ARBITRATION TRIBUNAL

Canada
PROVINCE OF QUEBEC

File no.:

Date: October 11, 2011

BEFORE THE ARBITRATOR: M^{e} FRANÇOIS HAMELIN

Bell Canada,

Hereinafter called “Bell”

And

Communications, Energy and Paperworkers Union of Canada (CEP) – Craft and Services Employees

Hereinafter called “CEP Bell"

Union grievance no. QN-01-09
Dispute: Contestation of a contracting out in 2009

Collective agreement: June 5, 2008 to November 30, 2012

Counsel for the Employer: M^{e} Maryse Tremblay
Counsel for the Union: M^{e} Claude Tardif

Mandate: July 23, 2009
Hearing: November 4, 2010, March 4 and 24, July 5 and September 2, 2011
Award: October 11, 2011

ARBITRATION AWARD
(Canada Labour Code)

I- THE DISPUTE

[1] On May 6, 2009, CEP Bell filed the following grievance:

> DATE OF THE INCIDENT GIVING RISE TO THE GRIEVANCE OR COMPLAINT: April 7, 2009
>
> NATURE OF THE GRIEVANCE OR COMPLAINT (INCLUDING ALLEGED LOSS OR PREJUDICE): The Union is contesting Bell's decision to award work belonging to Bell technicians (Central Office Technicians) to employees outside of the bargaining unit, namely to Bell Technical Solutions (BTS) technicians.
>
> IN THE CASE OF A GRIEVANCE, INDICATE THE ARTICLES OF THE COLLECTIVE AGREEMENT WHICH ARE ALLEGED TO HAVE BEEN VIOLATED: Articles 1, 3, 9, 10, 11, 17, 18, 19, 20, 21, 22, 23, 24, 34, appendices A, B, C, D, E and pages 212-213 of the memorandum of agreement as well as all other relevant clauses.
>
> REMEDY SOUGHT: That Bell immediately rectify the situation and that Bell have this work performed by Bell technicians. That Bell stop allowing employees from outside the bargaining unit to perform work that is covered by the bargaining certificate. That Bell apply all provisions of the collective agreement to the employees performing this work by deducting union dues from the salary of these employees and that Bell compensate employees for any monetary losses that they have incurred or will in the future incur [including, notably, punitive damages],[1] with interest.

II- THE EVIDENCE

[2] At the hearing, the respective counsel for the parties had the following individuals testify, all of whom held the functions indicated at the time of the events in question in this case:

Evidence presented by CEP Bell

- Alain Portelance, CEP Quebec National Representative

Bell's defence

- Sylvie Couture, General Manager, Field Services Quebec
- Claire Germain, Regional Director, Field Services Quebec

CEP Bell's rebuttal

[1] At the hearing, the Union waived the claim for punitive damages.

- Alain Paradis, Bell technician

[3] Their testimony, the documents submitted in evidence and the admissions made by the parties revealed the following relevant facts:

[4] The present grievance contests the decision made by Bell in April 2009 to award "*the voice and DSL frame work in unmanned central offices*" – which had until that time been performed by Bell technicians – to technicians from *Bell Technical Solutions* [hereinafter called "BTS"], a wholly owned subsidiary of Bell.

[5] For a better understanding of the dispute, I will begin by reporting the facts relating to a subcontract awarded by Bell in 1996 to the firm *Entourage,* which would later become *BTS*, for the installation and repair of indoor wiring at the premises of its residential and commercial customers.

A) The contract awarded to *Entourage* in 1996

1) Background of the agreement

[6] In the spring of 1995, Bell announced its intention to launch a major administrative restructuring in order to reduce its costs.

[7] Bell planned, notably, to divest itself of its inside wiring services (installation and repair) performed at the premises of its residential and commercial customers.

[8] CEP Bell initially opposed this move by Bell, but faced with the determination of the Company, it was forced to resign itself and to reach an agreement with it.

[9] In a decision[2] issued on September 22, 1998, the Canada Labour Relations Board presented the following account of the events that led to an agreement between Bell and CEP Bell concerning the contracting out of inside wiring work for the employer's customers:

> [TRANSLATION]
> The CEP spent nearly all spring and summer of 1995 preparing for collective bargaining with Bell, which was scheduled to begin at the start of fall 1995. The aim of the negotiations was to renew the collective agreement of two bargaining units represented by the CEP: the craft and auxiliary service employees unit and the operators' unit. The issue of lay-offs was one of the problems looming on the horizon of these negotiations.
>
> In March 1995, the Company's CEO notified the Union that Bell would soon be introducing major changes. The Company had already announced its decision to

[2] CEP Local 25 -and- Bell Canada (Richard Connolly et al., Complainants), September 22, 1998, [1998], CLRBR 18.

eliminate 10,000 jobs by the end of 1997 and to reorganize a substantial portion of the work performed by it.

According to the March 1995 internal newsletter for Bell employees, the organization had embarked on a “transformation of the company.” In doing so, Bell intended to reduce its workforce and improve its service by ceasing to perform certain activities judged to be unnecessary and by reducing its general expenditures in a logical and structured manner. In this newsletter, the Company also informed employees that it would do everything possible to treat the employees affected with respect and dignity and that it would offer career planning and counselling services to employees whose position had been modified or eliminated.

The CEP took Bell’s position seriously. Up until 1995, it had managed to avoid any lay-offs of its members. However, by the end of the summer of 1995, CEP officials had accepted the fact that Bell was determined to eliminate certain activities, or at least to dismantle certain “non-value-added” services. Bell’s plans to transform several of its departments into separate subsidiaries had already been the focus of discussions. In addition, Bell had already applied to the CRTC to release it from its exclusive responsibility relating to the provision of inside wiring services. The CRTC issued a decision authorizing customers to hire the supplier of their choice for inside wiring services. The decision was to take effect on February 1st, 1996 and would allow Bell to charge customers for inside wiring performed from a “demarcation point” toward the interior of the premises at an hourly rate of $91.00. According to the CEP and many others, the CRTC’s decision effectively allowed Bell to abandon inside wiring work, as the majority of other telephone companies had already done.

[…]

In September, Bell’s “transformation” began to take shape. Construction services and BNI were on the verge of being incorporated as separate entities requiring only two-thirds of the existing workforce. A similar situation prevailed in the logistics and materials departments as well as in building maintenance. A new subsidiary would employ only approximately 40% of the personnel of Bell’s existing departments. In addition, Bell expected to lose up to 80% of the inside wiring market as a result of the hourly rate of $91.00 it would be charging.

The CEP maintains that it was determined to prevent what its representatives perceived as the dismantling of Bell. One of the main issues at the centre of collective bargaining was Bell’s proposal to amend Article 11 of the collective agreement in order to allow it to contract out work even if there were employees on lay-off. Article 11 prohibits the recourse to contractors where there are bargaining unit employees on lay-off. For its part, the CEP had made “job security” its main priority and was determined to limit the number of lay-offs.

Bell and the CEP negotiated throughout the months of October and November 1995. Bell stood firm on its intention to eliminate a portion of the services it was still providing at the time, including the installation and maintenance of inside wiring.

In addition to participating in collective bargaining, Mr. Long and Mr. Roy were in charge of the project to create an “entreprise de solidarité” (organization based on solidarity), of which they were analyzing the strengths and weaknesses. The analysis of the project was carried out with the participation of representatives of the Quebec Federation of Labour’s Solidarity Fund and Bell.

[…]

With regard to the new company that would take over inside wiring work, Mr. Long and Mr. Roy presented a document whose introduction read as follows:

> “— The solidarity project is in response to Bell Canada’s decision to withdraw from inside wiring installation and maintenance services.
>
> — The Solidarity Fund of the Quebec Federation of Labour (QFL), along with the Communications, Energy and Paperworkers Union of Canada and a group of executives from Quebec and Ontario, has studied the possibility of creating a new company (Newco) that would offer, as a preferred supplier, Bell Canada subscribers all the services mentioned in point 1.3.
>
> — This document describes the general terms and conditions of a partnership agreement that would be reached between Bell Canada and Newco authorizing the latter to begin offering these service on or around February 1st, 1996.”
>
> […]

February 1st, 1996 was a crucially important date. It was on this date that the CRTC decision took effect that authorized Bell to divest itself of, notably, its inside wiring installation and maintenance services. There was a general feeling, based on what had happened at BC Tel and Telebec, that if the CEP didn’t do something, many employees would lose their job. The CEP representatives did not see any other legitimate recourse.

The new company proposed by the solidarity project was given the name Newco. In 1996, Newco became “Entourage.” However, it was referred to simply as Newco during the negotiations.

[…]

Collective bargaining continued into December 1995. On December 21, 1995, a tentative global agreement was reached for the craft and service employees’ unit and the operators’ unit represented by the CEP. With regard to Newco, the following memorandum of agreement was signed on December 20, 1995:

> “1. Newco will carry out the activities previously performed by the Company and described in the appropriate sections of the Agreement to be concluded between the Company and Newco.

2. The business and operations of Newco will be independent from those of the Company, and the employees represented by the Union in Newco's bargaining unit will be entirely separate from the employees and bargaining units of the Company.

3. The activities pursued and the work performed by Newco employees will not be considered to be the work of the bargaining units of the Company."

[10] This memorandum of agreement was then included in the collective agreement signed in February 1996 and was renewed in its entirety in all subsequent collective agreements, with the name *Newco* being replaced, as applicable, by that of the companies that succeeded it: *Entourage* in February 1996, and *BTS* in November 2005.

[11] Following this agreement, nearly 870 Bell technicians agreed to transfer to *Entourage* and consequently received a separate package.

2) Genealogy of Newco, Entourage and BTS

[12] On February 12, 1996, *Newco* became *Entourage*, a company jointly owned by the Solidarity Fund, QFL, with a 75% stake, and by Bell with a 25% stake.

[13] In the fall of 1999, Mr. Adrien Pouliot – who has no relation to Bell – bought the Solidarity Fund's 75% ownership stake in *Entourage.*

[14] From 2000 to 2002, 57% of *Entourage*'s shares where held by Mr. Pouliot, 33% by Bell and 10% by a group of employees.

[15] On November 1, 2005, Bell acquired 100% of the shares of *Entourage,* which became *Bell Technical Solutions.*

[16] At the time, CEP Bell submitted an application for certification to the *Commission des relations du travail* [Labour Relations Board] to obtain a separate bargaining certificate from that of Bell employees in order to represent *Entourage* employees. Bell did not oppose this application.

[17] CEP Bell subsequently submitted a similar application in order to obtain a separate bargaining certificate from that of Bell employees in order to represent *Bell Technical Solutions* employees. Once again, Bell did not oppose this application.

3) Nature of the work entrusted to *Newco* and its successors

[18] At the time, Bell and *Newco* signed a service contract specifying, notably, in Appendix "A," the nature of the inside wiring work that Bell was transferring to the company:

> APPENDIX "A"
>
> ***Definitions and descriptions of Services provided by NEWCO (Quebec)***
>
> ***A- Definitions***
>
> All the definitions listed below apply to Appendix A to E.
>
> ***Inside wire:***
> *Wiring and jacks on the Customer's side of the Demarcation Point, for single-line service only.*
>
> ***Demarcation Point:***
> *A point of termination on the customer's premise at which Bell provided facilities interface with Bell or Customer provided terminal equipment including inside wiring and jacks.*

[19] According to the terms of the "service contract," Bell receives requests for inside wiring services from its customers and forwards the requests to *Entourage*, whose technicians perform the installation and repair work required in compliance with the rules and quality standards established by Bell.

[20] All work is carried out in its entirety by the personnel hired and trained by *Entourage,* in accordance with the assignments that the latter entrusts to each employee.

[21] *Entourage* manages its personnel independently, without the intervention of Bell, with respect to employee control, evaluation, discipline or other.

[22] With regard to *Entourage* technicians, they do not perform inside wiring work in buildings owned by Bell, but rather at the premises of Bell customers. They neither work at the same location as Bell technicians, nor do they use the same equipment.

[23] In November 2005, when *Entourage* became *BTS*, it continued to perform the services entrusted to it by Bell in accordance with the same conditions and in the same manner.

4) Changes made in 1999

[24] In 1999, by virtue of Article 2.2 of its contract with *Entourage,* Bell awarded the following additional services to the latter:

[25] Article 2.2 reads as follows:

> **2.2 New or additional services**
>
> Bell Canada may determine, from time to time, to outsource new or additional services which require a customer field service technician and, in connection with such new or additional services, (services which are not Services as defined herein), Bell Canada shall invite Entourage to bid as one of the bidders for the same. Where Entourage is the successful bidder, the terms and conditions of this Agreement shall apply with the necessary changes to such new or additional services. Bell Canada may also request Entourage to provide new or additional services directly without submitting the same to a bidding process. Unless otherwise agreed to by the Parties, the terms and conditions of this Agreement shall apply to such new or additional services with the necessary changes.

[26] At the time, Bell and CEP Bell did not reach any agreement on these new or additional services entrusted to *Entourage*, and CEP Bell did not file any grievances contesting this decision.

B) The contract awarded to *BTS* in 2009

[27] In 2009, Bell decided to award *BTS* a contract for voice and DSL frame installation and repair work in unmanned central offices.

1) Nature of the project

[28] At the hearing, Bell's witnesses provided a general description of this contract relying essentially on the document prepared by the Company for CEP Bell in February 2009, of which the relevant excerpt reads as follows:

> Business context
>
> - Currently, we have two modes of operation in the central offices:
> - Some central offices (urban zones) are manned and have dedicated technicians assigned to them;
> - Other central offices (semi-urban and rural zones) are unmanned: the technicians travel to different sites in accordance with service, provisioning and maintenance priorities.
> - With the introduction of Same Day/Next Day and Express Install offers, a new operational model in our central offices would allow us to deliver on our promise to provide timely service to our customers. Hence the need to optimize the work performed in our central offices.
> - The evolution of technology and increased competition means that fewer connections need to be made directly in the central office.

- Since the work load has decreased, we have expanded the territory covered by technicians working in the unmanned central offices, which has resulted in a loss of productivity due to increased travelling.

Consequently:

- As part of a pilot project, we will move the voice and DSL frame work in unmanned central offices for residential, business and wholesale orders to technicians from Bell Technical Solutions (BTS). In addition, we will evaluate other opportunities in order to deliver on our promise of timely customer service and reduce travelling between central offices.

- We will offer training to our technicians performing frame work in unmanned central offices and reassign them to work on I&R load or to replace technicians who avail themselves of the retirement incentive program.

- Between now and the launch of the pilot project, we will offer training to BTS technicians who currently execute orders on voice and DSL frames in unmanned central offices to allow them to cover a large territory and deliver flawless service.

[29] The document also explains the scope of the project and the options offered to employees in the following terms:

Scope of the project
- This initiative affects 361 out of 498 (74%) central offices that are presently unmanned.
    - It affects 32 [sic] technicians (15%) currently performing frame work in unmanned central offices (the total number of central office technicians is 900).
    - Of these 132 technicians, 44 work in Quebec and 88 in Ontario.
- It also affects BTS technicians who will receive training for the pilot launch on voice and DSL frame work for residential, business and wholesale orders.

Excluded
- Bell central office technicians performing frame work in manned central offices.
- All other tasks performed by Bell central office technicians in unmanned central offices (see table below).

Tasks in unmanned central offices	**Current operating mode**		**New model**	
	Bell	BTS	Bell	BTS
Frame work (voice CSL, ESCL, prov. and repairs)	X			X
Maintenance work	X		X	
Project-related work	X		X	
Data provisioning	X		X	
Transport equipment provisioning	X		X	
Data repair	X		X	
Transport equipment repair	X		X	
Switch maintenance	X		X	
	X		X	

Options for our employees

The following options are available to technicians working in unmanned central offices:

- Some will keep their positions as central office technicians, performing the remaining maintenance routines, project work and more complex tasks (see table on previous page).

- The other employees working in unmanned central offices will be reassigned: they will either replace a central office technician who retired or be assigned to business technician functions or cable repair functions; they will be trained within the Field Operations group according to our business needs.

- The business needs will be re-evaluated once we know the take-up rate on the retirement incentive plan (689 technicians in the Field Operations group are eligible for the retirement incentive plan, including 315 central office technicians).

[30] Finally, the document explains the advantages of this new model in the following terms:

This new model supports our efforts aimed at establishing a more competitive cost structure and improving the customer experience – two of our five strategic imperatives.

Improve customer service

- Service
    - Given that the tone signal will be given at 8:00 a.m. by local BTS technicians rather than by central office technicians assigned to long distances, we will reduce the response time for Same Day/Next Day installation service orders and Express Install. This will improve our performance.
    - The trouble tickets for frame work will be executed more rapidly by the closest BTS technician.

Establish a competitive cost structure

- Productivity
    - Since the orders will be executed by BTS technicians working in specific geographic regions, productivity will increase due to the significant reduction of travel time between unmanned central offices.
    - Since our productivity will be increased, our cost per activity will also be reduced.
- Process
    - With this initiative, we will be able to match work orders at the central office with installation and repair orders and to assign a technician to a single order rather than assigning a central office technician and a technician assigned to installation and repairs.

- Workforce
    - We must begin to train BTS technicians in order to meet our business needs, since 315 of our central office technicians are eligible for the retirement incentive program.

2) Nature of the work awarded to *BTS*

[31] At the hearing, Ms. Couture and Ms. Gemme specified that only one of the tasks performed by Bell technicians in the unmanned central offices was covered by the new contract awarded to *BTS* in 2009.

[32] The service agreement reached between Bell and *BTS* describes the nature of the work covered by the contract as follows:

> *WHEREAS the Parties have entered into a Service Agreement as of October 25th, 1999, as amended from time to time (the "Agreement") and the Parties agree to apply the terms and conditions of the Agreement to the Field Operations Provisioning and Assurance of Voice and DSL Services for single customer orders, except as specified below:*
>
> *BTS will assume the accountability for the field Operations Provisioning and Assurance of voice and DSL Services for single customer orders which involve an unmanned central office within the Quebec and the Ontario regions (Bell).*

[33] In summary, the contract awarded to *BTS* concerns only voice distribution frame provisioning, installation and repair.

[34] As for the Bell technicians, they continue to perform all the other tasks that they were performing up until then, including all maintenance and repair work, project work as well as all tasks related to provisioning in unmanned central offices.

[35] Moreover, the evidence reveals that, while it is true that the *BTS* technicians perform these new tasks in buildings owned by Bell and using its equipment, on the other hand, they generally do not work alongside Bell technicians, since the tasks they perform are in unmanned central offices. And when, on occasion, Bell and BTS technicians find themselves in the same central office, they do not perform the same work and their work is completely separate.

[36] The evidence also reveals that when Bell receives a request from one of its customers for the installation or repair of a voice distribution frame in an unmanned central office, Bell forwards the request to *BTS* so that it can perform the necessary work in compliance with the applicable standards.

[37] Once the request has been forward to *BTS*, it is responsible for performing the work and, to this end, it assigns one of its technicians to the site. Once again, it is *BTS* that has full responsibility at all times for managing, supervising,

disciplining and paying its technicians, without any intervention whatsoever from Bell.

[38] In their testimony, Ms. Couture and Ms. Gemme explain that, in awarding the voice distribution frame work to BTS, Bell had two objectives: to reduce costs and to improve customer service by reducing the response time for customer service calls involving the voice distribution frames.

[39] During the hearing, I upheld the Company's objection aimed at preventing CEP Bell from presenting evidence to demonstrate that more effective measures were available to reach these objectives.

[40] Indeed, provided that Bell exercises its managerial discretion reasonably and in good faith – which is not being contested by CEP Bell – there is no cause to call into question its decision, all the more so considering that, in this case, this discretion is exercised in a high-tech activity for which Bell has the necessary expertise.

[41] Moreover, it should be recalled that, not only does the employer have the necessary expertise to make the decisions that will allow it to reduce its costs and improve customer service, but it has the right to make mistakes as long as they are not patently unreasonable, which CEP Bell has never claimed in this particular case.

[42] The evidence also reveals that Bell did not reach any agreement with CEP Bell before awarding *BTS* – initially for a trial period, and then on a permanent basis – the work covered by the grievance.

[43] Finally, CEP Bell did not contest the fact that this decision by Bell did not result in any lay-offs in the bargaining unit.

III- ARGUMENTS OF THE PARTIES

A) Submission of the Union

[44] Based on a comprehensive review of the evidence, the Union's counsel arrives at the conclusion that, in the case at hand, the agreement reached between Bell and *BTS* in 2009 does not constitute a true "contracting-out" arrangement, but rather a "contracting-in" arrangement, which is prohibited by Articles 1 and 9 of the collective agreement.

[45] In support of this claim, counsel for the Union recalls the criteria established by the Ontario Court of Appeal in the decision Hydro Ottawa Ltd.[3] According to this ruling, he explains, the notion of contracting out implies that all

[3] Hydro Ottawa Ltd -and- International Brotherhood of Electrical Workers, Local 636, April 19, 2007, [2007], ONCA 292.

duties related to an activity are outsourced to an independent firm that performs these duties on its own premises.

[46] According to counsel, Bell's outsourcing of frame work in unmanned central offices to *BTS* does not meet these criteria, because only part of the work is performed in these offices – which are the property of Bell – and because the other duties continue to be performed by Bell technicians.

[47] The Union's counsel adds that since the agreement was reached between Bell and *BST* in 2009, their technicians find themselves working side by side in the same unmanned offices that belong to Bell, and performing duties of the same nature, not to mention that *BTS* is a wholly owned subsidiary of Bell.

[48] Counsel concludes that this clearly constitutes a situation of contracting in, disguised as contracting out, and, as such, is prohibited by Articles 1 and 9 of the collective agreement.

[49] The Union's counsel then establishes a parallel between the current situation and the true contracting-out arrangement reached in 1996 by Bell and *Entourage*.

[50] At the time, recalls counsel, Bell had outsourced all inside wiring at its residential and commercial customers' premises to *Entourage*. The subcontractor's technicians did not work on premises owned by Bell, nor did they work at the same locations or use the same equipment as Bell's technicians, not to mention that *Entourage* was not a wholly owned subsidiary of Bell.

[51] Moreover, adds counsel, this contracting out by Bell to *Entourage* led to an agreement being signed between CEP Bell and Bell, which has been included in each of their collective agreements to this day.

[52] According to him, it is clear that this agreement covered only the inside wiring services and that, if Bell wanted to contract out other duties to *Entourage*, or subsequently to *BTS*, it would have to reach a new agreement with CEP Bell, which was not the case in 2009 with the frame work awarded to *BTS.*

[53] Finally, the Union's counsel submitted several decisions in support of his arguments.

B) <u>Submission of the Employer</u>

[54] According to the Employer's counsel, Article 8, which deals with management rights, and Article 11, which recognizes Bell's right to use contracting out provided that no lay-offs result, authorized Bell to award BTS the voice frame work in unmanned central offices in 2009.

[55] Counsel goes on to argue that CEP Bell's claims are ill founded in fact and in law.

[56] According to CEP Bell, she recalls, the situation contested by the grievance does not constitute a case of contracting out, but rather contracting in, since the *BTS* technicians perform the voice frame work in unmanned central offices belonging to Bell.

[57] However, submits the Employer's counsel, the case law does not take into account this criterion alone in distinguishing between a situation of contracting out and a situation of contracting in. Rather, she explains, it assesses the whole situation in order to determine the veritable employer – i.e., the entity that actually oversees the work and is responsible for controlling, evaluating, compensating and disciplining the personnel performing the work in question.

[58] In the case at hand, she submits, the evidence reveals that *BTS* is an independent company, totally separate from Bell, that it is *BTS* that distributes the work among its technicians, oversees the work and evaluates and disciplines its personnel, all of which demonstrates, in her view, that there is no relation between the employees of *BTS* and Bell.

[59] The fact that *BST* is a subsidiary of Bell changes nothing of this situation, adds counsel, specifying that, in any event, CEP Bell acknowledged this subsidiary relationship when it signed the memorandum of agreement included in the collective agreement, found on pages 182 and 183.

[60] Counsel further notes that, based on the case law, the fact that the work awarded to *BTS* is performed in the central offices belonging to Bell is not a determining factor, since this circumstance constitutes only one element of the situation as a whole and, in any case, the work in question is wholly separate from that performed by Bell employees in said central offices.

[61] The Employer's counsel submits several authorities in support of her arguments concerning the first ground submitted by CEP Bell, namely the Hydro Ottawa Ltd. decision,[4] which is also referred to by the counsel for Bell.

[62] Counsel then notes that CEP Bell also claims that, before contracting out the voice frame work to *BTS*, Bell should have reached an agreement with this firm, as it had done in 1996 with *Entourage*.

[63] According to counsel, this agreement – reproduced in all collective agreements to date – is only intended to cover inside wiring work awarded to *Entourage* and in no way stipulates that Bell will have to reach a new agreement with CEP Bell if it subsequently decides to contract out new work.

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[4] *Ibid.*, note 3.

[64] By way of proof, adds counsel, Bell awarded additional work to *Entourage* in 1999 without reaching an agreement with CEP Bell, and this decision was never contested by the Union.

C) Union's reply

[65] In reply, the Union's counsel specified that the Union is not contesting the criteria established by the case law in matters of contracting out and contracting in. Rather, its position is that, when these criteria are applied to the case at hand, one can only conclude that the real employer is not *BTS,* but Bell.

[66] In fact, adds counsel, the present situation is unique, since over the years, *BTS* has become a wholly owned subsidiary of Bell, which, in his view, calls into question the independence and autonomy of this company in relation to Bell.

[67] Counsel adds that CEP Bell never recognized, as it did in the case of *Entourage* when it signed the agreement of 1996, that *BTS* constitutes a distinct company from Bell and an autonomous employer.

[68] In the present case, he concludes, Bell should have reached an agreement with CEP Bell in 2009, similar to the agreement reached in 1996, which is still included in the collective agreement to this day.

IV- THE LAW

[69] The main clauses of the collective agreement that are relevant to the resolution of this dispute are as follows:

> **ARTICLE 1 – RECOGNITION AND SCOPE**
>
> […]
>
> **1.02** This Agreement shall apply to all Craft and Services employees of the Company covered by the certification order of The Canada Labour Relations Board dated May 28, 1976. When the parties mutually agree that a new occupation established during the term of this Agreement has clearly a number of significant points in common with the other occupations within the unit, such new occupation shall fall within the scope of this Agreement.
>
> **ARTICLE 8 – MANAGEMENT RIGHTS**
>
> **8.01** The Company has the exclusive right and power to manage its operations in all respects and in accordance with its commitments and responsibilities to the public, to conduct its business efficiently and to direct the working forces and without limiting the generality of the foregoing, it has the exclusive right and power to hire, promote, transfer, demote or lay-off employees, and to suspend, dismiss or otherwise discipline employees.
>
> **8.02** The Company agrees that any exercise of these rights and powers shall not contravene the provisions of this Agreement.

ARTICLE 9 – DEFINITIONS

[…]

9.01 "Employee" means a person employed in Bell Canada to do skilled or unskilled manual or technical work in any of the occupations listed in Attachment A attached hereto, but does not include a person who:

(1) is employed in a confidential capacity in matters relating to industrial relations, or

(2) exercises Management functions.

(a) "Regular Employee" means an employee whose employment is reasonably expected to continue for longer than two years, although such employment may be terminated earlier by action on the part of the Company or the employee.

(b) "Regular Term Employee" means an employee engaged for a specific project, as an Apprentice Technician or for a limited period with the definite understanding that his employment is expected to continue for more than one year but may terminate at the end of the period, upon completion of the project or by application of Article 11 of this Agreement. Details of the engagement shall be provided to the employee in writing at the time of engagement and a copy of this document shall be provided to the Union Steward as soon thereafter as possible. Such employee shall be reclassified as Regular in the event that employment exceeds the time of the engagement.

(c) "Temporary Employee" means an employee who was engaged on the understanding that the period of employment was expected to continue for more than three weeks but not more than two years.

A Temporary employee, upon accumulating 24 months of time worked as defined in section 9.02, shall be offered a Regular Part-Time position and, upon his acceptance, be reclassified, to a regular Part-Time status, in his current job and at his current work location. Should the employee refuse this offer, his employment shall be terminated.

[…]

ARTICLE 11 – FORCE ADJUSTMENT

[…]

Temporary Lay-Off

11.04 (1) Where as a result of the discussions outlined in sections 11.01 and 11.02 the work force is to be reduced and the Company proceeds on a plan of lay-offs which may be for a period of up to but not exceeding a maximum of 25 consecutive weeks, the following provisions shall apply.

(2) (a) No Regular employee shall be laid off until:

(i) the employment of all Regular Term and Temporary employees is terminated within the affected family and headquarters where lay-off is warranted, and

(ii) all contractors working within the affected family and headquarters where lay-off is warranted, are released, where Company employees can do

the contracted work with a five day familiarization period and when the necessary tools and equipment are available.

[…]

Long Term Lay-Off

11.07 Where as a result of the discussions outlined in sections 11.01 and 11.02 the work force is to be reduced and the Company proceeds on a plan of lay-offs which are expected to be in excess of 25 consecutive weeks, the following provisions shall apply:

11.08 No Regular employee shall be laid off until:

(a) the employment of all Regular Term and Temporary employees within the headquarters is terminated, and

(b) all contractors working in the territory served by the headquarters are released, where Company employees can do the contracted work with a five day familiarization period and when the necessary tools and equipment are available.

[…]

MEMORANDUM OF AGREEMENT BETWEEN:

Bell Canada, hereinafter designated as the "Company"

and

Communications, Energy and Paperworkers Union of Canada representing Craft and Services employees, hereinafter designated as the "Union".

The parties hereby agree as follows:

1. Entourage Technology Solutions (ETS)**,** now known as Bell Technical Solutions (BTS), will carry out the activities previously performed by the Company and described in the appropriate sections of the 1996 Services Agreement concluded between the Company and ETS.

2. The business and operations of ETS will be independent from those of the Company, and the employees represented by the Union in ETS's bargaining unit will be entirely separate from the employees and bargaining units of the Company.

3. The activities pursued and the work performed by ETS will not be considered to be the work of the bargaining units of the Company.

V- DECISION AND REASONS

[70] In filing a grievance, CEP Bell "is contesting Bell's decision to give work belonging to Bell technicians […] to employees excluded from the bargaining unit, namely to Bell Technical Solutions (BTS) technicians."

[71] The work in question concerned a portion of the duties performed by Bell technicians in unmanned central offices – namely, frame installation and repairs.

[72] According to CEP Bell, the contracting out of this work constitutes a contracting-in arrangement which is prohibited by articles 1.02 and 9.01 of the collective agreement. Additionally, CEP Bell submits that if the arbitrator were to conclude that the arrangement is, on the contrary, one of contracting out, he should nonetheless allow the grievance, because Bell should have reached an agreement with CEP Bell before awarding the work to *BTS*, as it did in 1996 with *Entourage.*

[73] I will address each of these two claims in turn.

A) Nature of the contract awarded to *BTS*

[74] First of all, it must be determined whether the fact of awarding the voice frame installation and repair work in unmanned central offices to *BTS* constitutes a situation of contracting in or contracting out.

1) The notion of contracting in

[75] In their submission, counsel referred to the Hydro Ontario Ltd. decision[5] in which the Ontario Court of Appeal considered this issue in 2007.

[76] In this decision, the Court of Appeal found that the Arbitrator was not unreasonable in finding that when a collective agreement defines the different categories of employees who can perform the work of the bargaining unit members – for example, regular and temporary employees – it is not permitted to contract in work belonging to the unit on the grounds that this work would be performed by a class of employees not covered by the collective agreement, which is implicitly prohibited by it.

[77] The same applies, according to the Court, in the following finding by Arbitrator Shime in his decision regarding the case of Bristol-Myers:

> In my view, where persons are brought into a work situation to work alongside regular employees and where they perform the same work as those employees, the mere fact that those persons are recruited through the auspices of an independent agency is not sufficient to create a "true" contracting out situation as that term is generally understood.[6]

[78] With respect for the opposing view, I share the opinion of Arbitrator Shime. In the present case, the combined effect of articles 1 and 9 of the collective agreement is to prohibit Bell from having employees who are outside the collective agreement work "alongside" employees covered by said agreement, to

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[5] *Ibid.*, note 3.

[6] *Re Bristol-Myers Pharmaceutical Group –and– Canadian Automobile Workers, Local 1538* (1990), 15 LAC (4th) 210, p. 215.

perform work normally performed by the employees to whom the collective agreement applies.

[79] Article 1.02 effectively establishes that the collective agreement applies to all craft and service employees who are covered by the bargaining certificate, while Article 9 defines the different categories to which these technicians can belong: regular employees, regular term employees who are "*engaged for a specific project, as an Apprentice Technician or for a limited period with the definite understanding* […]," and temporary employees who are hired for a period varying from three weeks to two years.

[80] Respectfully, I believe that if Bell hires people who are not members of the bargaining unit in order to have them work alongside its own technicians to perform work normally performed by the latter, in buildings owned by it and using its equipment and under the same supervision as its technicians, it is effectively creating a new category of employees, not contemplated by Article 9. In such circumstances, the use of contracting in appears to me to be illegal.

2) <u>Distinction between contracting in and contracting out</u>

[81] Called upon to distinguish between contracting in and contracting out, the Ontario Court of Appeal retained the following criteria:

> *The Arbitrator's decision reasonably conforms to the concepts of contracting out and contracting in as those concepts have evolved in the labour relations field. "Contracting out" is said to involve a situation where "an integral function or a whole operation of the business of the employer is assigned to an independent contractor"; the work is often done off site and where done at the same location as the bargaining unit employees, usually involves work of a different nature even though it is bargaining unit work; the independent contractor controls the work, and the employer has "effectively abdicated" the work to the outside contractor. "Contracting in", on the other hand, involves a situation where non-bargaining unit personnel are brought into the workplace to work alongside bargaining unit employees, performing the same work as those employees, under the same supervision and utilising the same materials and equipment provided by the employer; the way in which the bargaining unit and non-bargaining unit employees work is "virtually indistinguishable". See Re St. Jude's Anglican Home and British Columbia Nurses Union (1996), 53 L.A.C. (4th) 111 at 119-120 (Larson); Re Bristol-Myers Pharmaceutical group and Canadian Automobile Workers, Local 1538 (1990), 15 L.A.C. (4th) 210 (Shime); Re Radio shack and United Steelworkers of America, Local 6709 (1994), 44 L.A.C. (4th) 69 (Beck). 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 […].*[7]

[82] This excerpt makes it clear that, to conclude that a situation involves contracting out, the following three criteria must be present:

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[7] *Ibid.*, note 3, p. 11.

1) the work in question must be whole and integral and separate from the work normally performed by the employees, and it must include precise and clearly defined functions;

2) the work must not normally be performed on the employer's site, otherwise, the work must be totally distinct from that performed by the latter's employees;

3) in all cases, the subcontractor must be the actual employer of the persons hired to perform the work; i.e., the subcontractor must be the one who recruits, pays, supervises and evaluates the performance of the workers in an autonomous and totally independent manner.

[83] On the other hand, a situation of contracting in must meet the following three criteria:

1) the subcontractor's employees generally perform their work on the employer's premises;

2) they perform work similar to that performed by the employer's employees, notably using the same materials and equipment;

3) the employer's employees and the subcontractor's employees work under the same supervision, such that it is difficult to distinguish the work of one from the other.

[84] These are the criteria that we must now apply to the case at hand.

3) Application to the present case

[85] In the present case, the evidence shows that the Bell technicians are responsible for all equipment installation and repair operations in all central offices, whether manned or unmanned.

[86] In February of 2009, Bell decides to outsource the voice and DSL frame installation and repair work in unmanned central offices, corresponding to one of eight tasks normally performed by the technicians in these central offices.

[87] As for Bell's technicians, they continue to perform the other tasks in the unmanned central offices – namely, maintenance work, project work, data and transport equipment service provisioning, data and transport equipment service repairs, and, finally, switch maintenance.[8]

[88] In other words, Bell awarded to *BTS* technicians work that was clearly defined, specific, whole and separate from that performed by its own technicians.

[8] See table on p. 10.

Moreover, the *BTS* technicians perform this work in the central offices belonging to Bell, but using the equipment of their employer.

[89] Finally, the evidence shows that it is *BTS* that hires, compensates, supervises, evaluates the work of, and, if necessary, disciplines its technicians, and that Bell has no right of oversight with regard to these decisions.

[90] For these reasons, I must conclude that the situation contested by the grievance at hand meets all the criteria established in the case law to be considered as contracting out and that the actual employer of *BTS* technicians is not Bell, but in fact *BTS*.

[91] While it is true that the work in question is performed in the central offices belonging to Bell, this element alone is not sufficient for the situation to be considered as a contracting-out arrangement, since the other criteria are not met. In the case at hand, the fact, on the one hand, that the work performed by *BTS* technicians is very specific and distinct from that performed by Bell technicians, and, on the other hand, that *BTS* technicians do not work under the supervision and control of Bell, is a more decisive factor.

[92] In addition, the fact that *BTS* is a wholly owned subsidiary of Bell is not in itself relevant, since the evidence shows that each is a separate and wholly independent corporate entity, as recognized by the parties themselves in the memorandum of agreement included on pages 182 and 183 of the collective agreement.

[93] The same also holds true for the bargaining units representing the employees of Bell and *BTS,* which are autonomous and distinct legal units, which prevents them from being affiliated with the same labour organization.

[94] For all these reasons, I conclude that the contract awarded by Bell to *BTS* in February 2009 constitutes a contracting-out arrangement, and not a contracting-in arrangement.

B) Obligation to reach an agreement with CEP Bell

[95] The response to this aspect of the dispute comes under the provisions of the collective agreement.

1) Provisions of the collective agreement

[96] As we know, the rights and obligations of each party are determined by the collective agreement and the role of the Arbitrator is limited to applying all the clauses of this agreement as they stand, without the right to modify or change them in any way whatsoever.

[97] In the case at hand, the first relevant clause is found in Article 8, which covers management rights. In Article 8.01, the parties agree that: "*The Company has the exclusive right and power to manage its operations in all respects*," while Article 8.02 adds that: "*The Company agrees that any exercise of these rights and powers shall not contravene the provisions of this Agreement*."

[98] In other words, the parties officially recognize two principles. The first principle is the primacy of the collective agreement over Bell's management rights, since said agreement states that the Company shall not contravene it. The second principle is the residual nature of Bell's management rights, meaning that in the absence of a provision on a given issue, Bell is free to manage its operations as it sees fit, provided that its decisions are not discriminatory, inequitable or in bad faith.

[99] The Arbitrator's job is thus to verify whether the collective agreement restricts, in whole or in part, Bell's right to use contracting out.

[100] A careful examination of the provisions of the collective agreement reveals that it does not contain any clauses systematically prohibiting Bell from awarding contracts to external subcontractors, but that it does prohibit this practice in two specific situations.

[101] For example, Article 11.04, entitled "*Temporary Lay-Off*," stipulates that "*[n]o regular employee shall be laid off until […] and (ii) all contractors working within the affected family and headquarters where lay-off is warranted, are released."* Article 11.07, entitled "*Long Term Lay-Off,*" says basically the same thing.

[102] It emerges, therefore, that except in the case of lay-offs, whether or not they are the result of contracting out, Bell preserves its discretionary right to award work to outside contractors.

[103] On this issue, doctrine and case law have unanimously adopted the view that only a clear provision can alienate this right conferred on the employer.

[104] Authors Brown and Beatty effectively summarize the legal status of this issue as follows:

> ***5:1310 Clear language required to prohibit "contracting out"***
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> *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. As one arbitrator has said:*

> *The wide notoriety given to labour's protests against this practice, the almost equally wide notoriety, especially amongst experienced labour and management representatives, of the overwhelming trend of decisions, must mean that there was known to these parties at the time they negotiated the collective agreement the strong probability that any arbitrator would not find any implicit limitation on the management's right to contract out. It was one thing to imply such a limitation in the early years of this controversy when one could not speak with any clear certainty about the expectations of the parties; then, one might impose upon them the objective implications of the language of the agreement. It is quite another thing to attribute intentions and undertakings to them today, when they are aware, as a practical matter, of the need to specifically prohibit contracting out if they are to persuade an arbitrator of their intention to do so.*[9]

[References withdrawn from the text]

2) <u>Application to the present case</u>

[105] In the case at hand, the evidence shows, on the one hand, that at the time that Bell awarded *BTS* the contract that is the subject of the grievance, no technician was laid off and, on the other hand, that the use of contracting out did not result in any lay-offs.

[106] In the circumstances, I must conclude that Bell had the right to award *BTS* the voice frame installation and repair work in the unmanned central stations.

3) <u>Memorandum of agreement of 1996</u>

[107] The counsel for the Union capably recalled that, in 1996, after Bell had contracted out inside wiring work at its customers premises to *Entourage*, the precursor of *BTS*, the parties signed a memorandum of agreement on the subject, which they have included in all subsequent collective agreements. According to the Union's counsel, the existence of this memorandum of agreement means that Bell must henceforth reach a similar agreement each time it wishes to contract out work.

[108] Respectfully, I do not share this opinion, for several reasons.

[109] First, let us recall that the evidence does not tell us whether the collective agreement in effect in 1996 contained provisions similar to those we find in the current articles 11.01 and 11.04.

[110] If not, these provisions have not been reproduced in the current collective agreement, which, for its part, does not prohibit Bell from contracting out work in the absence of lay-offs.

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[9] BROWN, David M. and Donald J.M. BEATTY (to be verified), <u>Canadian Labour Arbitration,</u> 3rd edition, Canada Law Book.

[111] Moreover, if the 1996 collective agreement contained the same provisions as those in question, in that case we would have to conclude that, already in 1996, Bell was under no obligation to reach an agreement with CEP Bell before awarding a contract to the subcontractor *Entourage.*

[112] In any case, several reasons – including, notably, the preservation of industrial peace – prompted Bell, at the time, to reach an agreement on the terms of application of this contract with CEP Bell.

[113] In such circumstances, the fact that, for reasons related to the domain of labour relations, the Employer decided to enter into this agreement in 1996 in no way alters the fact that it was under no legal obligation to do so and, more specifically, that the mere existence of this agreement can not give rise to any obligation for the future.

[114] Moreover, a careful examination of the content of this memorandum of agreement does not permit us to conclude that it has the effect of modifying, either explicitly or implicitly, the provisions of the collective agreement that confirm Bell's right to use contracting out in the absence of lay-offs.

[115] Thus, Article 1 of the memorandum of understanding stipulates that *Entourage* "*will carry out the activities previously performed by the Company and described in the appropriate sections of the 1996 Services Agreement concluded between the Company and ETS*." All this clause does is defines the nature of the activities awarded to *Entourage* and covered by the memorandum of agreement.

[116] I therefore do not see how this agreement could prohibit Bell from contracting out other work in the future.

[117] If we were to draw this conclusion, then we would also have to conclude that the memorandum of agreement of 1996 had the major effect of alienating the right explicitly conferred on Bell by the collective agreement to use contracting out.

[118] However, as we saw previously, doctrine and case law unanimously establish that only a clear and explicit provision in the collective agreement can deprive an employer of its right to use contracting out.

[119] In fact, Bell unilaterally granted another contract to *Entourage* in 1999, without any opposition by CEP Bell by way of a grievance, thus confirming its comprehension of the rights of the parties with respect to this important issue.

[120] For all these reasons, it is my view that no provision contained in the memorandum of agreement of 1996 either directly or indirectly impairs the right of Bell to contract out other activities to *BTS.*

[121] Therefore, Bell was under no obligation to reach an agreement with CEP Bell to award the work to *BTS* in February 1999.

VI- AWARD

[122] For all the above reasons, having examined the evidence and submissions, verified the applicable legislation and case law and deliberated on the whole, I dismiss the Union's grievance.

[signed François Hamelin]

François Hamelin, Arbitrator

For the Union:	M^{e} Claude Tardif
For the Employer:	M^{e} Maryse Tremblay
Hearing dates:	November 4, 2010, March 4 and 24, July 5 and September 2, 2011
Award:	October 11, 2011

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