James E. Dorsey, Q.C.
Lawyer
James E. Dorsey, Law Corporation

3380 Redfern Place
North Vancouver, B.C. V7N 3W1
Telephone (604) 980-7225
Facsimile (604) 909-2755
dorseyj@shaw.ca

June 17, 2010
File: 9891

Mr. Allan E. Black, Q.C.
Black, Gropper
Labour & Employment Lawyers
1640 - 401 West Georgia Street
Vancouver, B.C.
V6B 5A1

Mr. Keith J. Murray
Harris & Company LLP
Barristers & Solicitors
1400 – 550 Burrard Street
Vancouver, B.C.
V6C 2B5

Dear Sirs:

Re: COPE, Local 378 –and– Terasen Gas Inc. (Bargaining Unit Work)

The union grieves that fifteen retired, former employees of the employer, who are receiving pension benefits, have been or continue to be engaged by the employer as employees or dependent contractors to perform bargaining unit work without recognition by the employer that they perform bargaining unit work and are employees covered by the collective agreement.

The union seeks redress for itself, members of the bargaining unit and each of the fifteen individuals. The redress includes employer contributions to the pension plan for the hours each of the fifteen has performed or does perform bargaining unit work. The trustees of the tripartite pension plan might have separate actions and interests with respect to each of the fifteen if they were or are engaged in pensionable service.

The employer denied the grievance and maintains it has not contravened the collective agreement. It has preliminarily stated its position as follows:

> It is Terasen's position that the contracting for the services provided by the foregoing individuals did not violate the Collective Agreement.
>
> To the extent the foregoing individuals (or Gasficient) performed work normally performed by bargaining unit employees, the contracting out of such work did not violate Article 1.10 of the Collective Agreement. The contracting out assignments did not result in the termination or downgrading of any employee, and the contracting out arrangements were otherwise bona fide. (March 25, 2010)

The employer's engagement with some of the fifteen is directly with the individual. The engagement with some is with an individual personal service corporation through which individuals performed services. The engagement with some of the fifteen is through two third party corporations doing business as Gasficient Consulting Services and CH4 Consulting Services.

At the case management conference on May 26, 2010, the union agreed to give notice to each of the fifteen individuals in accordance with the common law requirement in *Re Bradley et al and Ottawa Professional Fire Fighters Association et al* (1967), 63 DLR (2d) 376 (Ont. C.A.) and *Re Hoogendoorn and Greening Metal Products & Screening Equipment Co. et al* [1968] S.C.R. 30.

At the case management conference, I agreed with the employer and decided notice to an individual who was or is engaged by the employer through a personal service corporation is sufficient. Additional notice does not have to be given to the individual's personal service corporation when notice is given to the individual.

The employer submits notice must also be given to Gasficient Consulting Services and CH4 Consulting Services, which are not party to or covered by the collective agreement, because they are persons whose interests might be affected. The employer submits:

> A third party corporation's interest is affected where its employees or contractors become the subject matter of a grievance. Your decision in this matter could potentially affect the relationships between the individuals in question and the third party corporations with whom they are either employed or in contractual relationships. Further, your decision could affect Gasificient and CH4's ability to continue in their contracting relationships with Terasen. As such, it is our position that Gasificient and CH4's interests are potentially affected by this hearing and they are entitled to Hoogendoorn notice.

The union disagrees these third party corporations are entitled to *Hoogendoorn* notice. It submits persons not party to the collective agreement with whom an employer has contracted have no entitlement to notice of an arbitration established to decide whether the employer's action was contrary to the collective agreement. If it is found that an employer has contracted-out contrary to a collective agreement, the person with whom it contracted will have a remedy in another forum. (*B.C.I.T. and College of New Caledonia* (1979), 24 L.A.C. (2d) 129 (Hope); *Avenor Inc.* (1995), 52 L.A.C. (4^{th}) 72 (Bendel); *Consumers Glass Ltd.* [1997] B.C.C.A.A.A. No. 376 (Chertkow) (QL))

Some of the evolution of the requirement for notice to individual bargaining unit employees since the decisions in *Bradley* and *Hoogendoorn* and approaches arbitrators have taken to determining whether persons who are not covered or bound by or sought to be covered or bound by a collective agreement are entitled to notice were reviewed in *Canada Post Corporation* [2006] C.L.A.D. No. 46 (Dorsey) (QL); 149 L.A.C. (4^{th}) 306.

The employer's submission is predicated on an assumption that a third party who will be given intervenor party status and standing is also entitled to *Hoogendoorn* notice. In support, the employer refers to four decisions in which arbitrators considered the right of third party strangers to a collective agreement to be given intervenor party status with standing to participate in arbitration and to challenge the rights asserted by a union under its collective agreement with the employer. (*B.C.I.T. and College of New*

Caledonia (1979), 24 L.A.C. (2d) 129 (Hope); *Calgary Television* (1991), 20 L.A.C. (4th) 374 (Ponak); *Vancouver Hospital & Health Sciences Centre* (1998), 72 L.A.C. (4th) 297 (Kinzie); *British Columbia Buildings Corp.* 2002 CLB 11619 (Laing))

In the context of grievance arbitration, the entitlement of a bargaining unit employee to *Hoogendoorn* notice because of the union's exclusive bargaining agency is distinct from whether a person not covered or bound by a collective agreement should be granted status to participate in arbitration under a collective agreement and the terms and conditions on which that person is to be permitted to participate. The right to *Hoogendoorn* notice does not extend to third party contractors when a union grieves there has been a contravention of collective agreement contracting out language. The employer acknowledges "... in such a case, the third party contractor is generally not entitled to notice."

Entitlement to *Hoogendoorn* notice is a distinct issue from granting a stranger to the collective agreement status as an intervening party to participate in grievance arbitration. Based on considerations of labour relations, avoidance of multiple and duplicate proceedings and considerations of natural justice, private grievance arbitrators, who over the decades have been assigned an enlarged legal mandate and jurisdiction, have broadened the circumstances in which persons not covered or bound by a collective agreement will be given intervenor party status and standing to participate in an arbitration.

Approaches arbitrators have taken to this issue were reviewed in *Canadian Staff Union* [2007] O.L.A.A. No. 626 (Dorsey) (QL); 168 L.A.C. (4th) 388. It is in the context of such an application that an arbitrator must determine the portion of the fees and expenses of the arbitrator, if any, to be borne by the intervening party under section 90(1)(c) of the *Labour Relations Code*:

> 90 (1) Unless the provision required under section 84 or 85 provides otherwise, each party to an arbitration under section 84, 85, 104 or 105 must bear
>
> (a) its own fees, expenses and costs,
>
> (b) the fees and expenses of a member of an arbitration board that is appointed by or on behalf of that party, and
>
> (c) equally the fees and expenses of the chair of the arbitration board or a single arbitrator, unless the arbitration board allows another person to participate in the hearing in which case the arbitration board may direct that a portion of the fees and expenses of the chair be borne by that person.

(see *Kamloops / Thompson School District No. 73* [2006] B.C.C.A.A.A. No. 73 (Dorsey) (QL; 156 L.A.C. (4th) 171)

The employer submits the claim that individuals are really employees of the employer when they have been treated by the employer and by Gasficient Consulting Services and CH4 Consulting Services as employees or contractors of Gasficient Consulting Services and CH4 Consulting Services gives Gasficient Consulting Services and CH4 Consulting Services a material interest in this arbitration and an entitlement to both notice and standing. The employer submits not giving them their legally entitled notice and standing carries the risk of the final arbitration decision being challenged and set

aside.

In this application, the only issue is entitlement to notice, not intervenor party status and standing. It is foreseeable that an interest of Gasficient Consulting Services and CH4 Consulting Services might be adversely affected if the grievance is successful. However, this grievance arbitration will not determine or dispose of their rights and obligations. It will determine the rights and obligations of the union and employer parties to the collective agreement.

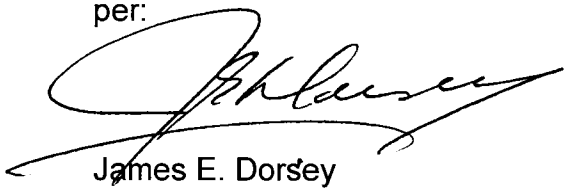
If the employer is not permitted under the terms of the collective agreement to have entered into whatever contractual arrangements it has with Gasficient Consulting Services and CH4 Consulting Services, then they will have avenues of redress against the employer in other forums.

The potential that Gasficient Consulting Services and CH4 Consulting Services might be consequentially and adversely affected if it is found the employer acted contrary to its collective agreement obligations to the union does not entitle them to notice of this arbitration to determine the rights and obligations of the union and employer under their collective agreement. The employer's application is denied.

As agreed at the case management conference, the union will give an initial notice to each of the fifteen individuals. I propose that dates for hearing be scheduled to hear evidence on the business units which counsel agree can conveniently be heard first. Once hearing dates are scheduled and hearing arrangements have been made, the union can give a second detailed notice to the individuals.

Yours truly,

James E. Dorsey, Law Corporation
per:



James E. Dorsey