LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION AWARD

CANADIAN OFFICE & PROFESSIONAL EMPLOYEES' UNION, LOCAL 378
UNION

FORTISBC INC.
EMPLOYER

(Re: Retirees Doing Bargaining Unit Work – Ian Metcalf and Margaret Pitts)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Shanti P. Reda and Stephanie T. Mayor
Representing the Employer:	Keith J. Murray and Lou L. Poskitt
Dates of Hearing:	March 7 and 8, 2011
Dates of Written Submissions:	September 9 and 28; October 12, 2011
Date of Decision:	October 28, 2010

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Contents

1. Grievance, Procedural Background and Outstanding Dispute

[1] The bargaining unit of employees represented by the union and covered by the collective agreement for the term April 1, 2007 to March 31, 2012 is all full time, part-time and temporary employees as defined in the *Labour Relations Code* in "any phase of office, clerical, technical, administrative or related work" excluding field workers represented by another union.

[2] In 2007, the union grieved the predecessor employer, Terasen Gas Inc., was contracting out work to retired bargaining unit employees contrary to the scope of the union's exclusive bargaining authority. (Article 1.01) The employer did not require the retired employees to become union members and did not supply the union with monthly information about these employees. (Article 1.02) It did not otherwise have them covered by the collective agreement and did not post job vacancies contrary to Article 6.

[3] The union regarded the contracting of work to retired bargaining unit employees as contracting prohibited by Article 1.10: "The Company will not contract out work normally performed by bargaining unit employees if such contracting out will result in any termination or downgrading of existing employees."

[4] The grievances evolved into a policy grievance in October 2009. Some of the differences over disclosure of particulars and documents and the scope of the grievance are recited in *Terasen Gas Inc.* [2010] B.C.C.A.A.A. No. 59 (Dorsey).

[5] For the purposes of managing this arbitration, the disputed work and retirees were allocated to groupings. The grievance was settled with respect to all groups except two. There has been a decision allowing the grievance for one group (*Terasen Gas Inc.* [2010] B.C.C.A.A.A. No. 165 (Dorsey)).

[6] The one unresolved retiree group consists of Ian Metcalf (Former Technologist 3 – Engineering Drafter in the Engineering Drafting Department) and Margaret Pitts (Former Measurement Clerk in the Measurement Records Department). The union gave each notice of the arbitration hearing.

[7] The issue for decision is whether Mr. Metcalf and Ms Pitts were bargaining unit employees covered by the collective agreement or contractors engaged in accordance with the employer's contracting out rights under the collective agreement. The union says they were employees. The employer concedes they "largely performed work that was similar to, or identical to, that which they previously performed as employees" and they "largely performed the work in the same location as when they were employees, using the same equipment (which largely or exclusively belonged to Fortis)", but says these facts do not lead to a conclusion the integrity of the bargaining unit was undermined or the collective agreement otherwise contravened.

2. Engineering Drafting Department – Ian Metcalf

[8] From April 2007 to March 2008, Mr. Metcalf was bridging to his impending retirement by taking accumulated and unused leave. He was a Technologist 3 in the Engineering Drafting Department located in Surrey. This is the Engineering Drafter 3 classification under the collective agreement, for which there is a bargaining unit job description.

[9] During his absence from the workplace and in anticipation of his retirement, a position vacancy for Engineering Drafter 2 (Mechanical) was posted in July and filled in November 2007. An employee must work four years as a Drafter 2 before being eligible for a Drafter 3 position. In February 2008, an existing employee was promoted to fill the Drafter 3 vacancy created by Mr. Metcalf's retirement in March 2008.

[10] For three periods – November 17 to December 5, 2008; February 2 to April 29, 2009; and February 18 to March 19, 2010 – while receiving pension benefits negotiated by the union, Mr. Metcalf returned to work for the employer in the Engineering Drafting Department. This small drafting group produces construction drawings for the employer's provincial gas transmission and distribution system.

[11] Departmental Manager Ron Decaigny testified Mr. Metcalf was engaged to deal with an upsurge in workload volume and to train and mentor junior employees. While it was not his preference to contract out departmental work, Mr. Decaigny contracted with Mr. Metcalf under the terms of successive local order service contracts for miscellaneous computer assisted drafting duties for a 7.5 hour day at a daily rate of $450 and an hourly rate of $60 for partial days. The contracts did not set daily or weekly hours of work.

[12] Mr. Metcalf did not act through a corporation or third party. He did not have a registered GST number or workers' compensation employer number as required under the terms of the employer's standard local order contract. He was paid as a contractor with no statutory or collective agreement source deductions.

[13] Mr. Metcalf's invoices for services identify the projects on which he worked each day to which his time was to be internally charged by the employer. He worked in an office work station using the tools and software programs accessible to bargaining unit employees and that he had used before his retirement.

[14] Before his retirement, Mr. Metcalf had been the go-to-person on questions of plant design. As before his retirement, he was assigned work by the bargaining unit group work leader, Wayne Kopola. He did plant design work and some station design work. His daily routine, with employer supplied identification (probably identifying him as a "Contractor") and user identification, passwords and email, and his hours of work were as they had been before his retirement. As before his retirement, he worked without direction, was a knowledge and experience resource for others in the department and interacted with employees in the department and in other departments.

[15] Drafter 3 and Union Board Executive Member Tim Boutzeksky testified that, infrequently in the past, work similar to the work performed by Mr. Metcalf after his retirement had been contracted out after following a practice of first having the work refused by the department. This was, in effect, a determination by the work leader that the work could not be performed in a timely manner within the department in accordance with the requestor's timeline. Mr. Boutzeksky did not characterize this as a right, but as a courtesy of first refusal. The work was usually contracted out to Chinook Engineering.

[16] When work was contracted out, the entire project left the department. There was not the collaborative work with bargaining unit employees that occurs when a project is done within the department and as happened with the projects on which Mr. Metcalf worked after his retirement.

3. Measurement Records Department – Margaret Pitts

[17] Margaret Pitts was employed as a bargaining unit employee in the position of Measurement Clerk (Measurement Technologies Assistant) in the Measurement Records Department when she retired in January 2008.

[18] At the time of her retirement, there were three Measurement Clerks in the Records Department, a sub-unit of the Measurement Technologies or Services Department. A major portion of their work was identifying and correcting discrepancies between internal metering systems and databases. The remaining portion was a core group of time sensitive functions that had to be performed at the beginning of each day. By arrangement among the three employees, these functions were rotated weekly among the three employees. None of these tasks were regularly done by persons outside the bargaining unit.

[19] There was no permanent or temporary vacancy posting and Ms Pitts was not replaced. The remaining two employees were informed in January 2008 their work unit was being moved in October 2008 to Penticton where the employer's meter repair shop is located. These employees declined the opportunity to move to Penticton. Three job vacancies in Penticton were posted and filled.

[20] After Ms Pitts' retirement, the other two employees were offered and did work some overtime until Ms Pitts returned to work for the employer for 1,348.5 hours from May 20, 2008 to April 3, 2009. Ms Pitts worked the same hours at her former work station with the same breaks, performed the same duties and tasks she had before her retirement. The three employees shared and rotated duties as they had before her retirement. Measurement Clerk Carol Ross testified the three carried on as if Ms Pitts had not retired.

[21] At the end of October 2008, Ms Ross and her fellow Measurement Clerk moved to other positions in Surrey. Ms Pitts continued to work until April 2009. She made trips to Penticton to assist in training the new clerks. She was paid

directly as a contractor with no statutory or collective agreement source deductions.

[22] Kevin Harms, the Measurement Services Manager at the time, testified Ms Pitts was engaged to assist with the transition by performing work in Surrey and providing some training and support for employees in Penticton. She was knowledgeable in a specialized work area that required experience to become knowledgeable and proficient. She was engaged as a contractor with security identification and building access as a contractor renewable every sixty days. She had all computer, software and systems access she had before her retirement.

[23] Ms Pitts submitted invoices for “meter records errors processing.” She was paid $28.74 per hour for administrative support consulting services through internal purchase orders approved by Mr. Harms.

4. Union and Employer Submissions

[24] The union submits the employer improperly contracted bargaining unit work through an arrangement that was not a *bona fide* employer-contractor relationship. In doing so, the employer contravened the collective agreement, failed to recognize the union’s exclusive bargaining authority and undermined the integrity of the bargaining unit for which the union is both certified under the *Labour Relations Code* and recognized as the exclusive bargaining agent under the collective agreement.

[25] The union submits the employer has not genuinely contracted out work as contemplated and permitted by Article 1.10. Rather it has contracted in work in breach of the collective agreement. Whether using the fourfold test of control, ownership of tools, chance of profit and risk of loss in *Montreal v. Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161 (J.C.P.C.) or an organizational or integration test as articulated in *Don Mills Foundation for Senior Citizens* (1984), 14 L.A.C. (3d) 385 (Picher), there has not been a genuine contracting out to create an independent contractor relationship. These retired employees were not an accessory to the employer’s business. They were fully integrated into its business.

[26] The union submits there has been no change in the way the employer does business with the engagement of these two individuals and no genuine contracting out. It relies on the approach I articulated in a 2002 decision.

> For there to be a genuine contracting out, there must be a significant change in the method by which the employer does its business, some new arrangement readily distinguishable from the manner in which business is conducted under the collective agreement. Simply to have a personnel agency or labour broker supply employees is not such a significant change. It is more akin to a device to avoid collective agreement obligations.
>
> Careful attention to context is a character of grievance adjudication. Arbitrators have regard beyond the language of the collective agreement to, among other things, collective bargaining history, the expectations of the parties, the reasons for vagueness in some collective agreement provisions and changes in public industrial policy expressed in legislative and other changes. Arbitrators strive to make a fully informed, not simply literal, interpretation of language. They look to a broader context when articulating and applying arbitral principles.
>
> Current arbitral review of management contracting out decisions takes a contextual approach to assessing and balancing the relevant facts and factors – those that tend to lean toward a finding that there has been a genuine contracting out and those that tend to lean toward a finding that there was a contracting in. No longer is there an exclusive focus on the degree of control exercised by the employer or the identity of the legal employer of the workers who performed the work. (*British Columbia Hydro and Power Authority* [2002] B.C.C.A.A.A. No. 312 (Dorsey), ¶ 60 – 62; (2002) 115 L.A.C. (4th) 242, pp. 256 - 257)

[27] The union submits arbitrators recognize that bringing persons into the workplace to perform the same work as bargaining unit employees alongside bargaining unit employees, rather than having the work performed by the "contractor" elsewhere does not relinquish employer control and "destroys or erodes the foundation upon which the collective agreement is negotiated." (*Bristol-Myers Pharmaceutical Group, Division of Bristol-Myers Canada* (1990), 15 L.A.C. (4th) 210 (Shime), p. 216)

[28] In the context of the bilateral relationship between each retiree and the employer without any intermediary third party, the union submits the most relevant factors are the eight factors considered in *Theatre Under the Stars Musical Society* [2004] B.C.L.R.B.D. No. 105. (see also *Government of the Province of British Columbia* unreported, December 21, 1990 (Hope))

[29] The union submits the collective agreement applies to the work performed by Mr. Metcalf and Ms Pitts, which is normally performed by bargaining unit members. (*Days Hoteliers Inc.* [2011] B.C.C.A.A.A. No. 37 (Moore), ¶ 63) If

necessary, this is confirmed by the adverse inference that can be drawn by the employer's failure to have either retiree testify. (*Redpath Sugars, a Division of Redpath Industries Ltd.* [1998] O.L.L.A. No. 448 (Barrett), ¶ 23)

[30] The employer submits a consideration of the context, rather than a mechanistic application of the traditional control and organization tests, is required. In the context of a modern economy, many individuals provide services at an hourly or daily rate on a third party's premises. Individuals supply specific expertise and human capital. The manner in which they are remunerated, where they work and what tools they use are irrelevant to the determination of their status.

[31] The employer submits there were no intention and no actual undermining of the integrity of the bargaining unit, as alleged. A temporary contracting in to supplement the workforce during peak demand periods is not necessarily an undermining of the bargaining unit or contravention of the collective agreement. Each situation must be carefully assessed on its own facts with regard to the likelihood that temporary contractor replacements for bargaining unit employees are less likely to erode the union's bargaining rights than permanent contractor replacements. (*IKO Industries Ltd.* [2002] O.L.L.A. No. 1043 (Picher), ¶ 149; 158; see also ¶ 160 - 161)

[32] The employer submits a nuanced understanding of the reason for the use of contractors, the duration and term of their engagement and the impact of their engagement on the bargaining unit in a modern economy, where work performance can be time sensitive and overtime can be impractical, cannot be achieved through the lens of any simplistic litmus test to determine the issue in dispute. An example of a proper comprehensive and flexible approach to be taken, even when there is no third party supplier, is the Quebec Superior Court judgment in *Société des alcools du Québec v. Sabourin* [2010] Q.J. No. 9355.

[33] The employer submits Mr. Metcalf and Ms Pitts' services were engaged to "cope with discrete instances where it became clear that it was impractical, if not impossible, for bargaining unit employees to manage the high volume of work that was being generated." (*Employer's Written Argument*, ¶ 49) There was no contravention of Article 1.10 or any other article of the collective agreement.

[34] The employer submits it required the post-retirement service of Mr. Metcalf and Ms Pitts for time-limited operational reasons, but they would not return as employees and incur suspension of their pension benefits. Therefore, it was necessary to engage them as contractors. In the case of Mr. Metcalf, it was for three brief periods over three calendar years with no probation period, no specified hours of work, no expectation of ongoing services and no minimum guarantee of work. The terms of the contract demonstrate he was an independent contractor supplying a specific intellectual capital and familiarity with the work process. He was not economically dependent on the employer and he was not an employee.

[35] Similarly, the employer submits, Ms Pitts was engaged and treated as a contractor because of her unique expertise to assist with a temporary work overload and transition training. On balance, it was a *bona fide* sub-contracting, not an employment relationship. Alternatively, the relative continuous service by Ms Pitts might distinguish her situation from that of Mr. Metcalf and make it more susceptible to being regarded as "employment like."

5. Discussion, Analysis and Decision

[36] The most salient contextual fact in this dispute is that Mr. Metcalf and Ms Pitts possessed an expertise and knowledge of the employer's work process and systems that can only be obtained through years of employment as a bargaining unit employee. The workplace and operational question most germane to this dispute is why was there inadequate succession planning for their retirements in 2008? Why did the predecessor employer place itself in a position where it was required to resort to engaging retired employees with the expertise and knowledge of the employer's work processes that can only be acquired as bargaining unit employees and pay them more than it pays bargaining unit employees under the collective agreement?

[37] This is not a situation of an employer having periods of peak demand that required additional persons from third parties who had the available services of persons outside the employer's current and former workforce to offer to the employer under contract. This was a situation where the employer wanted the services of two specific retired bargaining unit employees with proven performance

whose replacement in the bargaining unit it had not adequately planned before they retired. In making this operational choice, the employer deliberately chose not to use the provisions of the collective agreement to hire and assign temporary or part-time employees to meet peak or time sensitive service demands.

[38] In Mr. Metcalf's case, the work was not sunset work that would disappear with his retirement. He was on leave bridging to retirement for approximately eleven months from April 2007 before his retirement date in March 2008. He was retired for a further six months before he was brought back in mid-November 2008. At that time, he had been gone from the workplace since April 2007 and yet the employer had not planned for and developed the human capital and expertise it required to meet demand. The employer was still engaging Mr. Metcalf in February 2010, almost three years after he retired.

[39] When Mr. Metcalf returned, the employer exercised no less control over him than it did over his bargaining unit professional coworkers. Like them, he was there because of his expertise and work process knowledge and ability to work independently. He was there to work as an integral component of the projects assigned to him which included being available at the times others required. The agreement between Mr. Metcalf and the employer did not specify his hours of work. The work context with project deadlines and coordination with others directed the hours of work. He understood this and worked the same pattern as bargaining unit employees.

[40] Applying any combination of the accepted factors for determining whether there has been a genuine contracting out, Mr. Metcalf was an employee, not an independent contractor. As a pensioned retiree he might not have had a personal economic dependence on the employer, but it cannot be said he was in business for himself. He worked exclusively for the employer. In performing the professional work, he was fully integrated into the employer's business using its systems, equipment and facilities with no risk of loss and no entrepreneurial activity. Calling him a contractor and issuing him contractor identification did not mask the real relationship of employer and employee. It simply provided him security access to the workplace and systems.

[41] It is a distracting mischaracterization of the context to avert attention away from the core character and context of the relationship between Mr. Metcalf and the employer toward the employer's self-imposed need through lack of succession planning and to compare Mr. Metcalf's return to his old job situation with self-employed contractors providing services on another's premises. Mr. Metcalf was not an entrepreneur engaged on a contract procured by the employer through invitations, expressions of interest, a request for proposals or any other competitive marketplace process. He was a retired employee recalled to his old job.

[42] Mr. Metcalf was not one step removed from the employer as an employee of a third party, such as an employment agency, as was the context in *IKO Industries Ltd.* [2002] O.L.L.A. No. 1043 (Picher). The question in this grievance is not who is the real employer in the context of an employee of another employer performing work on the premises and under the control of the person a union claims is the real employer.

[43] Here the context is different. Only the employer had control over Mr. Metcalf, a retiree engaged to return to perform his old job and to mentor others to succeed and fill the knowledge gap occasioned by his retirement. As in *City of Powell River* [2008] B.C.C.A.A.A. No. 95 (Jackson), the question is whether Mr. Metcalf is an employee or independent contractor. In addressing that question, the problems with straying into consideration of employer intention and the impact on the bargaining unit, as was done in *IKO Industries Ltd.* [2002] O.L.L.A. No. 1043 (Picher) and advocated by the employer, were considered and questioned in *Municipal Property Assessment Corp.* [2006] O.L.L.A. No. 609 (MacDowell). Because in this situation there is a bipartite, not tripartite relationship, there is no need to pursue the applicability, soundness of the foundation or persuasiveness of the reasoning and approach in *IKO Industries Ltd.*

[44] The form of the relationship between Mr. Metcalf and the employer was contracting out of services, but the substance was an employment relationship. The employer engaged an employee to perform bargaining unit work without complying with the collective agreement provisions for posting position vacancies

and recruiting under the collective agreement or assignment of the work to bargaining unit employees.

[45] As recognized by the employer in its alternative position with respect to Ms Pitts, her continuous period of service from May 2008 to April 2009 is less susceptible to being characterized as one of an independent contractor than that of Mr. Metcalf. Using parallel reasoning to that applied to Mr. Metcalf, I find that applying any combination of the accepted factors for determining whether there has been a genuine contracting out, Ms Pitts was an employee, not an independent contractor.

[46] I declare that Mr. Metcalf and Ms Pitts were employees covered by the collective agreement while performing services under contracts with the employer. There was no contracting out and none as permitted under Article 1.10. Mr. Metcalf and Ms Pitts should have been covered by the collective agreement and entitled to the benefits of the collective agreement. The union was entitled to its rights as their exclusive bargaining agent during the periods of their employment. With respect to their post-retirement periods of employment, I find the employer failed to comply with Articles 1.01 and 1.02 of the collective agreement. The employer also failed to post temporary or part-time job vacancies contrary to Article 6 of the collective agreement.

[47] Therefore, I order the employer to pay to the union the union dues required to have been remitted by Mr. Metcalf and Ms Pitts for hours worked during the disputed period as if each of them had been employed in his or her pre-retirement pay grade. In the circumstances, I find it is unnecessary to order the employer not to re-employ Mr. Metcalf and Ms Pitts in contravention of the collective agreement.

[48] I retain and reserve jurisdiction over the implementation, application and interpretation of this decision.

October 28, 2011, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

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