IN THE MATTER OF AN ARBITRATION

BETWEEN:

BELL CANADA

(the “Company”)

-and-

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA (CEP)

(the “Union”)

RE: SALE OF FLEET MAINTENANCE OPERATIONS
GRIEVANCE OF STEVEN PERRY
GRIEVANCE NUMBER 42-06-36

SOLE ARBITRATOR: Michel G. Picher

APPEARANCES FOR THE EMPLOYER:

Mireille Bergeron	- Counsel
Raynald Wilson	- Labour Relations
Laura Mather	- Labour Relations

Pierre Bujold	- Transervice

APPEARANCE FOR THE UNION:

Ed Holmes	- Counsel
Michael Lambert	- National Representative
Martin Peckham	- Chief Steward, Local 42
Dave Beynon	- Steward
Jim Kay	- Advisor
Jim White	- Advisor
Steve Perry	- Grievor

Hearings in this matter were held in Mississauga and Toronto, Ontario on March 5, 2009, December 4, 2009 and January 19, 2010.

AWARD

This arbitration concerns a dispute between the parties relating to the status and rights of employees who worked in its Fleet Maintenance Operations following the sale of that part of the Company's business to a purchaser, Transervice Lease Co. Fleet Maintenance Operations is a division of the Company's business which provides mechanical inspection and repair service for the Company's fleet of vehicles in Ontario and Quebec. The instant arbitration concerns approximately 80 employees, who are members of Local 42 of the Union and who work in Fleet Maintenance Operations in Ontario. Some 50 employees, members of Local 82, were similarly affected in the province of Quebec. This Award concerns only the Ontario based employees.

At the hearing the following Agreed Statement of Facts was filed before the Arbitrator:

1. Bell Canada transferred its Fleet Maintenance Operations to Transervice on February 4, 2007, as it appears from the Service Agreement between Bell Canada and Transervice produced as evidence (hereinafter “Agreement”).

2. Bell Canada has, for many years, provided Fleet Maintenance Services.

3. The transfer of the Fleet Maintenance Operations to Transervice on February 4, 2007 qualifies as a Sale of Business under Section 44 of the *Canadian Labour Code.* (sic)

4. The employees working in Fleet Maintenance Operations were advised on December 5, 2006 of the fact that Bell Canada was transferring its Fleet Maintenance Operations to Transervice.

5. The Agreement provides that Transervice recognizes the CEP as the bargaining agent of the transferred employees and that Transervice agrees to be bound by the collective agreement between CEP and Bell Canada.

6. Bell Canada, Transervice and the CEP have recognized that the transfer of the Fleet Maintenance Operations to Transervice lead (sic) to the application of Section 45.3 of the *Quebec Labour Code* (subject to having the decision translated).

7. Bell Canada took the position that all mechanic employees were automatically transferred to Transervice on February 4, 2007.

8. The mechanics represented by the CEP disagreed with Bell Canada's position and filed grievances alleging that they had been wrongfully terminated and/or improperly laid off and that the Company has violated the collective agreement including articles 8, 11 and 13.

9. The parties agree to enter the following exhibits into evidence:

    - Fleet maintenance Outsourcing – Questions and Answers, dated December 8, 2006.
    - Memorandum of Agreement between the CEP and Transervice dated January 24, 2007.
    - Memorandum of Agreement between the CEP and Bell Canada dated January 29, 2007.
    - Service Agreement between Transervice and Bell Canada.

10. A total of approximately 135 employees were transferred.

As is apparent from the foregoing, the position of the Company is that upon the sale of its Fleet Maintenance Operations to Transervice, all of the employees within that

department transferred with their work to Transervice on or about February 4, 2007. The Union's position is that the transfer was not automatic, and that each employee concerned retained the right to pursue such alternatives as might be available to him or her under the terms of the collective agreement, including accepting layoff from the Company or, alternatively, exercising seniority to displace into or bid on other employment within the Company. As expressed by counsel for the Union, the question the Arbitrator must answer is whether the employees have the right to stay with Bell Canada and exercise their collective agreement rights or whether they are forced to move with their work to become employees of Transervice, effectively severing their relationship with Bell Canada.

Additional facts, apparently not contested, were related to the Arbitrator through the testimony of Mr. Pierre Bujold, now Vice-President of Operations for Transervice and previously the Managing Director in the Bell Fleet Solutions Department. He relates that he has essentially maintained the same functions with Transervice that he

performed with Bell Canada. Mr. Bujold relates that the employees in the Fleet Maintenance Operations are all either apprentice or certified automotive mechanics who worked from some 46 locations in Ontario and Quebec. Mr. Bujold testified that he was part of a team which developed the transfer of the Fleet Maintenance Operations which he describes as servicing between 12,000 and 13,000 vehicles. According to Mr. Bujold, who had some 15 years of service with Bell Fleet Solutions before the transfer, the bargaining unit was comprised of relatively senior employees, with an average of 19 years service and averaging 45 to 46 years of age. He describes Transervice as a New York state based company with a substantial history in providing fleet maintenance services to large corporations.

Mr. Bujold explained that there has been no visible change in operations, save that he now works for a different employer. Bell Canada has retained ownership of all real property, equipment and tools. The contract with Transervice is for a period of five years. Under cross-examination Mr. Bujold confirmed that nothing in effect transferred

into the hands of Transervice save the employees of the Company's Fleet Maintenance Operations. That assertion is obviously subject to the contrary position of the Union in this grievance.

It appears that the collective agreement does contemplate employees making changes in their career path. A letter dated August 19, 2004, which is appended to the collective agreement, describes the Form 912B process by which employees may request to change occupations. According to Mr. Bujold's testimony at least one employee in Chicoutimi used the Form 912B to transfer to another department. Under cross-examination by counsel for the Union he also recalled that an Ontario based employee did transfer into a position of CO I Technician in switching, a change which he explained as a result of an accommodation. Mr. Bujold agreed with counsel for the Union that the grievor, Mr. Steven Perry, could in theory have used a Form 912B transfer to claim a position as CO I Technician, with training being made available to him by the Company.

Mr. Bujold further explained how employees who might be required to transfer into the service of Transervice would see some changes in their non-collective agreement benefits. Notably, there is a significant difference in pension benefits, as the plan has changed from a defined benefit pension plan to a defined contribution pension plan, an arrangement which Mr. Bujold acknowledges is less advantageous to the employees. He notes that employees have also experienced an increase in their life insurance premiums by reason of the smaller group in which they now find themselves. Further, although he is not certain, Mr. Bujold expressed the belief that dental benefits are somewhat less under the plan of Transervice. Additionally, while under Bell Canada employees in receipt of W.S.I.B. benefits were topped up to 100 percent of their wage rate, he was uncertain whether the same top up is available with Transervice. A further lost benefit is the employees' entitlement to stock option purchases in Bell Canada, said to be valued as high as $1,000.00 per year per employee, although Mr. Bujold's understanding is that there is a payment given to employees in lieu of Bell Canada

stock options while they are employed with Transervice, although he is not aware of whether the value of that payment is less than the previous stock option opportunity.

Hours of work have also changed. Under Bell Canada most employees worked one of two tours of duty, either 6:00 a.m. to 2:00 p.m. or 7:00 a.m. to 4:00 p.m. With Transervice, most employees now work from 4:00 p.m. to midnight. Additionally, in some Ontario locations, employees may also work on Saturdays.

Mr. Raynald Wilson, the Company's Director of Industrial Relations, also gave evidence. He explained that in Quebec there was no objection to the transfer of employees, relating that the Company, Transervice and the Union's local in that province obtained an order from the provincial labour relations board for the transfer. Among other things, Mr. Wilson explained the mechanics of employee movement under article 22, which involves transfers of location and article 24 of the collective agreement entitled "912B, Career Path and Job Posting Procedures". He notes the limitations of

the 912B procedure, relating as it does to a job opening which results from a permanent addition or replacement of staff within a district or from outside a given district. He notes the further constraint reflected in article 24.02(c) of the collective agreement whereby 912B applicants are selected by priority to employees “within the same family”, with employees from a different job family having a lower priority of access. Under cross-examination by counsel for the Union Mr. Wilson acknowledged that with the transfer 135 Bell Canada employees became employees of Transervice without any involvement on the part of the Union.

Mr. Wilson did confirm the existence of two agreements entered into by the Union, or more specifically by both its Ontario and Quebec locals. The first is an agreement with Transervice relating to the continuation of the collective agreement and the pension plan through the expiration date of November 30, 2007, the negotiation of a subsequent collective agreement for a five (5) year period expiring November 30, 2012 and the enrolment of shop personnel into a major medical and dental plan. The

agreement further contains reference to employees participating in a defined contribution pension plan as well as further conditions in relation to wages, vacation, seniority, as well as a range of benefits, including life insurance, short term and long term disability, educational assistance and a group R.R.S.P. The second agreement, the fashioning of which did involve Mr. Wilson's participation, is a Memorandum of Agreement between Bell Canada and the Union, signed on behalf of both the Ontario and Quebec locals. That agreement deals with pre-retirement benefits for the period between February 4, 2007 and November 30, 2007, as well as provisions relating to the ability of transferred employees to accumulate service with Bell Canada until December 31, 2011 or until the end of their employment with Transervice, whichever comes first. That portion of the agreement relates to the acquisition of an unreduced retirement pension and acquiring the right to post-retirement benefits, including a provision for pension calculation.

It may be noted that the preamble to that agreement between Bell Canada and the Union reads, in part:

> Whereas Bell Canada will transfer its Mechanical Vehicle Maintenance Operations to Transervice Lease Co. as of February 4, 2007;
>
> Whereas by virtue of this transaction, Bell Canada employees working in the Mechanical Vehicle Maintenance Operations and represented by the CEP (the "Transferred Employees") will be transferred to Transervice Lease Co. on February 4, 2007;

Mr. Wilson also spoke to a Question and Answer document prepared for employees prior to the transfer of the business to Transervice. Two of the questions and answers on that document speak to the fate of employees who do not wish to work for Transervice. They read as follows:

> **5. What choices do I have if I do not want to go to the new company?**

- All employees are joining Transervice along with their current working conditions. If you decide you do not want to apply for a position with the new company, you can apply for another position within Bell using the 912 process prior to January 31, 2007. (Now February 3, 2007 – please see Question 21 for details). If you do not find a position in Bell prior to January 31, 2007, you will need to join Transervice.

24. If I refuse to go to Transervice, am I deemed to have quit or am I declared surplus?

- You are deemed to have abandoned your position.

Mr. Wilson acknowledged that the Union did not participate in the drafting of the Q&A document and never indicated its agreement with the document's contents.

Counsel for the Union questioned Mr. Wilson with respect to the possible application of article 11 of the collective agreement entitled "Force Adjustment". Specifically, it deals with the layoff of employees from the bargaining unit, specifying in article 11.01(b) that when a contemplated reduction in the workforce involves fewer than

50 employees the Company cannot resort to laying off employees except with the Union's agreement. Mr. Wilson responded that article 11 has no application in the case of the transfer to Transervice. As he expressed it, the workload of Fleet Maintenance Operations simply ceased to exist with the transfer of the workload to Transervice. This is not, in his opinion, a workforce adjustment such as contemplated under article 11 of the collective agreement. Mr. Wilson also stated that the Company never turned its mind to the application of article 11.08 which provides for access to the work of contractors and term employees for employees who would otherwise be laid off. Mr. Wilson then went on to relate a number of situations, both at the time of the transfer to Transervice and subsequently, where the Company either hired new employees off the street or moved employees from one function to another, as for example payphone repair and collections employees being moved to become cable repair employees in 2007.

Counsel for the Union specifically asked Mr. Wilson whether at any time the Union representative with whom he dealt, Ontario Region Administrative Vice-President John Edwards, ever indicated his agreement or the Union's agreement that bargaining unit employees had to transfer to Transervice. Mr. Wilson responded that there was never any indication from Mr. Edwards that he or the Union agreed that employees had to transfer to Transervice.

On re-examination by counsel for the Company Mr. Wilson was asked whether there had been any prior transfers of part of the Company's business, where employees moved to the transferee employer. He responded in the positive, giving the example of the transfer of some 700 technicians to Bell Alliant in the summer of 2006. It appears that in that case the Company spun off part of its operations in a number of localities in Ontario and Quebec. As he relates it, on that occasion employees were given no choice and the Union agreed to apply the job swap provisions of the collective agreement to allow them to maintain work closer to home. Most significantly, as

reflected in a notice issued over the signature of Mr. Edwards for the Ontario Region, the Union made no objection to the transfer. It appears that in that circumstance Bell Canada retained part ownership of Bell Alliant.

Mr. John Edwards, who is now retired from his position as Administrative Vice-President for the Ontario Region, testified on behalf of the Union. Mr. Edwards confirmed that the Union never indicated its agreement that employees were required to transfer with their work to Transervice. He indicated that the terms of the Memorandum of Agreement quoted above were negotiated simply to ensure that those who did transfer "...were fully protected." He testified that the Union specifically disagrees that an employee who declines to transfer should be deemed to have abandoned his position in the bargaining unit. According to Mr. Edwards the Union's position was always that employees maintained their rights under the collective agreement, including such rights as they might have to transfer to other work within the bargaining unit, to exercise their seniority to displace into other work or to bid on vacancies, subject always

to qualifications and their entitlement to training. In his view the rights of the affected employees extend well beyond the Form 912B procedure. He related that his advice to employees who did not wish to transfer was that they should file a grievance, as was obviously done by Mr. Perry, the grievor in the instant case. It does not appear disputed that all 80 of the Ontario based employees transferred to Transervice, although 40 of them did so under protest, filing grievances.

The grievor, Mr. Steven Perry, also gave evidence. He is among those who transferred to Transervice under protest. Mr. Perry relates that his hours of work have changed from days to evenings with Transervice, although he performs the same duties using the same tools and equipment in the same premises as he did with the Company. Mr. Perry relates his belief that there are jobs within the bargaining unit with Bell Canada that he could perform including cable repair, standby power, CO 1 technician, coin collector and business technician servicing telephones. By his estimate, most of these tasks he could be trained to perform "...in a couple of weeks". He states that he

did file a Form 912B transfer request, but apparently without success. In conclusion, Mr. Perry simply stated that he wanted to continue to work for Bell Canada and he felt that he could do so, for example, as an employee in cable maintenance.

Both counsels acknowledge that the jurisprudence is divided with respect to the question of whether employees must follow their work when there is the sale of part of a business. Counsel for the Union relies on those arbitration decisions which hold that in the event of a sale of part of a business, members of a bargaining unit continue to retain their employment status and their rights under the collective agreement, and are not obliged to transfer with their work. He points, by way of example, to the decision of the British Columbia Court of Appeal in *B.C.G.E.U. v. British Columbia (Industrial Relations Council)*, (1988), 33 B.C.L.R. (2d) 1. That case involved the transfer of government employees working in a laundry service to a private employer. The decision of an arbitrator and the eventual decision of the Industrial Relations Council affirmed the view that the employee must transfer with his work. In the court of first instance the

reviewing judge found both the arbitrator's decision, as well as the decision of the Council, to be patently unreasonable and quashed them. The British Columbia Court of Appeal dismissed the appeal against that decision. In approaching the issue the Court of Appeal analyzed the provisions of subsections 53(1) and (2) as well as section 64 of the *Industrial Relations Act*, R.S.B.C. 1979, c. 212, the legislative provisions governing the transfer of a business or part of a business where a collective agreement is in force.

In essence, the Court of Appeal ruled that employees could be transferred automatically only if a statute so provided. In the absence of any such statutory provision, it concluded that there was no basis to find that the grievor in the case there under consideration was compelled to transfer to the private company which purchased part of the government's operation. At pp. 14-15 Anderson J.A., on behalf of the majority, reasoned, in part, as follows:

> I am in agreement with the reasons of Shaw J. Insofar as they hold that s. 53 did not expressly or by implication or

when read with s. 64 of the Code make Verrin an employee of the purchaser. It is not necessary in this case to determine whether the principles of common law enunciated by Shaw J. Should or should not have been used by him in interpreting s. 53. In my opinion, the language of s. 53 is clear and unambiguous. The language of s. 64 is equally clear and unambiguous. If one examines these provisions in their most favourable light insofar as the Government is concerned they cannot be interpreted so as to make Verrin an employee of the purchaser. There is no logical or rational basis for holding that Verrin ceased to be an employee of the Government or that he ever became an employee of the purchaser.

When Verrin became an employee of the Government both he and the Government became bound by the provisions of the collective agreement in accordance with s. 64. When the business was sold the purchaser became subject to the terms of the collective agreement in accordance with s. 53. The employees of the purchaser also became bound in their relations with the purchaser by the terms of the collective agreement. Verrin never became an employee of the purchaser and hence he never had any contractual relationship with the purchaser. His only contractual relationship was with the Government. In order to make Verrin an employee of the purchaser one must, as Shaw J said, read words into the statute which are not there. The statute may, in a sense, have provided for the assignment of the collective agreement from the Government to the purchaser. It did not provide for the

assignment of the employees from the Government to the purchaser.

Both the arbitrator's decision and the decision of the Council are founded on the proposition that Verrin continued to be employed and, therefore, his employment was not terminated within the meaning of the collective agreement. As Verrin was never employed by the purchaser he did not become subject to any relationship with the purchaser. His relationship was with the Government only and he had the right to grieve pursuant to the collective agreement that the Government had wrongly attempted to terminate his employment.

The only way that the interpretation placed by the arbitrator and Council on s. 53 can be upheld is to assume that the arbitrator had the legislative power to amend s. 53 by adding the following words to the section:

> (53) "and the employees of the former owner of the business shall become the employees of the purchaser, lessee or transferee."

No authority was put forward by counsel for the Government or for the Council and none can be found which would enable the Council or the arbitrator to interpret legislation by adding words to the statute which are not there. The fact that the Council and the arbitrator have special expertise with respect to the field of industrial relations does not give them the power to usurp the

> legislative function. Assuming for the purposes of argument that there are compelling policy reasons for making the employees of the former owner the employees of the purchaser, these policy reasons and their resolution are for the consideration of the Legislature and not the arbitrator or the Council.

Counsel for the Union further refers the Arbitrator to the following decisions of boards of arbitration and courts: *Computing Devices Canada Ltd. and Employees' Association Computing Devices Canada*, an unreported award of Arbitrator Brian Keller, dated December 19, 1995; *McDonald's Consolidated Ltd. and Retail Wholesale Union, Local 580*, [1997], 61 L.A.C., 4th 129, (McKee); *Canadian Broadcasting Corporation and Communications, Energy and Paperworkers Union of Canada*, an unreported award of Arbitrator M.H. Freedman, dated June 14, 2001; *Canadian Union of Public Employees, Local 38 and Corporation of the City of Calgary*, a decision of the Court of Queen's Bench of Alberta, dated December 20, 2002 (2002 ABQB 587); *MTS Allstream Inc. and Communications, Energy and Paperworkers Union of Canada, Local 7*, [2007], 158 L.A.C., 4th 353, (Peltz); *Pembroke Regional Hospital and Canadian Union of Public Employees*, an

unreported award of Arbitrator Richard Brown, dated August 10, 2009; *Ottawa Hospital and Canadian Union of Public Employees, Local 4000*, an unreported award of Arbitrator Judith Allen, dated September 28, 2009.

Counsel refers to the CBC case in particular, noting that Arbitrator Freedman concluded that the sale by the broadcaster of its transmitter service, involving the possible transfer of 125 bargaining unit employees, did not, in light of the provisions of section 44 of the *Canada Labour Code,* result in the automatic transfer of the employees. Counsel stresses, in particular, paragraph 91 and 95 of that award which read as follows:

> **91** Arbitrator McKee's approach in MacDonald's Consolidated (supra), a fairly recent decision, is unambiguous and compelling. On the sale of a business the employee has an "absolute right" to choose his employer. If he decides to stay (here) with the CBC, the CBC is obliged to continue the employee in employment. There will, however, be no work for the employee such as he had been doing, so the employee may then choose to exercise his seniority rights, wherever that may lead. Instead the

> employee may decided to start work with the successor company which the cases make clear is his right.
>
> ...
>
> 95 I am not determining here precisely what rights employees who choose to stay with the CBC may exercise. That is not a question I am asked to decide. The Corporation argued that there will be no bumping rights exercisable or severance pay payable unless employees "lose" their jobs. The Corporation argued that there will be no loss of jobs and that all employees, at the least, have the right to continue in their jobs with the successor, although they would be free to reject such employment or immediately to quit the employ of the successor. I am only determining the question asked of me, and that is whether the employees have the option either to remain employees of the CBC on the sale of the transmitter service, or to have their employment transferred to and become employees of the purchaser. For the reasons given, I answer the question in the affirmative; that is, the employees do have the option to remain with the CBC or to become employees of the purchaser.

Counsel argues that there is nothing in the terms of the collective agreement, or any other agreement between the parties, which would force the bargaining unit employees who are the subject of this grievance to transfer to the service of

Transervice. Absent any statutory obligation that would force their transfer, he submits that the employees do have the ability to exercise their rights under the collective agreement as persons who may choose to remain in the employment of Bell Canada.

Counsel for the Union also stresses the negative impact on a transfer for bargaining unit employees. He notes the evidence concerning changes in certain benefits and hours of work. He also notes that at most what has transpired, even if it is acknowledged to be the partial sale of a business, is a five year arrangement. He questions what will happen in five years should Bell Canada not decide to renew its contract with Transervice. Counsel submits that fundamentally what has transpired is a workforce reduction, as contemplated under article 11 of the collective agreement, stressing that the Company cannot escape its workforce adjustment rights and obligations which flow from article 11 and the rights of 61 Ontario based employees who have grieved. He stresses that there were many job opportunities posted prior to the forced transfer and that there may well have been employment opportunities available

to them. That, he notes, would be the subject of a later phase of this grievance should the Union's initial argument succeed.

Counsel for the Company questions the basis of the Union's position. She recalls that in the case of the sale of a part of the Company's business to Bell Alliant the Union raised no objection to the automatic transfer of the employees who were affected by that transaction. She questions whether the status of individual employees can be made to depend upon the position adopted by their union as to whether an employee is to be deemed to have transferred upon the sale of part of a business. She notes that contrary to what occurred in Bell Alliant, the Union now asserts that the employees have an individual right to choose to remain with Bell Canada rather than to transfer to Transervice, although they are also entitled to assert the right to take a position with the successor company. Counsel submits that for an employee to be able to exercise any such common law right is contrary to and inconsistent with the most fundamental premises of the collective bargaining regime.

The Company's counsel submits that to the extent that boards of arbitration and courts have said that a common law right of choice is be implied from the collective agreement, that conclusion can no longer be sustained by reason of the decision of the Supreme Court of Canada in *Isidore Garon Ltée v. Tremblay*, [2006] 1 S.C.R. 27. In that case the court found that where a company ceased operating its business and the collective agreement contained no notice provision dealing with the closing of the business, a board of arbitration was incorrect in concluding that the notice entitlements of individual employees found within articles 2091 and 2092 of the *Quebec Civil Code* were implicitly incorporated into the collective agreements. In other words, there was no subsisting common law right of the individual employee that could be asserted.

Counsel for the Company submits that in the case at hand the collective agreement itself contemplates that employees are to transfer with the business when the Company sells a part of its business as a going concern. That, she submits, is

reflected in a memorandum of agreement dated August 19, 2004, incorporated within the collective agreement which reads as follows:

> **Re: Potential Sale of Business involving the transfer of Craft and Services employees**
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> As reviewed with the union during bargaining for the renewal of the Craft and Services Employees Collective Agreement, the Company does not have any plans regarding a sale of business involving the transfer of Craft and Services employees and specifically will not make any such sale from the date of signing of the Collective Agreement to December 31, 2000.
>
> Article 11 – Force Adjustment provides protection for Regular employees from lay-off in cases where bargaining unit work has been contracted out.
>
> In the case of a sale of business, even inter-jurisdictional, where a portion of Bell Canada is sold as a going concern and which involves the transfer of Craft and Services employees, the Company will include in the terms of the sale the requirement for the purchaser to recognize the CEP as bargaining agent for the transferred employees and the terms of this collective agreement. Where, as a result of the sale of business, Craft and Services employees will be intermingled with the purchaser's employees, the criteria for

> determining successor rights outlined in the appropriate statute will be used.

Counsel submits that the foregoing memorandum of agreement reflects the parties' understanding that Bell Canada has the right to sell part of its business and to transfer its employees as part of that transaction, as long as it does so in a manner that ensures that the bargaining rights of the Union and the collective agreement transfer with the business.

Further to that submission, counsel draws to the Arbitrator's attention the provisions of Schedule H of the contract entered into between Bell Canada and Transervice Lease Co. Paragraphs 2.1 and 2.2 of Schedule H of that agreement read as follows:

> 2.1 Bell will transfer to the Supplier all mechanic employees who are members of the CEP under the Craft and Services Employees bargaining unit and

whose names are listed in Appendix 1. The transfer of employees will occur at the Effective Date.

2.2 The Supplier will recognize the CEP as bargaining agent for the Transferred Employees and the terms of their current collective agreement.

Counsel submits that in light of the above, a transfer did occur as contemplated within the provisions of the memorandum of agreement signed between the Company and the Union on August 19, 2004, a document which she maintains is premised on the concept of the transfer of employees and the terms of their collective agreement.

In answer to the question put by counsel for the Union with respect to what will happen to the employees should Bell Canada not renew its contract with Transervice after five years, counsel for the Company points to the clear provisions of article 5.4 of Schedule H of the transfer contract. Under the terms of that provision Bell Canada would then become liable to pay the severance pay of the transferred employees to the

extent of their service with Bell Canada, with Transervice being liable for severance relating to their service with that company.

In essence, counsel makes a twofold submission. Firstly, on the basis of the jurisprudence of the *Isidore Garon v. Tremblay* decision of the Supreme Court of Canada, a common law right of selection cannot be implied into the collective agreement and is inconsistent with the fundamental principles of a collective bargaining regime. Secondly, to suggest that an employee has a right of selection is incompatible with the parties' own memorandum of agreement of August 19, 2004 and Schedule H of the transfer agreement made between the Company and Transervice.

In support of her submissions, counsel for the Company cites the following court and arbitration precedents: *Isidore Garon Ltée v. Tremblay*, [2006], 1 S.C.R. 27; *Calgary City (Re)*, [2001], Alta L.R.B.R. 131; *Calgary City (Re)*, [2001], Alta L.R.B.R. 529; *Enmax Corp. V. Canadian Union of Public Employees*, [2003], ABCA 100;

Association des ingénieurs et scientifiques des télécommunications c. Sylvestre, [2002], R.J.Q. 879, (C.A.); *Northern Telecom Limitée et Association ingénieurs et scientifiques des télécommunications et Framatome Connectors Canada*, D.T.E. 98T-1146; *Westbury/Howard Johnson Plaza Hotel and H.E.R.E., Local 75*, [1992] O.L.A.A. No. 131, (Charney); *Nortel Networks v. Communications, Energy and Paperworkers Union, Local 4*, [2002], C.L.A.D. No. 632, (Tacon).

The jurisprudence in respect of the general question as to whether an employee may elect to stay with his or her original employer, when there is the sale or transfer of part of a business, was well canvassed by Arbitrator Brown in the *Pembroke Regional Hospital and Canadian Union of Public Employees* award. At pp. 6-8 of that award Arbitrator Brown comments as follows:

> **5** Counsel cited several cases dealing with the rights of employees affected by the sale of a business under a labour relations statute making the successor employer a party to the collective agreement negotiated by its predecessor. In all

of these cases, the successor was obliged to offer jobs to the affected employees on the terms and conditions found in the agreement. The only dispute was about the predecessor's obligations. The union argued employees had been laid off or otherwise terminated and were entitled to some right or benefit normally available in the context of redundancy. The claims asserted included bumping and recall rights as well as severance pay and early-retirement benefits. The predecessor employer contended the sale did not expose it to any liability under the collective agreement. In the eleven cases cited, arbitrators, labour boards and courts have differed in their approach to this type of dispute.

6 The predecessor employer prevailed in four cases: Borden Co. and Retail, Wholesale and Department Store Union (1980), 28 L.A.C. (2d) 39 (Kennedy); Westbury Howard Johnson Plaza Hotel and Hotel Employees Restaurant Employees Union (1992), 29 L.A.C. (4th) 89 (Charney); Corporation of the City of Calgary and Canadian Union of Public Employees, [2001] Alta. L.R.B.R. 131; and Nortel Networks and Communications, Energy and Paperworkers Union, [2002] C.L.A.D. No. 632 (Tacon). The first three decisions, two made by an arbitrator and one by the Alberta Labour Relations Board, treated the governing legislation as not only allowing the affected employees to enforce their collective agreement against the buyer but also as terminating their employment with the seller. Arbitrator Charney in Westbury characterized this result as a "quid pro quo." In the fourth case, Nortel Networks, Arbitrator Tacon interpreted the collective agreement as imposing no

obligation on the seller in the context of a statutory succession conferring rights enforceable against the buyer. The outcome was the same in all of these cases. The affected employees had contractual rights vis-à-vis the buyer but not the seller.

7 In the remaining seven cases, the sale of a business did not terminate employment relationships with the predecessor employer. This was the conclusion reached by five arbitrators: Silverwood Dairies and Milk & Bread Drivers' Union (1976), 12 L.A.C. (2d) 225 (Weatherill); Computing Devices Canada Ltd. and Employees Association of Computing Devices Canada, unreported decision dated December 19, 1995 (Keller); Macdonald Consolidated Ltd. and Retail Wholesale Union (1997), 61 L.A.C. (4th) 129 (McKee); Canadian Broadcasting Corp. and Communications, Energy and Paperworkers Union, [2001] C.L.A.C. No. 294 (Freedman); and MTS Allstream Inc. and Communications Energy and Paperworkers Union (2007), 158 L.A.C. (4th) 353 (Peltz). The British Columbia Labour Relations Board came to the same conclusion in Crown Zellerbach Canada Ltd. and International Woodworkers of America, [1982] B.C.L.R.B.D. No. 57. A similar approach was taken by the British Columbia Court of Appeal in Government of British Columbia and British Columbia Government Employees Union (1988), 33 B.C.L.R. (2d) 1.

8 These seven decisions treated sale-of-a-business legislation as giving employees rights against the successor employer but not extinguishing their employment with the

predecessor. In Government of British Columbia, a majority of the British Columbia Court of Appeal quashed an arbitral award treating the grievor's employment with the predecessor as terminated. In support of the Court's ruling, Anderson J.A. offered a succinct rationale:

> The statute may, in a sense, have provided for the assignment of the collective agreement from the government to the purchaser. It did not provide for the assignment of the employees from the Government to the purchaser. …
>
> The only way the interpretation placed by the arbitrator … on s. 53 can be upheld is to assume that the arbitrator had the legislative power to amend s. 53 by adding the following words to the section: "and the employees of the former owner of the business shall become the employees of the purchaser."

In other words, the Court held a clear statement of legislative intent was required to end an employment relationship.

9 If employment relationships with the predecessor employer survive the sale of a business, it follows that employees may elect to stay with that employer. They also have the option of transferring to the successor who is bound by the existing collective agreement. In other words, they are free to choose between the two employers. These observations lead to the question of what contractual entitlements employees have against the predecessor and

whether these rights are affected by the decision they make about changing employer.

10 The predecessor employer's obligations to employees who wish to remain employed by it were squarely addressed in two of the seven cases. In Silverwood Dairies Arbitrator Weatherill concluded "employees who preferred to stay with their original employer" (page 227) retained bumping and recall rights. Likewise in *Mcdonalds Consolidated*, Arbitrator McKee decided employees who did not transfer to the buyer were entitled to collect severance pay under the collective agreement.

11 The extent of the predecessor's obligations was not a central issue in the remaining five of seven cases, but the reasoning in most of them suggests employees who elected not to switch employers could avail themselves of the safeguards normally available to redundant workers. In Computing Devices, CBC and MTS Allstream, the arbitrator was asked to decide only whether the sale terminated employment with the predecessor employer. In the event this question was answered in the union's favour, the arbitrator was not requested to determine precisely what rights employees had against that employer. All of these arbitrators concluded employment relationships survived the sale, based on the reasoning that the purpose of sale-of-a-business provisions in labour relations legislation was to protect employees by binding the buyer to their collective agreement, not to end their relationship with the seller. Arbitrator Keller put it this way in Computing Devices: "A

successorship creates obligations for the successor employer but it cannot of itself extinguish the obligations of the vendor employer towards its employees" (page 8). The same rationale was adopted by the British Columbia Labour Relations Board in Crown Zellerbach which also concluded the sale did not result in a transfer of employees. The reasoning in these four cases suggests employees electing not to transfer retained, not only their employment with the predecessor, but also the contractual rights normally available in the context of redundancy. It would make little sense for an adjudicator first to decide successor legislation did not terminate employment with the predecessor employer, because the sole legislative purpose was to give employees rights against the successor, and then to read the predecessor's collective agreement to mean the benefits normally available to surplus employees did not apply in a sale-of- a- business scenario. The second ruling would rob the first of any practical significance.

12 The force of these observations is buttressed by the following comments made by Arbitrator Freedman in CBC:

> Many of the employees who work in the transmitter service business have considerable seniority. That seniority is not with the transmitter service, but rather it is with the CBC. They are employed by the CBC, not by the transmitter service. There is no policy rationale which should lead to a result where, on the sale by the CBC of the transmitter service, those employees lose their ability to exercise their seniority rights as against

> their employer, among a large bargaining unit, and instead are force to move into a situation where in practical terms they have restricted rights. That is inconsistent with the underlying policy of the successorship provisions in the law, which is to protect employees … (para. 86)

As this passage demonstrates, one of Mr. Freedman's reasons for concluding the sale did not terminate employment with the seller was that the contrary conclusion would have prevented employees from utilizing seniority rights to bump into another job in the selling enterprise. This reasoning leaves no doubt that employees who elect to remain with the seller would retain bumping rights.

13 What about employees who decide to take a job with the successor employer? Three of the seven cases address the question of whether an employee's decision to change employers affects the predecessor's contractual obligations. In Mcdonalds Consolidated Arbitrator McKee ruled employees who decided to transfer to the buyer were not entitled to collect severance pay from the seller, even though such pay was owing to those staying with the seller. The arbitrator noted transferring employees, if later terminated by the buyer, would then be entitled to severance pay based upon their combined length of service with both employers. In short, when it came to collecting severance pay at the time of the sale, employees were faced with a choice between being paid by the seller and exercising their right to

a job with the buyer. They were not entitled to enforce contractual claims against both employers.

14 In CBC, Mr. Freedman described the decision in Mcdonalds Consolidated as “compelling” and went on to say:

> On the sale of a business an employee has an “absolute right” to choose his employer. If he decides to stay (here) with the CBC, the CBC is obliged to continue the employment. There will, however, be no work for the employee such as he had been doing, so the employee may choose to exercise his seniority rights, wherever that may lead. Instead, the employee may decide to start work with the successor company which the cases make clear is his right. (emphasis added; para. 91)

By using the word “instead”, the arbitrator suggested employees could either assert seniority rights against the seller or claim work with the buyer, but they could not do both.

In turning to consider the merits of the submissions of the parties I must agree with the fundamental proposition of counsel for the Union who stresses that in answering the issues in this grievance an arbitrator must consider closely what the statute law says and what the collective agreement says. There is not, in other words,

one rule of general application with respect to the status of employees who work in part of a business which has been sold or transferred. I think that Arbitrator Brown, in his ultimate conclusion in the *Pembroke Regional Hospital and Canadian Union of Public Employees* case is correct in concluding that absent any clear collective agreement language or statutory language which provides that employees may be transferred with part of a business, the individual employee does retain the right to exercise his or her collective agreement rights with the original employer. However, the converse must also be true. Where statute or a clear contractual provision within the terms of a collective agreement provide that employees may be transferred with their work upon the sale or transfer of part of a business, they are then bound by that statutory or contractual obligation and can assert no further rights with the original employer.

After careful consideration I am compelled to conclude that that is the situation with respect to the grievor in the case at hand. I rest that conclusion on the wording of

the collective agreement which is before me, and in particular on the language of the parties' memorandum of agreement dated August 19, 2004.

What does that memorandum provide? Fundamentally it places an obligation upon the Company. It requires Bell Canada to include in the terms of the sale of part of its business that the purchaser must agree to recognize the Union as bargaining agent "for the Transferred Employees" and that it must respect the terms of the collective agreement.

The important question for the instant grievance is whether the Union ceded to the Company the right to enter into a sale of part of its business where that sale includes the transfer of the employees within that segment of its enterprise. In addressing that question the critical language is the following:

> In the case of a sale of business, even inter-jurisdictional, where a portion of Bell Canada is sold as a going concern

> and *which involves the transfer of Craft and Services employees, the Company will include in the terms of the sale*...
>
> (Emphasis added)

How can the foregoing language be responsibly interpreted as other than a mutual recognition of the parties that it is open to the Company, when it sells part of its business, to include the transfer of employees as part of that transaction? A reading of the whole of the final paragraph of the memorandum of agreement of August 19, 2004 leads the Arbitrator to the conclusion that in the event of the partial sale of the Company's business the Company may include within the terms of the transaction a transfer of the employees, but that it must accord to the Union and the employees the protection of requiring the purchaser to recognize the Union and to respect the ongoing application of the collective agreement. The language of this provision does not speak in terms of the treatment of employees who may choose to transfer with the business. Rather, it speaks of the sale of a portion of Bell Canada "...as a going concern" and goes on to say "and which involves the transfer of Craft and Service Employees". In my

view, that language is clear and unequivocal. It contemplates that, by the Union's agreement, the Company can sell part of its business and it can include within that sale the transfer of the employees within it. That is what the Union has agreed to, in exchange for the obviously important protections of its ongoing status as bargaining agent and the ongoing application of the collective agreement under the new employer.

It is obviously not for a board of arbitration to question the wisdom of the bargain which the parties have made. Suffice it to say that I know of no principle of common law and no provision of the *Canada Labour Code* or any other statute which would prohibit such an agreement. I must agree with counsel for the Company that for this Arbitrator to fail to recognize and give effect to these provisions of the memorandum of agreement of August 19, 2004 would be tantamount to amending the collective agreement in manner contrary to the limits on the Arbitrator's jurisdiction clearly expressed in article 15.12 of the collective agreement.

The question then becomes whether the agreement made between Bell Canada and Transervice Lease Co. does involve the transfer of employees, in the sense contemplated by the memorandum of agreement of August 19, 2004. On that question I must agree with counsel for the Company that the parties' agreement respecting the sale of Fleet Maintenance Operations to Transervice effective February 4, 2007 is clear. Article 2 of Schedule H of their agreement, a section entitled "Employee Transfer" specifically states:

> 2.1 Bell will transfer to the Supplier all mechanic employees who are members of the CEP under the Craft and Services Employees bargaining unit and whose names are listed in Appendix 1. The transfer of employees will occur at the Effective Date.

I am satisfied that in negotiating the transfer of employees, as it did in the above contractual language, the Company was exercising a prerogative which was agreed to by the Union in the language of the memorandum of August 19, 2004. Nor do I think that it can be argued that the memorandum of agreement was merely intended as a

restatement of the successorship provisions provided for within the *Canada Labour Code* in the event of the sale of a business. While it is clear that the memorandum of agreement creates a contractual obligation to the same effect as the statute, it is a contractual obligation of no small import. Changes of government can bring changes of law and the elimination of statutory rights and obligations. By negotiating the contractual application of protections which are found within the *Canada Labour Code* the Union may be viewed as having assured itself of the protection of contractual provisions which would transcend the repeal or amendment of the successorship provisions of the *Canada Labour Code*. So viewed, the exchange of bargain made between the parties in their memorandum of agreement is clearly not insignificant. It is therefore not unreasonable to conclude that in exchange for that assurance the Union was willing to acknowledge the Company's right to transfer employees as something which is involved within the sale of part of its business as a going concern. That, in my opinion, is the clear understanding and intent of the memorandum of agreement of August 19, 2004. To that extent, therefore, the collective agreement contemplates that

bargaining unit employees can be transferred to a purchaser or transferee upon the sale or transfer of part of its business, subject to the continuation of the Union as bargaining agent and the continuation of the collective agreement as the instrument which governs the terms and conditions of employment of the transferred employees.

For all of the foregoing reasons the grievance must be dismissed.

Dated this at Ottawa, Ontario this 23rd day of June, 2010.

Michel G. Picher
Arbitrator