

ARBITRATION AWARD

BETWEEN:

NEWFOUNDLAND AND LABRADOR ASSOCIATION
OF PUBLIC AND PRIVATE EMPLOYEES
(hereinafter called the "Union")

AND:

LEWISPORTE TOWN COUNCIL
(hereinafter called the "Employer")

GRIEVANCE:

Group Grievance re contracting out

COUNSEL:

For the Union

Hubert Sutton

For the Employer

Michelle A. Willette

ARBITRATOR:

James C. Oakley

The arbitration hearing was held at St. John's on November 24, 2009. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter for ninety (90) days following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.

The Union raised an issue of *res judicata*, submitting that the issue in dispute was previously decided in an arbitration award between the same parties, *Newfoundland and Labrador Association of Public and Private Employees and Lewisporte Town Council*, unreported, November 6, 2008 (Oakley)(the "*NAPE v. Lewisporte*" award). The issue of *res judicata* will be addressed in the Award.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between Lewisporte Town Council and Newfoundland and Labrador Association of Public and Private Employees, effective February 1, 2009 to January 31, 2011
- Consent 2 - Grievance Form dated June 29, 2009
- Consent 3 - Indenture dated September 28, 2007, registered November 4, 2008 between the Town Council of the Town of Lewisporte and Hodder Holdings Inc.
- Consent 4 - Agreement dated May 26, 2008 between Hodder Holdings Inc. and the Town Council of the Town of Lewisporte
- Consent 5 - Agreement dated 2007 between Town of Pasadena and "Developer"
- Consent 6 - Indenture dated June 16, 2009 between Town Council of the Town of Lewisporte and Cecon Limited
- Consent 7A - Letter dated July 9, 2008 from Cecon Limited to the Town of Lewisporte
- Consent 7B - Letter dated September 16, 2008 from Cecon Limited to the Town of Lewisporte

- Consent 8 - Agreement dated April 16, 2009 between Cecon Limited and the Town Council of the Town of Lewisporte
- Consent 9 - Minutes of private Council meeting, Town of Lewisporte, March 17, 2009
- Consent 10 - Minutes of private Council meeting, Town of Lewisporte, March 24, 2009
- Consent 11 - Letter dated March 26, 2009 from Perry Pond, Manager, Town of Lewisporte to Dennis Laing, Cecon Limited, with enclosed conditions for development agreement
- Consent 12 - Minutes of Council meeting, Town of Lewisporte, April 7, 2009

Nature of the Grievance

The Union grieves violation of the contracting out provision in Article 28.01 of the Collective Agreement for work done on the development of a residential subdivision. The Employer submits that it sold land to a private developer before the work was done, and there is no violation of the Collective Agreement.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 3 Management Rights

3.01 All functions, rights, powers and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Union as being retained by the Employer.

...

Article 28 Contracting Out

28.01 The Employer shall not contract out bargaining unit work that provides Municipal Services through the life of this Agreement. Municipal Services means:

- (1) Water and Sewer repairs (Capital Works)
- (2) Street Maintenance
- (3) Garbage Collection & Disposal
- (4) Curb and Sidewalk Construction

- (5) Stadium Operations
- (6) Land Development (Sub-division)
- (7) Equipment Repairs
- (8) Snow Clearing
- (9) Sanding and Salting
- (10) Recreation and Beautification
- (11) Repairs to the following Town properties:
 - (a) Town Hall
 - (b) Fire Hall
 - (c) Town Garage
 - (d) Stadium
 - (e) Bowling Alley
 - (f) Pumphouse

Evidence

The witnesses called by the Union were Malcolm Ball, stadium attendant and John Combden, heavy equipment operator. The witness called by the Employer was Perry Pond, town manager.

Malcolm Ball is the president of the local Union and the shop steward. He signed the grievance form dated June 29, 2009 stating “violation of Article 28 contracting out and arbitration case”. He testified that the Union was grieving land development work done on Evergreen Place by a private contractor. The work included road construction, water and sewer installation and storm sewer installation. He testified that employees of the Lewisporte Town Council (the “Town”) had previously done work on the development of Evergreen Place, including clearing the roadway, and installing water and sewer and storm sewer. Town employees did work for the first 4 or 5 building lots. There was no work done to clear and grub lots, prior to the sale of lots to individual buyers. Mr. Ball said that the redress claimed by the Union included compensation for any bargaining unit employees on layoff. He was not aware of any employees on layoff at the relevant time.

John Combden is a heavy equipment operator employed by the Town. He testified that he did work on Evergreen Place. He drove a truck used for construction of the road, and installation of water and sewer. He said that the work was done for the purpose of the sale of the first 6 lots by the Town. He understood that the work for 12 more lots was done by a private contractor. He testified that Town equipment was available to do the work at the time the work was done by the private contractor. He testified that the grievance concerned the contracting out by the Town of work that members of the

bargaining unit had previously done. Mr. Combden agreed that Town employees did not do any of the road construction work in connection with a development of White Pines Estates. The work for that subdivision was done by Hodder Holdings. He agreed that Town employees did not clear snow on private property. He said the grievance was not about the Town selling land, but was about bargaining unit work.

Perry Pond testified that he has been the town manager for the Town Council of Lewisporte for about 4 years. He was a member of the Town's negotiating committee. He attended negotiations with the Union that resulted in the current Collective Agreement. The Collective Agreement was signed on June 9, 2009.

Perry Pond testified that the benefit of land development to the Town of Lewisporte is that it will attract new residents, increase taxation revenue, and allow the Town to grow and prosper. He said there was no land development by the Town in this case. The Town sold land for the Evergreen Place development to a developer, Cecon Limited ("Cecon"). Once the land was sold, the risk of loss or chance of profit was on the developer and not the Town. Mr. Pond said the Town did not sell the land for the purpose of avoiding its obligation under Article 28.01 not to contract out work.

The Town employees did some of the work on the Evergreen Place development before the land was sold. Mr. Pond said that in 2006, Town employees did some brush clearing for the road and did water and sewer work. There was not much work done on Evergreen Place in 2007 or 2008 as Town employees were busy doing other work. Mr. Pond said that he had discussions with Dennis Laing and Junior Colbourne of Cecon Limited in July, 2008 about doing development work in Lewisporte on Town owned land. He said that the Town Council decided to sell the land for the Evergreen Place development to Cecon at a meeting on March 17, 2009. The Town Council did not want to compete with private developers. Mr. Pond sent a letter to Cecon dated March 26, 2009. The letter referred to conditions that were attached. The conditions included transfer of land to Cecon less the land required for a street right of way. Mr. Pond said that the list attached to the letter was a draft document and changes were made in the final agreement. Mr. Pond prepared a Development Agreement between the Town Council and Cecon. He said that the Development Agreement was prepared in a form similar to development agreements used by the Town of Pasadena. The Development Agreement referred to a subdivision called Evergreen Place, Lewisporte, consisting of 30 residential lots. The Agreement stated that, following completion of the work by Cecon and approval of the development work by the Town, the developer would transfer to the Town the land

area required for public use as streets and public works, including water distribution and sanitary and storm drainage systems installed in the subdivision. The Agreement stated that, prior to approval of the completed work, Cecon would own the land including the street. The Agreement included a one year warranty on the developer's work. The Development Agreement was approved at the Council meeting on April 7, 2009 and signed on April 16, 2009. The land was transferred by the Town to Cecon by Deed of Conveyance dated June 16, 2009. The Town Council had previous experience with Cecon, as it had done some engineering consulting work for the Town for about 25 years.

Mr. Pond testified that the arrangement made between the Town and Cecon for the Evergreen Place subdivision, was similar to the arrangement made between the Town and Hodder Holdings Inc. ("Hodder") for the White Pines Estates subdivision. He said the Town sold land to Hodder for the purpose of developing a residential subdivision. The Town Council and Hodder signed a Development Agreement dated May 26, 2008, which was similar in form to the Development Agreement signed by the Town Council and Cecon in 2009. The Development Agreement stated that upon completion of the work and approval by the Town, the streets and services would be transferred by Hodder to the Town. Hodder completed the road work and installed water and sewer and storm sewer. The Town did not own the street when Hodder was doing the development work. The street was transferred back to the Town upon completion of the work. Mr. Pond said the Union did not file a contracting out grievance of the construction work done by Hodder for the White Pines Estates development. He was informed by Union representatives that the reason they did not grieve the White Pines Estates development, was because the Union believed the land had been Crown land, and not Town owned land.

Union Submission

The Union submitted that the Employer contracted out bargaining unit work in violation of Article 28.01. The work done by the developer on the Evergreen Place development was land development within the meaning of Article 28.01. The Employer did not have authority to enter into a Development Agreement that violated the Collective Agreement. The exercise of management's rights were subject to Article 28.01. The result of the Development Agreement was a violation of the Collective Agreement. The parties did not change the wording of the contracting out language when negotiating the current Collective Agreement. The Collective Agreement was negotiated by the parties after the parties received the prior arbitration award in *NAPE v. Lewisporte*, dated

November 6, 2008. The Town's intent when it entered the Development Agreement was to develop land. The Employer was aware of the prior award and had accepted its interpretation that clearing and grubbing work was bargaining unit work within the meaning of Article 28.01. The decision in the prior award was binding in this case based on the principle of *res judicata*. The Union referred to arbitral authorities to support its position. The Union submitted that it did not grieve the land development work done by Hodder because it believed the land was Crown land, and was not owned by the Town. The Collective Agreement does not violate the *Municipalities Act*. The Employer was attempting to sell land that included the road, but under the Development Agreement, the road would be sold back to the Town as soon as the construction work was completed. In effect, the Town retained ownership of the road. The Union requested that the grievance be allowed.

Employer Submission

The Employer submitted that Article 28.01 did not restrict the Town's right to sell land to a private developer. Article 28.01 protects the work of the bargaining unit in a situation where the Town develops a subdivision on Town owned land. The parties did not intend the Collective Agreement to restrict the Employer from selling land. There is no express provision to that effect. The Town accepted the decision in the prior award in *NAPE v. Lewisporte*. The prior award applied in a case where the Town Council owns the land. The prior award found that clearing and grubbing work on building lots, prior to sale by the Town, was bargaining unit work. The parties had accepted that clearing and grubbing work done by the buyer, after the Town sold the lot, was not bargaining unit work. The principle of *res judicata* does not apply because the prior award was based on a different fact situation. In a case where the Town owns the land that is being developed, there was still a chance of profit and a risk of loss on the Town. If the Town hired a contractor to do road construction on a Town owned development, then it would be a violation of Article 28.01. In this case, there was an arms length transaction between the Town and the developer. There was no attempt by the Town Council to circumvent the prior award. The discussions with the developer, Cecon, had commenced prior to the filing of the grievance that was the subject of the prior award. Once the work was completed, then the road vested in the Town Council under Section 163 of the *Municipalities Act*, SNL 1990, c. M-24. The Employer requested that the grievance be denied.

Considerations

The parties dispute whether work done by a developer on the Evergreen Place subdivision violates the contracting out provision in Article 28.01 of the Collective Agreement. At issue is the effect, if any, of the sale of land by the Town Council to the developer. The Union also submits that *res judicata* applies in this case, as the issue was decided in a prior arbitration award between the same parties.

Article 28.01 of the Collective Agreement states that the Employer shall not contract out bargaining unit work that provides “municipal services”. The Article states that “municipal services” includes “(6) land development (subdivision)”.

The factual background is that housing subdivision developments in Lewisporte have been done by private developers, or by the Town Council using its own employees and equipment. The Employer and the Union agree that, when the Town does land development, then the work is “municipal services” and therefore bargaining unit work. Land development, within the meaning of Article 28.01 (6) of the Collective Agreement, includes road construction, curb and gutter construction, installation of water and sewer services, and installation of storm sewer services. As a result of the prior arbitration award in *NAPE v. Lewisporte*, land development also includes clearing and grubbing of building lots, where the work is done prior to the sale of the building lot by the Town to the buyer.

The Town Council employees did the initial work on road construction and installation of water and sewer for the first building lots sold in the Evergreen Place subdivision. In 2008 the Town had discussions with Cecon, the developer, about land development in the Town. The Town Council and the developer entered into a Development Agreement in 2009. The Town sold the land to the developer at that time. The developer then continued the road construction and other work for the subdivision. The Town Council employees did not do any further work on the Evergreen Place subdivision. The contracting out grievance was filed on June 29, 2009. The Development Agreement states that when the subdivision work is completed and approved by the Town Council, then the road and services will revert to the Town Council.

The meaning of “land development” in Article 28.01 was at issue in the prior arbitration award in *NAPE v. Lewisporte*. The Arbitrator decided that clearing and grubbing of building lots owned by the Town, before the lots were sold to individual buyers, was land development within the meaning

of Article 28.01. The Arbitrator discussed the meaning of land development and stated as page 7 of the prior award as follows:

The Arbitrator has considered that the proposed clearing and grubbing work is work of the same type or nature as the work currently performed by Town Council employees, such as road construction, water and sewer installation, and curb and gutter installation. The proposed work would be performed on Town Council owned building lots and would be done for the purpose of assisting with the sale of the building lots. The objective of land development is the sale of building lots and the development of a residential subdivision. Although the Town Council employees have not performed clearing and grubbing work in the past, it is the same type of work, done for the same purpose. A characteristic of land development (subdivision) work, within the meaning of item (6) in Article 28.01, is that the objective of the work is the development of the subdivision and preparation of residential building lots for sale.

Having regard to all the circumstances, the clearing and grubbing of building lots, for the purpose of the sale of the lots, is land development (subdivision), within the meaning of Article 28.01 (6). Therefore, contracting out the work violates the prohibition against contracting out in Article 28.01. The Arbitrator will issue a declaration accordingly.

The prior award notes that the objective of land development is the preparation of building lots for sale. On the facts in the prior award, the Town owned the building lots and was preparing them for sale by the Town. The Town was doing the development work and was selling building lots to buyers to construct residential houses. Where the Town does the development work and sells the lots, it is considered to be “land development”, one of the categories of “municipal services” under Article 28.01.

In this case, the Town sold a piece of land to a developer to be developed as a subdivision. Building lots are sold by the developer and not by the Town. The development work of road construction and preparation of building lots for sale is done by the developer and not by the Town. The developer, and not the Town, has the risk of loss or the opportunity of profit on the sale of the lots. The sale of land to the developer included the land used for the road and services. Ownership of the road does not revert to the Town until the work is completed and approved by the Town, according to the Development Agreement. Whether the developer bought the land from the Town, or bought the land from another person, does not change the fact that the land development is done by the developer

and not the Town. The sale of land to the developer, and the subsequent development of the Evergreen Place subdivision by the developer, is not “land development”, one of the categories of “municipal services”, within the meaning of Article 28.01 (6).

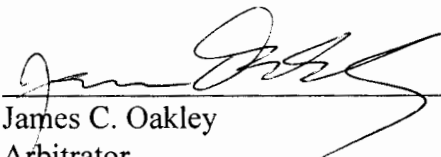
The Union submits that *res judicata* applies, meaning that the prior award in *NAPE v. Lewisporte* should be followed in this case. The principle of *res judicata* is discussed in Mitchnick and Etherington, *Labour Arbitration in Canada*, at page 45, and in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 2:3220. *Res judicata* is based on the principle that an issue should not be relitigated once it is decided. *Res judicata* applies when there is a prior decision that (1) is judicial in nature; (2) is between the same parties; and (3) determines the same issue. In this case, the prior award was between the same parties and was judicial in nature. However, the same issue was not before the Arbitrator in the prior award. The prior award addressed a different fact situation, namely, the clearing and grubbing work done on a building lot prior to sale of the building lot by the Town Council to a buyer of the lot. This case concerns road construction and service work done for a subdivision by a developer, after the land has been sold to the developer by the Town Council. The prior award decided a different issue and for that reason *res judicata* does not apply.

In summary, the Town was not engaged in land development, and did not contract out work, within the meaning of Article 28.01 (6), when it sold a piece of land to a developer and the developer subsequently developed the Evergreen Place subdivision. The principle of *res judicata* does not apply, as the prior award between the parties decided a different issue. There was no violation of the Collective Agreement.

Decision

The grievance is denied for the reasons stated in the Award.

DATED this 4th day of February, 2010.


James C. Oakley
Arbitrator