

**IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE LABOUR RELATIONS CODE, R.S.B.C. 1996, C.244**

BETWEEN:

**THE VICTORIA TIMES COLONIST GROUP INC.,
a division of Southam Publications, a CanWest Company**

EMPLOYER

AND:

**THE VICTORIA-VANCOUVER ISLAND NEWSPAPER
GUILD LOCAL 30223/TNG OF COMMUNICATIONS
WORKERS OF AMERICA**

UNION

AWARD

Gabriel Somjen - Arbitrator

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**DATE OF ARBITRATION: December 5-7, 10, 12-14 and 18, 2001
DATE OF AWARD: December 28, 2001**

In mid-October, 2001 The Victoria Times Colonist Group Inc., a Division of Southam Publications, a CanWest Company newspaper (the "Employer") provided 60 days' lay-off notice to a number of employees within the bargaining unit represented by The Victoria-Vancouver Island Newspaper Guild Local 30223/TNG of Communications Workers of America (the "Union"). The grievances in this case arise from the Union's contention that these lay-offs are invalid.

I.

The Employer has a long history as does its relationship with the Union. There are also several other unions in a Council of Unions with whom the Employer bargains. Matters of common interest are negotiated at a main table; matters unique to each constituent union are negotiated with that union and are referred to as "peculiar".

The second last collective agreement between these parties expired on January 1, 1998 and was replaced by the current collective agreement which runs from January 1, 1998 to January 1, 2002.

After the expiry of the previous collective agreement, there were two ownership changes at the Times Colonist. Initially, collective bargaining for the current collective agreement was between the Times Colonist as owned by Thomson Corporation. In June of 1998 Southam purchased the Times Colonist. The current collective agreement was ratified on September 16, 1999. Then in 2000 CanWest purchased the Times Colonist. This rapid change

in ownership in a short period of time somewhat confused collective bargaining and may in some ways have contributed to this dispute.

When Southam purchased the Times Colonist in 1998, they sought to streamline the operation which was somewhat outdated both in terms of technology and, in the view of Southam, in terms of work practices and restrictions.

Andy Smith and Ian Henry, both senior human resources managers with the Southam Group at Pacific Press in Vancouver, were assigned by Southam to assist the Times Colonist in negotiating changes to their collective agreements in 1998. The primary thrust of the discussions between the Guild and these representatives of Southam on behalf of the Times Colonist was to allow the Times Colonist to revamp many of its practices, procedures, technology, and the collective agreement to allow for a more efficient and cost-effective operation.

In various discussions with the Union, both Mr. Smith and Mr. Henry proposed that the Times Colonist enter into a reorganization of the workplace and a "buyout" of a number of employees in order to accomplish a number of goals which had been successfully achieved at Pacific Press. The essence of these discussions was that with Pacific Press an arrangement had been made whereby a number of employees were "bought out" on a permanent basis.

The collective agreement was amended in a number of ways. Technological changes were introduced and other aspects of a major reorganization were accomplished. This

was done over a number of years during the term of the collective agreement at Pacific Press and without any involuntary layoffs.

In persuading the Union to buy into this type of arrangement for the Times Colonist, Mr. Henry and Mr. Smith on a number of occasions made the point that at Pacific Press there were no "involuntary layoffs" associated with these arrangements.

It took the Union some time to consider the concept of a major reorganization together with the buyout of a number of employees. In the end the Union agreed to the concept, and the parties entered into lengthy negotiations which resulted in the current collective agreement as well as two letters of understanding which deal specifically with the buyout arrangements and the reorganization (Letters of Understanding 20 and 21).

While agreeing in principle to the concept of the reorganization and buyouts, the Union stipulated one difference between the Pacific Press arrangements and those at the Times Colonist. The Union requested, and the Employer agreed, to complete the buyouts and reorganization within a period of 12 months from the date of ratification of the agreement by the Union. The Union asked for this so that there would be some stability and an end date to the process. In contrast, at Pacific Press the process of reorganization and buyouts had gone on for a number of years under the whole term of the collective agreement.

For some time it appeared that the whole arrangement would not succeed because one of the other unions at the Times Colonist, the CEP, which represented the compositors, was not agreeing to the reorganization and buyout concept; in the end, on September 16, 1999, the

CEP finally agreed in principle and the Times Colonist and the Union entered into the various agreements which comprised the reorganization and buyout arrangement. The agreement was ratified September 16, 1999.

The buyout aspect of the agreement was voluntary; therefore, neither party knew exactly how many employees might volunteer for the buyouts. In the end, 37 employees within the jurisdiction of the Union volunteered for the buyouts and were accepted as candidates by the Employer. Approximately four further employees volunteered for the buyout but were not accepted by the Employer as appropriate candidates.

From this arrangement the Union benefited to the extent that several of its members received quite generous buyouts (some reaching the sum of \$150,000 per person). In addition, the remaining employees were able to work for a modernized, more efficient employer with some assurance of more job security in the long term. The Union also obtained other improvements to the collective agreement, including wage increases.

The Employer received a number of substantial benefits from this arrangement as well. Reduction of 37 employees from the Guild's bargaining unit was a significant accomplishment for the Employer because, prior to the reorganization, even without the introduction of any new technology, the Employer felt that it was overstaffed. It was unable to easily reduce the number of its staff because there were a large number of employees with "job guarantees" (approximately 26 in the group that were bought out). In addition, there were other restrictive clauses in the collective agreement, such as a proliferation of classifications in the

bargaining unit and a prohibition on layoffs resulting from technological change. In agreeing to the 37 voluntary buyouts, the Union waived these various restrictions on staff reduction.

Although the Employer paid several million dollars for the buyouts, this one-time expense led to long term future savings which the Employer could not accomplish under the previous collective agreement without substantial negotiated changes. The end result appeared to be a good resolution for both parties with significant compromises and gains on both sides.

The buyouts were paid and the employees involved left permanently within the 12 month period stipulated. Many elements of the reorganization were implemented during the 12 months, but some aspects were not completed until more recently. In particular, a new system of taking customer calls called IVR CallPro, which was intended to be implemented during the year between September 16, 1999 and September 16, 2000, was in fact not completed until much later. This was due in part to the fact that the Employer lost its manager of information technology. For this and other reasons the Employer was unable to complete the various applications that were required to install the IVR CallPro system. Nevertheless, the buyouts and staff reductions that were associated with the introduction of IVR CallPro did occur within the 12 month period as stipulated.

Then came September 11, 2001. The event that destroyed the lives of many in America had significant impact around the world. It also affected the Times Colonist Newspaper. Prior to September 11, 2001 the Times Colonist had been experiencing some decline in revenue which is generated for this newspaper by circulation sales and advertising. Subsequent to September 11, because a number of customers of the Times Colonist were

significantly affected by world events, the Times Colonist noticed a further significant reduction in revenues. Advertising for travel, automotive and other businesses which were sensitive to these world events was in decline.

In response to this, CanWest, the current owner, and the Times Colonist decided that cost reductions would be required to deal with these new economic circumstances. The Employer concluded that approximately 10 employees in the Guild bargaining unit should be laid off, hopefully on a temporary basis, in order to reduce costs. The evidence that I heard on this point was uncontradicted.

The proposed layoffs which took effect December 17, 2001 were not as a result of the reorganization and various technological changes which had occurred earlier at the Times Colonist, but rather were a necessary business response to difficult economic circumstances that the Times Colonist found itself in. In fact, some of the managers who testified in this hearing indicated that they were very reluctant to agree to the layoffs because the Times Colonist would be short-staffed during the period of the layoffs and it was their sincere hope that all or some of the employees being laid off as of December 17, 2001 would be recalled in the future.

Some of the employees in this bargaining unit who were laid off in fact have accepted severance pay under the layoff provisions of the collective agreement, thus reducing the likelihood of recall, at least for those employees. Some have decided to pursue other employment or business opportunities.

II.

The Union's grievance claims that the layoffs were in violation of the collective agreement and the promises made to the Union in negotiating the reorganization and buyout program. It is based both on its interpretation of Letters of Understanding 20 and 21 as well as an estoppel argument based on the statements made by Mr. Smith and Mr. Henry when Southam owned the Times Colonist.

This case raises some difficult issues and is not easily resolved.

III.

The Union argues that throughout the course of all the discussions of buyouts and reorganization, the Union was repeatedly promised that there would be "no involuntary layoffs". The Union representatives who heard these assurances from Mr. Smith and Mr. Henry based on the experience at Pacific Press held an honest belief that these assurances meant during the term of this current collective agreement there would be no layoffs whatsoever for any reason. I have no doubt that the Union representatives honestly believed that to be the case.

On the other hand, from the evidence I heard, including the evidence of Mr. Henry, I conclude that it was not the intention of the Employer to guarantee jobs for all the employees who remained after the buyouts and reorganization took place. In the discussions leading up to agreement in principle on the reorganization and buyouts, the Employer representatives on occasion referred to what the alternative would be in the event that such an arrangement could not be achieved at the Times Colonist. They alluded to perhaps difficult

negotiations including attempts by the Employer to change the collective agreement, and involuntary layoffs. The arrangement which had been achieved at Pacific Press and which was being proposed for the Times Colonist was an alternative to these less attractive arrangements and would bring the Employer to its desired goal of streamlining operations in a co-operative manner.

I believe that the Employer's intent in referring to "no involuntary layoffs" at Pacific Press and suggesting the same would occur at the Times Colonist was to indicate that if the buyout and reorganization program was implemented at the Times Colonist layoffs would not be used as a technique for achieving the desired number of staff reductions at the Times Colonist at that time. These discussions were always in the context of the proposed reorganization and buyout. Neither party raised the issue of layoffs which might occur outside that context, for example, layoffs due to a decline in the volume of business.

I find that the understandings of the two parties were somewhat different on what it meant to say that there would be "no involuntary layoffs" and that the difference in understanding was bona fide on both parties' part. The Union representatives believed that they were being assured there would be no layoffs at all during the term of the collective agreement. The Employer representatives were merely indicating that the reorganization and buyout program, if successful, would mean that the Employer would not look to involuntary layoffs to accomplish those reorganization goals.

Under the current collective agreement, Article 6 states: (in part)

1. Except as provided elsewhere in this Agreement, there shall be no dismissal except for just and reasonable cause.
2. Management shall give two weeks' written notice to any employee who is to be laid off, or whose dismissal for just and reasonable cause is contemplated, or two weeks' pay in lieu of notice, except in the cases of gross misconduct where dismissal may be immediate.
3. a) The prerogative of the Management to reduce the force as necessitated by economic conditions shall be maintained and shall not be subject to grievance procedure under Article 4 provided that where there is reduction of force under the Technological Change Clause, Article 7, the Guild shall in such case have the right to Grievance Procedure under Article 4.
b) as far as it is possible and practicable to do so. Management agrees to give the Guild a minimum of 60 days notice of any such contemplated reduction in the force.
c) At least 60 days in advance of lay-off, the Management shall accept voluntary resignations from employees in the classifications involved. The number of employees laid off shall be reduced to the extent that the necessary payroll saving has been achieved by such resignations.
d) An employee laid off may elect within two weeks after the actual notice of dismissal to bump into a classification into which he/she has worked at the Times Colonist, provided not more than three years have passed since he/she worked in such classification. However, such employee may only displace an employee in that other classification when his/her years of service with the Times Colonist are greater than those of the employee being bumped. An employee thus displaced may similarly elect to bump into a lower classification in which the employee has worked, or the employee may elect to take severance pay provided by Article 8. An employee who bumps into a lower classification shall be paid the top minimum for that classification.
e) When Management reduces the work force, or an employee has been bumped, employees so laid off shall be placed on a recall list for the classification in which an employee worked when laid off for a period of one (1) year.

It is the responsibility of the laid off employee to observe the posting of vacancies on the bulletin boards for other classifications. Should a vacancy occur during the said one (1) year recall period in another classification, employees on the recall list shall not be recalled until internal employees with more seniority have exercised their rights.

A laid off employee shall notify the department Manager of their wish to be recalled to a posted vacancy.

Once internal employees have exercised their rights as stated above, the laid off employee shall be considered for recall, if he/she possesses the skills and/or abilities before an outside applicant.

- f) Recall in each classification for both permanent and temporary vacancies shall be in order of seniority subject to the provisions of Article 6, section 3 e) above.
- g) Every laid off employee, upon notification of - recall by the Management to the classification from which they were laid off, shall report for duty not more than 28 calendar days after receipt of such notification, and failure to comply shall cause such name to be struck off the recall list.

Furthermore Article 7 states: (in part)

1. Definition: Any change in technology, method a), or procedure b) during the period of a collective agreement which decreases the number of employees that existed when the current contract was negotiated with the Guild except for normal layoff, such as those occurring as a result of a decline in the volume of business:
 - a) e.g., hot metal to cold type,
 - b) e.g., change in computer operation.
2. Management guarantees to the Victoria-Vancouver Island Newspaper Guild that no present regular full-time or regular part-time employees will lose employment by the introduction of technological change. It is agreed that the number of employees as at January 1, 1998, was 217.
3. The Management has the right to introduce technological changes. Prior to so introducing, the Management shall

advise the Victoria-Vancouver Island Newspaper Guild and the Victoria Joint Council of Newspaper Unions. The Management will give the Guild three months' notice of any contemplated technological change and will meet with the Guild beginning no more than 10 days after such notice to discuss with their representatives the time, procedure and training necessary for the introduction of the contemplated change.

If the current layoffs were not a result of technological change and contrary to Article 7 of the collective agreement (the Union did not argue that they were), then the Employer has a *prima facie* right to lay off in accordance with Article 6(3)(a) which gives Management the “prerogative to reduce the workforce as necessitated by economic conditions”. The Union does not argue that the Employer does not have this right under the collective agreement but rather that the circumstances in negotiating the reorganization and buyouts created an estoppel which now precludes the Employer from relying on the right contained in the collective agreement, until the end of the collective agreement and its continuation.

In order to establish an estoppel, the principles are well set out. For example, in *Re District of Maple Ridge and CUPE, Local 622 et al.* [2001], B.C.L.R.B.D. No. 209 case, the Labour Relations Board set out the modern labour relations principles to be applied in an estoppel situation. The first is that there be an unequivocal representation on which the other party may reasonably rely:

“28 The issue of whether the modern doctrine of estoppel requires some form of unequivocal representation was addressed by the Board in *Conventions Unlimited*, B.C.L.R.B. No. B487/99. It is noteworthy that that decision was rendered by Vice Chair John Hall. He had earlier chaired the three person panel that rendered the decision in *B.C. Rail*. In *Conventions Unlimited*, Vice-Chair Hall, after noting that the “modern doctrine of estoppel” had been reviewed in *B.C. Rail*, went on to state that:

...while reliance is assessed from the perspective of the party raising the estoppel, there must still be unequivocal conduct...

...The doctrine [of estoppel] requires some form of “unequivocal conduct” by one party, as assessed from the perspective of the other party, which makes it inequitable for the former to enforce its strict legal rights...(paras 5 and 21, emphasis added)

29 We endorse Vice Chair Hall’s statement with the following qualification. When the Board assesses a party’s words or conduct to determine whether it is estopped, its fundamental concern is whether, from the perspective of the party alleging an estoppel, it was reasonable to rely on those words or conduct. As the Board stated in *Kelowna Daily Courier, A Division of Thomson Canada Limited/Thomson Canada Limitee*, B.C.L.R.B. No. B363/2000:

...While an estoppel may flow from an agreement (estoppel by convention), it is well established that it may also be founded upon conduct or behaviour that leads the other party reasonably to believe that an undertaking or commitment has been given ... (para 119, emphasis added)

30 Equivocal words or conduct do not give rise to an estoppel because it would not be reasonable for a party to rely on words or conduct of that character. Moreover, the context of the words or conduct may sometimes be important in determining whether it was reasonable for a party to believe that another party had given an undertaking or commitment. It is not unfair or unjust to permit a party to resile from a representation on which it was not reasonable for another party to rely.”

As the Employer correctly argues, the estoppel alleged here would take away an important right under the collective agreement (the Employer’s right in Article 6(3)(a) of the collective agreement to lay off as necessitated by economic conditions). Looking at it another way, it would give the union a significant job guarantee for employees in the bargaining unit for the term of the collective agreement. To reach this result there must be clear evidence to this

point. The evidence must show an estoppel based on a representation on which it was reasonable for the Union to rely.

I have some sympathy for the Union's concerns here and understand their dismay at having layoffs occur so soon after the reorganization and buyouts were concluded. Nevertheless, I cannot find that there was an unequivocal representation sufficient to create the estoppel claimed here. Nothing that the Employer said or did throughout all these discussions was intended by the Employer to give the Union the understanding that there would be no layoffs for any reason under the collective agreement. The Employer never said this and the Union never made a point of insisting on it as a term of the various documents that resulted in the reorganization and buyouts or the amendments to the collective agreement. The Union did not at any time during all these discussions indicate to the Employer that its understanding was that there would be no layoffs for any reason under the collective agreement. This issue could have been raised by the Union to clarify its understanding since collective bargaining spanned several months, and indeed amendments to Article 6(3) were actually proposed by the Union in the last round of bargaining. At no time did the Union suggest to the Employer that the Union was of the view that there could be no layoffs during the remainder of the collective agreement.

I do believe there was a mutual understanding, not written, that, once the Union agreed to the buyouts and reorganization in principle, the Employer would not use involuntary layoffs as an additional method of reducing the workforce in the circumstances facing the parties in 1998 and 1999. It was reasonable for the Union to rely on this element of the representations made to it. To this extent, the Union could succeed on an estoppel argument if the current layoffs were necessitated by the reorganization that occurred in 1999 and 2000. If this layoff

was merely a backhanded way of doing what the Employer promised it wouldn't do (ie. it promised there would be no involuntary layoffs associated with the reorganization), then the Employer would be estopped. I believe there was a mutual understanding to this degree and therefore, if I were to find that the current layoffs were as a result of the reorganization contemplated in 1998 and 1999 and not simply as a result of a decline in business for the Employer in 2001, I would find for the Union. However, I do not find, based on the evidence before me, that there was a representation by the Employer that there be no layoffs for any reason under the collective agreement. The statements made by the Employer did not, on their face, go that far, and therefore to that extent there can be no estoppel.

The Union's second argument is somewhat related to the estoppel argument: it is based on Letters of Understanding No. 20 and 21. Letter of Understanding No. 20 deals with the terms of the voluntary buyout; in Article 12 of that Letter of Understanding, it is clear that the buyout was to be completed within 12 months from the date of ratification of the collective agreement. Letter of Understanding No. 21 deals with various aspects of the reorganization and technological changes which were to occur subsequent to and during the buyout. Letter of Understanding No. 21 does not have a similar 12 month stipulation as Letter of Understanding No. 20, but there was a separate letter apart from the collective agreement, dated September 15, 1999 which clearly indicated that the reorganization was to be completed within the same 12-month period:

“3) No reorganization of the work shall be implemented until the day after the date of ratification of the collective agreement and the reorganization of work shall conclude 12 months from that date.”

The Union argues that, because certain aspects of the reorganization and technological changes were not completed within the 12 months as stipulated, the Employer was in breach of these terms of the collective agreement and the September 15, 1999 letter, and that, therefore, the layoffs which are now occurring are invalid to the extent that they flow from the reorganization. In other words, the Union argues that the Employer already got the benefit of the 37 voluntary buyouts which were in anticipation of various technological changes and reorganization and that now the current layoffs are a "second kick at the can" by the Employer; it achieves more net reductions of employees than the Union had bargained for.

I believe this argument, like the estoppel agreement, could also succeed if I were to find that the current layoffs were as a result of the same reorganization and technological changes which the parties agreed would be completed by September 16, 2000.

I agree with the Union that the Employer is in breach of the stipulation that there be a completion of the reorganization within 12 months. The Union argues that some aspects of the current layoffs are really part of the initial reorganization, e.g. the requirement to move some of the outside sales representatives' work to inside sales representatives where face-to-face contact is not required.

A more clear example is the late introduction of IVR CallPro. Some of the buyouts were clearly on the basis that there would be a requirement for fewer customer service representatives because the IVR CallPro system can handle approximately 20% of incoming calls to the Time Colonist, freeing up time from customer service representatives.

The Union is correct that the Employer has breached the 12 month aspect of the reorganization letter of understanding and "side letter". However, as with the estoppel argument, the more difficult aspect of this argument is whether any part of the current layoffs is a result of the reorganization as contemplated by the parties in 1998 and 1999, or whether the layoffs are simply as a result of the decline in business and the need of the Employer to reduce costs. The Employer argues that whatever reorganizing is now occurring (e.g. some outside sales' accounts going to inside sales representatives) is as a result of the current layoffs, not vice versa.

If I were to conclude that any part of the current layoffs was as a direct result of the reorganization contemplated in 1998 and 1999, I would find both an estoppel and a direct causal relationship with the violation of the 12 month clause in the side letter. To that degree I would find in favour of the Union.

However, I must conclude, based on the evidence before me, that the current layoffs were strictly as a result of a decline in business and not as a result of the reorganization and buyouts. The Employer's witnesses made it clear that the sole reason for the current layoffs was the sudden decline in business following the September 11th attacks on the United States and were not related to the reorganization. (This evidence was not controverted).

Indeed, subsequent to the reorganization being completed to the extent that it was, the Employer felt that the workforce fairly matched the work requirements at the Times Colonist. The reductions in staff which were associated with the technological changes such as IVR CallPro had already taken place within the 12 months as stipulated. In fact, in the area of customer service representatives, the Times Colonist was seriously understaffed because the

buyouts had occurred and the IVR CallPro system had not yet been implemented. The old system known as "Chatterbox" had not been functional for some time. The Union and Employer each achieved what was expected with respect to the introduction of IVR CallPro (albeit later than in 12 months).

I conclude that the current layoffs were not as a result of the reorganization or the reintroduction of IVR CallPro or any other changes contemplated during the reorganization; rather they were simply because of the sudden decline in business subsequent to September 11th. The reduction in customer service representatives as a result of this layoff is not because IVR CallPro was implemented recently. The staff reductions in the CSR group, in anticipation of IVR CallPro, already occurred as a result of the buyouts. The further layoffs that are occurring now will actually leave the CSR group significantly understaffed again. As much as the Union does not desire these layoffs, so the Employer does not desire them and hopes that they can be reversed in the near future.

If I were to find a link between the reorganization and the technological changes agreed in 1998 and 1999 and the current layoffs I would find in favour of the Union on both its arguments. The representations made to the Union did not go to the extent of guaranteeing no layoffs during the collective agreement but did indicate that involuntary layoffs would not be used to accomplish the reductions required for the reorganization. However, the current layoffs are not as a result of the reorganization.

I do find that the Employer is in breach of the collective agreement by not completing the reorganization in the appropriate 12 months; however the remedy which the

Union seeks, which is the rescission of some or all of these layoffs is not linked to that breach because the current layoffs are not related to the reorganization.

I do declare that should the Employer contemplate any layoffs as a result of further technological changes or reorganization contemplated by the initial reorganization or as a result of further reorganizations in addition to those contemplated by the initial reorganization, that those layoffs would be estopped in accordance with the Union's argument and would be a violation of the Letters of Understanding and the Side Letter, for the duration of this collective agreement. In other words, if the Employer decided next week to implement some new technology, or reorganize the workplace in addition to that contemplated in the 12-month reorganization, and lay off employees as a result, that would not be allowed for the term of this collective agreement.

Because the Employer has not done that in this case (ie. the current layoffs were not as a result of the initial matters contemplated by the reorganization, nor are they a new reorganization outside the 12 month period), I cannot find any further remedy in favour of the Union for the breach of the Employer in not completing the reorganization within 12 months. The grievance succeeds only to the extent of this declaration. The current layoffs involving 10 employees are not affected by this declaration.

"G. Somjen"

Arbitrator