IN THE MATTER OF A GRIEVANCE ARBITRATION

BETWEEN:

ONTARIO EMPLOYEES' ASSOCIATION

("OEA")

- and -

EXPERCOM TELECOMMUNICATIONS INC.

("Expercom")

Counsel for Ontario Employees' Association:	Michael Klug
Counsel for Expercom Telecommunications Inc.:	Allison E. MacIsaac
Counsel for Labourers' International Union of North America, Ontario District Council:	Ben Katz
Counsel for International Union of Operating Engineers, Local 793:	Kirsten Agrell

INTERIM AWARD

1. Labourers' International Union of North America, Ontario District Council ("LIUNA") and International Union of Operating Engineers, Local 793 ("the IUOE") seek to intervene and be accorded party status in the hearing of the OEA's grievance asserting that Expercom has acted contrary to its collective agreement with the OEA and violated the *Labour Relations Act, 1995* by allegedly contracting out work previously performed by Expercom bargaining unit employees.

2. The OEA opposes the requests by LIUNA and the IUOE.

Background

3. The OEA's grievance was sent to Expercom by email on April 27, 2023. It reads as follows:

> The Union, Ontario Employees Association, on its own behalf and on behalf of its members, grieves that the Employer, Expercom Telecommunications Inc, has violated the Collective Agreement, including, but not limited to, Articles 1.01, 1.02, 2.01, 2.02, and 2.03, and the *Labour Relations Act, 1995*, including, but not limited to, sections 70, 72 and 76, in that the Employer has contracted out work presently and normally performed by full-time employees in the bargaining unit.
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> More specifically, the Employer has contracted out the entirety of work presently and normally performed by full-time employees and has done so in violation of the Collective Agreement, statute, in bad faith, without any prior notice to, or consultation with the Union, for no legitimate business reason and in a manner targeted at eviscerating the Union's bargaining rights. The Employer's actions have effectively and immediately crippled the Union's ability to defend itself against rival trade unions in the upcoming open period.
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> The Union seeks a declaration that any agreement regarding the contracting out of work, and the contracting out of work itself, violates the Collective Agreement and the *Labour Relations Act, 1995* and, further, an order that the Employer cease and desist from continuing to violate the Collective Agreement and the *Labour Relations Act, 1995*. Further, the Union seeks damages, compensatory, general and punitive in an amount to be particularized at the remedy phase of the arbitration hearing in this matter.
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> Given the urgency of this issue, we asked that the parties proceed immediately to expedited arbitration.[1]

4. The email response on May 3, 2023 was as follows:

> We are in receipt of the email correspondence containing your grievance filed on date [*sic*] wherein you alleged that Expercom Telecommunications Inc. ("Expercom") has violated the Collective Agreement by "contracting out work".
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> Expercom has viewed the unparticularized allegations contained within and denies any breach of the Collective Agreement, the *Labour Relations Act, 1995*, or otherwise. Expercom notes that the grievance is devoid of any details as to how the referenced sections of the Collective Agreement have been violated and also contained contains no facts which, if true, would make out a violation of any of sections 70, 72 or 76 of *Labour Relations Act, 1995*. Expercom further denies that it has not [*sic*] acted in any way that is targeted as "eviscerating the Union's bargaining

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[1] I was appointed pursuant to section 48 of the *Labour Relations Act, 1995*; however, the matter was previously before the late Harvey Beresford who was obliged to withdraw due to his health. LIUNA and OEA had made written submissions to Arbitrator Beresford in June and July 2023 to set out their positions on LIUNA's request that it be granted standing. The IUOE first sought to be involved in this matter on the eve of the December 13, 2024 hearing.

> rights" or that it has "crippled the Union's ability to defend itself against rival trade unions in the upcoming open period", as suggested.
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> As the Union is aware, on April 14, 2023, the Union and bargaining unit members were advised of a recent settlement between Telecon Inc. ("Telecon") and LiUNA. Under the settlement, the Union and its members were advised that Telecon had agreed to directly hire its own workforce to perform the work which it had previously had [*sic*] directed to Expercom.
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> Accordingly, bargaining unit members were advised that, as a result of the settlement, any work performed by Expercom employees who were not LiUNA members would end no later than April 30, 2024. Employees were also advised that by April 2024, they would receive an offer of employment with Telecon Inc. which they could accept if they wished.
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> The implementation of a settlement between two independent parties in which <u>Telecon</u> agreed to cease assigning work to Expercom does not constitute a decision of <u>Expercom</u> to contract out under the Collective Agreement between Expercom, and the Union. Expercom was not a party to the settlement.
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> Accordingly, Expercom therefore denies any alleged breach of the Collective Agreement or the *Labour Relations Act, 1995*. The grievance is denied.
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> We further note that the Collective Agreement between the parties contains no provision for "expedited arbitration" and therefore should the Union wish to advance this grievance further, it is Expercom's expectation that it do so by following the appropriate procedure as set out in the Collective Agreement.

5. The OEA included in the book of documents it submitted for the hearing an agreement between LIUNA (defined, together with nine affiliated Locals, as the "Union") and four entities including Telecon Inc. (together styled "Telecon Companies"). The document is titled "Minutes of Settlement" and appears to have been executed on April 13, 2023. As noted in the grievance answer, Expercom was not identified as a party to the agreement.

6. The Minutes of Settlement include the following provisions:

> 4. Between the execution of these Minutes and April 30, 2024 (the "**Enforcement Date**) Telecon Inc. will transition all work captured under the jurisdiction of the [Union's] Provincial Utility Agreement, including work not currently being performed by Union members employed by an entity operating as Expercom Telecommunications Inc., to be performed by its direct employees or under subcontract to companies that are bound by the Provincial Utility Agreement. The transition will be completed by no later than the Enforcement Date and the Union agrees that it will not file and/or refer any grievances against any or all of the Telecon Companies in respect of work performed prior to the Enforcement Date except in Board Areas 15 and 29.
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> 5. The Telecon Companies agree that effective no later than the Enforcement Date, all non-ICI construction work, including work covered by the Provincial Utility Agreement, performed by Telecon Companies and/or assigned to Expercom

> Telecommunications Inc. will exclusively be performed pursuant to the Union bargaining rights including the LIUNA Provincial Utility Agreement.
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> 6. The Union will facilitate the above transition by allowing Telecon Inc. to offer employment to employees currently and previously employed by Expercom Telecommunications Inc., and immediately refer them to its project sites on the condition that all such employees become members of the Union before the Enforcement Date. Telecon Inc. will also be permitted to pay wage rates exceeding those required under the Provincial Utility Agreement that it deems necessary to attract/retain skilled labourers to meet work capacity.

The IUOE's Involvement

7. On December 12, 2024 I received an email from counsel for the IUOE, advising that "Local 793 . . . may wish to intervene in this grievance" and attaching a letter stating as follows:

> IUOE Local 793 has recently been informed that the OEA and Expercom Telecommunications Inc. have an arbitration scheduled before you on December 13, 2024 regarding a contracting out grievance. We understand that the dispute relates to work performed by employees of Telecon Inc.
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> IUOE Local 793 is the current bargaining agent for the operating engineer employees of Telecon Inc, and was the former bargaining agent of a bargaining unit of operating engineers employed by Expercom Telecommunications Inc. in eastern Ontario.
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> While we have not yet had time to fully understand the situation and the grievance, I am writing out [*sic*] this earliest opportunity to let you and the parties know that we may wish to intervene. We understand that the subject of an intervention by Labourers International Union of North America may be dealt with on December 13, 2024 and we would like to attend.

8. While counsel for the IUOE attended on December 13, 2024 and indicated its desire to intervene, I was unable to ascertain the bases for the IUOE's contention that it ought to be accorded status. Counsel advised that the IUOE has province wide bargaining rights; however, I was not assisted in my inability to understand how — without more — its possible interests as "the current bargaining agent for the operating engineering employees of Telecon Inc" or (if it were) "the former bargaining agent of a bargaining unit of operating engineers employed by Expercom Telecommunications Inc. in eastern Ontario" justified its participation in the hearing into the OEA grievance.

9. Indeed, I do not have anything from the IUOE as to its members being involved in the performance of work allegedly contracted out by Expercom or to establish a basis for the IUOE's contention that it had any prior connection to or collective bargaining relationship with Expercom, unless it preceded and ended before the OLRB's issuance of a certificate to the Port Perry Employees Association — the OEA's predecessor — sixteen years ago.

10. As for that, I note that the recognition clause in the collective agreement between the OEA and Expercom reads as follows:

> 2.01 The Employer recognizes the Ontario Employees Association ("the Union") as the sole and exclusive bargaining agent of all employees of Expercom Telecommunications Inc. ("the Employer") in the Province of Ontario, including those employees who are engaged in carrying out work in the construction industry, save and accept non-working foremen, persons above the rank of non-working foremen, office and clerical staff.[2]

11. There is nothing before me to explain how or when the IUOE became "the former bargaining agent of a bargaining unit of operating engineers employed by Expercom Telecommunications Inc. in eastern Ontario", how and when the IUOE ceased to be the bargaining agent for any Expercom employees, and how the IUOE's interests are affected by the alleged contracting out complained of by the OEA, or by any of the relief sought by the OEA. Unlike LIUNA, the IUOE has not explained how any success the OEA might enjoy in prosecuting its grievance would be to the IUOE's detriment.

Decision

12. Having carefully considered the parties' submissions and the material referred to in support, I have concluded that I should permit LIUNA to intervene; however, I am not satisfied that there is a basis for the participation of the IUOE as a party to these proceedings.

13. On reflection, I have found it unnecessary to attempt to resolve the dispute as to the application of the authorities submitted by counsel. In the main, I accept the OEA's position that the trade union representing workers performing the work said to have been contracted out is typically not afforded standing in the litigation of the contracting out grievance. However, the authorities submitted by the OEA demonstrate that "general rules" are subject to being distinguished with reference to particulars not found in all instances.

14. In my view, the text of the grievance and its obvious reference to the Minutes of Settlement that provide the underpinning for the movement of work and the alleged improper contracting out establish a basis for LIUNA's being afforded standing and an opportunity to respond to the allegations of its being party to — if not the initiator of — violations of the OEA collective agreement and the *Labour Relations Act, 1995.* From the perspective of the OEA made evident in its wording of the grievance and its submissions, the Minutes of Settlement constitute an agreement in respect of which the grievance seeks a remedy. Accordingly, LIUNA, as a party to that agreement, has a direct interest in responding to the contention that the agreement blamed

[2] In the submissions provided to Arbitrator Beresford by letter dated July 5, 2023, Mr. Klug's predecessor as counsel for the OEA noted that the OLRB's January 14, 2009 certificate for the Expercom bargaining unit used the same language to refer to "all employees of Expercom Telecommunications Inc. in the Province of Ontario, including those employees who are engaged in carrying out work in the construction industry, save and except non-working foremen, persons above the rank of non-working foremen, office and clerical staff."

for or associated with the alleged improper contracting out violates the OEA collective agreement and the *Labour Relations Act, 1995*.

15. In that respect, the situation here is akin to that considered by Arbitrator Burkett in *Laurentian University and Laurentian University Faculty Association*, 2009 CanLII 101182 (ON LRB) ("*Laurentian University*"). There, the grievance challenged the right of the University to deliver credit courses towards a Laurentian University degree at campuses of Georgian College using Georgian College teachers. Georgian College applied to intervene. OPSEU, as the bargaining agent for the College's academic bargaining unit and party to the collective agreement under which the teaching of the Laurentian University courses was credited, also sought to intervene.

16. Arbitrator Burkett noted (at p. 3) that the Laurentian University Faculty Association ("LUFA") had revised the position set out in its grievance and had confirmed that it was not taking the position that "non-LUFA members currently delivering Laurentian credit courses at Georgian are in fact Laurentian employees or should be members of the LUFA bargaining unit". However, as Arbitrator Burkett, explained the relief sought continued to be important to the application:

> The relief now sought by LUFA, to repeat, is a declaration that Laurentian is in violation of its obligations and an order directing the Employer to deliver courses in compliance with its obligations commencing in the 2009-2010 academic year. These obligations, although not specified, are identified as flowing from the ". . . operation of the *Post-Secondary Excellence Act, 2000*, the *Laurentian University of Sudbury Act,* the agreement and Laurentian University's own policies and procedures."

17. Arbitrator Burkett wrote (at pp. 7-8):

> While this is in essence a extracting [*sic*] out dispute, it has one significant distinguishing feature that must be taken into account. In the contracting out cases, the union that is party to the collective agreement with the employer who has contracted out part of its operation/work files a grievance challenging the validity of the contracting out under that collective agreement and the subcontractor (and perhaps the union representing the employees of the subcontractor) seeks status. In these cases, the weight of authority is against granting intervenor status on the basis that the interest of the subcontractor and/or the union representing its employees is commercial or incidental and, in any event, can be protected by enforcement of the commercial contract with the employer (see *re:* *Fanshawe College and OPSEU* *(supra)*, *Avenor Inc. and IWA-Canada, Local 2693* *(supra)*, Consumers Glass and Teamsters *[1997] (supra)* and *Air Canada Pilots Association v. Air Canada* *(supra)*).
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> . . .
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> However, as stated, there is a distinguishing feature of this case that requires consideration. LUFA is not alleging a simple breach of its collective agreement with Laurentian University by virtue of Laurentian's contractual arrangements with Georgian as would put this case on all fours with the contracting out cases. It would have been a simple matter for LUFA to have said that its claim concerned a breach

> of its collective agreement. Rather, LUFA has been careful to frame its claim in terms of Laurentian's obligations vis-à-vis not only its collective agreement with LUFA but also under the Post-Secondary Education Choice and Excellence Act, 2000, the Laurentian University of Sudbury Act and Laurentian's own policies and procedures. While LUFA's oral submissions were to the effect that the statutory references were made to provide context and to lay the foundation for the drawing of inferences as to the intended meaning of the collective agreement, its description of the issue in dispute in its February 25, 2009 letter to counsel for Georgian and OPSEU brings into question the legality of the partnership agreement under the Post-Secondary Education Choice and Excellence Act, 2000 and the Laurentian University of Sudbury Act.
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> It follows that Georgian, as a party to the partnership agreement, has a direct interest in defending against any allegation that the partnership agreement to which it is party is an unlawful agreement by reason of the operation of that statute. It is this interest that distinguishes this case from the usual contracting out cases. Where the effect of an award here might be to undermine Georgian's ability to rely upon its contract with Laurentian, its interest, even though aligned with Laurentian, is more than simply incidental or indirect. Accordingly, Georgian is entitled to intervenor status for the purpose of defending the statutory legality of its contract with Laurentian.
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> OPSEU, on the other hand, is a stranger to both the LUFA collective agreement and the partnership agreement and, therefore, although it has a collective bargaining relationship with Georgian and is free to pursue its rights under that agreement, it does not have a direct interest in this matter. Its interest is no different than the interest of any union representing the employees of a subcontractor who stands to have the subcontract under which its members have been assigned work declared invalid in an arbitration between the employer entity who has let the contract and the union representing its employees.

18. Here, of course, unlike the garden variety contracting out complaint, the OEA's grievance pointedly asserts, *inter alia*, that the contracting out is "in violation of . . . statute" and seeks "a declaration that any agreement regarding the contracting out of work . . . violates . . . the *Labour Relations Act, 1995*". In the result, unlike OPSEU in the context of the *Laurentian University* decision, LIUNA is party to an impugned agreement, the Minutes of Settlement, and is in the position Arbitrator Burkett ascribed to Georgian College in that LIUNA "has a direct interest in defending itself against any allegation that the . . . agreement to which it is party is an unlawful agreement by reason of the operation of . . . statute".

19. This is not a circumstance comparable to one in which an outside contractor seeks to join with an employer in simply defending the latter's transfer of bargaining unit work. Unlike the typical outside contractor, LIUNA is party to an agreement complained of, introduced here by the OEA, and identified by Expercom as having been brought to the attention of the OEA almost two weeks before it issued the grievance.

20. In *Avenor Inc. v. I.W.A.-Canada, Local 2693*, 1995 CarswellOnt 5560, ("*Avenor Inc.*") Arbitrator Bendel referred to Arbitrator Brent's decision in *Fanshawe College and O.P.S.E.U.,* 1991 CarswellOnt 6395, (1991), L.A.C. (4th) 162, ("*Fanshawe College*") and posited (at para. 20)

that "the proposed intervener must bring to the proceedings some labour law perspectives of its own, based on its own interests in the dispute."

21. Here, in my view, the text of the Minutes of Settlement — disposing of certain proceedings and identifying what would seem to amount to substantial consideration therefor — makes obvious the labour law interests and perspectives underlying a justification for the participation of LIUNA in responding to the OEA's grievance.

22. Arbitrator Bendel explained his decision in *Avenor Inc.,* in part, on the grounds that the collective agreement between Avenor and the I.W.A. had no application to the parties seeking to intervene, the outside contractor and its unrepresented employees. Arbitrator Bendel dismissed the contractor and its employees as having "no stake in it"[3]; however, Arbitrator Brent observed in *Fanshawe College* that "standing is not restricted to those with an interest under the collective agreement under which the grievance arose."[4]

23. Aligned with the rationale behind Arbitrator Brent's decision to permit the hospitals status in *Fanshawe College* wherein the relief requested by OPSEU would change existing employment relationships, the sought-after declaration here that — "any agreement regarding the contracting out of work . . . violates the Collective Agreement and the *Labour Relations Act, 1995*" — is not, as Arbitrator Brent put it, "a necessary and normal consequence of a successful contracting out grievance".[5] Moreover, unlike the "outside contractor" referred to by Arbitrator Brent, it is not at all clear to me that LIUNA would "also have available its normal remedies . . . to fully protect its own interests should the contracting out grievance succeed"[6] to the extent of the OEA's request or — to adopt Arbitrator Brent's measure — that LIUNA's interest in the agreement set out in the Minutes of Settlement can "reasonably be protected in any other forum but this."[7]

24. The situation in the *Stelco* decisions[8] cited by OEA is different from that here and Arbitrator H. D. Brown's decision as to status is supportive of LIUNA's position.

25. Arbitrator Brown dealt with a claim by Steelworkers Local 1005 that Stelco had violated the contracting out provisions of their collective agreement in connection with work on coke oven batteries performed by employees of a contractor. The work in question had been contracted out

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[3] *Avenor Inc*., at para 26.

[4] *Fanshawe College,* at para. 14.

[5] *Fanshawe College,* at para. 17.

[6] *Fanshawe College,* at para. 16.

[7] *Fanshawe College,* at para. 17.

[8] *Stelco Inc.* (*Hilton Works*) *and U.S.W.A., Local 1005* (2001), 93 L.A.C. (4th) 363 [January 31, 2001] and *Stelco Inc.* (*Hilton Works*) *and U.S.W.A., Local 1005* (2001), 97 L.A.C. (4th) 436, 2001 CanLII 62010 (ON LA) [April 23, 2001]

to a company that had in turn subcontracted the work to another. The subcontractor performed the work using teams of three employees, two bricklayers and one labourer, respectively members of the two unions seeking status, the Bricklayers and Allied Craft Union of Canada and Labourers' International Union of North America. The Steelworkers claimed that such work had been done in the past by Local 1005 members.

26. In the first *Stelco* decision rendered January 31, 2001, Arbitrator Brown distinguished *Fanshawe College* and Arbitrator Brent's holding that the hospitals would not have been given standing if the requested relief had been limited to the issuance of a cease-and-desist order. He noted Arbitrator Brent's comment (at para. 16 in *Fanshawe College*) — "In such a situation, we do not think that fairness and natural justice would dictate granting an outside party standing to a dispute arising out of the collective agreement" — and wrote:

> In my view, those comments simply do not apply in circumstances as here, where two unions are seeking status to protect their interests and the assignment of work which their members have performed and which work is claimed by the union which filed a grievance, which exhibits an underlying jurisdictional dispute among the unions, each of which claim the same work which is the subject of the grievance. In this case, I find that fairness and natural justice and the direction given by the courts, require the exercise of my discretion to provide standing to both intervening unions in these proceedings.

27. In his second *Stelco* decision, Arbitrator Brown dealt with the terms under which the intervening unions would be permitted to participate in the hearing on the merits.

28. He set out the following rulings on whether the intervening party would be required to agree to be bound by the outcome:

> The Interveners, through submissions to protect their interest in these proceedings, must be bound through the jurisdiction of the Arbitrator to make a final and binding decision under the terms of the collective agreement between the Union and the Company as to the grievance submitted to him. As such decision may affect the interest of the Interveners, it is for that purpose that the Interveners have been given status to participate which is to seek to protect their rights in the circumstances of this dispute. It is not the Arbitrator's interest as to whether the Intervenors may proceed in another forum as having provided their right to participate wholly in these proceedings; the Interveners must agree to be bound by the decision in this grievance. If not, while found to be entitled to notice of the hearings, the Intervenors participation would be limited to observation and at the discretion of the Arbitrator, to submissions only. When however, an Intervenor becomes, by declaration, a party to the proceedings, the right to participate fully is concomitant with the obligation to be bound by the result of the arbitration. I refer to the finding of Arbitrator Gray[9] who stated:

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[9] The following quotations are from paras. 20 and 21 in *Re Weston Bakeries Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Loc. 647* (1998), 79 L.A.C. (4th) 189, 1999 CanLII 35821 (ON LA).

> [20] . . . I am not persuaded that the rules of natural justice require that the benefits of party status be granted to anyone unwilling to assume the usual or reasonable burdens of that status. Being bound by the result is one of the usual burdens of party status in legal proceedings, and in any event is a reasonable one to attach to it.
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> [21] Accordingly, I am satisfied that it is within my jurisdiction to require of the intervenor as a condition of its participation as a party to these proceedings that it agreed to be bound by the result in the same way and to the same instead as the other parties to it are bound. I am also satisfied that fairness requires that I so require. [10]

29. I am of the same mind and would make the same order; however, the claim in the grievance to the effect that the Minutes of Settlement violate the *Labour Relations Act, 1995* necessitates a variation. In my view, it is arguable that the OEA's allegation has the potential to reach beyond the OEA and Expercom, neither of which are parties to the Minutes of Settlement, and it is unnecessary, ill-advised and wrong to require LIUNA to attorn to a disposition in this matter that might be seen or argued to affect rights and obligations other than those that relate strictly to the alleged contracting out by Expercom.

30. The parties having agreed that he had discretion to award costs of the arbitration, Arbitrator Brown continued in his second *Stelco* decision to direct the intervening unions to provide a written undertaking that they would be bound by his award, adding:

> With this provision, the Interveners will be granted party status to participate fully in the proceedings as set out above. The issue of the apportionment of the cost of the arbitration will be dealt with at the conclusion of the hearing as to which I reserve my decision.[11]

31. I make the same ruling regarding the cost of the proceedings with the following variation. Expercom and the OEA will receive and be expected to pay my invoices in the ordinary course rather than at the end of the hearing. In their closing submissions, the parties will address the extent to which LIUNA shall be required to reimburse Expercom and the OEA in respect of my invoices, and I will rule on that in my final award. In the interim, LIUNA is required to commit, as indicated below, to contributing to the parties' expenses in relation to this matter.

Disposition

32. In summary, my ruling is that LIUNA may intervene in these proceedings as a party upon its delivering to me and to counsel for the OEA and Expercom its written undertaking and agreement:

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[10] *Stelco Inc.* (*Hilton Works*) *and U.S.W.A., Local 1005* (2001), 97 L.A.C. (4th) 436, 2001, at pp. 441-42

[11] *Ibid*, at p. 442.

(a) to be bound by my decision in this matter in the same manner and to the same extent that Expercom and the OEA shall be bound, saving only that it shall not be bound by any decision in relation to the Minutes of Settlement constituting a violation of the *Labour Relations Act, 1995* otherwise than as the decision might relate strictly to its role in alleged contracting out by Expercom; and

(b) to reimburse Expercom and the OEA such portion of their shares of my fees and expenses as I determine to be payable by LIUNA.

33. The next agreed date for the continuation of the hearing is April 11, 2025. I will be available to the parties in the interim to deal with any issues regarding the text of LIUNA's undertaking and agreement, or any other preliminary matter.

Issued January 13, 2025

Derek L. Rogers