ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

- and -

UNION OF NORTHERN WORKERS

Concerning a policy grievance over the use of contract court reporters

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AWARD

BEFORE:

Andrew C.L. Sims, Q.C..... Arbitrator

REPRESENTATIVE FOR GOVERNMENT OF THE NORTHWEST TERRITORIES

Karin Taylor..... Counsel
Mike Johnston..... Adjudication Advisor
Jeff Round..... Associate Director, Court Services
Anne Mould..... Director, Court Services

REPRESENTATIVE FOR UNION OF NORTHERN WORKERS

Rebecca Thompson..... Grievance & Adjudication Officer
Lois Hewitt..... Chief Court Reporter

HEARD in Yellowknife, NWT on May 17, 2016

AWARD ISSUED on June 6, 2016

Our file: 7832

AWARD

The Government of the Northwest Territories is responsible, along with many other matters, for providing administrative support for its three levels of Court; the Territorial Court, the Supreme Court and the Court of Appeal. One aspect of that support involves, except in a few exceptional cases, ensuring that a professional court reporter is present every time those Courts sit, to record and transcribe the proceedings.

There is presently a Chief Court Reporter position plus five other court reporter positions allocated to meet this need. However, only three positions are fully filled and one other filled half time by an employee on restricted duties. There has been a vacancy in the allocated position for Inuvik for many years as well as the vacancies in Yellowknife.

There has always been some need to supplement the complement of employed court reporters with contract reporters, for example to meet special bilingual requirements or to cover unusually high demand. However, this reliance on contract reporters has grown in absolute amounts, and in proportion to the court reporters on staff, due to these persistent vacancies.

Territorial employees, including the Chief Court Reporter, Ms. Lois Hewitt, and the current incumbents in the positions that are filled, are all members of the bargaining unit represented by the Union of Northern Workers, a component of the Public Service Alliance of Canada. While the Union has been concerned over the level of vacancies in these positions for some time, and the related increase in the use of contract reporters, it was only in 2016 that it filed a grievance over the matter. In the Union's view, the excessive use of contract reporters, caused in part at least by the failure or inability to fill the vacancies, has had the effect of undercutting the bargaining unit and transferring what it views as bargaining unit work to contractors, removing any impetus to fill the vacant positions. As a result, the overall unit consists of fewer people than the Union feels ought to be the case.

The Union's grievance refers to Articles 3, 13 and 37 of the collective agreement, and reads:

> **I/We the undersigned claim that:**
>
> The Union of Northern Workers hereby files this Second Level grievance on behalf of all affected Court Reporters under the authority of Article 37 of the Collective Agreement, any other related Articles of the Collective Agreement, pertinent Legislation, and/or Regulations, Policies and past practices.
>
> **Therefore I/We request that:**

1. A declaration that the Employer has misinterpreted, misapplied, and/or violated the Collective Agreement
2. To be made whole in all respects without restriction, including being awarded interest on monies owing or made part of redress, and further to be awarded monetary damages
3. Any other remedy that is deemed just to address the concerns that present and as are disclosed through the evidence the Union will adduce at any stage of the grievance process, including arbitration
4. That the Employer seek no further retaliation or other action against the affected employees for the Union having exercised its right to grieve this matter on their behalf
5. That all documentation leading up to and including this grievance be removed from any and all of the members' employee files
6. That the Employer recognize contractor staff who are employed as Court Reporters to be employees of the GNWT and as such subject them to all the terms and conditions of the Collective Agreement
7. That the Employer ceases its practice of hiring contractor staff to work alongside bargaining unit members under terms and conditions of employment which are different from those under which members of the bargaining unit are employed

Details

The Union specifically asserts that other issues may present and it places the Employer on notice that as the Union becomes aware of such it shall put the Employer on notice, either through the processing of this grievance or through the filing of a further grievance. The Union maintains that where those other issues are so determined, the Union does not regard itself restricted, and such can be raised through to the commencement of an arbitration hearing.

Specifically, the Employer has a policy of hiring contractors who work as Court Reporters alongside bargaining unit members. These contractors have different terms and conditions from the bargaining unit members. Furthermore, the contractors do not pay union dues. The Union alleges that this Employer policy and practice is a violation of the collective agreement. In the past, the Union filed a grievance (Ref: #98-660) challenging the employment of agency nursing staff by the Employer. The Union asserts that the circumstances of the current grievance are similar to that grievance.

The Employer's second level reply provides, in part:

The Department of Justice maintains six court reporter positions (including the chief court reporter). There are four positions located in Yellowknife, one located in Hay River and one located in Inuvik. Of the six positions, two are presently without an incumbent. One employee is serving on a transfer assignment until September 2016, and despite being created in 2014 to address the growing reliance on contractors, the Inuvik position has not been filled due to staffing difficulties described below.

In most court proceedings the Court requires a court reporter to be present in order to take down evidence verbatim and to create the official record. As this requirement for court reporters to attend court is inflexible, if a court reporter is not available the matter would have to be adjourned, which could contribute to delay and prejudice parties and others involved.

The Employer has been actively attempting to fill vacant court reporter positions and has faced great difficulty. Currently, there are only two schools in Canada that offer the training required. Despite the competitive salary and benefits, the Department has not been successful in attracting qualified candidates to relocate to Yellowknife or Inuvik. Competitions in 2013 and 2014 resulted in 10 and 21 applications respectively. Unfortunately, none of the applicants met the screening criteria. A 2015 competition received 11 applications, with only one applicant meeting the screening criteria, but the candidate then did not pass the assignment.

With no candidates to fill the positions, the Government has been compelled to use contract court reporters from outside the Northwest Territories on short term assignments to fill immediate needs while it continues to seek and attract qualified candidates. This has been a long-standing practice,

> which usually involves a contractor being assigned to attend to cover a specific court assignment lasting between 1-5 days.
>
> The Government's requirement to provide court reporters at judicial hearings has forced the Employer to fill immediate needs with contractors. These court reporters are not employees of the GNWT. Contracts are held with court reporting firms that assign court reporters based on the specific skills and experience required for the particular assignment as and when required.
>
> The current Collective Agreement does not prohibit the use of contract staff, nor has the use of contractors resulted in job losses or the loss of union positions in this case. The Collective Agreement only speaks to consulting the Union if contracting out would lead to redundancies. Instead, as mentioned above, our present practice is a long standing one to address needs beyond our capacity, which has only been exacerbated by the inability to fill staff positions.
>
> For the above reasons, this grievance is denied at the final level.

Each party maintained the same position at arbitration. For the purpose of this case, the Union is not alleging that the contract employees are in fact employees of the Government; its complaint is not about their employee status which it, is agreed, lies with the contracting agency, primarily ACE Reporting. It is not a "contracting in" case. Rather the Union argues, the Employer's failure to fill these bargaining unit positions, something it can only sustain because contract court reporters are available, amounts to a breach of Article 38:

> Article 38 – Contracting Out
>
> 38.01 The Employer will give all reasonable consideration to continued employment in the Public Service of employees who would otherwise become redundant because work is contracted out.
>
> 38.02 The Employer will seek the views of the Union before finalizing any plans to contract out work, which would or could result in employees becoming redundant. The Employer agrees to provide information, including the rationale, relevant to the work that is being reviewed for the potential of contracting out. If the Union provides its views in writing fifteen (15) days of the date the Employer formally advises of the intention to contract out work, the Employer will provide a formal response prior to finalizing its plans. The timeline may be extended by mutual consent of the parties and such request will not be unreasonably denied.

The other reference in the grievance to collective agreement terms involves the Union recognition clause:

> 3.01 The Employer recognizes the Union as the exclusive bargaining agent for all employees in the Bargaining Unit.

Bargaining unit is a defined term under Article 2.01(c) and it means "those set out in s. 41(1.4)(a) of the *Public Service Act"*. Essentially, the Union argues, its unit is smaller than it should be due to a failure to fill these vacancies. The reference to Article 13; the dues check-off provision, is simply one tangible consequence of the main argument.

Each party called one witness as well as providing documentation over the use of employed and contracted court reporters. The Union called Ms. Lois Hewitt, a bargaining unit member who is the Chief Court Reporter. The Employer called Ms. Anne Mould who, as a managerial employee, is outside of the bargaining unit and the NWT's Director of Court Services.

Ms. Lois Hewitt has worked for the GNWT in Yellowknife for 23 years as a Court Reporter and became the Chief Court Reporter in 1993. She is a graduate of the NAIT Court Reporting program, certified to transcribe at 225 words per minute. She holds qualifications accepted throughout North America.

Ms. Anne Mould is the NWT's Director of Court Services and has held a variety of positions in the Ministry leading up to her appointment as Director in June of 2008. Ms. Hewitt reports to her and she provides the resources to enable Ms. Hewitt to ensure the Court's reporting needs are met. Both Ms. Hewitt and Ms. Mould gave evidence, with very few differences as to the facts, despite certain differences of perspective.

Court reporting requires training, primarily available at the Northern Alberta Institute of Technology, although a few other programs have at times existed elsewhere in Canada. There are North American accreditation standards, customarily requiring a transcription speed of 225 words per minute although there are persons qualified to a lower level at 180 words per minute. The Employer has conducted competitions to fill the vacancies, but without success.

The documentary record, supplemented by Ms. Hewitt and Ms. Mould's recollections, shows the four postings listed below, called "staffing actions", with their job requirements. In January 2013, a Yellowknife position for a 1-year term was posted requiring "completion of a two-year Court Reporting diploma program", but allowing that "all other equivalencies will be assessed on a case by case basis". Ms. Hewitt recalls this was to fill a vacant position due to an injury. Two applicants met the job requirements, but one could not pass the written component of the competition and the second was rejected following reference checks.

In September 2013, a permanent position was advertised for a Yellowknife position. It listed the requirements as:

> EDUCATION AND EXPERIENCE
>
> - Diploma certification from an accredited court reporting program with recent experience (within 1-5 years) using a Computer Aided Transcription (CAT) software
>
> EQUIVALENCIES

- Certificate from an accredited court reporting program with 1 year recent experience (within 1-5 years) using a Computer Aided Transcription (CAT) software.
- All other equivalencies will be assessed on a case-by-case basis.

Ms. Hewitt says this competition attracted 15 applicants but none had any background in court reporting so no one was hired. Ms. Mould says the screening criteria were enhanced because they needed people with recent court experience for the job. In September 2014 a similar posting was published, listing the same requirements. Ms. Hewitt recalls that there was only one applicant who was screened out at the human resources level. Ms. Mould was not involved in that competition.

Once again, in June 2015, the same posting was advertised, with the same requirements. Ms. Hewitt could not recall this competition which she thinks did not go ahead. In any event, no one was hired. She does recall that this was at the time when they were about to lose one of their employees as a result of a one year secondment to a different job in government. Ms. Mould confirms that no one was hired. Only one applicant screened in but was unsuccessful on the assignment, which takes place before any interview.

Ms. Hewitt's evidence is that she has seen the use of contracted court reporters grow from an "as and when needed basis" up to the point where contracted services are used for multiple days and at locations throughout the NWT. This increase has had the indirect affect of altering the mix of duties performed by the employed court reporters, who carry the responsibility for providing administrative resources for the contract reporters. Simply put, as the contract court reporters are transient and the employed reporter's permanent, things like requests for transcripts, appeal books, general inquiries and the storage of records all fall to the employed court reporters, leaving them with even less capacity to perform their core courtroom and transcription duties.

Ms. Mould says the contract arrangement has been in existence since at least 1990 when she started. She agreed it has increased for various reasons over time, particularly the increase in the number of court sittings and the inability to hire sufficiently qualified and experienced court reporters as employees. She confirmed that no layoffs have ever occurred and no redundancies have been created. Ms. Mould agrees she approved the transfer or secondment of one employed court reporter temporarily to another position, but characterized this as a choice between approving the secondment or losing the person entirely.

Both Ms. Hewitt and Ms. Mould confirmed the growth in Court sittings in the NWT. When Ms. Hewitt started there were five court reporters in Yellowknife, one in Inuvik and one in Hay River.

In 1993 the Court Reporters in Yellowknife were able to provide the local bar with a week of discoveries, a practice that has since discontinued. There were 6 judges in the Territories and Supreme Courts in 1993 and now there are 8 plus a Deputy Judge in Yellowknife. Court reporters attend all the Court sittings except for a few domestic matters. They are also, but infrequently, called upon for other hearings, like coroner's inquests or judicial remuneration hearings.

The Union introduced the RFP's ("Request for Proposals") used to solicit *ad hoc* contract court reporting, on an "as and when needed basis", from 2006, 2010 and 2015. The 2015 document advised that:

> The GNWT requires qualified Contractors to create verbatim records of Supreme Court and Territorial Court proceedings across the NWT by electronic (stenographic) shorthand, and to produce transcripts from the verbatim records or directly from digital audio files.

One of the contracts awarded was for specialized French-English bilingual services which are occasionally needed. The main contract was awarded to ACE, a firm based in Edmonton, with a secondary contract to a firm based in Ontario. Ms. Hewitt indicated that the Edmonton firm has arrangements with a large number of certified court reporters for whom it can contract and who it can dispatch for work as and when required. It appears to act as a brokerage agency. It attends to the scheduling, billing, and similar arrangements, charging the reporters a percentage (as Ms. Hewitt understood the arrangement) of what it bills to the client. The firm serves many clients both public (presumably boards, agencies and courts) and private (presumably law firms). The volume of court reporters it supplies to the NWT depends on the demand created by the NWT Court's schedules.

Ms. Hewitt is responsible for arranging for court reporters to attend, using such employees as she has available, and then using contract services as needed after that. Ms. Hewitt, under direction from the Supreme Court, uses resident (non-contract) court reporters for jury trials where continuity and availability is particularly important. Ms. Hewitt supervises the court reporters to a degree when they are in the NWT, but not directly, only by speaking to the firm's owner. She also troubleshoots any issues with court expectations, facilities etc.

The contractor is obliged to specify a list of the reporters it will use, and can only add reporters with the NWT's consent, in order to prevent the substitution of junior, insufficiently experienced, people.

Ms. Hewitt described the differences in how the contract reporters are paid (or at least invoiced for by ACE as their employer) and how GNWT employee reporters are paid. The contract reporters are paid on a per diem basis whether or not they are required for the full day. The GNWT employee reporters are paid by the hour from 8:30 – 5:00 p.m. with a one-hour lunch break and are committed for the full day. The contract reporters received both a daily fee and a transcript fee. They are both paid travel time, but the contract reporters get their housing paid for while the employees do not. Both can be paid overtime, but the contract reporters are billed at a higher rate.

Ms. Hewitt noted particularly that the court reporter's best asset is their accuracy and speed in producing a transcript. As she sees it, the contract reporters reap the rewards of this because they are partly, at least, paid by the product (usually per page). Those who are employed get no advantage for their speed and accuracy because they work set hours and get no additional per product fees. Ms. Mould testified to some of the provisions that contract reporters do not enjoy including the guarantee of permanent work, a pension, health and welfare benefits, and so on, all provided for by statute or as a consequence of being in the bargaining unit and covered by the collective agreement.

Certain changes were introduced in 2012 concerning the remuneration for court reporters. There is a difference of view as to which came first. There was a change to the Court Services Fees Regulation (R-120-93), which reduced or eliminated fees payable to the employed reporters.

At roughly the same time, an amendment to the collective agreement freed up employed court reporters somewhat to do freelance court reporting, primarily for the local bar. Appendix A3 now reads, in part:

> A3.02 Court Reporters will not be required to observe the normal hours of attendance stipulated for the Public Service but will be required to maintain attendance for provision of services as required. In the event no Court has been scheduled and a reporter wishes to remain absent from his/her place of employment during that time, permission must be obtained from the Chief Reporter. The Chief Reporter shall set up a weekly work schedule, which shall be posted at least six (6) working days in advance. This schedule will cover all normal work requirements.

Ms. Mould says the change in the Fees Regulation came about as a result of this change to the collective agreement. The Union takes a different view and Ms. Mould agrees she was not involved in the negotiations. Ms. Hewitt views the two changes together as detrimental to the ability to hire court reporters and as detrimental to the position of the existing employed reporters.

It was put to Ms. Mould that the GNWT might attract more applicants and have them qualify if they were to reduce the job requirements. She says they considered creating two levels of court

reporter but recalls the idea was rejected because of the amount of training and monitoring it would require. She agreed there had not been any direct reaching out to NAIT to help fill positions, for example by establishing a co-op program. It was put to Ms. Mould that the current contractor costs and the Government's Fee Schedule, with a page of transcripts costing $8.50 but being charged out a $3.00, in effect subsidized transcripts. She agreed that the amounts were correct. There is no staffing activity currently underway, and she customarily only initiates such a process at the request of Ms. Hewitt, although she agrees she could do so on her own initiative.

A question lying behind this dispute relates to the way court reporters are organized and paid. There are obviously some differences of view as to why a contractor is able to supply court reporters as needed, but the GNWT has been unable to successfully recruit people to full-time positions. Ms. Hewitt and Ms. Mould differed somewhat in their views on the impact of the 2012 changes, but filling vacancies was a problem even before then, so the issue is only whether these changes relieved or exacerbated a pre-existing problem. They both alluded to factors that reflect a more fundamental shift in the industry. There has been a rise, in some jurisdictions, in the use of tape recorded proceedings without a court reporter present, and advances in voice recognition software. There has been the development, with increasing sophistication, of computer assisted transcription. These changes appear to have led to a decline in the number of people entering the field.

Arguments

The Union argues that the Employer has failed to take adequate steps to fill the vacant positions covered by the collective agreement. By relying, as it has, on contractors to do this same work, it has reduced the impetus to fill these bargaining unit positions. Greater and ongoing efforts are called for. In the Union's submission, there is no question that the court reporting is "bargaining unit work" and that the contracted reporters' tasks overlap significantly with the tasks of those employed directly by the GNWT. However, the Union is not, in this case, asserting that they are *de facto* GNWT employees. Despite this, the continued use of contract reporters has in fact privatized the work and made hiring redundant. Management has abdicated its hiring role. It has also failed to deal with the issue by considering "out of the box" solutions like revamping the position's requirements.

The Union does not object to supplementary contract court reporting services, its only objection is to the use of contractors for basic day to day reporting functions. It is not suggesting any lack of *bona fides* or improper motive, but does say management is taking advantage of a situation that

works in its favor and results in a side-stepping of the purpose and intent of the collective agreement.

The Union legal argument rests upon two cases, one from the Ontario Court of Appeal and one by Arbitrator Trachuk which drew upon that Court of Appeal decision:

> *Hydro Ottawa Ltd. v. International Brotherhood of Electrical Workers Local 6361* (2007) 85 O.R. (3d) 727 (Ont. C.A.) leave to appeal to the S.C.C. discussed [2007] SCCA 305
>
> *Brantford Police Association and Brantford Police Services Board* [2015] CanLii 60924 (Trachuk) also indexed as [2015] CanLii 62342

The *Brantford Police* case involved similar facts in that the employer had contract employees working side by side with existing bargaining unit members doing identical work. The grievance was in part fought, successfully, over the failure to post vacancies as they occurred. The Union here relies upon the arguments advanced in that case as noted in the award under the heading "Submissions - Association" where the Union argued that:

> … the jurisprudence in this area has not always been consistent and that arbitrators often approach the issue of contracting in as a question of whether it is the contractor or bargaining unit employer who is the real employer of the contract staff. The Association says, however, that it should not be a binary question because a person can have two employers. It contends that arbitrators are really using the "who is the employer" question to determine whether it is a real contracting out or an impermissible contracting in that undermines the bargaining unit.
>
> The Association argues that the appropriate analysis for determining whether there has been an impermissible contracting in is to look at the context of the work and the effect that contracting it has on the integrity of the bargaining unit. The Association submits, in the alternative, that the more traditional tests found in the jurisprudence should be applied and that they will lead to the same result. *(emphasis added)*

Here too, the Union argues, the cumulative effect of the Employer's failure to post and fill these vacancies is to undermine the integrity of the bargaining unit. The award goes on to say, in part:

> A grievance must be based on an alleged violation of the collective agreement. In an improper contracting case the fundamental violation is the effective employment of people within the scope of the recognition clause without applying the terms and conditions of the collective agreement to them and/or to filling the positions they are holding. Those are the violations alleged in the grievances before me. Such violations may well undermine the bargaining unit, the collective agreement and collective bargaining relationship and some awards have found that doing so is in itself a violation of an implied term of the collective agreement. Nevertheless, in a case like this where there is no limitation in the collective agreement on contracting out bargaining unit work, the violation stems from effectively employing people without applying the collective agreement to them. However, the Association is correct that it is not a simple binary question of whether the contractor or bargaining unit employer is the employer of the contract staff because people can have more than one employer. That is the reason that the issue of whether the Board has retained or relinquished fundamental control over the work and the workers is the ultimate focus. In assessing that, it is necessary to determine whether the contractor has taken on all the elements of delivering the work, thus demonstrating that the employer has truly contracted out a function and not just brought in some nonunion labour. *(emphasis added)*

The Union places particular emphasis on the words underlined above. It draws my attention to the use of similar language in *Hydro Ottawa (supra)* where the Court, or the arbitration award, spoke of, for example:

> At paragraph 5:
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> > … breach of the established practice of not eroding the bargaining unit through the use of contractors …
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> At paragraph 36, referring to a series of prior cases:
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> > These and other arbitral decisions all emphasize that contracting in is "inherently destructive of the bargaining relationship" and generally contrary to the obligations undertaken by the employer in the collective agreement: St. Jude's, supra, at p. 119 L.A.C.
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> At paragraph 43:
>
> > A review of the arbitration decisions dealing with the subject reveals that there are factual differences between the two types of situations that are significant in terms of the collective bargaining relationship. As well, there are reasons for concluding that the same policy considerations do not necessarily apply. For example, while contracting out (which involves the effective abdication of the work by the employer to the subcontractor) admittedly impinges upon the bargaining unit work that would otherwise be done by union members, it is far less inherently destructive of the collective bargaining relationship than contracting in (where the work of the two groups is virtually indistinguishable). Consequently, the rationale for protecting management's general right to control the assignment of work may be less compelling in the latter situation than in the former.

Hydro Ottawa, the Union asserts, held that it is permissible to infer, from a Union recognition clause, provisions in a wage scale and similar clauses, that the Employer was not intended to have a free hand to contract out bargaining unit work where to do so would be inherently destructive of the collective bargaining relationship. Further, such an implied restriction is not dependent on a finding that the Employer is the “true employer” of the persons doing the work.

The Employer’s position is that, once one accepts that the court reporting agencies contracting with the Government are the true employers of the court reporters they supply, the issue becomes a simple one of applying Article 38 according to its plain meaning. The Union, for this case, accepts that it is the contracting agencies, and not the GNWT, that hires, directs, and controls the contracted reporters. In the Employer’s view, this is in any event the correct conclusion, given the principles set out in “contracting in” cases like *IKO Industries Ltd. v. USWA* (2002) 118 L.A.C. (4th) 1 (Picher) and “true employer” cases like *Northwest Territories and NWT Public Service Association* (1990) 23 CLAS 49 (Cherkow).

Article 38.01, the Employer urges, has not been violated since no employee has become redundant because work has been contracted out. All existing court reporters continue to be employed. There have been no layoffs. As to Article 38.02, no plans are being made to contract out this work, and no notice has been given to the Union of any such intention. To the contrary, the Employer continues to try to fill the vacancies it has, not only by repeated competitions but also by the more recent designation of the job as "hard to fill", enabling hiring at any time without a competition. The collective agreement provisions do not contain any "no contracting out of bargaining unit work" provisions, either in Article 38 or elsewhere. There is no evidence of anything but *bona fide* contracting for the provision of necessary services that the Employer has been unable to secure through its efforts to fill the vacant positions. This does not constitute "undermining the bargaining unit", and is in compliance with rather than contrary to the collective agreement's express provisions.

Decision

In my view, the two decisions cited by the Union do not support a conclusion that what has occurred here violates the collective agreement. For the reasons given below, I do not find a direct violation of Article 38. The thrust of *Hydro Ottawa* is that, in appropriate circumstances, an arbitrator will not be found to be unreasonable for inferring restrictions on an employer's ability to contract out where provisions in the agreement provide a rational basis for drawing such an inference. In my view such an inference is not appropriate here where the parties have specifically set out, in Article 38, the contracting out protections they intend to apply in the event of contracting out. There are no clauses in this agreement analogous to the definition clause for temporary employee that led to such an inference in *Hydro Ottawa*.

A review of the arguments before the Court in *Hydro Ottawa* (*supra*) and the arbitrator in *Brantford Police (supra)* reveal something that is quite common in contracting in/contracting out arbitrations. Arguments and legal tests are cited from both labour board decisions and from arbitration awards. There is a fundamental difference between the labour board's customary task and the arbitrator's task.

Such labour board decisions mostly arise from certification or other representation cases, where the issue is whether a person is an employee or not, as defined in the Act. Labour board certification involves authority to represent "employees" not the exclusive right to bargain over specified work. It is in this context that labour boards have drawn upon common law tests defining the employee-employer relationship, and have then developed their own tests to distinguish between those who are employees and those who are not. *Brantford (supra)* for

example, refers to *Montreal Locomotive Workers* [1947] 1 D.L.R. 161, a common law case, and *York Condominium* [1977] OLRB Rep. 645 (OLRB) a labour board case. It is in this area that labour boards have developed the "true employer" test, to prevent certification applications and bargaining rights being avoided by interposing some "shell employer" into the equation to avoid or reduce a potential bargaining unit for representational purposes. What is important is that in labour board matters the question involves a single choice (referred to in some cases as a binary question); is the person an "employee" of the employer or not?

A similar issue arises in collective agreement arbitration, but it is not quite as simple. The questions often overlap, but they are not identical. The reason is that, once bargaining rights are acquired, the Union and the Employer may, but are not presumed to, negotiate such restrictions on subcontracting, or for the definition or protection of bargaining unit work, as they choose. A collective agreement may be silent on contracting out work, or it may involve almost watertight protection preventing any form of contracting out (or in) of bargaining unit work. It may also provide all sorts of more limited provisions somewhere in between those two extremes.

For arbitrators it is rarely just a question of who is the "true employer". Answering that question may resolve the dispute, but more may be involved, depending upon the specific language used in the collective agreement. Often, it is whether and to what degree the parties have approved of or restrained the contracting out of work. Sometimes that involves a simple interpretation of a clause dealing with contracting out. Sometimes restraints on contracting out, or protection for bargaining unit work, can be inferred from less obvious terms within the collective agreement.

As the Ontario Court of Appeal noted at paragraph 38 of *Hydro Ottawa* (*supra*) (quoting from the Employer's argument), the generally accepted principle in labour arbitration is:

> … a long and established practice in labour relations -- dating back at least to the arbitration decision of Professor Arthurs in Re United Steelworkers of America and Russelsteel Ltd. (1966), 17 L.A.C. 253 -- to the effect that arbitrators will not imply a term prohibiting "contracting out" in a collective agreement. As Arbitrator P.J. Brunner noted in Re Kennedy Lodge Nursing Home and Service Employees' Union, Local 204 (1980), 28 L.A.C. (2d) 388, at p. 391:
>
> > The law appears to be reasonably clear according to both textwriters and arbitrators that absent express language in the collective agreement to the contrary, bona fide contracting out of work to persons (non-employees) who are not within the bargaining unit is a management right.

Brown and Beatty, *Canadian Labour Arbitration* (4th edition) express the same proposition, in firmer terms, as follows at para. 5:1310:

> **5:1310 — Clear language required to prohibit "contracting out"**

> A determination that certain tasks fall within the class of work normally performed by bargaining unit employees does not imply that the employees have a proprietary right to that work. To the contrary, in the absence of specific language in the collective agreement providing otherwise, it is now universally accepted that bargaining unit work may be subcontracted to non-employees, as long as the subcontracting is genuine and not done in bad faith. Whatever the view may have been in the earlier awards, it is now settled that to prohibit subcontracting, the agreement must expressly so provide.

This presumption applies where the parties, in their collective agreement, are virtually silent on the issue of contracting out. However, many collective agreements do say something about the issue, directly or indirectly. Again, Brown and Beatty comment on this, in the same section, as follows:

> In any event, where the agreement limits the circumstances in which contracting out is permitted, questions can arise both as to the meaning of such a provision and whether, in fact, the requisite conditions exist. Thus, for example, where the limit was expressed in terms of whether it was "practicable", evidence was required of the differential cost advantages of contracting the work out. Where the agreement contained an exemption for "*ad hoc* use of agency or registered nurses for single shift coverage of vacancies due to illness, or leaves of absence", such a provision has been held to bar the creation of a "parallel contingent workforce". As well, an arbitrator may be required to determine if such contracting was "necessary". Furthermore, it will be necessary to establish the causal connection where contracting is prohibited only when it would lead to a layoff. However, where there is an express prohibition against contracting out if layoffs would result, a massive change in the technology of performing bargaining unit work will not justify such layoffs.

Many arbitration cases hold that, in some situations, the Employer may in fact be the true employer and therefore obliged to apply the collective agreement to the persons involved. Usually, this is simply described as contracting in. Sometimes however it is characterized as a non-*bona fide* effort to contract out work, since the presumption that the Employer is free to contract out work, unless proscribed by clear language, only applies to a *bona fide* contracting out not to a situation where the employer in fact maintains control over the person and their work in a way that renders them the true employer.

Again, Brown and Beatty (*supra*) provide a helpful commentary, this time at para. 5:1340, on what is *bona fide*, usually characterized as a decision arrived at "in good faith and for sound business reasons".

> Arbitrators have further circumscribed the employer's right to contract out certain work by requiring that it be done in good faith and for sound business reasons. However, if the employer's actions meet this implied requirement of good faith, in the absence of specific language in the agreement to the contrary, subcontracting or franchising will be upheld even to the extent of wholly displacing the bargaining unit. Indeed, even where the agreement expressly limits the ability of an employer to contract out, this may not apply to emergency situations where bargaining unit employees are unavailable to do the work. As well, where there is a change in the business arrangement as, for example, where a retailer has refused to continue purchasing products directly from an employer, this arrangement may not be viewed as an instance of contracting out, nor will it where the disputed practice involves a commercial agreement for the sale of an asset.

The case at hand is not silent on contracting out. The parties have addressed the issue expressly, but in terms that fall well short of a prohibition. My task is to interpret the words these parties have used in Article 38, read in the context of the entire agreement and in the context of this workplace.

Cases have, more recently inferred a restriction on contracting out work from other provisions in a collective agreement where that agreement is otherwise silent on the contracting out of work issue. Again Brown and Beatty provide a helpful summary at para. 1410:

> **5:1410 — Implied restriction**
>
> In earlier awards, arbitrators often treated the assignment of bargaining unit work to employees who were excluded from the scope of the agreement on the same basis as they did subcontracting. Specifically, in the absence of express language in the agreement to the contrary, these arbitrators concluded that employers were not fettered in their abilities to assign work to employees who were excluded from the bargaining unit, provided that, as in all instances involving the reallocation and reassignment of work, the assignment was made in good faith, for valid business purposes, and in a manner that was neither discriminatory nor arbitrary. However, later awards have distinguished such assignments from contracting out, and arbitrators have implied, from the seniority, classification, recognition and wage clauses, a fetter on management's discretion to make such assignments. As one board stated:
>
> > . . . unless the contract forbids foremen doing the jobs ordinarily done by production workers in the bargaining unit, they are free to do the work provided the doing of the work was not of such an extent as to bring the person doing it within the bargaining unit.
>
> Indeed, some arbitrators have taken the view:
>
> > . . . that performance of bargaining unit work by a foreman was permissible *only* when an existing practice of performance of work by a foreman was shown, and that only then would the board look further to see if, even given such a practice, bargaining unit work was being performed to "such an extent" as to bring the foreman within the unit.
>
> However, arbitrators have generally taken the position that the overtime provisions in an agreement do not limit the assignment of bargaining unit work to non-unit employees, although ultimately the question in each case is one of construction of the agreement. *(emphasis added)*

It is one thing to infer restrictions on the reassignment of work or contracting out where the collective agreement is silent on the issue; the situation described above. It is a significantly different question when the collective agreement, as here in Article 38, is not silent on the topic.

I have relied heavily on the Brown and Beatty but only because the authors provide a well-accepted and useful breakdown of the issues. Most of the general principles alluded to above can also be found within the *Hydro Ottawa* (*supra*) decision itself. For a further discussion of these same issues, reference might be had to:

> *Southam Inc. (The Edmonton Journal) and GCIU Local 34M* [2001] CarswellAlta 2562, 65 C.L.A.S. 90 (Sims)

With this introductory commentary, I now turn to the two cases relied upon by the Union. *Hydro Ottawa (supra)* is challenging for several reasons. It involved a judicial review of the last of three arbitration decisions against what was then the "patently unreasonable" test. The Court's decision upheld the award in question, but without any ringing endorsement of its underlying rationale. Indeed, some of the Court's discussion, particularly at paragraphs 51 to 59, suggest that it was the breadth of the patently unreasonable test that saved the original award from intervention. The Court reviewed the approach of other arbitrators to similar issues but went on to say, at para. 59:

> [59] In any event, even if a different approach were suggested by other arbitration decisions, the failure of a subsequent arbitrator to follow previous decisions does not by itself make the subsequent arbitrator's decision patently unreasonable … Lack of unanimity is the price to be paid for having independent and specialized decision-makers in the labour relations field protected by the standard of review of patent unreasonableness.

The decision is also challenging in that, as the Court noted at paragraphs 4, 6 and 17, the arbitrator dealt with a series of related issues in sequence rather than all at once making the challenged ruling appear inconsistent with some of the rationale in the earlier two. Despite this, the Court's ruling is relatively clear. An arbitrator, in determining whether a collective agreement restricts contracting out or protects bargaining unit work, will not be found patently unreasonable for inferring from less direct clauses that the parties have agreed upon restrictions on the presumptive or even express management right to contract out work. In that case, the arbitrator ruled that such such a restriction was implicit from the fact the parties agreed upon a definition of "temporary employee" reading:

> "temporary employee" means a person hired for a specific period of time, without the intent of continuous employment. Temporary employees whose initial term of employment is two weeks or more are members of the bargaining unit...

He found this despite an explicit clause providing:

> 21. Hydro Ottawa may contract out work; however, the performance of work by outside contractors will not cause the lay-off or demotion of any employee. An employee whose job is eliminated because of contracting out may request to be laid off.

What is particularly significant for this case are the Court's two expressed reasons for upholding the award, set out at paragraph 33-34:

> 33 First, the Arbitrator found as a fact that Hydro Ottawa's use of non-bargaining unit agency personnel to perform bargaining unit work side by side with bargaining unit employees, under the supervision of its own managers and using the same equipment and materials supplied by it, did

> not constitute contracting out. That factual finding was open to him on the record and is entitled to considerable deference. I can see no basis for interfering with it and, for that reason alone, Article 21 is of little assistance to Hydro Ottawa in this case.
>
> 34 Secondly, the Arbitrator took an interpretive approach to the collective agreement that was consistent with the body of arbitral decision-making dealing with the notions of "contracting out" and "contracting in". In spite of a reference in some texts — picked up by some arbitrators (including this one in an earlier ruling in this grievance proceeding) — to "contracting in" being a subset or subcategory of "contracting out", arbitrators have in fact distinguished between the two forms of working arrangements. The Arbitrator's decision to do so in this case, then, cannot be said to be patently unreasonable.

In the case at hand, it is conceded both that ACE, and not the GNWT, is the true employer and that this is not a case of “contracting in”. I make this distinction because of the differing views, noted in paragraphs 41 and 43 of *Hydro Ottawa,* that the two concepts may not be the same, depending on whether one views contracting in as a subset of contracting out, or not. Further, the conclusions of fact referred to in paragraph 33 are not true here since supervision is not direct and several other indicia indicate that ACE is the true employer of the court reporters it supplies. They are supplied only “as and when needed” and are not working side-by-side with GNWT reporters on any long term basis. ACE is relatively free to send in a different court reporter for each assignment. In *Hydro Ottawa,* the Arbitrator found that since the Employer was not truly “contracting out” work, Article 21 did not apply. I make no such finding here.

In my view this is quite clearly a case of contracting out court reporting services and not a disguised way of undermining the unit. I find nothing non-*bona fide* in this arrangement. One might suggest, as the Union does now, that greater efforts could have been made to fill vacancies, but this is only a question of degree. My conclusion is that the inability to fill the positions advertised has more to do with the attractions (including the economics) of being an independent reporter and with location that with any inadequacies in the effort put forward by the GNWT. One might say greater success would result if standards were lowered, but the Employer is entitled to set the standards it feels it needs and nothing in the evidence suggests any ground for questioning its judgment on the point.

This is contracting out and Article 38 does apply here. A finding that other clauses imply something to the contrary of what Article 38 anticipates might occur lawfully is not appropriate. The recognition clause and the wage scale of themselves are insufficient to achieve such a result.

I now turn to the *Brantford Police* case where the arbitrator introduced the matter as follows. The allegations are clearly similar to those at hand.

> The Brantford Police Association (the Association) has filed two grievances alleging that the Brantford Police Services Board (the Board) violated the collective agreement by “contracting in” janitorial workers. One of the grievances alleges that the Board failed to post vacancies in the

> maintenance department and the other alleges that the Board filled vacant positions with people contracted outside the bargaining unit.

That employer consciously decided to contract out some of its janitorial work and used an outside agency to provide janitorial employees to come into the workplace on a regular full time basis to do the same work as people within the bargaining unit. At the same time, it ceased posting vacancies for the in-scope jobs. However, like here, no existing employees were laid off.

The Association is recorded as making the following submissions, obviously expressed in the alternative:

> The Association submits that the jurisprudence in this area has not always been consistent and that arbitrators often approach the issue of contracting in as a question of whether it is the contractor or bargaining unit employer who is the real employer of the contract staff. The Association says, however, that it should not be a binary question because a person can have two employers. It contends that arbitrators are really using the "who is the employer" question to determine whether it is a real contracting out or an impermissible contracting in that undermines the bargaining unit.
>
> The Association argues that the appropriate analysis for determining whether there has been an impermissible contracting in is to look at the context of the work and the effect that contracting it has on the integrity of the bargaining unit. The Association submits, in the alternative, that the more traditional tests found in the jurisprudence should be applied and that they will lead to the same result.

The arbitrator elaborated on the "traditional" vs. "non-traditional" tests. The first is the usual contracting in, who is the true employer? test.

> The Association contends that when the contract staff members are doing their jobs, they look exactly like the Association's members because the work they do is virtually indistinguishable.

and further:

> The Association also argues that applying the traditional tests will lead to the conclusion that the Board has engaged in an impermissible contracting in because it exercises fundamental control over the contract staff.

The less traditional approach appears to have been argued in the following way:

> It says that the collective agreement is being harmed by the contract because the contract staff and the Board's employees are virtually indistinguishable but get compensated very differently. The Association maintains that is inconsistent with the principle that employees who do the same work should be paid equally.

and further:

> The Association replies, further, that it does not matter whether the Board intended to undermine the bargaining unit if that was the effect of the contracting in. It submits that eliminating two positions by replacing them with contract staff affects the integrity of the bargaining unit.

At times in the decision the arbitrator appears to treat the issue of "undermining the bargaining unit" as a freestanding basis for finding a violation of the recognition clause in the collective agreement. However, at others the award suggests that is only so if the Employer is in fact the "true employer" of those purportedly contract persons. The non-traditional aspect of this comes from the assertion in the second sentence below that people can have two simultaneous employers:

> Nevertheless, in a case like this where there is no limitation in the collective agreement on contracting out bargaining unit work, the violation stems from effectively employing people without applying the collective agreement to them. However, the Association is correct that it is not a simple binary question of whether the contractor or bargaining unit employer is the employer of the contract staff because people can have more than one employer.

I am not persuaded of the viability of this "you can have two employers" approach. However, despite that suggestion, Arbitrator Trachuk appears to ultimately decide the case on traditional contracting in principles, finding that the Employer maintained fundamental control over the activities of the purportedly contracted out employees. Having concluded these persons should have been treated as employees and within the recognition clause, she then concluded that having failed to post these positions when vacant amounted to a violation of the collective agreement. This conclusion does not depend on any freestanding proposition that failing to post vacancies because persons truly and *bona fide* employed by a contractor do the work, of itself, amounts to a violation of a recognition clause because it affects the integrity of the bargaining unit. To uphold such a principle (absent a lack of *bona fide*s argument, or a contracting in reality) would simply be a reversal of the rule that if a Union intends to prohibit contracting out it needs to negotiate a provision to that effect. I do not find *Brantford Police* assists the Union here.

I find that this is a contracting out situation of the kind contemplated by Article 38. That Article recognizes that contracting out may occur subject to certain protections and restraints that do not apply here. For these reasons I find I must dismiss the grievance. I thank counsel for their helpful submissions.

Dated at the City of Edmonton in the Province of Alberta on June 6th, 2016.

Andrew C. L. Sims, Q.C.