Conclusion

I hope these examples illustrate our intent to oppose privatization at the bargaining table, before the labour relations board, in the courts, at the political level, and, if need be, in the streets.

The Canadian union movement believes that there is a legitimate role for the public sector in a modern industrialized and civilized society. We believe that one of government's most important roles is to ensure the accountable delivery of needed public services to all citizens without discrimination.

In our view the attempt to decimate the public sector and to unleash upon it the survival-of-the-fittest mentality represented by privatization is a wrong-headed, regressive policy. Its economic advantages are as dubious as its public policy implications. Quite frankly, history has taught working people not to totally trust the unfettered so-called free market economy. It has taught us that the market system does a questionable job of distributing resources equitably. It has taught us that the market system does little to build social cohesion. It has taught us that the free market system does not do enough to encourage social harmony either within or between nations.

You can count on the Canadian trade union movement, together with most other trade union movements around the world, to continue to use all the tools at our disposal to blunt the spread of privatization and contracting out in our society. I can assure you that any help we receive from the members of the National Academy of Arbitrators in this struggle will be gratefully appreciated.

IV. CANADIAN PRIVATE SECTOR: A MANAGEMENT VIEWPOINT

ROY L. HEENAN*

It was with great pleasure that I accepted your kind invitation to address this distinguished gathering and I am honoured to be here. As I remarked the last time I had this privilege, I have tremendous sympathy for arbitrators. This is undoubtedly because, being born in Mexico, I have always remembered a gypsy saying. The worst thing that a Mexican gypsy can wish on

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anyone is, "*Que entre abogados te encuentres*," which is translated, "May you be found between lawyers." Since the nature of your profession requires you to be often so found, you can understand the reason for my sympathy.

I have been requested to address the Canadian experience in the private sector with subcontracting and outsourcing. Having listened with great interest to John Fryer's remarks against privatization, I cannot help but make a few remarks on this subject in the public sector.

First, it is not correct that privatization is necessarily and inevitably viewed as an evil by the employees. After the recent announcement of privatization in Air Canada, for instance, it was found by independent studies that the employees supported it by a large majority, but the labour movement opposed it, obviously for ideological reasons. Privatization should be judged pragmatically on a case-by-case basis, and the labour movement is wrong to have an ideological knee-jerk reaction against any form of privatization.

Second, one of the reasons we are considering privatization in Canada is because of the unfortunate experience in the public sector in the 1970s. With an almost unlimited right to strike, strikes in the public sector were frequent and settlements were expensive, not only in wages but also in the operational clauses. The result was built-in inefficiency and high labour costs in many of the public services, with the post office in Canada as the most obvious example. As a conciliator named by the government in 1978 in one of the frequent disputes between Canada Post and the CUPW, I wrote in the report that I wished I could persuade the union that the greatest threat to their job security was not technological change but the inefficiency and cost of the service. Indeed, one of the growth industries in Canada in the last decade has been companies offering alternatives to postal services.

In other words, public sector unions rarely considered the public interest in their demands at the negotiating table and in their numerous strikes. These unions should not be surprised that they do not command the support of the long-suffering public, which is now prepared to see alternative services offered if they are efficient and uninterrupted. If the labour movement had considered the public more in those earlier negotiations and strikes, it would not be faced with politicians anxious to find private alternatives to public services. The public does not see

anything inherently good in high cost and inefficient public service. Where that exists, there is logic in looking for private alternatives.

But I have strayed from the topic assigned to me which relates to subcontracting in the private sector. Let me remind my American friends of the substantive differences between Canadian and American labour law, which explain, in part at least, the different approach we have taken in Canada in the arbitration of subcontracting disputes.

First, although we accepted the principal features of the Wagner Act, we added certain important modifications. The most important of these was that by law there was to be no right to strike or lock out during the life of the collective agreement.[1] If there was to be no right to strike, it was obviously necessary to provide by statute the method of resolving disputes during the collective agreement. This was done by providing that every grievance must be settled by binding arbitration.[2] Arbitration and what was to be arbitrated were not left to private negotiations but were statutorily imposed on the parties. Finally, the grievance to be arbitrated was generally defined by statute as a dispute concerning the interpretation, application, or alleged violation of the collective agreement.[3] Within this framework there is no requirement to negotiate during the life of the collective agreement, which in itself sets the rules that arbitrators are expected to apply.

Two other points may interest you. The Supreme Court of Canada has recently ruled that: (1) arbitration is an exclusive remedy for the interpretation of all disputes arising out of collective agreements, and these matters have therefore been removed from the courts,[4] and (2) the arbitral decision is final and binding on the parties and cannot be reopened.[5] The basic principle in Canadian labour law when dealing with an issue of

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[1]*See*, for instance, §§180(1) and (2) of the Canada Labour Code R.S.C. 1970, c.L-1; §§58, 107, 109 of the Quebec Labour Code R.S.Q. 1977 c. C-27; 244(1) of the Ontario Labour Relations Act, R.S.O. 1980 c. 228. The only exception is where a wage reopener is specifically agreed to.

[2]*See*, for instance, *Canada Labour Code* §§155(1) and (2); Quebec Labour Code §100; Ontario Labour Relations Act 44(1).

[3]*See*, for instance, Canada Labour Code §155(1); Quebec Labour Code §1(1); Ontario Labour Relations Act §44(1).

[4]*See St-Anne Nakawick Pulp & Paper v. Canadian Paperworkers Union*, 1 S.C.R. 704 (1986). *Cf.* also *General Motors of Canada v. Brunet*, 2 S.C.R. 537 (1977).

[5]*See Gendron v. Municipalité de la Baie James*, 1 S.C.R. 401 (1986). Obviously, judicial review is available if arbitrators exceed their jurisdiction.

subcontracting is the primacy of the collective agreement. The parties' rights and obligations are to be found there, and management retains the right to subcontract except insofar as that right has been limited by the collective agreement. The classic statement of this rule is in *Re Russelsteel Ltd.*:[6]

> The wide notoriety given to labour's protests against this practice, the almost equally wide notoriety, especially amongst experienced labour and management representatives, of the overwhelming trend of decisions, must mean that there was known to these parties at the time they negotiated the collective agreement the strong probability that an arbitrator would not find any implicit limitation on management's right to contract out. It was one thing to imply such a limitation in the early years of this controversy when one could not speak with any clear certainty about the expectations of the parties; then, one might impose upon them the objective implications of the language of the agreement. It is quite another thing to attribute intentions and undertakings to them today, when they are aware, as a practical matter, of the need to specifically prohibit contracting out if they are to persuade an arbitrator of their intention to do so.

This reasoning has been specifically followed on numerous occasions by Canadian labour arbitration boards, so frequently indeed that it can fairly be said to be axiomatic. Some more recent examples include the decisions in *Robin Hood Multifoods*,[7] *Nabob Foods Ltd.*,[8] *Kennedy Lodge Nursing Home*,[9] *Re Air Canada*,[10] and *Re Park & Tilford Canada Ltd.*[11]

It has also been approved as a correct statement of the law by the courts and labour relations boards. Thus the Ontario Divisional Court, in *Re 401548 Ontario Ltd. and Retail, Wholesale and Department Store Union*, held:

> It seems to be well settled that unless the collective agreement contains a specific prohibition, it is open to management to contract out certain aspects of the work or undertaking to persons other than employees or members of the union.[12]

Similarly the British Columbia Labour Relations Board, in *Re Federated Cooperatives Ltd.*, found:

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[6] 17 L.A.C. 253 (1966), at 256.
[7] 26 L.A.C. (2d) 371 (Ladner, 1980).
[8] 5 L.A.C. (3d) 256 (Munroe, 1982).
[9] 28 L.A.C. (2d) 388 (Brunner, 1980).
[10] 23 L.A.C. 406 (Bairstow, 1971).
[11] 22 L.A.C. (3d) 366 (Larson, 1985).
[12] 111 D.L.R. (3d) 502 (1980), at 504.

> Since the seminal arbitration award in *Re United Steelworkers of America and Russelsteel Ltd.* (1966) 17 LAC 253 (Arthurs, chairman) it is safe to say that in the absence of the kind of motivation which would render contracting out either a lockout or an unfair labour practice under the Labour Code of British Columbia, an employer is not prevented from contracting out unless there is an express prohibition contained in the collective agreement.[13]

Professor Paul Weiler, when he was Chairman of the British Columbia Labour Relations Board, put the matter thus in *Pulp and Paper Industrial Relations Bureau and Canadian Paper Workers Union:*

> Arbitrators do not normally assume that management has agreed to limit its judgment about the level of operations which will be maintained by implication from the mere fact of entering into a collective agreement—even one containing a recognition clause, seniority rights, hours of work and wage classifications (*cf. Russelsteel Ltd.* (1966) 17 L.A.C. 253). But to the extent that parties do negotiate specific restrictions on these residual management rights, arbitrators can and do enforce them. . . . But the fact remains that unions have to negotiate these restrictions on management's normal freedom to cut back on the level of operations.[14]

Indeed, Professor Weiler, in his earlier study *Labour Arbitration and Industrial Change*, produced for the Woods Task Force,[15] observed that "both arbitral and juridical doctrine in Ontario accepts, with limited reservations, the reserved rights theory as justifying management's prerogative to change, unilaterally, working conditions for business reasons. . . . Its logic extends to the subcontracting of a whole operation, as has indeed been held." For this reason he considered that arbitrators wrongly engage in unacknowledged compulsory interest arbitration, rather than rights arbitration, when they impose prohibition on certain types of subcontracting, absent an express prohibition in the collective agreement: "The arbitrator misuses his institutional role when he seeks to imply limitations on management's unilateral initiative in such fields as subcontracting."[16]

Recently some Canadian arbitrators have shown themselves quite uncomfortable with this case law. In *Re Alcan Smelters*, the arbitrator remarked:

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[13] 1 Can. L.R.B.R. 372 (1980), at 379.
[14] 1 Can. L.R.B.R. 557 (1977), at 567.
[15] (Ottawa, Queen's Printer 1970), 6–7.
[16] *Id.* at 138–139.

> The right of employers to contract out work is coming under increasing challenge in both collective bargaining and in the exercise of the grievance and arbitration process . . . one can say that unions must continue to accept the reality that they must negotiate any limitation on contracting out in the collective agreement and have the limitation set out in specific terms in the collective agreement. But the backlash of union response to the contracting out of work is a factor to consider in interpreting any language in which an employer has in fact agreed to limit its right to contract out.[17]

This approach is wrong (though on the facts of the case the arbitrator held that the contracting-out provision had not been breached). That there is a "backlash of union response" to contracting out can scarcely be an argument for allowing arbitrators to look with a jaundiced eye on the exercise of an admitted management right. On the approach taken by the arbitrator in *Re Alcan Smelters,* the *Russelsteel* award itself could never have been made, since unions were no fonder of subcontracting in 1966 than in 1987. Indeed, one can argue with equal cogency that the long-standing imposition of an onus on management to prove just cause in disciplinary cases should be restricted as far as possible by arbitral interpretation because management prefers not being subject to it.

Arbitrators who desire to cut down the scope of the right to subcontract have generally followed one of two routes. The first involves a distortion of the meaning normally assigned to a clause, such as:

> The Company will not permit any person not covered under this agreement to do any tasks or duties covered under this Agreement, unless specifically provided for herein.

In Canadian labour arbitration such language has almost invariably been interpreted as a "working foreman clause," preventing nonbargaining unit employees, such as supervisors or managers, from performing bargaining unit work.[18] In *Re Air Canada,*[19] the arbitrator held that this language prohibited any person, whether an Air Canada employee or not, from performing bargaining unit work, since it was a clear and unequivocal expression of intent that no contracting out take place.[20] Such

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[17]28 L.A.C. (3d) 353 (1987), at 362–363.
[18]Brown and Beatty, Canadian Labour Arbitration, 2d ed. (Aurora, Ontario: Canada Law Book, 1984), 215–216.
[19]10 L.A.C. (2d) 113 (O'Shea, 1975).
[20]*Id.* at 122.

an interpretation is scarcely defensible, given both the normal interpretation of such language in collective agreements and the reversal of the equally well-established principle that contracting out is permissible unless expressly prohibited.

The arbitrator in *Re Country Place Nursing Home*[21] similarly strained the language of the collective agreement he was considering in order to find a way to bar contracting out. He first gave an orthodox interpretation to a typical "working foreman" clause. He then went on to find that the word "person," in a clause forbidding layoffs of bargaining unit members "as a direct result of a nonbargaining unit person performing the work of the said bargaining unit employee," prohibited contracting out. The basis for this conclusion was the finding that, as in *Re Air Canada*, "person" referred to anyone, whether or not an employee of the employer bound by the collective agreement.[22]

A second method of discovering restrictions on contracting out in collective agreements which are silent on the matter is by a distortion of the employer-employee relationship. If the contractor's employees are determined to be "employed" by the employer bound by the collective agreement, then contracting in or out becomes impossible in practical terms. The contractor's employees become the most junior "employees" in the bargaining unit and almost invariably must be "laid off" for lack of work.

Subcontracting in nursing homes and the use of security guards supplied by outside agencies have been the most frequent areas in which arbitrators have distorted the employer-employee relationship to prevent subcontracting. A more detailed examination of some of these cases shows the problems that such distortion entails in the application of the bargain the parties have made.

In *Re Don Mills Foundation for Senior Citizens*,[23] the employer, a nonprofit senior citizens' home, contracted out the functions of the classification of health care aide to Medox, a health care staffing agency. The collective agreement contained no provision prohibiting contracting out and the Foundation had met with the union to discuss the matter in advance, as was required by the agreement. All of the employees in the health care aide classification were laid off by the Foundation, although some

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[21] 11 L.A.C. (3d) 341 (Prichard, 1981).
[22] *Id.* at 354.
[23] 14 L.A.C. (3d) 385 (P.C. Picher, (1984)).

were later hired to work at the home by Medox. Along with other persons hired by the contractor, they performed much the same duties for Medox as for the Foundation.

Medox was responsible for hiring, disciplining, scheduling, supervising, and paying the aides it provided, although the Foundation could have aides it was unsatisfied with removed from assignment to it. Such supervision of the aides as was needed on a day-to-day basis was largely performed, as before the contracting out, by nurses employed by the Foundation. Any disciplinary action taken by Medox would be on the basis of reports by the Foundation, as Medox supervisors were at the home only occasionally.

On these facts the majority of the arbitration board found that the arrangement between the Foundation and Medox did not amount to a contracting out because the health care aides remained employees of the Foundation. Some aspects of the majority's reasoning seem grounded more in the perception that the Foundation had not acted fairly than in an application of the parties' bargain.

For example, the majority found that the Foundation retained "a shared burden" of the remuneration of the aides because "the money paid to the health care aides can be traced directly to [the Foundation] in the form of a fee paid by [the Foundation] to Medox,"[24] and that because the Foundation could require that individual aides employed by Medox not be assigned to the home, "control over dismissal from work at [the Foundation], must be considered a shared one."[25] The most revealing passage in the majority's reasoning occurs in the discussion of the application of the "organization test" (developed in the context of tort law to determine whether an individual's work is integral to an employer's business) to contracting-out situations:

> Using the organization test counsel for the union would have us conclude that if an individual performs a function that is an integral or central part of the business, it cannot be contracted out. . . . We might comment, however, that where there is what might be referred to as a "contracting in" situation such as the one before this board, it may be more difficult to prove that the employment relationship with the prime contractor has either ceased or has not been created.[26]

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[24]*Id.* at 415–416.
[25]*Id.* at 417.
[26]*Id.* at 423.

One curious result of such reasoning is, of course, that individuals who had never been hired by the Foundation and who believed that their employment relationship was with Medox are discovered to be in truth the Foundation's employees.

A similar process can be seen in *Re Royal Ontario Museum.*[27] The museum entered into a contract with Burns International Security to provide additional security guards temporarily required during two major exhibitions between March and July 1983. Under the contract, Burns hired the guards, supplied them with uniforms, scheduled them, and assigned them to particular posts in the museum. Any problems with work performance of individual guards were brought to the attention of the Burns supervisor (who visited the museum daily) or the leadhands (who were present at all times). A union witness who had worked as a Burns security guard testified that he had regarded himself as employed by Burns.

The majority of the arbitration board held that the museum had acted in good faith and that the collective agreement did not prohibit contracting out.[28] It found, however, that the museum exercised control over the guards in that it had the right to require the removal of individual guards for misconduct, that it could require improvement in individual guards' conduct (though criticisms were made via Burns supervisors or leadhands), and that it determined the number of guards required in the various galleries.[29] The majority of the board further held:

> After a great deal of reflection, we have concluded that the control exercised by the museum through at least one contract provision in its agreement with Burns and by way of directions conveyed by museum supervisors through the Burns floater is sufficient . . . to support the finding of an employment relationship between the museum and the personnel supplied by Burns.[30]

As with the *Don Mills* case, the board seems to have been as concerned to see that certain work remained in the bargaining unit on principle, as it was to interpret and apply the provisions of the collective agreement before it. Despite the findings that the employer had acted in good faith and that the collective agreement did not restrict contracting out, the majority award makes "day-to-day direction and control and the utilization of

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[27]16 L.A.C. (3d) 1 (Adams, 1984).
[28]*Id.* at 15–16.
[29]*Id.* at 24–25, 26–27.
[30]*Id.* at 28–29.

personnel" a consideration that virtually automatically overrides any others, lest work be lost to the bargaining unit by "manipulation" of "formal aspects of an employment relationship."[31]

Such an approach involves a degree of manipulation of concepts to attain an end—a prohibition on contracting in or out of some types of bargaining unit work—that was not part of the agreement of the parties. It is surely questionable to use the criteria of "day-to-day control" in such a way that it alone transforms persons hired, paid, disciplined, and directly controlled in the performance of their duties by one employer into the "employees" of another employer. This is the more so because if two employers agree that one will perform some service for the other, the directions which the employer performing the service gives its employees can scarcely avoid being responsive to the other employer's requirements.

Much the same reasoning as in the *Don Mills* and *Royal Ontario Museum* cases was applied by the arbitrator in *Re Maple Leaf Mills Ltd.*[32] for the same purpose. In *Maple Leaf Mills*, the employer had contracted out the watchman function performed by two bargaining unit members. Nothing in the collective agreement limited the employer's right to contract out. Accordingly, the arbitrator stated that "there is no dispute that these individuals are employees and the issue is whether they are employees of the company."[33] In determining that they were Maple Leaf's employees, the arbitrator relied largely on the degree of control which she found to be exercised by it over the guards and "whether the work performed by the security guards is an integral part of the company's operation rather than merely an accessory to it."[34]

A number of common threads run through these cases. The employer is not found to have acted in bad faith in its contracting out. Nothing in the collective agreement is found to bar contracting out. The proposition that an employer may contract out in the absence of restrictions in the collective agreement is not challenged. There is no suggestion that the entity with which the contract is made is anything other than a business wholly independent of the employer's, dealing with it at arm's length. Yet, in all cases, the employer's action was held to be in breach of the

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[31] *Id.* at 34, 28.
[32] 24 L.A.C. (3d) 16 (Devlin, 1986).
[33] *Id.* at 26.
[34] *Id.* at 29.

collective agreement because it had not relinquished sufficient control over the contractor's employees or because the contractor's employees were performing work which was "vital" to the employer's operation.

Several observations suggest themselves. First, in *Russelsteel* no distinction is made between the "vital" and "accessory" parts of an employer's business in considering an employer's right to contract out in the absence of restrictions in the collective agreement. Second, the degree of control an employer is required to relinquish to satisfy the standards of the *Don Mills Foundation*[35] or *Royal Ontario Museum*[36] cases for a successful contracting out is such that the standard will almost never be satisfied in practice. Finally, the enthusiasm for the "organization test," which was developed in the very different context of determining who is an employee for purposes of assigning vicarious liability in the law of tort,[37] gives pause for thought. This is true particularly when arbitrators coolly distance themselves from some of the labour relations boards' tests for determining the existence of an employment relationship. For instance, the Ontario Labour Relations Board in *York Condominium Corp.*[38] identified seven criteria that it would consider to determine which of two entities is the employer for labour relations purposes:

1. The party exercising direction and control over the work.
2. The party bearing the burden of remuneration.
3. The party imposing discipline.
4. The party hiring the employees.
5. The party with the authority to dismiss the employees.
6. The party which is perceived to be the employer by the employees.
7. The existence of an intention to create the relationship of employer and employees.[39]

The arbitrators mentioned above distance themselves from the Board's approach by disclaimers, such as "the approach of a labour relations board dealing with certification applications cannot be so easily integrated into arbitral jurisprudence with-

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[35]*Supra* note 18.
[36]*Supra* note 27.
[37]*See, e.g.*, Flemming, The Law of Torts, 6th ed. (Sydney, Australia: The Law Book Co., 1983), 342–344.
[38]O.L.R.B. Rep. Oct 645 (1977).
[39]*York Condominium, supra* note 38, at 648.

out qualification."[40] A labour relations board's tests for deciding who is an employer for labour relations purposes are more likely to be useful to arbitrators than tests derived from the law of torts. But *York Condominium* considers factors in addition to "on the job control" or "organization" and does not make the latter invariably decisive. The law of torts is less well adapted for the "social engineering" that this line of cases engages in. "Social engineering" has no compelling labour relations justification, as can be seen from recent cases rejecting it; it is precisely the unacknowledged compulsory interest arbitration which Paul Weiler warned against.[41]

The better approach to the issue of contracting out of work can be seen in such cases as *Re Ford Motor Corp. of Canada*,[42] *Re Liquid Carbonic Inc.*,[43] and *Re Park and Tilford Canada Inc.*[44] In the *Ford Motor* case, the employer had contracted out the security work at its new plant during the plant's construction. Nothing in the collective agreement restricted the employer's right to contract out. The union representing Ford's security guards, some of whom were on layoff at the time of the contracting out, grieved, arguing that there had not been a true contracting out because Ford's control over the guards made them Ford employees.

The contractor was an independent business which hired, paid, transferred, disciplined, and discharged the guards assigned to the Ford site and provided their equipment. Neither the guards nor the contractor intended the guards to become Ford employees. However, under the terms of its contract with Ford, the guards assigned to the Ford site required special training not required at other locations guarded by the contractor. Moreover, the policies and procedures which bound the guards were largely prescribed by Ford, and the Ford official in charge of security frequently gave day-to-day instructions to the guards via their supervisors.

The arbitrator held that the guards were not Ford employees and, thus, that Ford had successfully contracted out the work. In doing so, he cautioned against a one-sided emphasis on the

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[40] *Re Royal Ontario Museum*, *supra* note 22, at 32; quoted and applied in *Re Maple Leaf Mills*, *supra* note 27, at 28.
[41] *Supra* note 10, at 138–139
[42] 21 L.A.C. (3d) 141 (McDowell, 1981).
[43] 25 L.A.C. (3d) 309 (Melnyk, 1986).
[44] 22 L.A.C. (3d) 367 (Larsen, 1985).

"control test" in determining the identity of an employer, both because the test was developed to determine vicarious tort liability not for labour relations purposes, and because an employer always has some degree of control over the activities of a contractor's employees when they work on the employer's premises.[45] The better approach, the arbitrator held, is to recognize that "control" is not the only factor to be considered, is difficult to define with precision, and may not be determinative in a particular case."[46] He added that factors such as the power to hire, fire, discipline, or set wages, along with the perceptions of the parties to the alleged employment relationship, cannot be ignored.

In other words, the proper tests for the existence of an employer-employee relationship for arbitration under collective agreements ought to be similar to those for other labour relations purposes:

> Both the O.L.R.B. and the N.L.R.B., like the arbitrators, are concerned with defining the employment relationship for the purposes of labour relations, and it would be a little unusual if, for the purpose of collective bargaining legislation, forming a trade union, negotiating with his employer, suing for unjust discipline or nonpayment of wages, workmen's compensation, employment standards, or safety legislation, an individual had one employer—the subcontractor—but for the purpose of interpreting a prime contractor's collective agreement, he had another. *This would be especially curious since, for practical purposes, the almost inevitable result of finding him to be an "employee" of the prime contractor is to terminate his employment relationship. The arbitrator's quest for employment status is normally undertaken for the purpose of ending it!*[47] (emphasis supplied)

Here, consideration of all factors other than day-to-day control showed the guards' employer to be the security agency, and day-to-day control was "mixed and equivocal," with both Ford and the security agency determining the activities of the guards. The grievance was accordingly dismissed since the guards could not be considered to be Ford employees.

In *Liquid Carbonic*, the employer's deliveries were carried out partly by its own drivers and partly by drivers from a contractor.

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[45] *Id.* at 151–152. It is worth noting that Lord Denning, the inventor of the control test, referred to it as a "very useful device to put liability on the shoulders of one who should bear it, but it does not affect the contract of service itself." (*Denham v. Midland Employers Mutual Assurance, Ltd.*, 2 Q.B. 437 (1955), at 443)

[46] *Id.* at 152.

[47] *Id.* at 156.

The contractor hired and paid its drivers and imposed formal discipline when necessary. The contractor's drivers were dispatched from the same site as those of Liquid Carbonic, wore Liquid Carbonic uniforms, and were generally assigned to Liquid Carbonic on a continuous basis. The union admitted that the collective agreement did not preclude contracting out but claimed that the contractor's employees should be considered Liquid Carbonic employees, so that contracting out had not in fact occurred.

The Board found that Liquid Carbonic had contracted out and rejected the "control test" in favour of an emphasis on the legal relationships among the parties, particularly on who pays an employee's wages. This approach avoided problems inherent in the control test with a notional (and involuntary) transfer of employees from one employer to another, namely, that the rights of contractors and their employees can be affected without their having status in the proceedings,[48] and that conflicting terms of employment may be held to apply to the same employees. Finally, the factual situations giving rise to allegations that an employer has not succeeded in contracting out are better dealt with by a labour relations board hearing under the "related employer provisions" in the applicable labour relations act.[49]

The situation in *Re Park & Tilford*[50] was that the employer had shut down its distillery, along with a large adjacent garden open to the public, due to economic conditions. Almost all the employees had been laid off, including all the gardeners. Some months after the layoff, Park & Tilford engaged in negotiations to sell the land on which the distillery stood for commercial redevelopment. In connection with the sale, it let a contract to a landscap-

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[48]*Supra* note 37, at 319. This consideration may take on additional weight if the decision of the Ontario Divisional Court in *Canadian Union of Public Employees v. Canadian Broadcasting Corp.* (unreported, June 23, 1988) becomes generally accepted. The court there held that cases such as *Hoogendoon v. Greening Metal Prods.*, 1968 S.C.R. 30 and *Bradley v. Ottawa Professional Fire Fighters Ass'n*, 2 O.R. 31, 63 D.L.R. (2d) 376 (Ont. C.A. (1967)) do not require that unions not parties to a collective agreement be given notice of an arbitration hearing, even if the *de facto* result of the hearing may be that the union's work jurisdiction is circumscribed or some of its members are laid off. This was so, the court held, because the arbitration hearing is not *de jure* binding on a union not party to the collective agreement; the union has a remedy for any harm suffered by its members by grieving under its own collective agreement. Logically, this means that nonunionized employees of a contractor who are in *de facto* danger of dismissal as a result of an arbitration award are not entitled to notice of the hearing since they can sue their employer for wrongful dismissal at common law if laid off. Similarly the contractor still has its remedy in a breach-of-contract action.

[49]*Id.* at 320–321.

[50]*Supra* note 38.

ing business for renewed maintenance of the gardens. A Park & Tilford gardener who had been laid off grieved that the employer had improperly permitted bargaining unit work to be performed by nonunion personnel. Unlike most cases considered here, the Park & Tilford collective agreement did contain a clause limiting the employer's right to contract out. The employer was not permitted to contract out work "for the purpose of reducing the number of employees employed by the Employer." The arbitrator held that the contract with the landscaper had not been made for that purpose, therefore the clause was not applicable.

The principal issue was whether Park & Tilford's agreement with the landscaper was true contracting out. The arbitrator found that the landscaping business had supplied its own tools and that it alone had provided supervision, charging Park & Tilford a fixed rate per hour for each employee's time. While relying on "real and substantial control" as the decisive standard, the arbitrator considered a range of factors besides day-to-day supervision and concluded that contracting out had taken place.[51]

This review of recent case law shows the problems arising when the single consideration of "control" is used and distorted by arbitrators to achieve results which may seem fair to them but do not reflect the agreement of the parties. "Control" has been so widely defined that almost any degree of influence over the actions or employment conditions of a contractor's employees has been sufficient for an arbitrator to find that the employer has failed to effectively subcontract.

A better test for determining the identity of the employer is that developed by the Ontario Labour Relations Board in such cases as *York Condominium Corp.*[52] and *Sutton Place Hotel.*[53] As the Board indicated in *Sutton Place Hotel*, the criteria are used in a flexible manner with no relative priority assigned to any one factor. The Board will "consid[er] how each in turn applie[s] to the particular facts before it and [come] to a decision based on the preponderance of evidence."[54] In adopting this more sophisticated approach, the Board is mindful of one considera-

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[51]*Id.* at 374–375.
[52]*Supra* note 38.
[53]O.L.R.B. Rep. Oct. 1538 (1980).
[54]*Supra* note 53, at 1545–1546.

tion in particular, which disappears from the view of arbitrators focusing only on "control":

> The consensual element in an employment relationship ought not to be forgotten. An employee is entitled to know the identity of his employer at the outset of the relationship with an employer . . . . In brief an employee should be the first, not one of the last, to know the identity of this employer.[55]

This observation applies to the employees caught as outsiders in a contracting-out dispute as much as to others.

As an attorney, it is my view that arbitration works best when it applies and interprets the provisions of the collective agreement. It does not work as well (and indeed calls arbitration itself into question) when arbitrators improvise and impose their own sense of "industrial justice" on the parties. At that point there are too many variables, too many pressures, too many ideologies at play. What may be right for one arbitrator may be wrong for another. Absent the framework of the parties' intentions in the collective agreement, arbitration drifts into other considerations, not all laudable, but all uncertain. This does not serve the parties well. In subcontracting cases, in Canada at least, arbitrators have generally avoided that temptation, and the result has been certainty, which both parties can use at the bargaining table. That was the reasoning behind Harry Arthur's *Russelsteel* decision. I believe it was the correct approach.

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[55]*Alwell Forming Ltd.*, O.L.R.B. Rep. Aug. 709 (1978), at 715.