Grievance File Nos.: 6004-2015-024
6004-2015-025

IN THE MATTER OF AN ARBITRATION
Under the *Canada Labour Code,* R.S.C. 1985, c. L-2

B E T W E E N:

BELL CANADA

(the "Company"),

- and -

UNIFOR, LOCAL 6004

(the "Union"),

AND IN THE MATTER OF A GROUP GRIEVANCE AND INDIVIDUAL GRIEVANCE REGARDING ALLEGED VIOLATON OF OUTSOURCING PROHIBITIONS AFFECTING "BIMS" EMPLOYEES.

SOLE ARBITRATOR: Gordon F. Luborsky

APPEARANCES

For the Union: Micheil M. Russell, Counsel
Ron Girardin, National Representative
Michelle Arruda, National Representative
Derek MacLeod, President, Local 6004

For the Company: Maryse Tremblay, Counsel
Serge Thibault, Sr. Consultant, Labour Relations

HEARD: October 13 and 14, 2016, May 11, 2017
Ottawa, Ontario

DECISION: December 5, 2017

A W A R D

I. Introduction

[1] The Company, Bell Canada, incorporated a wholly-owned numbered subsidiary in or about 2000 that was later named, "Bell Internet Management Systems Inc.," and referred to as "BIMS". It operated a call centre providing, among other things, technical assistance for Bell Canada customers having difficulties with the emergent Internet services offered by the Company. The BIMS employees were not unionized or included in any existing bargaining unit

within Bell Canada, consistent with the Company's view that they were performing duties for a third-party corporation covered under provincial employment jurisdiction.

[2] At the same time, the Union (then named Communications, Energy and Paperworkers Union of Canada or "CEP") held exclusive representation rights for separate bargaining units at Bell Canada for "Craft and Service" workers (hereinafter "Craft Unit") and "Clerical and Associated" employees (hereinafter "Clerical Unit") at different locations throughout the country. Over the years the Union came to recognize the BIMS workers as performing substantially the same functions as those in the CEP Craft and/or Clerical Units working out of the same Bell Canada office buildings in Ottawa and Montréal that were integral to its developing telecommunications business under the common direction and control of the Company. Consequently, in May 2011 the CEP filed an application under sections 35 and 44 of the *Canada Labour Code,* R.S.C. 1985, c. L-2 (the *"Code*") before the Canada Industrial Relations Board ("CIRB" or "Board") claiming that Bell Canada and BIMS constituted a single employer ("single employer application"), or, in the alternative, that a "sale of business" had occurred between them, thus impacting CEP's bargaining rights.

[3] Section 35 of the *Code,* which is immediately relevant, provides as follows:

> 35. (1) **Board may declare single employer** – Where, on application by an affected trade union or employer, associated or related federal works, undertakings or businesses are, in the opinion of the Board, operated by two or more employers having common control or direction, the Board may, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business. Before making such a declaration, the Board must give the affected employers and trade unions the opportunity to make representations.
>
> 35. (2) **Review of bargaining units** – The Board may, in making a declaration under subsection (1), determine whether the employees affected constitute one or more units appropriate for collective bargaining.

[4] In circumstances described below the Company and Union resolved the single employer application with a signed Memorandum of Agreement dated May 29, 2013 providing in part that: "all non-management BIMS employees will remain at the employ of BIMS until March 31, 2014" and, "[o]n April 1, 2014, all non-management BIMS employees will be transferred to Bell

Canada and the CEP will become the certified bargaining agent of the newly transferred employees", which the parties later agreed to extend to April 6, 2014. After considering an agreed statement of facts filed by BIMS, Bell Canada and CEP, the CIRB subsequently issued an order dated July 4, 2013 declaring that: "Bell and BIMS constitute a single employer and a single federal work, undertaking or business pursuant to section 35(1) of the *Code*."

[5] The Company and Union renewed their collective agreement for the Clerical Unit that included a Memorandum of Agreement ("MOA") entitled, "Outsourcing/Contracting Out" dated September 23, 2013, providing *inter alia* that:

> It is agreed that for the duration of this Memorandum of Agreement, Bell Canada will not, as a direct result of the outsourcing or contracting out of any of the work normally performed by employees included in the Clerical and Associated Employees bargaining unit, declare a surplus that would result in the termination or lay off of any Regular Bell Canada employee included in the Clerical and Associated Employees bargaining unit and who is employed by Bell Canada on the date of the signing of this Memorandum of Agreement.

[6] On or about May 19, 2015 the Company announced that it was outsourcing the function of former BIMS employees at its Ottawa offices in the classification "Resolution Representative" (also referred to as "Clerical Profile 537"), resulting in the layoff of up to 30 employees who were unable to find alternate positions within the Company. The loss of those jobs caused the Company to also declare as surplus the single "Administrative Support" for the 30 Resolution Representatives (referred to as a "Clerical Profile 303" job). These surplus declarations were effective June 4, 2015.

[7] The Union asserted that the Company's surplus declarations and layoff of its members as a result of outsourcing violated the "Outsourcing/Contracting Out" MOA. It consequently presented a group grievance to the Company on behalf of the 30 Resolution Representatives and a single grievance by the affected Administrative Support on June 18, 2015, both alleging that: "The Company's assignment of Clerical and Associated Employees' work to contractors is an abuse of management rights and a violation of the Collective Agreement." The grievances requested as resolution: "Full Redress. That the Company assign all Clerical and Associated Employees' work to employees in the Clerical and Associated Employees bargaining unit [and

that] the Company provide appropriate damages to all adversely affected employees and such further relief as may be appropriate". It claimed that the Company's actions violated articles 1, 3, 12, 18, 37, 39 and others of the (Clerical Unit) collective agreement.

[8] In denying the grievances at "step two" of the grievance procedure under the collective agreement the Company responded on July 23, 2015 that, "The Grievors did not become Bell Canada employees until April 6th, 2014 and are therefore not covered by the Memorandum of Agreement dated September 23rd, 2013." This was repeated in the Company's "third step" written response under the grievance procedure dated October 6, 2015 which stated: "It is the Company's view that the Grievors, who were declared surplus on June 4th, 2015, became Bell Canada employees and entered the clerical bargaining unit on April 6th, 2014. Therefore the Outsourcing/Contracting Out MOA in the current collective agreement does not apply to the Grievors, as they were not Bell Canada employees on September 23, 2013."

[9] The dispute between the parties is accordingly joined on the status of the 31 adversely impacted employees when the September 23, 2013 MOA was signed. Are they covered by that MOA proscribing outsourcing that results in the layoff of employees? The Union claims that as a result of the CIRB's single employer declaration of July 4, 2013, the 31 former BIMS employees were, in law, Bell Canada employees and members of the Union's Clerical and Associated Employees' bargaining unit effective that date and as such, they were entitled to the security of tenure guaranteed under the Outsourcing/Contracting Out MOA dated September 23, 2013.

[10] The Company disagrees, maintaining that by the express terms of the parties' Memorandum of Agreement dated May 29, 2013, the BIMS workers did not become Bell Canada employees with any employment rights under the Craft or Clerical Unit collective agreements (including the attached MOAs) until they were formally transferred into the CEP bargaining units on April 6, 2014 by agreement of the parties. Therefore, the BIMS employees were not covered by the September 23, 2013 MOA on Outsourcing/Contracting Out and the Company's managerial right to contract out the identified work resulting in the surplus declarations and layoffs for up to 31 former BIMS employees was unrestricted.

[11] The parties agreed at the outset of the arbitration hearing into this matter that I was properly appointed under the Clerical and Associated Employees' collective agreement with jurisdiction to determine their dispute. They also agreed that in the event I found the Company violated any provision of the collective agreement and/or MOAs, that I should refer the remedy back to the parties, remaining seized to decide that issue if they could not settle the matter. While it appears on the preliminary information submitted that all but two of the 31 employees were terminated via layoff (the remaining two exercising their seniority to displace employees in other classifications who may have consequently lost their employment) the parties reserved the right to present further evidence, if necessary to quantify any damages.

II. Decision

[12] For the reasons that follow I conclude the Company violated the collective agreement/MOA and therefore allow both grievances, remitting the question of appropriate remedy to the parties for resolution, on which I remain seized.

III. Factual Context of Dispute

[13] In addition to documents filed on consent, I heard testimony on behalf of the Union from Mr. Derek MacLeod, who has been the president of Unifor, Local 6004 (and its CEP predecessor) since January 2013 representing Clerical and Associated Employees of Bell Canada primarily working out of two office buildings in Ottawa, and Ms. Barbara Dolan, who is the Union's current "Director of Strike Fund and Retired Workers" but in 2013 was CEP's "Administrative Vice President" responsible for its communications sector employees that included the Clerical and Associated Employees of Bell Canada. The CEP merged with the Canadian Auto Workers to become Unifor on August 31, 2013. As its successor, Unifor has retained all rights and obligation of its CEP predecessor.

[14] The Company presented evidence from Mr. Serge Thibault, who as of his testimony had been a Senior Labour Relations Consultant for 26 years with responsibilities for evaluating the

jobs of clerical and craft employees for placement in the appropriate salary groups under their respective collective agreements. I also heard testimony from Mr. Reno Vaillancourt, who was at all material times Vice President, Human Resources and Labour Relations for Bell Canada Enterprises (BCE) and Bell Canada, having been employed with the Company and BCE for a combined 15 years with overall responsibilities for the human resources and labour relations functions of the corporate establishment.

[15] There is substantial agreement on the relevant background facts to the present dispute, which I find on the evidence as follows.

(a) Related Employer Application of May 4, 2011

[16] The CEP and Bell Canada were parties to a collective agreement for the Clerical and Associated Employees in effect from January 19, 2010 to May 31, 2013. Under "Appendix A" of the collective agreement named, "List of Clerical and Associated Occupations", the classifications of "Administrative Support" (in "Salary Group 10") and "Resolution Representatives" (in "Salary Group 11") are set out as two of the many "occupations" covered by the contract. The collective agreement also included the following MOA at the back of the document (as one of several attached MOAs) entitled "Outsourcing/Contracting Out", signed by representatives of the Company and the Union on January 19, 2010.

OUTSOURCING / CONTRACTING OUT

MEMORANDUM OF AGREEMENT BETWEEN

BELL CANADA

AND

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

> Bell Canada is evolving in a very competitive marketplace and the parties recognize that in order to remain successful, Bell Canada needs to manage its business in the most efficient manner. The parties agree that, amongst other things, efficiency requires flexibility in the workforce, the

assignment of work and Bell's ability to assign employees according to customer and business needs.

It is understood that Bell Canada has the right to outsource or contact out any of the work normally performed by employees included in the Clerical and Associated Employees bargaining unit at any time and under its own terms, subject to Letters of Intent on the Utilization of External Human Resources and on Outsourcing Initiatives and to the present Memorandum of Agreement.

The Company's preference is to maintain employment internally. In light of this, the intent of this Memorandum of Agreement is to provide a measure of job security for existing Regular Bell Canada employees, who are included in the Clerical and Associated Employees bargaining unit and who are employed by Bell Canada at the date of the signing of this Memorandum of Agreement, in the event that Bell Canada decides to outsource or contract out any of the work normally performed by employees included in the Clerical and Associated Employees bargaining unit.

The parties agree that before Bell Canada outsources or contracts out any work normally performed by employees in the Clerical and Associated Employees bargaining unit, the Company shall meet with the CEP National Communications Vice Presidents to discuss, review and exchange on issues associated with outsourcing or contracting out.

Therefore the parties agree as follows:

1. ***It is agreed that for the duration of this Memorandum of Agreement, Bell Canada will not, as a direct result of the outsourcing or contracting out of any of the work normally performed by employees included in the Clerical and Associated Employees bargaining unit, declare a surplus that would result in the termination or lay off of any Regular Bell Canada employee included in the Clerical and Associated Employees bargaining unit and who is employed by Bell Canada on the date of the signing of this Memorandum of Agreement.***

2. The parties acknowledge that Bell Canada may resort to the outsourcing or contracting out of bargaining unit work to deal with incremental work volume, work volume generated through attrition and/or for other operational reasons, including situations involving the movement of members of the Clerical and Associated Employees bargaining unit to entities outside of Bell Canada.

3. The parties agree that in situations where any differences concerning the interpretation or application of this Memorandum of Agreement arise, a grievance shall be filed and shall be processed through expedited arbitration. The matter shall be heard by an arbitrator on a date mutually agreed to by the parties.

4. The job security protection described in paragraph 1 of this Memorandum of Agreement, which is provided in the specific context of the modifications made to the Collective Agreement as part of its renewal, shall be in force for the duration of the collection agreement.

<u>General</u>

> Use in this Memorandum of Agreement of the feminine or masculine gender shall be construed as including both female and male employees, and not as specific sex designations.
>
> Signed at Montréal this 19th day of January 2010
>
> [Emphasis added]

[17] The Union filed its application under sections 35 and 44 of the *Code* on May 4, 2011, which was during the term of the 2010 – 2013 Clerical and Associated Employees' collective agreement that incorporated the foregoing Outsourcing/Contracting Out MOA. The application alleged that employees at BIMS were "performing a range of work functions that clearly fall within the ambit of work performed historically by employees at Bell Canada in the [Craft and Clerical] bargaining units", and being a wholly-owned subsidiary the Union claimed that BIMS "is clearly under common control or direction with Bell". The Union submitted that BIMS was an integral component of Bell Canada's evolving telecommunications business. It consequently requested that the CIRB issue a "declaration that all employees of BIMS are subject to the terms and conditions of the Craft and Services Collective Agreement, or the Clerical and Associated Collective Agreement, as the case may be", among other forms of relief that included compensatory damages for the CEP and all BIMS employees.

[18] In its response to the application filed on May 27, 2011, the Company claimed that "BIMS has been performing customer support services for Bell Canada since approximately 2003 [and that it] is one of several external providers that has been used by Bell Canada over the years for this type of services". The Company described its relationship with BIMS as providing call centre activities that included answering telephone calls from Bell Canada customers over difficulties with their Internet packages and inquiries about Bell Canada's "one bill" invoices (bundling several Bell Canada offerings together, including telephone, television and the Internet). It consequently asserted that: "The work currently performed by BIMS for Bell Canada is mainly of the nature of call centre services [that] clearly fall under provincial jurisdiction and cannot be the subject of a single employer declaration pursuant to section 35 of the *Code.*"

[19] The CIRB disagreed with the Company. Following an investigation by the Board's Industrial Relations Officer ("IRO") who issued a Report on November 30, 2011 and a Supplemental Report dated April 19, 2012 detailing the activities of the BIMS employees and their relationship to the business of the Company, which the Board relied upon in determining whether it had jurisdiction in the matter, the CIRB rendered a decision dated July 20, 2012 (under Board File No.: 28738-C, which is also cited as 2012 CIRB LD 2841) where it found at pp. 3 – 4 that:

> 1. BIMS (which operates under other names as well) has operations in Montreal and is characterized as a bilingual call centre located on the 2nd and 3rd floors of a Bell building;
>
> 2. BIMS does not generate income, but provides support to existing Bell customers for billing concerns. It works exclusively for Bell in all of its activities;
>
> 3. Bell manages BIMS' call volume and Bell's Command Centre coordinates the schedules of BIMS' employees;
>
> 4. BIMS employees have a Photo ID security pass, which Bell issues, and has Bell's logo on it;
>
> 5. BIMS employees all sign Bell's Code of Conduct;
>
> 6. Bell employees create and design the training modules used for BIMS' employees;
>
> 7. BIMS handles Bell customer inquiries covering topics such as rates, changes, credits, clarifications, and promotions involving wireline, internet, TV, as well as Bell's bundles and packages of services;
>
> 8. BIMS Ottawa operations has 3 distinct units located again in Bell buildings: (i) Small/Medium Business Technical Support; (ii) Residential Internet Technical Support; and (iii) Bell Second Line/Level II IPTV Resolution Team;
>
> 9. BIMS' three Ottawa units assist Bell's customers with bilingual technical support for telephone, internet and/or TV;
>
> 10. Bell assists in the recruitment of BIMS' employees.

[20] The CIRB was satisfied on the pleadings of the parties and the IRO's Reports that "BIMS falls within federal jurisdiction for the purposes of the CEP's application". It gave the following reasons for reaching that conclusion at p. 6 of its decision:

> BIMS operations as a going concern ensure that Bell's customers who are experiencing difficulties received prompt and effective assistance. Whether Bell, or a wholly-owned subsidiary provides these services, they are vital to ensure continued service for Bell's paying customers. This is very

> different from a situation where Bell might decide to contract out building cleaning services rather than do them in house. Those types of services, if Bell even performs them, fall outside the vital or essential characterization.
>
> While BIMS employees may not perform on-site cable installations, they nonetheless allow Bell customers to access their telecommunications services. Bell may provide technical assistance to its clients directly or, subject to its collective bargaining obligations, may have others, including wholly-owned on-site subsidiaries, perform these services. The use of BIMS was just one method Bell had to provide, *inter alia,* a full range of essential services to its customers.
>
> The Board has not been convinced that creating a wholly-owned and on-site subsidiary to provide essential technical services to customers makes BIMS any less vital to Bell's telecommunications undertakings or removes it from federal jurisdiction.
>
> The Board is accordingly satisfied that it has jurisdiction over BIMS. The Board will convene forthwith a Case Management Conference with the parties and will set tentative hearing dates if another earlier method of resolution is not available.

[21] The Board also attached a copy of the IRO's Supplemental Report dated April 19, 2012 that it incorporated within its reasons. In addition to the facts referred to in the Board's decision, the Supplemental Report revealed (at pp. 5 – 7) that: (a) Bell Canada employees holding senior management positions occupied offices adjacent to BIMS employees working in cubicles within Bell's Ottawa office buildings; (b) all calls from Bell Canada customers were routed to the BIMS operations in Ottawa via Bell Canada's automated Interactive Voice Response ("IVR") system and could be re-routed to call centres depending on call volume as determined by Bell Canada; (c) Bell Canada provided the BIMS managers with yearly forecasts (broken down by month) of expected call volume and Bell Canada would build annual plans around those forecasts for BIMS operations; (d) while BIMS employees referred day-to-day human resources matters to their "Team Leaders" (who were BIMS managers), they had access to Bell Canada's Intranet Services (referred to as "Bellnet") and/or the Bell Canada employee assistance toll-free number to resolve human resource inquiries and for other services available to Bell Canada employees generally; (e) each BIMS operations manager had access to a Bell Canada human resources contact to assist with more complex employment issues; (f) in order to hire a new BIMS employee the BIMS operations manager contacted Bell Canada human resources to initiate recruitment and to arrange an appropriate job posting; (g) Bell Canada human resources also provided assistance with the offer of employment letters and letters of termination for BIMS employees; and (h) all necessary

office equipment and supplies for BIMS were provided by Bell Canada, as were the operating funds for salaries and benefits to all BIMS staff.

[22] Oral hearings before the CIRB on the merits of the Union's single employer application were held on November 6, 7 and 8, 2012 (when the Union presented a number of witnesses) with continuation dates set for May 28 – 30 and June 11 and 12, 2013, in Toronto. By the May hearing dates the Union and Company were in the midst of negotiations for the renewal of their Clerical and Associated Employees' collective agreement (as well as for the Craft Unit contract) that began in March of 2013 extending for some 20 bargaining sessions.

(b) Memorandum of Agreement dated May 29, 2013

[23] Both Mr. Derek MacLeod, the president of Local 6004, and Mr. Serge Thibault, the Company's Senior Labour Relations Consultant responsible for job evaluations, were participating in the collective agreement bargaining for the Craft and Clerical Units in Montréal when the proceedings at the CIRB reconvened on May 28, 2013 in Toronto. Mr. MacLeod (who had attended the November hearings) was nevertheless apprised of the ongoing developments at the CIRB and Ms. Barbara Dolan, who was the Administrative Vice President of CEP at the time, was present for those hearings as the senior Union representative instructing legal counsel. Her counterpart at the Company was Mr. Reno Vaillancourt, the Vice President of Human Resources and Labour Relations, who also attended the May 2013 CIRB proceedings.

[24] Instead of continuing with the hearing of oral evidence at the CIRB on May 28, 2013, the parties agreed to participate in an effort to settle the single employer application through mediation with the assistance of the IRO assigned to the case. Mr. Thibault (who had also been present during the November CIRB hearing dates) was aware of these mediation efforts while working with the Company's bargaining team in Montréal, and was in telephone contact with senior Company officials attending the CIRB proceedings to offer advice on human resources matters. He testified there were some 653 BIMS employees at that time who would be impacted by any agreement (or CIRB ruling) to recognize BIMS and Bell Canada as a single employer.

(This number would ultimately be reduced through attrition to 648 individuals by the time of the "transfer", of which 615 were non-managerial personnel). Many BIMS employees were performing jobs that were the same or comparable to roles at Bell Canada, requiring an evaluation of their duties before they could be assigned to the proper "profile" or classification recognized by the Craft and Clerical Unit collective agreements. In some cases the differences led to the necessary creation of a new profile description for the specific job performed by the BIMS employee with appropriate placement of the position within the salary groups under the applicable collective agreement, based on an assessment of relevant documentation and interviews with some or all of the affected employees. There were also material differences in the benefits package, scheduling/vacation practices and bonus structure for the BIMS employees as compared to their Bell Canada counterparts requiring time to adjust and to train BIMS managers in the new unionized workplace procedures at Bell Canada.

[25] Since Mr. Thibault was the only Bell Canada official assigned to do this work on behalf of the Company (for reasons that were not explained), he emphasized to those involved in the mediation proceedings at the CIRB of the need for "at least six months" to complete the job evaluations and the training of managers. At the same time, Mr. Thibault knew that the Company was involved in the merger of Astral Media and CTV that was organizationally referred to as "Bell Media" under the Company's control, for which he was also responsible. There had already been an undertaking to transfer the employees affected by that merger to Bell Media on April 1, 2014. Thus Mr. Thibault testified that if the Union had not agreed to a sufficient amount of time to permit his completion of the evaluations and training necessary to properly transfer the BIMS employees to Bell Canada, the Company would have continued with the adjudication proceedings before the CIRB, which he anticipated would take at least another full year to complete.

[26] Mr. Vaillancourt was of the same view. He testified the Company indicated at mediation that it was prepared to settle the single employer application by recognizing the Union's representational rights, provided the Union granted enough time to seamlessly transfer the BIMS employees to Bell Canada. Mr. Vaillancourt recalled a face-to-face discussion with Ms. Dolan

on the issue during the mediation, in the course of which Ms. Dolan proposed a transfer date of January 1, 2014 to start the New Year "fresh", which Mr. Vaillancourt did not consider sufficient time. He consequently proposed the date of April 1, 2014 (coinciding with the transfer of the Astral Media and CTV employees to Bell Media), which he testified Ms. Dolan accepted. His evidence was that Ms. Dolan told him: "If you need more time – a couple of weeks – give us a shout and we will see what we can do". Like Mr. Thibault, Mr. Vaillancourt maintained that without the Union's consent to delay the official transfer of the BIMS employees to April 1, 2014, which was more than 10 months away, the Company would not have signed a settlement on the matter. In that event the Company would be content to continue with the proceedings before the CIRB, with little likelihood of its completion and a decision from the Board on the single employer application before that date.

[27] Ms. Dolan's testimony on point differed somewhat, although not materially. Her evidence (supported by copies of exchanges of the written proposals between the parties) was that the Company initially requested a date that was 12 months after the CIRB declared BIMS and Bell Canada to be a single employer. While the Union's initial demand was that the BIMS employees should be placed in the appropriate Union bargaining unit (i.e. Craft or Clerical) effective the date of the Board's single employer declaration, it proposed December 1, 2013 as a compromise, which the Company rejected. Following her discussion with Mr. Vaillancourt on the matter, Ms. Dolan confirmed that the Union agreed to "do the integration of the BIMS at the same time" as the merger of Astral Media and CTV employees into Bell Media, which was scheduled for April 1, 2014.

[28] Consequently the parties settled on an "Agreed Statement of Facts" during mediation, which was intended as the factual basis on which the CIRB could exercise its independent discretion to grant the Union's single employer application. Mr. Vaillancourt testified that the Company felt it important that the CIRB issue the single employer declaration "as soon as possible" because the Company "wanted to start looking at the positions as soon as we could". The Company also required a formal Board order to placate BIMS employees who might have objected to being included within the Union's bargaining unit and to counter any suggestion of

Company complicity in the matter, which prompted Mr. Vaillancourt to solicit an "assurance" from the IRO assisting the parties that the CIRB would grant their request for a single employer declaration. That Agreed Statement of Facts, which was signed by representatives of the Company, Union and BIMS, and attached as "Schedule A" to the ultimate decision of the Board on the matter, is reproduced below:

Schedule A

AGREED STATEMENT OF FACTS BETWEEN:

BELL CANADA
And
BELL INTERNET MANAGEMENT SERVICES
And
COMMUNICATIONS ENERGY AND PAPERWORKERS UNION OF CANADA

1. The following agreed facts sets out the facts that are agreed upon by all parties (Parties) in relation to the above noted matter.
2. Bell Canada (Bell) is a telecommunications company. Its services include local and long distance phone services, wireless voice and data services, Internet access and satellite television.
3. Bell Internet Management Services (BIMS) is a wholly owned subsidiary of Bell. The particulars of BIMS operations are set out in detail in the Supplementary Officer's Report dated April 19, 2012.
4. The Communications Energy and Paperworkers Union of Canada (the CEP) and Bell are parties to the following collective agreements (among others): (a) Craft and Services and (b) Clerical and Associated (the Collective Agreements).
5. The CEP filed an application pursuant to section 35 of the *Canada Labour Code* (Code) (Board file no. 28738-C) alleging that BIMS and Bell are associated or related businesses (the Application).
6. The Application requested that the Board declare that the employees of BIMS be subject to the terms and conditions of the Collective Agreements.
7. The Board issued a decision dated July 20, 2012 in which it determined that BIMS was subject to federal jurisdiction.
8. The Application was scheduled for hearing before the Board on the following dates: November 6, 7, and 8, 2012. The Board took note of the admissions, heard detailed evidence from several witnesses, and entered as exhibits a number of documents related to the Application.
9. ***The evidence presented before the Board established that: (a) the five conditions that are required for a single employer declaration existed; and (b) there is a sound labour relations purpose for Board exercising its discretion.***
10. ***The reasons for the exercise of the Board's discretion include a recognition that the employees at BIMS perform similar functions to employees at Bell and as such the issuance of the order will further the objectives of the Code.***

May 29, 2013

[Emphasis added]

[29] As discussed later in the review of jurisprudence, "the five conditions that are required for a single employer declaration" referred to in paragraph 9 of the Agreed Statement of Facts are: "(1) two or more enterprises, i.e. businesses; (2) under federal jurisdiction; (3) associated or related; (4) of which at least two, but not necessarily all, are employers…;(5) the said businesses being operated by employers having common direction or control over them": per *Murray Hill Limousine Service Ltd. et al.* (1988), 74 di 127 (CLRB no. 699) described in *Air Canada et al.,* 2000 CIRB 90 at para. 13.

[30] At the same time the Company and the Union negotiated an agreement to amend the bargaining unit description for the Craft and Services bargaining unit, which is not immediately relevant except to note that the application was made to the Board under section 18.1 of the *Code,* described below. They also negotiated terms of another Memorandum of Agreement signed by the parties' representatives on May 29, 2013 (that included Ms. Dolan for the Union and Mr. Vaillancourt for the Company), related to the implementation of the CIRB's expected declaration that BIMS and Bell Canada constituted a single employer, as follows:

MEMORANDUM OF AGREEMENT BETWEEN
BELL CANADA
AND
COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

WHEREAS the CEP filed an Application in accordance with sections 35 and 44 of the Canada Labour Code ("Code") on May 23, 2011 requesting the Canada Industrial Relations Board ("Board") to declare that Bell Internet Management Services ("BIMS") and Bell Canada are a single employer ("Application");

WHEREAS Bell Canada and BIMS contested the Application and submitted that BIMS was subject to provincial jurisdiction;

WHEREAS the Board mandated a labour officer to conduct an investigation into the Application and BIMS jurisdiction and a report was produced on November 30, 2011;

WHEREAS a supplementary report was produced on April 19, 2012;

WHEREAS the parties have received mediation assistance from the Board on May 28 and 29, 2013 and have signed an Agreed Statement of Facts which was filed with the Board on May 29, 2013;

AND WHEREAS the parties enter into this Memorandum of Agreement to avoid a lengthy debate on whether the Board should exercise its discretion pursuant to section 35 of the Code;

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. The preamble is an integral part of this agreement.

(A) Condition Precedent

2. The parties agree that all their agreements and respective obligations contained in this Memorandum of Agreement are completely and entirely conditional upon:

   i) the Board issuing an order declaring that BIMS and Bell Canada constitute a single employer pursuant to section 35 of the Code;

   ii) the parties agreeing on the Craft and Services bargaining unit description, which description shall be adopted by the Board in the form of an order.

3. For clarity, this Memorandum of Agreement will become null and void in the event that the conditions set out in paragraph 2 are not fulfilled.

4. The parties agree that this Memorandum of Agreement will take effect on the date the Board issues the orders mentioned above ("Effective Date").

5. The parties agree that this Memorandum of Agreement resolves fully all issues raised in board files 28738-C and 29892-C with the exception of all subsequent matters to be determined pursuant to section 35(2) of the Code flowing from the orders described in paragraph 2.

(B) CEP Representation Rights

6. The parties agree that all non-management BIMS employees will remain at the employ of BIMS until March 31, 2014.

7. On April 1, 2014, all non-management BIMS employees will be transferred to Bell Canada and the CEP will become the certified bargaining agent of the newly transferred employees ("Transferred Employees").

8. The Transferred Employees will be included into the Craft and Services bargaining unit or the Clerical and Associates bargaining unit, depending on review of various positions. Part-time employees will be included as Regular Part-Time employees and Full-Time employees will be included as Regular Full-Time employees. ***Bell Canada will recognize the net credited service of all Transferred Employees.***

9. From the Effective Date until March 31, 2014, with respect to the Transferred Employees to be included in the Clerical and Associates bargaining unit, Bell Canada will:

    a) review the various job profiles that may apply to the positions in BIMS or create new job profiles if necessary;

    b) in the event new profiles are created, rate those positions and assign them a proper salary group;

    c) inform the CEP of the proposed job profile into which the subject employees will be integrated and the new salary group at which they will be paid.

10. From the Effective Date until March 31, 2014, with respect to the transferred Employees to be included in the Craft and Services bargaining unit, Bell Canada will inform the CEP in which classification the employees will be included in accordance with Schedule G of the current Craft and Services collective agreement.

11. The CEP will have an opportunity to review the proposed integration and classification of the Transferred Employees and provide its comments and position to Bell Canada.

12. In the event the CEP and Bell Canada disagree on the proposed integration of the Transferred Employees, the parties agree that the CEP will have the opportunity to file a grievance which will be assigned to an accelerated arbitration date and it is agreed that the arbitrator shall have full jurisdiction to interpret the collective agreement as provided for in article 15 of the Craft and Services collective agreement and article 17 for Clerical and Associates collective agreement.

13. Transferred Employees who are integrated into either one of the bargaining unit and whose base hourly rate is:

    a) Higher than the maximum of the class or profile corresponding to their job shall have their salary frozen until such time as the maximum for the class or profile they hold matches their salary.

    b) Lower than the minimum of the class or profile corresponding to their job shall have their salary adjusted to the minimum of the class or profile they are entering.

    c) Within the class or profile corresponding to their job, but between two steps of the wage schedule, shall have their salary adjusted to the higher step that is closest to the salary they are earning immediately prior to the integration.

14. In consideration of the foregoing the CEP agrees to put all individual and/or policy grievances relating in any way to BIMS on hold until March 31, 2014 and to withdraw them within 15 days after the Transferred Employees are integrated into Bell Canada.

15. Following the Effective Date, Bell Canada agrees to send to the BIMS employees (that will become the Transferred Employees) a communication from the CEP. The parties will agree on the content and timing of such communication and it will be attached to an e-mail informing the employees of the Board's order with respect to the single employer application.

16. This Memorandum of Agreement is entered into by the parties without any admission of liability or wrongdoing.

17. The parties agree to keep this Memorandum of Agreement strictly confidential between them, with the exception of CEP officers and/or members of the negotiation committees that must be informed due to their participation in the integration process and save and except for its enforcement.

Signed at Toronto this 29th day of May 2013

[Emphasis added]

(c) Single Employer Declaration of July 4, 2013

[31] While Ms. Dolan and Mr. Vaillancourt were resolving the single employer application in Toronto that was concluded in the evening of May 29, 2013, Messrs. MacLeod and Thibault along with their respective Union and Company negotiating teams in Montréal were finalizing the terms of a Memorandum of Agreement for the renewal of the Clerical and Associated Employees' collective agreement (along with the collective agreement for the Craft and Service workers). They reached a tentative agreement subject to ratification by their respective principals on May 30, 2013. The Union's subsequent communication bulletin dated June 28, 2013 indicates that the majority of Union members who voted, approved the new collective agreement which was said to be "effective to June 1st 2013". The Company also ratified the agreement, although the precise date was not specified in the evidence. Article 39.02 of the "Duration" clause in the renewed collective agreement stipulated that the "Agreement shall be effective June 1, 2013…and shall remain in full force and effect up to and including November 30, 2017." The "Witness Clause" of the renewed collective agreement shows that the parties "executed" the document "by their duly authorized representatives" (which included Messrs. MacLeod and Thibault) on September 23, 2013.

[32] Continuing as a term of the new collective agreement was the Outsourcing/Contracting Out MOA previously dated January 19, 2010. The terms of that MOA were not altered from the 2010 version, reproduced above, except to change the signing date to September 23, 2013,

coinciding with the actual date that the renewed collective agreement was executed by the parties' representatives. The classifications of "Administrative Support" (in Salary Group 10) and "Resolution Representatives" (in Salary Group 11) were also maintained. There was no explanation provided for the delay in signing the renewed collective agreement from the date of ratification on or about June 28, 2013. I can only conclude that the actual signing date had no significance to the parties, other than being a convenient day for the parties' representatives to meet for the administrative purpose of executing the formal contractual documents. Indeed, on the evidence submitted there was no reason (other than administrative convenience) why the renewed collective agreement could not have been formally executed on the date of ratification by the Union on June 28, 2013 as there was nothing left for the parties to determine in settling all of the terms of their new contract.

[33] In that context all four witnesses before me were questioned about the renewed Outsourcing/Contract Out MOA, which was also signed on September 23, 2013 without changing any of its substantive terms. Both Mr. MacLeod and Mr. Thibault testified that neither the Union nor the Company raised any issues respecting the applicability of the Outsourcing/Contracting Out MOA to the BIMS employees during their negotiations for the renewed Clerical and Associated Employees' or Craft and Services collective agreements. It appears the Outsourcing/Contracting Out MOA was not reviewed at all during that round of bargaining. Likewise, both Ms. Dolan for the Union and Mr. Vaillancourt for the Company confirmed that the Outsourcing/Contracting Out MOA and its applicability to the BIMS employees was never discussed during the CIRB mediation talks on May 28 and 29, 2013.

[34] However, both Ms. Dolan and Mr. MacLeod asserted (over the Company's objection) that if they had been specifically advised during mediation that the commitments in the existing Outsourcing/Contracting Out MOA (or any successor) did not apply to the BIMS employees affected by the CIRB's single employer declaration, they would not have agreed to any delay in transferring the BIMS employees to Bell Canada from the date of that expected declaration. Rather their position would have been that the BIMS employees were, in law, already Bell Canada employees and therefore entitled to the full protection of the Outsourcing/Contracting

Out MOA from at least the moment the CIRB's declaration was made. There is no evidence that the Union made this position known to the Company at the time. From their perspective, the purpose of the more than 10-month delay in formally transferring the BIMS employees to Bell Canada was only to accommodate the Company's request for enough time to complete the job evaluations and management training that it required to properly place the BIMS employees within the appropriate profiles and salary groups for a smooth integration. It was, according to Ms. Dolan, done solely as a matter of administrative convenience for the benefit of the Company that was not intended to affect the fundamental job protections provided to the BIMS personnel as *de facto* Bell Canada employees and members of the Union's Craft or Clerical Units by the date of the Union's single employer application, if not before.

[35] Of course, when Mr. Vaillancourt was asked the same question (this time over the Union's objection), he maintained the Company always recognized that the BIMS employees would not be entitled to the protections under the Outsourcing/Contracting Out MOA unless they were "Regular Employees" of Bell Canada on the date of the signing of that MOA. He testified it was 'clear in his mind' that by signing the Memorandum of Agreement arrived at during the mediation of May 28 - 29, 2013, the BIMS employees would not immediately become Bell Canada employees with any rights under the Clerical or Craft Unit collective agreements and attached MOAs but rather would remain BIMS employees "until March 31, 2014", as stipulated in paragraph 6 of that Memorandum. Mr. Vaillancourt also offered that he was careful in negotiating the language for paragraph 7 of the May 29, 2013 Memorandum of Agreement, to stipulate that the CEP would not become the bargaining agent of the BIMS employees until the official date of transfer on April 1, 2014, in order ensure there was no ambiguity of the parties' intention "that BIMS employees would remain BIMS employees until March 31, 2014." Had the Union representatives taken the position that the BIMS employees must become Bell Canada employees as of the CIRB's declaration of their single employer status for purposes of the Outsourcing/Contracting Out MOA, Mr. Vaillancourt testified the Company would not have signed the May 29, 2013 Memorandum of Agreement, but rather would have waited for the hearings before the CIRB to proceed to their inevitable conclusion, which Mr. Vaillancourt

estimated would be later than the April 1, 2014 date agreed upon by the parties. There is no evidence to suggest that Mr. Vaillancourt expressly made this position known at the time.

[36] I could give little, if any, weight to the after-the-fact assertions (or rationalizations) by both Union and Company witnesses of what they would have or not have agreed upon had there been any consideration of the Outsourcing/Contracting Out MOA during the mediation leading to the settlement of the single employer application before the CIRB. What is certain on the evidence is that neither side raised any issue about the effect of their settlement on the applicable Outsourcing/Contracting Out MOA, either during the CIRB mediation talks or at the negotiating table when the renewed Clerical and Associated Employees' collective agreement was tentatively finalized on May 30 and later ratified. There is also no dispute that the only reasons expressed by the Company for delaying the transfer of BIMS employees to Bell Canada was to allow sufficient time to evaluate the BIMS jobs for placement in comparable or created positions within the Company's organizational structure, for coordinating practical scheduling, vacation, benefits and payment practices for the smooth integration of those individuals within Bell Canada's operations, and for training the BIMS managers to properly supervise their employees who were to be covered by the collective agreements. The evidence is conclusive that the Company's representation of its administrative need for the delay was the sole basis of the Union's agreement to the April 1, 2014 date in the May 29, 2013 Memorandum of Agreement. I find on the evidence before me that there was simply no consideration by the parties of the potential impact of the May 29, 2013 Memorandum of Agreement on any rights of individuals or obligations of the Company under the Outsourcing/Contracting Out MOA.

[37] The CIRB subsequently approved the parties' requested changes to the description of the Craft Unit on July 4, 2013. On the same day it also issued the following Order No.: 10437-U over the signature of Vice Chairperson Graham J. Clarke, declaring "that Bell and BIMS constitute a single employer":

> **WHEREAS** the Canada Industrial Relations Board (Board) received an application from the Communications, Energy and Paperworkers Union of Canada (CEP) dated May 4, 2011, pursuant to section 35 of the *Canada Labour Code (Part I – Industrial Relations) (Code),* seeking an order

> declaring that Bell Canada (Bell) and Bell Internet Management Services Inc. (BIMS) are a single employer and a single federal work, undertaking or business for all purposes of Part I of the *Code;*
>
> **AND WHEREAS,** after hearing the evidence and submissions of the parties and considering the agreed statement of facts attached hereto as Schedule A, the Board has determined that Bell and BIMS constitute a single employer and a single federal work, undertaking or business pursuant to section 35(1) of the *Code;*
>
> **AND WHEREAS,** pursuant to its powers under the *Code,* the Board reserves its jurisdiction to dispose of any issues arising out of its order;
>
> **NOW, THEREFORE,** the Canada Industrial Relations Board declares that Bell and BIMS constitute a single employer and a single federal work, undertaking or business pursuant to section 35(1) of the *Code.*
>
> **ISSUED** at Ottawa, this 4th day of July, 2013, by the Canada Industrial Relations Board.

(d) Transfer of BIMS Employees to Bell Canada of April 6, 2014

[38] On the same day that the CIRB issued the foregoing declaration, Ms. Dolan sent a memorandum addressed to, "Employees of BIMS" entitled, "Welcome to the Communications, Energy and Paperworkers Union of Canada". In it Ms. Dolan stated in relevant part:

> I am writing with great pleasure in anticipation of your joining the Communications, Energy and Paperworkers Union of Canada on April 1, 2014, as a result of the findings of the Canada Industrial Relations Board.
>
> We have a proud history of effectively representing employees in many sectors of the economy in Canada. This includes employees at Bell Canada. We have a long history of working collaboratively with Bell Canada in order to achieve the best possible outcomes for both the company as well as its employees.
>
> Our Union is organized into local unions which mostly correspond to the location at which employees work. Before April 1, 2014, we will review with Bell Canada which employees will be covered by the Craft and Services bargaining unit or Clerical and Associates bargaining unit. Ottawa Clerical employees will be placed in Local 6004 and Ottawa Craft and Services employees in Local 34-0. Montreal Clerical employees will be placed into Local 6002.
> …
>
> Once again, I would like to welcome you to the Communications, Energy and Paperworkers Union of Canada.

[39] Mr. Vaillancourt also distributed a memorandum on July 4, 2013 to the "BIMS team members" on the subject of "CEP single employer decision". Consistent with his desire to

deflect criticism of any complicity by the Company in the matter (which seemed to be a major focus), he wrote:

> The Canadian Industrial Relations Board issued a decision today declaring Bell Canada and Bell Internet Management Services (BIMS) a single employer. The decision was in response to the application filed by the CEP in May 2011.
>
> As a result, all non-management BIMS team members will transfer to Bell Canada on April 1, 2014 and be represented by the CEP union as their bargaining agent. You can refer to the CEP letter here.
>
> Between now and March 31, 2014, the Human Resources team will review all non-management BIMS roles to determine which collective agreement and union job profile or classification is appropriate for each position. Each employee's years of service with BIMS will transfer and be recognized as Bell service.
>
> Complete details about the transfer will be provided as we work through the transition. In the meantime, please speak to your manager if you have any questions.

[40] Mr. Thibault began work soon afterwards on evaluating the jobs performed by the BIMS employees that was a fundamental step towards integrating those employees within the Company's operations. His evidence was that he met or convened telephone conferences with CEP officials on September 19, 2013 to present his "work breakout structure or timeline of activities for the integration of the BIMS employees that would take from September (2013) all the way to April 1 (2014)" and regularly communicated his progress to the Union. This of course was before the parties officially signed the renewed collective agreements and MOAs on September 23, 2013.

[41] In those meetings with the Union Mr. Thibault testified he described "all of the different activities (he) needed to go through as well as who would be helping (him) in the evaluation process from an HR perspective; that (he) would be setting up and sending (the Union) information and setting up additional columns (in his written outline) to keep (the Union) in the loop on how the process was evolving". Thus with the assistance of another Bell Canada official, Mr. Thibault interviewed every BIMS manager to gather information on the role and responsibilities of the more than 600 BIMS non-managerial employees, located in the two Bell Canada office buildings in Ottawa and one Bell Canada building in Montréal, for the purpose of

evaluating their jobs for placement within the appropriate classifications (or by creating new "profiles") recognized under the Craft and/or Clerical Unit collective agreements. Mr. Thibault kept the Union apprised of his progress through regular telephone conferences or face-to-face meetings with designated Union officials.

[42] As he got closer to the end of this task by February 2014, Mr. Thibault realized that the anticipated April 1, 2014 transfer date was in the midst of a Bell Canada pay period. If the transfer occurred on that date the BIMS employees would have to wait an additional two weeks beyond their usual payday for their next salary deposit, which might cause hardship for some. This non-synchronization of the BIMS and Bell Canada payrolls also threatened to affect bonus calculations as well as vacation and shift scheduling across the two organizational lines.

[43] For these reasons and with the goal of achieving a smooth integration of the BIMS payroll to Bell Canada's, the Company proposed and the Union accepted a further extension of the official transfer date for the BIMS employees from April 1 to Sunday, April 6, 2014 which was the commencement of a new Bell Canada pay period. Representatives of the Company and the Union accordingly signed a Memorandum of Agreement between the newly named Unifor Union and Bell Canada (in counterparts on February 19 by Local 6002, February 20 by Local 6004 and February 21, 2014 by Bell Canada) that provided in substantive part:

> **WHEREAS,** the parties entered into a Memorandum of Agreement dated May 29, 2013;
>
> **AND WHEREAS,** in accordance with paragraph 7 of the Memorandum of Agreement all non-management BIMS employees will be transferred to (Bell) Canada on April 1, 2014;
>
> **AND WHEREAS,** Bell Canada has requested an amendment for administrative reasons;
>
> **AND WHEREAS,** Unifor has consented to the requested amendment;
>
> **NOW THEREFORE,** it is agreed as follows:
>
> 1. Paragraph 7 of the Memorandum of Agreement is hereby amended and the date of transfer of Transferred Employees shall be April 6, 2014 and not April 1, 2014.

[44] In or about mid-February, 2014, the Company made a presentation to the Union that included a document entitled, "BIMS Integration into Bell Canada" wherein the Company

summarized its "initiative" as: "Effective April 6, 2014 BIMS (Bell Internet Management Services) employees will be integrated into Bell Canada's unionized Clerical/Craft bargaining units". It stated that the "desired outcome" of this initiative was to complete the integration "flawlessly and transparently for our employees" and that its "mandate" was: "Through effective communications, change management and rollout plans we will ensure a smooth transition for our employees". There were regular consultations by Mr. Thibault with his Union counterparts to update them on his progress towards the final integration and to seek their input into the decisions and process as it unfolded.

[45] The evaluation process under the direction of Mr. Thibault was completed by the end of February 2014. It ultimately identified a number of BIMS employees located in Ottawa who were performing what was determined to be the functions of Resolution Representatives recognized under the Bell Canada Clerical and Associated Employees collective agreement, corresponding to "Clerical Profile 537". The Bell Canada "Profile Description" for the Resolution Representatives, which existed under the Clerical collective agreement before the CIRB's single employer declaration of July 4, 2013, set out the Resolution Representatives' duties and responsibilities as follows:

> Job Purpose:
>
> The Resolution Representative is responsible to support both internal and external representatives with various client issues. She provides guidance on appropriate tools, processes and reference material as well as identifying coaching and training opportunities. She is responsible for assuming customer contacts and providing a final resolution to their telecommunication issues.
>
> Major accountabilities/duties:
>
> 1. Respond to client requests/inquiries and ensure complete resolution of customer issues. May include issuance of service orders.
> 2. Answer queries from internal and external agents.
> 3. Detail all discrepancies in reference material and/or process and refer them to the appropriate stakeholders.
> 4. Identify specific coaching and training opportunities.
> 5. Promote and sell products and services.
>
> Key decision/Problem solving:

1. Gain a clear understanding with both agents and clients concerning the telecommunication issue in order to provide final solutions.

Relationships:

1. Ability to communicate effectively with internal and external Clients.
2. Ability to guide internal and external agents.

[46] Mr. Thibault's evaluation also categorized the single administrative assistant for the Ottawa Resolution Representatives as falling within "Clerical Profile 303", which was an "Administrative Support" associate position under the existing Clerical and Associated Employees' collective agreement (which was similarly operational before the CIRB's single employer declaration of July 4, 2013).

[47] The determinations made by Mr. Thibault concerning the placement of BIMS personnel within the Craft Unit or Clerical Unit and their specific profile designations were not without controversy. Mr. Thibault testified a number of the individuals initially assigned to the Resolution Representatives classification disputed their assignments. These individuals were half of a team of workers identified by Mr. Thibault under the name, "Bell Business Market" or "BBM", who believed they should be within the Craft Unit instead of the Clerical Unit where they were initially placed. Some who complained were in fact reassigned to a new profile established by the Company within the Craft Unit after further review and discussions between the Company and the Union. Although at one point the Union's "Director of Telecommunications" threatened to "file grievances pursuant to the applicable collective agreements" in connection with employees who remained unsatisfied, no grievances on the final assignment of the 30 individuals evaluated as Resolution Representatives in the BBM group within the Clerical and Associated Employees' bargaining unit were submitted.

[48] On April 6, 2014 the BIMS personnel were formally integrated into Bell Canada and their net credited service ("NCS") calculated from the beginning of their employment with BIMS, was recognized by Bell Canada for all purposes under the applicable Craft and Clerical Unit collective agreements. While I was not provided with the specific NCS date of each Grievor before me as part of the group or individual grievances dated June 18, 2015, the inference from

everything I heard is that Bell Canada recognized the seniority of the BIMS employees going back to their initial continuous employment with BIMS, which was before the CIRB's single employer declaration on July 4, 2013, and before the parties signed the renewed Outsourcing/Contracting Out MOA dated September 23, 2013. It was Mr. Thibault's evidence that the recognition of such past service was part of Bell Canada's policy "where an employee transfers from an affiliate with no break in service" and thus he stated it was "not an exception" to the Company's general practice in the circumstances. He also testified that prior to the instant arbitration proceedings the Union never suggested that the BIMS workers were in fact Bell Canada employees as of the CIRB's declaration of July 4, 2013. Certainly for all administrative purposes it is not disputed that the BIMS personnel continued to be paid through the BIMS payroll system, their benefits were processed through the insurance plans in place at BIMS that differed from those at Bell Canada, and they reported to their usual BIMS managers under the same employment terms in effect while working for BIMS until the official transfer date. They received two T4s for their work in 2014; one from BIMS for the period January 1 to April 5, 2014, and the second from Bell Canada from April 6 to the end of 2014. Effective April 6, 2014 their hours of work and schedules also changed from those at BIMS to the different procedures and practices mandated under the Craft and Clerical Unit collective agreements.

(e) Notice of Intention to Contract Out Work of May 19, 2015

[49] During all of the foregoing discussions between the parties, including the mediation of the single employer application before the CIRB, the contract negotiations resolving the parties' Craft and Clerical Unit collective agreements for 2013 - 2017, and throughout the evaluation process supervised by Mr. Thibault that incorporated extensive consultations with the Union, the Company never raised the possibility of contracting out any of the work performed by the BIMS workers to a third-party. However, that situation changed. Mr. Thibault testified that by May of 2015 the Company "was desperately trying to cut some costs and get some synergies in order to reduce their costs", leading to the Company's decision to outsource a portion of the BBM work performed by the former BIMS employees. (This was of course was more than one year after the official integration of the BIMS and Bell Canada workers on April 6, 2014). When consulted on

the matter, Mr. Thibault expressed the opinion to management that since the BIMS personnel were not "Regular Employees" of Bell Canada when the Outsourcing/Contracting Out MOA dated September 23, 2013 was signed, the Company had the right to outsource their work and declare those individuals "surplus" without limitation.

[50] The Union was accordingly notified of the Company's intentions on May 19, 2015 in a telephone conference presentation from the BBM Director, Ms. Rosetta Pilozzi, accompanied by other human resources officials of Bell Canada, which Mr. MacLeod also attended via telephone as a Union representative. Mr. MacLeod described it "an emotional call" as he testified it was "the first time in my experience that they were laying people off because of the outsourcing of their work." He also characterized the Company's announcement as "a very dirty, underhanded way to enter into an agreement with someone – and most importantly, for the employees that were impacted." When the Union representatives participating in that conference call (which included the Union's National Representative) objected to the layoff of the employees as a violation of the Outsourcing/Contracting Out MOA, Ms. Pilozzi told them the Company believed it was within its rights under the collective agreement.

[51] The Company tabled a document entitled, "BBM Customer Service – Small Business Clerical Workforce Reduction" that purported to explain the reasons for the Company's decision and the options available for the 31 affected employees, reproduced in relevant as follows:

> Business Reality
>
> - As part of our effort to improve customer service and create a more competitive cost structure – these being two of our 6 Strategic Imperatives – we constantly review our business and processes for opportunities to maximize business efficiency and to enhance customer service, thereby enhancing our competitive position in the market.
>
> - In line with this directive to improve customer service and maximize business efficiency, the Resolution Representative function in Ottawa will be eliminated and this work will be outsourced, resulting in the consolidation of ticket creation and resolution in one queue.
>
> - This consolidation will allow for more efficient and effective ticket resolution, and a simplified customer experience.

- This will result in the elimination of 30 Resolution Representative positions (Clerical Profile 537) in Ottawa.

- To further maximize business efficiency and effectiveness, the Administrative Support function currently managed by 1 Clerical employee in Ottawa will also be eliminated. This work will be absorbed by a team of 7 employees within BRS, who manage the same function.

…

Employee Options

- Surplus employee options include:

    - 912M will (be) submitted to the Transfer Management Group
    - Displacement option (must have 8 years of service)
    - Lay-off with recall option

- If the employee does not find an alternate position, she will receive Corporate Severance from the Company based on years of service

    - 0.5 months of base salary for each completed year of service
    - Minimum 3 months, Maximum 12 months.

[52] Mr. Thibault explained that the reference in the presentation to "912M" was an internal Bell Canada form for transfers initiated by management due to surplus which gives these employees priority over other clerical employees for available vacancies. The form was part of the process contemplated by the parties under another Memorandum of Agreement attached to the collective agreement entitled, "Workplace Adjustment Plan" for managing the force adjustment and layoff provisions of the collective agreement that included relocation and "career transition services to facilitate internal and external job search". Employees who could not be relocated within the organization were entitled to certain payments calculated under a formula: "For employees with less than fifteen (15) years of NCS" (Net Credited Service); and "For employees with fifteen (15) or more years of NCS". The Workplace Adjustment Plan was signed by the parties on September 23, 2013 along with all of the other MOAs attached to the renewed collective agreement.

[53] Notwithstanding relocation efforts under the Workplace Adjustment Plan, at least 29 of the 31 targeted employees were declared surplus effective June 4, 2014 and lost their

employment as a direct result of the Company's outsourcing decision, giving rise to the Union's group grievance on behalf of the Resolution Representatives and their single Clerical Support dated June 18, 2015. The grievances allege violations of articles 1, 3, 12, 18, 37, 39 "and others of the (Bell Clerical) collective agreement." Those and additional provisions of the collective agreement relevant to this dispute are set out below:

COLLECTIVE AGREEMENT

ARTICLE 1
APPLICATION

1.01 The Company agrees to recognize the Union as the sole collective bargaining agent for employees covered by this Agreement.

1.02 Where the Company adds a new occupation to the bargaining unit, Appendix A shall be deemed to be amended to include that new occupation upon notification to the Union.

ARTICLE 3
DEFINITIONS

3.01 For purposes of this Agreement,

(a) "Employee" means a person employed in Bell Canada, to do work in any of the occupations listed in Appendix A, but does not include a person who:

(1) Is employed in a confidential capacity in matters relating to labour relations, or
(2) Is employed as an occasional employee, or
(3) Exercises management functions.

(b) "Regular Employee" means an employee whose employment is reasonably expected to continue longer than one (1) year, although such employment may be terminated earlier by action on the part of the Company or the employee.

…

ARTICLE 12
MANAGEMENT RIGHTS

12.01 The Company has the exclusive right and power to manage its operations in all respects and in accordance with its commitments and responsibilities to the public, to conduct its business efficiently and to direct the working forces and, without limiting the generality of the foregoing, it has the exclusive right and power to hire, promote, transfer, demote or lay-off employees, and to suspend, discharge or otherwise discipline

employees. The Company agrees that any exercise of these rights and powers shall not contravene the provisions of this Agreement.

ARTICLE 18
FORCE ADJUSTMENT

18.01 Where any condition arises which reduces the work load to the extent that a general program of lay-offs or spreading the work is contemplated, the Company shall endeavor to reach an agreement with the Union as to whether a plan of part-timing, lay-offs or a combination of the two shall be put into effect.

18.02 In the event that an agreement as to a plan cannot be reached within a period of 30 days after the matter has been submitted to the Union, the Company may proceed on a plan of part-timing to the extent it deems necessary.

18.03 It is expressly understood, however, that if the Company proceeds on a plan of part-timing at the expiration of the 30 day period or later as prescribed in this Article, negotiations toward an agreement relating to a force adjustment plan shall be resumed at any time at the request of either party. Similarly, after agreement has been reached as to a plan of force adjustment, either party may resume negotiations at any time in an effort to obtain agreement upon modifications of the plan then in effect.

ARTICLE 23
SENIORITY

…

23.02 Seniority, for the purposes of this Agreement, shall be determined by the net credited service as shown on the Company records.

ARTICLE 37
VALIDITY OF AGREEMENT

37.01 In the event of any provision of this Agreement or of any of the practices established hereby being or being held to be contrary to the provisions of any applicable law now or hereafter enacted, this Agreement shall not be nor be deemed to be abrogated but shall be amended so as to make it conform to the requirements of any such law.

ARTICLE 39
DURATION

39.01 This Agreement shall be effective June 1, 2013, except as otherwise herein provided, and shall remain in full force and effect up to and including November 30, 2017.

…

APPENDIX A

LIST OF CLERICAL AND ASSOCIATED OCCUPATIONS

SALARY GROUP 10	**SALARY GROUP 11**
Associate – …	**Associate –** …
Administrative Support …	
Client Representative – …	**Client Representative –** ...
	Resolution Representatives …

[54] The Company also referred to the French language version of the contractual provisions in article 3.01(a) with particular emphasis on the phrase, "une personne qui occupe à Bell Canada un des emplois inscrits à l'annexe A" that Company counsel advised literally translates into English as, "a person who occupies one of the jobs listed on Schedule A at Bell Canada" (and that the website "Google Translate" converts into English as: "a person who has one of the jobs listed on Schedule A at Bell Canada"). The parties agreed that the French language version is equally authoritative with the English version of that and all provisions in the collective agreement, as reproduced below:

ARTICLE 3
DÉFINITIONS

3.01 Aux fins de la présente convention:

(a) Le terme "employee" désigne une personne qui occupe à Bell Canada un des emplois inscrits à l'annexe A, et n'inclut pas:

(1) une personne affectée a une tâche à caractère confidential concernant les relations industrielles;
(2) une personne embauchée à titre d'employée surnuméraire;
(3) une personne qui exerce des fonctions de cadre.

(b) Le terme "employee permanente" désigne une personne don't il y a lieu de croire que la période d'emploi sera de plus d'une (1) année, bien qu'elle puisse se terminer avant, de l'initiative de l'employée ou de la Compagnie.

IV. The Parties' Arguments

(a) The Union

[55] On behalf of the Union Mr. Russell submitted that the BIMS non-managerial personnel were, in law, Bell Canada employees at least as of the CIRB's order of July 4, 2013 that, "Bell and BIMS constitute a single employer and a single federal work, undertaking or business pursuant to section 35(1) of the *Code*." As of that date (if not as early as the Union's single employer application to the CIRB on May 4, 2011), BIMS and Bell Canada must be considered "a single employer" for all purposes under Part I of the *Code,* and as such, it was asserted that all of the BIMS employees had the legal status of being employees of Bell Canada as well.

[56] The Memorandum of Agreement entered into between the Union and the Company on May 29, 2013 did not change the essential status of those individuals as Bell Canada employees even before the CIRB's declaration given the remedial purpose of section 35(1), according to the Union. Rather, that legal status remained in effect when the parties signed the renewed collective agreement for the Clerical and Craft Units which attached the Outsourcing/Contracting Out MOA dated September 23, 2013. Consequently, notwithstanding the parties' May 29, 2013 Memorandum of Agreement, the Union submitted the BIMS personnel that the Company found to be working as or in the equivalent roles of "Resolution Representatives" and their "Administrative Support" as those occupations are recognized under the Clerical Unit collective agreement must be considered to have the legal status of "Regular" employees of Bell Canada. As such, the Union contended the Outsourcing/Contracting Out MOA applied to their employment and that the Company could not outsource their work if that "would result in the termination or lay off" of any of them.

[57] The wording of the parties' May 29, 2013 Memorandum of Agreement did not alter their status, which the Union argued must be interpreted in the context of the events and representations leading to the signing of that Memorandum. Thus applying a contextual

approach that considers the underlying factual matrix to interpret the language of that Memorandum of Agreement dated May 29, 2013, the Union submitted both parties were acting on the mutual understanding that the reason for delaying the transfer of BIMS employees to the Bell Canada payroll was to accommodate the Company's administrative needs: (a) to evaluate the different jobs at BIMS in order to place them within their appropriate counterparts in the Craft and Clerical Unit collective agreements; (b) to ensure the smooth transition of salary and benefit management from BIMS to Bell Canada; and finally (c) to train the former BIMS supervisors in properly directing unionized employees under a collective agreement.

[58] Neither the language of the May 29, 2013 Memorandum of Agreement nor the circumstances under which that language was agreed by the Union diminished the essential status of those BIMS employees as being at the same time, in law, Bell Canada employees during the transitional period after the formal "single employer" declaration by the CIRB to the date of the formal administrative "transfer" of employees from BIMS to Bell Canada on April 6, 2014, according to the Union. At most, the May 29, 2013 Memorandum of Agreement authorized the Company to delay paying salary and benefits, remitting Union dues and implementing other terms of the Clerical and Craft Unit collective agreements until April 6, 2014. This did not extinguish their status as employees or eliminate their fundamental job security and seniority throughout this period without clear language in the May 29, 2013 MOA having that result, which the Union maintained was not the case here. Ironically, if the Company was correct in its assertion that the May 29, 2013 Memorandum of Agreement permitted the Company to contract out any or all of the work performed by the BIMS employees, the effect would be to undermine the entire basis for the Union's single employer application before the CIRB, which could not have been the reasonable expectation of the parties.

[59] However, if the Company was correct in its interpretation of the May 29, 2013 Memorandum of Agreement, reserving a broad right for the Company to contract out all the BIMS employees' work without limitation and thereby ignoring their seniority rights, the Union claimed in the alternative that the Company was estopped from applying that interpretation in the present case. The Union argued I must conclude on the evidence that a representation was made

by the Company to the Union that the sole purpose of the delay in implementing the CIRB's single employer order of July 4, 2013 was to benefit the Company's administrative needs, where there was absolutely no mention by the Company of the intention or even possibility of contracting out any of the BIMS work in the future. The Union submitted that the evidence supported the conclusion that it relied upon that representation in agreeing to the delay in implementing the CIRB's order for the Company's administrative convenience, which constituted the kind of detrimental reliance sufficient to found an estoppel in the circumstances. Moreover, from a labour relations perspective, it was clear that having permitted the Company to delay the full implementation of the CIRB's order in order to accommodate the Company's professed needs, and then being victimized by (in Mr. MacLeod's words) a "very dirty underhanded way" of taking advantage of the situation (or in counsel's words, "hiding in the bushes" with a "cheeky technical position") by later terminating the former BIMS employees as a result of contracting out their work, the Union warned that the Company could hardly expect any future cooperation of this kind by the Union, setting back their relationship on any other number of matters to the ultimate detriment of both parties and the business as a whole.

[60] Lastly, and in the further alternative, the Union submitted the Company's conduct in laying off the former BIMS employees in the present circumstances was so manifestly unfair and unreasonable given all of the surrounding circumstances to constitute a breach of the basic duty of fair administration of the collective agreement that the Supreme Court of Canada has affirmed as an underlying presumption for all contractual arrangements: See *Bhasin v. Hrynew,* 2014 SCC 71, standing for the fundamental premise that, "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (per Cromwell J. at para. 63), which labour arbitrators have adopted as the "general organizing principle" for the interpretation, administration and enforceability of collective agreement terms (also referred to as "the principle of good faith collective agreement administration") in defining the limits of managerial discretion: per Arbitrator Sims in *Re Global Edmonton and Unifor Local M-1 (Edmonton Meal Periods),* 2015 CarswellNat 8138, 125 C.L.A.S. 47, 263 L.A.C. (4th) at paras. 85 – 93. Thus the Union submitted I had the authority and it was appropriate to order the

Company to reverse its decision to layoff the former BIMS employees or assess appropriate damages on that basis alone.

[61] The Union also referred to the following judicial, CIRB and arbitration decisions in support: *Oceanex (1977) Inc.,* 2000 CIRB no. 83, *A.L.P.A. v. Air Canada,* 2002 CarswellNat 4600, 2002 CIRB 183, *PLH Aviation Services Inc. et al.,* 1999 CIRB no. 37, *Re Dynamex Inc. and Teamsters, Chauffeurs, Warehousemen and Helpers, Loc. 141* (2002), 111 L.A.C. (4th) 145 (Can. Arb.) (Tims), *Re K-Bro Linen Systems Inc. and TC, Local 847 (0018)* (2015) 262 L.A.C. (4th) 425 (Ont. Arb.) (Luborsky), *Re Bell Canada and Unifor, Local 34-O (34-15-01),* 2016 CarswellNat1358, 127 C.L.A.S. 1 (Can. Arb.) (Surdykowski), *Re Hallmark Containers Ltd. and Canadian Paperworkers Union, Local 303* (1983) 8 L.A.C. (3d) 117 (Ont. Arb.) (Burkett) and *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals,* 2011 SCC 59 (referred to in *Re Bell Canada and Unifor, Local 34-0, supra*).

(b) The Company

[62] Ms. Tremblay, counsel for the Company, noted that the parties were sophisticated participants in a long-standing bargaining relationship and, as such, it was reasonable to expect they would appreciate that the plain meaning of the words in their agreement to resolve the Union's single employer application before the CIRB could leave no doubt as to their mutual intentions. Thus on the claimed clear and unambiguous language of the May 29, 2013 Memorandum of Agreement the Company submitted the parties agreed in subparagraph B6 that "all non-management BIMS will remain at the employ of BIMS until March 31, 2014" (that was later extended to April 6, 2014 on consent), which could only mean they did not become "employees" of Bell Canada until that date. To make their intention even clearer (if necessary), subparagraph B7 of the Memorandum of Agreement provided that on April 1, 2014, "all non-management BIMS employees will be transferred to Bell Canada ***and the CEP*** will become the certified bargaining agent of the newly transferred employees" (emphasis added), which could only mean that before that date (later extended to April 6, 2014) the BIMS employees had no status as employees of Bell Canada or standing as members of the Union's Craft or Clerical

bargaining units. Consequently, and notwithstanding the CIRB's declaration on July 4, 2013 that BIMS and Bell Canada were a single employer, the Company argued the parties had the independent ability to stipulate exactly when the BIMS personnel would be recognized as employees of the Company for purposes of any entitlement under the collective agreement, which they had done by explicitly deferring that recognition until April 6, 2014. To suggest otherwise would, in the Company's submission, lead to the "absurdity" of BIMS employees not recognized as members of the Union's bargaining unit, yet being able to claim negotiated rights under the collective agreement before that date.

[63] The Company observed that the Union did not have to agree to resolve the single employer application on the terms it did in the May 29, 2013 Memorandum of Agreement, in which case the Company submitted the evidence was conclusive that the proceedings before the CIRB would have continued with the likelihood that the matter would not have been decided until well after April 6, 2014. In that event there would have been no declaration by the CIRB before the parties signed the Outsourcing/Contracting Out MOA dated September 23, 2013, being dispositive that they could not have been "employees" of Bell Canada at that time. Nevertheless, having agreed to the specific language in the May 29, 2013 Memorandum of Agreement that was acceptable to the Company to resolve the single employer dispute, which was entered into by the Company under paragraph 16, "without any admission of liability or wrongdoing", the Union was bound by its terms. That Memorandum did not limit what the Company contended was its clear managerial prerogative to contract out any of the work that the BIMS employees were performing without restriction, where those employees were transferred to the Company after the critical September 23, 2013 date when the Outsourcing/Contracting Out MOA took effect.

[64] The implications of the Union's failure to negotiate specific protections for the BIMS employees in that regard was clear or should have been clear to these sophisticated parties, according to the Company. The CIRB's decision of July 4, 2013 was, in the Company's submission, no more than what it called a "bare declaration" of single employer status, which left open the ability of the parties to negotiate the specific rights and obligations of the affected BIMS

employees in accordance with section 18.1(2)(a) of the *Code,* reproduced below. By not negotiating guarantees for this group of individuals, both parties were bound by the existing language in the Outsourcing/Contracting Out MOA requiring that the BIMS employee be a "Regular Bell Canada Employee…who is employed by Bell Canada on the date of the signing" of the MOA, in order to be covered by that agreement. Relying on the French translation of article 3.01(a) of the collective agreement that defines the word "employee" as, "une personne qui occupe à Bell Canada un des emplois inscrits à l'annexe A", which it took as translating into English as "a person ***who occupies*** one of the jobs listed in Schedule A at Bell Canada" (emphasis added), the Company submitted that none of the BIMS personnel could satisfy the requirement of 'occupying' a specific job listed under the Clerical or Craft collective agreements as of September 23, 2013, and thus they did not satisfy the definition of "employee" for purposes of the parties' collective agreements.

[65] The Company also distinguished the arbitration and CIRB decisions relied upon by the Union on the grounds that, unlike those cases, my jurisdiction was limited under section 60 of the *Code,* which did not confer on an arbitrator the kind of broad discretion to determine bargaining unit composition or changes applied by the CIRB (where the cases presented by the Union dealt with applications for certification or for consolidating different bargaining units and changes in bargaining unit configurations under section 18.1 of the *Code*). The relevant portions of sections 18.1 and 60 of the *Code* are as follows:

> 18.1 (1) **Review of structure of bargaining units** – On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.
>
> (2) **Agreement of parties** – If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board
>
> (a) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from the review; and
>
> (b) may make any orders it considers appropriate to implement any agreement.
>
> (3) **Orders** – If the Board is of the opinion that the agreement reached by the parties would not lead to the creation of units appropriate for collective bargaining or if the parties do

not agree on certain issues within the period that the Board considers reasonable, the Board determines any question that arises and makes any orders it considers appropriate in the circumstances.

(4) **Content of orders** – For the purposes of subsection (3), the Board may

…

(b) amend any certificate order or description of a bargaining unit contained in any collective agreement;

…

(d) amend, to the extent that the Board considers necessary, the provisions of collective agreements respecting expiry dates or seniority rights, or amend other such provisions;

…

60. (1) **Powers of arbitrator, etc. –** An arbitrator or arbitration board has

(a) the powers conferred on the Board by paragraphs 16(a), (b), (c) and (f.1);
(a.1) the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statute and the collective agreement;
(a.2) the power to make the interim orders that the arbitrator or arbitration board considers appropriate;
(a.3) the power to consider submissions provided in the form that the arbitrator or the arbitration board considers appropriate or to which the parties agree;
(a.4) the power to expedite proceedings and to prevent abuse of the arbitration process by making the orders or giving the directions that the arbitrator or arbitration board considers appropriate for those purposes; and
(b) power to determine any question as to whether a matter referred to the arbitrator or arbitration board is arbitrable.

[66] While the foregoing was claimed to be sufficient to award the group and individual grievances to the Company, the Company also submitted that in the case of the grievance filed on behalf of the single "Administrative Support" employee who was laid off with the elimination of the 30 Resolution Representatives' positions in BBM, the Outsourcing/Contracting Out MOA had absolutely no application because that individual was not displaced "as a direct result of the outsourcing or contracting out of any of the work normally performed" (as stated in the MOA) by that employee. Rather the employee was laid off because of a shortage of work, which the Company argued was a complete answer to that grievance. (On this point, it should be noted that the Union's positon was that it was sufficient that this individual lost employment as consequence of the "domino effect" of the Company's decision to contract out the work of the

Resolution Representatives in BBM where that individual was the only clerical support for their work, and was thereby covered by that MOA).

[67] The Company disputed the Union's first alternate argument that the Company was estopped from relying on the date restriction in the Outsourcing/Contracting Out MOA in connection with the BIMS employees transferred to Bell Canada effective April 6, 2014. The Company submitted that the conditions necessary for the Union to establish an estoppel did not exist in this case because no representation was made by the Company during the negotiations resulting in the May 29, 2013 Memorandum of Agreement that it would forego or not rely upon its managerial right to contract out any of the BIMS employees' work for legitimate business reasons. The Company contended that mere silence on the matter in the context of the parties' discussions and their sophistication as experienced negotiators, did not constitute a "representation" that the Company would forego its ability to contract out any of the work performed by the BIMS employees prior to the official transfer to Bell Canada, which was not otherwise restricted where the Outsourcing/Contracting Out MOA did not apply.

[68] The Company also denied the Union's further alternate argument that the Company had subjected the BIMS employees to unfair or unreasonable treatment in violation of the prescription in *Bhasin v. Hrynew, supra,* that, "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily". The Company noted that there was no suggestion the Company's decision to contract out the work of the Resolution Representatives in the BBM group was motivated by anything other than legitimate business reasons in the good faith application of its prerogatives affirmed by article 12 of the collective agreement (entitled "Management Rights") to "manage its operations in all respects", in the absence of which no claim of acting dishonestly or unreasonably could be sustained.

[69] Consequently, the Company requested that the Union's group and individual grievances be dismissed, referring to the following jurisprudence and commentary in support: *Air Canada et al.,* 2000 CIRB no. 78, *Air Canada et al.,* 2000 CIRB no. 90, *Global Television Network Inc., et al.,* 2006 CIRB no. 351, Donald J.M. Brown & David M. Beatty, *Canadian Labour Arbitration*,

4th ed. (Toronto, Ont: Canada Law Book, 2006) (WLNC) 2:2211– Estoppel, the basic elements; *Re Bell Canada and Unifor, Local 34-0 (34-15-01),* 2016 CarswellNat 1358, 127 C.L.A.S. 1 (Can. Arb.) (Surdykowski), *Re Sudbury District Roman Catholic Separate School Board v. O.E.C.T.A.,* 1984 CarswellOnt 2411, [1984] O.L.A.A. No. 65, 15 L.A.C. (3d) 284 (Ont. Arb.) (Adams), *British Columbia v. B.C.G.E.U.,* 1987 CarswellBC1987, [1987] B.C.C.A.A.A. No. 234, 30 L.A.C. (3d) 279, 7 C.L.A.S. 14 (B.C. Arb.) (Hope), *Toronto Industries Ltd. v. I.A.M. & A.W., Thunder Bay Lodge 1120,* 2010 CarswellOnt 5788, 101 C.L.A.S. A2, 192 L.A.C. (4th) 1 (Ont. Arb.) (Surdykowski), *Re Progistix Solutions Inc. and Unifor, Local 26 (2013-01),* 2014 CarswellOnt 10035, [2014] C.L.A.D. No. 176, 119 C.L.A.S. 242 (Ont. Arb.) (Luborsky), *Re Ontario (Metrolinx – GO Transit) and ATU, Local 1587,* 2014 CarswellOnt 11141, 120 C.L.A.S. 14,246 L.A.C. (4th) 223 (Ont. GSB) (Dissanayke), *Bhasin v. Hrynew, supra, Re K-Bro Linen Systems Inc. and TC, Local 847 (0018), supra, Re Global Edmonton and Unifor, Local M-1 (Edmonton Meal Periods), supra,* Brown & Beatty, *Canadian Labour Arbitration, supra,* para. 5:1310 – Clear language required to prohibit "contracting out", Ronald M. Snyder, *Collective Agreement Arbitration in Canada,* 5th ed. (Markham, Ont: LexisNexis Canada Inc. 2013), pp. 739 – 746 ("Contracting Out"), Definitions of "Existing" in *Macmillian Dictionary, Collins English Dictionary, Cambridge English Dictionary, Oxford English Dictionary, Re Belleville Police Services Board and Belleville Police Assn.* (2000), 91 L.A.C. (4th) 99 (Ont. Arb.) (Goodfellow), *Re Lambton Kent District School Board and E.T.F.O.* (2007), 164 L.A.C. (4th) 430 (Ont. Arb.) (Etherington), *R v. Mac,* 2002 SCC 24 and Pierre-André Côté, *The Interpretation of Legislation in Canada,* 4th ed. (Toronto, Ont: Thomson Reuters Canada Ltd., 2011) p. 343 – 44 (Special Questions – Bilingual Enactments).

V. Reasons for Decision

[70] The parties' submissions give rise to a framework of analysis centered on the following five questions: (a) What was the status of the 31 Grievors as of the effective date of the relevant Outsourcing/Contracting Out MOA? (b) Given that status, what were the rights and obligations of the parties under the applicable Outsourcing/Contracting Out MOA? (c) Did the Memorandum of Agreement dated May 29, 2013 change that situation, and if so, how and/or is

that change enforceable? (d) If the Grievors were not employees of Bell Canada for purposes of the applicable Outsourcing/Contracting Out MOA, did the equitable doctrine of estoppel apply to affect that result? (e) If not, did any underlying expectation of "fairness" in the administration of contractual entitlements and obligations nevertheless intervene to prevent the Company from exercising its managerial discretion to contract out the identified work?

(a) What was the Grievors' status under the applicable Outsourcing/Contracting Out MOA?

[71] The labour laws throughout Canada recognize the risk that employers may seek to exalt "form over substance" in efforts to avoid or undermine the rights of employees to freely associate in their employment relationship through unionization. To that end, labour boards and arbitrators are empowered to pierce corporate veils and byzantine organizational structures to determine the identity of the "real employer" in order to safeguard the integrity of bargaining units and the workers they legitimately represent, consistent with the Preamble to Part I (Industrial Relations) of the *Code* that proclaims, "a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes".

[72] Advancing these goals, section 35(1) of the *Code* (which prior to legislated amendments effective January 1, 1999 was reflected in section 133 that was worded somewhat differently) has traditionally been construed by the CIRB as "remedial in nature" that is intended to prevent erosion of collective bargaining rights or the avoidance of employers' obligations under the *Code* where safeguarding such rights continues to be a paramount objective: per *Air Canada et al.,* 2000 CIRB no. 78, at para. 31. Labour arbitrators confronted with allegations by a trade union that an employer has taken steps (through the incorporation of related entities to run different aspects of the enterprise in organizing its business affairs, etc.) that undermine the integrity of the bargaining unit or proper representation by the bargaining agent that is claimed to be contrary to the terms of a collective agreement, are recognized to have concurrent jurisdiction with the CIRB in such matters as noted by Arbitrator Tims in *Re Dynamex Inc., supra.* The question in that case

was whether a board of arbitration could give effect to an agreement by the parties to expand the recognition of the bargaining unit that the parties had written into their collective agreement to include a location in Cambridge, Ontario, beyond the description awarded by the CIRB on the original certification that was limited to dependent contractors "working in and out of London, Ontario." In finding that the board of arbitration had authority to interpret and apply the terms of the parties' agreement on the matter, the following is stated to highlight the "peril" on which parties proceed when they agree to go outside of the declarations by the Board, at pp. 158 – 9:

> Arbitrator Kirkwood carefully considered the same authorities as those cited before me in these proceedings, and concluded:
>
> > While parties may agree to exclude or to extend the bargaining unit after certification has been granted, it does so at its peril. The Board sets out the basic principles of recognition of bargaining units and the dangers and effects of going beyond or not as far as the Board had intended in the certification…and concludes that the Board in the federal jurisdiction does not recognize these agreements because of its policy in determining the appropriateness of bargaining units. (At p. 280).
>
> The arbitrator, however, accepted that "there is concurrent jurisdiction created by the parties in their collective agreements to interpret and apply the collective agreement" (at p. 281). She concluded that the recognition clause before her was ambiguous, and thus considered extrinsic evidence, the original Board certificate, as an aid to interpretation. She commented as follows:
>
> > The certification limited the bargaining unit to the geographic area of Toronto and therefore provided rights only to those persons meeting the description in the certification that carried on business with the Company within that geographic area. As the description of the bargaining unit creates the core upon which the collective agreement is built, I interpret the parties' intention to include the new terminals as they arise, as set out in article 1.02, that the new terminals and the members of the union that arise from those terminals must flow within the context of the Toronto region.
> >
> > …However, as the certification is limited to Toronto, I cannot interpret article 1 of the collective agreement as extending the rights and obligations flowing from that collective agreement, to those outside the geographic area contained in the original certificate. If I were to do so, I would be sanctioning an agreement that was inconsistent with the original certification, and which pursuant to the Board's authority under the Code and its policy, could be overturned on a challenge. [At p. 282].
>
> The *Canada Labour Code* empowers the Board to determine a bargaining unit appropriate for collective bargaining where a trade union applies for certification. In addition, the *Code* provides for Board review of bargaining unit structure where the Board "is satisfied that the bargaining units are no longer appropriate for collective bargaining". Both the *Code* and the Board's jurisprudence

> are clear that the Board, in conducting such review, is not bound by the agreement of the parties. As Ms. Kirkwood noted, therefore, while parties may agree to amend the bargaining unit description after certification, they do so at their own peril.

[73] The foregoing discussion is germane to the consideration of my own jurisdiction in assessing the meaning and enforceability of the May 29, 2013 Memorandum of Agreement given the Company's submission that the Board's order of July 4, 2013 was, in the Company's words, a "bare declaration" only, and particularly in view of section 60 (1) (a.1) of the *Code* that confers on arbitrators, "the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statue and the collective agreement." This general power, in my view, extends to labour arbitrators determining whether supplemental agreements between employers and unions arising out of a single employer declaration by the Board such as the May 29, 2013 Memorandum of Agreement at issue in the present case, are compliant with the law when asked to interpret and/or enforce such agreements.

[74] In interpreting supplemental agreements that are outside of the CIRB's declaration of a single employer, the foregoing quotation from *Dynamex Inc.* (and its reference to Arbitrator Kirkwood's decision therein) indicates that I am to consider the underlying purposes of the *Code* with the presumption that the parties would have intended their supplemental agreement to be consistent with those purposes as well, absent which there is a recognition they act at their "peril" in risking a finding that their agreement is unenforceable. This directs me to an examination of what the Board's underlying purposes are in making the kind of "bare declaration" asserted by the Company in the instant factual circumstances, where the relevant statutory provisions and the supporting jurisprudence indicates that such declarations do not arise in a vacuum but are attached to a number of fundamental objectives that must be given proper effect.

[75] Under section 35(1), the CIRB has conceptualized what it has described as a "two step" analysis in deciding whether to grant a "single employer declaration" of the kind issued by the Board in the instant case on July 4, 2013, that first determines from an objective perspective whether the five criteria stated in *Murray Hill Limousine Service Ltd., supra*, have been satisfied, followed by the exercise of discretion to grant or refuse the application for a single employer

declaration based on the necessary finding of a "sound labour relations purpose". This process is described in *Air Canada et al.,* 2000 CIRB no. 90 in the context of an application for a single employer declaration by Air Canada to consolidate a number of corporate entities and unions arising out of the acquisition by Air Canada of Canadian Airlines International Ltd. in or about the early 2000s, as follows at paras. 10, 13 and 21.

> ¶ 10 As was noted most recently in *PLH Aviation Services Inc. et al.,* [1999] CIRB no. 37, at paragraphs 89 ff., in general, there are two steps involved in a consideration by the Board as to whether a section 35 declaration of single employer ought to issue. The first of these steps is the determination as to whether the so-called *Murray Hill Limousine* criteria objectively are present. (The criteria in question are called the *Murray Hill Limousine* criteria because they were first outlined by the Board in *Murray Hill Limousine Service Ltd., et al.* (1988), 74 di 127(CLRB no. 699).) The Board must then decide whether to exercise its discretion to make the requested declaration, to determine if there is a labour relations purpose in issuing the so-called declaration. The Board's position generally has been that while the objective criteria may have been satisfied, if a labour relations purpose for issuing a declaration does not exist, the requested declaration should not be made.
>
> …
>
> ¶ 13 …The Board, as contemplated by the first portion of section 35(1), quoted above, first proceeds objectively and in accordance with the criteria initially set out in *Murray Hill Limousine Service Ltd. et al., supra,* to determine if the works, undertakings or businesses are operated by two or more employers having common control or direction. These criteria which are based on a careful consideration of the wording of section 35 were outlined as follows in *Murray Hill Limousine Service Ltd., et al., supra:*
>
> > …
> >
> > In order for section 133 to apply, the following criteria must be met:
> >
> > 1. two or more enterprises, i.e. businesses,
> > 2. under federal jurisdiction,
> > 3. associated or related,
> > 4. of which at least two, but not necessarily all, are employers (*Ende Trucking Ltd., supra),*
> > 5. the said businesses being operated by employers having common direction or control over them.
> >
> > (page 145)
>
> …
>
> ¶ 21 Certain parties, interested parties and intervenors in the present matter have contended that the Board should only exercise its discretion to issue such a declaration if there is a "remedial" purpose for issuing such a declaration. It is true that this was the Board's practice in the past. Even before the recent statutory amendments to replace the Canada Labour Relations Board (hereinafter CLRB) with the Canadian Industrial Relations Board (hereinafter CIRB), however, this practice had been altered in favour of the consideration of broader criteria for the exercise of the

> relevant discretion. The objectives of developing good industrial relations and constructive collective bargaining or making industrial relations harmonious and effective have generally been pursued by the Board in keeping with the objectives of the *Code.* ***The Board thereby recognized that section 35 could be applied to restructure bargaining units if such restructuring promotes other valid labour relations objectives, which need not necessarily be remedial in nature***….The broadening of the criteria for such a declaration has become even more manifest, in the view of the Board, because of amendments to section 35 of the *Code* and the addition of section 18.1 by *An Act to Amend the Canada Labour Code, Part I,* proclaimed in force on January 1, 1999.
>
> [Emphasis added]

[76] Seizing upon the Board's reference in the foregoing case (and others cited to me) to the role of section 18.1 of the *Code* "applied to restructure bargaining units" (which was one of the amendments coming into force on January 1, 1999), the Company has submitted that in determining the enforceability of the parties' May 29, 2013 Memorandum of Agreement, I am required to give effect to what the Company contends are the plain meaning of the words used in that agreement to limit the rights of the BIMS employees after the CIRB's "bare declaration" of single employer status to BIMS and Bell Canada on July 4, 2013.

[77] In further support of that proposition the Company has referred to the case of *Global Television Network Inc., et al., supra,* where after a different panel of the Board issued a "bottom-line decision" in which it granted a single employer declaration under section 35 of the *Code,* it then "handed off" the bargaining unit review issues in the context of the amalgamation of several employer entities and unions pursuant to section 18.1 for reasons that were elaborated upon at paras. 19 – 24, reproduced in relevant part as follows:

> ¶ 19 Section 18.1 (1) provides a statutory power ***for the type of freestanding bargaining unit review*** the Board's predecessor, the Canadian Labour Relations Board (CLRB), had previously conducted under its general reconsideration power. Section 18.1 (2) to (4) provide new mechanisms that apply not just to section 18.1 applications, but also to single employer (section 35) and successor rights (section 45) applications. ***These mechanisms reflect the view that employers and trade unions are often best able themselves to work out changes that need to be made to their bargaining unit structures once the board has decided whichever issue precipitates the need for change.***
>
> ¶ 20 Section 35 is divided into two parts. The first relates to the circumstances when a single employer declaration can be granted. ***The*** **second deals with the consequential issues that can arise if, and when, such a declaration is granted; that is, do the affected employees**

appropriately fall in one, or more than one, bargaining unit? A variety of circumstances can trigger the operation of section 35. The Task force on Part I of the *Canada labour Code* in its report *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Human Resources Development Canada, 1995), noted the following:

> …Single or common employer provisions are not only designed to protect against union avoidance schemes. They are also useful where, for tax ownership or risk management reasons, businesses choose to operate associated undertakings together under common control.
>
> (page 71)

¶ 20a Any discussion of the purpose of s. 35 has to reflect this diversity of application. The section is broad enough to cover the challenges of the complex corporate relationships in this case which have arisen from changes in ownership, integration, technological change and convergence in the broadcasting industry.
…

¶ 23 In each case, where the Board finds the initial reason for looking at the bargaining unit configuration is met, the process to be followed is the same. Section 18.1(2) is mandatory, no matter whether the source of the Board's action is section 18.1(1), section 35 or section 45. The present case raises the important question as to when, and with what direction or guidance, if any, should the Board be "handing off" the bargaining unit issues to the parties pursuant to section 18.1(2).

¶ 24 The section 18.1(2) mechanism provides a balance between Board responsibility to ensure that the bargaining unit it supervises are appropriate collective bargaining and the parties' own control of their collective bargaining. Section 18.1(2) demonstrates that the parties' own insights are important, and that respect to be paid to arrangements upon which they can agree. ***However, section 18.1(3) and (4) make it clear that the Board maintains its statutory responsibility to ensure that units, even if agreed upon, meet the statutory requirement of appropriateness and serve the purposes inherent in the Code***. The Board also maintains the statutory powers set out explicitly in section 18.1(4) to give such consequential orders as are necessary to get collective bargaining, under any new bargaining unit structure, off to a good start.

[Emphasis added]

[78] The difficulty identified in *Global Television Network Inc., supra,* was that in "handing off" the bargaining unit review to the parties under section 18.1(2) the original panel of the Board provided no guidance in the matter, which resulted in its reconsideration by a subsequent panel of the Board. In commenting upon the "statutory cross-linking of sections 35 and 18.1(2)" the Board stated the following at para. 37 that emphasizes the important sequencing of the considerations under sections 35 and 18.1(2), which requires the examination, firstly, of whether

some labour relations purpose would be served by making a single employer declaration under section 35(1), before a secondary or consequential consideration of whether the bargaining unit configuration should be addressed:

> ¶37 In this panel's view, the employer appears to reverse the two-step analysis that must be undertaken in cases such as this. The question regarding the existence of a valid labour relations purpose goes directly to the issue as to whether a single employer declaration should be issued. In other words, would some labour relations purpose be served by deciding that two or more employers should be treated as one for the purposes of the *Code*? The labour relations purpose question is not tied, of necessity, to the consequential issue as to whether the bargaining units should be reconfigured. Whether the bargaining units should be reconfigured is a separate question to be determined by the board under section 35(2).

[79] The Union relied upon CIRB jurisprudence as well, that is said to demonstrate the proper interplay of sections 35 and 18.1 in *A.L.P.A. v. Air Canada, supra.* That case dealt with an application by a number of pilot associations and union locals challenging the manner in which a consensual board of arbitration had determined how the parties were to integrate pilot seniority lists following the merger of Air Canada and Canadian Airlines International Ltd. arising out of an earlier order by the CIRB declaring Air Canada to be a single employer of the two airlines that were to be operationally integrated. In commenting on the relationship between sections 35 and 18.1 in the circumstances, the CIRB stated the following at pp. 27 – 28:

> The fundamental remedial nature of section 35, as noted, is to ensure that bargaining rights are protected in circumstances where changes in an employer's operations have led to a real threat to the rights of bargaining agents or to the bargained rights of employees, whether such rights are set out in a collective agreement or whether the rights have yet to be bargained. ***Therefore, it is appropriate that, to give meaning to section 35 and section 18.1, negotiated collective agreement rights expressly set out in collective agreements of ongoing effect must be protected.*** Also, the Board must be cautious not to override one set of such rights in favour of another. The negotiated rights of the merging bargaining units must be recognized equally and given equal value unless a persuasive basis can be jade out for preferring the rights of one group over another.
>
> In the present matter, as in many instances, the bargaining rights of the merging units must also be considered, since the application for a declaration of single employer and the Board's consequent order followed by a merger of bargaining units did not immediately occur following the assumption of control by Air Canada***. In these circumstances, the Board must be careful to keep in mind the difference between bargaining rights and bargained rights, and appropriately distinguish between them. Particularly, however, the Board should not lightly discount acquired collective agreement rights.***
>
> …

> Some additional insight in respect of the importance of protecting acquired, bargaining rights in the circumstances of a single employer declaration under section 35 and a consequent process pursuant to the provisions of section 18.1 of the *Code,* arises from a careful consideration of the actual text of that section. If the parties cannot agree in respect of certain issues, the Board must determine the matter at issue and make such orders as it considers appropriate. Where, as in the present circumstances, collective agreement rights and particularly seniority rights are in conflict the Board must amend those rights, but only "to the extent that the Board considers necessary." The indication from the text chosen by Parliament is that the Board must consider amendment of collective agreement rights, including seniority rights only to the extent that such amendment becomes necessary. ***In the case of seniority rights, therefore, like any other collective agreement rights carried forward in a merger, it appears that the Board's goal and that of an arbitrator acting pursuant to Board statutory authority must be, whenever possible, to preserve such existing rights.***
>
> [Emphasis added]

[80] While the CIRB jurisprudence submitted by both the Company and the Union were in circumstances that are factually distinguishable from those of the two grievances before me, resulting in the merger of existing bargaining units of employees of some complexity, there is a common thread through these decisions having direct relevance to the questions that I must nevertheless consider. The foregoing cases illustrate that the first step of the process is to convince the Board on whether it should exercise its discretion to make a single employer declaration under section 35 after objectively satisfying the five tests under the *Murray Hill Limousine Service Ltd.* principles and the Board's independent determination on whether there are sound labour relations purposes supporting the declaration. It is not, in my view, appropriate to characterize this as a "bare declaration" as the Company has in an attempt to discount the significant factual findings and policy considerations that must underlie that determination, which continues to have at its core a remedial objective that seeks to redress an employer's conduct in circumventing the objectives of the *Code* which if not checked will ultimately undermine the integrity of the bargaining agency.

[81] Only when the CIRB is satisfied on the evidence before it that, regardless of the form of business organization, the activities of two or more (usually corporate) entities are, in law, a single employer under common control or direction, and thus makes a single employer

declaration under section 35(1), will the considerations under section 18.1(2) be triggered requiring the parties to attempt to arrive at mutually acceptable terms of their somewhat forced merger. This opportunity for the parties to fashion their own solution to accommodate the potentially desperate interests of the groups being amalgamated under section 18.1(2) is particularly important where there is a joining of two or more existing bargaining units (with their own history of collectively bargained rights) arising out of the section 35(1) declaration, which was the key factual underpinning of each of the CIRB decisions cited to me by the parties. Those cases and their review of the considerations under section 18.1(2) did not arise in circumstances where one of the two entities coming together was not unionized, as the apparent outcome of the employer's past successful efforts in circumventing the objectives of the *Code* to deny (whether intentionally or not) employees of the non-unionized group the protections that they are entitled to under the *Code,* which is more akin to the factual circumstances before me in the present group and individual grievances.

[82] The CIRB jurisprudence also makes clear that the parties' agreement under section 18.1(2) is never the final word. Rather, the extent to which the parties have the ability to determine the configuration of their amalgamated bargaining unit and, in particular, on terms that impact the acquired seniority rights of employees who are affected by the amalgamation, will remain subject to the overall supervision of the CIRB to ensure compliance with the general purposes of the *Code,* which in a proper case a labour arbitrator has concurrent jurisdiction as conferred under section 60(1) (a.1) of the *Code,* subject to the overriding scrutiny (and potential approval or rejection) of the CIRB as indicated by *Dynamex Inc., supra,* and *A.L.P.A. v. Air Canada, supra,* considered above.

[83] What the Company is asking me to do, and which I respectfully must reject, is to look at the CIRB's July 4, 21013 declaration of single employer through the backwards lens of the parties' May 29, 2013 Memorandum of Agreement, which reverses the sequence that the jurisprudence indicates must occur with a declaration under section 35(1) followed by an agreement under section 18.1(2) of the *Code,* in a way that in my opinion misconceives the essential purpose of section 18.1(2) in promoting the preservation of the essential seniority rights

of individual employees affected by the section 35(1) declaration as described in *A.L.P.A. v. Air Canada, supra*. Indeed the parties have recognized the importance of this sequencing in paragraphs A2 and A3 of their May 29, 2013 Memorandum of Agreement, where they have made their Memorandum of Agreement "entirely conditional upon: (i) the Board issuing an order declaring that BIMS and Bell Canada constitute a single employer pursuant to section 35 of the Code"; failing which, "this Memorandum of Agreement will become null and void." They have also stated in paragraph A4 that their Memorandum of Agreement will only take effect "on the date the Board issues the (single employer and the amended Craft and Services bargaining unit description) orders", which is mandated as a condition precedent to the implementation of Memorandum of Agreement's terms.

[84] Thus in applying the proper sequencing to the analysis in the instant case that gives effect to the parties' own expectations, it is first necessary to consider the status of the BIMS employees ***before*** exploring their rights and obligations under the May 29, 2013 Memorandum of Agreement and then considering whether that Memorandum is enforceable as an agreement under section 18.1(2) that is compliant with the purposes of the *Code*.

[85] Adopting that premise, on the evidence before me and in exercising my concurrent jurisdiction with the Board on the matter, I conclude the BIMS employees' status as *de facto* "employees" of Bell Canada ***prior*** to the CIRB's declaration of single employer on July 4, 2013 could not be clearer, which the Company would have recognized at the time. As indicated in paragraphs 9 and 10 of the Agreed Statement of Facts dated May 29, 2013 that was appended as Schedule A to the CIRB's single employer declaration and obviously intended to be relied upon by the Board, both parties acknowledged "the evidence presented to the Board ***established*** that: (a) the five conditions that are required for a single employer declaration ***existed***; and (b) there is a sound labour relations purpose for [the] Board exercising its discretion" (emphasis added). Couched as the language of subparagraph (a) is in the past tense, it is evident that the five conditions set out in *Murray Hill Limousine Service Ltd., supra,* had already been met by that May 29, 2013 date.

[86] The parties also significantly agreed in paragraph 10, "that the employees at BIMS ***perform similar functions*** to employees at Bell" (emphasis added), which they included as part of the reasons justifying the exercise of the Board's discretion in making the single employer declaration that they acknowledged, "will further the objectives of the Code." As indicated by the subsequent efforts of Mr. Thibault to properly place the BIMS employees within the occupations recognized under Appendix A of the Clerical and Associated Employees' collective agreement, the 30 BIMS employees whose work was later contracted out were found to be performing in the role of "Resolution Representatives" that already existed within "Salary Group 11" of the collective agreement, and their single associate, referred to as "Administrative Support" already existed as an occupation or classification within "Salary Group 10".

[87] Even before the "Agreed Statement of Facts" presented by Bell Canada, BIMS and CEP on May 29, 2013 that formed the basis of the CIRB's single employer declaration, the Board's earlier decision of July 20, 2012 that relies on the factual findings in the Industrial Relations Officer's reports dated November 30, 2011 and April 19, 2012, reviewed above, supports the status of the BIMS workers as employees of Bell Canada in substance if not in form, thus demonstrating the Company's successful circumvention of the proper inclusion of these employees within the Union's Craft and/or Clerical bargaining units for years; which is the harm that section 35(1) of the *Code* was intended by Parliament to redress.

[88] I therefore conclude on the evidence submitted to me that as of May 29, 2013 the BIMS employees already had, in law, the status of also being employees of Bell Canada performing similar functions to the unionized employees in the Craft and/or Clerical bargaining units at Bell Canada, perhaps for years, and that their inclusion in one of those bargaining units furthered the objectives of the *Code*, which was later formalized by the CIRB's single employer declaration of July 4, 2013. Moreover, the evidence is conclusive that the 30 Resolution Representatives and their single Administrative Support who were later displaced as a result of the subsequent outsourcing decision by the Company, were performing in the same roles or occupations existing at the time in the Clerical Unit.

(b) Given their status, how did the applicable Outsourcing/Contracting Out MOA affect the Grievors' contractual rights?

[89] In the context of the foregoing conclusion, and before interpreting the meaning and implications (or perhaps enforceability) of the May 29, 2013 Memorandum of Agreement that I shall deal with under a separate heading below, it is appropriate to next consider how their acknowledged status as Bell Canada employees affected the BIMS workers under the Outsourcing/Contracting Out MOA. Since section 35(1) of the *Code* is remedial legislation, I am obliged to consider what the position of the parties (and in particular the 31 Grievors immediately before me) ***would have been*** had the Company properly recognized their status as employees of Bell Canada at the appropriate time, which I have determined to have been at least by May 29, 2013, and was likely as far back as the date of the Union's application before the CIRB on May 4, 2011. This requires an interpretation of the Outsourcing/Contracting out MOA and its application to the facts existing as of the parties' Agreed Statement of Facts resulting in the single employer declaration of the CIRB on July 4, 2013, at the latest.

[90] The Outsourcing/Contracting Out MOA that was signed on September 23, 2013 was the same document in place as of January 19, 2010. Thus by the time of the events leading to the CIRB's single employer declaration of July 4, 2013 (as well as throughout the collective bargaining between the parties that took place from in or about March of 2013 until they achieved a memorandum of agreement to settle their new collective agreement on May 30, 2013) both parties were well aware, or as sophisticated parties would have been reasonably expected to be aware, of the existence of this MOA that the parties renewed without changes.

[91] I accept the premise put to me by the Company, nor did I hear the Union to be denying that, "bargaining unit work may be subcontracted to non-employees, as long as the subcontracting is genuine and not done in bad faith [and that] to prohibit subcontracting, the agreement must expressly so provide": Per Brown & Beatty, *Canadian Labour Arbitration, supra,* at para. 5:1310. The authorities also support the proposition noted by Ronald M. Snyder, *Collective Agreement Arbitration in Canada, supra,* that insofar as a contracting out provision in

a collective agreement may "preclude contracting out work that is "normally done", or that has "historically and customarily" been performed by members of the bargaining unit [the] onus is on the union to establish that the work was customarily done by the members of the bargaining unit" (at para. 14.95). I also agree that there is no evidence to support any assertion that the Company's decision to contract out the work of the Resolution Representatives and their single Administrative Support effective June 4, 2015 wasn't for bona fide business reasons that the Company made in good faith.

[92] The following sections of the preamble language and paragraph 1 of the Outsourcing/Contracting Out MOA are of critical interpretative importance in the foregoing context, which for the ease of immediate reference is reproduced again below:

> The Company's preference is to maintain employment internally. In light of this, the intent of this Memorandum of Agreement is to provide a measure of job security ***for existing Regular Bell Canada employees, who are included in the Clerical and Associated Employees bargaining unit and who are employed by Bell Canada at the date of the signing of this Memorandum of Agreement***, in the event that Bell Canada decides to outsource or contract out any of the work normally performed by employees included in the Clerical and Associated Employees bargaining unit.
>
> The parties agree that before Bell Canada outsources or contracts out ***any work normally performed by employees in the Clerical and Associated Employees bargaining unit***, the Company shall meet with the CEP National Communications Vice Presidents to discuss, review and exchange on issues associated with outsourcing or contracting out.
>
> Therefore the parties agree as follows:
>
> 1. It is agreed that for the duration of this Memorandum of Agreement, Bell Canada will not, as a direct result of the outsourcing or contracting out of any of the work ***normally performed by employees included in the Clerical and Associated Employees bargaining unit***, declare a surplus that would result in the termination or lay off ***of any Regular Bell Canada employee included in the Clerical and Associated Employees bargaining unit and who is employed by Bell Canada on the date of the signing of this Memorandum of Agreement.***
>
> [Emphasis added]

[93] The Company points out, correctly in my opinion, that the preamble to any rights under the Outsourcing/Contracting Out MOA makes clear that its application to restrict the Company's

otherwise inherent managerial prerogative to contract out work for what it determines to be in the best interests of the enterprise is dependent on the satisfaction of three conditions. First, it only applies to "existing" employees. Second, associated with their "existing", the individual must fit within the definition of a "Regular Bell Canada employee included in the Clerical and Associated Employees bargaining unit". And third, perhaps most importantly, the employee "is employed by Bell Canada on the date of the signing of this Memorandum of Agreement".

[94] The Company argues that any protections under the Outsourcing/Contracting Out MOA don't apply to the BIMS employees that were subject to the CIRB's single employer declaration because, when read subject to the May 29, 2013 Memorandum of Agreement between the parties, they were: (i) not existing employees of Bell Canada; (ii) not "Regular Bell Canada employees" as the words "Regular" and "employee" are defined under the collective agreement; and (iii) as of September 23, 2013 when the Outsourcing/Contracting Out MOA was signed in conjunction with the renewed collective agreement, they were not "employed" by the Company because the May 29, 2013 Memorandum of Agreement is to be construed as delaying their entry into any employment status with Bell Canada until April 6, 2014.

[95] Aside from my disagreement with the Company on its interpretation of the May 29, 2013 Memorandum of Agreement that I will expound upon below, the foregoing logic is, again, an example of the Company looking at the BIMS employees through the backwards lens of their May 29, 2013 Memorandum of Agreement which they liken to an agreement contemplated under section 18.1(2) of the *Code* after a "bare declaration" of BIMS and Bell Canada as a single employer in law, rather than applying an analysis of fist considering the status of the BIMS workers from a section 35(1) perspective and then interpreting their subsequent agreement in a manner consistent with the purposes of the *Code*. Applying the perspective of section 35(1) which is remedial in nature that seeks to place the parties in the position they would have been in but for the Company's circumvention of the objectives of the *Code*, the facts reviewed above lead me to the inevitable conclusion that the BIMS employees have the status, in law, of being employees of Bell Canada ***before*** the parties signed the renewed Outsourcing/Contracting Out MOA on September 23, 2013, and thus subject to applicability of the May 29, 2013

Memorandum of Agreement, those employees were entitled to the protection of that Outsourcing/Contracting Out MOA.

[96] It follows from my assessment of the Agreed Statement of Facts dated May 29, 2013, considered above, that the factual and legal basis for the declaration of BIMS and Bell Canada as a single employer had been established by that date, with the result that the BIMS employees were also Bell Canada's employees when the Company and the Union concluded their negotiations for the renewal of their Clerical Unit collective agreement on May 30, 2013. The employees continued to have that legal status when the Union membership ratified the renewed collective agreement on June 28, 2013 (which was presumably approved by the Company at or about the same time), and they held that legal status on July 4, 2013 when the CIRB made its formal declaration of single employer for all purposes under Part I of the *Code,* which is the point where the terms of the Memorandum of Agreement dated May 29, 2013 first takes effect under subparagraph A4 of that Memorandum. The question for my further determination is whether that Memorandum of Agreement changed their status in a way that precluded the operation or application of the Outsourcing/Contracting Out MOA to those BIMS employees.

[97] Assuming for the purposes of analysis at this juncture that the May 29, 2013 Memorandum of Agreement did not affect the BIMS employees' essential status as also being employees of Bell Canada as of July 4, 2013, it is my conclusion that these employees would be covered under the Outsourcing/Contracting Out MOA for the following reasons.

[98] First, having status as employees of the Company, they were by operation of law and the terms of the collective agreement in substance members of the Union's Clerical (or Craft) bargaining units. Their significant seniority rights were recognized under article 23 of the collective agreement which provides that, "Seniority, for the purposes of this Agreement, shall be determined by the net credited service as shown on the Company's records." The facts reviewed above indicate that the BIMS employees' net credited service, at least by then, extended to a point in time that was well before the CIRB's single employer declaration of July 4, 2013. As of July 4, 2013 the parties had ratified the renewal collective agreement that, in accordance with

article 39.02 is recognized as being "effective June 1, 2013, except as otherwise herein provided", thereby capturing all of the BIMS employees whose status, in law, as being Bell Canada employees at that time was unrestricted.

[99] Second, on the evidence before me I have found that the BIMS employees were performing in existing jobs recognized under Appendix A of the collective agreement, and as directly relevant in the instant case, the 30 Resolution Representatives who were later displaced as a result of the contracting out of their positions were working in that precise job as of July 4, 2013, and had been for some time. The same may be said of their Administrative Support that was part of the same operational group. The evidence before me of the IRO's reports relied upon by the CIRB in making its July 20, 2012 determination that the BIMS operations were subject to the jurisdiction of the CIRB under the *Code,* is also conclusive that these 31 Grievors were working side-by-side with Bell Canada employees and managerial officials in the same office buildings, being subjected to the same security protocols and personnel policies, where they had been working with some degree of permanency, likely for years.

[100] Thus to the extent the preamble of the Outsourcing/Contracting Out MOA denotes an intention, "to provide a measure of job security for existing Regular Bell Canada employees, who are included in the Clerical and Associated Employees bargaining unit", the objective facts support the conclusion that these BIMS employees were, but for the circumvention of the *Code* by the Company, performing in or occupying the "existing" occupations of "Resolution Representatives" and "Administrative Support" listed in Appendix A under the Clerical and Associated Employees collective agreement thereby satisfying the definition of "employee" under article 3.01(a) of that collective agreement, whether one considers the English or French translations. The facts also demonstrate there was a degree of permanency to that occupational status for those 31 Grievors thereby satisfying the definition of "Regular Employees" under article 3.01(b), which is defined as "an employee whose employment is reasonably expected to continue longer than one (1) year." Notwithstanding the Company's characterization of these individuals as BIMS employees only, the remedial effect of the section 35(1) declaration by the CIRB is to affirm what should have been their positions in existing bargaining unit positions

under the Clerical and Associated Employees' collective agreement, in the equivalent role of any other "Regular Bell Canada employee". As such, subject to the applicability of the May 29, 2013 Memorandum of Agreement, I conclude that the 30 Resolution Representatives and single Administrative Support Grievors in the present case satisfied those preconditions for the application of the Outsourcing/Contracting Out MOA to their individual circumstances.

[101] The third, and perhaps most important precondition for the application of the Outsourcing/Contracting Out MOA is that the 31 Grievors must be "employed by Bell Canada on the date of the signing of this Memorandum of Agreement", which was signed on the arbitrary date of September 23, 2013. (That this was "arbitrary" is indicated by the fact the parties attached no significance to that date other than it being a convenient time to sign the renewed Craft and Clerical Unit collective agreements and their attached MOAs). Approaching this question from the first step of a section 35(1) perspective, without factoring the impact, if any, of the May 29, 2013 Memorandum of Agreement considered below, I conclude that the Grievors could only have the status of being the employees of both BIMS and Bell Canada at the same time, as of the CIRB's declaration of single employer on July 4, 2013. It follows, given the remedial purpose of a declaration under section 35(1) of the *Code,* that the 31 Grievors in the present case had the status, in law, of being "employed by Bell Canada on the date of the signing of this Memorandum of Agreement", which occurred on September 23, 2013.

[102] That being the case, the intent and meaning of the Outsourcing/Contracting Out MOA in application to the 31 Grievors is manifestly clear. Viewed from the remedial perspective of section 35(1) of the *Code,* that MOA prohibits the Company from outsourcing or contracting out "any of the work normally performed" by the 30 Resolution Representatives working in the Bell Business Market or "BBM" group that has as a direct consequence the layoff or termination of any of the employees in that group. Having done so effective June 4, 2015, which was the proximate cause of the decision to declare them surplus and lay them off, the Company breached its obligations towards those employees under that MOA, if the May 29, 2013 Memorandum of Agreement does not alter that result.

[103] The evidence before me also supports the conclusion that the single Administrative Support who has the individual grievance before me was no less a casualty of the contracting out of the work of the Resolution Representatives. Subparagraph 1 of the Outsourcing/Contracting Out MOA states that the Company "will not, as a direct result of the outsourcing or contracting out ***of any work normally performed by employees included in the Clerical and Associated Employees bargaining unit,*** declare a surplus that would result in the termination or lay off of any Regular Bell Canada employee…"(emphasis added). Inasmuch as this language does not require the outsourcing or contracting out to have involved the same classification of employee who is laid off or terminated, the fact that I find the Company's decision to contract out the work of the Resolution Representatives in the BBM group caused, as a direct result, the shortage of work resulting in the termination or layoff of the single Administrative Support for those BBM group employees, is sufficient to engage the protection contemplated under the MOA.

[104] Consequently, I must reject the Company's submission that the Outsourcing/Contracting Out MOA had no application to the single Administrative Support grievance where the evidence is conclusive that the layoff or termination of that Grievor occurred as a direct result of the Company's decision to outsource or contract out the work normally performed by the Resolution Representatives in the Clerical and Associated Employees bargaining unit, for which that single Grievor was its sole Administrative Support.

(c) Did the Memorandum of Agreement dated May 29, 2013 change the Grievors' status or effect of the relevant Outsourcing/Contracting Out MOA?

[105] Thus having determined in the foregoing analysis under section 35(1) of the *Code* that, absent the May 29, 2013 Memorandum of Agreement, the Outsourcing/Contracting Out MOA applied to the BIMS employees who had the status of being employees of Bell Canada from the remedial perspective of putting the Grievors in the same position they would have been in but for the successful circumvention of their rights by the Company, the essential question on which the instant grievances turn is whether the purported section 18.1(2) agreement effectively takes away those rights entirely. In my opinion any agreement by the parties that, in effect, permits the

Company to benefit from its heretofore successful circumvention of its obligations under the *Code* that was likely ongoing for years prior the Board's declaration of single employer on July 4, 2013, cannot be inferred but must rather be clearly and unequivocally supported by the language agreed upon by the parties where there is a presumption that the parties would have intended to be compliant with the purposes underlying the *Code*. But if it does, there remains the question of whether such an agreement is nevertheless unenforceable as being inconsistent with those purposes that a labour arbitrator has jurisdiction to declare in the exercise of the arbitrator's authority under section 60 (1) (a.1) of the *Code*.

[106] On my assessment, the May 29, 2013 Memorandum of Agreement does not achieve in clear and unequivocal language the result that the Company has advanced in the present grievances of providing the BIMS employees with no rights under the Outsourcing/Contracting Out MOA as of September 23, 2013 when that MOA was signed. Article B6 of the May 29, 2013 Memorandum of Agreement, which states that, "all non-management BIMS employees will remain ***at the employ of BIMS*** until March 31, 2014" (emphasis added), begs the question: What does "at the employ of BIMS" mean on July 4, 2013 when the Board issued its single employer declaration which parties agreed to be the "Effective Date" of their May 29, 2013 Memorandum of Agreement? The CIRB has declared that as of that date, "Bell and BIMS constitute a single employer and a single federal work, undertaking or business pursuant to section 35(1) of the *Code.*" In accordance with the Board's declaration, to be at the employ of BIMS is to be at the employ of Bell at the same time in a single federal work, undertaking or business. The Company asks me to interpret this clause as evidencing the parties' intention to distinguish between the BIMS employees and Bell Canada's employees, but the parties haven't expressly made that distinction in their own Memorandum of Agreement. To interpret it in that manner would, in my opinion, be inconsistent with the CIRB's declaration of July 4, 2013, effectively negating or nullifying the declaration itself until March 31, 2014 (which was later extended to April 6, 2014). If the parties had intended that result they have not done by also saying in clear and unequivocal language that remaining "at the employ of BIMS" meant that these individuals would have no status as employees of Bell Canada at the same time.

[107] If I am wrong in that interpretation, then at most the parties' intention is ambiguous or equivocal from the words they have used in article B6 of the Memorandum of Agreement, permitting reliance upon extrinsic evidence for the purpose of resolving the ambiguity in their language, given the otherwise clear legal status of the BIMS employees as also being Bell Canada employees as a result of the Board's single employer declaration.

[108] Recounting the negotiating history between the representatives of the parties in arriving at the May 29, 2013 Memorandum of Agreement, the evidence conclusively supports the finding that the Company consistently represented to the Union that the sole reason for the delay in implementing the terms of the Board's single employer declaration for the BIMS employees was because of its need to complete the review of the employees' functions in order to place them within the appropriate job profiles within the applicable Craft and Clerical Unit collective agreements, coupled with the Company's further desire to coordinate a smooth transition from the BIMS payroll to Bell Canada and to properly instruct the former BIMS managers on the procedures for operating within a collective agreement. The evidence also supports the finding that consistent with the Company's stated reasons for the delay in implementing the Board's declaration, Mr. Thibault was engaged along with his Union counterparts in reviewing the job duties and responsibilities of all of the BIMS employees, with there being absolutely no suggestion throughout that process that the Company was ever considering contacting out any of their work; all of which was also consistent with what the Union had been told, and the reason it agreed to the Company's request.

[109] I therefore find on this negotiating history and the practice of the parties that followed, that the agreement to delay the implementation of the CIRB's single employer declaration was premised on the mutual intention of the Company and the Union to facilitate the administrative convenience of effecting a smooth transition of the payroll and other remunerative terms of the Craft and/or Clerical Unit collective agreements that the parties did not intend to affect the fundamental status of those BIMS employees to also be Bell Canada employees as of the Board's single employer declaration on July 4, 2013.

[110] That it was not the intention of the parties to eliminate the status of those BIMS employees as also being Bell Canada employees throughout the transitional period is further supported by their curious use of the word "at" in the operative phase of article B6, "will remain ***at*** the employ of BIMS" instead of the word, "of". To be "at" the employ of BIMS denotes an administrative position as opposed to being "of" its employ which is a characterization of essential status. Thus having regard to the ambiguities in the language of the May 29, 2013 Memorandum of Agreement, the effect of the extrinsic evidence is to support an interpretation that the agreement of the parties to delay the full implementation of the Board's single employer declaration to the BIMS workers was for administrative convenience only; not for purposes of diminishing or delaying their fundamental status as Bell Canada employees at the same time.

[111] This interpretation is not changed by the language in article B7 of the May 29, 2013 Memorandum of Agreement which states that: "On April 1, 2013, all non-management BIMS employees will be transferred to Bell Canada and CEP will become the certified bargaining agent of the newly transferred employees". The legal effect of the CIRB's single employer declaration on July 4, 2013 under section 35(1) of the *Code* was to also recognize the BIMS employees as being employees of Bell Canada that must bring with it their legal standing as members of the Union's bargaining units. Therefore in considering whether one should interpret the parties' Memorandum of Agreement of May 29, 2013 as an understanding that the BIMS employees had no seniority protection or fundamental representation rights in that regard by the Union while having the status of being employees of Bell Canada, is such an extreme proposition to require the clearest of language supporting that result, including an unequivocal statement that the BIMS employees' seniority rights are not being recognized for any purposes during the 10-month transitional period until April 6, 2014, which in my assessment is not achieved by the language in the Memorandum of Agreement.

[112] Such clarity is, in my opinion, required to support the Company's interpretation of the May 29, 2013 Memorandum of Agreement that effectively undermines the goal of preserving the fundamental seniority rights of employees who are being merged into bargaining units, contrary to what the Board has instructed arbitrators to achieve in *A.L.P.A. v. Air Canada, supra,* at p. 28

where the Board has stated that: "In the case of seniority rights like any other collective agreement rights carried forward in a merger, it appears that the Board's goal and that of an arbitrator acting pursuant to Board statutory authority must be, whenever possible, to preserve such existing rights." The recognition and promotion of employee seniority rights is no less important or consistent with the purposes of the *Code* to non-unionized workers being merged into a bargaining unit, as in the present case.

[113] Also, having concluded that the BIMS non-managerial workers had the status of being "employees" of Bell Canada as of September 23, 2013 when the Outsourcing/Contracting Out MOA was signed, to then interpret article B7 as supporting the Company's right to completely disregard the BIMS employees' seniority rights as Bell Canada employees at that time, is entirely inconsistent with the purposes of the *Code* that seeks through the remedial application of section 35(1) to place those BIMS employees in the same position they would have been in but for the circumvention of their rights by the Company.

[114] Thus in determining the meaning of what the Company has argued is a section 18.1(2) agreement of the parties respecting the bargaining unit configuration arising out of the CIRB's section 35(1) declaration that is consistent with the purposes of the *Code,* one can only interpret the parties' agreement to be limited to the administrative convenience of effecting a smooth transition from the BIMS to Bell Canada's payroll, without affecting the essential seniority rights of the BIMS employees.

[115] However, if I am wrong in that conclusion, and indeed one has to properly read articles B6 and B7 of the parties' May 29, 2013 Memorandum of Agreement as effectively suspending any seniority rights of the BIMS employees (that, as a consequence, could enable the Company to contract out the work of all 615 non-managerial BIMS employees remaining throughout the transition period to the end of the 2013 – 2017 collective agreement), notwithstanding the remedial purpose of a section 35(1) declaration by the Board, it would in my view be appropriate to consider whether I have the authority and ought to declare such agreement having that effect to be nevertheless unenforceable.

[116] Under section 60 (1) (a.1) of the *Code* an arbitrator has "the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statute and the collective agreement." This, in my opinion, extends to a labour arbitrator under the *Code* that is confronted with what is purported to be an agreement under section 18.1 (2) respecting the bargaining unit configuration in the context of a single employer declaration under section 35(1), that in the opinion of the arbitrator subverts the underlying purposes of the *Code.*

[117] Inasmuch as I have concluded that any agreement of the parties that purports to effectively extinguish all seniority rights of the BIMS employees to the bargained protections under the Outsourcing/Contracting Out MOA that they would otherwise had been entitled to but for the circumvention of their recognition and rights as employees of Bell Canada, I declare that that agreement is not enforceable as a contravention of the remedial purposes and expectations under the *Code.* As Arbitrator Kirkwood noted that Arbitrator Tims approved in *Dynamex Inc., supra,* at pp. 158 – 9, reproduced above, this precise risk of unenforceability is the "peril" that the parties must accept when they go outside of the "bare declarations" by the Board in crafting their own agreements under section 18.1(2) of the *Code*.

[118] Consequently, and notwithstanding any provision in the collective agreement or May 29, 2013 Memorandum of Agreement to the contrary, I must conclude that the BIMS employees had the status of being employees of Bell Canada as of September 23, 2013 and, as such, they were entitled to the protection of the Outsourcing/Contracting Out MOA throughout and after the transitional period from the Board's single employer declaration of July 4, 2013 until the administrative transfer of all payroll and related matters from BIMS to the Company.

(d) Did the equitable doctrine of estoppel apply?

[119] It follows from the foregoing discussion and conclusions that the 30 Resolution Representatives and their single Administrative Support in the BBM group were entitled to the protections of the Outsourcing/Contracting Out MOA and thus the Company violated the

collective agreement when it declared these 31 positions to be surplus effective June 4, 2015 as a direct result of the Company contracting out the Resolution Representatives' work.

[120] Given that determination it is not necessary to consider the Union's alternate arguments based on the equitable doctrine of estoppel. Although I am sympathetic to those submissions where I have found there was a clear representation by the Company that the sole reason for delaying the implementation of all of the terms of the Craft and/or Clerical Unit collective agreements on the date of the CIRB's single employer declaration and the parties' coincident execution of the May 29, 2013 Memorandum of Agreement was for the Company's administrative convenience, it is unclear whether the Company's silence on any unanticipated consequences of that delay was sufficient to shield the Union from those consequences under the technical rules of the doctrine. Nevertheless, not only did the Union reasonably rely on the Company's representation to its ultimate detriment in the circumstances of this case, the Union's accommodations in facilitating the Company's understandable administrative goals extended to Ms. Dolan's offer on behalf of the Union to Mr. Vaillancourt that, "If you need more time – a couple of weeks – give us a shout and we will see what we can do". This kind of cooperative problem-solving is to be encouraged in the workplace, which the opportunistic actions of the Company can only serve to have set back a step if not redressed.

(e) Did any underlying concept of "fairness" nevertheless affect the result?

[121] Nor do I find it necessary to consider the Union's further alternate arguments based on an alleged breach of the implied duty to act honestly and reasonably in the exercise of the Company's contractual prerogative to direct the enterprise under the management rights provisions of article 12 of the collective agreement in accordance with the principles established by *Bhasin v. Hrynew, supra.*

[122] Regardless of the potential application of the concept of "fairness" in the present circumstances, the facts before me support a finding that the Company acted throughout in the good faith pursuit of its business interests, albeit under a misconceived appreciation of its

entitlements and obligations having regard to its past evasive conduct justifying the remedial invocation of section 35(1) of the *Code*.

VI. Disposition

[123] The group and individual grievances before me are accordingly allowed.

[124] For the reasons set out above I conclude: (a) that the BIMS employees had the status of also being Bell Canada employees as of September 23, 2013 when the Outsourcing/Contracting Out MOA was signed; (b) as such they were entitled to the protection of the prohibitions on outsourcing or contracting out their work during the term of the collective agreement under which they maintained seniority rights that were not displaced by the parties' May 29, 2013 Memorandum of Agreement or are unenforceable under the *Code*; and consequently (c) when the Company later contracted out the work of the Resolution Representatives in the BBM group which directly resulted in their own layoff and the layoff of their sole Administrative Support, the Company violated the collective agreement.

[125] As requested by the parties the question of the appropriate remedy for the Company's breach of its obligations considered above is remitted back to them for resolution, failing which I shall remain seized to determine the matter.

DATED AT MARKHAM, ONTARIO THIS 5TH DAY OF DECEMBER, 2017

"G. F. Luborsky"
Gordon F. Luborsky,
Sole Arbitrator