LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION DECISION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 213

UNION

TRADER CORPORATION (B.C.)

EMPLOYER

(Re: Contracted in IS/IT Department Agency Supplied Consultants)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Brandon Quinn
Representing the Employer:	Gabrielle Scorer
Dates of Hearing:	April 7 to 9; and 15, 2015
Date of Decision:	April 30, 2015

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1. Dispute and Jurisdiction

[1] Persons with open, honest, trusting and honourable relationships can differ about the intention and meaning of agreements they make. This happened over a grievance settlement agreement made during collective bargaining in August 2010. Despite all efforts to find a resolution, the difference proceeded to arbitration.

[2] The employer contracted in consultants through agencies placing independent contract professionals to perform bargaining unit work at the employer's premises before and after the 2010 settlement agreement. The difference is whether the employer is permitted to do this under either the contracting out provision of the collective agreement or the settlement agreement.

[3] The circumstances and terms of the settlement agreement and the union's 2013 grievance are recounted below.

[4] The union and employer agree I am properly appointed under their collective agreement and the *Labour Relations Code* to finally decide this grievance.

2. Business Transition from Primarily Print to Primarily Online

[5] Through successive ownership in the past decade, the employer has evolved from providing services predominantly through print media products to online websites accessible through desktop computers and mobile devices. It develops and provides marketing and under the hood organizational support solutions to automotive dealers.

[6] Since the first collective agreement was negotiated in 2001, the complement of bargaining unit employees working in information systems or solutions and information technology (IS/IT) has grown from five or fewer to over fifty. The first agreement

contained articles identifying the group of employees represented by the bargaining agent; limiting performance of bargaining unit work by management and employees outside the bargaining unit; limiting the employer's right to contract out bargaining unit work; and limiting the benefits and duration of employment of temporary employees.

[7] The contracting out article, unchanged since 2011, states: "The Employer will not contract out work normally performed by employees covered by this Collective Agreement that will result in the layoff of bargaining unit employees." (Article 2.03)

[8] When Lynn Frazer, Vice President, Human Resources joined the employer in November 2003 as Human Resources Manager for the British Columbia region, the British Columbia business unit had work locations in New Westminster, Coquitlam and Abbotsford reporting to a local General Manager. After Yellow Pages purchased the employer in 2006, there was a national consolidation of provincial business units outside Ontario with two other enterprises, one of which was operating in Ontario.

[9] Consolidation, efficiencies and transition from print to digital were a focus for the new owner. The small IS/IT group working in the basement at the New Westminster location was regarded as a national unit before 2006. It was not the subject of consolidation similar to the call centre, production and other groups.

3. IS/IT Recruitment and Expansion (2006-09)

[10] IS/IT department expansion began after the 2006 purchase when the employer moved to a converted warehouse in Burnaby.

[11] Then as now, recruiting information technology talent with the requisite skill set for short or long term employment was time consuming and challenging. Some talented professionals prefer to work as independent contractors engaged in limited term projects in different environments on leading edge development. They find this work more interesting and challenging. And, perhaps, more remunerative before or after taxes or both.

[12] To assist the employer recruit information technology employees, the union agreed in 2007 that the employer could hire temporary employees for IS/IT project work for longer than four month terms agreed in 2001: "Temporary employees can be hired

for twelve (12) months for Maternity Leave or for performing project work for IS/IT department. Temporary employee terms can be extended by mutual agreement between the Union and the Employer." The term of the third collective agreement was January 1, 2007 to December 31, 2009.

[13] The employer had engaged one consultant through an agency in 2006. The employer engaged fifteen consultants through agencies to perform information technology work at its warehouse location in 2007. A majority were engaged after the collective agreement was renewed in July 2007.

[14] With the addition of these consultants, referred to as contractors, the number of consultants was higher than the number of bargaining unit employees. The disproportionate number of contractors to bargaining unit employees increased when the employer engaged eleven consultants in 2008 and sixteen in 2009.

4. Grievance Settlement Agreement (2010)

[15] Since the first collective agreement, the union received bargaining unit employee seniority lists from the employer, which were posted in the workplace. In 2010, one shop steward, Dragos Vuia, was an employee in the IS/IT department.

[16] The union committee formed for collective bargaining in 2010 to renew the collective agreement included Mr. Vuia. Union Assistant Business Manager Rav Ghuman, who had led negotiations in 2007, learned from Mr. Vuia when the committee met that the employer had more contractors than bargaining unit employees in the IS/IT department. Mr. Ghuman was not given precise information on the number of contractors or when each was engaged.

[17] Because there had not been any layoffs, Mr. Ghuman assumed the employer had contracted out in accordance with its right under the collective agreement. Based on this assumption, the committee's response was to propose a complete prohibition on the employer's right to contract out: "The Employer will not contract out work normally performed by employees covered by the collective agreement."

[18] The union presented this proposal at the opening session of collective bargaining on February 22, 2010. Mr. Ghuman stated concern about the number of contractors

engaged and the length of time some of them had been engaged. He thought the employer was abusing the agreement the union had made in 2007 to extend the duration of temporary employment from four to twelve months for IS/IT project work.

[19] In the following days, Mr. Ghuman learned more about the work being performed by the contractors and the duration of some their engagements. He revised his view and thought the "contractors" might be "employees" who should be included in the bargaining unit and entitled to representation by the union.

[20] He drafted a new proposal requiring the employer to inform and consult the union before any contracting out was undertaken. In this way, he sought to keep abreast of what was happening in the IS/IT department. He would know when and how many contractors were to be used for how long. The union could grieve if it considered the employer was hiring temporary or full or part-time permanent employees disguised as contractors.

[21] Mr. Ghuman presented this proposal at the fourth bargaining session held at the union offices on Friday, March 19, 2010. He prepared and read a statement at the bargaining table before presenting the proposal.

> Before we go any further the union needs to know the Company's position on all the contractors being used in the IS/IT Department. Our position is they should have employee status.
>
> If we can't get agreement in writing we are prepared to go to the LRB to get a determination.

[22] Ms Frazer dismissed the union's position by not looking at the proposal and stating the employer would not agree to any new collective agreement language. She asked if the union was refusing to bargain. The exchange led to an adjournment over lunch and subsequent off the record discussions that did not resolve the impasse.

[23] Mr. Ghuman still did not have complete information about the specific number of contractors or how long each had been engaged. If some of them were employees, he wanted, and was required, to represent them. The employer, in the midst of its business transition, was not willing to consider a limitation on its flexibility to engage consultants for IS/IT projects.

[24] The next bargaining session was scheduled for Thursday, March 25th. Ms Frazer stated the employer's considered position: the union could not refuse to bargain because of this difference, which the union could grieve; and the employer would not provide information about the contractors, which might not resolve the principal issue about the employer's right to engage contractors.

[25] As partial explanation for engaging contractors, Ms Frazer explained that, in financial accounting by a publicly traded corporation, the treatment of consultant costs compared to employee wages favoured engaging contractors. Consultant costs are a capital expense to develop a new product, rather than an operating expense. Consultant costs do not decrease earnings before income tax, depreciation and amortization (EBITDA).

[26] The union stepped back. Mr. Ghuman said the union would proceed step-by-step and continue to bargain on other matters. He asked for a list of contractors and information about the terms of their contracts. Ms Frazer softened the employer's approach and said the employer could consider the request on conditions. Collective bargaining continued that day.

[27] The next day, Mr. Ghuman wrote Ms Frazer stating its position: the consultants were not "true contractors"; they were "properly covered by the collective agreement"; and this issue had to be resolved.

> It has recently come to the union's attention that the company has been using, and continues to use, what it has called "contractors" to perform most of the work in its IT department.
>
> The union understands there are approximately thirty-two (32) of these individuals, however, I have asked you to provide me the names and contract information for these individuals, but you have refused to do so. There are eleven (11) other employees in the IT department.
>
> As you know, the union believes these individuals are not true contractors. While the exact terms on which they have been retained are not known to the Union, we assume they are paid by the hour (or an equivalent) to perform work under the guidance and direction of the Company. They use Company equipment.
>
> The union believes these individuals are, in fact, employees of the Company and that the Company is violating multiple provisions of the collective agreement by using them to perform work without recognizing them as being covered by the agreement.

> The use of these individuals has become an issue in bargaining.
>
> The union maintains these individuals are properly covered by the collective agreement and the Company says they are not. The Union has attempted to engage the Company in a discussion of these individuals, but the Company has refused to talk to the Union unless the Union agrees not to use the information it receives in any proceeding concerning this issue.
>
> The union believes this issue must be sorted out prior to the conclusion of bargaining. The union needs to know on whose behalf it is bargaining. Your refusal to provide us with information regarding these individuals and insistence on unreasonable preconditions to discussing this issue puts us in an untenable position.
>
> In light of your refusal to discuss this issue, the Union will seek the intervention of a third party. You have indicated your position is that the appropriate forum for the resolution of this issue is arbitration and the union is prepared to have an arbitrator decide this issue. In light of the importance of this issue to bargaining, we propose that we agree on an expedited arbitration process. Our lawyer has indicated he has dates available in April and early May.
>
> In the meantime, there are many outstanding issues which do not involve the IT department which the Union would like to focus on, pending the outcome of the arbitration. The union does not want to see bargaining delayed by this issue and hopes the Company will cooperate with the union by providing to it, the information it needs and by agreeing to an expedited process to ensure a prompt resolution of this important issue.

[28] Collective bargaining had reached an impasse on this issue. This March 26th letter was treated as a grievance.

[29] On or after that date, Mr. Ghuman gave Ms Frazer a list of forty-six contractors engaged from 2006 to 2010 compiled by Mr. Vuia. Thirty-two were currently working with the eleven bargaining unit employees.

[30] Ongoing national operational consolidation resulted in a July lay off when production department functions were consolidated in Ontario. A senior graphic designer with website design skills bumped Mr. Vuia in the IS/IT department. On July 29th, the union grieved this displacement was a “layoff” in the IS/IT department triggering a right to grieve impermissible contracting out in the IS/IT department. The employer denied the grievance saying the number of employees in the IS/IT department had not decreased. The union submitted the grievance to arbitration on August 18th.

[31] The union agreed to hold the March 26th grievance in abeyance pending mediation, which happened August 25th. Neither Mr. Vuia nor Brendan Topely, his future successor as shop steward in the IS/IT department, attended mediation.

[32] Ms Frazer had committed in March to investigate the contractor situation and to decrease the number of contractors as projects were completed. In July, she determined the number was down to twenty-four: 1 engaged in 2006; 4 in 2007; 6 in 2008; 12 in 2009; and 1 in 2010. The employer considered four of the twenty-four to be performing management work outside the bargaining unit.

[33] She considered the proportion of bargaining unit employees to contractors had become unbalanced. She learned some contractors with critical enterprise knowledge would leave rather than convert to employee status because they were committed to working as independent contractors. If they were to leave, steps had to be taken to have their knowledge transferred and retained in the organization before they left.

[34] On August 25th, Ms Frazer reported to the union that the number of contractors had decreased since March. Seven who departed had not been replaced. The employer was planning to grow and ten new bargaining unit positions would be created. Some current contractors could be converted to employee status. Their conversion could be facilitated if the union waived collective agreement vacancy posting requirements. As a reciprocal gesture of good faith, she asked the union to withdraw the grievances and recognize the employer required time to capture for retention the knowledge some contractors had before they would be phased out.

[35] Ms Frazer said the employer did not have a definite deadline, but expected the remaining contractors would be converted or phased out by the end of 2010. Any that remained into 2011 would be a small percentage of the group. Especially for one long term contractor committed to remaining an independent contractor, the employer needed time to ensure his knowledge was transferred for retention by the employer.

[36] The next day, August 26th, the union and employer entered into an agreement proposed by the employer.

> The following outlines the settlement between the parties resolving the dispute concerning contractor usage in the ISIT department
>
> The union agrees, on a without prejudice basis, to withdraw the following grievances:
>
> * ISIT Contractor usage, filed March 26, 2010; and,
> * Policy Layoff Grievance filed July 29, 2010.

> In addition, the Union agrees to waive the posting requirement under Article 13.01 to facilitate the conversion of contractors to employees for the following new positions:
>
> * 6 Web Developers
> * 3 QA Analysts
>
> The Company commits to approaching the remaining contractors and offering employment, no later than Dec 31, 2010. Should some contractors not be willing to convert, the Company will determine the required plan to ensure critical knowledge is retained and communicate this to the union.
>
> The Company continues to retain its right under the collective agreement to use Contractors in the future. However, it is our intention that the majority of current contractors will be either converted to or replaced by employees before the end of February 2011.

[37] Following bargaining sessions in November attended by Mr. Topely, a collective agreement was concluded for the term January 1, 2010 to December 31, 2012.

[38] The employer did not present any critical knowledge retention plans to the union. Mr. Ghuman did not inquire about the use of contractors in 2011 or 2012. He relied on the employer to implement the agreement and assumed no new contractors would be engaged.

[39] Mr. Topely left in 2011 to join another employer. Tim Hamelin, who Mr. Topely had known in the workplace since 2008, became the shop steward in the IS/IT department.

[40] Contractor conversion to employees to fill the new positions occurred in and after 2011. One contractor engaged in 2008 converted to employee status in December 2011 after consulting Mr. Hamelin. He and others who converted to bargaining unit employees were given seniority dates as of the date of conversion and included on the seniority list. From 2011 to 2014, fifteen contractors converted to employee status. (*Trader Corporation* [2014] B.C.C.A.A.A. No. 126 (Gordon), ¶ 64)

[41] The employer was bought by APAX Partners in 2011. In the fall of 2011, the employer moved to new offices in Burnaby near the BCIT electronic arts campus. Ms Frazer was promoted to her current position in 2012.

[42] In November 2013, the union grieved the contractor converted to employee status in December 2011 was entitled to collective agreement benefits based on service

since his date of engagement in 2008 because he was contracted in before December 2011. The employer objected the grievance was untimely. Arbitrator Gordon agreed. The grievance was filed beyond the agreed time limit beginning in December 2011 (¶ 74), which is also the time at which the union "first knew or should have known" of the occurrence giving rise to the alleged violation of the collective agreement (Article 9.02; ¶ 80). Both the grievor and Mr. Hamelin knew in December 2011 and it is expected Mr. Hamelin would report any concern to Mr. Ghuman.

[43] In addition to regular seniority lists, employer representatives worked with Mr. Ghuman during the conversion process. A reasonable degree of diligence on his part would have informed the union of the employer's approach to date of hire for service and seniority. The union should have known the employer's approach at the time of the conversion and not waited to grieve until an employee complained (¶ 93 – 97).

[44] The employer has continued to evolve, expand and develop new products for public consumers and automobile dealerships. Since 2013, it has invested in major projects developing new lines of business. Project development is being done by bargaining unit employees and contracted consultants.

5. Difference Re-emerges in Next Round of Collective Bargaining (2013)

[45] The union gave notice to bargain in September 2012 and prepared proposals dated November 20, 2012. None address bargaining unit employee work jurisdiction, performance of bargaining unit work, contracting out or temporary employees. Mr. Ghuman assumed the issue of employer use of contractors in the IS/IT department was resolved. He thought all of them had converted to employee status or left.

[46] In March 2013, Mr. Ghuman learned from Mr. Hamelin that the employer had contractors working in the IS/IT department. He testified that initially: "I blew my lid."

[47] Because of the 2010 settlement and his confidence the employer would implement the agreement, as he understood it, he thought the persons Mr. Hamelin said were contractors must be new temporary employees. If they had been employed for more than twelve months, they were entitled to full time employee status and all benefits under the collective agreement.

[48] Based on this assumption, he wrote Human Resources Consultant Naomi Lynam on March 22, 2013 requesting information about the temporary employees.

> Dear Ms. Lynam,
>
> **RE: Article 8.02 Temporary Employees;**
>
> It has been brought to the union's attention that there are several employees in the IS/IT Department that have been working as "Contractors" for longer than 12 months. I have been informed that some may have been employed for 2 or more years as Contractors. Article 8.02 is clear in its intent that part time employees ln the IS/IT department cannot be employed for more than 12 months unless an extension is agreed to by the parties,
>
> Please provide the union with names and duration of how long they have been with Trader Corporation and how long they are expected to be employed as temporary (Contractors) employees in the IS/IT Department.
>
> At this time the Union is not filing a grievance on this issue but reserves the right to do so depending on the information provided by Trader Corporation.

[49] The reply he received March 28th set him "on fire." There were ten contractors, including the one first engaged in 2006; one engaged in November 2009; and one engaged in March 2011. These three and three others were described as "Developers." The remaining five engaged in 2012 were doing work in bargaining unit classifications – Business Analysts, Quality Assurance Analysts, and Database Administrator.

[50] Mr. Ghuman sent Ms Lynam a copy of the 2010 settlement agreement by email on April 9th. He stated:

> If the Company is still taking the position that Article 8.02 does not apply please let me know. If that is the case the union [is] filing a grievance claiming a violation of the collective agreement and the employment standards act.

Her reply was:

> I am working with IT on this. As I said the level of knowledge the individuals have along with the difficulty in recruiting senior level web developers has presented a huge challenge.
>
> The company reserves the right to hire contractors but I understand your concern. Can you give me some time to respond with more detail?

[51] A month later, Ms Lynam emailed the employer would be approaching the three engaged in 2006, 2009 and 2011 to convert to employee status. "If they do not accept we will provide a timeline for transferring knowledge and mitigating risk to the business."

[52] Another month later, she emailed the contract with one contractor had ended and the contracts with the three long term contractors would end December 31st. The Quality Assurance Analysts contractor would be replaced by an employee to be recruited. The remaining contractors were engaged for less than a year. Other recruitment and training initiatives were being undertaken.

[53] To resolve the issue, Mr. Ghuman offered not to claim four of the contractors were employees. "However the remaining so called "contractors" should be given employee status and treated as employees including receiving the wages they are currently receiving along with all the other benefits afforded to other employees."

[54] Ms Lynam replied she was working with IS/IT management to identify timelines for the shorter term contracts.

> Some are covering work as we recruit, others are working on specific projects and will be gone once those projects are over. Finding a definitive date for these people is tricky as project deadlines can move. The company continues to retain its right to use contractors and the goal is to keep these contracts under a year.
>
> Whenever we have an opening come up we will ask a contractor to convert to employee.

Some contractors will and some will not convert to employee status from independent contractor. She will send an updated list with end dates.

[55] Mr. Ghuman replied the union did not abandon its position, but once it received and reviewed the list it would likely abandon its claim they are employees "in order to keep the business moving forward."

[56] Collective bargaining continued and the union made a proposal to resolve the issue. The employer rejected the proposal on August 9, 2013 stating: "We agree that the intention of using contractors is not for the long term and we have committed to monitoring timelines and keep the union informed of any extension or changes to the contracts." The contract of the contractor engaged in 2011 was terminated effective August 20th. The contractor engaged in 2006 left.

[57] Union Business Representative Christina Brock, who succeeded Mr. Ghuman in servicing this bargaining unit, grieved August 12, 2013. The grievance was amended August 26th with a new reference line: "Re: Contracting-In – Policy/Union (IS/IT

Department).” It claims contraventions of several sections of the collective agreement by “contracting-in.”

[58] Ms Frazer testified this is the first time this term was used to characterise the contracting out the employer had undertaken since, at least, 2006. It was the first time she became aware of this term and concept. She regarded this characterization as an effort to redefine the issue and challenge an employer right the union had recognized in the 2010 settlement agreement.

[59] A renewal of the collective agreement was achieved without discussion or resolution of this difference at the collective bargaining table. I was appointed April 24, 2014 to arbitrate the August 2013 grievance.

[60] Despite the grievance, the employer engaged thirteen contractors between April 28 and July 21, 2014 for terms anticipated to end between September 12 and October 31, 2014. In September 2014, Ms Brock grieved. Collective bargaining for renewal of the 2012-14 collective agreement is ongoing.

6. Contracting Out and Contracting In

[61] In employment relationships covered by a collective agreement, the employer’s unfettered right to conduct business is limited by the terms of the collective agreement. This principle is recognized in Article 5.01 of this collective agreement:

> The management, control, and operation of the Employer’s business, and the supervision, direction, and promotion of the working force are vested exclusively in the Employer, subject to the terms of this Collective Agreement. The Employer retains all rights and responsibilities not specifically modified by this Collective Agreement, subject to the laws of the Province.

[62] At one time, the opinion of some arbitrators was that the establishment of a collective bargaining relationship created an entirely new day. Employers did not retain the right to assign or contract out bargaining unit work to employees or persons outside the bargaining unit because this could annul the rights of bargaining unit employees and the union under the collective agreement. Others held the opinion such a limitation on employer rights could not be implied by the existence of the collective bargaining relationship and required express language in the collective agreement.

[63] By the mid-1960's the arbitral opinion that contracting out is a residual management right emerged as the prevalent opinion in Canada. (*Russellsteel Ltd.* (1966), 17 L.A.C. 352 (Arthurs)). For a comparison with the approach of United States arbitrators see Morton G. Mitchnick, "Contracting Out: Two Solitudes" in W. Kaplan, J. Sack, M. Gunderson and R. Filion, eds, *Labour Arbitration Yearbook 1998*, p.79.

[64] Similarly, work jurisdiction clauses, like Article 2.04 of this collective agreement, do not reach to "persons" who are employees of the employer.

> Management or other excluded employees will not perform work normally assigned to bargaining unit employees except for training and emergencies such as staff shortages, equipment failure, power outages, instances of force majeure, and where a deadline is in serious jeopardy of not being attained, all of which must be unforeseeable and unanticipated. (Article 2.04)

If the word "person", instead of "excluded employees", is negotiated, then the work jurisdiction article might limit contracting out. (E.g., *Country Place Nursing Home Limited* (1981), 1 L.A.C. (3d) 341 (Pritchard))

[65] The tension and balance between an employer's right to operate and control its business by contracting out and limiting employer action that threatens the integrity of the collective bargaining relationship and employee rights under a collective agreement was determined differently when the employer contracts with a third party to supply persons to perform work at the employer's site. This is especially so if the in-house work is done by persons or contractors supplied by a personnel agency.

> In their search for greater flexibility, companies often hire temporary employees through personnel agencies. This strategy allows them to fill temporary vacancies in their regular staff or handle a temporary work overload without incurring the recruitment costs or other expenses related to hiring permanent employees. Moreover, since temporary workers are usually in the employ of the agency, none of the obligations governing an employer-employee relationship are transferred to the agency's client. (Gilles Trudeau, *Temporary Employees Hired Through A Personnel Agency: Who Is The Real Employer?* (1997), 5 Canadian Labour and Employment Law Journal 359)

[66] Despite the formalities of the tripartite relationship – employer/agency/contractor – the contractor is often found to be an employee of the employer for the purposes of the collective agreement. (E.g., *Pointe-Claire (City) v. Quebec (Labour Court)* [1997] S.C.R. 1015) The issue is not that the work performed by the contractor is the same as

bargaining unit work, which is the case with contracting out, but that the onsite contractor is not working under the direction of a third party when the work is contracted in.

> Contracting-in is to be treated differently. It is distinguished from contracting-out by the fact that the work is not truly moved to the control of the contractor, but remains under the direction and control of the employer. It remains an integral part of the employer's operation and is often performed on the employer's premises alongside bargaining unit employees. An example is the case of the employment agency supplied employees who worked on the assembly line under the direction of a lead hand, who reported to a foreman. (*Bristol-Myers Pharmaceutical Group. Division of Bristol-Myers Canada Inc.* (1990), 15 L.A.C. (4th) 210 (Shime)) Fundamental to the decision to uphold the grievance in that case was the following:
>
> > When a company and union negotiate a collective agreement they negotiate about the work. Usually, as in this case, there are different job classifications receiving different rates of pay. The substratum upon which those classifications are formed is the work of the enterprise. To bring persons into a plant or work location to perform the same work as bargaining unit employees destroys or erodes the foundation upon which the collective agreement is negotiated. (p. 215)
>
> Not all third party services provided or performed on site will be so integral to bargaining unit work that the foundation of the bargain between the employer and union is eroded or destroyed. Some will be unrelated to the work about which the parties bargain. Some will be collateral. In *Government of the Province of British Columbia and British Columbia Nurses' Union*, unreported, August 24, 1989 (Ladner) the board found that the contracting for nursing services for inmates at a correctional facility was "collateral and accessory to the employer's operations" (p. 15).
>
> Some use the term "contracting-in" to characterize those circumstance where the employer has sought to contract-out but failed to create an arms length business relationship by not giving up control to a third party. As the employer argued here, for them the location where the work is performed is of minor significance and is only one of the indicia of retained control. (*Tofino General Hospital Society* [1991] B.C.C.A.A.A. No. 390 (Dorsey), ¶ 30 – 32)

[67] In that decision, I determined: “The work is intermingled with that of other departments and having it performed on site by a non-bargaining unit person is inherently destructive of the relationship and bargain established by the collective agreement.” (¶ 38)

[68] In 2007, the Ontario Court of Appeal described contracting out and contracting in as follows:

> "Contracting out" is said to involve a situation where "an integral function or a whole operation of the business of the employer is assigned to an independent contractor"; the work is often done off site and, where done at the same location as the bargaining unit employees, usually involves work of a different nature even though it is bargaining unit work; the independent contractor controls the work, and the employer has "effectively abdicated" the work to the outside contractor. "Contracting in", on the other hand, involves a situation where non-bargaining unit personnel are brought into the workplace to work alongside bargaining unit employees, performing the same work as those employees, under the same supervision and utilising the same materials and equipment provided by the employer; the way in which the bargaining unit and non-bargaining unit employees work is "virtually indistinguishable". See *Re St. Jude's Anglican Home and British Columbia Nurses Union* (1996), 53 L.A.C. (4th) 111 at 119-120 (Larson); *Re Bristol-Myers Pharmaceutical Group and Canadian Automobile Workers, Local 1538* (1990), 15 L.A.C. (4th) 210 (Shime); *Re Radio Shack and United Steelworkers of America, Local 6709* (1994), 44 L.A.C. (4th) 69 (Beck). These and other arbitral decisions all emphasize that contracting in is "inherently destructive of the bargaining relationship" and generally contrary to the obligations undertaken by the employer in the collective agreement: *St. Jude's, supra*, at 119. (*Hydro Ottawa Ltd. v. International Brotherhood of Electrical Workers, Local 636* [2007] O.J. No. 1424, ¶ 36; leave to appeal dismissed *Hydro Ottawa Ltd. v. International Brotherhood of Electrical Workers, Local 636* [2007] S.C.C.A. No. 305)

[69] The unique feature of this dispute is that the employer submits contracting in, not mentioned in the collective agreement, is permitted by the contracting out article of the collective agreement.

7. Summary of Union and Employer Submissions

[70] The complement of contractors the employer engaged through agencies changed from 2013 to the exchange of particulars in 2015 in preparation for this arbitration. The union identified sixteen contractors in the IS/IT department in 2015.

[71] The employer does not dispute it has a contracting in relationship with each, but states three are engaged in management work outside the bargaining unit. The union and employer agree not to hear and decide at this time whether each of the three is performing on site work outside the bargaining unit.

[72] The union submits the employer's ongoing contracting in is not a good faith attempt to contract out. There is no collective agreement language allowing contracting in. There is no ambiguity in the contracting out language – it addresses contracting out, not contracting in. In reading the language, the union and employer are presumed to know the relevant arbitral jurisprudence about the difference between contracting out

and contracting in – they are different; there must be language permitting contracting in, which is inherently destructive of the bargaining unit. (*Tofino Hospital* [1991] B.C.C.A.A.A. No. 390 (Dorsey); *B.C. Hydro and Power Authority* (2002), 115 L.A.C. (4th) 242 (Dorsey); *Halton Recycling Ltd.* [2013] B.C.C.A.A.A. No. 124 (McPhillips)) The same contracting out language as in this collective agreement has not previously permitted contracting in. (*St. Jude's Anglican Home* (1996), 53 L.A.C. (4th) 111 (Larson), ¶ 25)

[73] The union submits it agreed to employer flexibility for project work through longer term employment of temporary employees. Instead, the employer contracted in and led no cogent evidence about difficulties staffing projects with temporary employees.

[74] The union submits the 2010 grievance settlement agreement, the subsequent events and the employer's interpretation of them do not amount presumptively, factually, expressly or impliedly to a union agreement to an interpretation of Article 2.03 (contracting out) that is inherently destructive of the bargaining unit. To the contrary, as soon as the union learned in 2010 there were contractors at the worksite, it sought to negotiate a complete prohibition on contracting out and argued there was no good faith contracting out. The union considered the subsequent August settlement to be a process to remove all contractors from the worksite. It relied on the employer's good faith to fulfil the agreement.

[75] The union submits it informed the employer five times in 2013 between April 9th and August 12th that it considered the contractors to be employees and not true contractors doing contracted out work. The union did not agree the employer's right to contract out included a right to contract in under the collective agreement or the 2010 grievance settlement agreement.

[76] The union submits the employer's practice before and after 2010 does not assist the employer in its proposition that contracting out under this collective agreement includes contracting in. Mr. Ghuman, the person in the union hierarchy responsible for the meaning of the collective agreement, was not aware of the practice. When he learned about it he had protested and thought he had achieved an agreement the employer would stop. When he learned the employer had not, he blew his lid and acted

immediately. His actions include this grievance. (*John Bertram & Sons Co. Ltd.* (1967) 18 L.A.C. 362 (Weiler); *Teck Coal* [2015] B.C.C.A.A.A. No. 16 (Kinzie),¶ 40 – 43)

[77] The union submits knowledge or acquiescence cannot be imputed to the union on the basis of successive shop stewards' workplace knowledge of the employer's actions between the time Mr. Vuia left in 2011 and preparations for collective bargaining in 2013. ((*FortisBC Energy Inc.* (unreported) February 19, 2015 (Hall), ¶ 22 - 24). The union submits:

> While the Employer did not "hide" the contractors, we cannot expect shop stewards and bargaining unit members to understand a nuanced area of the law like contracting in. Even when Vuia eventually did complain to Ghuman, he was still operating under the understanding that the contractors were *bona fide* and permitted under Article 2.03. This is the exact reason why a member of the Union hierarchy responsible for the meaning of the agreement has to be the one who acquiesces to a practice.
>
> Even if this Panel accepts that the Union acquiesced to the practice, the fact remains that the Collective Agreement language here clearly does not permit contracting in. Past practice does not trump clear language (*Surrey School District* [2005] B.C.C.A.A.A. No. 112 (Hall) at Tab 11, para. 59). (*Union Submission*, ¶ 20 - 21)

[78] The union submits the union's 2010 contracting out proposals do not support a conclusion the union agreed the current language permits contracting in.

> Presenting a proposal that is later withdrawn does not necessarily mean that the party making the presentation is conceding the interpretation (*Pacific Northern Gas*, [1993] B.C.C.A.A.A. No. 77 (Kelleher) at Tab 12, paras. 53-58). Here, the evidence clearly shows that Ghuman made the first proposal because he assumed the Employer was retaining *bona fide* contractors. Once he became aware that contracting in was the issue, his proposal changed to informational rights so he could ascertain if contracting in was occurring in the future. Once the settlement agreement was signed, Ghuman thought that contracting in was no longer an issue and withdrew the proposals. If anything, this evidence clearly shows that the Union did not accept the Employer's interpretation of Article 2.03. (*Union Submission*, ¶ 23)

[79] The union submits the grievance settlement agreement does not recognize or permit contracting in. If it did, there would be no need for the requested and agreed delay in ending contractor engagement or an employer plan to transfer and retain critical knowledge. There is no union agreed limitation on the employer prohibition on contracting in, such as a reasonable or any balance between bargaining unit employees and contractors contracted in. When challenged in 2010 and again in 2013, the

employer behaved contrary to any belief it had a right to contract in by immediately "shedding contractors" and not asserting any right to contract in.

[80] Finally, the union submits if there are genuine differences in the meaning and scope of Article 2.03, then all the extrinsic evidence is not helpful in determining the mutual intention of the language and must be ignored. (*Rivtow Marine Inc.* [2004] C.L.A.D. No. 316 (Glass))

[81] On the employer's alternative reliance on estoppel, the union submits there was no unequivocal representation by the union it would not rely on its legal rights under the collective agreement. It made no representation the employer could contract in. If it is construed that the union did, then the union gave notice it is to end with the grievance. The employer cannot claim any detrimental reliance for the current group of contractors whose contracts were renewed or entered into after the grievance.

[82] In reply to the employer's submission the 2010 grievance settlement agreement is an ancillary agreement to the collective agreement, the union submits if it were intended to be an ancillary agreement it would be included among the several letters of understanding appended to the 2010-12 collective agreement. This is the practice of these parties.

[83] The employer submits the language of Article 2.03 permits contracting in if there is no lay off. This interpretation was confirmed by practice, the August 26, 2010 settlement agreement and conduct after that agreement.

[84] The employer submits it has operated for years on the understanding it can use contractors in the IS/IT department to perform the same or similar work as bargaining unit employees provided no bargaining unit employee is laid off. There was no objection prior to 2010, when the union expressed concern about the number, not the use, of contractors and the length of engagement of some of the contractors. The employer proposed and the union accepted a resolution to redress the balance, not stop contracting in.

[85] The employer submits the "contractor usage agreement" expressly states: "The Company continues to retain its right to use Contractors in the future." And the

employer did, as it had in the past in the presence of successive shop stewards in the IS/IT department. It posted seniority lists sent to the union that did not include the contractors working with the shop stewards and bargaining unit employees. There was no union assertion this was prohibited contracting in until March 2013.

[86] The employer submits the 2010 "contractor usage agreement" is an ancillary agreement to the collective agreement that cannot be unilaterally altered or rescinded by the union. (*British Columbia (Workers' Compensation Board) v. Compensation Employees' Union (President's Salary Grievance)* [2014] B.C.C.A.A.A. No. 113 (Burke))

> The Union sought to eliminate or curb an existing practice in which contractors engaged by the Employer to work in the ISIT department worked in an integrated manner with bargaining unit employees and used Trader's equipment.
>
> Trader sought to have the Union withdraw its grievances and to continue its practice of using contractors as it had for approximately 5 years.
>
> The compromise reached by the parties was that the Union would withdraw its grievance. Trader would reduce the number of its current contractors and would attempt to convert them to employees to obtain a better balance between employees and contractors in the ISIT department. Trader would continue to use contractors in the future.
>
> The CUA [Contractor Usage Agreement] represented a compromise to both sides – Trader lost the right to retain the use of contractors in an unlimited manner and unlimited number as it had for several years and the Union withdrew its grievances and agreed that Trader could continue to use contractors, subject to the agreed upon conditions. New positions were created and a number of new employees entered the bargaining unit.
>
> The Employer submits that the Union is attempting to unilaterally end or amend the CUA, an agreement which was mutually agreed to by the parties, and which the parties agreed would see the Employer continue its practice of engaging contractors to work in the ISIT department.
>
> The Employer submits that upon learning in spring 2013 that some contractors in the ISIT department may have continued there for "2 or more years as Contractors", the Union was unhappy with the Employer and changed its position with respect to the parties' agreement to continue the interpretation of Article 2.03 as permitting contracting in as long as it did not result in a layoff.
>
> The Employer submits that it was never the intention of the Parties that one of the Parties, either the Union or the Employer, would be permitted to unilaterally amend the Collective Agreement and that therefore the Arbitrator should dismiss the Union's grievance which seeks a remedy which is inconsistent with the bargain struck between the Employer and the Union. (***Employer's Written Submissions***, ¶ 104 – 114)

[87] The employer submits the agreement that “The Company continues to retain its right under the collective agreement to use Contractors in the future” is a union acceptance, acknowledgement and agreement the employer may continue to use contractors in the manner in which it had used them – at the employer’s premises integrated with bargaining unit employees, performing bargaining unit work and using employer equipment.

[88] The employer submits the evidence of past practice and bargaining history creates a doubt about the scope, meaning and application of Article 2.03 and reveals that the true mutual intention is that the language limiting the employer’s right to contract out language includes an agreement it may contract in with the same limitation. This evidence includes:

- The Employer’s transparent practice of contracting in to the ISIT department between 2006 and 2010
- The large number of contractors used by the Employer in that period, and in particular, the fact that the number of contractors used greatly outnumbered the bargaining unit employees in the department
- The Employer’s “contractor usage” regularly involved contracting in, not contracting out
- the “transactional” nature of project / development work in IT and the Union’s knowledge of that fact
- the preference of many skilled IT professionals of entering into an employment relationship and the Union’s knowledge of that fact
- the fact that the Union did not grieve the Employer’s practice of contracting in or any other relevant collective agreement provisions prior to 2010, despite having the means to know the Employer was engaging a large number of contractors in the department
- the fact that the Union’s most significant concern regarding the Employer’s use of contractors was expressed during 2010 negotiations as there being “too many” contractors in ISIT and for too long
- the fact that the Union did not inform the Employer during 2010 collective bargaining or during discussions which led to the CUA: (1) that the Employer was not permitted to contract in to the ISIT department or (2) that it was the Union’s position Article 2.03 did not permit contracting in
- the fact that the Union tried to obtain more restrictive contracting out language in 2010 to curtail the Employer’s contractor usage practices
- the contractor usage grievance did not allege breach of Art. 2.03

- the Policy Lay off grievance did allege breach of Art. 2.03 due to the alleged lay off of a bargaining unit employee while a contractor performed bargaining unit work
- the CUA did not express any limitations on the Employer's right to contract in to the ISIT department, in fact the CUA expressed that the Employer continued to retain its right under the collective agreement to use contractors in the future
- the Employer's contracting in of technology professionals to work on the New Car project and Trader Exchange, two substantial and significant development projects, alongside employees in the ISIT department and Union's knowledge of this fact
- for a period of approximately 2.5 years following the CUA the Employer continued to contract in to the ISIT department without objection from the Union despite the Union having the means to know the contracting in continued
- when the Union wrote regarding the Employer's use of contractors in ISIT in March 2013, the objection was related to how long the contractors had been working in the department, it did not allege breach of Art. 2.03 resulting from the Employer's continued contracting in to the ISIT department
- the current amended grievance dated August 26, 2013 is the first time the Union has informed the Employer of its view that contracting in to the ISIT department contravened the collective agreement (*Employer's Written Submissions*, ¶ 158)

[89] The employer submits the union's real concern in 2013 was with the employer's implementation of the 2010 agreement. It was not that the employer contracted in. All events prior to 2013 evidence a mutual intention that Article 2.03 permits the employer to contract in for any work in the IS/IT department if the contracting in does not result in laying off a bargaining unit employee.

[90] The employer submits a non-restrictive approach to estoppel establishes the union, intentionally or not, has unequivocally represented it will not rely on its legal rights under the collective agreement prohibiting contracting in; the employer relied on that representation; and the employer will suffer harm or detriment if the union is allowed to change its position. (*Insurance Corporation of British Columbia* [2002] B.C.C.A.A.A. No. 109 (Hall); *Mountain Equipment Co-operative* [2015] B.C.C.A.A.A. No. (Keras))

> The Union's first representation was made during the four years it remained silent while the Employer contracted in over 40 contractors who worked at the

Employer's premises, with bargaining unit employees, working on the same tasks and projects as bargaining unit employees.

Mr. Ghuman's evidence was that when the shop steward, Dragos, brought the issue of the number of contractors in ISIT to his attention, Mr. Ghuman asked Dragos to prepare him a list of the contractors. Ex. 3, Tab 5 was created by Dragos in response to Mr. Ghuman's request and is proof that the Union had ready access and means to know who in the ISIT department was a contractor and who was an employee. The list created by Dragos at Mr. Ghuman's request includes contractors from 2006 to July 2010 by name and start date.

The Union made the same representation when it entered into the CUA, which expressly stated that the Employer continued to retain its right under the collective agreement to use Contractors in future.

The Union made this same representation a third time when following the parties entering into the CUA the Union remained silent for two and a half years as the Employer continued to contract in. For at least the first year after the CUA the shop steward was Brendan Topely, whom Mr. Ghuman testified was familiar with the contractor usage issue raised during 2010 bargaining and the Union's view that the Employer was not entitled to contract in to the ISIT department.

After Mr. Topely departed Tim Hamelin, and ISIT employee, acted as shop steward. Mr. Hamelin worked in the department and was in a position to see that the Employer continued to use contractors in the department.

During this period, seniority lists were posted on the Union's bulletin board in the Employer's workplace and sent to the Union's Assistant Business Manager, Rav Ghuman.

****

… the Union was provided all the information necessary to determine that the Employer continued to contract-in contractors. The Union was either aware of this practice and chose to allow it to occur for over two years or the Union failed to adequately govern the Employer's adherence to the CUA.

****

The Employer submits that the Union was under an obligation to monitor the Employer's interpretation and application of the Collective Agreement and the CUA in the "new and unusual circumstances" created by the resolution of the March 2010 grievance. The Union had shop stewards working in the ISIT department at all material times, including after the CUA was concluded between the parties. Upon exercising reasonable diligence the Union could have determined much earlier than March 2010 that some of the contractors had been working in ISIT for as long as two years, as noted in its letter.

This is consistent with Arbitrator Hall's decision in *ICBC*, *supra*, in which he found that the requirement of unequivocal representation or conduct is a question of fact, and may arise from silence where the circumstances create an obligation to speak out.

If the Union disagreed with the Employer's interpretation of the CUA, then the Union was under an obligation to raise that with the Employer when the

> Employer interpreted the CUA as permitting the Employer to continue contracting in.
>
> The Employer submits that the Union's failure to raise an issue with the Employer's interpretation is consistent with the Employer's understanding of the parties' mutual agreement in the CUA that the Employer could continue to contract-in so long as it attempted to convert the existing contractors and reduced the number of contractors.
>
> In the alternative, however, the Employer submits that the Union's failure to raise this issue despite the obligation to do so served as a representation that the Employer's interpretation of the CUA was correct. (*Employer's Written Submissions*, ¶ 176 – 181; 185; 187 – 191)

[91] The employer submits because of this representation, the employer relied that it was not required to comply with the collective agreement prohibiting contracting in and will suffer harm if the union is permitted to revoke its representation.

7. Discussion, Analysis and Decision

[92] In 2010, two experienced negotiators with a good working relationship found a solution to a problem created by IS/IT department management. Subsequently, department management failed to carry through with the employer's resolution commitments within the time or in the manner promised in the settlement agreement. Then managers returned to their former method of having work performed and vacancies temporarily filled by engaging contractors. As Ms Lynam wrote about the contractors in the spring of 2013: "Some are covering work as we recruit…."

[93] Department management did not manage in accordance with the limitations on the performance of bargaining unit work in the collective agreement prior to 2010. It took the easier path of having agencies engage consultants rather than recruit full-time or temporary employees. The situation was indefensible when it came to the union's attention during collective bargaining in 2010. To the credit of the relationship between the union and employer, Mr. Ghuman did not immediately suspect such a flagrant contravention of the collective agreement. He thought it must be true contracting out or limited duration employment of temporary employees.

[94] Ms Frazer proposed a creative solution to have a reset without incurring employer liability. It was based on immediate and future unilateral employer action with merely a waiver of vacancy posting requirements by the union and no other concession.

The union acted reasonably in the interests of a good relationship and to support business growth by letting bygones be bygones, waiving the posting requirement, giving the employer the implementation time it requested and trusting the employer would fulfill its promises.

[95] Trusting the employer, Mr. Ghuman moved on to collective bargaining with other employers and other matters within his responsibilities. He did not monitor or instruct others to monitor the employer's fulfillment of its promises, some of which the employer fulfilled. He knew promised steps were being taken because, as Arbitrator Gordon reported, employer representatives worked with him during the conversion process in 2011. However, unknown to him, the employer did not fulfil its promise that: "Should some contractors not be willing to convert, the Company will determine the required plan to ensure critical knowledge is retained and communicate this to the union."

[96] Neither Mr. Vuia nor either of his successor shop stewards would be expected to proactively monitor the employer's implementation of this agreement. From August 2010 to December 2011, only one contractor had been engaged when Mr. Vuia was shop steward. In December 2011, Mr. Hamelin was involved in part of the implementation through the conversion of one contractor who had been in the workplace since 2008 to employee status. This was not condonation or representation the employer could continue contracting in.

[97] The evidence is three contractors continued into 2013. One contractor was one engaged before 2010; one was engaged in March 2011; and one was engaged August 27, 2012.

[98] By August 2012, Ms Frazer had been promoted to her current position. It was two years since the settlement agreement and Mr. Ghuman had not received any reports from a shop steward. Conversion had dragged into December 2011.

[99] During the two years after the August 2010 settlement agreement, the absence from the seniority list of two or three contractors, who might be performing management roles, would not attract attention in the workplace or at the union office. The union gave notice to bargain on September 27, 2012.

[100] Beginning August 27th, department management reverted to its pre-2010 approach. It engaged six additional contractors on the following dates:

- 1 – September 24, 2012
- 1 – October 2, 2012
- 2 – November 13, 2012
- 1 – December 21, 2012
- 1 – January 14, 2013

[101] When Mr. Ghuman learned there were ten contractors, he did not assume department management had reverted to its former approach. He assumed some contractors were temporary employees who "may have been employed for 2 or more years" and should be converted to full time employee status with benefit entitlement. When he learned some were engaged before the 2010 agreement, he sent a copy of that agreement to Ms Lynam.

[102] The union again took a reasonable approach in 2013 when Ms Lynam completed the conversion process promised in 2010 and followed the same unilateral employer approach to the then current situation that Ms Frazer succeeded in having the union accept in 2010.

[103] Despite Ms Brock grieving in August 2013, the employer engaged thirteen contractors between April 28 and July 21, 2014 for terms anticipated to end between September 12 and October 31, 2014. These engagements were not condoned by the union, which gave no representation by word, action or silence that it would not rely on its legal rights under the collective agreement.

[104] Ms Frazer and Mr. Ghuman testified to clear but contradictory interpretations of the 2010 agreement. Is the agreement an ancillary agreement of a character that was intended to have ongoing effect? Is it an agreement, as the employer submits, intended to govern the employer's use of contractors going forward? No.

[105] The language and circumstances of the agreement clearly establish it was a compromise resolution limited to the situation and the two outstanding grievances at the time. It was the product of two negotiators problem solving with each cautious to preserve, but not create or modify, rights. The rights did not have to be stated to

achieve the resolution. The difference arising from the recurrence of behaviour by IS/IT management is that there is no mutuality on what rights were intended to be preserved.

[106] The agreement does not add to or detract from the collective agreement. It applies to a fixed population of contractors – then current contractors who will convert to employee status and "the remaining contractors" who will not. It has a projected time within which the remaining contractors will be converted or replaced – "before the end of February 2011." There is no contemplation of engaging new contractors and no future relinquishment of existing rights under the collective agreement.

[107] The use of contractors in the future is to be in accordance with the collective agreement, not the grievance settlement agreement, which will lapse when its terms have been fulfilled. Those terms include "the required plan to ensure critical knowledge is retained and communicated to the union." This refers to existing critical knowledge held in 2010 by the contractors engaged at the time. It is not a reference to, and does not include, future critical knowledge acquired by future engaged contractors.

[108] The employer's actions in 2013 to terminate its relationship with the three contractors first engaged in 2006, 2009 and 2011 is consistent with the 2010 agreement not having an enduring effect. The 2013 actions were completing what should have been done in 2011 for the two contractors engaged in 2006 and 2009. The employer did not assert the 2010 agreement allowed it to engage a new contractor in March 2011.

[109] There were no union actions or inaction that created any express or implied representation the employer could continue after August 2010 to contract in to perform bargaining unit work in the IS/IT department. The union did not condone what was done before 2010. It trusted the employer to fulfill its promises in the settlement agreement after August 2010.

[110] For the next two years, except for engaging one contractor in March 2011 there was no employer action for the union to condone. And there is no evidence what that contractor did and how frequently that contractor was in the workplace. It is an overstatement to characterize this single contractor engagement as the employer carrying on openly in the same manner as it did before August 2010.

[111] After department management began again in August 2012 to contract in, the union acted as soon as Mr. Ghuman learned, which was during preparations for collective bargaining in early 2013. The union was explicit and unequivocal that engaging contractors to perform bargaining unit work was not permitted or condoned under the collective agreement.

[112] There was no representation by the union from August 2010 to 2013 that the employer could rely on to its detriment that contracting in bargaining unit work was accepted or condoned by the union. There is no basis for an estopple against the union.

[113] There is no past practice that assists to interpret Article 2.03 in the manner the employer advocates. There is no ambiguity in the language.

> **2.03 Contracting-out**
>
> The Employer will not contract out work normally performed by employees covered by this Collective Agreement that will result in the layoff of bargaining unit employees.

[114] The evidence of negotiating history and employer unilateral action does not cast a shadow of ambiguity or doubt on the meaning of the language to be interpreted. No evidence about its introduction into the collective agreement or its administration, including the grievance settlement agreement in 2010 and posted seniority lists, or union proposals to amend its language reveals any mutual intention beyond the plain and clear language. The extrinsic evidence is of no assistance.

[115] The language in unambiguous. It does not permit the contracting in grieved.

[116] The circumstances in which Article 2.03 will permit contracting out of bargaining unit work performed in the IS/IT department is not an issue in dispute. The evidence and submissions simply establish that the union acknowledges such circumstances could exist, as it did in 2010 when it agreed: “The Company continues to retain its right under the collective agreement to use Contractors in the future.” That right is the right to contract out in Article 2.03. It is not a right to contract in.

[117] The grievance is allowed. I declare the employer does not have the right under the collective agreement to contract in to perform bargaining unit work in the IS/IT department.

[118] The employer is ordered to compensate the union in the amount of the union dues the persons listed in Ms Lynam's letter of March 28, 2013, who were contracted in to perform bargaining unit work, would have paid to the union during the period of their contracting. For the two contractors engaged before 2011, the period for compensation begins January 1, 2012.

[119] I reserve and retain jurisdiction over the interpretation and implementation of this decision and remedy, including its application to any contractors currently engaged by the employer to perform bargaining unit work in the IS/IT department. I also retain jurisdiction over the dispute whether three contractors are performing bargaining unit or non-bargaining unit work in the IS/IT department.

APRIL 30, 2015, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey