

## 15.2 CONTRACTING OUT OF BARGAINING UNIT WORK

### Basic Features

Contracting out is an employer practice under which parts of a manufacturing process, plant maintenance or other work functions are given to outside contractors to perform with their own work forces. Usually contracting out is undertaken as an economy measure, but it may also be proposed where the employer's own work force cannot handle the job in question, the project is short-term, or an emergency has arisen which was unforeseen by the employer. However, contracting out is a matter of serious concern for unions, since a bargaining unit can be destroyed by such action. From the union's point of view, contracting out reduces employment opportunities and job security, weakens the union's bargaining position, depresses wages and benefits in the industry, creates a fragmented labour force, and seriously undermines the effectiveness of the strike weapon.

The employer's interest is in retaining flexibility, the union's in restricting the practice. A number of contract clauses have been devised to deal with the problem. Some clauses prohibit the employer from contracting out altogether, while others restrict the practice by limiting the extent to which it can be done. The latter typically provide for advance notice, restrictions on layoffs in the event of contracting out, or a ban on contracting out beyond the current practice. In the construction industry unions frequently negotiate clauses that require a contractor to sub-contract work only to firms which have a collective agreement with the union. Such a clause is distinct from a non-affiliation clause which allows unionized employees to refuse to work alongside the contractor's non-unionized employees.

### Applicable Legislation

No jurisdiction in Canada has legislatively prohibited the contracting out of bargaining unit work.\* However, the practice may, depending on the circumstances, amount to a sale of a part of a business, so that the union's bargaining rights are preserved: see, for example, s. 31(2) of the *Nova Scotia Trade Union Act*, where contracting out may

\* Effective in 1993, amendments were made to the Ontario *Labour Relations Act*, to protect union and employee rights on the transfer of building service contracts (e.g. food, janitorial and security). The amendments provided that, in the contract service sector, where a new employer replaced a previous employer, a sale was deemed to have taken place and the union's bargaining rights and any collective agreement continued; under companion amendments to the *Employment Standards Act*, the new employer was also required to offer available positions to previous employees before offering positions to other persons. All of these protections, however, were repealed by the newly elected Progressive Conservative government in 1995.

be deemed a sale of business if it is done to avoid obligations under the *Act*. Non-arm's length subcontracting may also attract the "related employer" provisions of labour relations legislation: see *Brantwood Manor Nursing Homes Ltd.* (1986), 12 C.L.R.B.R. (NS) 332 (O.L.R.B.). In certain circumstances, contracting out may amount to an unfair labour practice if the purpose of the employer is to avoid unionization or collective bargaining obligations: see *Kennedy Lodge* (1984), 7 C.L.R.B.R. (NS) 157 (O.L.R.B.); see also *Peralta Foods*, [1987] OLRB Rep. Sept. 1162.

It has been held that subcontracting clauses requiring employees of a subcontractor to be members of a particular trade union are not ordinarily considered coercive or otherwise illegal where their purpose is to preserve the union's bargaining rights or jurisdiction: see *Metro Toronto Apartment Builders Association*, [1979] 1 Can. LRBR 197 (O.L.R.B.). Non-affiliation clauses are also regarded as legal.

Whether contracting out bargaining unit work constitutes a technological change so as to trigger a right to re-open the collective agreement and bargain depends upon the definition of "technological change" in the labour legislation. Of the five Canadian jurisdictions which permit mid-term bargaining over technological change, several (B.C., Manitoba and Saskatchewan) have broad definitions.

The duty to bargain in good faith may require an employer to disclose, during negotiations, any plans or decisions to contract out work during the life of the collective agreement.

## Clauses and Comment

### 15.2.1 Complete Prohibition

- (1) **Except to the extent and to the degree agreed upon by the Parties, no work customarily performed by an employee covered by this agreement shall be performed by another employee of the Corporation or by a person who is not an employee of the Corporation.**

[Sarnia Professional Firefighters Association and City of Sarnia]

- (2) **The Company shall not contract out work regularly performed by the classifications set out in this Agreement without the prior approval of the Joint Standing Committee on Contracting Out and Technological Change.**

[TWU and B.C. Telephone Co.]

- (3) a) **The Company will not contract out any work that is performed by employees in the Bargaining Unit at the effective date of the agreement.**

**b) Current practices in operations shall be agreed on with the local union in writing. Until such time as agreement is reached the above clause (a) only will apply.**

[IWA and Council of Northern Interior Forest Employment Relations]

- (4) **The Owners Group shall not contract out bargaining unit work.**

[RWDSU Local 1688 and Blue Line Taxi Co.]

- (5) **Chrysler Canada advised the union that it will not outsource any major operations during the life of this agreement. The Company commits there will be no reduction in community employment levels as a result of outsourcing during the term of this agreement . . . During the term of the Agreement Chrysler Canada will advise the National Union on a bi-annual basis of announced outsourcing actions planned for units covered by the agreement. Information concerning replacement work will be similarly provided . . . this will confirm that during the term of the new Collective Bargaining Agreement, until September 14, 1999, the Company will not close or sell any plant, in whole or in part, covered by this Collective Agreement. It is understood that conditions may arise that are beyond the control of the Company, e.g. act of God, catastrophic circumstances, or significant economic decline concerning the subject. Should these conditions occur, the Company will discuss such conditions with the National Union.**

[CAW and Chrysler]

- (6) **Except to the extent and to the degree, agreed upon by the parties, no work ordinarily performed or which could be performed by an employee covered by this agreement shall be performed by another employee of the Conseil Scolaire-Clare Argyle-School Board or by a person who is not an employee of the Board.**

[NSGEU and Conseil Scolaire-Clare Argyle-School Board]

It is not essential that the words “contracting out” be spelled out if the work protection clause is sufficiently clear in its intent: *Regina Exhibition Association Ltd.* (1996), 52 L.A.C. (4th) 170 (Moore). These clauses prevent contracting out of bargaining unit work. Where work has been contracted out in the past, unions may propose that it be returned to the bargaining unit during the term of the collective agreement. Employers will sometimes propose that the word “normally” precede the word “performed”. The effect of this modification would be to allow the contracting out of work which, although it may have been performed by the employees at some time in the past, or may be currently performed by employees, is nonetheless not normally or regularly performed by them. If the parties intend to prohibit the contracting out of all bargaining unit work, whether or not it is regularly performed by employees, this should be explicitly stated.

One arbitrator has held that clauses prohibiting the contracting out of bargaining unit work are effective only with respect to the actual work usually performed by employees at the time the contract was signed: *Brewers' Warehousing* (1964), 15 L.A.C. 155 (Egan). In a recent

award, however, an arbitrator has held that a provision prohibiting the contracting out of “work that is normally done by employees covered by the collective agreement” prohibits an employer from moving work to a third party using new technology even though no employee in the bargaining unit would be replaced: *Weyerhaeuser Canada Ltd.*, LAN July/August, 1998 (Hood). In order to ensure that new work, which has not been previously performed, is not contracted out, some collective agreements provide that the clause applies not only to work which is “performed by the employees”, but also to work which “could be performed by the employees”.

The last clause contains commitments which were negotiated by the CAW with the Big Three Automobile manufacturers in Canada in 1996. The agreements contain bars on plant sales and closings for the next three years, include commitments not to outsource any major operations during the life of the agreement, and provide for protection and/or compensation for those workers affected by the approved sales, closures and outsourcings.

### 15.2.2 Prohibition with Exceptions

- (1) **The Company will not contract out work which would normally be performed by members of this bargaining unit, for which the mill is equipped, for which crews are available and which employees are capable of doing and which can be carried out without undue delay. If contracting out becomes necessary, the Company will advise the Union as far in advance as practicable of the work and explain the reason for the contracting. When a contractor is performing work for the Company, he will be requested to give preference to such employees under the jurisdiction of the Union as are available and have the necessary skills to perform such work.**

[IAM, Lodge 771 and Boise Cascade]

- (2) **Work presently and normally performed by employees who are subject to the provisions of this collective agreement will not be contracted out except:**
- (i) **when technical or managerial skills are not available from within the Railway; or**
  - (ii) **where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees; or**
  - (iii) **when essential equipment or facilities are not available and cannot be made available at the time and place required (a) from Railway-owned property, or (b) which may be bona fide leased from other sources at a reasonable cost without the operator; or**
  - (iv) **where the nature or volume of work is such that it does not justify the capital or operating expenditure involved; or**

- (v) **the required time of completion of the work cannot be met with the skills, personnel or equipment available on the property; or**
- (vi) **where the nature or volume of the work is such that undesirable fluctuations in employment would automatically result.**

**The conditions set forth above will not apply in emergencies, to items normally obtained from manufacturers or suppliers nor to the performance of warranty work.**

[IBEW and CP Limited]

- (3) **It is agreed and understood that Employers when subcontracting work within the jurisdiction of Lodge 359 covered by this Agreement, shall only subcontract such work to an Employer signatory to an Agreement with the Local Lodge 359.**  
[BBF, Lodge 359 and B.C. Boilermaker Contractors' Association]

These clauses prohibit contracting out except in certain circumstances, such as in an emergency or where the work cannot be done in time or bargaining unit employees are not available. However, such clauses do not require the employer to add to the existing workforce or to acquire additional equipment before contracting out: *Alcan Smelters* (1987), 28 L.A.C. (3d) 353 (Hope). Moreover, employees will not be considered "available" where they are already fully employed: *Boise Cascade* (1990), 16 L.A.C. (4th) 82 (Rayner). If a certain procedure must be followed before contracting out work, such as calling in employees for overtime, this should be explicitly stated.

### **15.2.3 Restrictions on Layoff, etc.**

- (1) **The Hospital shall not contract out any work usually performed by members of this bargaining unit if, as a result of such contracting out, a lay-off of any employees other than casual part-time employees follows. Contracting out to an employer who is organized and who will employ the employees of the bargaining unit who would otherwise be laid off is not a breach of this provision.**  
[SEIU and Toronto East General Orthopaedic Hospital]
- (2) **The System shall not contract out any work performed by the classifications set out in this agreement while any employees are laid off or when the lay-offs are being contemplated.**  
[CEP and Manitoba Telephone System]
- (3) **No bargaining unit employee shall be laid off or terminated as a result of the employer contracting out any of its work or services.**

[CUPE and City of Hamilton]

- (4) **No employee will be terminated, laid-off, or have their regularly scheduled work day or regularly scheduled work week reduced as a result of contracting out.**  
[CUPE and Simon Fraser University]
- (5) **No work will be contracted out which is normally performed by members of the bargaining unit while employees are laid off, working short time, or which would reduce the working force.**  
[Teamsters and Steinberg Inc.]
- (6) **Should the Employer contract out work, the Employer agrees to provide other positions for any staff that would normally be laid off by the decision to contract out work and the employees' salary at the time of contracting out shall be maintained during the duration of this contract.**  
[NAPE and Newfoundland Hospital Association]
- (7) **The Employer agrees not to contract out any of the work done by the members of the bargaining unit in such manner as to jeopardize the continued employment of the members of the bargaining unit. This Article shall not apply to [security supervisors, foremen and casual employees] nor shall it apply in the case of an emergency or under circumstances where members of the bargaining unit are unable or unwilling to perform the work.**  
[SIU and Thunder Bay Harbour Commission]
- (8) **The Company will not contract work out that results directly in the layoff of any employee from the bargaining unit. The Company further agrees that, if it has available regular qualified employees and possesses and has available in the Works the equipment and the services necessary to accomplish the work, at and in the time required, all maintenance and repair work, the nature of which is normal and routine, presently performed by its employees, will be carried out by employees covered by the Agreement. Nothing of the foregoing shall be interpreted as a restriction of the Company's right to purchase raw or processed materials, equipment or component parts, intended for the operation of the Works.**  
[CASAW, Local 1 and Alcan Smelters]
- (9) **Employees presently in the CUPE Local 2424 bargaining unit will not suffer loss of employment or of remuneration as a result of the contracting out of work presently performed by members of the bargaining unit.**  
[CUPE Local 2424 and Carleton University]
- (10) **The Company will do repair, maintenance and production work with employees of the bargaining unit. Contracting out will be kept to a minimum.**

**No employee in the bargaining unit will be laid off or displaced to a lower rated job because of work normally accomplished by the employee in the bargaining unit being contracted out, or such work being performed on site by a contractor. Fur-**

thermore, before contracting out such work, the Company will recall, in accordance with 6.11 a), qualified employees who are laid off or displaced, for such work, provided these employees are available.

No employee working in a job in the department or departments in which a contractor is employed will be displaced from his department, because of the contractor's work, during the period of time a contractor's employee is working in a similar occupation on site.

[USWA Local 5795 and Iron Ore Co. of Canada]

- (11) The Employer agrees not to contract out any work presently performed by employees covered by this Agreement which would result in the laying off of such employees.

The Employer further agrees that all such contracting out shall be to union employers, provided the service required is available from union employers.

Subject to operational requirements, the Employer agrees to hire casual employees, where practicable and where it is cost effective, in preference to contracting out work.

[BCFMWU and B.C. Ferry Corporation]

- (12) The Company shall not contract out work performed by the employees of the bargaining unit which would have the effect of being detrimental to the employees so as to cause their layoff or a continuation of layoff.

[GSU and Saskatchewan Wheat Pool]

- (13) In order to provide job security for the members of the bargaining unit, the Board will make every effort to secure the retention of the employees affected in the event of any change of the method or type of operation.

The Employer agrees that all work or services normally performed by the employees shall not be contracted, subcontracted, transferred, leased, assigned or conveyed, in whole or in part, to any other plant, person, company or non-unit employee if it would cause or prolong the layoff of any Regular Employee, or the loss of straight time work opportunity for any Regular Employee.

[CUPE Local 606 and School District 68]

- (14) The Company further agrees that it will not subcontract work normally and historically performed by the maintenance group if employee(s) in the affected skilled trades group are on lay off or not fully utilized as provided for under the respective local agreements. It is understood that this will not apply in cases where the Company does not have the manpower, skills, equipment and facilities to do so and the work can not be performed to required specifications and within projected time limits.

[CAW and PPG Canada Inc.]

- (15) (a) The Company agrees that the Union has an understandable concern over 'contracting out' by the Company because of its effect upon such matters as job opportunity for the employees.
- (b) The Company will, therefore, having due regard to the availability of equipment, engineering, skills, manpower, supervision and services and to operating efficiency, and to the time to do the work, make efforts to limit the amount of the future production or maintenance work to be 'contracted out' during this Agreement.
- (c) No employee will be demoted or laid off as a direct result of work being contracted out by the Company.
- (d) Persons employed by contractors shall not, except in cases of emergency, use or operate Company owned equipment or machinery. This shall not apply to such equipment or machinery which is installed and/or in a fixed location.
- (e) Contractors will not perform work outside the scope of their contract with the Company.
- (f) The Company further agrees that it will meet once a month with the Local Union Contracting Out Committee consisting of the President of the Local Union, two (2) employees and a representative of the Union to review and discuss information concerning its 'contracting out' practices. The Company shall be represented at such meeting by the Manager of Central Maintenance and Utilities, the Superintendent of Industrial Relations and such other Company personnel as may be considered necessary for the purposes of the meeting. If the President of the Local Union provides the Company with at least five (5) days' notice of the desire to discuss at a Section 2.04 meeting specific work which has been contracted out, the Company will advise the Local Union at the meeting of the nature of the work, its expected duration and the approximate number of contractor workers involved. The Company will pay the two (2) employees attending such meetings at their applicable hourly rate plus any applicable Cost of Living Allowance plus any applicable Nickel Price Bonus for any time lost during their regular shifts.

[USWA, Local 6500 and Inco]

These clauses allow contracting out provided that no existing employees are laid off or terminated, but they do not prevent the employer from transferring employees from one job to another or from reducing the workforce by attrition while at the same time contracting out bargaining unit work. In other words, although the clauses protect the employees, they do not protect the jobs in the bargaining unit, and do not provide for wage protection; as a result, bargaining unit employees may be demoted from their positions with a cut in pay: *City of Hamilton v. CUPE* (1997), 33 O.R. (3d) 5, MELN July/August, 1997 (Ont. C.A.). Employers may propose a proviso to ensure that the employees are qualified to perform the work in question.

It may be difficult to establish that a particular layoff is attributable to contracting out especially where the layoff does not occur immediately before or after the contracting out. Thus, a clause similar to those set out above has been held not to prohibit the contracting out of bargaining unit work where employees were laid off a year prior to the contracting out and, as a result, the essential causal connection had not been established between the contracting out and the layoff of the bargaining unit employees: *Rockwell International* (1982), 6 L.A.C. (3d) 304 (Rayner); see also *Unitel Communications* (1994), 42 L.A.C. (4th) 354 (Bird). In order to avoid the necessity of establishing a causal link, some clauses restrict contracting out where the effect would be to “jeopardize” the employment of bargaining unit members: *East Prince Regional Authority* (1995), 47 L.A.C. (4th) 327 (Bruce). Other clauses also prohibit contracting out of bargaining unit work where employees are already on layoff, or where contracting out would result in a loss of hours of work or pay or a reduction in the amount of work available to bargaining unit members, or employees in the bargaining unit would be denied employment or an opportunity for employment: see *Regional Municipality of Ottawa-Carleton* (1989), 9 L.A.C. (4th) 201 (Thorne).

#### 15.2.4 Advance Notice Required

- (1) **Except in case of emergency, the Hospital agrees to give the Unit notice in writing, at least one hundred and eighty (180) days prior to contracting out any work which may result in the layoff of any employee in the bargaining unit. Discussions will commence between the parties within ten (10) days of such notice and every reasonable effort will be made to provide continuing employment for affected employees with the contractor or with some other Department of the Hospital.**

[NBPEA and Government of New Brunswick]

- (2) **The Employer agrees that work normally performed by the bargaining unit shall not be subcontracted, transferred, leased, assigned, or conveyed, in whole or in part, to any outside source prior to a discussion of the intended action between the Union and the Employer.**

**For the purposes of this Article, the word discussion shall mean discussion in the Joint Committee for the Administration of the Collective Agreement. Discussion may be terminated by either party after two months from the date the Union receives notice and rationale of the contemplated action, or within two months by agreement of the parties. The contemplated action shall not be implemented until the discussion is ended.**

[CUPE Local 2424 and Carleton University]

- (3) **Employees of an outside contractor will not be utilized in a plant covered by this Agreement to replace seniority employ-**

ees on production assembly or manufacturing work or fabrication of tools, dies, jigs and fixtures, normally and historically performed by them when performance of such work involves the use of Corporation-owned machines, tools or equipment maintained by employees.

The foregoing shall not affect the right of the Corporation to continue arrangements currently in effect; nor shall it limit the fulfilment of warranty obligations by vendors nor limit work which a vendor must perform to prove out equipment.

In all cases, except where time and circumstances prevent it, the plant management will hold advance discussion with local Union representatives prior to letting such a contract. In this discussion local management is expected to review its plans or prospects for letting a particular contract. The local Union should be advised of the nature, scope and approximate dates of the work to be performed and the reasons (equipment, manpower, etc.) why management is contemplating contracting out the work. At such times Corporation representatives are expected to afford the Union an opportunity to comment on the Corporation's plans and to give appropriate weight to those comments in the light of all attendant circumstances.

In no event shall any seniority employee who customarily performs the work in question be laid off as a direct and immediate result of work being performed by any outside contractor on the plant premises.

Notwithstanding the foregoing, the notice provisions of Section (11)(a) of the Supplemental Agreement, Special Provisions Pertaining to Skilled Trades employees, shall apply when plant maintenance and construction work is let to outside contractors.

[CAW and Chrysler]

- (4) The Company will not contract out work which is normally performed by employees at the particular location where there is appropriate equipment, skills, necessary time and qualified employees to perform such work. Before the Company decides to contract out work not prohibited by the preceding sentence, the Local Union President or designee will be notified in writing as soon in advance as is practical as to the nature of the work and the reasons for contracting out such work. Local Management will give due consideration to the suggestions of the Local Union before making its final decision as to whether or not such work will be contracted out.

The Company agrees to notify the Local Union immediately following a decision by management to contract out work.

[CWFU Local 354 and Ball Packaging Products Canada Inc.]

- (5) At a mutually convenient time at the beginning of each year and, in any event, no later than January 31 of each year, representatives of the Brotherhood will meet with the designated

officers to discuss the Company's plans with respect to contracting out of work for that year. In the event Brotherhood representatives are unavailable for such meetings, such unavailability will not delay implementation of Company plans with respect to contracting out of work for that year.

The Company will advise the Brotherhood representatives involved in writing, as far in advance as is practicable, of its intention to contract out work which would have a material and adverse effect on employees. Except in cases of emergency, such notice will be not less than 30 days.

Such advice will contain a description of the work to be contracted out; the anticipated duration; the reasons for contracting out and, if possible, the date the contract is to commence. If the General Chairman, or equivalent, requests a meeting to discuss matters relating to the contracting out of work specified in the above notice, the appropriate Company representative will promptly meet with him for that purpose.

Should a General Chairman, or equivalent, request information respecting contracting out which has not been covered by a notice of intent, it will be supplied to him promptly. If he requests a meeting to discuss such contracting out, it will be arranged at a mutually acceptable time and place.

[BBF and CN Railway]

- (6) The Company agrees to recognize the Local's Contracting Out Committee and to provide it with reasonable notice of the Company's intent to have contractors on site. While it is understood that only limited notice may be possible for repair work, a minimum of fourteen (14) days notice will be given on project work.

[PPWC Local 18 and Fletcher Challenge]

- (7) The Company will notify the Union of their intention to have work performed by contractors in the mill and will, emergencies excepted, afford the Union the opportunity to review it with the Company prior to a final decision being made. For this purpose, a Joint Contracting Committee will be established and it will be used as a forum to discuss the Company's contracting decisions.

[CEP, Local 603 and Northwood Pulp]

Most of these clauses allow contracting out provided the proper notice is given. The parties may agree that such notice must include reasons. However, a failure on the part of the employer to give the required notice, or consult the union, will not necessarily invalidate the subcontract. Rather than reversing the employer's action, arbitrators have so far only awarded damages for failure to consult the union. See *Dominion Stores* (1982), 4 L.A.C. (3d) 127 (Prichard). How much is the right to be consulted worth? It depends on the amount of wages

lost, and the chance of persuading the employer that the work should be awarded to the union's members. In the *Burrard Yarrows* case (1981), 30 L.A.C. (2d) 331, Arbitrator Christie held that the union had a 1 in 20 chance of persuading the company to award the work to its members and therefore awarded only \$750 although the employees lost the opportunity to earn \$15,000 in wages. In short, a right to be consulted may not be worth much. This is also illustrated by the award in *Giant Yellowknife Mines* (1990), 15 L.A.C. (4th) 52 (Bird), where each grievor received only \$250. For this reason, a union may propose language providing that, in the event of a failure to give the required notice, the contracting out shall be deemed null and void.

If an employer has firm plans to contract out at the time of negotiations, it is bound by the duty to bargain in good faith to disclose those plans to the union. However, there is no obligation to disclose plans which have not been firmed up unless the union requests information about such plans during the negotiations: *Consolidated Bathurst* (1983), 4 C.L.R.B.R. (NS) 178 (O.L.R.B.). Moreover, the employer has no obligation, under labour relations legislation, to negotiate with the union over a proposed subcontract of bargaining unit work, if the decision to contract out is made during the currency of the collective agreement, and the collective agreement contains no restriction. Hence, in order to ensure that contracting out does not take place without an opportunity to negotiate, a union may propose a clause requiring that "in the event the employer decides to contract out work, it shall first give notice to the union during negotiations for the renewal of the collective agreement".

### 15.2.5 Subcontracting Clause

- (1) **The Employers each agree not to subcontract asphalt or concrete paving or curb and gutter work to subcontractors other than those who employ members of the Union.**  
[IUOE and Toronto Roadbuilders Association]
- (2) **In the event of subletting, the Employer agrees that any and all of the acknowledged work herein contained in Article 6 (Recognition of Jurisdiction) must be sublet to an Employer who has become signatory to this Provincial Agreement.**  
[SMWIA and Ontario Industrial Roofing Contractors' Association]
- (3) **The terms of this Agreement shall apply to all Sub-Contractors or sub-contracts let by the Employer. The Employer agrees to engage only those Sub-Contractors having an Agreement with the signatory Union, prior to commencing work.**

**The Employer signatory to this Agreement shall be responsible for enforcing the wages and conditions of the Agreement on the Sub-Contractor.**

[Teamsters, Local 213 and Construction Labour Association of B.C.]

- (4) **Any work that is the work of the Union under the provisions of this Agreement shall only be contracted or subcontracted to a contractor or subcontractor bound by this Agreement.**

[CJA Local 27 and Ontario Carpentry Contractors' Association]

- (5) **The Employer agrees to engage only subcontractors who are in contractual relations with the Union and/or its affiliated bargaining agents for all work covered by this Agreement, or work forming part of an I.C.I. General Contract except as provided in Schedule "D" hereof.**

[LIUNA and Ontario Provincial District Council]

These clauses, which are common in the construction industry, allow a contractor to subcontract work only to a contractor who employs members of the union or is bound by the union's collective agreement.

#### **15.2.6 Non-Affiliation Clause**

- (1) **The Union reserves the right to render assistance to other labour organizations. Refusal on the part of the Union members to work with non-Union workmen or workmen whose organization is not affiliated to a Building Trades Council, shall not be deemed a breach of this Agreement.**

[Teamsters and Hardy Associates]

- (2) **The engager shall not require any member of ACTRA to take part in any production with anyone who is not at the time of engagement a member of ACTRA or who does not hold a work permit or who is not eligible to work due to the terms of an Agreement between ACTRA and another union.**

[ACTRA and Institute of Canadian Advertising]

The first clause, also common in the construction industry, permits employees to refuse to work alongside non-unionized workers.

#### **15.2.7 Review of Contracted Out Work**

- (1) **The parties have agreed to discuss the contracting in of work that is presently being contracted out by the City. Some examples of work presently being contracted out that will be the subject of discussion are; tire work, locksmithing, electrical work, H.V.A.C. work, cleaning work at City Hall and Line Painting.**

[CUPE and City of North York]

- (2) On request by the Union, the Hospital will undertake to review contracted services which fall within the work of the bargaining unit. The purpose of the review will be to determine the practicality of increasing the degree to which bargaining unit employees may be utilized to deliver such services in the future. The Hospital further agrees that the results of their review will be submitted to the Staff Planning Committee for its consideration.

[SEIU and Participating Hospitals (Ontario)]

- (3) This letter confirms the agreement reached between Manitoba Hydro and Local Union 2034, International Brotherhood of Electrical Workers to undertake a joint review of contracting in initiatives, but not limited to:
- the ability to compete for work;
  - profit making ventures;
  - preserving jobs and opportunities;
  - the use of term employees.

The review will commence at the earliest opportunity following the renewal of the collective agreement. The parties will endeavour to complete the review prior to 1998 12 31.

It is understood that recommendations resulting from the review that require amendments to the collective agreement will require the approval of each party's respective principals prior to implementation.

[IBEW Local 2034 and Manitoba Hydro]

Some collective agreements provide for the review, and possible recapture, of contracted out work.

### **15.2.8 Joint Ventures**

- (1) The Corporation recognizes and agrees that the Canadian Media Guild is the exclusive bargaining agent for the program production and presentation bargaining unit comprising all on-air personnel plus all personnel whose core functions are associated with the elaboration, preparation, production, coordination and completion of radio and television programs produced solely by the CBC outside the province of Quebec and of Moncton, N.B.

By way of example, this includes producing, directing and related duties, writing, re-writing of news, editing, reporting, announcing, hosting, voicing, research, program marketing, library services, the line-up and assignment functions. It is also understood these functions shall continue to be assigned to persons represented by the Canadian Media Guild.

The Parties recognize that new media developments, whether CBC-owned or through partnerships and joint ventures must continue to be part of CBC's development and survival strategies in the future.

It is agreed that there will be ongoing dialogue on these ventures, and each party will respond to the other's request to meet to discuss concerns related to these areas and work opportunities which might apply to them.

The Corporation fully values its CMG employees and the work they do for the CBC.

In new ventures controlled by the Corporation, from the date of ratification of this contract, the Corporation recognizes the Canadian Media Guild as the bargaining agent which represents people who perform the same functions as those covered under article 2.1 and 6.1 of this collective agreement.

With respect to co-ventures, partnerships and other such ventures, the Corporation will continue to undertake its best efforts to use persons in the bargaining unit for assignments as defined in article 2.1 and 6.1.

It is also recognized that given the uncertain or unknown nature of new media ventures, all areas of the current Collective Agreement may not apply. In such cases the parties will meet prior to start up to negotiate as to what terms and conditions apply.

Should there be any arbitration arising out of this process, such an arbitration will be expedited as per clause 64.6.1 of this collective agreement.

[CMG and CBC]

## Discussion

The great majority of arbitrators have held that, in the absence of an express restriction in the collective agreement, an employer may contract out bargaining unit work to outside contractors, provided the contract is a legitimate arrangement carried out in good faith for sound business reasons: *Russelsteel Ltd.* (1966), 17 L.A.C. 253 (Arthurs); see also *Leduc General & Auxillary Hospital & Nursing Home, District 83* (1993), 36 L.A.C. (4th) 268 (Power); *B.C. Systems Corporation*, [1981] 3 C.L.R.B.R. 231 (B.C.L.R.B.). Also, it has been held that the existence of job descriptions and job classifications provides no protection against contracting out since arbitrators have said that job descriptions are designed to ensure that proper wages are paid for the work performed and do not bestow upon the employees a proprietary right to the work: *Steel Co. of Canada Ltd.* (1966), 17 L.A.C. 90 (Bennett); see also *City of Dartmouth* (1994), 43 L.A.C. (4th) 228 (MacDougall). Thus, if it is intended to limit or prohibit contracting out, this must be done by express language in the collective agreement.

Moreover, it has been held that language designed to prevent the performance of bargaining unit work by supervisors or other employees outside the bargaining unit is not effective to prohibit contracting out of work to outside contractors: *Russelsteel Ltd.* (1966), 17 L.A.C. 253

(Arthurs).<sup>\*</sup> What if the collective agreement provides that no “person” may perform the work of a bargaining unit employee? Does the word “person” refer only to supervisors and non-bargaining unit employees, or does it also encompass persons employed by outside contractors? Clearly, if the word “person” appears in the context of a clause limited to supervisors and non-bargaining unit employees, then it is likely confined to such personnel: see *Re Multifittings* (1989), 70 O.R. (2d) 328 (Ont. Div. Ct.). One arbitrator has held that the answer depends upon whether the context of the language restricts the meaning of the word “person” to non-bargaining unit employees of the employer; if the word “person” is unlimited, then it may extend to the employees of outside contractors: see *Country Place Nursing Home* (1981), 1 L.A.C. (3d) 341 (Prichard). This view has not been widely adopted, however: see *Bethany Lodge-Manor*, HCELN March/April, 1998 (Barrett); *Dashwood Industries* (1992), 29 L.A.C. (4th) 19 (Roberts). Accordingly, if it is intended that contracting out be prohibited, then the words “whether or not employed by the employer” should be added.

As indicated above, the contracting out must be legitimate; the work must, in other words, be handed over to a contractor, in substance as well as form: see, for example, *Cambrian College* (1989), 5 L.A.C. (4th) 325 (Swan). Where the employer has retained control or supervision over the day-to-day performance of the work and the employment conditions, arbitrators may conclude that the employer has not effectively contracted out the work at all and that the persons performing the work are employees who are therefore subject to the collective agreement: see *Saskatchewan Wheat Pool* (1998), 70 L.A.C. (4th) 335 (Smith); *Prince Rupert Grain* (1987), 30 L.A.C. (3d) 10 (Hope); *Royal Ontario Museum* (1984), 16 L.A.C. (3d) 1 (Adams). It has also been held that, where an employer asserts that it has sold part of its business, but retains control over the substantial functions of the department, the

\* However, in a recent decision, Justice Cory of the Supreme Court of Canada stated as follows:

The exclusive right-to-work clause [i.e., bargaining unit work clause], in turn, provides the basic foundation for the collective agreement itself. It is of such fundamental importance to both parties but, particularly to labour, that I would be surprised if this type of clause is not included in every collective bargaining agreement. In fact, the exclusive right to bargaining unit work is so essential to labour relations that it has been described as a proprietary right. It must be remembered that clauses which reserve an exclusive right to do certain work to a bargaining unit provide the foundation, not only to a particular collective agreement, but, more importantly, to the entire system of labour relations. Without such a clause, bargaining unit work could be contracted out to those who are not covered by the collective agreement, thereby defeating the entire legislative scheme of collective bargaining. In my view, the importance of these clauses cannot be overemphasized.

No other judge commented on this issue, but Justice Cory was among the plurality of judges who decided the case, which centred on a conflict of rulings by arbitrators and the C.R.T.C.: see *B.C. Tel v. Shaw Cable* (1995), 125 D.L.R. (4th) 493 (S.C.C.).

arrangement constitutes contracting out in breach of the collective agreement: *Syndicat des travailleurs et des travailleuses des épiciers unis Metro-Richelieu v. Epiciers Unis Metro-Richelieu Inc.*, unreported, August 12, 1994 (Lefebvre), upheld by the Quebec Court of Appeal, LAN May/June, 1997. On the other hand, where control is transferred in good faith for sound business reasons, subcontracting will be upheld, in the absence of specific language in the agreement to the contrary: *Carecor* (1992), 30 L.A.C. (4th) 391 (Knopf); *Toronto Star* (1990), 18 L.A.C. (4th) 49 (Burkett).

One arbitrator has said that the paramount factor is “who exercises fundamental control over the working lives and work environment of the individuals in question”: *Lakehead Family Centre* (1991), 24 L.A.C. (4th) 23 (Solomatenko). However, a number of arbitrators take account of factors other than the “control” test, such as the relationship of the work in question to the enterprise as a whole: *Cambrian College* (1989), 5 L.A.C. (4th) 325 (Swan), following *Mayer v. J. Conrad Lavigne* (1979), 105 D.L.R. (3d) 734 (Ont. C.A.). All arbitrators agree that the purpose of their inquiry is to ensure that the employer does not by subterfuge avoid its obligations under the collective agreement: Brown and Beatty, *Canadian Labour Arbitration* (3rd ed.), at 5:1400.

Arbitrators differ on whether to give predominance to the day-to-day control test or the overall control test: *Metro-Calgary General Hospital* (1988), 3 L.A.C. (4th) 265 (Beattie). A seven-fold test has been developed by the Ontario Labour Relations Board in *York Condominium*, [1977] O.L.R.B. Rep. Oct. 645, and is set out in the *Don Mills Foundation* case. The inquiry focuses on the identity of:

- (1) the party exercising direction and control over the employees performing the work;
- (2) the party bearing the burden of remuneration;
- (3) the party imposing discipline;
- (4) the party hiring the employees;
- (5) the party with the authority to dismiss;
- (6) the party which is perceived by the employees to be the employer; and on
- (7) the existence of an intention to create the relationship of employer and employee.

This approach has been frequently followed: see, for example, *Children's Aid Society of Northumberland* (1994), 40 L.A.C. (4th) 129 (Mitchnick).

Using outside workforces to perform the same work as the bargaining unit on the premises may be found to be improper contracting-in: *Don Mills Foundation* (1984), 14 L.A.C. (3d) 385 (P.C. Picher); *Kennedy Lodge* (1984), 7 C.L.R.B.R. (N.S.) 157 (O.L.R.B.); and see *PSAC v. Attorney-General of Canada*, [1993] 1 S.C.R. 941 (S.C.C.).

**Checklist**

- Has the meaning of bargaining unit work been defined? For example, does it include inventory-taking? Maintenance and repair of equipment? Emergency operations? Services performed by volunteers?
- Does the language of the collective agreement prohibit the contracting out of all bargaining unit work, of work normally performed by bargaining unit employees, or of specified kinds of work only?
- Does the clause protect bargaining unit work or merely the jobs of those currently performing it? If the latter, does it also protect against loss of pay, or hours of work or overtime opportunities? Does it prevent transfers, demotions, or shift changes? Does it apply when some employees are already on layoff? Does it also preclude further layoffs?
- Does the clause provide for advance notice, reasons and consultation if contracting out is permitted? If so, what remedy is provided for failure to give the required notice within the stipulated time or to consult the union? Does the clause provide that the subcontract is thereby rendered null and void? Does the collective agreement require that an opportunity be afforded for negotiation and/or arbitration before contracting out can proceed?