criminology
    - law enforcement studies
    - corrections and youth justice
    - human service worker studies
- Completion of British Columbia auxiliary constable training program or police officer training or equivalent.

The training necessary could be obtained through on-line programs and the City, during the discussions, agreed it could be taken during work hours. Nonetheless it involves a substantial undertaking by employees whose capacity, given age, prior education, and so on was variable.

The City's evidence of problems due to the lack of this training before the change was not substantial. I prefer Mr. Gill's evidence on what Bylaw Officers had in fact been doing although others may have exhibited less initiative than he did. Further the City provided no significant evidence of improved results once it switched to those who became CSO-TO's or new hires with the qualifications, although both intervenors attested to the training being useful to them in their jobs.

The expressed probationary aspect of this CSO-TO position, as well as the challenges for persons employed for years dealing with bylaw offences, in taking such a program, may have appeared daunting to many, to the point where they might lack confidence in their ability to pass. The City's position was that, if employees elected the training opportunity, and if they then failed to pass the requirements, their

job would end, and they could not revert to there by then eliminated prior job or to other suitable employment with the City.

As with the physical testing requirement, my conclusion is that this new requirement was driven more by anticipated changes in the law, and as a result the powers and duties that might at that point be assigned to CSO's, then to any immediate need.

Mr. Gill compared his work as a Bylaw Enforcement Officer to the duties listed for the CSO position. He said that he had not done custodial work. However, he had met with block watch groups, had spoken at elementary schools and participated in Joint Task Force Meetings. His job included helping the business community. He had been on foot patrol with the RCMP and had worked at various community events. He had been on duty at protests.

In assessing what is a "real and substantial change" a distinction needs to be made between real change, and changes that could be implemented within the context of the existing job descriptions. In several respects, what the City sought to achieve to respond to citizen concerns could have been implemented by simply directing Bylaw Enforcement Officers as to how to carry out these duties.

If they wanted the officers to do more of the clean-up of homeless sites or camps, rather than calling the contractor, it could have given direction, and perhaps more resources, to that end. If it wanted more initiative taken to mediate private disputes it could have mandated that. No obvious steps were taken in these directions. Some of the alleged changes were due to increased volumes. That is not in itself indicative of a change in duties, although it may indicate a need for management to redistribute its existing resources. Article 20 contemplates the prospect of sufficient change within a job to justify an alteration to the pay level. That flexibility needs to be considered in deciding whether there is sufficient real and substantial change to justify the elimination of a job in favour of an entirely new one.

The Situation of Individual Employees

Many employees had not committed themselves to a specific option. The City's target date for implementation of its reorganization had changed to January 1, 2021. To this end, a series of meetings were held in late November and early December with affected employees. Mr. David Jones sat in on the meetings and took notes. Ms. Micah Strecheniuk, a Human Resource advisor, handled most of the meetings for the City. The purpose, in each case, was explained in roughly the following form, taken from the minutes of the meeting with Bylaw Officer Elin Jahn-Edwards.

> A meeting was held this date to provide Elin with her options as the Community and Protective Services move forward with a restructure with in the department. Elin would now have to decide what she wanted to do as she did applied for a Community Service Officer position and her job as a Bylaw Officer was being eliminated, as a result of the restructure. The meeting was arranged by the HR advisor and at this meeting Elin was provided a letter from Micah (as attached).
>
> Micah reviewed the letter with Elin and explained that after the meeting she would only have 24 hours to provide the letter back to her with Elin choice of how she would like to proceed.

The meetings varied with what was offered to each employee, their questions, and their individual decisions. A sample, from the notes of the options put to Mr. Andy Kaskowski, read:

> 1) To maintain his seniority for one (1) year and apply on open position within the City. If after the one year Andy did not secure a position, his employment with the City of Kamloops would be ended.
>
> 2) To use his bumping rights and be placed in a permanent full-time position as a Equipment Worker III-Civic Operations. Andy would have to go a training program to successfully complete and obtain his Class 3 Drivers Licence with an air brake endorsement.
>
> 3) To be placed in one of the following vacant positions with in the City of Kamloops
>
> > a. Labourer I (outside pay grade 1) or Labourer II (outside pay grade 5) if Andy had previously worked 3120 hours in that classification
> > b. Caretaker (inside pay grade 1)
>
> 4) To retire from the City of Kamloops-He would just have to confirm date which needed to be between November 20, 2020 and January 31, 2021.
>
> 5) To sever his employment with the City of Kamloops and be paid 10 weeks of severance as per Article 27 of the Collective agreement. The employer would decide Andy's last day of work.

Items 1, 4 and 5 were common to most discussions.

At the end of each meeting (sometimes after an adjournment) Mr. Jones on behalf of the Union and the employee advised the City of the following position, again taken from the example of Mr. Kaskowski.

> The union would like to state that this matter is being grieved. Andy K. would have been willing to continue to work as a Bylaw Officer had you not eliminated his position. In the event that the position is restored at arbitration, we will be looking for Andy to be made whole.

The Union complained and the Employer denied that employees lacked the information necessary to make decisions. I agree that the Employer provided substantial information. However, even after these meetings, I conclude that many incumbents still faced significant uncertainties. First, it was not clear at the time whether all those who applied for the CSO-TO position would get full-time positions or have to accept part-time or even on-call positions. Second, employees had to decide whether the risk of not

passing the CSOPAT test was worth taking when they had been denied any preview. Third, they did not know whether they would lose their seniority or employment status because of the imprecise use of the word probation and the apparent loss of a job and the other options if management (apparently, and as written, in management's sole discretion) felt they had not satisfactorily completed the training program.

The Employer's written argument on this point reinforces the ambiguity employees saw in what was put before them.

> 198. The Employer's chief position is that the term "probationary period" was mistakenly used. It was used interchangeably with the term "training period", including by members of the Union with little regard for its overall meaning. This was made clear throughout the evidence.
>
> 199. With that in mind, the Employer submits there was nothing untoward about the references to "probationary period" or "probationary periods". This is because the Union and the Employer have long been in agreement about training periods and, specifically, in agreement that:
>
> > (a) training opportunities may vary in length based on the amount of experience which the successful qualified applicant brings to the position; and
> >
> > (b) employees who fail to satisfy the requirements of a training position will not be allowed to return to their former position; instead, they will be permitted to retain their seniority for one year, during which time they are able to bid on open positions.
>
> 200. This is a complete answer to any claim of impropriety by the Union; there is nothing unacceptable about providing lengthy or flexible training periods as has been done in this case, and nothing wrong with advising employees that if they were to be unsuccessful, they would be entitled to use their seniority to bid on open positions but would not be able to return to their former position.

This explanation is after the fact and would not have been self-evident to employees at the time.

Mr. Gill and Ms. Jahn-Edwards testified about how options were presented to them, and how they affected their lives and careers with the City. In addition, Mr. Jones testified to the letters and restricted options given to several other employees as observed during his role as shop steward and by attending the one-on-one meetings. Ms. Micah Strecheniuk did not testify. Mr. Jones took detailed notes of what took place during these meetings which align with the letters presented to each grievor. I accept Mr. Jones' testimony about the reasons and reactions of these individuals. I do not need to repeat for each individual that:

> (a) they were, by the time of their interview, required to respond within 24 hours, although I accept they had prior notice of some of their options and that those who asked were given extensions;
>
> (b) they were told that they could select only one option and not fall back on another option later;

(c) if they asked, they were told their only "bumping option" was the particular job offered by the City and no other. There was no opportunity to discuss how their seniority, past experience, or skills fit into these options, nor was any explanation given how the limited options offered were selected.

Mr. Raja Gill

Mr. Gill started with the City as a lifeguard. In 2004 he became a Bylaw Enforcement Officer. He described how, in that role, he had to deal with lots of different issues including animal control, nuisance issues, parking, panhandlers, transient camps and homeless people on the streets. He started on an eight hour shift, but went to a 4 days on-4 days off, 12 hour shift sometime later. He had no intention of changing his job at the time the City disclosed its plan. His intention was to stay in the job until retirement.

Mr. Gill came away from the August meetings feeling too much was still unknown. The uncertainty bothered him. The City explained that the changes were due to the increasing need to deal with social issues, but Mr. Gill felt, and others said, they were already dealing with such issues on a daily basis. After the reorganization he said that some Bylaw Enforcement Officers were sent to the RCMP to work as custodial guards. However, for his part his job did not change at all.

On December 7 Mr. Gill, along with Mr. Jones participated in a phone call meeting with Human Resources. He was told he had four options. His options were:

1) To maintain his seniority for one (1) year and apply on open position within the City. If after the one year Raj did not secure a position, his employment with the City of Kamloops would be ended.

2) To use his bumping rights and be placed in a permanent full-time position as a Equipment Worker II- Streets. Raj would have to successfully complete the following training: Valid Class 3 Driver's licence with air brake endorsement

3) To be placed in one of the following vacant positions with in the City of Kamloops

a. Landfill Clerk (inside pay grade 2)

4) To sever his employment with the City of Kamloops and be paid 10 weeks of severance as per Article 27 of the Collective agreement. The employer would decide his last day of work.

He asked whether, if he did not get a job within the one year, he would still be entitled to the 10 weeks and was told he would not. Mr. Gill asked whether he could take a Recreation Facility Attendants position

in the Field House, a position he had held before. He was told, without explanation, that it was not an option for him. This, despite the fact on December 17 or 18, Mr. Bryan Ferro was given, as one of his four options:

> 2) To use his bumping rights and be placed in a permanent full-time position as a Recreation Facilities Attendant – Aquatics position. Bryan would have to go a training program to successfully complete and obtain a Pool Operator Level 1 & WHMIS Certificate.

Notes of Mr. Ferro's meeting record that:

> Bryan asked about any other potions of his choice, and Micah advised that the position that the employer is taking with how jobs are being offered through the bumping/placement process. To lessen the impact on the organization, bumping is not decided on Bryan's choice, at this time these are the jobs available to him.

Notes of the December 22, 2020 meeting with Mr. John Simms show that he too was offered the Facilities Attendant position, subject to training. Mr. Gill had 5 years more seniority than either of them and already had the necessary qualifications.

Mr. Gill says the pay for the Landfill Clerk position was far too low for him. He lacked the driver's license for the Equipment Operator Job. Mr. Gill says that, faced with these options, he selected severance.

Elin Jahn-Edwards

Ms. Elin Jahn-Edwards spent 18 years with the City as a Bylaw Services Officer and then as one of the Lead Hand Bylaw Services Officers. As a lead hand, she gave direction to and generally supervised the Bylaw Service Officers. She also performed several administrative duties and assisted in training new officers. She asked in her meeting if she could bump into an inside position and told she could not.

Her reaction to the initial announcement in July was to be shocked and nervous because so little information was given. At the time she did not understand whether or not she would lose her job. She had hoped to move into management in the future. She did not have a one-on-one meeting in August. At her meeting in December she asked if she could move to an RCMP watch clerk job but was told she could not. She had understood the position was open. Medical restraints prevented her from taking the offered positions. She also had childcare responsibilities. She ended her employment with the City in April 2021 when she found a position she could work with that accommodated her partner's schedule and her child care needs.

After she applied for the CSO-TO job she says she did not do much new work except pick up more shopping carts. Ms. Jahn Edwards says she stopped working because she was told by Human Resources that she would need to move to full time work. She was also involved in a complaint about Ms. Blundell and felt her working environment was not safe, but I take no account of that issue.

Andy Mutchen

Mr. Mutchen applied for and was accepted into the CSO-TO position. He took the CSOPAT test three times and failed. Nonetheless he was able to keep working alongside the other CSO-TO doing the same work on the same schedule.

Jim Boomer

Mr. Boomer, a custodial guard, applied for the CSO-TO position but failed the CSOPAT. He too continued working in the position despite that failure. However, he retired in 2022.

Andy Kaskowski

Mr. Kaskowski was 71 years old and had spent 30 years within the department. He planned to retire but not for another year. He was offered a bump into an Equipment Worker III – Civic Operations driving a dump or garbage truck, for which he would have to take the training necessary to obtain a Class 3 driver's license with an air brake endorsement. He was also offered vacant positions; an inside labourer at pay grade 1, an outside labourer at pay grade 5 (if he had already worked 3120 hours in that classification) or a caretaker position at Grade 1. Mr. Kaskowski chose under protest to retire as of December 6, 2020. Mr. Jones said Mr. Kaskowski felt the layoff option would leave him without income for a year. He was unsure about his ability to get the necessary driver's license and selecting that option, should he fail, would preclude the other options. Mr. Jones says Mr. Kaskowski was very vocal, felt underappreciated and felt he should have been grandfathered for a year until his planned retirement.

Don McConnell

Mr. McConnell along with Mr. Jones met with H.R. on November 24, 2020. He was a Bylaw Officer at the time and had two or three years left before he planned to retire. He was offered a placement as a full-time Recreation Facilities Attendant – Arenas, but he would need to take training as a B.C. Refrigeration Operator or obtain a fifth class Power Engineer qualification with a refrigeration endorsement. Alternatively, he could take over one of the vacant labourer or caretaker positions, which would involve a big pay cut.

Mr. McConnell immediately selected the retirement option as of January 1, 2021. Mr. McConnell recorded the following exchange:

> Don and Dave both inquired about any other position that Don might be interested in and could be trained for or wish to get the qualifications for.
>
> Micah advised Don the position that the employer is taking with how jobs are being offered through the bumping/placement process. At this time these are the jobs available to Don.
>
> Don advised that he was looking forward to retirement, but that would not be for another 2 to 3 years.

Al Macus

Mr. Jones attended Mr. Macus' meeting with H.R. on November 24 or 25. He had been offered the Recreation Facilities Attendant – Arenas position, subject to training or one of the vacant labourer or caretaker positions. Under protest he selected the grade 5 outside labourer position.

He had inquired about moving into a vacant (posted) sign shop position, but was told he could not bump into that position. The posting shows it was temporary. Mr. Jones' notes of the meeting record:

> Dave inquired with Al if he was offered any position for a CSO, since this was part of the offers. How could Al choose that option if he didn't even know if it was a full-time position, parttime or on call.
>
> …
>
> Al and Dave both inquired about any other position that Al might be interested in and could be trained for or wish to get the qualifications for.
>
> Micah advised Al the position that the employer is taking with how jobs are being offered through the bumping/placement process. At this time these are the jobs available to Al.
>
> Al specifically inquired about a position at the sign shop that he believes is vacant and he believes he is qualified for, and that he would be willing to bump into that position.
>
> Micah stated she did not believe there was an open position in the sign shop.
>
> Al advised that he could not retire yet. So, he needs to continue working.
>
> More discussion on Al's options and that the CSO position had way too many concerns that have not been answered i.e. schedule, shift rotation, RCMP cell block rotation, training timeline, and concerns with the physical fitness testing.
>
> Al left disappointed and frustrated with this process and not being offered a position that he may wish to choose.

Mr. Macus apparently tried again to get clarification on the CSO-TO position but was not successful, so he elected the Grade 5 labourer job. He had concluded that the CSO-TO option was just setting him up for failure.

David Calderoni

Mr. Calderoni and Mr. Jones met with H.R. on November 26. He was a Bylaw Services Officer lead hand. Mr. Calderoni had a need for specific shift times that fit in with his day care and children's school needs. Mr. Jones says he asked if he could bump into a specific shift and was told he could not.

Darren Abraham

Mr. Jones and Mr. Abraham met with H.R. on December 3. He had applied for but not to that point been offered a CSO-TO position. He was advised he could bump into a Grade 8 – Equipment Operator II – Streets position, but subject to training to get a Class 3 license with an air brakes endorsement. Instead, he could choose a Landfill Clerk (Grade 2) position, along with shifts varying throughout the year. He elected to continue with his CSO-TO application.

Keith McIsaac

A telephone meeting was held on December 22, 2020 with Mr. McIsaac, Mr. Jones and H.R. The option given to Mr. McIsaac read:

> 2) To use his bumping rights and be placed in a Permanent part-time position as a Customer Relations Representative. This position was offer to Keith as Keith as some on going medical concerns and his doctor has authorized this position.

This was a part-time pay grade 2 position. Mr. Jones recorded Mr. McIsaac's reaction as follows:

> [We] … spoke on the phone after the meeting. Keith is very upset with the employer over the way the staff is being treated and how the restructure of the department is being rolled out. December 23, 2020, [Keith] emailed Dave and advised he has sent his letter back to Micah advising he is picking the retirement option.

Mr. Sandro Piroddi

Mr. Piroddi worked for the City for 26 years. Mr. Piroddi had partially completed an application for a CSO-TO position and has asked for and been granted an extension of time to decide. He was in the process of refinancing his house and needed proof of employment for his bank. The City gave him a letter reading:

> The Bylaw Service Division is currently undergoing a restructure and new positions will be posted. As such there is no guarantee of ongoing employment once the restructure is complete.

Ms. Sullivan says this caused Mr. Piroddi considerable stress. She was able to intervene with the City and get it to revise the letter to say he would be allowed to exercise his seniority to “pursue a number of different options”.

In several interviews it was made clear to the incumbents that whatever they felt their seniority or bumping rights were, they would only be allowed to select the position the City selected for them. It was also made clear that the City’s priority was to avoid a waterfall, trickle down chain reaction. No explanation was given as to why Mr. Gill, a senior trained employee, could not take a position offered to junior untrained employees. There was no discussion or even explanation of such issues which I find to have been arbitrary in the circumstances. Whether the City was right or wrong in particular cases is not before me.

My conclusion, from the letters presented to the incumbents, is that they were presented with options that failed to fairly state their rights under the collective agreement or were contrary to their rights. Clearly, all of them already had the right to quit and some of them had the right to retire, but I am satisfied at least some took those options because of legitimate concerns about selecting any of the other options offered. The collective agreement allowed a severance payment, but required an abandonment of other options and rights. I am satisfied that some incumbents felt that their prospects in the jobs the Employer offered, their prospect of achieving a fuller right to bump, and the educational, physical and probationary uncertainties of the CSO training position led them to take severance when they would not otherwise have done so.

I find that some felt pressured to decide quickly by the 24 hour requirement even though extensions were granted to others. I find that the uncertainty about the scheduling question and the rotation requirement caused some to feel the CSO-TO option would always be incompatible with their family and similar responsibilities.

Conclusions

I have found:

1. Article 2 is authority for the City to establish a new job description and classification and to eliminate or at least leave unfilled other job classifications.

2. The City's authority to create a new classification is subject to its being done in accordance with the collective agreement and general arbitral law, in good faith and for valid business reasons.

3. The elimination of a clarification in favour of a new classification must involve real and substantial change.

4. Article 20 allows a negotiation over the new classification. If the parties cannot agree on the factors that go into classifying the position, or the appropriate wage rate, that follows, the Union can arbitrate that matter.

5. Article 20 does not of itself restrict the City's right to create a new classification, indeed, it supports that right .

6. Any new classification created by the City (assuming it to be non-managerial) falls within the Union's bargaining unit.

7. The creation of a new job description or classification is subject to all the requirements of the collective agreement; the fact that a position is new, or part of a reorganization, does not provide the City with the ability to establish a new classification involving non-compliant terms such as schedules, probationary terms, and so on.

Taking a macro look at this dispute, I see a municipality faced (like many other urban cities) with challenges due to homelessness and an influx of citizens without resources, with mental health issues, and so on. This, in turn, led to citizen pressures to take action.

At the same time the municipality faced financial pressures, both generally and in respect to community policing, the increased cost of the RCMP. This is clear from the fact the City's position not only involved a reorganization but also a reduction in its overall workforce in this department.

Alberta had introduced, and B.C. was expected to introduce, new legislation allowing for some form of two-tier policing, perhaps as in Alberta through provisions for Peace Officers with enhanced powers and perhaps some other form of added capacity to what in the past had been Bylaw Enforcement Officers.

The City decided it needed to restructure to meet its budget problems and to prepare itself for the anticipated increase in municipal powers. The decision was made to reconfigure managerial authority as well as to eliminate the two existing jobs and replace them with the CSO position. The City appears to have been under pressure to react quickly, hence the September target date. However, B.C. law provides the Section 54 process to try to achieve an adjustment plan to address mass layoffs or job abolishment. One added dimension is that the City's options, particularly as to scheduling and rotations, were limited by its agreements with the RCMP.

The Section 56 process faltered in part because of diametrically opposed views of the parties' legal rights.

The City believed it had the management right to reorganize. I have found, in a broad sense, that it had.

The City believed, as part of such a reorganization, it could impose new qualifications and requirements, and that existing provisions in the collective agreement, unless they made specific reference to surviving a reorganization, would not apply. I have found they are wrong in the breadth of that assumption. Explicit agreement provisions at least would automatically apply to the new CSO position even if implied obligations did not.

The Union believed it had an express contractual right under Article 20 to resist the creation of a new position and to arbitrate the issue if impasse was reached. I have found they were incorrect in this in that the Article 20 process, while important, is narrower than the Union's belief.

This difference has lingered ever since the Germaine board declined to resolve it. Bargaining over time could have, but did not, clarify the issue. This basic difference is what led the parties to arbitrate this matter. In retrospect, had the parties had more fluid views on their respective legal positions, I believe they may well have been able to achieve a sufficient Section 54 Adjustment Plan. To repeat the anticipated contents of such a plan, it could include:

> (i) consideration of alternatives to the proposed measure, policy, practice or change, including amendment of provisions in the collective agreement;
>
> (ii) human resource planning and employee counselling and retraining;
>
> (iii) notice of termination;
>
> (iv) severance pay;

(v) entitlement to pension and other benefits including early retirement benefits;

(vi) a bipartite process for overseeing the implementation of the adjustment plan.

I repeat this list not to suggest Section 56 requirements were not met. Rather the section usefully lists the human resource issues that need to be met when a mass layoff has to take place. Since this award rejects both parties' principal arguments, it leaves most such issues outstanding, but with the added complication that the City has proceeded to implement its reorganization and has hired new individuals. Many of the incumbents have moved on in ways they might not otherwise have chosen. Yet others (now only 7) have settled into the full CSO position.

Remedies

The Employer asks that the grievance be dismissed. The Union asks for the following remedies:

i. A declaration that the City has violated the terms of the Collective Agreement by its restructuring of the BSO and Custodial Guard (and related) classifications;

ii. A declaration that the City has demoted or terminated those Affected Employees without just cause who did not become CSO TOs and who took positions in classifications at lower pay grades or who ceased their employment with the City;

iii. An order that the restructure be reversed and the classifications and job descriptions for BSO and Custodial Guards (and related positions) be restored to what they were prior to the restructuring taking effect;

iv. An order that all Affected Employees be reinstated to their classifications and positions prior to the reorganization and that they be made whole. Including for any mental suffering or other harm arising from the restructuring;

v. An order that the BSO and Custodial Guard LOUs are reinstated and in effect; and

vi. Any other declarations or orders which this Board may deem just.

The parties agreed that any remedial matters would be addressed separately should it be necessary.

I make the following declarations.

1. The City of Kamloops, when it created, posted, offered, and subsequently filled the CSO or CSO-TO positions violated the collective agreement by including in those job descriptions non-compliant terms as to probation and (as posted) the statement that it would involve "non-normal shift, including shift work and rotating shifts".

2. The City of Kamloops, prematurely and contrary to the collective agreement, advised the incumbent employees that, as a consequence of its reorganization, and its posting of the new position, their positions were eliminated. This, when they were entitled to continue in their positions until the Employer had obtained the necessary permission to post jobs involving non-normal shifts and rotating shifts.

3. The options given to incumbent employees were insufficiently precise (a) as to their individual right to continue in their existing position until the terms of the CSO and CSO-TO jobs were negotiated and (b) as to their options as a result of their job's elimination, to allow them to make reliable and informed choices, all sufficient to allow a reopening of those options for those employees adversely affected.

The parties agreed that remedial matters should be reserved. The declarations given to this point are deliberately limited and leave many matters to be resolved.

Assuming the City continues with its reorganization it needs to negotiate suitable terms over scheduling with the Union. It had to do so quite recently when it combined the Bylaw Officer I and II positions. It needed to at that time and was able to agree upon a suitable Letter of Understanding and that possibility remains open here.

The offers put to the incumbents raised several objections as discussed above. A major concern was over the City's view of bumping and the individual's rights in that respect. I have reviewed that concern because it was legitimately a major source of uncertainty for employees as they assessed their options; particularly as to whether they should risk losing the severance option or accept one position abandoning their view that they were entitled to other positions. The Union has filed a specific grievance over the bumping process. My rulings extend no further than necessary to address the broader view of the individual's alleged improper termination and the impact of posting the replacement for their jobs.

That said, those issues still need to be addressed either through the bumping arbitration, or part of the discussions to resolve the current situation.

Some employees have moved on and will not wish to resume work with the City; others may wish to continue with employment. Any remedial measures will need to take into account the employee's current choices.

The Employer's position at the time of transition was that the police qualifications should form an integral part of the CSO-TO position. That wish, to have existing employees take that training could have been achieved by telling existing staff that such qualifications would be a future requirement for CSO opportunities, allowing some to choose to take it while continuing with their existing duties. Similarly, more flexibility could have been offered over the CSOPAT test. The very limited rotations into cells with the requirement for 6 months or more continuity left room and might still leave room for a more gradual transition accommodating the needs and rights of the incumbents, many long serving.

These are merely observations to inspire a flexible approach to remedy. I believe much can be negotiated between the parties but reserve jurisdiction to issue such remedial orders as may be necessary once the parties have had a sufficient opportunity to explore their options.

I wish to thank counsel for their thorough presentations. I also wish to thank Ms. Meixner and Mr. Thompson for their collaborative and helpful participation in the proceedings.

DATED at Edmonton, Alberta this 14th day of August, 2023.

ANDREW C.L. SIMS, K.C.

Appendix A – Agreed Facts

I. Parties

1. The Employer, the City of Kamloops (the "City" or the "Employer"), is a municipality in the Thompson-Nicola Regional District of British Columbia that employs approximately 775 employees (including both excluded employees and bargaining unit members.

2. The Union, Canadian Union of Public Employees, Local 900 (the "Union" or "CUPE 900"), is certified to represent thirteen units comprised of approximately 900 municipal and other service employees in the Thompson-Nicola Regional District, including at the City of Kamloops. The City employs members of the Union's bargaining unit in a variety of roles.

II. Collective Agreement

3. The Union and the Employer are parties to a collective agreement (the "Collective Agreement") that governs the terms and conditions of employees at the City. We attach as Exhibit "A" the current Collective Agreement, having a term of January 1, 2019 to December 31, 2023.

III. By-law Reorganization Grievance

(a) City of Kamloops' Bylaw Services Division and Municipal Support Services Division Prior to Re-Organization

4. Prior to the parties' instant dispute, the City of Kamloops' Bylaw Services Division and Municipal Support Services Division was comprised of Custodial Guard (Custodial Guard Crew Leader; Custodial Guards) and Bylaw Services (Bylaw Officer Lead Hand and Bylaw Services Officer) classifications.

5. The modern Bylaw Services Division was constituted on or around 1995. The Bylaw Services Division was traditionally composed of two separate Officer positions: Bylaw Services Officers I and Bylaw Services Officers II. The two positions were consolidated into a single position in or around late 2018.

6. On or around February 14, 2020, the parties executed a revision of their Letter of Understanding regarding the Bylaw Services Division, to be incorporated into their 2019 to 2023 Collective Agreement. The LOU applies to Bylaw Services Officer or Bylaw Officer Lead Hand classifications and is attached as Exhibit "B" (the "Bylaw Services LOU, 2020").

7. On or around July 1, 2020, there were 33 active employees working as either a Bylaw Services Officer / Bylaw Officer Lead Hand (22) or a Custodial Guard/Temporary Crew Leader (11). See, in this respect, Exhibit "C" (the "Seniority List").

8. At the time of the City's re-organization, the Bylaw Services and Custodial Guard classifications had separate schedules of work.

9. Under the parties' revised Letter of Understanding regarding the Bylaw Services Division (Bylaw Services Officer and Bylaw Officer Lead Hand classifications), the parties had agreed to a normal workday of 6:00 am until 10:00 pm seven days per week. Incumbent employees who held an 8-hour shift would continue to work 8-hour shifts, with a shift differential to be applied for hours worked outside of 8:00 am to 4:00 pm, Monday to Friday (including weekends). Incumbent employees who held 12-hour shifts would be grandparented into a 12-hour shift and were working a 4 on and 4 off shift schedule. 12-hour shifts were to be replaced with 8-hour shifts if the current incumbent vacated the shift for any reason. See Exhibit "B", the Bylaw Services LOU, 2020.

10. The revised LOU revised a precursor LOU regarding the Bylaw Services Division that had also set a schedule and other terms for the Bylaw Services Division. See Exhibit "A", the Collective Agreement at page 46.

11. The Custodial Guard LOUs to which Custodial Guards are subject does not set a specific schedule for Custodial Guards, except for certain weekend shift requirements for part-time Custodial Guards.

See Exhibit “A”, the Collective Agreement at pages 74 and 75 to 76 (the “LOU Re Part-Time RCMP Guards – Weekend Shifts” and “Agreement not to Contract Out RCMP Custodial Guards”).

12. Given the 24/7 nature of the Custodial Guard position, the parties’ established practice was that Custodial Guards would rotate in a 24/7 schedule, with three separate 8-hour shifts. However, there were also two set 8-hour shifts in the Custodial Guard classification, Monday to Friday, 6:00 am to 2:00 pm and 12:00 pm to 8:00 pm. See Exhibit “D”, Frequently Asked Questions, Community Services Officer Restructure, Q5, December 8, 2020. Shifts on weekdays and weekends were bid on and awarded via separate postings.

(b) Duties of Bylaw Officers and Custodial Guards

13. At the time of the parties’ instant dispute, the City of Kamloops’ Bylaw Services Division was primarily comprised of Bylaw Services Officers and Bylaw Officer Lead Hands. The classifications have been amended through the years. See Exhibit “E”, Bylaw Classifications.

14. The City’s jail cells were staffed by Custodial Guards and one Custodial Guard Crew Leader. The classifications have similarly been amended through the years. See Exhibit “F”, Custodial Guard classifications.

(c) City of Kamloops’ Section 54 Notice and City’s Proposed Reorganization

15. On July 8, 2020, the City provided the Union with notice that it sought to restructure the Community and Protective Services Department. A copy of the notice, sent pursuant to Section 54 of the Labour Relations Code, is attached as Exhibit “G” (the “Section 54 Notice”).

16. The City’s re-organization was to result in the elimination of several positions, chiefly the positions of Bylaw Services Officer and Custodial Guard. The restructuring would introduce a single position in place of these positions, and that would perform the duties that were historically performed by these classifications : the Community Services Officer (“CSO”). The parties dispute whether the CSO performs additional duties other than those historically performed by the Bylaw Services Officer and Custodial Guard. One of the goals of the CSO position was to produce an interchangeable role between Custodial Guard duties and Bylaw Services Officer duties with “better trained officers”. See Exhibit “H”, the Community and Protective Services Presentation.

17. The Union was advised that incumbents of the eliminated positions would not be placed into the CSO or CSO - Training positions. The incumbents were instead “placed in motion”. See Exhibit “G”, the Section 54 Notice.

18. A copy of the first draft of the new classification (July 13, 2020) is attached as Exhibit “I” (CSO V1). A copy of the second (July 29, 2020), third (August 10, 2020) and fourth draft (November 3, 2020) are attached as Exhibits “J” (CSO V2), “K” (CSO V3) and “L” (CSO V4) respectively.

19. A CSO – Training Opportunity position was also created as part of the classification. A copy of the first and second draft of the Training Opportunity requirements are attached as Exhibits “M” (CSO – Training Opportunity V1) and “N” (CSO – Training Opportunity V1) respectively.

20. A CSO – Crew Leader and CSO – Crew Leader (Training Opportunity) was also created and provided to the Union. See Exhibit “O”.

21. On July 13, 2020, the Employer held a staff meeting with affected employees to provide notice of the re-organization.

22. Both parties met on a number of occasions to discuss the re-organization, including on at least July 8, July 9, July 13, July 29, August 6, August 31, September 16, September 29 and October 13. During these meetings, the City provided the Union and/or employees with materials regarding the re-organization.

23. Throughout these meetings in July, August and beyond, the City sought the Union’s agreement to the restructuring but took the position that the agreement was not a requirement for the re-organization to proceed. The Union participated in these meetings but did not agree to the re-organization and took the position that its agreement was required.

24. On August 7, 2020, the Employer sent letters to affected employees that confirmed the elimination of their positions as part of the re-organization, and outlined the options that would be available to them.

25. A template of these letters is attached as Exhibit “P”.

26. Subsequent to these letters to the affected employees, the Union filed a grievance on August 24, 2020. A copy of the original grievance is attached as Exhibit “Q”.

27. The Union amended its instant grievance on August 31, 2020. A copy of the amended grievance, as revised, is attached as Exhibit “R”.

28. In subsequent correspondence, the parties confirmed that the amended grievance replaced the Union’s original grievance. See Exhibit “S”.

29. From September 8 through September 15, 2020, meetings were held with affected employees. The City provided materials to the employees during these meetings. The employees were asked whether they were interested in remaining with the City and/or whether they were intending to apply to the new classification. The employees were not yet provided with details of the alternate positions in which they might be placed. The City e-mailed the materials to employees who were unable to attend in person. The e-mails to employees who did not attend in-person meetings are attached as Exhibit “T”.

30. On or around September 16, 2020, the Union was provided with job descriptions for a new Community Services Clerk Job Description (Exhibit “K”, CSO V3), a CSO Crew Leader Job Description (Exhibit “O”, Crew Leader), a new shift rotation and staffing levels schedule (Exhibit “U”), CSO “On Call Guidelines” (Exhibit “V”), and a document detailing the CSO – Training Opportunity (Exhibit “W”). The CSO On Call Guidelines would eventually be further revised on or around April 21, 2021, under objection by the Union (Exhibit “X”).

31. In addition to the above September 16 meeting, the parties engaged in further meetings on September 29, 2020 and October 13, 2020.

32. From July 8, 2020 onwards, the Union and employees were advised of the following features of the new classification of Community Services Officer:

a) Community Services Officers would rotate in and out of Custodial Guard work and Bylaw Services work, for a period of up to two years.

b) Community Services Officers would be required to obtain qualifications, training and certificates that were not required either of the Bylaw Services Officers or Custodial Guards classifications, including the completion of two years of post-secondary education in certain eligible subject areas; a physical abilities testing requirement; the completion of British Columbia Auxiliary Constable Training Program or Police Officer Training or equivalent; and the Completion of the Justice Institute Level I and II Enforcement Certificates or equivalent.

c) The Community Services Officer was a new classification, and current employees in the City would have no rights to the classification, such as through the grandfathering of incumbents or a closed competition for the new positions that would be restricted to incumbents (the Training Opportunity for the CSO position was, however, posted as a closed competition for affected employees only, i.e. those who held Bylaw Services Officer and Custodial Guard positions).

d) Current Bylaw Officer Lead Hands and Custodial Guard Crew Leaders would have no claim on CSO – Crew Leader positions or any other enhanced claim on a CSO position.

e) CSO positions would all be on a rotating shift schedule (with the exception of two cell-block shifts from 6:00 am to 2:00 pm and 12:00 to 8:00 pm). While in the cell block, a CSO would rotate through 8-hour shifts that were on a 24/7 rotation (8:00 am to 4:00 pm; 4:00 pm to midnight and midnight to 8:00 am). While in the community, a CSO would rotate through 8-hour shifts (6:00 am to 2:00 pm, 9:00 am to 5:00 pm, and 2:00 to 10:00 pm). The City has since announced plans to transition community-based CSOs to a 24/7 schedule, something that it had indicated during the s. 54 meetings was a possibility sometime in the future.

f) On call CSOs are required to be available all week, Sunday to Saturday inclusive, as work arises, unless they are on other City on-call lists.

(d) City of Kamloops' Implementation of the Reorganization

33. The elimination of the classifications described in the City's Section 54 Notice was eventually set for the end of 2020. It was originally set earlier, however it was delayed to the end of 2020 at the request of the Union. The Union requested a further delay beyond the end of 2020, but this was not agreed to . A Frequently Asked Questions document was circulated by the Employer on October 8, 2020 to describe the process. A revised FAQ was then circulated on December 8, 2020. See Exhibit "D".

34. In November and December 2020 and into January and February 2021, and as part of this final transition, one-on-one meetings were held with certain affected employees. These meetings were held with eleven employees who: (1) did not apply for the CSO position or training opportunity; (2) applied but did not accept one or both of the positions; or (3) applied for one or both of the positions but also indicated that they wanted to know their options.

35. In these meetings, the City gave employees written notice of the specific alternate positions with the City that were available to them, either through the employee's exercise of their bumping/placement rights or by being placed into a vacant position. The City also provided written notice of their additional options (other than proceeding with an application for the CSO Training Opportunity position), namely: the option of maintaining seniority for one year and applying for open positions (or continuing with a pending application, as applicable), on the understanding that if the applicant did not secure a position within the one-year period, they would lose their seniority and their employment with the City would end; as applicable, the option of agreeing to the severance of their employment with the City, along with the provision of severance pay under Article 27 of the Collective agreement; and, as applicable, the option to retire.