IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIFOR, LOCAL 723M
(the "Union")

and

BELL MEDIA INC.
(the "Employer")

Grievance of Ivan Wong (Grievance no. 723-2014-03)

AWARD

Appearances on behalf of the Union:
Micheil Russell, Counsel
Dave Lewington, National Representative
Kelly Dobbs, President, Unifor Local 723M
John Sewell, Treasurer
Ivan Wong, Grievor

Appearances on behalf of the Employer:
Janine Liberatore, Counsel
Robert Knapp, Manager, IT Help Desk
Catherine Foti, Director, Human Resources, Queen Street
Robert Yamamoto, Director of Infrastructure Technology Systems
M. Morrison, Director of Technical Operations

Arbitrator: Diane L. Gee

Date of Award: June 9, 2015

1. Grievance no. 723-2014-03 is a grievance in which it is alleged that the Employer is in violation of Article 10.1 of the collective agreement by virtue of having assigned work to other than bargaining unit employees without recalling Ivan Wong (the "grievor") from layoff. Article 10.1 reads as follows:

> The Company agrees not to assign duties relating but not limited to the preparation, administration, audition, rehearsal and/or broadcast of the Company's television programmes and overall operation, including the operation of technical equipment, to other than employees in the bargaining unit if such work assignment directly avoids the hiring a full-time employee in the bargaining unit, directly results in a layoff, or avoids a recall from layoff of a full-time employee. It is agreed that the Company's obligations under this Article shall only apply with respect to work on television programmes or productions produced exclusively by and for the company on the company's premises.

2. The Employer denies that it is in violation of Article 10.1 of the Collective Agreement.

3. The parties called numerous witnesses over the course of the hearing. The Union called John Sewell, Treasurer, and David Lewington, National Representative. The Employer called Mr. Morrison, Director of Technical Operations; Catherine Foti, Director, Human Resources Queen Street; Rob Yamamoto, Director of Infrastructure Technology Systems; Robert Knapp, Senior Manager Business Solutions Architecture; and Anthony Petron, Help Desk Supervisor at Queen Street and Agincourt.

4. The National Association of Broadcast Employees and Technicians ("NABET") was certified in June 1988 to represent a unit of employees of CITY-TV, CHUM City Productions Limited, and MuchMusic Network, Division of CHUM Limited. In June 1995, the certificate was amended to change the name of the bargaining agent to the Communications, Energy and Paperworkers Union of Canada ("CEP") and further change the name of the employer to CITY-TV, CHUM City Productions Limited, MuchMusic Network and BRAVO! a Division of CHUM Limited. The certificate is for an "all employee unit" except for specific exclusions and contains no geographic reference aside from a reference to "Toronto, Ontario" that appears immediately below the list of entities that comprise the "employer" in the title of proceedings. As at the time of the instant proceedings, the bargaining agent had become UNIFOR, Local 723M and the employer Bell Media Inc. The Certification Order has not been amended to officially record this change.

5. The Collective Agreement between the parties that applies to the instant dispute was in effect from November 1, 2009 to May 31, 2014. The entities that collectively constitute the "Company" that is bound to the Collective Agreement are: Bravo! Digital Media, Fashion Television Channel, Much LOUD, Much More Music,

Much Music, Much Vibe, Much More Retro, Space: The Imagination Station, Star! – The Entertainment Information Station, and CP24, all divisions of CTV Limited. The Company is a both a broadcaster and producer of television and radio.

6. The term "employee" is defined in Article 2.1 of the collective agreement to mean: "any person employed in a classification included within the bargaining unit set forth in Article 2.2." Article 2.2 defines the bargaining unit as follows:

> 2.2 **Bargaining Unit** – The Company recognizes the Union as the sole and exclusive collective bargaining agent for all employees in the unit set forth in the certification of the Canada Labour Relations Board dated July 10, 1995 or any amendments thereto, as mutually agreed by the parties or as ordered by the Canada Labour Relations Board.

There is no dispute that the classification in issue herein, that of IT Technician I, is included in the bargaining unit.

7. The operations of the Company are, for the most part, housed in three buildings that are collectively referred to by the parties and herein as "Queen Street." The three buildings are 299 Queen Street and 250 and 260 Richmond Street in Toronto.

8. Prior to 2007, the ticketing system for recording and tracking requests for IT assistance made by the staff at Queen Street was referred to as "Footprints." It was a web-based ticketing system that required the IT Technician who answered a call to manually create a ticket. The IT Technician who answered the call generally tried to resolve the issue and, only if the issue was to take longer than 5 – 10 minutes, would the matter be placed in a bin to be resolved by another IT Technician. The IT Technicians at Queen Street were scheduled to work between the hours of 7:00 a.m. and 6:00 p.m. An end user who was in need of assistance after 6:00 p.m. or on the weekends would have to have an IT technician paged or wait until the next business day. There was no IT work that was generated by personnel of the Company who worked at Queen Street that was not handled by an IT Technician who also worked at Queen Street.

9. In 2007, when Bell Global Media acquired CHUM Limited, it acquired stations located at 9 Channel Nine Court in Agincourt ("Agincourt"). Agincourt had a help desk staffed by non-union IT Technicians who were scheduled from 5:00 a.m. to 1:00 a.m. seven days a week in order to support late night news shows and Canada AM.

10. In early 2008 the Company implemented a new IT system that is shared between Queen Street and Agincourt formally known as the "Service Centre" and is informally known as the "help desk". Under the new system there continues to be a help desk staffed by IT Technicians at Agincourt and a help desk staffed by IT Technicians at Queen Street, however, there is now one central phone number and

email address that end users from both Agincourt and Queen Street use to ask for assistance. Callers call in to a single number and are asked by a computerized system to indicate whether they are calling from Queen Street or Agincourt and routed, depending on the time of their call, to either the Queen Street or Agincourt help desk. Tickets are generated for each and every request for assistance. Tickets that are not resolved immediately are placed in a bin to be picked up by an IT Technician and resolved. Once resolved, the ticket is closed.

11. During the hours when Queen Street IT Technicians are scheduled to work (7:00 a.m. to 6:00 p.m.), the management directive is that calls for IT assistance from personnel at Queen Street are to be handled by IT Technicians at Queen Street. As indicated in the findings of fact set out below, the directive is not strictly adhered to. During those hours when there are no IT Technicians working at Queen Street but there are IT Technicians working at Agincourt (after 6:00 p.m. until 1:00 a.m. and between 5:00 a.m. and 7:00 a.m. Monday to Friday and from 5:00 a.m. until 1:00 a.m. on Saturdays and Sundays) an IT Technician at Agincourt would respond to a request for assistance from an end user located at Queen Street. Callers between 1:00 a.m. and 5:00 a.m. with urgent issues are routed to an on-call Agincourt IT technician.

12. Given the manner in which tickets are generated and then closed in the Service Centre system, the Company is able to generate data on the number of tickets handled by an IT Technician, which location the IT Technician works out of, and where the calls generated from. A single full-time IT Technician is measured against completing 170 tickets each month. 97.24% of all calls/emails for IT assistance generated by staff located at Queen Street are generated between the hours of 7:00 a.m. and 6:00 p.m. Monday to Friday. Only 2.76% of calls generated by Queen Street users are generated outside of these hours.

13. Following the acquisition of Astral Media in or about 2012, the Company established targets for head count reductions. In order to achieve the target established for the IT group, it was decided that the Queen Street help desk would be reduced by one position. This decision was based on the fact that there had been a reduction in ticket volumes in the preceding months. Mr. Wong was the most junior IT Technician and was given notice of lay off on July 31, 2013. The Union filed a grievance challenging Mr. Wong's lay off on August 2, 2013.

14. On March 31, 2014 there was a conference call between representatives of the Union and representatives of the Company to discuss after hours calls for Queen Street users. During this call, the Company made reference to the number of calls generated by users located at Queen Street that were handled by IT Technicians located at Agincourt. It was at this time that the Union discovered how much IT Technician I work was being performed by the non-union IT staff at Agincourt. A second grievance, alleging a violation of article 10.1, was filed on April 4, 2014. It is this second grievance that is the subject matter of this decision.

15. From January 2013 to November 2014, Agincourt IT Technicians responded to calls generated by Queen Street staff in the following quantities:

2013	
January	210
February	191
March	143
April	117
May	138
June	162
July	143
August	146
September	174
October	226
November	163
December	170
2014	
January	211
February	188
March	184
April	225
May	205
June	234
July	209
August	167
September	198
October	199
November	128

16. The average number of calls resolved by Agincourt IT Technicians over the five months following Mr. Wong's layoff was 175 and over the 16 months following Mr. Wong's layoff was 189. Thus, the evidence establishes that, following Mr. Wong's layoff, there has been a sufficient quantity of IT work performed in connection with tickets generated by staff at Queen Street to employ one full-time IT Technician. Mr. Wong was not recalled to do this work.

17. The Company argues that article 10.1 does not apply because, as a result of the second sentence of article 10.1, it is limited to duties relating to television programmes and further limited to work at the Company's premises. The Company argues that the work of an IT Technician does not relate to the Company's television programmes and, if it does, is not at the Company's premises. In addition, the Company argues that the Union cannot assert ownership or jurisdiction over the work in issue because it has historically been shared between the IT Technicians at Queen Street and Agincourt. Finally, the Company argues that the article does not restrict the resolution of calls generated from Queen Street by Agincourt IT

Technicians as there is no direct causal relationship between such and the avoidance of recalling Mr. Wong.

18. The Union argues that the work performed by the IT Technicians relates to the preparation and/or broadcast of the Company's television programmes and thus falls within the scope of the first sentence of article 10.1 The Union further submits that intention of the second sentence of article 10.1 was to permit the Company to acquire programming from outside without a challenge from the Union that the Company ought to have produced it themselves using bargaining unit members. The Union argues that it does have jurisdiction over the work to the extent is falls within the protections of article 10.1. In terms of the need for a causal relationship, the Union argues that, in the case of the avoidance of a layoff, the language of article 10.1 does not indicate that a "direct" causal relationship is required. The only requirement is that the assignment of the work "avoids a recall from layoff" and that such is the case on the facts before me.

19. It is my determination that the work performed by IT Technicians falls within the scope of the first sentence of article 10.1. It is related to the preparation and or broadcast of the Company's television programmes and overall operation.

20. The evidence adduced before me establishes that, amoungst the tasks performed by an IT Technician I at Queen Street, are the following:

- Channels BNN and CP24 are both live to air. The IT Technicians at Queen Street resolve IT issues for Channels BNN and CP24 as necessary in order to ensure that they air.

- When the sales group from Astral Media moved into Queen Street, work was performed setting up computers, transferring files, configuring their email, setting up printers.

- The CRTC requires closed captioning. IT Technician I's fully build and support the computers used by the closed captioning group.

- MTV utilizes online shows and visuals. IT Technicians support the social devises used for the online shows as well as the hardware.

- The Marilyn Denis Show employs Wi-Fi. Technicians ensure that the devises needed to access Wi-Fi are working and that, on the day of the show, they can get on the Internet.

- There is IT work to be performed in connection with awards shows such as the Much Music Awards. This involves set up, wiring, and the connection of lighting and audio boards.

- The IT Technicians respond to requests for assistance from staff at Queen Street who depend upon the hardware and software serviced by the IT group in order to do their jobs. In the absence of the IT group hardware breakdowns and outdated/malfunctioning software would result in interruptions in programming and broadcasting.

21. My finding that the IT Technicians perform work that relates to the preparation and/or broadcast of the Company's television programmes is consistent with a finding made by the Canada Industrial Relations Board in *Communications, Energy and Paperworkers Union of Canada and CITY-TV, CHUM City Productions Limited, MuchMusic Network and BRAVO!, Division of CHUM Limited*, [1999] CIRB no. 22 in which the CIRB characterized the Information Technology department of the Company as an operational support department to the general broadcast operations and television channels housed at Queen Street. At paragraph 31 the function of the IT department is described as follows:

> The IT department, which is also located in the basement, is essentially CHUM Television's Informatics division. It is responsible for the ChumCity building's internal computer network (Local Area Network or "LAN") and for CHUM Television's Domain Name Server ("DNS"). The LAN allows for desktop applications, internal communication by E-mail and other forms of data transmission such as spread sheets and graphic designs. The IT department provides technical support in relation to the LAN and informatics to every segment of CHUM located in the ChumCity building, including interactive.

22. I turn then to the Company's argument that the work is excluded from the application of article 10.1 because the second sentence of article 10.1 states that it only applies "with respect to work on television programmes or productions produced exclusively by and for the Company at the Company's premises."

23. Mr. Lewington gave evidence as to his understanding of the parties' mutual intentions as to the meaning of this language. Mr. Lewington was not, however, at the bargaining table when the language was negotiated and bases his evidence on what he was told by the Union negotiator who was so present. As such, Mr. Lewington's evidence in this regard is hearsay. Further, while Mr. Lewington alluded to conversations he had with management representatives that he stated evidenced a mutual understanding as to the meaning of the language, few particulars, such as the dates on which the conversations occurred, the context in which the conversations took place, or what was said by whom, were provided. Mr. Lewington's evidence was a reflection of his views or opinions as opposed to providing the foundation from which I could reach a conclusion. Thus, do not give any weight to Mr. Lewington's evidence on this point.

24. I am presented with two interpretations of the language in issue. The Company says the second sentence of article 10.1 means that the article does not apply unless the work is work on television programmes or productions and further

does not apply if the work is being done outside of Queen Street. The Union says the language means that article 10.1 does not apply to productions acquired from elsewhere, that is programmes or productions acquired from others as opposed to produced by the Company. In order to discern the mutual intentions of the parties, the words of a collective agreement are to be given their commonly understood meaning in the context within which they appear. Where two possible interpretations present themselves the one that is most probable is to be preferred.

25. Article 10.1 consists of only two sentences. The first sentence sets out the Company's agreement not to assign duties "relating but not limited to the preparation, administration, rehearsal and or broadcast of the Company's television programmes." The scope of duties included within the first sentence is fairly broad; amoungst other duties not described but included by virtue of the phrase "not limited to", duties "related to" the preparation, administration etc. of a Company television programme, it is included in the work covered by Article 10.1. There is no restriction on the type of television programme to which the work must relate. As I have found in this case, work that is necessary to the production or broadcast of a television programme, but is not directly involved in the actual production or broadcast of a programme, is "related to" a television programme and thus included in the scope of the first sentence.

26. In contrast, the second sentence of article 10.1 speaks of "work on" television programmes or productions. The use of the words "work on" in the second sentence as contrasted with the words "relating to" in the first sentence suggests that the second sentence was intended to address a narrower scope of work than the first. In contrast to the first sentence where "television programmes" is not qualified at all, the second sentence limits its scope to television programmes produced by and for the Company at its premises. The second sentence strictly defines a scope of work; it does not contain the phrase "not limited to." According to the second sentence, it is only where work is on a television programme produced by and for the Company at its premises that the "Company's obligations" under article 10.1 apply.

27. The second sentence thus describes a narrower scope of work than does the first sentence. The first sentence places an obligation on the Company that is described in broad terms. The second sentence states "it is agreed that the Company's obligations under this Article shall apply only with respect to work" that is described much more narrowly. Either the second sentence operates to narrow the first (as suggested by the Company) or the second sentence is a carve out from the first (as argued by the Union).

28. It is my determination that the Union's interpretation is more probable than that offered by the Company. There are only two sentences in article 10.1. The Company's interpretation would have those two sentences contain conflicting definitions of the work covered by the article. Further, if the Company is correct, the scope of work set out in the first sentence is completely superfluous; it is completely

overtaken by the scope of work in the second sentence. The result would be to ignore words contained within the first sentence; an approach the rules of interpretation indicate is not to be taken unless necessary to avoid an absurd result. Reading the article as a whole and in context it is more probable, and I so find, that the parties intended to extend the protections of article 10.1 to the broader scope of work as described in the first sentence of article 10.1 and then carve out from that protection work performed on productions produced other than "exclusively by and for the Company at the Company's premises."

29. In addition, in so far as the Company challenges the application of article 10.1 based on the fact that the work had been assigned to persons located outside of Queen Street, this work was, prior to being assigned to non-bargaining unit members, performed by members of the bargaining unit at Queen Street. As such, it is the work as it existed prior to its assignment to non-bargaining unit employees that must fall within the scope of article 10.1 in order for it to be protected not after.

30. This leads to the Company's argument that the work was not exclusively bargaining unit work as it was shared work between the non-union Agincourt IT Technicians and the unionized Queen Street IT Technicians. As I have set out above, 100% of calls generated by Queen Street staff were, prior to 2007, resolved by unionized IT Technicians at Queen Street. When the Service Centre was introduced in 2008, the Union did not take issue with the non-union IT Technicians at Agincourt resolving some tickets generated by staff at Queen Street as article 10.1 specifically permits the assignment of bargaining unit work to "other than bargaining unit members." However, article 10.1 only permits such sharing of bargaining unit work if the amount being done non-union does not, amoungst other things, result in the avoidance of a recall. Once the amount of work being assigned to other than employees in the bargaining unit reaches a stage where it results in the avoidance of a recall from layoff, the amount of work representing a full-time position must be returned to the bargaining unit and can no longer be done by non-union members. Any "sharing" that is permitted is capped at an amount that is less than a full-time position when a layoff is avoided as a result of the assignment of work outside of the bargaining unit.

31. Finally, the Company argues that there is no causal link between the resolution of calls generated by Queen Street staff by Agincourt IT Technicians and Mr. Wong not being recalled from layoff. It is argued that the causal link must be direct and that there is no such evidence in this case. The second half of the first sentence of article 10.1 reads as follows: "if such work assignment directly avoids the hiring of a full-time employee in the bargaining unit, directly results in a layoff, or avoids a recall from layoff of a full-time employee." The word "directly" appears twice: immediately before "avoids the hiring a full-time employee" and immediately before "results in a layoff". It does not appear before "avoids a recall from layoff of a full-time employee."

32. As determined by *Vaughan Hydro-Electric and CUPE, Local 2246* (1995), 51 LAC (4th) 129 "as a result of" can only be interpreted as meaning causation. There must be a causal link between the assignment of bargaining unit work to persons who are not members of the bargaining unit and the avoidance of Mr. Wong's recall in order for article 10.1 to be triggered. Further, as determined in *Re Petro-Canada Inc. and Energy & Chemical Workers Union, Local 593* (1988), 1 L.A.C. (4th) 404; *Re Toronto Electric Commissioners and Canadian Union of Public Employees, Local 1*, (1974), 6 L.A.C. (2d) 243; *Re Caressant Care Nursing Home of Canada Ltd. and Service Employees Union, Local 183* (1994), 44 L.A.C. (4th) 24 and *Re Ottawa-Cornwall Broadcasting Ltd. (CJOH-TV) and National Association of Broadcast Employees & Technicians*, (1982), 4 L.A.C. (3d) 284 a vacancy exists only where there is adequate work to fill a full-time position.

33. Mr. Wong was laid off as a result of a manpower reduction initiative that required the IT group to reduce by a total of 14 staff. It was decided that one of those 14 staff would be a member of the Queen Street help desk based on an assessment of the help desk workload during the previous months. Mr. Wong was served with his layoff notice on July 31, 2013. The average number of calls generated by Queen Street staff that was resolved by Agincourt IT Technicians during the months of March to July 2013 was 140 calls per month. While 140 was fairly close to the 170 calls per month against which the Company measures a single IT Technician, the Company was in a position where it could lay Mr. Wong off without there being sufficient work being assigned to persons outside of the bargaining unit to fill a full time job. Mr. Wong's layoff would not offend article 10.1. However, after Mr. Wong's layoff, the number of calls generated by Queen Street staff resolved by Agincourt IT Technicians rose. The average number of calls resolved by Agincourt IT Technicians over the next 5 months was 175 and over the next 16 months was 189. The increase in the number of calls resolved by the Agincourt IT Technicians that were generated out of Queen Street rose to an extent where there was, over a 16 month period following Mr. Wong's layoff, enough work to fill a full-time IT Technician position.

34. It is my determination that the Company's avoidance of recalling Mr. Wong from layoff is causally related to the fact that the Agincourt IT Technicians are now doing more than 170 calls generated by Queen Street Staff each month. The work in issue exists and has to be performed. The Company is having it performed by Agincourt IT Technicians and, as a result of doing so, is able to avoid recalling Mr. Wong.

35. Having regard to the foregoing, I declare the Company to be in violation of article 10.1 of the Collective Agreement by having assigned to IT Technicians at Agincourt duties relating to the preparation, administration, audition, rehearsal and/or broadcast of the Company's television programmes and overall operation in circumstances where such work assignment directly avoided the recall from layoff of Mr. Wong.

36. The Union has asked that I further declare Mr. Wong's layoff to be a violation of the Collective Agreement and order that he be recalled to work with full compensation. The Company disputes that such is an appropriate remedy given that the parties elected at the commencement of this matter to proceed with only Grievance no. 723-2014-03 and place the grievance arising directly out of Mr. Wong's layoff in abeyance.

37. At the point in time that Mr. Wong was laid off, there had been five consecutive months during which there were fewer than 170 calls generated by users from Queen Street resolved by Agincourt IT Technicians. Further, the Union accepts that Mr. Wong was laid off as part of an initiative to reduce manpower. I am not persuaded, based on the evidence before me, that Mr. Wong's layoff was a violation of the Collective Agreement.

38. I have found that there was a point in time when Mr. Wong ought to have been recalled, and thus consider it appropriate to order the Company to recall Mr. Wong to the position of IT Technician I and compensate him for his losses. Given that the parties have not had the opportunity to address before me (either through evidence or submissions) the date on which Mr. Wong's recall ought to have occurred I have deliberately not indicated a date on which such recall is to be considered effective. I understand Mr. Wong has been performing some work under contract for the Employer during the period of his layoff and accordingly the issue may be moot, however, the quantum of compensation owing to Mr. Wong will depend upon the date he ought to have been recalled. I remit this issue to the parties and remain seized to deal with it should they be unable to reach a resolution.

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Diane L. Gee