

BRITISH COLUMBIA LABOUR RELATIONS BOARD

CANWEST MEDIAWORKS PUBLICATIONS INC.
PUBLICATIONS CANWEST MEDIAWORKS INC.;
ABBOTSFORD TIMES, A DIVISION OF CANWEST
MEDIAWORKS PUBLICATIONS INC. PUBLICATIONS
CANWEST MEDIAWORKS INC.; CHILLIWACK TIMES, A
DIVISION OF CANWEST MEDIAWORKS PUBLICATIONS
PUBLICATIONS CANWEST MEDIAWORKS INC.; AND
MAPLE RIDGE TIMES, A DIVISION OF CANWEST
MEDIAWORKS PUBLICATIONS PUBLICATIONS
CANWEST MEDIAWORKS INC.

("CanWest", the "Abbotsford Times", the "Chilliwack Times" and the "Maple Ridge Times" respectively, together, the "Respondents")

-and-

COMMUNICATIONS, ENERGY AND PAPERWORKERS
UNION OF CANADA, LOCAL 2000

(the "Union")

PANEL:	G.J. Mullaly, Vice-Chair
APPEARANCES:	Michael H. Korbin and Alexander Mitchell, for the Respondents Carolyn Askew and Heather Neun, for the Union
CASE NOS.:	55478, 55864 and 56032
DATES OF HEARING:	January 30, 2007, October 18, 2007, November 1-2, 2007, Dec. 17-21, 2007, May 20-21, 2008
DATE OF DECISION:	January 19, 2009

DECISION OF THE BOARD

I. INTRODUCTION

1 The Union applies under Sections 6(3)(a), 6(3)(d), 38 and 54 of the *Labour Relations Code* (the "Code"). The unfair labour practice complaint (the "ULP Complaint") and the Section 54 complaint (the "Section 54 Complaint") relate to the layoff of six employees of the Abbotsford Times at the conclusion of a strike for a first collective agreement. The Section 38 application seeks to have all the Respondents declared a common employer.

2 The Respondents concede that the Abbotsford Times, the Chilliwack Times and the Maple Ridge Times (the "Respondent Papers") are associated or related businesses under common control and direction. However they maintain that there is no labour relations purpose for declaring them to be a common employer. The Respondents also deny that they committed any unfair labour practices or violated Section 54 of the Code.

II. BACKGROUND

3 CanWest owns 12 community newspapers in the Lower Mainland. The Union holds separate certifications for five of them, including the Abbotsford Times. The Chilliwack Times and the Maple Ridge Times are among CanWest's seven Lower Mainland community newspapers the Union is not certified to represent.

4 All of the Respondent Papers need 'ad production work' ("production work") done. The work involves the use of page layout software to prepare advertisements for publication.

5 Historically, production work for the Respondent Papers has been done in two different ways: at times each paper did its own production work (the "in-house model") and at other times employees at the Abbotsford Times did the production work for all three papers (the "consolidated model"). For eight years before 2000, the Respondent Papers used the in-house model. In 2000, the Respondent Papers adopted the consolidated model. When that happened, some of the employees involved in production work at the Chilliwack Times and the Maple Ridge Times were transferred to the Abbotsford Times and given credit for the time worked at the Chilliwack Times and the Maple Ridge Times.

6 The Union applied to be certified to represent the employees of the Abbotsford Times on October 31, 2005. On November 7, 2005, Rod Thomson, the Publisher of Abbotsford Times, invited the President of the Union to address a meeting of the employees of the Abbotsford Times. Two days later the employees voted 22 to 6 in favour of certification and the Union was certified the same day. Its certification is for a unit described as:

employees at and from 30887 Peardonville Road, Abbotsford, BC, except management and those excluded by the Code employed by Abbotsford Times, a division of CanWest Mediaworks Publications Inc. Publications CanWest Mediaworks Inc.

7 The parties began to bargain a first collective agreement on January 21, 2006. By June 7, 2006 they had reached agreement on many of its terms, including a "Coverage and Jurisdiction" provision which eventually became Article 3 of the collective agreement that was later achieved (the "Collective Agreement"). Article 3 states:

This Agreement covers all employees engaged in the publication of the Abbotsford/Mission Times or any other work produced by the Company except as provided in subsection (a)

- (a) the following are excluded from the application of this agreement
 - Publisher
 - Advertising Sales Manager
 - Office Manager
 - Editor

- (b) Employees are recognized in the following departments
 - Editorial
 - Production
 - Accounting
 - Ad Control
 - Clerical
 - Advertising/Sales

The Company agrees that all employees in the departments outlined in subsection (b) and any employee hired into those departments, must become a member of CEP Local 2000 upon employment. The Company shall terminate employees not in compliance with this section 30 days after notification, should they not comply with these provisions.

8 Two days after the Union and the Abbotsford Times agreed to Article 3, the employees of the Abbotsford Times went on strike after the Union and the Abbotsford Times reached an impasse in bargaining with respect to the proposed collective agreement provisions that remained in dispute. Although the Abbotsford Times ceased to publish during the strike, the Chilliwack Times and the Maple Ridge Times continued to publish. To accomplish this, they reverted to the in-house model, using "freelancers" to produce their advertisements.

9 During the strike the Union took a number of steps that adversely impacted the Chilliwack Times and the Maple Ridge Times. First, members of the Union attended once at each of their offices wearing picket signs. This resulted in some people not entering the offices.

10 Second, on June 12, 2006, and without any prior warning, the Union wrote to College Printers—the printer of the Chilliwack Times and the Maple Ridge Times—declaring them (and the Abbotsford Times) to be unfair employers. As a result of this hot edict, the Chilliwack Times and the Maple Ridge Times had to scramble to find another printer willing and able to print their publications during the strike. The printer that the papers found was not able to print as many colour pages as College Printers had been able to print and as a result, during the strike, the Maple Ridge Times had to turn down some advertisers who wanted to place colour advertisements.

11 The Chilliwack Times was also negatively impacted by the hot edict in another way. After the strike ended it was not able to have both of its two weekly editions again printed by College Printers because it had lost one of its 'spots' with that printer during the strike. Consequently, the Friday edition of the Chilliwack Times now has to be printed at a technologically inferior printer.

12 The last thing the Union did during the strike which adversely impacted the Chilliwack Times and the Maple Ridge Times was to write to their advertisers urging them to "cancel any future ads immediately" and advising them that "[t]here are other alternatives in your marketplace for advertising".

13 The strike lasted until August 22, 2006 when, with the Board's assistance, the Union and Abbotsford Times reached the Collective Agreement. At the conclusion of the strike, the production work for the Chilliwack Times and the Maple Ridge Times was not returned to the Abbotsford Times. This resulted in a shortage of work at the Abbotsford Times and on October 2, 2006 it issued back dated layoff notices to six of its eleven production employees: Adrienne Johns, Jennifer Compeau, Janet Scott, Ann Goudswaard, Margi Thiessen and Mona Heppner (the "Production Work Employees"). The layoffs were not preceded by any notice under Section 54 of the Code and the Production Work Employees were not given the option of transferring to the Chilliwack Times or the Maple Ridge Times.

14 On October 5, 2006, the Union complained under Sections 6(3)(a) and (d) of the Code alleging that "[t]he Employer's decision to layoff [the Production Work Employees] was motivated in whole or part by anti-union animus."

15 On January 19, 2007, the Union filed its Section 54 Complaint and asked that it be consolidated and heard together with its ULP Complaint.

16 When the hearing of the Union's ULP and Section 54 Complaints began on January 30, 2007, it sought a one day adjournment to consider whether it wished to file a common employer application. The Abbotsford Times opposed the adjournment application. I ruled that if the Union wished to make a common employer application it would be permitted to do so, but the hearing would not resume until there had been a full exchange of submissions with respect to the Section 38 application.

17 The Union elected to file a Section 38 application and it was heard with its ULP and Section 54 Complaints. The hearing resumed on October 18, 2007. After eight days

of hearing I became concerned that the merits of the Union's submission that a common employer declaration would serve a labour relations purpose rested, in part, on a disputed interpretation of Article 3 of the Collective Agreement. Accordingly, I raised with the parties the Board's long established policy of deferring to arbitration the resolution of disputes arising under collective agreements: *Repap Carnaby Inc.*, BCLRB No. B31/94, 22 C.L.R.B.R. (2d) 100, 94 CLLC ¶16,063 ("*Repap*"). In response, they made a joint request that, if necessary, I interpret the Collective Agreement for the purposes of adjudicating the Union's ULP and Section 54 Complaints and its Section 38 application. In making this joint request the parties submitted that if at that stage they were required to arbitrate the interpretation of Article 3, the adjudication of the Union's ULP and Section 54 Complaints and its Section 38 application would be delayed and they would both also suffer considerable additional expense and inconvenience. Mindful of my obligation under Section 2 of the Code to exercise my powers and perform my duties in a manner that promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes, I acceded to the parties' joint request to, if necessary, interpret Article 3 for the purpose of adjudicating the Union's ULP and Section 54 Complaints and its Section 38 application.

III. POSITIONS OF THE PARTIES

18 The ULP Complaint alleges that "[t]he Employer's decision to layoff [the Production Work Employees] was motivated in whole or part by anti-union animus." The only "Employer" named in the ULP Complaint is the Abbotsford Times. The ULP Complaint distinguishes two decisions made by the "Employer": the decision to layoff the Production Work Employees (which the Union later termed the "Layoff Decision") and the decision to leave the production work for the Chilliwack Times and the Maple Ridge Times at those papers when the Union's strike ended (which the Union later termed the "Transfer Decision"). Although the Union acknowledged that the Transfer Decision produced a shortage of work at the Abbotsford Times, the ULP Complaint alleged that the Transfer Decision was taken to accomplish three improper purposes: (i) to "avoid the Union"; (ii) to "undermine support for unionization"; and (iii) to "compel or induce other employees from continuing to support the Union".

19 In its reply to the Abbotsford Times' response to the ULP Complaint, the Union clarified that the subject of the ULP Complaint was what it termed the "real employer": CanWest. In its reply, the Union also alleged another improper purpose for the Transfer Decision—punishing its production work employees (who the Union says were the impetus for unionization):

The entity identified by [the Abbotsford Times' counsel] as "the Employer" (which we have named Abbotsford Times-CanWest), is not an incorporated entity and, as the name suggests, is not independent of CanWest. In other words, Abbotsford Times-CanWest is not an employer that is independent from the real employer, CanWest. ...

The ad production work of the *Chilliwack Times* and *Maple Ridge Times* has been withdrawn from the *Abbotsford Times* by CanWest in order to punish employees for joining the union and withdrawing their labour to achieve a first collective agreement. This action was intended to undermine the Union in the eyes of the remaining bargaining unit employees...

The lay offs are also intended to serve as a warning to employees of CanWest's unorganized publications within its Community Publishing Group as to the potential consequences of unionization. (emphasis in the original)

20 In written submissions made after the hearing the Union attributed more allegedly improper purposes to CanWest (while omitting reference to some of its earlier allegations). In the "Impermissible Conduct and Improper Purposes" portion of a post-hearing submission the Union stated that:

...at least part of the Employer's motivation was not for legitimate business reasons and was for the improper purpose of avoiding collective bargaining obligations and the collective bargaining relationship. We further submit that the adverse effects of the impugned conduct were significant in nature and extent.

Among the Employer's improper purposes were the desire to avoid collective bargaining obligations with respect to the production work, and the desire to avoid the possibility of being subject to or affected by economic sanctions in the future.

The evidence does not support the ground that the Employer advances: that it was motivated to avoid or respond to an economic crisis or imperative which had materialized as opposed to constituting an abstract possibility.

21 Later in the same submission the Union claimed that "future risk management" had been:

...a key factor in the minds of decision-makers at CanWest. We say that this reasoning is itself tainted by anti-union animus (given the avoidance of collective bargaining obligations), but also that it independently runs afoul of the unfair labour practice provisions of the *Code* because it constitutes an improper purpose or illegitimate business reason.

22 The principal remedy the Union seeks for the alleged unfair labour practices is an order that has the practical effect of requiring CanWest to return the production work to the *Abbotsford Times*. This is consistent with the position the Union takes with respect to the labour relations purpose that would be served by a common employer declaration:

The concrete, immediate labour relations purpose underlying this [Section 38] application is to preserve the employment rights of the Union's affected members. A declaration is required to *restore* the loss [sic] of work already experienced within the Union's bargaining unit. (emphasis added)

23 The Respondents maintain that the decision to continue with the in-house model after the strike was done entirely for legitimate business reasons.

24 The Respondents' chief disagreement with respect to the Union's Section 38 application is whether a common employer declaration would serve a labour relations purpose. The Union's contention that a declaration would serve such a purpose rests on its claim that it and its members "have rights with respect to the performance of [the production work], under the collective agreement and in accordance with principles of the Code." With respect to the latter, the Union maintains that it is inconsistent with the principles of the Code for an employer to be able to avoid the effect of a certification by "transfer[ing] work from its newly unionized operation to its non-union arms." With respect to the former, the Union submits that the Transfer Decision is inconsistent with "the express agreement about the scope of its bargaining rights".

25 The Respondents concede that the Respondent Papers are associated or related businesses that "are carried on by or through more than one corporation, individual, firm, syndicate or association, or a combination of them under common control or direction": Section 38 of the Code. However, they submit that a common employer declaration would not serve a labour relations purpose.

26 The Union submits that the Abbotsford Times breached Section 54 of the Code by failing to give timely notice of its intention to layoff most of its production work employees and by failing to meet in good faith with the Union to develop an adjustment plan.

27 The Respondents make four responses to the Union's Section 54 complaint. First, they submit that the "status quo" at the time of the layoffs was that the production work had been 'recaptured' and therefore the Abbotsford Times never introduced a "change" within the meaning of Section 54.

28 Second, the Respondents maintain that the layoffs of the Production Work Employees did not result from a "measure, policy, practice or change" introduced *by the Abbotsford Times*, the only entity named in the Section 54 complaint. According to the Respondents, the decision to keep the production work at the Chilliwack Times and the Maple Ridge Times was made in a "consultative fashion" by Fred Armstrong, the Publisher of the Maple Ridge Times, Nick Bastaja, the Publisher of the Chilliwack Times, Nigel Miller, Vice President Human Resources and Labour Relations for Pacific Newspaper Group, a division of CanWest MediaWorks Publications Inc., Steve Bodnar, the Vice President of Finance and Operations for CanWest Community Publishing Group, Hitesh Kothary, Vice President of Finance for Pacific Newspaper Group, a division of CanWest and Dennis Skulsky, President and CEO of CanWest.