IN THE MATTER OF AN ARBITRATION
(Under the *Canada Labour Code*)

BETWEEN:

BELL CANADA

("Company")

- AND -

UNIFOR

("Union")

AND IN THE MATTER OF an arbitration of the grievance of National Policy Grievance No. 2018-002 concerning a bargaining unit work issue under the collective agreement between the parties.

BEFORE: G. T. SURDYKOWSKI – Sole Arbitrator

APPEARANCES:

For the Company: Sacha Liben, Counsel (on February 11, November 10, 2020, and January 20, 2021); Maryse Tremblay, Counsel (on October 6 and 7, 2021); Howard Anderson, Senior Consultant Labour Relations; Paul Robert, Labour Relations; Linda Assad, Senior Manager Field Operations; Melanie Hebert, Senior Manager Field Operations.

For the Union: Micheil Russell, Counsel; Tyson Siddall, Telecommunications Director; Jeff Brohman, Chief Steward, Local 34-O; Ray Mortimer, Prime Contact OCC Arbitration/Bargaining Fund.

Hearing held in Etobicoke, Ontario on February 11, and using the Zoom remote access platform on November 10, 2020, and January 20, and October 6 and 7, 2021.

AWARD

I. INTRODUCTION

1. As described in my July 27, 2021 Preliminary Award, the Union grieves that the Company is "having" Bell Technical Solutions ("BTS") perform "cable repair work" that belongs to its bargaining unit work under the collective agreement with the Company, contrary to Articles 1 and 8, and the Memorandum of Agreement regarding BTS work (the "BTS Memorandum"), the Allocation of Work Memorandum of Agreement (the "Allocation Memorandum"), and the Letter of Intent on Contracting Out.

2. Article 1 (the "Recognition and Scope" clause) identifies the Union as the sole collective bargaining agent for "all Craft and Services employees of the Company covered by the certification order of the Canada Industrial Relations Board ("CIRB") dated December 24, 2015". Article 8 is a typical "Management Rights" provision. It reads as follows:

> **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 of lay-off employees, and the 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.

3. The collective agreement does not contain a contracting out provision as such, or a specific "bargaining unit work" provision. However, the BTS Memorandum speaks to the issue by identifying the separation between the Company and BTS businesses, bargaining units and work. It states that:

> 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.

Paragraph 1(a) of the Allocation Memorandum in effect identifies cable repair work as Craft and Services bargaining unit work and specifies that with one exception BTS employees "will not" do that work. This is the real focus of the grievance and the dispute between the parties. The Allocation Memorandum reads in full as follows:

> The Company is committed to stop the transfer of bargaining unit work as provided in this Memorandum of Agreement to Bell Technical Solutions (BTS).
>
> To this goal the parties have established the following Allocation of Work Memorandum of Agreement. The parties agree as follows:
>
> **1. Cable Repair work volume:**
>
> a) Cable repair functions including cable repair on fibre will not be performed by employees of BTS, except for the replacement of serial quick connect-type terminals that do not require testing using cable testing equipment to identify a trouble.
>
> **2. Central Office work volume:**
>
> a) Frame functions, excluding those performed in major Central Offices identified in Attachment A of this Memorandum of Agreement, can be performed by BTS. Technicians currently assigned to frame load in Central Offices listed in Attachment B will be provided with other CO work in their headquarters to the extent that CO work is available and may not be transferred without consent.
>
> b) All central office functions, excluding those identified in sib-paragraph 2a) will not be transitioned to BTS.
>
> **3. Business Data and Outright Sales (ORS) functions:**
>
> a) Business Data and Outright Sales functions will not be transitioned to BTS. For full clarity, BTS may occasionally provide support for ORS contacts.
>
> (Underlined emphasis added.)

4. There is no dispute that the BTS Memorandum and the Allocation Memorandum are part of the collective agreement. The collective agreement specifies that the Letters of Intent attached to the collective agreement document "are included in this agreement solely for the sake of convenience and shall not be construed as forming part of this Collective Agreement". Although the Union initially suggested it would argue that non-

collective agreement Letters of Intent may nevertheless be used as a contextual aid to interpretation, in the end the Union did not pursue any such argument.

5. The Company and BTS are both wholly owned subsidiaries of BCE Inc. ("BCE"). For the purposes of this case it is sufficient to distinguish between the operations of the Company and BTS on the basis that the Company installs and maintains the copper and fibre optic network cables while BTS installs and maintains customer service lines in Ontario and Quebec. The Company's and BTS' operations commonly interface at usually brown or gray distribution terminals commonly referred to as "pedestals" where network cables meet customer service lines.

6. The Company and BTS have been separate corporate entities since 1996. The corporate history in that respect is summarized in the apparently unreported October 11, 2011 *Bell Canada v. Communications, Energy and Paperworkers Union of Canada (CEP)*[1] *– Craft and Services Employees* decision of respected Quebec Arbitrator Francois Hamelin referred to by both parties (the "2011 *Bell Canada* decision")[2].

7. The Company and BTS have separate bargaining units covered by separate collective agreements. "Unifor" (i.e. the Union herein) is identified as "The Union" in both the Company "Craft and Services" and the BTS collective agreements, but area representation and administration of the collective agreements is left to what are often (if not always) composite Local Unions (i.e. the Local Unions that represent both Company Craft and Services and BTS bargaining unit employees).

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[1] The Union is the successor collective bargaining agent to the Communications, Energy and Paperworkers Union of Canada (CEP).

[2]In paragraph 90 of that decision Arbitrator Hamelin concluded that the "the actual employer of BTS technicians is not Bell [Canada] but BTS", and continued in paras 91-94 that:

> [91] … 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] … 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.

8. The Craft and Services and BTS bargaining units both include technicians who perform telecommunications field services work in their separate bargaining unit work jurisdictions. The "rub" or border between the Craft and Services and BTS bargaining unit work of these technicians is at the distribution interface between the network cable and the customer service lines, most often at the aforementioned local pedestal terminals commonly seen in residential areas. The Company Craft and Services technician bargaining unit cable repair work consists of adding to, maintaining and repairing the network cable behind the "faceplate" of the distribution terminals (or in the case of encapsulated (buried) cable to where the cable connects to customer services lines), and making any connections required behind the faceplate of the distribution pedestal terminals. The wiring work associated with connecting customers to the network in front of the faceplate and at customer premises is BTS technician bargaining unit work.

9. The Union has discovered that some cable repair work behind the faceplate that belongs to Company Craft and Services technicians has been performed by BTS technicians. The National Policy Grievance herein is just one of many grievances that have been filed in response to these alleged violations of the Union's Craft and Services bargaining unit work integrity.

10. The Company does not dispute that cable repair work behind the faceplate belongs to its Craft and Services bargaining unit cable technicians or that BTS technicians have been caught doing that work. The Company's position is that the BTS technicians who have been doing cable repair work behind the faceplate contrary to the Allocation Memorandum have been doing so without its authorization or permission, and that it has therefore not violated the collective agreement. The Company also says it has acted to remedy the situation, and that the steps it has taken have been reasonable, responsible, and have significantly reduced the problem to a continually improving *de minimus* problem that does not in any event require arbitrator intervention.

II. THE EVIDENCE

11. The evidence consists of documentary evidence filed by the parties, supplemented and explained by the oral testimony of 5 witnesses.

12. The Union called 3 witnesses: Jeff Brohman, Louis Costa, and Kevin Paddon.

13. Brohman has been an employee of the Company for more than 20 years, during 15 of which he was a Company Craft and Services "Cable Repair Technician". He is the current Chief Steward of Unifor Local 34-0 (Ottawa) and a Vice-Chair of the Union's Ontario Communication Council. Local 34-0 represents both the Crafts and Services

bargaining unit under the collective agreement herein and the BTS bargaining unit (among others). Brohman was a member of the Company-Union Joint Labour Relations Committee ("JLRC") for some 8 years (from 2012 to 2020). The JLRC meets quarterly to discuss collective agreement issues. He was a member of the Union's negotiating team for the February 23, 2017 – November 30, 2020 ("2017-2020") collective agreement under which the grievance herein was filed.

14. Costa appears on the "Bell Organization Chart" as both Bell Canada Director, Field Operations and the BTS Director, Field Operations. He is dual listed on the organization chart for benefits and pension purposes but works for BTS. Everyone who reports to him is a BTS employee. The actual corporate organizational merge appears to occur at the SVP, Field Services level (currently Bruce Dean).

15. Paddon is an11-year BTS installation and repair technician who works out of Kingston. He is also Local Union 31 president, health and safety representative, and Co-Chair of Regional Council. Like Local 34-0, Local 31 is a composite local that represents both the Company Crafts and Services bargaining unit and the BTS bargaining unit (among others).

16. The Company called 2 witnesses: Linda Assad, and Melanie Hebert.

17. Assad has been with the Company in various positions for some 40 years. Since October 2018 she has been the Director, Field Services for Ontario and Bell West (outside of Toronto), Manitoba, Saskatchewan, Alberta and British Columbia.

18. Hebert has been employed by the Company for 28 years. For the last approximately 4 years she has been the Sr. Manager, Field Services, Quebec responsible for 10 managers and some 200 technicians, most on her cable team that maintains and repairs the Company cable network.

19. The essential material facts are not significantly in dispute.

20. The evidence includes an overview of the Bell Canada telecommunications organization and services distribution network, including the copper or fibre optic network cable connection to customer service lines at the distribution terminals. Although not the only one, the most important function of Crafts and Services cable repair technicians is cable repair work.

21. The Union discovered multiple instances of BTS technicians performing cable repair work prior to (I infer) 2017. In addition to filing grievances and discussing the

issue with the Company at length at the JLRC, the Union made this a high priority contracting out issue in negotiations for the 2017-2020 collective agreement. The negotiations resulted in the Allocation Memorandum being included in the collective agreement.

22. Despite the Allocation Memorandum the Union continued to discover alleged instances of BTS technicians performs Craft and Services cable repair work.

23. There are approximately 900 Company cable technicians Ontario and Quebec. The Company's cable teams, business and IR Technicians work out of 3 Central Offices that connect to the National Office. Company and BTS work is dispatched through separate control centres. Cable repair work is not assigned or dispatched to BTS technicians. When necessary cable repair work is encountered by a BTS technician s/he/they is supposed to "refer to cable" so that a Company Crafts and Services technician can be dispatched to do it.

24. The Company's cable repair work is dispatched from the Cable Control Centre using the Bell dispatch tool (called "Click" or "TMI"). The work is assigned by appropriate cable skill set profile in the area the work is required. Only Company technicians have "cable" in their skill set profiles (i.e. BTS technicians do not). The dispatch tool "looks" for that first and then for any required secondary skills, and assigns the work to an appropriate Company technician. Cable repair work may also be assigned to appropriate technicians by the Cable Surveillance Centre "direct to cable" service. Assad testified this is critical because BTS technicians are not trained for and don't have the skill sets required for this work. That is, cable repair work is only assigned to Company technicians and that's the way Assad testified she wants it in order to ensure that the work is done properly.

25. Assad is adamant that she does not want BTS technicians working behind the distribution terminal faceplate because their insufficient skill set could create a bigger problem or mask an existing problem which could cause customer service problems to continue or recur (since a BTS technician typically doesn't record behind the face plate changes to the network because they was not supposed to be working there). Assad testified that it is critical that BTS refer cable repair work to the Company so that its technicians can restore of service on the entire cable, not just to a single customer being serviced by BTS.

26. Although the focus of Assad's expressed frustration about the allegations of BTS doing cable repair work was on the impact on the Company's customers rather than on coincident violations of the Allocation Memorandum, she described her efforts to deal

with the problem. She says she has had numerous discussions with her BTS peers to try to build up their relationship and alleviate the situation and frustrations. She and BTS' Costa speak monthly to discuss issues and actions to be taken. She has asked Company Field Regional Managers to rebuild their relationships with their BTS peers and ensure that cable work is referred appropriately. And she has operational and process teams that deal with concerns about BTS doing Company cable repair work. Assad testified that her attempts to deal with the problem include meetings at the Director and Regional Manager level to address the problem, investigations to discover why there is an issue and what is required to correct it (e.g. training, coaching, discipline), and ensuring that the Gateway tool that tickets much of this work to ensure directs it to Craft and Services employees through a single portal. She says these efforts have been largely successful to the extent that there were no significant issues in the 8 months prior to her testimony on January 20, 2021. Assad testified that every Allocation Memorandum issue brought to the Company's attention is investigated and that appropriate action is taken by the Company or BTS if an allegation is substantiated.[3]

27. Hebert similarly testified that she does not want and does not tolerate BTS doing cable repair work, and that like Assad she has addressed the issue with BTS in numerous meetings, including regular monthly meetings, and communications.

28. It was presumably as a result of the cable repair work related discussions between the Company and BTS that the following bilingual "BTS Employee Communication" was issued by email on December 15, 2017 (only English version reproduced):

> ***La version francaise suit***
>
> To: All Technicians at Bell Technical Solutions
>
> From: Field Operations Directors; Lou Costa, Lill Breiteneder, Nathalie Beaudry & Jean-Luc Riverin
>
> **Subject: Reminder: restriction on Cable Repair work**
>
> Hello,
>
> Pursuant to the agreement between Bell Canada and Unifor, please be advised that BTS Technicians are not to perform cable repair functions. The exception to this is for the replacement/addition of fibre optic aerial quick connect-type terminals ("Flex Nap") that do not require testing using cable Repair testing equipment to identify a trouble.

[3] See Exhibits #4 (a 1-day suspension to BTS technician for doing cable repair work), #5, #6, #7 (a 1-day suspension to a BTS technician, which may relate to the same incident as #4 but I cannot tell because identifying information is missing), #8 (a coaching to BTS technician), and #9 (a coaching to a BTS technician).

> Thank you for your attention to this matter and your commitment to providing the best service to our customers.
>
> Should you have any questions, please contact your immediate leader.
>
> Lou, Lill, Nathalie & Jean-Luc

(Bolding supplied; underlined emphasis added.)

29. An identical BTS Employee Communication was issued by email on July 27, 2018. A further substantially the same BTS Employee Communication was issued by email on December 21, 2018 (the only difference being that the first line of the text began: "Pursuant to concerns expressed by Bell Canada, we remind you that …"). Assad testified that she considered it prudent to have this third "reminder" issued because she was new to her role and after discussions with BTS (namely Costa) it was apparent that BTS technicians not referring cable work to the Company for its Craft and Services cable technicians to perform was a continuing problem. A common example was a BTS technician pulling wire from behind faceplate and using a Scotchlok to connect a service wire in order to put a customer back in service.[4]

30. Brohman opined that communications these had "very little effect" and that BTS technicians continued to and still do cable repair work. On the evidence, all or almost all of the instances of BTS technicians doing cable repair work contrary to the Allocation Memorandum have been discovered the Craft and Services bargaining unit employees and brought to the Company's attention by the Union. The Company has very rarely if ever independently discovered such instances.

31. Brohman also identified a communication which could be taken to suggest that not everyone in Company management is on the same page as Assad. He testified that a Local Union 27 member discovered and a Union Steward brought to the Company's attention an instance of cable repair work performed by a BTS technician that resulted in a July 26, 2019 email exchange (some 3 years after the 2017-2020 collective agreement was ratified) between Company Senior Manager, Field Operations Jay Fennema and BTS Team Leader John Fasulo (Exhibit #2 T5). In the last email in the chain (9:48 a.m.), Fennema wrote to Fasulo as follows:

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[4] A "Scotchlok" is a wire connection tool designed for interior use and not appropriate for exterior use. I infer from the evidence that the Scotchlok is not a kind of "serial quick connect-type terminal" referred to in the Allocation Memorandum. The MR tool is wire crimping tool for exterior use that BTS technicians do not use.

> Not sure if you were able to attend my little road show talking to all of the teams in 416 but the union over here is really challenging this MOA* in our collective agreement (below).
>
> It is likely going to arbitration so we're trying not to muddy the waters with any work in splice peds/behind faceplate etc. We don't want to give them any more ammo to plead their case.
>
> Any questions let me know.
>
> (* refers to the Allocation Memorandum, the opening two statements and paragraph 1(a) of which were reproduced at the end of the email.)

Brohman described the wording of Fennema's 9:48 a.m. email to Fasulo as "disheartening" because all the Union was trying to do was have the Company comply with the collective agreement.

32. The reference in Fennema's email to the "little road show" is to one of the regional meetings (possibly the June 27, 2019 meeting) between the Company and BTS at which one of the agenda items was the performance of cable repair work by BTS technicians. The redacted June 27, 2019 Regional Meeting Agenda document (Exhibit #2 T6) that summarizes a cable discussion led by Fennema as follows:

> Techs working in en-cap splice peds, behind face plate The union is grieving techs doing that work.
> We should tell our techs not to do cable work. We do not want to muddy the waters anymore, as this is not our territory.
>
> If there is a major escalation with a splice peds or any cable related work we need to contact the right department. Get a hold of John to see if he can fix the issue.
>
> TCMO - they are able to cancel pattern ticket, this is the number you can call 1-800-556-1840.
> They will look at it and figure out the ticket.
>
> Jay and John said that managers should <u>tell technicians not to do cable related work even if it can directly be fixed by them</u>. This issues have spiked grievances and issues with the union that will result in collect agreement re-evaluations
>
> (Sic, except for underlined emphasis added.)

The same document attributes the following statement to Fennema:

> Union alleges that Bell surpluses cable techs only. The union making a stamp on the memo agreement. <u>Cable repairs will not be performed by BTS techs. Do not guide your techs to do a cabling job. 100 grievances.</u>

> Reach out to Jay if you need help Or Mike degatcha.
>
> Techs are not to touch the cable.
>
> (Sic, except for underlined emphasis added.)

33. I understand Brohman's reaction to Fennema's July 26, 2019 9:48 a.m. email. Read alone it suggests at best an example of a Manager with a "don't care" attitude who seems more concerned with beating the Union at arbitration than enforcing the collective agreement. I didn't hear from Fennema so have no evidence from him about the phrasing in his email. However, when read in context with the excerpts from the June 27, 2019 Regional Meeting Agenda document its reads more like a Manager trying to send his BTS counterpart who he deals with regularly the appropriate message in what he thinks may be a more diplomatic way (blame the Union) because notwithstanding his choice of words Fennema made it clear to BTS (I infer because the corporate affiliation and positions of the attendees are not discernable from the document in evidence) at the regional meeting that its technicians were not to do cable repair work.

34. There has been no written communication to BTS technicians specifically defining the cable repair work that they are prohibited from doing, or instructing them not to do any work behind the face plate of distribution terminals, or otherwise providing written guidelines regarding cable repair work. Assad believes that an instruction not to perform "cable repair functions" is explicit enough because BTS technicians should know that their work is from the terminal to and inside customer premises, and that they are not to do any cable repair work.

35. BTS recognizes that under its collective agreement with the Union its technicians cannot do cable repair work, and it doesn't want them to because, says Costa, BTS techs "clearly can't do cable work".[5] Notwithstanding that BTS technicians are not trained for it, that they are not assigned or dispatched to do it, and that it is against BTS policy for them to do it, it is apparent that BTS technicians to continue to do cable repair work on occasion.

36. The evidence reveals that BTS has tried to address the issue with its technicians, both through the 3 email communications sent to all BTS technicians as aforesaid and with individual technicians who have crossed the bargaining unit work boundary through its performance management program when BTS becomes aware that its technicians have performed cable repair work. According to Costa, BTS investigates allegations that its

[5] Costa testified that 99% of work associated with encapsulated cable is not BTS cable work "because our technicians are not trained for it" and "we don't have the [excavating] machinery".

technicians have performed cable repair work, including instances not brought to its attention by the Union, and takes appropriate action up to and including discipline.[6]

37. Assad and Hebert acknowledge that BTS technicians have performed and probably continue to perform cable repair work contrary to the Allocation Memorandum. But they both suggest that the problem is far from as serious as the Union makes it out to be, and that the measures they have taken have in any event have significantly reduced the number of such instances that have come to the Company's attention. Assad testified that the approximately 100 more or less (probably more) grievances have been filed concerning cable repair work allegedly performed by BTS technicians contrary to the Allocation Memorandum on an annual basis represents something on the order of 0.25% of the some 150,000 cable repair work job assignments in Ontario and Quebec, and something like 0.04% of referred to cable work. In cross-examination, Assad estimated that 50% of cable repair work is assigned directly to Company Craft and Services technicians and 49% of it comes from BTS "refer to cable" assignments. Assad testified that the Company uses contractors for some cable repair work, and requires federally regulated contractors and their employees to be bound by and follow the Company's policies and procedures. In cross-examination she agreed that effective communication in that respect requires that details of the Company's policies and procedures be specified. (It is not clear to me why provincially regulated contractors, if any, couldn't be similarly required to be bound by and follow the Company's policies and procedures.)

38. Assad estimates that when she started in her current position in 2018 she received more than 30 grievances about the cable repair issue in her first week but that the number of grievances has steadily deceased since then. She testified she received 65 cable repair grievances in 2019 and 20 in 2020. Hebert substantially echoes Assad's assessment of the situation in Quebec. She says there were 28 cable repair work grievances in 2018, and 2019, but only 5 in 2019. However, she conceded that she doesn't know how many instances have gone undetected. She also testified that as far as she is aware no one has made a comprehensive list of instances of cable repair work performed by BTS technicians (by which I infer she means no one at the Company because the Union has provided lists of such alleged instances in has discovered in Ontario and Quebec – Exhibits #2 T8 and T9 respectively). Brohman acknowledged that the situation in his Local Union area has improved since 2018 (i.e. that on an annual basis the Union had discovered fewer instances of BTS technicians doing cable repair work), but offered that it is hard to say whether that is because BTS technicians are not doing it as often, or the Union hasn't caught them doing it, or even because of the Covid pandemic.

[6] Exhibit #4 is an example of a 1-day suspension issued to a tech (on December 5, 2019) for doing cable repair work instead of referring to cable.

39. The Company and BTS have performance management programs, both currently called "Coaching for Success". The BTS Coaching for Success performance metrics are efficiency (amount of time spent on jobs); rework (more work on same job required within 7 days); and percentage complete (with reasons for incompletes including safety, no access, and refer to cable, i.e. cable repair work). According to Paddon in cross-examination, the percentage complete metric has a 20% assessment rating. An employee whose performance metrics are unsatisfactory is provided coaching at up to several levels (Coaching 1, 2, 3) as required until improvement required is made, followed if necessary by 30-day Action Plan and then 60-Day Action Plan. If the employee's performance still does not improve sufficiently there could be more coaching or discipline could be imposed. Employees are told that failure to meet performance goals may result in termination. Termination is a last resort and hasn't happened often, but it has happened. Costa testified that an employee will not necessarily be disciplined if he doesn't meet his metrics, and that fewer than 5 employees have been terminated specifically for failing to meet performance metrics.

40. Assad testified that she is aware (presumably because she was told) of numerous discussions BTS has had with its technicians about cable repair work, and that BTS technicians have received coaching, and that verbal and written warnings and suspensions have been issued. She says that the Company's and BTS' working relationship has improved, and that Company and BTS technicians are working together better.

41. Costa testified that not doing cable repair work is not held against BTS techs for performance management purposes. However, Paddon testified that being put in program cause employees stress because of the spectre of discipline, and that the issue of incompletes is the most common stressor because there is a constant push to complete jobs (i.e. getting the customer back in service), which employees think of as being something out of their control, the suggestion being that BTS technicians feel pressured to do whatever it takes to get a customer back in service, including prohibited cable repair work if necessary. Paddon testified that he has never seen a communication to BTS employees that there will be no consequences due to incompletes as a result of referrals to cable.

42. The Union offered no evidence about the actual impact on the Craft and Services bargaining unit of BTS technicians doing cable repair work. Hebert, whose information is presumably restricted to Quebec, testified that there have been no Craft and Services cable technician layoffs as a result of BTS technicians doing cable repair work. She acknowledges that the total number of cable technicians in Quebec has declined (presumably due to attrition because there was a recent cable technician new hire), but that that is due to a reduced volume of work and not because of BTS technicians doing

cable repair work. Assad was not asked any questions about the impact of BTS technicians doing cable repair work on the Craft and Services bargaining unit.

III. SUBMISSIONS - SUMMARIZED

(a) The Union

43. The Union submits that this is primarily a collective agreement interpretation case. The Union submits this is a unique case which concerns very specific collective agreement language devised to address a particular situation in the context of the unique factual matrix that includes the relationship between the Company and BTS. The Union relies on the fundamental principles of interpretation that I described and applied in *Elementary Teachers' Federation of Ontario v. Elementary Teachers' Federation of Ontario Staff Association*, (2021) 324 L.A.C. (4th) 351, 2021 CanLII 3125 (ON LA) at paragraphs 63-67. Mr. Russell emphasizing my conclusion in paragraph 63 that when it comes to collective agreement interpretation:

> "…context matters. But it does not displace the words selected by the parties to express their mutual contractual intention. *Words still matter most*, in no small part because the context that matters is the one which was or ought to have been known to both parties when the words agreed to were selected."
>
> (Italicized [underlined in the Award as issued] emphasis supplied.)

44. The Union submits that the Company has violated its Allocation Memorandum commitment that "Cable repair functions including cable repair on fibre will not be performed by employees of BTS, except for the replacement of aerial quick connect-type terminals that do not require testing using cable testing equipment to identify a trouble."

45. The Union does not allege bad faith and acknowledges that there is a grain of truth to the Company's assertion that it cannot control the actions of individual BTS employees in the field. But the Union argues that the Company' efforts to stop the violation of the Allocation Memorandum have been woefully inadequate. Mr. Russell submits that given the language of the Allocation Memorandum and the Company's relationship with BTS, the Company's claim that it has made good faith efforts to stop the violations and that BTS employees are outside of its control is not in any event a legitimate defence to the grievance. The Union argues that the Company controls or can control the assignment and flow of cable repair work in the exercise of its management rights, and that Company can and must exercise its management rights in a manner that prevents the erosion of its bargaining unit work to the Company's wholly owned BTS subsidiary.

46. In the grievance as written the Union demanded that the Company "cease and desist from having BTS employees perform the Cable Repair work and that all members affected be made whole in every way up to and including damages." In its oral submissions on the merits, the Union clarified its request for relief. The Union seeks:

(a) A Declaration that the Company has violated the Allocation Memorandum.

(b) An Order requiring the Company to cease and desist in that respect.

(c) An Order requiring the Company to pay damages in the amount of $2,000.00 for each violation of the Allocation Memorandum.

(d) An Order requiring the Company to issue a communication to BTS requiring BTS to direct its employees regarding performance of the work in issue, the form and content to be agreed or determined.

(e) An Order requiring the Company to issue proactive written guidance to BTS in the form of a communication requiring BTS to clearly instruct its employees that they are not to perform cable repair work other than as permitted by the Allocation Memorandum.

(f) An Order requiring the Company to require BTS to hold meetings with its employees for the purpose of explaining to them the Allocation Memorandum and the specific limits of the cable repair work that they may perform.

47. The Union characterizes this as a contracting out case. To that end Mr. Russell referred me to the decisions in the *K+S Windsor Salt v. Unifor, Local 1959*, January 13, (2017) 276 L.A.C. (4th) 72 (Crljenica); and *Stelco Inc. v. USWA, Local 1005*, 1997 CarswellOnt 7383, 48 C.L.A.S. 98 (O'Neil).

48. The Union acknowledges the well-established collective agreement interpretation principle applied by the arbitrator in *Windsor Salt*; namely, that a restriction on an employer's to contract out must be express and cannot be implied. But the Union also relies on Arbitrator Crljenica's conclusion in that case that when the collective agreement contains an express restriction against contracting out the contracting out prohibition applies to bargaining unit work on a qualitative basis (i.e. all bargaining unit work), not on a quantitative basis (i.e. not part of or up to a certain quantity of bargaining unit work), unless the language of the provision clearly states otherwise. The Union also relies on

the proposition applied in *Stelco Inc.* that an employer cannot avoid the consequences of violating a collective agreement prohibition against contracting out by pleading that an exception it created was unforeseeable.

49. The Union submits that Allocation Memorandum identifies a cable repair work problem and clearly states the Company's commitment to address the problem by stipulating that cable repair functions will not be done by BTS employees (subject to an exception not in issue). Mr. Russell notes that the Allocation Memorandum contains the same "will not" prohibition language found in *Windsor Salt*. He submits that this constitutes an absolute prohibition against BTS employees performing cable repair work that the Company is responsible for enforcing. Mr. Russell submits that the text of the grievance is significant, and that in its response to the grievance the Company in effect acknowledged that the Union's claim was true and that it took the issue seriously, which he says begs the question: why then did the Company deny the grievance? Mr. Russell argues that the Company's acknowledgement in response to the grievance is a sufficient basis for allowing the grievance, leaving only the question of remedy.

50. The Union does not leave it at that. Mr. Russell points to the testimony of Chief Steward, Local 34-O Jeff Brohman, who described the cable repair work in issue and the problem of BTS technicians performing that work, all instances of which have been discovered by Craft and Services Employees bargaining unit technicians who have chanced upon them, and that when it has identified an apparent violation of the Allocation Memorandum the Union has usually been right. Mr. Russell says it would be preposterous to suggest that the Union has discovered the full extent of the wrongdoing, and that it is reasonable to infer that the Union has discovered only a small subset of the actual incursion by BTS into its bargaining unit work space. Mr. Russell argues that it isn't the job of the Union or its member Craft and Services Employees bargaining unit technicians to audit BTS' activity in that respect.

51. The Union disputes the Company's claim that its approach to dealing with the problem is working and has significantly reduced the extent of the problem. The Union submits that the apparent reduction in the number of instances of cable repair work violations of the Allocation Memorandum is probably due to a combination of the Union stumbling upon fewer of them and fewer individual grievances being filed because the policy grievance herein addresses the problem more completely.

52. The Union submits that the Company has done nothing to discover the full extent of the violation of the Allocation Memorandum, and that the Company's reactive attempts to address the problem have been patently deficient and have resulted in BTS' failure to give its technicians appropriate instructions to stop doing cable repair work and

continuing violations of the Memorandum. Mr. Russell submits that because BTS is a subsidiary wholly owned by the Company, the Company is responsible for and able to control the activities of BTS employees. But Mr. Russell argues that I "don't need to go there" because this is a clear case of the Company contracting out cable repair work contrary to the Allocation Memorandum.

53. The Union suggests there is a strange tension between the Company's professed aversion to BTS performing the cable repair work in issue and its resistance to taking reasonable steps to stop it, including by taking a proactive step as reasonable and simple as delivering a communication to BTS that specifies that under no circumstances should a BTS technician work behind the pedestal face plate, that cable repair work that should be "referred to cable" and not performed by BTS technicians, and requires BTS to clearly communicate to its employees that not doing this work will not be considered to be an "incomplete" for performance management purposes. Mr. Russell points out that the evidence reveals that this not require more of the Company than what it did to address the issue in 2019 when its own engineers instructed BTS technicians to perform cable repair work contrary to the Allocation Memorandum. He also notes that the July 2019 email exchange between Company Senior Manager, Field Operations Fennema and BTS Team Leader Fasulo (paragraph 31, above) demonstrates that the Company's apparent upper management attitude about the issue has not necessarily filtered down to the operational management level.

54. The Union argues that the Company could also treat the matter as a contractor compliance issue, by requiring BTS to properly instruct its technicians about the work they are prohibited from doing as a compulsory condition of BTS's contract with the Company. The Union submits that there is no reason not to compel the Company to direct its contractor BTS to conduct its operations in a manner that complies with the Allocation Memorandum.

55. Mr. Russell notes Brohman's conclusion that part of the reason for the persistence of the problem is the BTS performance management program that work completion metric that incentivizes BTS technicians to perform the prohibited cable repair functions in issue.

(b) <u>The Company</u>

56. The Company submits that the Union has failed to prove its case and that the grievance should be dismissed. The Company denies that its response to the grievance constitutes an acknowledgement that the Union's allegation is true, and that the evidence does not support the Union's other assertions.

57. Mme. Tremblay submits that the BCE corporate management structure does not change the fact that as a matter of law the Company and BTS are separate entities. She notes that Arbitrator Hamelin so concluded in his 2011 *Bell Canada* decision, and that the BTS Memorandum clearly recognizes that the Company and BTS are separate and independent business operations and labour relations entities. Mme. Tremblay urges me to keep in mind that the Union's claim in the grievance is that "the Company is having BTS perform cable repair work that is the work of Bell Canada Craft members", and submits that the evidence clearly shows that the Company is not "having" BTS do any such thing. The Company submits that, on the contrary, to the extent that BTS employees have performed work contrary to the Allocation Memorandum that has been without the Company's authorization and contrary to its instructions and directions. Mme. Tremblay points out that BTS technicians are not Company employees and that the Company has no control over the actions of individual BTS technicians in the field. She argues that the Company cannot be held liable for actions of a third party not under its control to which it has not acquiesced.

58. The Company submits that it has in any event taken reasonable steps to deal with the issue. Mme. Tremblay points out that the evidence (e.g. Exhibits #2, T2 and #7) shows that the Company investigates when an alleged violation of the Allocation Memorandum comes to its attention and requires BTS to take appropriate action as appropriate, and that it regularly communicates with BTS at both Regional and Local levels to ensure that the Allocation Memorandum is complied with. She argues that the evidence shows that the Company's efforts have been effective.

59. Mme Tremblay submits that the evidence makes it is clear that the Company has not assigned, transferred, or transitioned cable repair work covered by the Allocation Memorandum to BTS, nor authorized or permitted BTS to perform such work.

60. Mme. Tremblay points out that the collective agreement does not contain a bargaining unit work provision, and that to the extent that the Allocation Memorandum is a form of no contracting out provision there is nothing in it that suggests that anything other than that the established principles apply. She argues that one of these principles is that there can only be a violation when the employer controls the work in issue, and that the Company's obligations under the Allocation Memorandum are limited to what the Company has committed to and can control.

61. The Company submits that the arbitral contracting out jurisprudence makes it clear that a collective agreement contracting out prohibition is not violated when the employer doesn't control the work or the party doing the work, and that it has no control

over BTS technicians who perform cable repair work outside of their jurisdiction. Mme Tremblay argues that the application of the Allocation Memorandum is limited to what the Company can control, so that read in that context the Company's commitment and the "goal" the parties have agreed to is to "stop the transfer" of cable repair work. Mme Tremblay submits there has been there has been no transfer of cable repair work, and that the "will not be performed by employees of BTS" language does not expand the protection of the Union's bargaining unit work to things the Company does not control. She argues that the Memorandum operates to ensure that the Company will not act in a manner that "transfers" the work to BTS, and that that is the extent of the Company's commitment: namely to not act in a manner that transfers cable repair work to BTS. She submits that is the "goal" referred to in the Memorandum and that that goal has been achieved; that is, there has been no such transfer.

62. The Company submits that the Union's submissions are full of unsubstantiated speculation, and that it is apparent that the amount of work apparently performed by BTS in violation of the Allocation Memorandum relative to the total volume of cable repair work performed (i.e. less than 0.25%) is so *de minimus* that it cannot properly be considered to be a violation, particularly when it has been done without its authorization and it has made reasonable efforts to stop it. Mme. Tremblay submits that the purpose of bargaining unit work and no contracting out provisions is to protect the integrity of the bargaining unit and there is no evidence that the Union's Company bargaining unit's integrity has been threatened.

63. Mme. Tremblay referred to the following decisions in support of the Company's submissions: *Boise Cascade Canada Ltd Kenora Division v. I.A.M., Local 490*, (1989) 5 L.A.C. (4th) 110 (Brown); *Ontario Steel Products Co. v. U.A.W. Local 127*, (1973) 3 L.A.C. (2d) 137 (Hinnegan); *Gourmet Baker Inc. v. Retail Wholesale Canada, Canadian Service Sector (USWA) (Truck Loading)*, [1999] O.L.A.A. No. 559 (Schiff); *Coca-Cola Ltd. v. United Brewery Workers*, (1983) 11 L.A.C. (3d) 207 (Springate); *Fraser Valley Mushroom Grower's Cooperative Association v. Retail Wholesale Union, Local 580*, (1992) 32 L.A.C. (4th) 439 (Taylor); *Finlay Forest Industries Inc. and I.W.A.-Canada, Local 1-424*, (1998) 52 C.L.A.S. 44 (Taylor); *Carleton University v. U.S.W.A.*, (1995) 50 L.A.C. (4th) 369 (Brown, Chair); *Molson Canada v. Brewery, Winery & Distillery Workers' Union, Local 300*, (2012) 111 C.L.A.S. 43 (Hall); *Muskoka Algonquin Healthcare v. OPSEU, Local 380*, (2008) 96 C.L.A.S. 29 (Schmidt); *OPSEU v. Ontario (Liquor Control Board of Ontario) (Butters)*, (2018) 293 L.A.C. (4th) 421 (Carrier); *MIC's Group of Health Services v. S.E.I.U., Local 204*, (2005) 146 L.A.C. (4th) 84 (Stephens); *S.E.U., Local 210 v. Hotel Dieu Hospital*, (1995) 38 C.L.A.S. 239 (Rayner); and, *Westin Hotel Co Societe Hoteliere Westin Ltée and Unite Here, Local 40*, (2021) 326 L.A.C. (4th) 122 (Nordlinger).

(c) Union Reply

64. The Union replies that the Company wants me to ignore the evidence and collective agreement language, and to apply arbitral principles of limited value. Mr. Russell submits that the Company's assertion that it is not "having" BTS perform cable repair work misrepresents the collective agreement restriction. He says that the prohibition in the Allocation Memorandum is a simple one; namely, that cable repair work is the work of the Company's bargaining unit, not of the BTS bargaining unit, and that the prohibition is clear – BTS employees are not to do cable repair work, and that it is clear from the evidence BTS employees are doing cable repair work. Mr. Russell submits that when the part 1 Allocation Memorandum prohibition in issue is read in context with parts 2 and 3 it totally prohibits BTS from performing cable repair work, which means that the *de minimus* defence is not available to the Company. The Union submits that this is not a case of random unauthorized acts by third parties, and that the parties have in any event specifically turned their minds to the particular situation.

65. Mr. Russell denies that the Union's submissions are uninformed speculation, and reiterates that it is reasonable to infer from the evidence that the Union has only discovered a relatively small number of instances of BTS technicians performing prohibited cable repair work, but that in any event, any evidence of BTS performing such work constitutes a violation of the Allocation Memorandum. The Union submits that the Company controls the work in issue because it has overall high level operational control and dispatches tickets to BTS technicians that will inevitably run into "refer to cable" issues that are "100% inescapable".

66. The Union submits that contrary to the Company's assertion, there is no evidence that BTS employees have been given specific instructions not to do cable repair work. They are only given very general direction in the context of an overarching instruction to get customers in service. Mr. Russell says that all the Union asks is that the Company live up to its cable repair work commitment, and that all the Union seeks are more specific instructions that BTS employees are not to perform cable repair work, including a clear description the prohibited work. The Union submits that its request for relief is reasonable and proportionate and even consistent with the Company's preference sand objective.

IV. DECISION

67. I agree with the Union that this is fundamentally a collective agreement interpretation and application case. As presented, the situation has been vexing the Union, and on the evidence apparently also the Company, for some time.

(a) Collective Agreement Interpretation

68. I continue to hold the collective agreement interpretation view expressed in paragraphs 63-67 of my *Elementary Teachers' Federation of Ontario* decision cited by the Union, as informed by the Supreme Court of Canada's instructive decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII), [2014] 2 SCR 633 (particularly at paragraphs 46-50 and 55-60 per Rothstein J.).

69. The primary rule of collective agreement interpretation is that the words used must be given their plain and ordinary meaning unless it is clear from the structure of the provision in issue read in applicable context that a different or special meaning is intended, or the plain and ordinary meaning result would be illegal or absurd. Words or phrases cannot be inferred or ignored unless doing so is essential to the apparent purposive labour relations interpretation required. A specific or special provision prevails over a general provision because it indicates a more focused attention by the parties.

70. The significance of context must not be overstated. Relevant context is the collective agreement read as a whole, or the mutually understood context established by objective evidence, not either party's – or the arbitrator's – assumed or subjective understanding of the context. Most importantly, as Rothstein J. made clear in paragraph 60 of *Sattva*, context cannot change or "overrule" the meaning of the words used by the parties. So yes, context matters. But it does not replace the words selected by the parties to express their mutual contractual intention. To repeat: words still matter most, in no small part because the context that matters is the one which was or ought to have been known to both parties when the words agreed to were selected.

71. The grievance arbitrator's task therefore remains what it has always been; namely, to determine the objective contextual labour relations meaning of the collective agreement, with the words used being the most important consideration. The fundamental (albeit rebuttable) presumption of contract interpretation is that the parties to the contract purposely chose the language used to express their shared intention. To put it another way, the presumption is that the parties wrote what they meant and meant what they wrote. This is as true for a collective agreement as it is for any other contract.

72. It bears repeating in this case that considerations of collective agreement purpose, fairness, internal anomalies, cost or administrative difficulty, or the effect on the parties or bargaining unit or other employees can only be considered if the grievance arbitrator concludes that s/he must choose between equally plausible interpretations of the collective agreement language in issue. The grievance arbitrator's task is to determine what the collective agreement requires or prohibits, regardless of the impact on the parties or employees. The employer, union and bargaining unit employees are entitled to no more or less than the benefit of the bargain made in the collective agreement as described by the words used. It is no part of a grievance arbitrator's job to save the parties (or either of them) from the consequences of the agreement they have written.

(b) Determination

73. There is no dispute that network copper and fibre cable repair work behind the faceplate of distribution terminals where network cable connects to customer service lines is Crafts and Services bargaining unit work covered by the collective agreement between the Company and the Union, and that it is not BTS bargaining unit work.

74. As noted above, notwithstanding the collective agreement references in the grievance, the focus of the grievance is on paragraph 1(a) of the Allocation Memorandum. The Union submits that the Allocation Memorandum commits the Company to stopping BTS from doing cable repair work, and that the Company is responsible and subject to sanction to the extent that BTS technicians do such work.

75. There are several layers to the Union's submission in support of its claim that the Company has failed to comply with its Allocation Memorandum paragraph 1(a) commitment. First, the Union submits that the Company's reply to the grievance (Exhibit #1 T3) effectively concedes the collective agreement violation alleged. Second, the Union submits that the "will not" prohibition language constitutes an absolute prohibition that the Company is bound to and has failed to enforce. The Union submits that the Company has failed to appropriately direct BTS or monitor BTS technician activity in the field in that respect. Third, the Union submits that the Company has effectively been contracting out the prohibited cable repair work to BTS.

76. I disagree with the Union's assertion that the Company's reply to the grievance amounts to an admission that it has violated paragraph 1(a) of the Allocation Memorandum. On a fair reading it does not. The fact that the Company stated in its reply that BTS had communicated to its employees that they were not authorized to perform cable repair work and that "any incident … will be taken seriously by both Bell Canada and BTS, with the necessary effort and due diligence …" signals that the

Company is aware of the issue and has taken and will continue to take necessary steps to deal with it. Nothing in the Company's reply constitutes an admission that the issue has arisen because it has violated the collective agreement, just as the Company's admission in this proceeding that the problem exists despite what it asserts are its reasonable best efforts to stop BTS technicians from performing cable repair work does not constitute an admission that the Company has violated the collective agreement. The fact that the Company has acknowledged the problem and taken corrective measures does not amount to an ipso facto admission of collective agreement liability.

77. There is no dispute that BTS is a wholly owned subsidiary of the Company, or that the Company's and BTS' separate lines of management merge at the Senior Vice President, Field Services level. The Union asserts that the relationship between the Company and BTS is non-arm's length, such that the Company effectively controls BTS, and by extension its workforce.

78. I disagree. There is no dispute that BTS is an employer entity distinct from the Company, or that BTS bargaining unit employees are covered by their own separate collective agreement. Indeed, by agreeing in the BTS Memorandum that the business and operations of BTS are separate from the Company and that the BTS bargaining unit and employees represented by "the Union" are separate from the Company's bargaining units and employees; by agreeing to a separate collective agreement covering telecommunications employees with BTS; and by not seeking a declaration under the *Canada Labour Code* that either the Company and BTS constitute one employer for purposes of or that there has been a sale of business between them (s. 35 and s. 44 of the *Code* respectively), the Union has effectively so agreed. The Union cannot say differently in this case. In any event, I am satisfied that as a matter of law the Company and BTS are separate employers with separate collective agreements for all purposes, including the Allocation Memorandum which is an agreement between only the Union and the Company.

79. There is more than a mere grain of truth to the Company's assertion that it cannot control the actions of individual BTS employees in the field. BTS is not party to or bound by the Allocation Memorandum or anything else in the collective agreement under which this grievance has been filed; and the Company does not effectively control BTS for labour relations purposes. The Company does not control and is not responsible for BTS' conduct or operations, or the activities of BTS employees in the field.

80. Turning to the Allocation Memorandum, the question is: what did the Company agree or commit to when it agreed in paragraph 1(a) that: "Cable repair functions including cable repair on fibre will not be performed by employees of BTS, except for the

replacement of aerial quick connect-type terminals that do not require testing using cable testing equipment to identify a trouble."?

81. The Union seeks to make something of the differences between the wording in paragraph 1(a) and paragraphs 2(b) and 3(a) of the Allocation Memorandum. The introductory opening paragraph of the Allocation Memorandum must also be considered. It identifies the Company's overall commitment as being to "to stop the transfer of bargaining unit work as provided in this Memorandum of Agreement to Bell Technical Solutions (BTS)." Paragraph 1(a) more specifically stipulates that that cable repair functions "will not be performed by employees of BTS", but does not alter the fundamental commitment identified in the opening paragraph. Paragraph 2(b) stipulates that certain Central Office frame functions "will not be transitioned to BTS", and paragraph 3(a) stipulates that Business Data and Outright Sales functions "will not be transitioned to BTS". "Transitioned" (the plain and ordinary meaning of which is to "convert or change from one form, state, style, or place to another") is probably not the best choice of words for the apparent purpose of paragraphs 2(b) and 3(a); namely, that the identified work will not to transferred to BTS. The stipulation that cable repair functions will not be performed by BTS employees is arguably broader than the paragraphs 2(b) and 3(a) prohibitions against transitioning. However, the opening statement in the Allocation memorandum does more to inform the interpretation of paragraph 1(a) and what it requires of the Company than the difference in phrasing.

82. The Union claims that the Company agreed that subject to the single specified exception BTS "will not" perform cable repair work and that by doing so the Company committed to ensuring that BTS would not do any such work. Although the Union seems to acknowledge that the Company has made efforts to prevent BTS from performing the prohibited cable repair work, and expressly acknowledged in argument that there is some merit to the Company's assertion that it cannot control the actions of BTS technicians in the field, the Union claims that the Company's efforts have been "woefully" inadequate, and that in the result Craft and Services bargaining unit employees have suffered compensable harm.

83. The Union in effect argues that upon proof that bargaining unit work has been performed by non-bargaining unit persons liability flows without proof of fault. That is, the Union in effect posits that the paragraph 1(a) of the Allocation Memorandum constitutes a strict liability bargaining unit work protection provision. The principle of strict liability is that the mere occurrence of a prohibited/proscribed event incurs liability, without proof of fault.[7] It would take very clear language to transform even a traditional

[7] Although strict liability is not "absolute" liability because intervening acts of a third party is a recognized defence.

no contracting out provision (which paragraph 1(a) of the Allocation is not) into a strict liability prohibition that makes the employer liable if any bargaining unit work is performed by other than a bargaining unit employee regardless of its conduct in that respect.

84. Collective bargaining parties are deemed to understand the state of the law and the settled meaning of commonly used language when they express themselves in their collective agreement and collective agreement language must be interpreted in that context. Clear language is required to demonstrate a shared intent to depart from the established collective agreement interpretation roadmap. This includes provisions that restrict an employer's inherent management right to contract out (i.e. somehow authorize a third party to perform work understood to be bargaining unit work or normally performed by bargaining unit employees). Provisions that restrict the employer's right to contact out must be clear and unambiguous. But it must in any event be the collective agreement employer who assigns or otherwise transfers or authorizes a third party to perform bargaining unit work in order to engage a collective agreement a no contracting out provision. The defining characteristic of contracting out is the exercise in some form of control, even if only in the form of forbearance, of the movement of bargaining unit work to a third party.

85. Further, arbitrators have not taken a strict liability approach to collective agreement bargaining unit work protection provisions. Arbitrators have recognized that such provisions cannot absolutely guarantee that bargaining unit work will only be performed by bargaining unit employees because they cannot stop someone outside of the employer's control from performing such work without the employer's authorization (see for example, *Boise Cascade*, *Gourmet Baker Inc.*, and *Carleton University*, among others). The principle of collective agreement application developed by arbitrators is that an employer who has not been derelict in its collective agreement duties and responsibilities will not be found to have violated a bargaining unit work protection provision if it did not authorize, even if only implicitly, non-bargaining unit personnel to perform bargaining unit work.

86. I am satisfied that when it is read in context with the Allocation Memorandum considered as a whole, paragraph 1(a) is in the nature of a no contracting out provision. I am equally satisfied that the Company has not been contracting out the prohibited cable repair work to BTS. It is clear from the evidence that the Company has not subcontracted or transferred the cable repair work in issue to BTS, or in any way authorized BTS technicians to perform that work. The Company has not been (and is not) transferring or "having", authorizing or allowing BTS technicians perform cable repair work contrary to the Allocation Memorandum. On the contrary, the Company has tried to stop BTS

technicians from performing this work by making it clear to BTS that its employees are not to perform the prohibited cable repair work, and by prevailing upon BTS to make it clear to its employees that they are not to do such work or even to touch the cable behind the faceplate of distribution terminals.

87. This is by itself sufficient to dispose of the grievance. However, in the event that I am wrong about that I will consider the Union's complaint that the Company's and BTS' efforts to deal with the Allocation Memorandum problem and eliminate the performance of cable repair work by BTS technicians have been "woefully" inadequate.

88. The Union complains that the Company has been reactive instead of proactive and that it has done nothing to monitor the work of BTS employees in the field in order to discover the extent of the problem and stop them from doing cable repair work contrary to the Allocation Memorandum.

89. It is not true that the Company has done nothing proactive to address the Allocation Memorandum cable repair work problem. The Company's management has and continues to meet regularly and communicate with BTS management about the problem, and conducted the educational "road show" identified in the evidence. The Company's clear message to BTS that its technicians are not to perform cable repair work led to the three communications to BTS technicians reminding them that "BTS Technicians are not to perform cable repair functions". The Union complains that the communications have not been effective, and that the Company and BTS have not been specific enough about the prohibition, including that the prohibited cable repair work has not been described to BTS technicians in sufficient detail.

90. It seems to me that when it is clear (as it is) to a non-telecommunications technician arbitrator and the parties' non-technician lawyers what cable repair work is, it should be at least as clear to trained telecommunication technicians. The Company's efforts have also resulted in BTS taking more specific steps to stop its technicians from doing cable repair work, as demonstrated by the evidence of the coaching given to and discipline imposed on BTS technicians for performing such work. It is clear that whether or not all members of management at the operational level are fully invested in putting a stop to the problem, the Company's and BTS' combined efforts have reduced the numbers of discovered instances of BTS technicians performing cable repair work. The full extent of the success of these efforts is impossible to know because the full extent of the problem before and now is unknown. But I am satisfied that the problem has been reduced as a result of the Company's efforts. That said, there is no doubt that the problem has not been eradicated.

91. Although it might be helpful for BTS to issue a communication to its technicians that specifically states what cable repair work is and that they are prohibited from doing it (subject to the quick connect exception) and warns that BTS technicians who perform prohibited cable repair work are subject to discipline, that is a BTS employer-employee issue. But this grievance is against the Company not BTS, whose activities in the field the Company does not control. This case is about the Company's obligations under the Craft and Services collective agreement, not about BTS's obligations under its separate collective agreement with the Union.

92. I am not in a position to make a business judgment about the merits of the corporate division between the Company and BTS, but neither is it within my jurisdiction or any part of my job to do so. The undeniable point is that notwithstanding a level of corporate integration under the BCE corporate umbrella at a very high management level, the fact is that the Company and BTS are separate corporate and labour relations entities. The Company and BTS' work telecommunications operations in the field mesh at the distribution terminals, but the Company does not control BTS or (as the Union acknowledges) the actions of BTS technicians in the field.

93. There is no doubt that collective agreement enforcement is an employer-union joint responsibility. The question is: has the Company shirked its Allocation Memorandum paragraph 1(a) responsibility? Could the Company itself have done/do more than it has done or is doing? "More" can almost always be done. But what more can reasonably be expected of the Company in the circumstances?

94. It is far from clear how the Company could reasonably be more proactive than it has been, or how it could reasonably do more (or anything) to try to either catch BTS technicians in the act of doing cable repair work prohibited by the Allocation Memorandum or to otherwise discover that they have done so after the fact. (I note that the Union has made no concrete suggestions in that respect.) Who is in a position to discover and report an Allocation Memorandum cable repair work violation? Given the nature and separation of field operations between the Company and BTS the only way to discover instances of BTS technicians performing cable repair work prohibited by the Allocation Memorandum is to find them in the field. The Union becomes aware of an apparent[8] violation when a Craft and Services bargaining unit employee "stumbles upon it" (as the Union put it).

95. I am satisfied that the Company's Allocation Memorandum commitment does not require the Company to attempt in the field monitoring of the work of BTS technicians.

[8] "Apparent" because not all reported alleged instances have turned out to be prohibited cable repair work performed by a BTS technician.

As a practical matter it is in any event not practically possible for the Company to discover instances of BTS technicians doing cable repair work contrary to the Allocation Memorandum. The Company's managers are typically not in the field, and when they are it is to look after and deal with the Company's business and employees – not BTS'. It is unreasonable to suggest that the Company should or even could send someone out to monitor the work of every BTS technician to ensure that they do not do any such cable repair work even on some sort of random selection basis. How would the Company even do that, given the separation of field operations? How would Company management know where to look? The Company does not assign work to BTS technicians, BTS does – through a separate ticketing dispatch system that does not assign cable repair work to them. How can the Company (or BTS itself for that matter) know when a cable repair issue is encountered by a BTS technician in the field (which on the evidence typically happens without warning) without actually witnessing them doing it, unless the BTS technician (or someone else) reports it? And the evidence is BTS technicians typically do not record or report that they have performed cable repair work (other than in some instances of "temporary" connections which are equally prohibited) because they know they are not supposed to do it but do so anyway, which the Union suggests is they feel pressure <u>from BTS</u> to do so in order to get customers back in service by any means necessary.

96. To that last point, I think it odd that Paddon suggests that BTS technicians feel pressure to perform prohibited cable repair work in order to "complete" an assigned job in order to avoid being put into BTS' performance management program and possibly be subject to discipline. It is odd because it is clear from the evidence that BTS technicians know or ought to know they are not supposed to do cable repair work because they have received several communications instructing them not to perform that work. The fact that BTS technicians typically do not record cable work they perform typically do not record or report doing such work suggests the message has been received. Not only have BTS technicians been repeatedly instructed that they are not to perform cable repair work prohibited by the Allocation Memorandum, on the evidence BTS technicians who have been caught doing such work have received coaching or been disciplined for doing so. It is reasonable to expect that such news gets around the bargaining unit.

97. Further, the matter is not as completely "out of their control" as Paddon suggests BTS technicians "feel". BTS technicians can keep track of and record the reasons for "incompletes" (in or in addition to the records they are required to make as part of their job) so that if they are unable complete a job because cable repair work is required and they "refer to cable" no legitimate criticism can be levelled against them. A "refer to cable" situation can result in customer service delays and is something that neither the customer nor the Company or BTS want, but it is a natural and seemingly inevitable

consequence of the manner in which the telecommunications work has been divided between the two companies and not something individual BTS technicians can be blamed for or do anything about (and to that extent it is out of their control). To the extent that the Union believes (and can prove) that BTS is pressuring its technicians to perform cable repair work everyone agrees they are prohibited from doing that is an issue between the Union and BTS. If performance management coaching is given or discipline is imposed because a BTS technician properly "referred to cable" instead of performing prohibited cable repair work a grievance can be filed against BTS, and absent other legitimate reasons for the coaching (and perhaps subject to establishing a disciplinary element to the coaching) or discipline the grievance will succeed.

98. Recall also that the Union represents both Company Craft and Services bargaining unit employees and BTS bargaining unit employees. Although, the Union's Local Unions have been given union-side collective agreement administration and enforcement responsibility, the evidence suggests that these are more often than not if not always composite Local Unions that represent both Company Craft and Services and BTS employees. It seems to me that it is not unreasonable to expect the Local Unions to take steps to educate their BTS bargaining unit members about the specific cable repair work that they are prohibited from doing, and about the protection the Union can offer if they are in fact pressured by BTS to do the prohibited work or if BTS penalizes them for not performing prohibited cable repair work.

99. Although not completely successful, in the sense that the problem of BTS technicians doing cable repair work prohibited by the Allocation Memorandum has not been completely eradicated, the evidence suggests that the Company's attempts to address the issue have resulted in a significant reduction in the number of such instances. On the evidence, the Company has not been avoiding its obligations under paragraph 1(a) of the Allocation Memorandum. On the contrary, I am satisfied that the Company has taken reasonable steps to comply and to get BTS to stop doing prohibited cable repair work.

100. There is no way to know the extent to which BTS technicians have performed prohibited cable repair work. On the evidence, such work is not assigned to BTS technicians, and when they do so they typically do not record or report it. Instances of BTS technicians performing cable repair work typically only come to the Company's attention when the Union complains after a Craft and Services technician happens upon such an instance. There is no way of knowing the percentage of instances that are caught by the Union. The Union's speculation that the extent of the problem is greater than has discovered is a fair one, but it is speculation and how much greater is no more than a guess.

101. It is obviously the case that the amount of Craft and Services bargaining unit work is reduced by the extent to which its cable repair work is done by BTS technicians. To that extent, whatever it is, the Union and its Craft and Services bargaining unit employees have lost out. But the Union does not know, and I am satisfied that as a practical matter it is impossible for anyone to know how much prohibited cable repair work has been or is being performed by BTS technicians. The Union does not know and does not even speculate about the actual impact on the bargaining unit of BTS technicians doing cable repair work covered by the Allocation Memorandum. Its relief requested estimate that every such instance merits compensation of $2,000.00 is no more than a wildly optimistic guess. (And how one would identify who would be entitled to any compensation in the event of an Allocation Memorandum violation is to say the least unclear.) There is no evidence that the Craft and Services bargaining unit is being subverted or that any bargaining unit employee has suffered any actual loss as a result of BTS technicians doing prohibited cable repair work. In any case, it does not follow from the fact that the apparently diminished problem persists despite its efforts that the Company has violated the Allocation Memorandum.

102. In the result, I am not satisfied that anything that the Company has done or failed to do amounts to a violation of the Allocation Memorandum.

103. The grievance is therefore dismissed.

104. Before ending, I note that the evidence presented raises the question: is it the third party actor BTS' fault that the problem persists? It certainly appears that its technicians (the Union's members in a separate bargaining unit) are at fault since on the evidence before me it seems that some of them continue to do prohibited cable repair work notwithstanding the Company's efforts to stop them, and BTS' instructions and efforts to stop them from doing so. Is that because of conduct at the BTS lower management operational level that upper management is countenancing or turning a blind eye to? It is impossible to tell from the evidence presented, and in any event BTS and that issue are not before me.

105. I note that there is no real jurisdictional dispute here because everyone seems to agree that "cable repair functions … except for the replacement of serial quick connect-type terminals that do not require testing using cable testing equipment to identify a trouble" is Company Craft and Services work, and not BTS bargaining unit work. There may nevertheless be some tension between the two bargaining units represented by composite Local Unions operating under the auspices of the same Union. This may create an awkward situation for the Union because it is generally more "politically"

palatable for a union to claim that an employer's conduct is effectively taking bargaining unit work away contrary to the collective agreement than to claim that the employer is not properly limiting bargaining unit work – even if the effect is the same. I don't know whether the Union has also advanced a claim under its BTS collective agreement that BTS is improperly requiring, encouraging or permitting its technicians to perform the cable repair work in issue, or has chosen the Craft and Services collective agreement as its "hill to die on".

106. Unfortunately, the problem of BTS technicians doing cable repair work prohibited by the Allocation Memorandum seems to be one of those intractable problems to which grievance arbitration can offer little in the way of a solution when the employer has acted reasonably and in good faith (as I am satisfied the Company has). If I had a magic arbitrator wand I could wave to solve the problem I would use it. But I do not.

DATED AT TORONTO THIS 29th DAY OF DECEMBER 2021.

George T. Surdykowski

George T. Surdykowski – Sole Arbitrator