IN THE MATTER OF AN ARBITRATION

UNDER THE

COLLEGES COLLECTIVE BARGAINING ACT

BETWEEN :

LA CITÉ COLLÉGIALE

- the employer [La Cité or the College]

- and -

THE

ONTARIO PUBLIC SERVICE EMPLOYEES UNION,

LOCAL 470

- the union [OPSEU]

Grievance relating to

Tutors Assigned to On-Line Courses

Grievance number: 2014-0470-0006

BEFORE: Kathleen G. O'Neil, sole arbitrator

For the union: Jesse Gutman

For the employer: André Champagne and Céline Delorme

Hearing in Ottawa: November 4, 2015, April 1, May 9, November 23, 2016, February 7, May 10, May 11, September 26, December 13, 2017, February 13, April 24, October 29 and November 14, 2018, January 31 and April 10, 2019

This is the English version of the decision, which was released simultaneously in French.

Decision

[1] This decision deals with a grievance which raises the question of the status of a category of staff known as tutors who are assigned to the college's online courses. They are considered by the college to be independent contractors and therefore neither employees nor members of any bargaining unit. The grievance challenges this characterization, claiming that the tutors are effectively employees and members of the academic bargaining unit

[2] No objection was raised to my jurisdiction to hear this grievance, which was filed by the union in accordance with the provisions of article 32 of the academic collective agreement.

Factual Context

[3] The grievance in question was filed in 2014 at a time when the college was increasing the number of courses offered online, in order to be able to better serve its French-speaking clientele scattered across the province and elsewhere. The union's case focuses on language courses, and the tutors associated with compulsory accredited English and French courses delivered by the Center for Continuing and Online Education [referred to as CFCL, the French acronym, below].

[4] The evidence and argument demonstrated different views on the appropriate legal status of tutors, and whether they "teach" or not, rather than assist and facilitate the progress of students enrolled in on-line courses, but their duties are clear, as set out in the tutors' contracts and as described in the testimony of three tutors and the CFCL manager who gave evidence in this respect. The salient facts are summarized in this introductory portion of the decision, and further detail is found in the discussion of the legal issues which follows. In the end, the facts necessary for this decision are not really in dispute. Rather, it is the interpretation of the collective agreement and *The Colleges Collective Bargaining Act, 2008* [referred to below as "the CCBA"] that divides the parties.

[5] The central fact stressed by the employer is that the tutors do not present the course material to the students; the on-line platform does. All the lessons and assignments are pre-loaded, having been developed by personnel other than tutors. Unlike professors assigned courses in more traditional formats, the tutors are not responsible for creating lesson plans, choosing textbooks or creating assignments or tests, with the exception of choosing some

readings and input to discussion groups. The union does not dispute the fact that the tutors do a more limited range of tasks related to the delivery of courses than many members of the academic bargaining unit. Nonetheless, the union emphasizes the central role the tutors play in the delivery of courses by the college for which the same academic credit is granted as for courses delivered either entirely in the classroom or in a hybrid format, partly in class and partly on-line. As well, the union highlights the fact that uncontested members of the academic bargaining unit do duties very similar to those of the tutors as part of the College's core educational mandate.

[6] The tutor's individual contracts describe the general role of the tutors as facilitating online courses, and set out many prescribed tasks, summarized as follows:

- become familiar with the learning platform known as eCité, and request the support of the technician if necessary;
- review the course content to ensure that the course notes, assignments and exams are up to date and correspond to the most recent version of the textbook used in the course, and inform the CFCL administration if changes to a textbook have a significant impact on the course.
- publish a short biography as well as a welcome message on the eCité platform, the latter with elements prescribed by the College, including the title of the required textbook, the start and end date of the course, and then weekly announcements including advice and reminders to students of deadlines and notices important to their course;
- respond to student emails and requests posted in discussion forums within one business day;
- send an email to students who have not connected to the course after a week to confirm their registration and ask if they need help using the teaching materials. Inform the program coordinator if a student has still not logged in after the second week of the course, and at mid-term send the program coordinator a list of students at risk of failure;
- review their emails and online discussion forums every day and on weekends if a due date for assignments is approaching;
- encourage student involvement and dialogue in discussion forums, by responding to their comments, stimulating critical thinking and sharing specialized industry knowledge related to the program of study;

- mark and return student work within 5 working days of receiving it. Students must be given an evaluation of their work as soon as possible and above all before the date of the final exam.

- allocate marks for final exams within a maximum of 5 working days and submit them according to specific guidelines set out in the contract;

- communicate with students and the College via the email address provided by the College;

- direct students needing help using the tools of the learning platform to online tutorials, or to the technician if necessary.

- promote student success by giving them instructions, helping them configure virtual email and video chat, monitoring academic work and answering questions in a clear and concise manner. If the tutor is unable to answer a question, the tutor should direct the student to college support staff.

- complete mandatory online training, in particular under the Accessibility for Ontarians with Disabilities Act, and participate in any meeting or training deemed necessary by the CFCL, for example an orientation session.

[7] With the exception of names and dates of signature, the contracts in evidence are identical. There was no evidence of real negotiation between potential tutors and management before signing the contracts. Remuneration, upon presentation of an invoice by a tutor, is calculated per course hour for each registered student, according to a fixed hourly rate for courses offered in continuing education, and a separate rate for those intended for post-secondary students. The contracts do not mention the status of independent contractor or employee.

[8] In order to obtain work as a tutor, individuals are interviewed by one of the administrators, and then offered the standard form contract if they are selected. The tutors who gave evidence had heard about the work through prior contact with the college or by word of mouth from individuals who had worked as tutors before. The evidence did not establish that it was always made clear in the interview that tutors were considered to be self-employed rather than working as employees of the college. The college's evidence was that they were not looking for teachers, but people with subject-matter expertise. While acknowledging that many of the people who had subject matter expertise relevant to the language courses were teachers by profession, Caroline Gauthier, Manager of Programming and Delivery of the CFCL, said that, for example, a translator with no teaching background or training could make a perfectly satisfactory tutor. She emphasized that in other on-line courses, many of the tutors do not have a teaching background.

[9] Sample invoices are provided to the tutors by the college, and instruction and support on the use of the electronic platform is available on the website, and from College technicians, if needed. There are other tools on the eCité platform to guide tutors, and to give tips, such as how to give effective feedback.

[10] The tutors are expected to identify plagiarism and advise the administration of the college of the circumstances for follow-up by others.

[11] The role of the tutors in marking student work is a key part of the dispute between the parties. An estimated 80% of the marking is self-marked by the students on the electronic platform, or by the tutors using a computerized answer key. Where there are known technical problems with the marking of a particular assignment or test, tutors may have to manually remark tests, such as on an occasion when a software malfunction caused the computer to not permit a student to answer all the questions on-line.

[12] As well, in some courses, including the language courses on which most of the evidence was focused, tutors are required to mark written work and to give feedback as to what is missing from the assignments and how the student could improve in the future. For example, one of the programs dealt with in the evidence trains translation assistants [paralangagiers in French]. The evidence established that the marking for the written work in this program involved correcting essay-type work according to very precise translation standards in respect of grammar and formatting as well as level of language for different business contexts. The tutor provided written comments about errors, indicating why certain usage was wrong, and what would have been the correct answer, some quite lengthy. These are a type of assignment that could not be effectively machine-marked, and is work that could not be done well by someone without extensive knowledge of the subject matter. The college provides marking grids, with specific criteria, for tutors to follow in order to promote consistency in marking among tutors.

[13] Tutors field questions from students in on-line forums and by email, in significant volume. Topics dealt with in the evidence included how to submit assignments correctly, or explaining why a student got a particular grade, where to find assignments, what the deadlines were, whether student work had been posted in the right electronic file for marking, a variety of technical difficulties such as instructions disappearing, a wrong reading posted. Other topics included an instance of a tutor giving two students zero marks because of plagiarism, queries when no work has been received, encouragement from the tutor to do the work, advising

students how to still pass a course or how to withdraw without academic penalty because of illness.

[14] There is no physical space reserved for tutors on the college campus and they do not normally come to the campus except for interviews before being offered contracts and very occasionally for a training session. They can do their work anywhere they can access the college's on-line learning platform. Tutors generally use their own computers or laptops to connect to this platform, but there is no evidence of any other equipment or tool provided by them. They are required to use their college email address for contact with students. Any in-person contact with students is done by College personnel other than tutors.

[15] The tutors have no control over how the basic material of the course is presented, or the mechanism by which they communicate with students. They have input, through the course developers or technical staff, if they observe something which is not working properly, or have suggestions for improvement. In some courses they may choose readings and discussion questions for on-line forums. Everything done on the e-Cité platform can be viewed by college personnel with the correct access.

[16] The tutors were responsible to implement accommodation plans for special-needs students and had some discretion to give extensions of time to hand in assignments or to make arrangements, for example, with students in the armed forces who needed special arrangements because of their deployment schedule.

Provisions of statute and the collective agreement

[17] The most relevant provisions of statute and the collective agreement are found in Appendices A and B. Key language will be discussed below.

Issues in dispute and positions of the parties

[18] There are two main issues that will be addressed in turn:

1) Are tutors properly considered employees of the college?
2) If the conclusion is that tutors should be treated as employees, are tutors members of the academic bargaining unit described in the Act and the collective agreement?

The union favors a finding that the tutors belong in the academic bargaining unit, and seeks a decision to the effect that the employer violated the collective agreement by using tutors for

accredited courses, without recognizing them as part of any bargaining unit. The union's case highlights the statutory nature of the bargaining unit, and argues that tutors should not be deprived of collective bargaining rights because of the college's preference.

[19] By contrast, the employer denies the union's allegations, submitting that the tutors are neither employees nor teachers. Rather, online courses should be viewed as self-study by autonomous students, in the employer's view. The software delivers the course, not the tutors. The tutors' role is limited, according to the employer, to facilitating the smooth running of this self-learning.

[20] I have carefully considered all the evidence and the case-law presented by the parties, but I note only the points most necessary to the understanding of this decision, in order keep it to a reasonable length.

1. Are tutors properly considered employees of the college?

[21] What are the appropriate criteria to decide this question?

[22] Both counsel cited extensive case law on the question of whether a worker should be considered an employee or a contractor, including the seminal decision of *Montreal v. Montreal Locomotive Works Ltd.,* [1947] I.D.L.R. 161, 1946 CanLII 353 (UK UCPC), and many subsequent decisions which have discussed it, cited in Appendix C. The history of the development of legal thinking in this regard is well detailed in decisions such as *671122 Ontario Ltd. v. Sagaz Industries Canada*, 2001 SCC 59 (Supreme Court of Canada), *Athabasca University Governing Council and CUPE, Local 3911 (Employee Status),* Re, 2012 CarswellAlta 1775 (Sims), *Saskatchewan (Director of Labour Standards) v. Acanac Inc. 2013* CarswellSask 35, 2013 SKQB 21, *Acanac Inc. v. Minister of National Revenue,* 2013 TCC 163, for example, making it unnecessary to repeat that analysis here. In the end, there was not a lot of disagreement between the parties on the criteria to be applied; rather the dispute between the parties is over the question of how those criteria fit the facts of this case. In the absence of a substantive definition of either the term employee or independent contractor in the applicable legislation, it is these common law tests that prevail in the arbitral jurisprudence.

[23] Employer counsel correctly notes that, in contrast to the labour Relations Act, the CCBA does not refer to the intermediate category of dependent contractor, and accordingly this decision does not deal with that category.

[24] I have reviewed the evidence in light of the factors discussed in the seminal judgment in *Montreal Locomotive*: a) control, b) ownership of tools, c) risk of profit, d) risk of loss, followed by a consideration of the tests and examples in more recent authorities, as well as the later articulation of the organizational and business tests, with close attention to the elements highlighted by the parties in their argument. The purpose of this exercise is to characterize the overall relationship between the tutors and the College, to determine whether they are employees or independent contractors. The jurisprudence makes clear that each case turns on its own facts in the context of the workplace in question, and that the label that one party or the other puts on the relationship is not determinative. Intention of the parties may be helpful, if there is clear evidence of mutual intent, and is not contrary to the actual substance of the relationship, or the controlling legislation. The purpose of the statute involved is relevant, and the context of jurisprudence developed in different contexts, such as taxation or vicarious liability disputes, is a relevant factor to be taken into account.

[25] In the Supreme Court of Canada's decision in *Sagaz* at para. 47, the Court expressed approval for the approach adopted in *Market Investigations, Ltd. v. Minister of Social Security, [1968] 3 All E.R. 732,* as follows:

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[26] This passage is a distillation or restatement of the test in *Montreal Locomotive,* where the Court explicitly said that the crucial question was whose business it is, or "in other words, by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior." The application of the four criteria above are intended to answer that question.

[27] In this regard each party invites me to find guidance in different arbitral precedents dealing with disputes over whether individuals were employees or independent contractors. Two cases, *Athabasca*, cited above, and *Cambrian and O.P.S.E.U*., (1989), 5 L.A.C. (4th) 325 (Swan), were centrepieces of each side's argument, and serve as useful vehicles to compare and contrast relevant factual elements.

[28] To support the position that the tutors are in fact independent contractors, the employer strongly recommends the approach of Alberta Arbitrator Sims' decision in *Athabasca* as the best example of a treatment of the distinction between employees and independent contractors in a contemporary workplace. In that case there were three categories of personnel doing similar work, academic coaches who were found by Arbitrator Sims to be true independent contractors, while tutors and markers, all also part-time, belonged to a bargaining unit represented by CUPE. Employer counsel underlines that these academic coaches were much more involved in the academic life of the University than the tutors at La Cité, with more stringent academic expectations of them, but they were nonetheless found to be independent contractors.

[29] The facts set out in that decision describe a situation where most of the students of Athabasca University study at home using their computers to access on-line courses, some self-paced, and some with a fixed start and end date to allow more group interaction, the latter being similar to the situation at La Cité for the courses on which the evidence focused. The University faculty develop the courses while the tutors, markers and academic coaches are responsible for much of the contact with students, in the case of the coaches, entirely on-line. Non-academic staff at Athabasca provide administrative and technical support to make the on-line arrangement work. The specific coaches at issue in the decision were assigned to the graduate program in the Business Faculty. The students were typically mature students with undergraduate or professional degrees and several years of management experience, many attending with support from their employers. The tuition was high, as were the expectations of the coaches. The recruitment of coaches was aimed at people who could provide academic expertise as well as business experience, as the university sought individuals capable of mentoring and coaching MBA students in respect of foreign business. Coaches do the work on their own time, usually on top of employment elsewhere. Renewal of contracts depends on the flow of students, and what coaches have the experience required for whatever courses need coaching assistance at any particular time. The role was described as akin to leading an on-line seminar, being on-line

almost every day, with the coach being responsible to rate the student's level and quality of participation.

[30] A standard contract with a fixed fee for service governs the relationship between the university and the coaches. As terms that supported the decision to find that the relationship was a true independent contractor relationship, the decision highlights wording in the contracts that acknowledges that the Coach is an independent contractor and is not an employee or agent of the University, and that exclusive control, direction and management to carry on the services "under its own superintendence and its own risk" is with the contractor rather than the University. Sub-contracting was specifically allowed, if written permission of the University was obtained. Other provisions mention that the Coach is being chosen for special expertise and competence and is being relied on to determine how to best apply such skill and "independent assessment and judgment" as may be necessary in the circumstances. Some of the coaches had pre-existing consulting or law practices, some working through corporations.

[31] By contrast, the union highlights the decision of Arbitrator Swan in *Cambrian College,* cited above*,* dealing with a factual situation where the owner of an incorporated driving school was engaged to teach in a ministry-approved college training program. As here, the college argued that the person involved was neither an employee nor a member of the academic bargaining unit. At the time of the grievance, the college was the driving school's only client, although the school had previously had other contracts with other clients, including another community college. The owner, Mr. Farrell, had been certified to examine for the Ministry of Transportation, and thus was able to evaluate the students in a manner that left them eligible for granting of the desired license. Cambrian College owned the trucks involved, and although Mr. Farrell did minor maintenance on them, more major repairs and all operating expenses were paid by the College. Mr. Farrell did not have an office at the College, operating out of his own jeep, while the College provided necessary communication equipment and certain books and materials required for the course.

[32] The contract in question specified the duration of the course, but did not provide a detailed curriculum, which was, however, prescribed by the Ministry. Arbitrator Swan spends some time detailing the content of the control test in the arbitral context, the essence of which has been whether the employer exercises a substantial degree of control over job performance. The decision deals at some length with a decision of arbitrator Devlin, *Re Maple Leaf Mills*

(1986) 24 L.A.C. (3d) 16, which includes a selection of elements articulated by Arbitrator Knopf in *Re Social Planning Council of Metropolitan Toronto and CUPE, Local 1777* (1980), 28 L.A.C. (2d) 134, as follows, asking which party had control over:

- Selection of employees
- Method and performance of the work
- The decision whether money should be paid for wages or other expenditures.
- The length and duration of the performance of job functions,

as well as whether the work performed was part of or integral to that of the alleged employer and who benefited from the work performed. To similar effect, in a college context, see also *St. Lawrence v OPSEU (Back)* April 26, 1999 (Finley) (unreported).

[33] With that background in mind, with the goal of determining whether the tutors are in business on their own account, or that of the College, I turn to a consideration of the four classic criteria derived from the decision in *Montreal Locomotive,* cited above.

[34] a) control - the great preponderance of control is located with the College. At the beginning of the relationship, the control which rests with the tutors is limited to acceptance or rejection of the fixed terms offered by the College. Given the digital nature of the work, they can perform their work wherever they can access the eCité platform, requiring a reliable connection to the internet and access to a computer. Nevertheless, access to the platform, and the platform itself are controlled entirely by the College. On the facts of this case, I consider that the electronic platform constitutes the true place of work, albeit a virtual one.

[35] Control of how the work is done is almost entirely with the College. The tutors have control over where they access the electronic platform, and over their specific hours of work and some control over the content of their feedback to students. As employer counsel underlined, they are free to leave when they finish their work. However, even in these areas, there are very specific requirements as to the response time for student inquiries and how and when marking is done. The level of control is similar to that of members of the bargaining unit who, by virtue of Article 11.01 G1, schedule preparation, evaluation, feedback to students and complementary functions outside the College, at their discretion, subject to the requirement to meet appropriate deadlines established by the College. Thus, it is not something that distinguishes the tutors

from employees. There is control in what the tutors are not to do as well, e.g. not contact the students with personal phone or email, or in-person.

[36] One of the reasons for the requirement to use the college platform and email for contact with the students is so that the college can see what transpired between the tutor and the student in case of a complaint, or absence of a tutor, another element of control on the college side.

[37] The course outline, the modality of presentation of the course content and the format of the assessment is determined entirely by the College. All of the work is structured on the electronic platform and the instructions to the tutors essentially prevent any interaction with the students which is not carried out by way of the platform and the College's email system. There was no evidence that the management of the College closely monitors the tutors' work electronically, but most of the format of their work is controlled by the electronic system, and the capacity to monitor exists at all times. One program coordinator testified that she did occasional checks on the tutors' work. In practice, it appears that the control of the performance of the tutors is done according to the deadlines for providing the student marks to the college, and according to any complaints from students. For example, if a student complains to the management of the program to the effect that a tutor has not responded to its messages within a reasonable time, the program coordinator would contact the tutor. If there was no improvement, the tutor risks not having the contract renewed.

[38] Some of the tutors thought that other forms of discipline from the college were a possibility, even if they had not been disciplined themselves.

[39] The employer underlined that there was no probationary period, and that is true in the formal sense, but the situation is, in my view, in effect one of continual probation, as the college can simply decide not to renew at any time.

[40] The college exercises significantly more control over the tutors' work than the situation with the mentor/coaches in the *Athabasca* decision. While both groups interacted almost exclusively on-line with students, the Athabasca coaches were much freer to shape the content of their interaction. This was expressed by Arbitrator Sims, at para. 198, as follows: "The more senior the level at which coaching is given, the less the substance of that instruction is

controlled by defined curricula, and the more it is controlled by the idiosyncratic guidance of the coach. There was little indication of any significant control factors being applied to what the coaching should consist of for the courses taught by these persons." The opposite is true for the La Cité tutors, where every aspect is controlled as much as possible.

[41] The Athabasca coaches had freedom to mentor a small group of highly advanced students in a graduate program as they saw fit. The tutors at La Cité are not afforded the same latitude; they have more limited scope of action in giving feedback on-line to language students. As well, there was evidence that the Athabasca coaches had a sense of doing volunteer work or enhancing their continuing education or reputation from engaging in the coaching. There was no similar evidence from the tutors in this case, albeit the tutoring work added another dimension to all of their professional experience, but not in a way that distinguishes them from employees, in my view.

[42] The La Cité tutors have no control over what students they serve, and there was no evidence of any role in securing students for the assigned courses, in promoting themselves or the programs to which they are assigned.

[43] Employer counsel highlighted that there was no restriction on competition by the tutors, and that they were free to work elsewhere. This is a factor that could be considered to support a finding that they were independent contractors, but there was no evidence that this was different than the situation for part-time college employees. Therefore, I do not see that it distinguishes the working conditions of the tutors from that of employees.

[44] b) ownership of tools - the essential tool for the work of the tutors is the eCité platform, which the College owns, and which has been designed and built by personnel other than the tutors. The software, and the applications which make up the platform are not the property of the tutors. The evidence is clear that it is impossible to do their work without the platform. The tutors all own or have access to a computer that is not owned by the college, which they use to connect to the learning platform, but I do not see this as an important factor in the determination of the status of independent contractor versus employee in this case. Rather, I agree with the idea expressed by Arbitrator Sims in the *Athabasca* decision, to the effect that, these days, owning a personal computer with internet access is as common as owning a pen or telephone, and is not of assistance in the determination. Further, like the Court of Queen's Bench in

Acanac, considering a business that operated at a distance and on-line, I find the true "tool" here is the College's learning platform e-Cité, which connects the tutors and the students, who are the clients of the College, rather than of the tutors. In this context, I do not consider it to be very important to the overall relationship that the college does not provide or repair the tutors' personal computers. They provide and repair the indispensable learning platform, and all the support personnel for that. Thus, I do not agree with the employer's submission that essentially all the college provided was an email address.

[45] As well, although I agree that the digital era has changed many things, I do not agree with Arbitrator Sims that the concept of ownership of tools has lost its utility. It is still an important feature, representing as it does what capital investment has been made, and it is often a principal feature of the economic relationship, to be weighed objectively on the facts of each case. The configuration of the ownership of tools and other capital will often present differently than in other time periods, and according to whether one is dealing with knowledge workers, production workers, or some modern hybrid, but I do not find that this diminishes its importance.

[46] In the *Athabasca* situation, the facts indicate that the coaches have much more control over the content and nature of the instructional content than the tutors at La Cité. The coach, rather than the platform, had control of more of the content. Perhaps this is why the ownership of the tool of the on-line platform was not considered as important.

[47] c) Chance of profit - There is no chance of profit for the tutors which differs from the situation of an ordinary employee. The rate of pay is fixed, depending on the number of students and the length of the courses assigned to the individual tutor. There is no investment or management of costs which may lead to a larger share for a tutor, as in an ordinary independent business, no "opportunity of profiting from sound management in the performance of his task", as the Court in *Market Investigations* put it, or any "entrepreneurial element" as Arbitrator Swan put in in the *Cambridge College* decision. There is no evidence of any expectation of profit in the normal business sense of the term, as in the amount remaining when costs are deducted from income. There is no evidence that tutors make any significant financial investment, not even in work clothes, or a regular means of transportation, because they are normally not physically present at the College. All of the significant capital investment is on the College side, including the physical and digital infrastructure, the course development, the

outreach to potential students and for finding tutors and the numerous College personnel supporting them and the on-line learning platform.

[48] I have considered the comment of Arbitrator Sims in *Athabasca* to the effect that the capital of the academic coaches in that case is brainpower, accumulated experience and professional qualifications, and that is true in this case as well. However, I do not find that the preponderance of the jurisprudence on the factors of risk of profit and loss to be using the concept of capital investment in that sense. In any event, when dealing with "knowledge work", which I find an applicable concept to the academic setting, this type of capital is more a neutral factor, in my view, as it does not appear more associated with one legal status over the other.

[49] As to Arbitrator Sims' comments about the profit in the coaches' work being that of professional enhancement, and the loss being that of time lost to other endeavours, I do not see that these are elements which distinguish one status from the other. The reality is that any activity takes time away from any other activity; I see no real profit and loss in a business sense in this. Further, the reviewing Court on the union's application for judicial review found that this finding "may have gone beyond the confines of the traditional chance of profit and risk of loss factors".

[50] There was no evidence of subcontracting, in the sense that a tutor at La Cité could make a profit by charging the college at a fixed rate and paying another person to do the tutoring work at a lower rate of pay. The chance of profit is entirely on the College's side, in the sense that it has the opportunity to manage the costs of its online programs to have more revenue for other College purposes.

[51] I note that even where there was limited sub-contracting in Arbitrator Swan's decision in *Cambrian College,* the majority of the Board of Arbitration found that the entrepreneurial element was completely missing in the relationship with the College, as the individual in question had no capital at risk, being paid on a piece-work basis. I find this interpretation of profit and loss more consistent with the jurisprudence, both longstanding and current, than the idea of profit as meaning professional enhancement and loss being the taking up of time that could be spent on other endeavours.

[52] Although employer counsel argues that the decision in *Cambrian* is dated, with the implication that it is a less reliable guide, I do not agree, as the same tests were applied as by Arbitrator Sims in the recommended Athabasca decision, but to different facts. It is my view that the tutors in our case are much closer to the bargaining unit markers and tutors in the *Athabasca* fact situation than they are to the coaches dealt with by Arbitrator Sims.

[53] d) Risk of loss - There was no evidence of risk of loss which differs from an ordinary employee, and thus this element does not favour a finding that the tutors are independent contractors. A tutor's contract can be lost if the College is not satisfied with that individual's work. However, the evidence shows no risk of spending more than the amount one would be paid, or any risk of loss of an investment of any kind, which is the type of commercial risk of loss typically facing entrepreneurs. Nor is there any opportunity to increase the proceeds or decrease expenses. There is no opportunity for the tutors to affect their income by any of the normal levers for a business, such as innovation, business acumen or investment in labour-saving equipment. The tutors are guaranteed a fixed rate for the course to which they are assigned, with no discernible risk of profit or loss.

[54] This direct application of the four *Montreal Locomotive* criteria to the facts of this case supports the idea that the tutors are in fact employees, rather than entrepreneurs or independent contractors.

[55] I have also considered the facts through the lens of the organizational and integration tests, and the question asked by the Supreme Court of Canada in *Sagaz:* Do the tutors work on their own account?

[56] The organizational test asks whether the person in question is an integral part of the would-be employer's organization. As Vice-Chair Wallace said in *University of Calgary v. A.U.P.E. (2008)*, 150 C.L.R.B.R. (2d) 15 (Alta. L. R. B.), quoted at some length by Arbitrator Sims in the *Athabasca* decision, this test can be problematic. This has been discussed in other cases, as well, with the problem being that the services of some true independent contractors are essential to the carrying-on of some businesses with whom they contract. Nonetheless, Vice-Chair Wallace found that the extent of integration was still a valid consideration, as "a thorough, ongoing integration into an enterprise will tend to characterize the relationship as one of service, not for specific services."

[57] Functionally, and on the eCité platform, the work of the tutors is totally integrated into the College's enterprise, as they are associated with the College programs and the ability of the College to deliver its on-line courses, and are the only face of the College that most on-line students see. Nonetheless, they are not physically integrated with the College's campus, and have limited interaction with College staff.

[58] As well, all of the tutors were continuously engaged for the length of the assigned course, and all those who gave evidence performed the functions for several years. This is not akin to the dancers found to be independent contractors who worked only sporadically for the employer in Arbitrator MacDowell's Algonquin Tavern decision, *C.L.C., Local 1689 v. Algonquin Tavern*, *2005 CanLII 92939 (ON LA*), 1981 CarswellOnt 975 (MacDowell. OLRB). I find nothing ancillary, casual or episodic about the tutors' participation in the delivery of the college's accredited on-line courses.

[59] Thus, the application of the organization or integration test also points to a finding of employee status.

[60] I turn then to the question from *Sagaz*: Were the tutors working on their own account? In other words, did the tutors each operate his or her own business and contract from that basis with the College, or was there only one business, that of the College?

[61] The question of whose business it is requires a closer look at the circumstances of the three tutors who gave evidence to see, if like the coaches in the *Athabasca case* or the Nurse Practitioners in the *Extendicare* case, cited by the employer, *Extendicare Maple View and ONA,* (12-02), Re, 2015 Carswell Ont 10551 (Misra), the structure of their other work and activities supports a finding that they are actually engaged in an independent business through which they provide tutoring services to the college. Three tutors testified and gave evidence relevant to this issue. They are all associated with language-related courses. None of them testified to any negotiation of price with the college, or their having offered terms to the college or promotion of themselves as independent businesses prior to taking on the tutoring work. It is clear that each of them expressed interest in the work at a fixed price on terms including a standard contract drafted by the college, which they signed as individuals. They were given sample invoices, and instructed on how to receive payment from the college. None of them

purported to offer the tutoring services in their own name, or in that of a business of their own, rather than that of the college. None of them thought they could sub-contract, and none had used helpers. One of them thought it would be unprofessional, another that it would be fraudulent. However, CFCL manager Caroline Gauthier, was surprised to hear this evidence and thought that it would be possible to sub-contract, although it had not happened so far. Clearly it was not an important part of the arrangement if it had never been addressed.

[62] All of them usually did the work elsewhere than the campus, much of it at home, but there was no evidence that any of them maintained an office or separate business premises out of which they operated a business, whether tutoring, or any other kind. One of the tutors sometimes worked in the college library where she could access a helpful translation software provided by the College.

[63] The first of the tutors to testify, Mary Cuddihy, did so under subpoena for the union. She served as a tutor for a number of English courses at La Cité, as well as being a professor at Algonquin College in business and communication courses. She had never worked as an independent contractor, and was not aware, even after the interview for the tutor position, that the College considered that she was an independent contractor. Rather, she became aware of this fact when she did not receive T-4 slips at tax time. She had a background in on-line teaching and was interested in the extra income the tutoring at the College provided. The evidence does not support a finding that she intended to offer the tutoring services as an independent contractor or saw herself as in business for herself. She heard about the work through a colleague at Algonquin College, rather than through any kind of outreach or marketing of her own to offer tutoring services. If given the choice, she would prefer employment status.

[64] The second tutor to testify, Anne-Marie Tudorache, called by the employer, has played several roles for La Cité, including, at various different time periods, being a language monitor and teacher in a summer program, course developer, coordinator and tutor in the paralangagier program, which trains translation assistants, on various contracts. She has worked as an employee as well. At the time of giving evidence, she had a full-time job as coordinator of subtitling for CBC/Radio-Canada in Ottawa, in addition to which she works as coordinator and tutor in the paralangagier program. In her role as coordinator of the paralangagier program, she recruits tutors on behalf of the college, on a separate contract. She was clear that the college had engaged her as an independent contractor, but said she did not have a preference; she

said she could work as either an employee or contractor. As well, her professional experience includes translation, interpretation, editing and reporting. She has done some of this work on contract.

[65] The third tutor, Anick Touchette, is an experienced teacher with a full-time job at the public francophone school board in Ottawa. She has additional qualifications in special education and has taught many subjects, to adults as well as children. She taught one course as a professor at La Cité prior to taking on the tutoring work, and then switched to tutoring as the college does not permit an individual to do both. She was clear that the college was offering the tutoring work on contract. She referred to her unionized job with the school board as her main employment. She has worked on contract as a consultant for a text book company, which did not involve any negotiation of terms. The tutoring work is not her main source of income, but part of her financial plan, and lets her gain experience with another type of training.

[66] Turning to evidence of intention, which I find relevant to whether the tutors were carrying on business on their own account, there is no doubt that the College intended to engage tutors as independent contractors, and made that clear to two out of the three tutors who gave evidence. The written contract does not make mutual intention clear, as it did in the *Athabasca* decision where there was explicit language acknowledging independent contractor status. This fact and the evidence of the coaches that they definitely considered themselves contractors played an important role in the decision of the Court which upheld Arbitrator Sims' award on judicial review.

[67] In a formal contractual sense, the two tutors who signed the offered contract with knowledge of the College's intention could be said to have accepted that status. However, the case law is clear, including the *Athabasca* decision, that the form of the contract is not determinative, if the substance of the relationship meets the tests of an employment relationship set out in the jurisprudence.

[68] Where the form and the substance do not match, as Arbitrator Albertyn put in in *Ottawa-Carleton District School Board v. O.S.S.T.F., District 12, 2008 CanLII 45539 (ON LA)* (Albertyn), a formal contract that could be interpreted as that of an independent contractor will not be determinative. As in that case, there is no clear evidence from the tutors here that their intention was to contract with the college as independent contractors. Rather they wanted to

perform the work offered by the Collège and the only way to do that was to sign the offered contracts. Similar to the situation in the *Ottawa-Carleton District School Board* case, the college instructed the tutors on how to invoice, something inconsistent with a true independent contractor, who would likely not need such instruction. In our case, even the two tutors who were aware they were considered to be independent contractors expressed little connection to the term. I am persuaded they were doing what they had to do to obtain the work. This is much different than the facts dealt with in the *Athabasca* decision, where there was much stronger evidence of intention, both from the language in the contracts and the expressed desires of the individuals involved.

[69] There was some discussion in the *Athabasca* decision both about the fact that part-time work means different things to different people who do it, and the reality that the coaches in that case were not economically dependent on the university. The tutors who testified were similarly not dependent on the college in the sense of its being their principal source of work. Nonetheless, as Arbitrator Sims made clear, it is commonplace for people working in academic institutions, and elsewhere, to be employed at more than one place, or to make a career out of a series of part-time jobs as employees. In this context, and in light of the total relationship seen in the larger context of the accepted criteria in the jurisprudence, I do not find it particularly significant that the tutors who gave evidence do it as a supplement to their other work.

[70] Although no statutory deductions were made from the tutors' pay as would be the case with employees, this was clearly a result of the College's choice to designate the tutors as independent contractors, rather than a mutually negotiated matter, for instance, or one clearly preferred by the tutors, which contrasts with the coaches in the *Athabasca* decision and the Nurse Practitioners in the *Extendicare* decisions, cited above. I view the form of remuneration as essentially neutral. Its form could be viewed as consistent with the status of an independent contractor, but the fact that it was set without individual negotiation favours a finding of employee status.

[71] Having considered all of the above criteria from the case law, separately and together, I find that almost all the criteria point in the direction of employee status rather than that of a finding that the tutors are, in essence, entrepreneurs working on their own account. Although there are some elements such as control over the location of access to the learning platform, the lack of physical integration, the freedom to work elsewhere and the lack of deductions from

pay that are consistent with contractor status, the weight of the evidence is very strongly in favour of characterizing the whole of the relationship as one of employment, rather than a series of independent tutoring businesses contracting with the college.

[72] Before leaving this portion of the decision, some comments are in order on some of the other jurisprudence referred to by counsel.

[73] Employer counsel made reference to a letter decision of the Canada Revenue Agency [CRA] finding that individuals working as online course facilitators were not employees. These facilitators were doing work for Algonquin College, La Cité's anglophone counterpart in Ottawa, and from what is recited in the decision, there are many points of similarity with the work of the tutors in this case. As is normal for decisions of this kind, there was not extensive recitation of the facts or arguments, so it is not possible to tell what information the decision-maker was relying on. However, it is clear that the CRA was seeking to apply the common law tests applicable in Ontario. The decision finds much less control than I have found on the facts of this case, and no continuity in the relationship between that college and the facilitators. The analysis of the ownership of tools focused on the computer and internet connection owned by the workers, and does not mention any infrastructure such as a learning platform, which is very likely to have been as large a factor in the operation of that college's on-line courses as in the instant case. As well, the analysis of financial risk and opportunity for profit does not, in my view, follow the mainstream jurisprudence concerning the possibility of profit and the risk of loss.

[74] Rather, it concentrated on the form of the contract and an unexplained statement that the "workers were financially liable if they did not comply with the obligations laid down in the contract", as well as a finding that speed in marking meant they could make a profit. Findings of fact that the on-line facilitators had to have the approval of the college to be replaced or hire an assistant and the fact that they had not invested capital in a business and were not in business, were acknowledged to favour a finding of employment status. Further, the finding that the facilitators were not in business seems inconsistent with the finding that the facilitators were financially liable and could make a profit. As well, the case was decided in a less formal context, and for tax purposes, rather than in the context of a collective bargaining statute. In light of these factors, together with the differences that are apparent on the face of the CRA's brief decision, I have not found it to be persuasive in coming to my decision in this case.

[75] Employer counsel invites the adoption of Arbitrator Sims' finding in the *Athabasca* decision to the effect that the employer in that case was free to have the work done either way and that the similarity of the work itself does not determine the result. This is true when there is no prohibition in the collective agreement, and the relationship is truly one between two contracting businesses. In essence, as the reviewing court found, Arbitrator Sims' decision turns on the relative lack of control of the University over the coaches and the existence of significant evidence that the individuals in question were in business for themselves, which I have found to be quite different than the facts of this case.

[76] The union also contrasts the facts relevant to this case with those dealt with in a more recent *Cambrian College* decision, *Cambrian College and OPSEU*, Local 655 (Staffing Cambrian Programs), (2015) 262 L.A.C. (4th) 343 (Davie), which found that the College had the right to contract out a program to a private college, in the absence of wording in the collective agreement that prevented it from doing so.

[77] In particular, according to the union, the facts set out in Arbitrator Davie's *Cambrian College* decision indicated that the College did not provide supervision of the employees of the private college, even though these employees were required to follow Cambrian course outlines. This was characterized as quality control rather than as control of the way in which the people delivered the course, or the "where", "when" and "how" of accomplishing the work. The union stresses that the evidence in this case was that the tutors had no freedom in this regard. In addition, the private college in question in the *Cambrian* decision had recruited, hired, paid and fixed the schedule of their own employees, who were not integrated with the employees of the Cambrian College. The typical indices of control of the employment relationship thus remained with the private college, and not with Cambrian College. Also, there was no evidence that the business of the private college had been integrated into the business of Cambrian College. I accept that the fact situation dealt with by Arbitrator Davie was significantly different, leading to a different result.

[78] The union also makes reference to a number of decisions of the OLRB in the context of a certification application for a part-time academic bargaining unit, i.e. *Ontario Public Service Employees Union v. College Compensation and Appointments Council,* 2010 CanLII 150911 (ON LRB) (March 25, 2010), 2010 CanLII 34137 (ON LRB) (June 17, 2010) and 2011 CanLII 43085 (ON LRB) (July 11, 2011) (Cummings).

[79] Prior to the dismissal of the certification application on the basis of the level of membership support, the OLRB found that the part-time bargaining unit would include teachers who provide training at a distance or online courses if they met the other criteria for membership in the bargaining unit prescribed by legislation. The OLRB found that there is no legislative basis to exclude individuals who do not work on the premises of a college, nor to exclude individuals whose identity or hours of work are difficult to establish. Although these decisions are relevant in the sense that it is clear that part-time work away from the campus, including on-line, is not prevented from being included in a bargaining unit, they do not answer the questions raised by the current grievance.

[80] To summarize, after consideration of all the usual factors flowing from the jurisprudence cited by the parties I am persuaded by the evidence that the tutors are properly considered employees rather than independent contractors. I am convinced that there is only one business involved in the facts of this case, and it is that of the college rather than of several independent contractors offering tutoring services.

2. Are tutors properly considered members of the academic bargaining unit?

[81] Having found that tutors are properly considered employees of the college, the remaining question is whether tutors are members of the academic bargaining unit described in the CCBA and the collective agreement.

[82] Given the fact that the bargaining units in the college sector are defined by statute, it is necessary to start with the statutory definitions. For the purposes of the Act, an "employee" means a person who is employed by a college and is a member of one of the bargaining units described in the legislation. The parties' arguments about the impact of the class definitions found in the academic collective agreement will be addressed in turn.

[83] The union's primary position is that the tutors are members of the academic bargaining unit. As noted above, the employer is of the opposite view.

[84] The union's secondary position relates to the support staff bargaining unit, and is addressed below. The employer's view is that there is no place for a consideration of the

support staff bargaining unit because the grievance was filed under the academic collective agreement.

[85] By virtue of the statutory language, the tutors are included in the academic bargaining unit if they are employed by the college as teachers, counsellors or librarians. Neither party suggested that the tutors were employed as counsellors or librarians. The focus of the parties' arguments was on the question of whether they were employed as teachers.

[86] I note that teaching more than six hours per week is the dividing line between the full-time and part-time academic bargaining units, but there was no suggestion that any of the tutors worked six hours or less. In any event, how to quantify the hours was not an issue dealt with by the parties, with the exception of the union's reference to the fact that the OLRB had ruled that any difficulty in ascertaining the hours worked was not in itself a reason for exclusion from a bargaining unit if the other criteria for inclusion were met. See O*PSEU v. College Compensation and Appointments Council,* June 17, 2010*,* 2010 CANLII 34137 (ON LRB) (Cummings).

[87] The union stresses that the parties are not free to deviate from the statutory bargaining unit to exclude the employees in the bargaining unit if the statute has included them. This point, emphasized in a significant number of decisions, including *St. Lawrence College and OPSEU*, 2005 CanLII 92939 (ON LA) (MacDowell) and two *La Cité* decisions cited by the parties, *Waito v. La Cité Collégiale Ottawa*, 1998 CanLII 18293 (ON LRB) (O'Neil, OLRB) and *La Cité Collégiale et S.E.F.P.O., Re* 1997 CarswellOnt 7293,48 C.L.A.S. 560 (M. Picher), has resulted in findings that the CCBA does not permit the parties to add exclusions to those intended by the statute. One way to paraphrase the union's position is to say that the employer is excluding the tutors from the academic bargaining unit based on exclusions that are not found in the statutory definition. This includes limiting membership in the bargaining unit according to class definitions which have been interpreted to exclude some kinds of non-traditional teaching, such as tutoring.

[88] The main dispute here is about what it means to be "employed as a teacher" in a college, which is the basic qualification for being included in the academic bargaining unit. Although the bargaining unit is defined in the CCBA, the term "teacher" is not. This lack of a definition, and the variety of duties performed by staff in both the academic and support staff bargaining units, have resulted in a number of disputes over the years concerning various functions said to be teaching in the college sector. Similar disputes have also arisen in other

educational contexts, such as school boards, which operate under a different specialized collective bargaining statute.

[89] There are a number of well accepted tools of interpretation that may be used to help adjudicators decide which of two conflicting interpretations of a statute should be preferred. The overarching one is that words of a statute are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, its object and the intention of the legislature. That approach informs the discussion which follows.

[90] The union relies on Arbitrator MacDowell's 2005 decision in *St. Lawrence* which, rooted in a statutory analysis, found that individuals employed by that college doing work similar to the *La Cité* tutors, belonged in the academic unit. The facts of that case involved people assigned to oversee the delivery of correspondence courses for academic credit. There was no face-to-face instruction or regular classroom attendance. All communication was by electronic means: telephone, fax or email. Similar to the facts of this case, students worked through the material on their own without the benefit of the kind of presentation of material that would be done in a classroom. The individuals in question were available to answer questions from the students, and marked assignments. They provided ongoing evaluation and feedback on whether the student was absorbing the course material and there was a final evaluation confirming the student's mastery of the assigned subject matter. These functions were described by the majority as work that was more like individual tutoring or counselling, than delivering a lesson to a full class.

[91] The majority found that this was properly characterized as teaching work and the people doing it properly regarded as teachers. Since it involved courses leading to academic credits, it was academic teaching work. As with the tutors in this case, documents received by the students identified the people associated with the correspondence courses as teachers. In the result, the employer's argument that the individuals in question were not occupying teaching positions and had not been hired as teachers was found to be unpersuasive. The majority found that there was no exclusion in the statute or the bargaining unit description for this kind of teaching, and there was no basis to infer one for non-traditional teaching settings.

[92] La Cité's response to this decision is to say that the facts are distinguishable, since the programs at La Cité are different, emphasizing that Arbitrator MacDowell made clear that the

students at St. Lawrence were not teaching themselves. As well, underlining that there has been much technological progress since, employer counsel suggests that the situation with the on-line courses at La Cité is the self-learning situation that Arbitrator MacDowell took the time to distinguish from the facts in the *St. Lawrence* case. Employer counsel in particular draws attention to the finding that the people responsible for the correspondence courses were giving personalized guidance or assistance with the prescribed subject matter as the reason not to use the *St. Lawrence* decision as guidance in the present one.

[93] Rather than relying on the 2005 *St. Lawrence* decision, the employer relies on a line of cases in which arbitrators have found that not all teaching is included in the academic unit. A number of these decisions deal with jobs which are acknowledged to have some involvement in teaching, but of a kind or quantity judged insufficient to bring the position within the core functions of the class definitions of the academic bargaining unit. In support of this concept, that not all involvement in teaching gives automatic entry into the academic bargaining unit, the college relies on Arbitrator Knopf's decision in *Algonquin College and OPSEU, Local 415 (2013-0415-0048*), Re, 2015 CarswellOnt 10140 (Knopf) re Math and English Coaches*.* This decision is a fairly recent example in a significant line of cases which take a core function approach to whether jobs supporting academic programs belong in the academic bargaining unit. The upshot of that decision was that Math and English coaches in the Student Learning Centre, which is not a traditional classroom or a location of teaching courses for academic credit, were found to belong in the support staff bargaining unit. The decision found that their duties did not constitute a teaching job within the meaning of the academic collective agreement or the CCBA, even though it was acknowledged that there were teaching components to the jobs. Those coaches did not evaluate student work, and were not associated with the delivery of courses for academic credit. Rather, they gave individualized assistance to students in need of help beyond their regular classes.

[94] To similar effect is Arbitrator Starkman's 2007 decision in *Fanshawe College,* which dealt with tutoring positions classified by that college as Technologists in the support staff bargaining unit. A majority of that Board of Arbitration agreed that the work performed by the individuals in question, tutorial assistance to students who were having difficulty with math or English, without evaluation or marking of assignments, was a form of teaching, but not academic teaching, and therefore appropriately placed in the support staff bargaining unit. There is no mention of Arbitrator MacDowell's decision in *St. Lawrence,* and the approach taken

by the Starkman panel revolves around the class definitions in both collective agreements, rather than the statutory definition of the bargaining unit. However, mention is made of the union's reference to Arbitrator Saltman's 2003 decision in *Sault College v OPSEU*, (unreported) February 19, 2002, (Saltman), which took a similar approach to that taken in *St. Lawrence,* finding that the parties were not free to add exclusions to the statutory bargaining units set out in the CCBA. No attempt was made to distinguish that case, but the result appears to be an acceptance of the employer's position that there was no conflict between the statute and the collective agreement in excluding tutors from the academic collective agreement. The Starkman decision relies heavily on the intention of the parties, found to be evidenced by the fact that the parties had not bargained language or wage grids related to tutors in the academic bargaining unit in the face of the jurisprudence since the 1990's which has taken a "core function" approach in disputes over whether a position belonged in the academic or support staff bargaining unit. Whether this has had the effect of broadening the bounds of the statute's description of the support staff bargaining unit or constricting those of the academic one is not something which has been directly addressed, or which has determined the result when the choice is between two classifications in existing collective agreements.

[95] In dismissing the grievance, and confirming the employer's assignment of the work of tutoring to the support staff bargaining unit, Arbitrator Starkman nonetheless acknowledged that tutoring was a form of teaching. The decision, thus, does not stand for the proposition that tutoring is not teaching. Rather, it supports the employer's argument that a finding of fact that an employee is engaged in some way in teaching has not ensured access to the academic bargaining unit in a number of earlier arbitration decisions.

[96] As noted, the employer's main position is that the tutors are not teaching. Rather, in the employer's view; they are guiding, facilitating or accompanying the students as they progress through their courses. The employer does not consider this a pedagogical function. The union disagrees.

[97] To answer the question whether the tutors in this case are teaching, it is helpful to compare their duties to those described in the main college cases relied on by the employer that have dealt with individuals performing similar functions, as well as one relied on by the union from the school board sector.

[98] The cases cover a variety of tutoring functions. In *Algonquin* and *Fanshawe*, the tutoring was face-to-face, and clearly remedial. The similarities with the tutors in this case are that the individuals recruited are people who know the subject matter, referred to as subject matter experts in the testimony in this case and in the *Algonquin* decision. The purpose of the function in all the cases is to increase the chances of student success, which means the ability of the student to demonstrate enough learning to pass the course and get an academic credit. Referring students to appropriate on-line resources is part of all these tutoring jobs.

[99] The important differences include that the tutors in the *Algonquin* and *Fanshawe* cases are not responsible for evaluation as are the tutors at La Cité. Without the marking done by the La Cité tutors, on-line students cannot get academic credit for their courses. Their marking is required to be done in a short turnaround time and in time for the students to prepare for the final exam. I am persuaded that the reason for this requirement is that the college considers that having the results and feedback from the tutor on previous work is important to the students' learning. Although the students and tutor never meet face-to-face as was the case with the *Algonquin* and *Fanshawe* situations, the La Cité tutors are involved with all the students throughout the length of the course, rather than on an episodic, drop-in or workshop basis as was the case in those other colleges.

[100] Further, the coaches and tutors at Fanshawe and Algonquin were not directly involved in the delivery of the courses leading to an academic credit, but were rather assisting students having difficulty in a more general *ad hoc* way.

[101] The duties of the course directors or evaluators described in Arbitrator MacDowell's St. Lawrence decision are more similar to those of the La Cité tutors than those in *Algonquin* and *Fanshawe*. The course material was presented in a prepared way at a distance, rather than prepared by the tutor or course director. Like the tutors in this case, evaluation was an important part of the course director's functions. Employer counsel submitted that a major distinction with the facts in the *St. Lawrence* decision was that that there was no staff giving personalized guidance at La Cité.

[102] Nonetheless, the evidence in this case persuades me that the La Cité tutors do provide individualized assistance and guidance to the students. Having only the summary of the evidence in the St. Lawrence decision to go by, it is not possible to tell whether the course

directors at St. Lawrence provided more or less individualized assistance to students than the La Cité tutors. However, the function has the same purpose, and it is no less personal, as expected by the terms of the contract. For example, the contract requires the tutors to review emails and discussion groups each day, encouraging the use of the discussion space to avoid the repetition of questions, and to reserve email for more individual issues. They are also required to respond to student comments in the discussion groups, stimulating critical thinking and sharing specialised knowledge of the industry linked to the program of study, and to send reminders by email to students who have not submitted their work. As one of the tutors put it in her evidence, she is responsible to see that the students have what they need to succeed in the course.

[103] Employer counsel submitted that what the tutors were doing was limited to encouraging the students, reminding them of "the when and where" of their course rather than the "how and the why" of the course content. It is true that much of the contact in the emails in evidence related to questions about the process or marks rather than the substance of the course material. Navigation in and around the platform was a frequent source of questions. Important to this case, the answers given by the tutors enabled those who could not figure it out for themselves, to learn how to use the sophisticated e-Cité platform, as well as to find their way to effective utilisation of the pre-packaged educational content that was posted there. And there was a significant amount of straightforward encouragement such as to do the assignments, to not panic and to not give up.

[104] However, it is my conclusion from all of the evidence that the tutors also play an important substantive role in respect of the course material. First of all, it is clear that the tutors are not akin to the "help desk" for technical issues. Other college staff support both the on-line students and the tutors with true technical issues. Further, and although the College witnesses were clear it was not necessary to be a teacher to be hired as a tutor, it is a requirement that they be subject matter experts. For instance, in recruiting tutors for the translation assistant program, Ms. Tudorache said it was the level of mastery of French that was of interest. The tutors need to be able to understand and communicate about the substance of the course in order to effectively assist the students. In both the required feedback to the students and in their evaluation of the students' work they are providing ongoing assistance with the subject matter. In this respect, I am convinced that the students are not entirely teaching themselves.

[105] The union invited a finding that it is no coincidence that all the tutors who testified were experienced teaching professionals with very impressive resumes in the fields of language teaching and translation. However, it is of course true that someone who is a teacher in one employment setting may be employed doing something else by another employer, so I have not assumed that the tutors are employed as teachers by La Cité because they have taught elsewhere for years.

[106] Employer counsel underlined that Ms. Cuddihy, who was a tutor assigned to English courses, testified that the *assumed* she was teaching, that no one had told her she was teaching. Ms. Cuddihy has significant experience as a teacher, and it is not without some probative value that she considered her function to be teaching. During the time she worked as a tutor, she was the recipient of an award which she understood to be because the students in the courses to which she was assigned had a good success and retention rate. Ms. Gauthier, a CFCL manager, gave evidence that Ms. Cuddihy was doing more than tutors were expected to do in terms of feedback to the students. However, I do not find that the evidence of Ms. Cuddihy's work was inconsistent with the expectations set out in the written contract. Further, the feedback given to students by way of comments on a marked assignment by a tutor in the paralangier program, Ms. Tudorache, was very extensive, and also dealt with the substance of the material, not just how to navigate the platform.

[107] A tutor assigned to French courses, Ms. Touchette, was clear that she did not transmit the course content in the first instance, that the course content was transmitted through interactive video content, but she said she facilitated the transmission. Although the questions from students are mostly technical, she receives substantive questions as well, in response to which she redirects the student to the course content. She said she presented the content, but did not teach it. Rather, she broke the material down, and posted information, followed up week after week. She counsels students not to panic, gives them advice about how to master the navigation of the website, which is too vast for some. There are virtual meetings where she can give advice to the group, but she deals with most problems individually, by email. She said there was a lot of interaction with the students to motivate them to do the work and help them along, by motivating and guiding them. She noted that many of the students did not have French as their first language and that technology is not the strong point for all. She was also responsible to make individual modifications, such as for deadlines for military and students with

special needs. She was of the view the students considered her as a teacher in distance education.

[108] As to evaluation of the students' work, the union accepted that 80% of the evaluation was done by self-correction and/or with the computer's assistance. Ms. Touchette's evidence was that the evaluation was almost all multiple choice, true or false or key words, but that she had to review the exams if there was a problem. However, the exceptions to this type of routine or assisted evaluation which she mentioned in her evidence are important to the overall picture. In the reading circle she has to manually evaluate whether the objectives have been reached. Although she emphasized there were very objective criteria for doing that, the evidence persuades me this is far from a mechanical exercise.

[109] For example, for the reading circle, she has to approve what students want to use as their material, to assure that the content is sufficient for the course objectives. The marking for the reading circle required evaluation of whether the student had identified the type of text, the level of language or the style of journalism, and whether the examples given for difficult expressions were appropriately contextualized, as well as grammatical errors. Ms. Touchette said that one did not need pedagogues to do this type of evaluation, and there was no subjective evaluation. Nonetheless, she agreed on cross-examination that she exercised her discretion as an educator in marking, to judge the quality of the French used by the student and that she evaluated whether the work was well done or not. She makes comments to encourage the students and to point out things that are missing and make suggestions.

[110] Ms. Touchette contrasted her work as a professor at La Cité, which was much more demanding than being a tutor for language courses. The duties were more extensive, with more responsibility for course content, preparation, presentation and evaluation. However, she noted that the fact that the on-line courses have the material prepared by others and presented electronically allows her to deal with a far higher number of students in her role as tutor.

[111] When Ms. Cuddihy gives feedback, she too gives students examples of how they could change things to do better, drawing attention to errors francophones make in English for example.

[112] The employer also relies on the evidence of Ms. Tudorache that the evaluation involved did not require critical thinking, that the function was to be a facilitator and guide to the on-line platform. As with the evaluation work done by Ms. Touchette, there was nothing mechanical about the marking and feedback in the example in evidence of what was involved in the translation assistant program. There was extensive feedback and suggestions about sophisticated points about translation in different contexts, and the requisite tone and level of language, as well as the accuracy and precision of the French in terms of both translation and grammar.

[113] The evidence persuades me that the feedback to the students through answering their questions and evaluation of their work is the essence of the reason tutors are assigned to the on-line courses. They are, liked the evaluators/course directors at St. Lawrence, the staff whose job it is to do just that, i.e. provide ongoing assistance with the prescribed subject matter for those students who need it; helping the students along with their learning; providing ongoing evaluation and feedback on whether the student is absorbing the course material, and being responsible for the final evaluation, which confirms the student's mastery of the assigned subject matter. This is the work that was found to be academic teaching work in St. Lawrence. If one takes a core function approach to comparing the duties of the course directors/evaluators at St. Lawrence to those of the tutors at La Cité, the core functions are very similar. Both groups performed the function of answering questions at a distance, at the student's initiative. The terms of the La Cité tutors' contracts require personalized feedback and evaluation, without which the course objectives could not be met. There was the difference in the St. Lawrence case that the evaluators or course directors had at one time been treated as part of the academic bargaining unit, while the tutors at La Cité did not have that history, and were treated as non-union independent contractors instead, but I do not find that this history is a sufficient basis to distinguish the cases on the facts.

[114] The employer emphasized that the courses were entirely on-line as a factor to consider in determining whether the tutors were teaching or not. It is definitely part of the facts which I have considered, but I do not see it as in any way determinative. As Arbitrator MacDowell emphasized, the statute does not make distinctions between who teaches, or how or what. The evidence that these very experienced tutors did not find it difficult to mark the work of the students in the accredited courses to which they were assigned does not lessen the pedagogic

function it serves in sharing with the students what they have to focus on to pass the final evaluation.

[115] Another way that the employer phrased their argument that the tutors were not teachers was that there was no transmission of learning or knowledge in the tasks of the tutors. I am not persuaded by the evidence that this is an adequate description of the work of the tutors. The tutor does not present the material as a teacher would in a classroom setting, but the feedback and marking is, in my view, a way to transmit knowledge to the students related to how to effectively use the digital platform, how to learn from their errors in order to assimilate the assigned material, and what sections of the material in the pre-packaged content are necessary to review in order to pass the course. I appreciate that the digital platform permits the teaching functions to be unbundled, with the machine carrying the initial load of delivering the content to the students. The person assigned to the course as a tutor then does a smaller, selected, range of functions of those which may be assigned in a more traditional format, but for a larger number of students than would be possible without the machine's assistance. Any student who can truly teach themselves will have little need to call on the tutor for assistance, although without the tutor's evaluation of their work, they will not get their credit. However, the evidence was clear that there were a significant number of students who need another human's assistance to meet the course objectives. In terms of function, rather than form, I see very little difference between this and a teacher answering questions after presenting a power point lecture which has been prepared by others, marking an exam composed by someone else, or marking a book report prepared after the student has read a text that someone else has written.

[116] Thus, I find the evidence to be persuasive, that no less than the evaluators or course directors in *St. Lawrence,* the work of the tutors is academic teaching work, they are employed as teachers and therefore are properly included in the academic bargaining unit described in the CCBA.

[117] This approach to unbundled or non-traditional teaching functions is consistent with that taken in arbitral decisions in the context of Ontario school boards, such as Arbitrator Albertyn's decision in *Ottawa-Carleton District School Board,* and the jurisprudence cited therein. The parameters of the statutory teacher bargaining units at the time of that decision were found in the *Education Act* [now found in the *School Boards Collective Bargaining Act, 2014]* and required a decision as to whether a group of personnel were employees and whether they were

teachers. Given that the statutes related to teaching in school boards are creatures of the same provincial legislature that created the CCBA, this decision is worthy of consideration as to how arbitrators in another educational sector with bargaining units defined by statute have interpreted the concept of being employed to teach.

[118] After finding that a group of individuals known as Educational Technology Integrators were employees of the school board, the Albertyn panel went on to discuss whether they were teachers, as the employer maintained that they were not performing teaching functions. Their functions can be summarized as assisting classroom teachers to integrate technology into their classrooms, rather than teaching the students in the classrooms directly. Adopting the words of Arbitrator M.C. Picher, relying on a significant line of jurisprudence in the Ontario school board context, the decision finds that teaching transcends classroom teaching in the traditional sense, and includes professional service in furtherance of teaching and education generally. In that context, falling in the statutory bargaining unit also requires being a certified teacher, but that was not the point in dispute between the parties. The question was very similar to the one before me, i.e. were the functions properly considered teaching, or were the individuals in question performing a supportive non-teaching function. The individuals in question were assigned to assist the teacher to use the internet and other technology to deliver the curriculum to the students in a more interesting way. The decision also found that they performed the function of encouraging pupils in the pursuit of learning, which was considered an essential purpose of the teaching program.

[119] Much like here, the employer in that case focused on the fact that the individuals in question were not responsible for leading the program of instruction or instructing the pupils directly. Rather, they had been engaged to provide on-site support for teachers to deploy technological educational resources, to be integrated into the lessons prepared by the teacher. Finding that assisting teachers to make the transition to computers and the internet to teach was a pedagogical function, integral to the educational program of the school board, the Albertyn panel found that they were therefore in the broad sense, employed to teach. Although the functions of that group of individuals were considerably different than those of the tutors, I find the functions of someone who is assisting someone else to make the transition to computers and the internet to teach quite analogous to the functions of the tutors which were directed at assisting students to use the electronic platform to successfully learn enough to gain an academic credit.

[120] I have carefully considered the employer's argument that to put the tutors in the academic bargaining unit would put decades of jurisprudence in disarray, and enlarge the academic bargaining unit, something which I do not have jurisdiction to do. This is a reference to the significant line of cases discussed above which have found that, in a contest between the academic bargaining unit and the support staff bargaining unit, personnel who do not perform the core functions of the classifications bargained in the academic bargaining unit may be properly included in the support staff bargaining unit. Employer counsel encourages a conclusion that the years of effort of these sophisticated parties in fashioning class definitions to meet the evolving needs of the college should be respected. Since coaching and tutoring have not been included in bargaining for the academic bargaining unit, as Arbitrator Knopf found, claims that they should be within the academic unit were rejected. However, the grievance before me does not raise that same issue, and that line of cases was decided in a context where denying the grievances did not leave the individuals in question with no bargaining rights at all.

[121] Union counsel suggested that, if the choice in the Algonquin case decided by Arbitrator Knopf had been between the academic bargaining units and no bargaining rights, that the grievance would have been allowed. Given the remarks at the end of that decision, echoing similar ones by Arbitrator Starkman in his *Fanshawe* decision, that the parties might have bargained terms and conditions for the tutors in those cases in the academic bargaining unit, the suggestion is understandable. However, I prefer not to speculate. More importantly, the issue before me is not a choice between the academic and the support staff bargaining units, since that is not the issue presented by the grievance. The grievance was filed under the academic collective agreement, objecting to the use of the tutors without classifying them under the academic collective agreement. As well, the employer strenuously opposed any consideration of the support staff collective agreement in the context of a grievance filed under the academic collective agreement.

[122] As discussed above, the case that dealt with an issue closest to the one before me is Arbitrator MacDowell's *St. Lawrence* decision, which found that positions with very similar duties to those before me fit within the academic bargaining unit. On the view of the facts I have set out above, I do not find it distinguishable. To find for the employer in this case, I would have to decide that the analysis in it was sufficiently erroneous that I should not decide this case in a manner

consistent with it. Rather than finding the analysis in *St. Lawrence* erroneous, I find it consistent with the statute and the line of cases that preceded it which emphasize the primacy of the statutory description of the bargaining unit.

[123] The line of jurisprudence represented by the 2005 *St. Lawrence* decision deals with cases where the choice between the exclusion from, or inclusion in, statutory rights, is based on a reading of the statutory description of the bargaining units as the controlling factor, given that the parties are not permitted to contract out of the statute. As made clear in this line of cases, if there is any inconsistency between the collective agreement language and the statute, it is the statute that prevails. The other aspect of the overriding effect of the statute which warrants mentioning here is the one remarked on by Arbitrator Knopf, in her *Algonquin* award commenting on Arbitrator MacDowell's *St. Lawrence* decision, as follows:

> He has properly set out the importance of the statutory scheme, recognizing that the Legislature has created two* distinct bargaining units in the College sector, with specific exclusions but resulting in all other positions having to fall within one of the two distinct units.
>
> [*Note that there were two bargaining units at the time of the St. Lawrence decision; there are now four, as the statute was amended in 2008 to add a part-time unit for each of academic and support staff personnel.]

[124] In other words, if a college employee is doing work which falls within the descriptions laid out by the CCBA, and they are not excluded as managerial, confidential, a member of the architectural, dental, engineering, legal or medical profession employed in a professional capacity, or employed outside Ontario, they would fall within one of the bargaining units which have been given recognition by the statute. As noted in my 2018 decision in *Algonquin College and OPSEU (Noah), 2018 CanLII 83052 (ON LA),* the 2008 statutory changes to the manner of amending the bargaining unit strengthened the notion that the legislature intended a statutory bargaining unit not easily amended by the parties, or controlled by the practice of individual colleges. The statutory provisions have the effect that the parties are not meant to directly control what employees do and do not have access to the statutory bargaining rights set out in the CCBA. Since an obvious purpose of the CCBA is to provide bargaining rights to college employees who fall within the statutory bargaining units, this is one of the factors which is appropriate to consider in interpreting the definition of the academic bargaining unit.

[125] By contrast, I find the line of jurisprudence, of which the *Fanshawe {*Starkman) and *Algonquin (*Knopf) decisions are the most prominent examples, distinguishable both on the

basis of the issue that was before them and the facts pertaining to the functions of the tutors, and as to the arguments presented. To the extent that any of those decisions is interpreted to stand for the premise that the parties are free to exclude individuals from statutory bargaining rights by classifying work functions in a specific way, when those functions are included in the statutory definitions of the bargaining units, I respectfully disagree. Such a conclusion would be contrary to a longer standing line of jurisprudence, of which the 2005 *St. Lawrence* decision is the main example relied on in argument, but which includes arbitrator Saltman's *Sault College* decision, cited above, and the decisions relied on therein, such as the two *La Cité* decisions cited above.

[126] Although it is not determinative, I note that most of the cases relied on in argument were decided before the 2008 amendments to the CCBA, and none of them consider the effect of those amendments. The major revision at that time was the addition of part-time bargaining units to the statute for both the academic and support staff groupings. There were accompanying amendments of some significance as well, which strengthened the notion of a province-wide bargaining unit, defined by statute, which could not easily be amended, even by the provincial parties, let alone the local parties at any given college. As well, the definition of employee was changed somewhat. Prior to the amendments, "employee" was defined as a person employed by a college in a *position or classification* that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2. After the amendments, the reference to positions or classifications was removed, so that employee is more simply defined as a person who is employed by a college employer and is a member of a bargaining unit. The purpose of the amendment to the definition of employee is not entirely clear, and was not addressed by the parties in argument. However, I find that, at the very least, it lessens the strength of the argument that the classifications or positions created by the parties are the controlling standard for determining what personnel should be found to belong in the academic bargaining unit defined by the CCBA.

[127] As is clear from the jurisprudence, this is not to say that all individuals who have potential rights flowing from the CCBA are covered by a collective agreement, for various reasons, including the fact that, at any given time, the part-time units have not been organized by a bargaining agent. For some of the earlier history of attempts to organize the part-time employees in the colleges, see *Ontario Public Service Employees Union v. Sault College of Applied Arts and Technology*, 1985 CanLII 1032 (ON LRB). And, as many decisions have

pointed out, the fact of being covered by a collective agreement does not mean that all classifications must have the same set of terms and conditions of employment.

[128] I also find it relevant to the consideration of what employees should be found to be included in the academic bargaining unit that it is not just teachers, but counsellors and librarians which the legislature deemed appropriate to place in the academic bargaining unit, rather than the support staff unit. To the extent that the employer's argument in this case suggests that the legislature intended only traditional teaching to be included in the academic bargaining unit, the presence of these other categories of employee who provide information and guidance to students, normally outside the traditional classroom, is an important consideration that I find indicates a broader intention. The combination of the three categories of teachers, counsellors and librarians, together, support an interpretation of the statute's description of the academic bargaining unit as one intended to capture three important categories of student-facing personnel integral to the academic effort of the colleges. Although the on-line students may have some contact with the administrative or technical staff for troubleshooting, the tutors are the only student-facing personnel involved in the actual delivery of the credit courses dealt with in the evidence before me.

[129] The union made an additional argument concerning an implied restriction flowing from the seniority and other provisions of the collective agreement, on assigning bargaining unit work to non-bargaining unit individuals. In light of the conclusions I have come to above, I find it unnecessary to deal with this line of argument and jurisprudence.

Summary and Remedy

[130] To summarize the above, it is my view that it is appropriate to issue a declaration that the tutors are properly considered to be employees of the college, and to have been employed as teachers, and thus they fall within the academic bargaining unit set out in the CCBA and the collective agreement.

[131] The question of the appropriate remedy remains. I have found above that the tutors in question fall with the academic bargaining unit described by schedule 1 of the CCBA as they are employed as teachers. The current collective agreement provides two classifications of teachers, professors and instructors, as well as two other classifications, counsellor and librarian. The evidence is clear that there are functions of the tutors which fall within each of the

teaching classifications. The union urges me to find that the duties of the tutors fall most closely within the class definition of instructor.

[132] As the evidence recounted above indicates, there is no doubt that that the tutors perform a more limited set of duties than those set out in the class definition for bargaining unit professors. The tutors do not develop courses, choose textbooks, prepare or deliver lectures or modify course content. The evidence is also clear that, at any given time, a person classified as a professor may perform only a portion of those duties as well. As for the instructor classification, there are, as argued by the union, significant similarities with the instructor classification in that the duties and responsibilities of the tutors are directed at prepared courses of instruction and according to prescribed instructional formats. Nonetheless, the parties did not focus on another portion of that definition, as to whether the tutors' functions were limited to the acquisition of a manipulative skill or technique, and there was no evidence that they worked under the direction of a professor. Further, the parties were agreed that, at the time of the hearing, La Cité did not use instructors, which means there is no possibility of comparing the duties of the tutors with actual instructors at this college. There was evidence that the instructor classification was used at Algonquin College for on-line and/or hybrid courses in computer applications for a few years, and that the direction of a professor was not always a feature of the arrangement at that college. However, I do not consider the evidence of the practice of another set of local parties under the provincial collective agreement to be particularly helpful in this case, where there is no indication that it had some significance at the level of the classifications which are the product of provincial bargaining.

[133] It is also clear, as arbitrators Starkman and Knopf pointed out, that the parties could bargain into the academic collective agreement a specific classification or specific provisions in respect of the duties of individuals with some teaching functions but not the full panoply of functions of a professor and its academic leadership role.

[134] Having considered all of the above, and given the time that has passed since the grievances were filed, and the fact that much may have changed in the interim, it is my view that it is appropriate to remit the question of the appropriate classification in the academic collective agreement to the parties in the first instance, as well as the question of implementation and other remedial issues. I remain seized in the event that the parties are not able to agree on any matter flowing from the above noted reasons.

[135] For the reasons given above, the grievance is allowed to the extent indicated. I remain seized.

Toronto, May 8, 2020.

Kathleen G. O'Neil, Arbitrator

Appendix A

Statutory Provisions

Excerpts from the Colleges Collective Bargaining Act, 2008

PART I

INTERPRETATION AND APPLICATION

Definitions

1 In this Act,

"bargaining unit" means a bargaining unit determined in accordance with sections 25, 26 and 27; ("unité de négociation")

…

"employee" means a person who is employed by an employer and is a member of a bargaining unit; ("employé")

…

"employer" means a college; ("employeur")

…

Bargaining Units

Bargaining units

25 From the day this Act receives Royal Assent until a first regulation comes into force under section 27, the bargaining units for the purposes of this Act shall be the units described in Schedule 1. 2008, c. 15, s. 25.

…

SCHEDULE 1

Full time academic staff bargaining unit

1 The full time academic staff bargaining unit includes all persons employed by an employer as teachers, counsellors or librarians, but does not include,

(a) chairs, department heads or directors;

(b) persons above the rank of chair, department head or director;

(c) other persons employed in a managerial or confidential capacity within the meaning of section 5 of this Schedule;

(d) teachers, counsellors and librarians who are included in the part time academic staff bargaining unit;

(e) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity; or

(f) a person employed outside Ontario.

Part time academic staff bargaining unit

2 (1) Subject to subsection (2), the part time academic staff bargaining unit includes all persons employed by an employer as,

(a) teachers who teach for six hours or less per week;

(b) counsellors or librarians employed on a part time basis; and

(c) teachers, counsellors or librarians who are appointed for one or more sessions and who are employed for not more than 12 months in any 24-month period.

(2) The part time academic staff bargaining unit does not include,

(a) chairs, department heads or directors;

(b) persons above the rank of chair, department head or director;

(c) other persons employed in a managerial or confidential capacity within the meaning of section 5 of this Schedule;

(d) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity; or

(e) a person employed outside Ontario.

Full time support staff bargaining unit

3 The full-time support staff bargaining unit includes all persons employed by an employer in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff, but does not include,

(a) foremen or supervisors;

(b) persons above the rank of foreman or supervisor;

(c) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college or of a constituent campus of a college, including persons employed in clerical, stenographic or secretarial positions;

(d) other persons employed in a managerial or confidential capacity within the meaning of section 5 of this Schedule;

(e) persons who are included in the part time support staff bargaining unit;

(f) students employed in a co-operative educational training program undertaken with a school, college or university;

(g) a graduate of a college during the period of 12 months immediately following completion of a course of study or instruction at the college by the graduate if the employment of the graduate is associated with a certification, registration or other licensing requirement;

(h) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity; or

(i) a person employed outside Ontario.

Part time support staff bargaining unit

4 (1) Subject to subsection (2), the part time support staff bargaining unit includes,

(a) all persons regularly employed by an employer for not more than 24 hours a week in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff; and

(b) all persons employed by an employer for a project of a non-recurring kind in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff.

(2) The part time support staff bargaining unit does not include,

(a) foremen or supervisors;

(b) persons above the rank of foreman or supervisor;

(c) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college or of a constituent campus of a college, including persons employed in clerical, stenographic or secretarial positions;

(d) other persons employed in a managerial or confidential capacity within the meaning of section 5 of this Schedule;

(e) students employed in a co-operative educational training program undertaken with a school, college or university;

(f) a graduate of a college during the period of 12 months immediately following completion of a course of study or instruction at the college by the graduate if the employment of the graduate is associated with a certification, registration or other licensing requirement;

(g) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity; or

(h) a person employed outside Ontario.

Definition

5 In this Schedule,

"person employed in a managerial or confidential capacity" means a person who,

(a) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer,

(b) spends a significant portion of his or her time in the supervision of employees,

(c) is required by reason of his or her duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,

(d) is employed in a position confidential to any person described in clause (a), (b) or (c),

(e) is employed in a confidential capacity in matters relating to employee relations,

(f) is not otherwise described in clauses (a) to (e) but who, in the opinion of the Ontario Labour Relations Board, should not be included in a bargaining unit by reason of his or her duties and responsibilities to the employer.

2008, c. 15, Sched. 1.

Predecessor definition of employee

Colleges Collective Bargaining Act

R.S.O. 1990, CHAPTER C.15

"employee" means a person employed by a board of governors of a college of applied arts and technology ***in a position or classification*** that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2; ("employé") [emphasis added]

APPENDIX B

PROVISIONS OF THE ACADEMIC COLLECTIVE AGREEMENT

1.01 The Union is recognized as the exclusive collective bargaining agency for all academic employees of the Colleges engaged as teachers, counsellors and librarians, all as more particularly set out in Article 14, Salaries, except for those listed below:

(i) Chairs, Department Heads and Directors,
(ii) persons above the rank of Chair, Department Head or Director,
(iii) persons covered by the Memorandum of Agreement with the Ontario Public Service Employees Union in the support staff bargaining unit,
(iv) other persons excluded by the legislation, and
(v) teachers, counsellors and librarians employed on a part-time or sessional basis.

NOTE A: Part-time in this context shall include persons who teach six hours per week or less.

NOTE B: Sessional in this context shall mean an appointment of not more than 12 months duration in any 24-month period.

…

11.01 A Each teacher shall have a workload that adheres to the provisions of this Article.

11.01 B 1 Total workload assigned and attributed by the College to a teacher shall not exceed 44 hours in any week for up to 36 weeks in which there are teaching contact hours for teachers in post-secondary programs and for up to 38 weeks in which there are teaching contact hours in the case of teachers not in post-secondary programs.

The balance of the academic year shall be reserved for complementary functions and professional development.

Workload factors to be considered are:
(i) teaching contact hours
(ii) attributed hours for preparation
(iii) attributed hours for evaluation and feedback
(iv) attributed hours for complementary functions

11.01 E 1 Weekly hours for evaluation and feedback in a course shall be attributed to a teacher in accordance with the following formula:

…

11.01 E 2 For purposes of the formula:
(i) "Essay or project evaluation and feedback" is grading:
– essays
– essay type assignments or tests
– projects; or
– student performance based on behavioral assessments compiled by the teacher outside teaching contact hours.

(ii) "Routine or assisted evaluation and feedback" is grading by the teacher outside teaching contact hours of short answer tests or other evaluative tools where mechanical marking assistance or marking assistants are provided.

(iii) "In-process evaluation and feedback" is evaluation performed within the teaching contact hour.

(iv) Where a course requires more than one type of evaluation and feedback, the teacher and the supervisor shall agree upon a proportionate attribution of hours. If such agreement cannot be reached the College shall apply evaluation factors in the same proportion as the weight attached to each type of evaluation in the final grade for the course.

…

11.01 G 1 Where preparation, evaluation, feedback to students and complementary functions can be appropriately performed outside the College, scheduling shall be at the discretion of the teacher, subject to the requirement to meet appropriate deadlines established by the College.

…

CLASS DEFINITION

PROFESSOR

Under the direction of the senior academic officer of the College or designate, a Professor is responsible for providing academic leadership and for developing an effective learning environment for students. This includes:

a) The design/revision/updating of courses, including:

- consulting with program and course directors and other faculty members, advisory committees, accrediting agencies, potential employers and students;
- defining course objectives and evaluating and validating these objectives;
- specifying or approving learning approaches, necessary resources, etc.;
- developing individualized instruction and multi-media presentations where applicable;
- selecting or approving textbooks and learning materials.

b) The teaching of assigned courses, including:

- ensuring student awareness of course objectives, approach and evaluation techniques;
- carrying out regularly scheduled instruction;
- tutoring and academic counselling of students;
- providing a learning environment which makes effective use of available resources, work experience and field trips;
- evaluating student progress/achievement and assuming responsibility for the overall assessment of the student's work within assigned courses.

c) The provision of academic leadership, including:

- providing guidance to Instructors relative to the Instructors' teaching assignments;

- participating in the work of curriculum and other consultative committees as requested.

In addition, the Professor may, from time to time, be called upon to contribute to other areas ancillary to the role of Professor, such as student recruitment and selection, time-tabling, facility design, professional development, student employment, and control of supplies and equipment.
…

INSTRUCTOR

The Instructor classification applies to those teaching positions where the duties and responsibilities of the incumbent are limited to that portion of the total spectrum of academic activities related to the provision of instruction to assigned groups of students through prepared courses of instruction and according to prescribed instructional formats; and limited to instruction directed to the acquisition of a manipulative skill or technique; and under the direction of a Professor. Notwithstanding such prescription, the Instructor is responsible for and has the freedom to provide a learning environment which makes effective use of the resources provided or identified, work experience, field trips, etc., and to select suitable learning materials from those provided or identified to facilitate the attainment by the students of the educational objectives of the assigned courses.

The Instructor's duties and responsibilities include:

- ensuring student awareness of course objectives, instructional approach, and evaluation systems;
- carrying out regularly scheduled instruction according to the format prescribed for the course, including as appropriate, classroom, laboratory, shop, field, seminar, computer assisted, individualized learning, and other instructional techniques;
- tutoring and academic counselling of students in the assigned groups;
- evaluating student progress/achievement, assuming responsibility for the overall assessment of the students' work within the assigned course, and maintaining records as required;
- consulting with the Professors responsible for the courses of instruction on the effectiveness of t he instruction in attaining the stated program objectives.

In addition, the Instructor may, from time to time, be called upon to contribute to other activities ancillary to the provision of instruction, such as procurement and control of instructional supplies and maintenance and control of instructional equipment.

Appendix C

Authorities Cited by the Parties

By the Union

Jurisprudence from the college sector

A) *La Cité Collégiale et S.E.F.P.O., Re* 1997 CarswellOnt 7293,48 C.L.A.S. 560 (M. Picher) ;

B) *Waito v. Cité collégiale Ottawa, 1998 CarswellOnt5548*, [1998] O.L.R.B. Rep.636, [1998] L.V.l.2956- 4, [1998] O.L.R.D. No.3025 (O'Neil);

C) *Sault College v OPSEU*, (unreported) February 19, 2002, (Saltman);

D) *St. Lawrence College v OPSEU*, (unreported) July 22, 2005, (MacDowell);

E) *Cambrian College and OPSEU*, Local 655 (Staffing Cambrian Programs), Re 2015 CarswellOnt 15116, 124 C.L.A.S . 239, 262 L.A.C. (4th) 343 (Davie);

F) *Ontario Public Service Employees Union v. College Compensation and Appointments Council*, 2010 CanLII 15350 and 15366 (ON LRB) (Cummings) (March 25, 2010) [English version]. French version is at 2010 CanLII 15354 and 15371 (ON LRB);

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16. Labour Relations Act, S. O. 1995, chap. 1, art. 1