

In The Matter of the Labour Relations Code of British Columbia  
And  
In the Matter of an Arbitration

Between

Victoria Times Colonist Group Inc.,  
A CanWest Company  
("the Employer")

And

Communications, Energy and Paperworkers Union of Canada, Local 2000  
("the Union")

And

Re: Grievance – Matt Hopkins Grievance – Contracting Out  
(C.A.A.B. No. 49225/03T)

AWARD

**Arbitrator:**

John M. Orr

**Appearances:**

F. Andrew Schroeder  
Counsel for the Union

Michael H. Korbin  
Counsel for the Employer

Place of Hearing: Victoria, British Columbia

Dates of Hearing: September 17, 18, 26 and  
October 16 and 17, 2003

Date of Decision: November 3, 2003

## AWARD

This award is issued following my appointment on May 13, 2003 by the Collective Agreement Arbitration Bureau as sole arbitrator pursuant to section 86 of the *Labour Relations Code* ("the Code"). The parties agree that I have been properly appointed with jurisdiction to hear this dispute.

During the hearing of this dispute private and confidential information was exchanged and discussed about the advertising rates and business arrangements negotiated by certain advertisers with the Employer. Because of the sensitive nature of this information I made a consent order banning the disclosure of any of this information by any of the attendees at the hearing, save and except where necessary for the performance of their duties with the Employer.

Victoria Times Colonist Group Inc., A CanWest Company, ("the Employer") publishes the Times Colonist, the major daily newspaper in the greater Victoria area. The Communications, Energy and Paperworkers Union of Canada, Local 2000 ("the Union") is one of three unions and five bargaining units certified at the Employer's business. The Local represents those employees at the Times Colonist known as compositors. The compositors, in short, compose the advertising on behalf of advertising clients. The number of compositors working in the composing room has shrunk from approximately 135 employees in the 1970s to only 14 presently. This shrinkage has been driven by technological change, buy-out programs and inter-jurisdictional struggles within the workplace.

It is alleged that the Employer has entered into an arrangement with a third party to have the advertising for two significant clients composed off the premises of the Employer by non union workers. It is alleged that this arrangement has resulted in significant work loss for the compositors and the lay-off of at least one employee. The Union suspects that this is part of an ongoing plan by the Employer to take compositors work and assign it to other bargaining units or outsource the work to non-union third parties.

Although this matter is commenced as an individual grievance on behalf of an employee, Matt Hopkins, it is in effect a policy grievance about whether the employer has contracted-out certain work within the jurisdiction of the Union and whether there is any prohibition against such contracting-out in the collective agreement between the parties.

The Union relies in particular on two sections of the collective agreement. The first of these is found in the opening part of the agreement entitled "Obligation to Supply Situation Holders" which is based on the historical relationships in the newspaper industry. The Union agrees to maintain the supply of workers and the Employer agrees to only employ members of the Union. The Union relies upon the first paragraph of Section 1 of the collective agreement that states:

**Section 1.** The Company agrees to employ only members of Communications, Energy and Paperworkers Union of Canada, Local 2000 to do all work within the jurisdiction of the Union.

As this section refers to work "within the jurisdiction of the Union" the Union relies upon the jurisdiction provisions in the agreement as follows:

**Section 27. (1)**

- (a) the jurisdiction of the Union begins with the markup of copy and preparation of copy in the composing room and continues until the plates to be used on the printing press have been completed, and any new equipment or adoption of processes designed as a substitute for or evolution of work previously or presently performed by composing or stereotype employees shall be considered as being within the jurisdiction of the Union and consists of all employees performing such work. It is further agreed that only members of the Union shall be permitted to perform work on any process and any material which includes, but is not limited to all litho preparatory work, typesetting, makeup, paste makeup, all camera work, photo-composition, makeup with the use of film which includes stripping and assembling and all work regardless of the material used in the making of any plate to be used for the Company's publications or commercial printing. Notwithstanding any of the foregoing language the jurisdiction of the Union shall also include all work allocations as defined by Paul C. Weiler in his awards of Sept. 6 and Oct. 13, 1977 and January 19, 1978. *{The parties stipulated that it was not necessary for me to consider these previous awards and I have not done so}*
- (b) **The Company shall make no other agreement written or verbal, to do or have done any of the work outlined above**, except as provided as follows: *{what follows provides for a proportionate arrangement with the Stereotypers Local 25 and is not relevant to this dispute}*
- (c) all material shall serve as copy for the Company's newspapers. Camera-ready copy may be used at the discretion of the company.

The Union submits that the employer has engaged in an arrangement with a non arms-length third party, Thumbnail PrePress Inc. ("Thumbnail"), for two major advertisers to have both their creative artwork (within the jurisdiction of another union, "the Guild", not a party to this grievance) and their composing work done by Thumbnail and the advertising then delivered to the paper "camera ready".

When advertising is delivered 'camera ready' it requires no additional work by the compositors. The amount of compositors work previously involved in the work for these two clients was estimated to be more than 20 hours per week. The Union submits that the out-sourcing of this significant volume of work has resulted in a reduction of work for the compositors and the lay-off of Matt Hopkins. They seek damages on his behalf or any other worker identified as having suffered loss as a result of this alleged contracting out of Union work.

On the evidence I heard, it cannot be said that Thumbnail is truly an arm's length third party. Thumbnail is a business operated by the wife of the pre-press manager at the Times Colonist. When this manager joined the Times Colonist in the mid 1990s his wife set up Thumbnail and was immediately offered a contract in the prepress production of a real estate advertising supplement called Homefinders. Prepress production includes the creative and composition work. Although this supplement did not succeed it is evident that Thumbnail continued to find work associated with the

Times Colonist publication. In 1998 the Guild successfully grieved a contracting out arrangement between the Employer and Thumbnail in regard to a flyer for S.U.V. advertising. The dispute was settled with the result that the work was returned in-house to the Guild.

There was also evidence that as recently as May 2003 a sales representative employed by the Employer had recommended Thumbnail to a real estate agency and had sent a copy of her recommendation to her management supervisor. It can only be inferred that she believed her manager would approve of the recommendation.

Thumbnail is incorporated and a registry search dated September 2002 indicates that the wife of the prepress manager is the only director and officer of the company. The actual ownership of the company was not disclosed, as the shareholdings are not revealed by the search.

The prepress manager denies any interest or involvement in his wife's business. He claims that his only support for his wife is to make dinner for her. While he went out of his way to deny any knowledge of, or connection to, his wife's business his denials did not have any air of reality to them. It was clear on the evidence before me that Thumbnail was in a preferred relationship with the prepress manager at least. There was credible evidence of his involvement in assisting his wife in her business from its inception. He and his wife now share office space in their home in a room no bigger than about 300 square feet. Thumbnail's whole operation is conducted out of their residence. The manager's own business and personal computer set-up is in the same room. The manager often works from his home on Times Colonist business side by side with his wife.

The manager was also the systems manager and computer expert at the Times Colonist and had full access to any and all of the Employer's systems. The evidence indicated that it is more than probable that the manager actively assisted his wife in her business including the transfer of intellectual property from the Times Colonist data banks to Thumbnail. Despite his denials it is obvious that he would have benefited personally from the work his wife performed for advertising customers of the Times Colonist if only by the sharing of space in the family home. I was advised by counsel for the Employer that the Employer approved of and stood behind the prepress manager and therefore it can only be concluded that the Employer condoned and approved of the special relationship with Thumbnail. However, it is noted that the Employer submits that this relationship is irrelevant to the issues in this case.

It must be noted that many Times Colonist clients prepare their own advertisements to the 'camera-ready' stage and the advertisement is then automatically placed in the newspaper without further work by the compositors. The collective agreement specifically recognises this reality. Other clients use advertising agencies who are at arms length from the Times Colonist and who do all the creative and composing work on clients' advertising and again submit the finished product camera ready. The agencies will also tend to place these advertisements in more than one publication or more than one medium.

There are two points that arise from the use of agencies. Firstly, the Union did not take the position at this arbitration that composition work done by arms length agencies was work within their jurisdiction. Secondly, the advertising sales manager testified that the Employer preferred to keep creative and composing work "in-house" and away from agencies because, if the work is in-house,

there is an ongoing relationship with clients that allows for upselling advertising and maintaining exclusive advertising from the client. The agency's commission usually results in less money spent on the actual advertising and therefore decreased revenue for the Employer.

The problems that give rise to this grievance started in the fall of 2002, when there was a 9-week strike at the newspaper. A grocery business that was the single biggest advertiser in the paper talked to management about possible solutions for his advertising needs during the strike. A plan was devised by the Employer to have Thumbnail create and compose flyers for direct distribution and for publication in the Employer's papers in Nanaimo and Port Alberni, which were not on strike. The client paid the Times Colonist for all the costs and then the Times Colonist paid Thumbnail and the distributors. Apparently the Employer did not make very much money on this arrangement but clearly acted as the key conduit for the arrangement with Thumbnail.

The client was certainly distressed about the impact of the strike on the business but apparently was very satisfied with the work done by Thumbnail who also prepared camera-ready advertising for publication in a rival newspaper during the strike. The client discovered that it was very convenient to deal with one agency for all of its advertising needs even though there was extra cost involved.

During the strike the rival newspaper expanded its business and the nature of its publication to become a significant competitor for advertising dollars. Many of the Employer's clients moved advertising to the competitor during the nine-week strike. This included a second major grocery client. When the strike ended the Employer had major challenges in re-establishing its market share and encouraging their advertisers to return. The Employer was successful in persuading these two major advertisers to return to the Times Colonist. However, the clients put significant pressure on the Employer to reduce the lineage charges because of the Thumbnail cost. The Employer agreed to reduce the lineage cost to compensate for the costs incurred by the clients in now having their copy created and composed at Thumbnail. The second client had also started to use Thumbnail and was also compensated for some of these costs.

The Union submits that because Thumbnail is not an arms length agency the reduction in lineage charges to the clients amounts to indirect payment by the Employer to Thumbnail. As such the Employer is actively participating in an arrangement whereby Union work is being performed by workers who are not members of the Union. The Union submits that this is contrary to Section 27(1)(b) that states that the Company shall make no other agreement written or verbal, to do or have done any of the work set out in Section 27(1)(a) i.e. composing work.

The Employer maintained that there was no evidence of any agreement written or verbal between the Employer and Thumbnail. The Employer submits that these two clients should be free to engage any agency to create and compose their advertisements, as many other clients do without complaint from the Union. At the conclusion of the Union's case the Employer made a no evidence motion on this basis.

On the evidence led by the Union I was satisfied that there was some evidence that could indicate that the Employer was an active participant in the arrangement between the clients and Thumbnail. The evidence indicated that Thumbnail was not an arms length agency, that it was contrary to policy to give discounts for camera-ready advertising and that the discount could be consideration

indicating that the Employer was indeed a party to the relationship. There was some evidence upon which an agreement might be inferred.

The Employer's evidence portrayed a different perspective on the nature of the negotiated advertising rates. During the strike the Employer lost many of its major advertisers to the rival newspaper and incentives were necessary to induce the clients to return to the Times Colonist. I heard considerable evidence about the nature of the negotiations involving the two major grocery clients and others. I am satisfied that it is consistent with the probabilities surrounding the return to work that the reduced lineage rates were the result of market pressures and not a direct or indirect payment to Thumbnail. The cost associated with the Thumbnail work was certainly used as leverage by the clients in the negotiations for lower rates but it was not the key issue. It was simply imperative for the Times Colonist to induce these two clients to return to the paper. The Times Colonist had lost most of the major grocery stores and the evidence was that they all tended to advertise in the same medium to stay competitive. In fact other clients were also able to re-negotiate rates or other benefits during this time period that they would not have been able to negotiate prior to the strike.

The question remains, even without the direct or indirect subsidy to Thumbnail, was the Employer a party to the arrangement to have the work outsourced to Thumbnail after the strike ended. It is not disputed that during the strike the Employer brokered the deal for the most significant advertiser to work with Thumbnail. During the strike the Employer received payment from the client and paid Thumbnail for the composition work that had previously been done by the Union. I have also concluded that Thumbnail is not an arms length agency and has a special relationship with the Employer.

The Employer submits that the Union has not met the onus of proving that the Employer is in breach of the collective agreement and, specifically, that the Employer has actually made an agreement to have the Union's work done by someone other than members of the Union. In the alternative, even if the Employer did make such an agreement, it is the Employer's position that such an agreement would not be contrary to the Collective Agreement. This latter argument is premised on the position that the language of the collective agreement does not prohibit contracting out but is only jurisdictional within the workplace as between bargaining units.

The Employer submits that the provisions that the Union has identified, Sections 1 and 27 are not prohibitions on contracting-out and are rather Union jurisdiction clauses, not work jurisdiction clauses. The Employers submits that this was the conclusion reached by arbitrator MacIntyre, Q.C. in *The Nanaimo Times v. Graphic Communications International Union Local 525-M* [1995] B.C.C.A.A.A. No.250. In that case the employer freely admitted that it contracted-out work to a related company that was wholly owned by the same parent company as was the Nanaimo Times. The employer contracted-out this work and then laid-off three employees, who were immediately offered employment by the non-union related entity. The arbitrator found that a similar clause was not a contracting-out clause, but was intended to ensure that all employees, wherever located, must be in the bargaining unit.

On the other hand the Union refers to an award by arbitrator Munroe in *Times Colonist Division, Canadian Newspapers Co. Ltd and Victoria Mailers' Union, Local 121* [1982] 7 L.A.C. (3d) 204

in which arbitrator Munroe found that similar language in the Mailers' collective agreement was not simply intra-jurisdictional but was intended as a work security provision and, in effect, prohibited contracting-out.

Before addressing these different interpretations of the language the issue must be decided whether the Employer has in fact breached the language of the agreement even if that language prohibits contracting-out of Union work. Has the Union established that there was indeed a contracting-out?

Without having access to the boardroom or company documentation it is difficult to think how the Union might, in the absence of admissions, ever 'prove' the existence of a specific agreement by the company to have compositors work done by others. As submitted by the Union, the existence of such an agreement in most cases would have to be pieced together from a pattern of circumstantial evidence and reasonably inferred from all of those circumstances. Still, the Union would have to meet the onus that such an inference be established on the balance of probabilities.

I am satisfied that the Union has established on the balance of probabilities that Thumbnail is not an arms length business, that it is has preferred status with the Employer and that the Employer was instrumental in assisting in or creating the relationship between Thumbnail and the two clients who had previously had their composition work done by the Union. It is an unreasonably restrictive interpretation of the language to suggest that once the work has left the composing room it is, by definition, no longer work within the jurisdiction of the Union. The work now done by Thumbnail was indeed work done by the Union. That Union work has been taken over by Thumbnail with at least the consent and support of the Employer. It is understandable why the Union is suspicious of the Employer's role in the transfer of this work to Thumbnail.

However, while I agree with the Union that the Employer has acquiesced in the transfer of Union work to the manager's wife, I am not convinced that the Employer has made an agreement with either the clients or Thumbnail to have this work done. I have to note that neither party called representatives from either of the advertisers or Thumbnail to testify. While these people may have been reluctant to participate they may have been able to shed some light on the role played by the Employer, if any, in the outsourcing of this work.

On the evidence before me it appears that the Employer has no control over whether a client chooses to send its advertising copy to the paper camera ready or whether a client chooses to use an agency to create and compose its copy to the camera ready stage. The Employer's sales staff would apparently prefer clients to compose their copy in-house but can only exert their powers of persuasion on the clients. A client can make an arrangement with an agency without the consent of the Employer. In other words many clients work through agencies without any involvement by the Employer.

In this case, while the circumstances are suspicious, it is equally possible that the clients acted on their own accord and independently from the Employer. Where the Employer has no ultimate control, other than the power of persuasion, it cannot be said that the Employer is contracting out: *Fraser Valley Mushroom Grower's Cooperative Association and Retail Wholesale Union, Local 580*, (1992) 32 L.A.C. (4<sup>th</sup>) 439. In this Money's Mushroom case there was a specific provision in the collective agreement prohibiting contracting out. However, the arbitrator found that because it

was the customer's decision to use a third party as a wholesaler who had their own drivers, the loss of driving jobs at Money's was not a form of contracting-out. Some of the arbitrator's findings are relevant to the case before me.

The arbitrator noted that Money's derived no economic benefit from the arrangement. The evidence before me indicated that the Employer, while retrieving a client, lost revenue that was not substantially offset by staff reductions. It was also noted that Money's had no control over how their customers managed their business. Money's could not compel them to buy direct using Money's drivers. In the case of the Times Colonist the customers always had the right to have their advertising created and composed by their own staff or through the use of advertising agencies. The Times Colonist had no control over this. Approximately 80% of the advertising already comes in to the paper "camera ready".

In *Kuehne & Nagel International Ltd. and Teamsters Local Union No.31* [1995] BCCAAA No.91 the question was posed that:

Reduced to its essentials, did the parties in fact agree to what amounts to a guarantee that certain work, once performed for a customer of the employer, could not be removed by the customer without such work being replaced by the employer?

In effect the Union here is suggesting the same premise. The work done by Thumbnail was once performed by the compositors and therefore it cannot be removed from the workplace without compensation from the Employer. In *Kuehn* the arbitrator found that work was taken away by the actions of a party which was not a party to the collective agreement even though it was clear that the contracting party was not an arms length party. He put it bluntly that it was unreasonable to stretch the restriction against contracting out to cover a business entity that is not bound by the collective agreement. He found that the collective agreement did not provide a guarantee that the work would always remain under the control of the employer. The Employer submitted a number of other authorities of similar import. While I have considered them I do not find it necessary to further elucidate the principle setout above.

I am persuaded that the evidence does not reveal that the employer has any control over how the customers choose to conduct their advertising business. I am not persuaded that the Employer made an agreement with either the clients or Thumbnail to have the work done by anyone other than the compositors. Additionally, I cannot conclude that it could have been the intention of the parties to the collective agreement that if customers withdrew their composition work that the Employer would be bound to maintain all of the jobs in the composing room in perpetuity.

While the aforesaid conclusion might dispose of this matter I was encouraged by the parties to address the Employer's alternative argument that the language does not, in any case, prohibit contracting out. Having considered the authorities provided to me I have concluded that I agree with the submission of the Employer on this point.

As noted above the Employer relies upon the award of MacIntyre, Q.C. in the *Nanaimo Times* grievance. In that case it was conceded that there was indeed a 'contracting out' but it was argued that contracting out was not prohibited by the agreement. The arbitrator reviewed the history of the

language in various collective agreements in the newspaper business and examined the language carefully to assess the true intent of the agreement of the parties. He concluded that the language in the Nanaimo agreement did not proscribe contracting out but rather it was a work jurisdiction clause or rather a “no-contracting-in clause” to protect against encroachment by other unions or employees.

The Union on the other hand relied on the decision of arbitrator D.R. Munroe in the Times Colonist *Mailers* award. In analysing the *Mailers* language. Munroe concluded that the work jurisdiction clauses of the collective agreement, when read as a whole, were intended to be very broad in scope. He found that the language embraced more than just work jurisdiction but was intended to create job security. He found that if the work was properly work of the company then it must be done by the union.

In agreeing with the conclusion reached in the *Nanaimo Times* case, I note that arbitrator MacIntyre had the benefit of the *Mailers*’ award and considered the distinctive differences in the collective agreement language. The *Mailer’s* collective agreement contained a much stronger jurisdictional clause than did the *Nanaimo Times* situation or the compositors. In the *Mailer’s* language all work appertaining to the newspaper mailing of the Company “***no matter where performed***” is considered part of the mailing craft. As there was only one actual workplace this seemed to indicate that the language must have been intended to capture work which the Company performed off-premises, including work performed by non-employees. Secondly, the *Mailer’s* collective agreement provides that “***no person***” other than Union members is permitted to perform such work.

In the compositor’s agreement before me it is simply agreed that the Employer will only employ members of the Union to perform work within the jurisdiction of the Union and that such jurisdiction consists of all “***employees***” performing such work and that only members of the Union shall be permitted to perform certain work relating to that jurisdiction.

Another distinguishing aspect is the placement of the provision about “no other agreement” in the jurisdiction section of the agreement where it is integrated into provisions dealing with the delineation of work between Unions and contains a specific exception reflecting an agreement between the Company and the Stereotypers Local 25 (Vancouver Printing Pressmen, Local 25) that enables Stereotypers to perform certain work within the jurisdiction of the Compositors, and vice versa, on a ratio basis. This is particularly significant in the case of the Times Colonist where there are five different bargaining units with different jurisdictions. It is also significant that the language is immediately followed by provisions for the settlement of jurisdictional disputes.

In the other case cited by the Union, *Victoria Times Colonist and Victoria-Vancouver Island Newspaper Guild Local 3223/TNG223 of Communications Workers of America* [2001] September 6 2001(Glass), the Guild grieved the transfer of Guild work from Victoria to a customer contact center in Winnipeg. The arbitrator found that the language providing that the work “shall be assigned” to the members of the Guild was sufficient to proscribe transferring the work to Winnipeg. However in that case there was considerable evidence of bargaining history presented to the arbitrator to assist in discovering the true intentions of the parties. The Guild was

able to establish that the general intent of the language was to prevent work flowing out of the plant in Victoria. The arbitrator found that the employer had the opportunity to limit the scope of the prohibitive language but did not achieve that in bargaining. The language in that case is not helpful to me in interpreting the intent of the composers' agreement because I do not have the same evidence of bargaining history.

In comparison to many collective agreements that use the actual words prohibiting 'contracting out' it seems to me that even a generous and liberal reading of the provision that "the Company agrees to employ only members ... to do all the work within the jurisdiction of the Union" does not in itself amount to a prohibition on contracting out. That provision is dependant on the Section 27 language. The first step requires a decision on whether the jurisdiction in Section 27 is an internal rule or whether it is broad enough to encompass work outside of the Employer's workplace. I agree with arbitrator MacIntyre that it cannot be read so broadly. Accordingly it is my conclusion that the combined effect of Section 1 and Section 27 of the collective agreement does not create a clear prohibition against contracting out.

In the result I have found that, even though the collective agreement does not provide for a clear prohibition against contracting out, I am also not satisfied that there was an agreement by the Employer to have the work done by a third party in breach of the collective agreement.

Accordingly the grievance is dismissed.

**Dated at Victoria, British Columbia, this 3rd day of November, 2003**

John M. Orr

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**John M. Orr**  
**Arbitrator**