

IN THE MATTER OF AN

ARBITRATION

BETWEEN:

**VICTORIA TIMES COLONIST, A Division of CANWEST
PUBLICATIONS LTD.,**

the "Employer"

AND:

**VICTORIA-VANCOUVER ISLAND NEWSPAPER GUILD LOCAL
30223; and, COMMUNICATION WORKERS OF AMERICA,
LOCAL 30403,**

jointly, the "Guild"

RE: **Telus Hot Edict / refusal to work**

AWARD

Arbitrator:	Rod Germaine
For the Guild:	Louis J. Zivot
For the Employer:	Michael H. Korbin
Hearing:	April 28 and 29, 2010; Victoria, B.C.
Award:	November 29, 2010

Introduction

1 The Employer publishes Victoria's major daily newspaper, the Times Colonist. In 2005, the Guild's members refused to perform work related to advertisements in the newspaper by Telus Corporation ("Telus"). The Employer grieved, alleging the refusal was an unlawful strike.

2 The Guild asserts an entitlement to refuse this work based on the struck work provision in the parties' collective agreement. Telus was embroiled in a labour dispute with its employees at the time, and its print advertisements had been declared hot by the BC Federation of Labour. The Employer disputes the application of the struck work clause. It seeks an award of damages.

3 The issue is therefore a matter of interpretation: did the refusal to work fall within the scope of the struck work provision in the parties' collective agreements? If so, the Guild and its members were entitled to refuse to perform the work and the grievance fails. If not, the grievance succeeds and the Employer is entitled to a remedy.

4 The Guild is a member of the Victoria Joint Council of Newspaper Unions (the "Joint Council"). In 2005 the Joint Council consisted of four trade unions representing five bargaining units. In the event the grievance succeeds, it is apparently agreed that liability will be shared by the trade union members of the Joint Council. The parties did not disclose the nature of this arrangement.

5 The provision to be interpreted is contained in the collective agreement of each of the trade unions certified to represent employees of the Times Colonist. In the Guild's agreement, it is Article 19(7)(a):

The Guild reserves for its members and itself the right to refuse to execute any work coming from or destined for delivery to any department of the Times Colonist, or any other newspaper, publication or wire services, or to any employer who furnishes supplies or material

required for the normal operation of the Times Colonist in any of its departments and which is involved in a lawful strike or lockout.

6 Although difficult, the interpretive issue is unremarkable. It is, however, closely related to a fundamental tenet of labour law: the prohibition of strikes during the term of a collective agreement. This proximity prevented the dispute from being arbitrated in the normal course. From the outset, the Employer sought to characterize the refusal to work as an unlawful strike. It applied to the Labour Relations Board (the “Board”) for a cease and desist order. The application failed but the Board ordered an expedited arbitration of the issues before this arbitration board: *Victoria Times Colonist Group Inc.*, BC LRB Decision No. B265/2005. An application by the Employer for reconsideration was dismissed: BCLRB Decision No. B168/2006. So were the Employer’s application for judicial review and the appeal of that decision: *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109; and, *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229.

7 The grievance was deferred by agreement pending the outcome of the Board and superior court proceedings, with two consequences. First, this expedited arbitration is probably the most delayed in history. Second, the legislative and policy context of the issues have been so thoroughly considered and discussed by the Board and superior courts that no further comment is required or warranted in this award. The Supreme Court decision of Ballance J. is especially informative.

8 The facts of the dispute were established by agreement and set out in an Agreed Statement. In addition, the Guild adduced extrinsic evidence. The parties have agreed that issues of remedy, if one is due, will be heard later.

Facts

9 The Times Colonist has a circulation of about 75,000 and enjoys a daily readership of approximately 150,000. Advertising revenues comprise close to 70 % of

the newspaper's total revenue. Advertisements by Telus and its related entities contribute significantly to the total.

10 Times Colonist employees represented by Joint Council trade unions perform the work of inserting the Telus advertisements into the newspaper. Guild members in sales and advertising are involved in the initial preparations. The Guild also represents the graphic artists who may be involved. Employees represented by other trade unions complete the process and perform all other work related to the printing, publication and distribution of the newspaper.

11 It is not clear when the Telus labour dispute began but, by July 2005, Telus had locked-out its employees represented by the Telecommunications Workers' Union. The dispute was described as "protracted" by Ballance J at paragraph 8. The Employer was a stranger to the Telus dispute.

12 On September 5, 2005, the BC Federation of Labour issued a hot declaration against Telus print advertising. In a letter dated September 6 to the trade unions at Vancouver's daily newspapers, the President of the BC Federation of Labour requested "the support of your members to respect the Federation's hot declaration". The hot declaration also applied to the Times Colonist. In another letter of the same date to the President of the Guild, the President of the BC Federation of Labour wrote:

Dear Chris:

Re: Hot Declaration on TELUS Print Ads

As you are already aware, the B.C. Federation of Labour has declared the Telus print ads in the Vancouver Sun and Province hot. We are declaring them hot as part of a multi-step strategy to put economic pressure on Telus to bargain fairly with the Telecommunications Workers' Union (TWU). Those workers have been locked-out by Telus for more than two months.

The Federation Officers have decided to expand that hot declaration to include the Times Colonist. We are contacting you to secure your union's support for expanding that hot declaration. I'm sure you can

appreciate the solidarity that your adherence to our hot declaration will have for TWU members. More importantly, your support will send a strong message to Telus management that it is time to end this dispute and negotiate in good faith with the TWU.

13 In a letter dated September 9 to Bob McKenzie, Publisher of the Times Colonist, the Joint Council gave the Employer notice of its intention to honour the hot declaration:

Dear Bob:

On Monday, September 5, 2005, the B.C. Federation of Labour issued a hot edict on Telus Corporation advertising.

As a result, and in accordance with our collective agreements, the unions, effective immediately, are exercising the right reserved for the unions and for our members to refuse to execute any work coming from or destined to Telus Corporation, or any related companies.

The letter was signed by officers of the four trade union members of the Joint Council.

14 Paragraphs 8 to 12 of the parties' Agreed Statement of Facts, in which the Employer is referred to as "TC", records the ensuing events:

8. After receiving the September 9, 2005 letter from the Joint Council, the TC contacted each of the unions at the TC to determine whether it was their position that their members would refuse to execute any work coming from or destined for Telus Corporation or its related companies and would refuse to handle any edition of the TC that contained Telus Ads. All of the unions confirmed that this was their position.
9. This meant that if the TC tried to publish any edition with Telus Ads included, the TC would have been unable to print or distribute its newspapers because the TC Unions and their members would have relied on the Hot Declaration and the collective agreement provisions in question to refuse to execute any work coming from or destined to Telus Corporation or its related companies and would refuse to handle any edition of the TC that contained Telus Ads.
10. Accordingly, while the hot declaration was in effect, the TC made the decision to print its editions without Telus Ads rather than be faced with a situation where it could not get its newspaper out at all on days where the edition would have included a Telus Ad. As a result, the TC did not run pre-booked Telus Ads in its editions on

September 17, 22, 23, 27 [and] 29, 2005. The editions on those days were normal editions for those days with the only change being the absence of these Telus Ads. It is the position of the TC that it lost advertising revenue... while the Hot Declaration was in effect...

11. Telus increased its advertising with competitors of the TC while the Hot Declaration was in effect.
12. On September 12, 2005, the TC filed an application with the Labour Relations Board seeking a cease and desist order. In addition, on September 13, 2005 the TC also filed grievances against all of the Unions under their respective collective agreements.

15 The grievance filed with the Guild was set out in a letter dated September 13 from Cindy Robertson, the Employer's Director of Human Resources:

We are in receipt of the Joint Council's letter dated September 9, 2005 advising of the Hot Edict relating to Telus Corporation and related companies.

As you know, we have nothing to do with the Telus labour dispute. We are disappointed that the Union would seek to import the prospect of a labour dispute into our workplace through the declaration of this Hot Edict. In our view, this Hot Edict will only hurt the Company and our employees.

As you know, we have applied to the Labour Relations Board for an Order that the Hot Edict is of no force and effect, and to compel the Union and its members to execute any work coming from or destined to Telus Corporation or any related companies.

In addition to that LRB application, we are filing this Grievance against the Union, and the other Unions at the... [Times Colonist]. The Hot Edict and the resultant, imminent refusal to work is a "strike" under the *Labour Relations Code*, and as such it is an illegal strike because the collective agreement between the Company and the Union is in full force and effect. As the *Labour Relation Code* says, all collective agreements are deemed to contain a provision that states that there must be no strikes or lockouts so long as this agreement continues to operate.

Therefore, by issuing the Hot Edict and encouraging the resultant and imminent refusal to work your Union is engaging in an illegal strike.

We understand that your Union is relying on Article 19(7)(a) of the Collective Agreement in issuing this Hot Edict. We dispute whether that provision gives your Union the right to issue the Hot Edict in the circumstances at hand. Further, even if the wording of the Collective Agreement supported the Union's position, the *Labour Relations Code*

says that if there is any conflict between a provision of the collective agreement and a requirement under the Code, the requirement under the Code prevails. Therefore, because the Code says there can be no strikes or lockouts, you cannot rely on the collective agreement provision to refuse to perform work as assigned and thereby engage in a strike.

* * *

To mitigate its damages, the...[Employer] has already had to pull one Telus ad due to the Hot Edict and the threat of this illegal strike. The ... [Employer] will seek to hold the Union fully responsible to compensate the ...[Employer] for all losses and damages suffered as a result of this Hot Edict....

16 On September 14, the Board convened a hearing at which the Joint Council voluntarily agreed to suspend the refusal to work. The Joint Council issued this bulletin:

Telus Ads Bulletin

At the request of Labour Relations Board Vice-Chairman Greg Mullaly, the Joint Council is temporarily suspending its refusal to execute any work coming from or destined for Telus Corporation or its related companies in accordance with the B.C. Federation of Labour hot edict.

This suspension is for the purpose of awaiting Vice-Chair Mullaly's decision on the jurisdiction of the Labour Relations Board, which is expected Friday, September 16, 2005.

The bulletin enabled the Employer to publish its September 15 edition with a Telus advertisement. But the Joint Council declined to extend the suspension beyond September 16.

17 In a decision dated September 26, the Board rejected the jurisdictional objection: Decision No. B256/2005. Vice Chair Mullaly held the Board had the jurisdiction to determine the Employer's complaint of a strike in contravention of Section 57 of the Code, as well as its application in the alternative under Section 70 for relief from the hot declaration.

18 On October 3, the Board issued Decision No. B265/2005 to which I have already referred (hereafter, the "original Board decision"). The Board rejected the Employer's principal argument that the refusal to work was an unlawful strike even if it was protected

by the struck work clause. However, the Board held the language of the clause did not clearly and unambiguously give the Joint Council and the employees the right to refuse the work in question. The Board issued a cease and desist order pending an expedited arbitration to determine the effect of the struck work clause. The following passages convey the gist of the decision:

- 10 Section 70 does not give employees the right to respect hot declarations. A union must bargain the right to do so. Absent such a provision in their collective agreement, employees who, during its term, refuse to do certain work as a result of a hot declaration would unquestionably be 'striking' and their employer could be entitled to damages for breach of that agreement.
- 29 ... Given the conclusion I have reached about how this dispute should be resolved (i.e., by arbitration), I will only state that I find, with some hesitation, the language of the Hot Edict provisions does not clearly and unambiguously give the Unions the right to refuse to handle Telus advertisements. Whether in fact it gives the Unions that right is an entirely different matter and I express no opinions about that.
- 34 ... The policy of the Board is that disputes about the meaning of collective agreement provisions are best decided by arbitrators and that should occur when it is possible: *Repap Carnaby Inc.*, BCLRB No. B31/94, (1994) 22 CLRBR (2d) 100, 94 CLLC ¶ 16,063. Accordingly, pursuant to Section 88 of the Code, I order that the dispute between the Unions and the Employer about... the meaning of the Hot Edict provisions in the Unions' collective agreements proceed to arbitration...
- 41 ...given that the Unions have not established with evidence and argument that they will suffer irreparable harm if I order Part 5 relief pending the outcome of the arbitration, I find that it would be appropriate to do so. Accordingly, I order that the Unions and their members cease to refuse to handle Telus advertisements pending the outcome of the expedited arbitration I have ordered.
- 43 ...when the Board decides to issue an interim cease and desist order against a union on the basis that it has not established that its collective agreement clearly and unambiguously gives its members the right to refuse to do certain work, the union should ordinarily be given the option of having the disputed language arbitrated on an expedited basis.

19 As noted, the Employer applied for reconsideration of this decision. When the Board upheld the decision, the Employer applied for judicial review and, when that application failed, the Employer appealed the judgment. The citations are provided in paragraph 6 above. Although ordered to expedited arbitration by the Board, the grievances commenced on September 13, 2005 were deferred by agreement between the parties for as long as the Employer pursued its primary position that the work stoppage was an unlawful strike regardless of the effect of the struck work provisions. The grievance against the Guild, which the parties agree is before this arbitration board, was thus referred to arbitration after the Court of Appeal issued its decision, 2009 BCCA 229, effectively upholding the Board's decisions.

20 The Telus labour dispute was settled in October or November 2005. Because of the cease and desist order issued pursuant to the original Board decision, the Employer was not subsequently affected by the Telus dispute or the B.C. Federation of Labour's Hot Declaration. In contrast, the hot declaration continued to apply to the Vancouver daily newspapers until the conclusion of the Telus dispute.

The alternative interpretations

21 The parties do not dispute the nature of the work the employees refused to perform in one sense. It entailed executing work from an employer involved in a lockout, within the meaning of those words in Article 19(7)(a). The differences between the parties lie elsewhere.

22 In addition, both of the interpretations advanced by the parties recognize that the clause is structured in two tiers or branches. In this respect, I reject the Employer's contention that the Guild advances a three-tier structure; the Guild's more expansive interpretation based on extrinsic evidence is readily incorporated into the first of the two

tiers. The structure may be illustrated as follows:

The Guild reserves for its members and itself the right to refuse to execute any work coming from or destined for delivery

- to any department of the Times Colonist, or any other newspaper, publication or wire services, or
- to any employer who furnishes supplies or material required for the normal operation of the Times Colonist in any of its departments

and which is involved in a lawful strike or lockout.

The meaning of both branches is disputed.

23 With regard to the first branch, the reference to other departments of the Times Colonist is not a factor in the dispute and little more will be said of it. The remaining words of this tier entitle the Guild and its members to refuse to perform work from or for certain other employers. The dispute is whether these employers are restricted to businesses in the newspaper or publication industry.

24 With regard to the second branch, the structure set out above reflects another agreement of the parties. As indicated, the words “furnishes supplies... required for the normal operation” of the newspaper modify only the second reference to employers, not the initial reference. The dispute is whether the Telus advertisements were “required” or essential in the sense intended by the clause.

25 The Employer acknowledges that Article 19(7)(a) “admits of some difficulties of interpretation” but says, on examination, its meaning is clear. The Employer submits the entitlement under the first branch is limited by the requirement that the work must be related to an employer in the newspaper and publishing sector. Although this restriction does not apply to the second branch, it is more restrictive because the employer referenced in the second tier must furnish essential supplies. The Employer says the rationale for the distinction is that, since disputes within the newspaper and publishing sector may impact the parties’ labour relations more directly, the trade unions have

negotiated a broader right to support employees in newspapers, publishing and wire services. The narrower right, the Employer contends, does not encompass advertisements.

26 The Guild emphasizes that the original Board decision was made without the benefit of any extrinsic evidence. Despite the Board's finding that the struck work clause "does not clearly and unambiguously give the Unions the right to refuse to handle Telus advertisements", the Guild, like the Employer, contends the language of the provision is clear. But the Guild says this is so "particularly in view of its history" and thus relies on extrinsic evidence. The Guild concedes that, to fully appreciate the impact of this evidence, it is necessary to read in additional words which are implicit in the clear meaning of the provision. To illustrate, the additional words are italicized and inserted at one of two or three locations which would equally reflect the Guild's interpretation:

The Guild reserves for its members and itself the right to refuse to execute any work coming from or destined for delivery

- to any department of the Times Colonist, or any *other employer*, other newspaper, publication or wire services, or
- to any employer who furnishes supplies or material required for the normal operation of the Times Colonist in any of its departments

and which is involved in a lawful strike or lockout.

In the Guild's submission, the Telus advertisements were "material required for the normal operation of the Times Colonist". This submission regarding the second tier of the clause does not entail any reference to extrinsic evidence.

Extrinsic evidence

27 As noted, the Employer contends the provision in dispute is clear and unambiguous. On this ground, the Employer submits extrinsic evidence is of no assistance to the Guild because it cannot be used to create rights not contained in the collective agreement. The argument is sound if the language of the clause is indeed clear and unambiguous: *University of British Columbia -and- CUPE, Local 116*, [2002]

BCCAAA No. 82 (Taylor), at paragraphs 22 to 25. But the initial finding regarding the clarity of the clause must be made in the context of both the contract language and the extrinsic evidence:

...there is no requirement or pre-condition that a party seeking to adduce extrinsic evidence must first establish a *bona fide* doubt or ambiguity on the face of the collective agreement prior to the arbitrator admitting the evidence. An arbitrator will accept the evidence when it is proffered (subject, of course, to the usual rules about relevancy and so on). The arbitrator is then able to consider both the language of the disputed provision and the extrinsic evidence when determining whether there is any *bona fide* doubt or ambiguity about the language of the agreement.

* * *

The fundamental point... is that arbitrators approach their interpretive task with a full appreciation of the circumstances relevant to the disputed contract language. The arbitrator may then determine how, if at all, the extrinsic evidence is of assistance. (*Nanaimo Times Ltd.*, BCLRB Decision No. B40/96, paragraphs 28 and 32)

Accordingly, I turn to the extrinsic evidence on which the Guild relies.

28 The Joint Council was formed in 1971 by the five trade unions which represented employees of the two separate newspapers then published by Victoria Press Limited: the Daily Times and the Colonist. Roger Stonebanks started working for the Daily Times in 1964 and participated in every round of bargaining from 1968 to 1995. Among the many positions he held with the Guild and the Joint Council over the years, Mr. Stonebanks was Co-Chair of the Joint Council from 1971 until 1985. He testified the Joint Council was established mainly for collective bargaining purposes. Under the Joint Council, each of the trade unions first negotiated its own individual matters – its “peculiar” – with the Employer. The Joint Council then bargained common matters, beginning with non-cost items and, finally, the cost items.

29 Struck work provisions have some history in the newspaper business. An award in 2000 involving the Vancouver dailies found such provisions dated back to the compositors’ 1945 collective agreement: *Pacific Press and CEP, Local 2000* (2000), 86 LAC (4th) 1 (Dorsey) (hereafter, the “2000 *Pacific Press*” award), at paragraph 13. But

the struck work provision did not appear in Victoria until the 1972-74 collective agreement between the Guild and Victoria Press Limited. The Guild negotiated it as a peculiar item and it appeared in the Guild contract only. Mr. Stonebanks does not recall any discussion of the provision in bargaining but conjectures that it was based on model contract language produced by the parent Newspaper Guild for its local unions. The language of the provision was:

The Guild reserves for its members the right to refuse to perform any work coming from or destined for other employers or publications where lawful lockouts recognized by The Newspaper Guild or lawful strikes authorized by The Newspaper Guild are in effect.

30 The Guild emphasizes the words “*any work* coming from or destined for *other employers...*” in the original provision. This language, it is submitted, was the foundation on which the Joint Council subsequently negotiated greater rights to refuse to perform struck work. On this basis, the contention is that the original language continues to express the intended breadth of the provision. It is also suggested that the language was borrowed from, and continues to bear the same meaning as, the struck work clause in the collective agreements negotiated for employees of the Vancouver daily newspapers:

The Union reserves to its members the right to refuse to execute any work coming from or destined for any other employer or publication which has been declared by the Union to be unfair. (as quoted in *Pacific Press Limited*, BCLRB Decision No. 140/85, at page 2).

31 The next round of bargaining was marked by a prolonged strike. Negotiations deadlocked and the strike began at the end of November 1974. The membership of the Joint Council trade unions published the “Victoria Express” newspaper three times a week for nearly six months. In April 1975, an Industrial Inquiry Commission was appointed. At the request of the Commissioner, the Joint Council delegated three representatives to conduct the bargaining. Although he was Co-chair of the Joint Council, Mr. Stonebanks was not one of the three representatives and he is therefore unable to speak to the bargaining table discussions which changed the struck work clause.

32 Two of the three representatives who negotiated the settlement were officers of trade unions which represented employees in the “back shop”, the printers and typographers. The revisions negotiated in this settlement appear to have addressed the interests of those employees. The clause also became a common term of all Joint Council collective agreements. The struck work clause, as it appeared in the 1974-75 Guild collective agreement, was as follows:

The Guild reserves for its members the right to refuse to execute any work coming from or destined for deliver to any department of Victoria Press Limited, or any other newspaper, publication or wire services, or to any employer who furnishes supplies or material required for the normal operation of Victoria Press Limited in any of its departments and which is involved in a lawful strike or lockout.

The provision thus assumed the structure it still retains. The revisions added the second tier regarding essential suppliers, which is referred to by the parties as the “ink and paper” language. The Joint Council viewed the changes as enhancing the entitlement to refuse to perform struck work. Mr. Stonebanks’ evidence to this effect is confirmed by an edition of the Guild’s newsletter, the Reporter, which highlighted the settlement in the spring of 1975. One of the highlights was described as “an expanded struck-work clause”.

33 The clause was invoked for the first time the following year. A sister organization of the Guild had organized Canadian Press and Broadcast News Ltd. (“Canadian Press”) and was conducting rotating strikes to secure a first contract. On July 30, 1976, at the request of the parent Newspaper Guild, the Guild declared Canadian Press hot. In its first bulletin, the Guild asserted that no Canadian Press copy or other content would be processed by its members and neither would any content be provided to Canadian Press. The Guild subsequently refined its message to emphasize that, under the struck work clause, it was for each individual member to decide whether to refuse to handle Canadian Press copy. Mr. Stonebanks testified that some Guild members refused and some continued to handle Canadian Press copy.

34 The response of the Employer was to protest that the work stoppages at Canadian Press were only “intermittent” and the wire service was “not closed by an official strike”. Three days later, on August 6, 1976, the Employer grieved. In a letter to the Guild’s President, the Employer’s General Manager, J. C. Melville, complained the “boycott” was contrary to the struck work clause. He said Victoria Press Limited did not “...accept that rotating strikes of a short duration occurring spasmodically in various Canadian Press offices constitute a legal strike affecting the output of the wire service 24 hours a day”. He asserted the struck work provision, “reserves the Guild’s right to refuse to execute work emanating from a source ‘which is involved in a legal strike or lockout’”.

35 The Guild endeavours to draw support from the Employer’s position in 1976. The Guild says the position, particularly the assertion that the struck work clause provides a right to refuse to execute work from a source involved in a strike or lockout, is consistent with the application of the provision to work from *any* struck employer.

36 The issue was apparently resolved, at least temporarily, in mid-August when Canadian Press scheduled some bargaining sessions and, in response, the job action was discontinued. But in October, when the bargaining did not produce an agreement, some Guild members resumed their refusal to deal with Canadian Press material. The evidence does not disclose when the job action was finally terminated or whether the 1976 grievance was ever arbitrated.

37 In May 1978, the struck work clause was again invoked by the Guild, this time in support of a sister local engaged in a strike against United Press International in the United States. This time, the Guild was careful from the outset to impress upon its members that they, as individuals, were entitled to handle “non-Canadian UPI copy”. Its bulletin to members concluded: “The Guild itself cannot order you to refuse to handle copy”. Mr. Stonebanks testified the impact was minimal, largely because “there was very little UPI news copy used in either newspaper”. He identified one Guild member who refused to handle US UPI copy. The Employer did not grieve.

38 In collective bargaining in 1981, the Joint Council proposed two changes to the struck work clause. As a result of the merger of the two Victoria newspapers in 1980, the Joint Council proposed that “the Times Colonist” be inserted to refer to the Employer. The purpose of the second proposal was to address the Guild’s demonstrated concern that only individual members could decide whether to refuse to perform struck work. The Joint Council sought to extend the right to the trade union as well as its members; it proposed to insert “and itself” immediately after “reserves for its members”. Both proposals were accepted by the Employer. This completed the evolution of the clause; the current language made its first appearance in the 1981-1983 collective agreements.

39 In September 1984, the struck work clause was invoked in support of employees of an advertiser for the first time. The request for assistance came from the trade union representing projectionists locked out by Famous Players Theatres, a trade union unrelated to the Guild. Joe Ravick, who was then the President of the Guild, testified theatres were among the “biggest advertisers” at the time and Famous Players placed ads in every edition of the paper. Nevertheless, in a letter dated September 20, 1984, Mr. Ravick informed management that the Guild and its members would “forthwith... refuse to execute any work coming directly or indirectly to the Times Colonist from the said Famous Players Theatres or its agents”. The refusal involved Guild members primarily but, in accordance with protocol, it was approved by the Joint Council.

40 The Employer protested. In a letter to Mr. Ravick dated October 19, 1984, the Publisher, Colin McCullough, raised a number of objections to what he described as the Joint Council’s “ban” on Famous Players advertising. He pointed out that it had not prevented Famous Players from advertising. Worse, it had driven Famous Players to advertise with competitors, thus delivering revenue to non-union operations and risking the permanent loss of an advertiser. Mr. McCullough also expressed concern about the impact on circulation and asked the Joint Council to reconsider the ban. But the refusal

to handle Famous Players advertisements continued until the Famous Players dispute was settled in December 1984. The Employer did not grieve.

41 The Guild emphasizes the absence of any argument by the Employer about the scope of the struck work clause or any complaint that Famous Players was not a newspaper or in the publishing industry. In the submission of the Guild, the parties' interpretation of the struck work provision in 1984 was consistent with the Employer's 1976 assertion that it permitted a refusal to perform work from any source involved in a lawful strike or lockout. It is very significant, the Guild contends, that in 1984 the Employer acted in accordance with this interpretation.

42 The only other occasion on which the struck work clause was invoked in connection with an advertiser was in 1986. The machinists' union was engaged in a collective bargaining dispute with certain automobile dealerships in Victoria. Mr. Ravick testified these businesses were also frequent advertisers. When the dispute resulted in a work stoppage, the Guild notified the Employer that its members would not handle advertising from the dealerships. In a letter to Mr. Stonebanks dated June 11, 1986, Mr. McCullough asked the Joint Council for relief: "In view of the serious economic impact this action could have on the total operation of the paper, I would ask that the Joint Council together consider the matter and its immediate as well as long-term consequences". The Guild emphasizes the Employer did not complain the struck work clause was inapplicable on the ground that the dealerships were not a newspaper or in the publishing business.

43 The Guild's notice respecting these advertisements caused a "fuss", to quote Mr. Stonebanks, because the Guild had acted unilaterally. One day later the job action was suspended pending a Joint Council meeting. When the Joint Council met a few days later, it deferred the matter because of a scheduled ratification vote. According to Mr. Stonebanks, the Joint Council was going to implement a refusal to work in accordance with the struck work clause but the ratification vote ended the machinists' dispute. Mr.

Stonebanks was unable to say whether any Guild member actually refused to perform work during the day or so the Guild's notice was in effect.

44 The parties commenced renewal bargaining in the fall of 1986. One of the Employer's proposals was to delete the struck work clause. The Guild relies on the arguments presented by the Employer at the time because they were about costs and potential losses to the newspaper and did not include any suggestion the provision did not apply to advertisements by an employer outside the newspaper or publishing industry. Among the recorded statements made by the Employer's spokesman in this round of bargaining was: "We have many serious concerns about the clause and the effects financially...[and] make it quite clear that if the clause stays, we would take a serious view of any losses and would take steps to protect ourselves". Nevertheless, the Guild submits the Employer's posture in this bargaining represented another confirmation that the provision is broader than merely newspaper and publishing employers.

45 The 1987 round of bargaining anticipated the enactment of section 4.1(1) of the *Industrial Relations Act, 1987*, SBC 1987, c. 24, the effect of which was to render "void" all struck work provisions. The settlement included a Letter of Understanding which retained the struck work clause as "part of the agreement if legal or legislative action is successful in overturning Section 4.1(1)". This LOU was renewed in the following round of bargaining in 1990.

46 In the 1992 bargaining, an Employer proposal would have removed any right to refuse to perform struck work. It was not restricted to employers in the newspaper or publishing industry or to businesses which furnish essential supplies. The proposal was not accepted and fell off the bargaining table but the Guild says it was significant because its terms reflected "what the... [Employer] felt was necessary to undo the existing clause". The language of the proposal was:

It is agreed that staff members and/or the union are not entitled to refuse to handle work or services coming from or destined for delivery to an employer or company which is involved in a strike or lockout.

47 This round of bargaining was prolonged, which made it possible for the parties to reinstate the struck work clause. Section 4.1(1) of the *Industrial Relations Act* was repealed by the enactment of the *Labour Relations Code*, SBC 1992, c. 82. The parties' final settlement reinserted the struck work clause into the collective agreements.

48 The next two rounds of renewal bargaining, for the 1994-98 and 1998-2002 collective agreements, did not include any reference to the struck work clause.

49 In the bargaining for the 2002-05 collective agreement, the Employer unsuccessfully proposed the deletion of the struck work clause. It then changed its bargaining position, proposing instead an amendment which would have allowed management to ensure the performance of "any work" refused under the struck work clause. This proposal was also unsuccessful but the Guild contends it further confirms a mutual understanding that the struck work clause allows the employees to refuse to perform work from any stuck employer.

50 Subsequent bargaining, including the negotiation of the collective agreement which governs this dispute, did not include any proposal or discussion respecting the struck work clause.

Applicable principles

51 There is no difference between the parties regarding the principles governing the interpretation process. While the Employer has cited awards supportive of the specific principles on which it relies, the Guild refers to general principles with an emphasis on the value of extrinsic evidence. The various principles cited and argued are compatible.

52 The object of the interpretive process is "to ascertain and give effect to the mutual intent of the parties": *Corporation of the City of Cranbrook*, BCLRB Decision No. B294/2001, as quoted in *Canwest Mediaworks Publications Inc.* (2009), 162 CLRBR

(2d) 252 (BCLRB No. B13/2009), at paragraph 53. The language used by the parties to express their agreement is the foremost indicator of their mutual intention. In *British Columbia Public School Employers' Association -and- BCTF*, [2008] BCCAAA No. 113, (hereafter, the “BCPSEA” award), Arbitrator Kinzie expressed this fundamental principle in the following terms:

In searching for the parties' intentions, arbitrators look first to the words they have used in their collective agreement to express those intentions. The parties are presumed to have intended what they have said. However, their words are not intended to be interpreted in isolation. Instead, they are to be read in the context of the collective agreement as a whole, giving them their normal and ordinary meaning unless to do so would lead to an absurdity or to an inconsistency with the rest of the collective agreement. See Brown & Beatty, *Canadian Labour Arbitration* (4th ed.), paras. 4:2100 and 2110. Harmony amongst the provisions in the agreement is desired and conflict and inconsistency is to be avoided. (paragraph 24)

See also *Canwest, supra*, at paragraph 53, quoting from *Cranbrook, supra*.

53 The Guild also cites *Kootenay-Columbia School District No. 20 -and- CUPE, Local 1285*, [2009] BCCAAA No. 153 (Burke), for further elaboration of the proper approach to interpreting a collective agreement. It, in turn, draws on the “rules of interpretation” enumerated in *Pacific Press -and- GCIU, Local 25-C*, [1995] BCCAAA No. 637 (Bird) (hereafter, the “1995 Pacific Press award”), at paragraph 27:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions, a harmonious interpretation is preferred rather than one that places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.

8. Where an agreement uses different words, one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.
(from *Kootenay-Columbia*, *supra*, at paragraph 34)

The Employer does not take issue with these principles. As will be seen, it relies on the second, fourth and fifth on the list.

54 The Guild refers to the considerations which guide an arbitrator's choice between alternative but defensible interpretations of the same language. In this regard, the award in *Kootenay-Columbia* quotes the oft-referenced passage from Brown & Beatty:

When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the purpose of the particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies. (Brown & Beatty, *Canadian Labour Arbitration* (4th ed.), paragraph 4:2100, as quoted in *Kootenay-Columbia*, paragraph 33)

55 The Guild's principal theme, however, concerns the third of the *1995 Pacific Press* principles: extrinsic evidence. The Guild begins with the proposition that the language of the provision is clear but, in view of the Board's reservations in this regard, the Guild contends the meaning is illuminated and confirmed by extrinsic evidence. Thus, the Guild cites several authorities on extrinsic evidence, beginning with *Peace River Coal Inc.*, [2009] BCAA No. 155 (Glass). That award relied on *Nanaimo Times*, *supra*, as have I, to admit extrinsic evidence so that it could be considered in conjunction with the disputed provision in order to assess the clarity of the language.

56 With regard to the proper use of extrinsic evidence, the Guild refers to the following passage from the *BCPSEA* award cited above:

Arbitrators can also have regard to various forms of extrinsic evidence if they conclude from the evidence they have heard that there is a *bona fide* doubt as to what the parties had intended... One source of such evidence is the exchanges the parties may have had across the bargaining table

when they negotiated the provisions in dispute. Another source is the manner in which the wording of those provisions has changed over successive collective agreements. A third source of such evidence is the practice the parties may have developed in applying the disputed provisions. The employer may have interpreted them in a particular way and the union, with knowledge of how the employer was interpreting and applying them, may not have objected or grieved. Such evidence would provide the arbitrator with evidence of what the parties mutually intended by the words they used in their collective agreement. (paragraph 25)

Of particular interest in this passage is the reference to the history of the disputed provision in earlier collective agreements. It is not often identified as a variety of extrinsic evidence but the Guild argues it is important in this case. The Guild also refers to the oft-cited limitations on the use of extrinsic evidence: *Board of School Trustees, School District No. 57 (Prince George)*, BCLRB Decision No. 41/76, as cited in both *BCPSEA, supra*, at paragraph 26, and *Canwest Mediaworks, supra*, at paragraphs 54 and 55; and, *John Bertram & Sons Co. (1967)*, 18 LAC 362 (Weiler).

57 The Guild makes an estoppel argument as well. Citing *Ryan v. Moore*, [2005] 2 SCR 53, the Guild submits that, on all of the evidence regarding the history of the struck work clause, the doctrine of estoppel by convention is established. Having regard to the changes to the provision in the 1970s, the subsequent practice and the parties bargaining in relation to the struck work clause, the Guild contends the Employer is estopped from disputing the Guild's interpretation of the provision.

Section 2 of the Code

58 The parties dispute the significance of Section 2 of the Code, which applies to arbitrators as well as the Board. Section 2 reads :

Duties under this Code

2 The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that

- (a) recognizes the rights and obligations of employees, employers and trade unions under this Code,
- (b) fosters the employment of workers in economically viable businesses,
- (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
- (d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,
- (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
- (f) minimizes the effects of labour disputes on persons who are not involved in those disputes,
- (g) ensures that the public interest is protected during labour disputes, and
- (h) encourages the use of mediation as a dispute resolution mechanism.

59 The Employer failed to persuade both the Board and the Courts that, due to amendments to Section 2 in 1987 and 2002, refusals to work under a struck work clause must now be treated as unlawful strikes. The Employer nevertheless insists that Section 2 bears on the interpretation of Article 19(7)(a). The argument is that, in the event the determination entails a choice between competing interpretations, the force of Section 2 is that it must support the Employer's interpretation.

60 The response of the Guild is to rely on the decision of the BC Supreme Court in *Victoria Times Colonist, supra*. In the course of rejecting the Employer's argument that the struck work clause was contrary to the Code, Ballance J. held that the 2002 change in the heading of Section 2 from "Purposes of the Code" to "Duties under this Code" was of no substantive importance. See paragraph 91. She went on to observe that:

The plain reading of s. 2 of the Code obliges the Board to exercise its powers and duties under the Code "in a manner" that recognizes, fosters,

encourages, promotes and minimizes certain realities and/or objectives derived from policy considerations in the labour context. I do not accept that the principles laid out in s. 2 themselves impose stand-alone duties under the Code in the sense urged by the petitioner, and I consider it somewhat misleading to characterize them in that way. They are principles which must inform the exercise of powers and duties carried out by the Board. It seems self-evident from a perusal of s. 2 that each listed principle will not necessarily arise in every exercise of a Board duty or power. It is equally clear that, in varying degrees, the principles represent competing interests or inherent tensions which require that the Board exercise a nuanced balance among those of the principles which happen to be engaged in any particular instance... The *Hansard* excerpts... refer to the fundamental principles in s. 2 of the Code... [A particular duty in one subsection] reflects but one of those objectives which, when it comes into play, must be balanced with the other objectives and without any pre-ordained paramountcy to any of them. (paragraph 103)

The Court of Appeal did not express any reservations regarding these comments. That being so, the Guild contends essentially that Section 2 does not affect the prevailing general principles of collective agreement interpretation.

61 For several years the labour relations community in BC has been aware of the elevated importance attributed to Section 2 by the Board. The Board's reconsideration decision in this matter devotes more time to defending this Board policy than to rejecting the Employer's application. As the judgment of Ballance J. demonstrates, however, the practical effect of the increased emphasis on Section 2 is not always easy to discern.

62 The Employer submits that Section 2 considerations should at least influence a determination of the meaning of disputed language if an arbitrator must choose between two plausible interpretations. The argument assumes that, after the appropriate "nuanced" balancing of the various duties, the net effect of Section 2 nevertheless favours one interpretation over another. If so, and as long as Section 2 does not altogether displace the other factors an arbitrator should take into account in those circumstances (see paragraph 54 above), it is difficult to disagree with the Employer's submission.

63 However, it is not necessary to come to any final decision in this respect. For the reasons which follow, the interpretation of Article 19(7)(a) does not involve two defensible or “linguistically permissible” interpretations (Brown & Beatty, *supra*).

Reasons

64 The Employer’s first argument is that a right to refuse to perform work during the term of a collective agreement must be expressed in clear and unequivocal contract language. This argument is based on the finding in the *2000 Pacific Press* award that struck work clauses are exceptional because they permit a mid-contract refusal to work:

A work refusal right is a fundamental departure from the basic bargain that employees work at the employer’s business for compensation and to further the employer’s business. The establishment and the extension of work refusal rights do not arise by happenstance. They are determinedly fought over and expressed carefully in collective agreements. (at paragraph 70)

65 The argument is sound in the sense that parties may be expected to define such rights with care. This is the fifth of the *1995 Pacific Press* principles: “A very important promise is likely to be clearly and unequivocally expressed”. Its application here is, as the Employer submits, consistent with the generally accepted proposition that important rights and benefits are usually expressed in clear language: *School District No. 37 (Delta) and CUPE, Local 1091* (1999), 85 LAC (4th) 33 (McPhillips); and, *Glenwood Label & Box Mfg. Ltd -and- CEP, Local 227*, [1997] BCCAAA No. 121 (Germaine).

66 Further, unlike a monetary benefit, the cost to the employer of a struck work clause does not generate any reciprocal gain to the employee, at least not directly. When the right to refuse to work is exercised, neither party derives any immediate benefit. This character of struck work clauses reinforces the need for an exacting and careful interpretation. I accept the Employer’s submission that this approach is illustrated by two awards in particular: the *2000 Pacific Press* award; and, *Brewers’ Distributor Ltd. -and- Brewery, Winery and Distillery Workers Union, Local 300*, [2000] BCCAAA No. 136

(Munroe). In both cases, the language of the clause in question was closely scrutinized and strictly applied.

67 In accordance with the authorities cited above, it is essential to start with the language to be interpreted, bearing in mind that the “parties are presumed to have intended what they have said” (*BCPSEA*, at paragraph 41). This is the second of the *1995 Pacific Press* principles: “The primary resource for an interpretation is the collective agreement”. Applying this principle, the words of Article 19(7)(a) do not pose any apparent difficulty. They are simple rather than sophisticated or difficult. The ordinary meaning of the words is not imprecise or vague. But, as different considerations pertain, the analysis must address the two branches of the clause separately.

First tier: work from any other newspaper etc.

68 The relevant words of the provision, on their plain and ordinary meaning, give the Guild and its members the right to refuse to perform work. The work is defined as emanating from or bound for certain employers engaged in a lawful strike or a lockout. The employers are plainly identified: aside from another department of the Employer itself, they are “any other” newspaper, publication or wire service. On the surface, I am unable to discern any ambiguity or *bona fide* doubt about the meaning of this language.

69 As I have said, however, the clarity of the language must be determined in the context of the extrinsic evidence. The extrinsic evidence in this case concerns only the first branch of the clause. The question is whether it remains as unambiguous in meaning when it is considered in conjunction with that evidence. This requires consideration of both the degree of any ambiguity in the language and the extent to which the extrinsic evidence is capable of reflecting the *mutual* intention of the parties: *School District No. 57, Prince George, supra*, as quoted in *Canwest Mediaworks, supra*.

70 The degree of ambiguity here is nil, and this conclusion is not affected by the extrinsic evidence. The most compelling aspect of the evidence is the Employer’s

response to the refusal to handle Famous Players' advertisements in 1984 and, more particularly, its failure to assert its present interpretation at that time. But the episode occurred more than 20 years prior to the events leading to this dispute. In my view, it is not safe to infer from the Employer's conduct in 1984 that it must have construed the struck work clause in the manner the Guild now contends it should be. There is no other evidence to support such an inference. The reality is that no one really knows how the Employer construed the provision in relation to the specific issue now in dispute. It is possible, for example, that the Employer regarded the work in question as captured by the second tier of the provision. More to the point, even if Employer believed the refusal was protected by the first tier, it was mistaken about the meaning of the relevant contractual language.

71 In other words, the fourth of the *1995 Pacific Press* principles is applicable: "Extrinsic evidence may clarify but not contradict a collective agreement". The situation is accurately depicted by the decision in *Nanaimo Times, supra*, as follows: "If the arbitrator decides, after considering both the collective agreement and the extrinsic evidence, that there is no *bona fide* doubt about the proper meaning of the clause in question, the arbitrator then reaches an interpretive judgment without regard to the extrinsic evidence" (at paragraph 29). As far as the first branch of the provision is concerned, I accept the Employer's submission that I would be creating a right not in the collective agreement if I were to conclude it protects a refusal to perform work from or for an employer outside of the newspaper or publishing industry. Such a decision is of course beyond my jurisdiction; see again Arbitrator Taylor's award in *University of British Columbia, supra*.

72 This conclusion is confirmed by two aspects of the Guild's case. First, as noted, the Guild concedes it is necessary to read the words "other employer" into the first tier of the provision. An invitation to imply additional words into the text of a contract term is almost invariably a request for an amendment. Second, the Guild submits the meaning of the provision in this respect is the same as the corresponding struck work clause at the

Vancouver daily newspapers. But the provision in question, quoted at paragraph 30 above, speaks to work from or for “any other employer or publication”. The difference is obvious and very basic; the Vancouver clause is specific and no additional words are required to extend it to work from employers outside the newspaper and publishing world. This comparison exposes the real character of the interpretation requested by the Guild; it seeks an amendment to change the scope of the struck work clause so that it corresponds to the struck work clause at the Vancouver dailies.

73 In case I have erred in my estimate of the clarity of the first tier of the provision, I will approach the extrinsic evidence as if the meaning of the relevant language were subject to *bona fide* doubt. This analysis must proceed in stages. First, to what extent is the extrinsic evidence properly considered? Second, if it is considered, does it provide any insight into the mutual intention of the parties in relation to the issue in this case? Third, if necessary, does the evidence establish an estoppel by convention which precludes the Employer from disputing the Guild’s interpretation?

74 As far as past practice is concerned, the Guild acknowledges the continued force of the venerable award in *John Bertram & Sons, supra*. It stipulated several “strict limitations” or “conditions” on the use of past practice. In accordance with more recent authority (*UBC and CUPE, Local 116*, [1977] 1 CanLBR 13 (BCLRB No. 42/76); *Nanaimo Times*), I have already considered the extrinsic evidence in my assessment of whether the meaning of the first branch is subject to doubt or ambiguity. *John Bertram & Sons* was referring to a different “use” of past practice; the award was about the use which may be made to clarify what the parties mutually intended by the language of their agreement. In this regard, the first limitation articulated in the award was that there must be “no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context” (page 368). If there is any doubt about the meaning of first tier of the struck work provision, it does not affect the possible interpretations equally. For the reasons canvassed above, the words and structure of the provision favour the Employer’s interpretation by a considerable margin.

The labour relations context does not undermine this conclusion. Because of the potential for these parties to be impacted by labour relations disputes in the same industry, it makes sense for them to circumscribe a struck work clause accordingly.

75 Therefore, on the authority of *John Bertram & Sons*, past practice cannot be used to assist the interpretation of the first tier of the clause. Further authority is supplied by *BC Ferry Corp. -and- BCF&MWU*, [1996] BCCAAA No. 386 (Kelleher), which observed that relying on past practice when the words and structure of a disputed provision clearly favour one interpretation amounts to varying contract terms: paragraph 30. In my view, the principle applies to other types of extrinsic evidence as well.

76 Even if the first tier of Article 19(7)(a) were more ambiguous, I am satisfied the extrinsic evidence in this case would not assist to establish the parties' mutual intention on the specific issue in dispute. Apart from the Famous Players episode in 1984, the effect of the evidence is most ambiguous.

77 Although the original language of the provision in the 1972-74 contract referenced "*any work*" from or for "*other employers or publications*", it was restricted in scope by the necessity for a lockout to be recognized, and for a strike to be authorized, by the Guild's parent organization. Given the industry orientation of the organization, it is probably safe to infer that few lockouts outside of the newspaper and publishing industry would be recognized and, further, only strikes within the industry would be authorized. In other words, although the history of a provision may well assist in some circumstances, the changes to the language of this struck work clause in the 1974-75 contract had little impact on the scope of the first branch of the provision; it continued to apply to work from or for employers in the same industry as the Employer. Contrary to the Guild's submission, then, it would appear the struck work clause in Victoria was always more narrow in scope than the corresponding Vancouver clause. This does not invalidate the Guild's 1975 assertion of "an expanded struck work clause" but the only real expansion was the addition of the second tier.

78 Next, as the Employer submits, the Joint Council's reliance on the clause in relation to strikes at Canadian Press in 1976 and UPI in the United States in 1978 is not relevant to the issue at hand. As wire services, both of those employers were expressly referenced in the first tier language. Further, the Guild's precipitous notice to the Employer in 1986 regarding automobile dealership advertising was rescinded too quickly to generate any useful guidance. Admittedly, the Employer's immediate reply did not question the application of the struck work clause to advertising by an employer outside the industry. But there is no evidence the Employer was confronted by an actual refusal to work which may have provoked it to review its position.

79 The balance of the extrinsic evidence consists of various communications and positions taken over the years from which I am invited to draw the inference that the Employer previously agreed with the Guild's interpretation. As comforting as these bargaining positions and other communications may have been to the Guild, they fall considerably short of extrinsic evidence capable of assisting with the interpretive issue at hand. It is settled law that extrinsic evidence is of no assistance unless it reveals the parties' mutual intention with respect to the specific issue of interpretation in dispute. Two statements of the principle will suffice:

Evidence of past practice must consist of a great deal more than evidence that a particular event occurred. At the least there must be evidence of a practice occurring in circumstances which would sustain the inference that the parties were *agreeing to a particular interpretation* of ambiguous language. (emphasis added; *Board of School Trustees of School District #38 (Richmond) -and- BCNU*, [1983] BCCAAA No. 16 (Hope), at paragraph 4)

...extrinsic evidence has value only if it supports a finding of a mutual intention in the parties with respect to a particular interpretation of particular language. (*Canada Safeway Ltd.-and- UFCW, Local 2000*, [1983] BCCAAA No. 19 (Hope), at paragraph 63, as quoted in *Peace River Coal Inc. and- IUOE, Local 115*, [2009] BCCAAA No. 155 (Glass), at paragraph 40)

The problem with the Guild's evidence is that it does not disclose that on any of the occasions identified the Employer actually considered - or reasonably must have

considered - the specific matter of whether the clause applies to work related to an employer outside the newspaper or publishing industry.

80 In 1976, the Employer was focused on intermittent and rotating work stoppages by employees of a wire service. There is no evidence from which to infer it was alive to the issue at hand when it composed its statements to the Joint Council. In 1986, the Employer sought to delete the provision; it was concerned about the potential damage of a refusal to work. The logical inference is that the Employer was thinking about a refusal of any kind, not the limits on the right to refuse which might arise from the nature of the struck employer's business. It was in this round of bargaining that the Employer expressly warned it would "take steps to protect" itself if the clause were invoked again with loss to the Employer. In 1992, the Employer was apparently bent on erasing any right to refuse to perform struck work. Without more evidence of Employer statements or explanations, it is not possible to ascertain whether the Employer compared its unsuccessful proposal with the scope of the existing clause. To find the proposal was intended to be equivalent but opposite to the struck work clause is conjecture at best. It is at least equally plausible to infer the Employer deliberately designed an excessively wide proposal to ensure the result it desired. In 2002, the Employer's proposal sought to neutralize the struck work clause by giving management the right to do "any work" the employees refused to perform. I am unable to discern how the use of the words "any work" in reference to work refused under the clause illustrates the Employer's conception of the scope of the struck work clause. In the absence of any other evidence, I cannot assume the proposal had any relationship with the specific issue at hand.

81 In sum, it is unclear whether the specific issue in dispute here was even a consideration in any of these circumstances. The evidence therefore fails to demonstrate any mutual intention with respect to whether the clause applies to work from a struck employer which is not a newspaper or in publishing.

82 There remain the events related to the Famous Players dispute. It is the only episode which does reflect a relevant interpretation of the struck work clause. It concerned advertising and an employer which was not a newspaper and not in publishing. Although the evidence of the duration of this refusal is not clear, it continued on and off for at least several weeks if not a few months. I agree with the Guild that it is significant the Employer did not then assert the interpretation it does in this proceeding and, indeed, did not even grieve the refusal to work. But does this evidence establish the parties' mutual intention with respect to the scope of the struck work clause?

83 The authorities caution against relying on a single event as past practice indicative of mutual intent. The reasons for the reticence are instructive; a "practice" is not established by isolated actions. At paragraph 4 of the award in the *School District #38 (Richmond)*, *supra*, Arbitrator Hope said:

The test of evidence of past practice was described in *Dominion Consolidated Truck Lines Limited and Teamsters Union Local 141* (1981), 28 LAC (2d) 45 (Adams). See the following comments extracted from context on page 49 and the authorities therein cited:

Rather we would find that where parties in collective bargaining refer to a "practice" they are referring to the accepted "way of doing things", their uniform and constant response to a recurring set of circumstances... But regardless of how it is initiated, like all binding past practices, the course of conduct must occur with sufficient regularity, and continue long enough to be accepted by both parties as the normal way of operating presently and in the future... The party asserting a practice bears the burden of proving it by clear and definite testimony.

The point has been reiterated many times. Arbitrator Bruce in *RNABC -and- OTEU, Local 15*, [1996] BCCAAA No. 160, at paragraph 64: "Arbitrators have consistently required evidence of a course of conduct that has been expressly or implicitly accepted by the parties as the proper or normal application of the Collective Agreement". Arbitrator Chertkow in *Greater Victoria Hospital Society -and- BCNU*, [1996] BCCAAA No. 212, at paragraph 75: "...one occurrence does not a past practice make". See also *Greater Vancouver Regional District -and- GVRDEU*, [1995] BCCAAA No. 186 (McPhillips), at paragraph 27.

84 In my view, it would require exceptional circumstances for one set of circumstances to be regarded as extrinsic evidence capable of demonstrating the mutual intention of the parties. The circumstances here were admittedly more than a single incident; as I have said, the relevant conduct persisted for a period of weeks or even a few months. In the circumstances, this does not change the caution which must be exercised when considering the value of the evidence.

85 As the Employer contends, the Famous Players lockout represented the only occasion on which the Guild can rely in the long history of the struck work clause. The Employer's reasons for accepting the work refusal 21 years prior to the events leading to this dispute are not in evidence. The Employer says the reasons may have had nothing to do with the issue of interpretation in this case. Support for this contention is found, coincidentally, in a decision of the Board which emanated from the Famous Players affair. *Famous Players Limited and Vancouver-New Westminster Newspaper Guild, Local 115 and Pacific Press et al*, BCLRB Decision No. 405/84, decided that Famous Players did not have standing to complain that employees of the Vancouver daily newspapers were engaged in an unlawful strike. The Board reasoned it was for the employer of the employees allegedly engaged in a strike to make the complaint and, in that respect, observed:

...there may be many reasons why an employer might choose not to complain of a work stoppage by its employees.... The labour relations motivations of an employer in either deciding to seek a determination that its employees are engaged in a strike or to decline for the time being to seek such relief may form an integral part of that employer's overall strategy in collective bargaining and in the administration of its own collective agreement. (page 4)

86 I am unable to conclude the Employer was conscious of any question about whether the clause applied to work emanating from employers not in the newspaper or publishing industry. The duration of the Famous Players lockout does not itself create any evidence the Employer had this issue in mind. The episode did not constitute a course of conduct and it was not of sufficient regularity to provide a foundation on which

Employer's awareness of the issue can be inferred. In the absence of evidence which supports a finding that the Employer was or should have been aware of the issue, whether directly or by implication, it is not possible to draw any interpretive assistance from the Famous Players events.

87 This conclusion brings me to the Guild's estoppel by argument. In this respect, the Employer urges continued compliance with the estoppel principles set out by the Board in *BC Rail Ltd.*, Decision No. C152/92, upheld on reconsideration by Decision No. B128/93. I am uncertain whether the Employer would have me ignore *Ryan v. Moore* even though it was decided by the Supreme Court of Canada over a decade after *BC Rail*. But I need not wade into the precise state of the law of estoppel in provincially regulated labour relations disputes because, even if I were to follow and apply *Ryan v. Moore* to the letter, it would not lead to the outcome desired by the Guild. I am satisfied the Guild's argument falls at the first hurdle.

88 In *Ryan v. Moore*, after reviewing authorities from the United Kingdom and Canada, the Supreme Court unanimously held the doctrine of estoppel by convention is based on three criteria. The first criterion is the distinctive piece; instead of an unequivocal representation by words or conduct,

The parties dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly). (emphasis in original, paragraph 59)

89 My conclusions in relation to the extrinsic evidence preclude any possibility of a shared assumption, or manifest representation of a mutual assumption, on the critical meaning of the struck work clause. The Guild and the Joint Council may have genuinely assumed it applied to any work from any struck employer but, for the reasons canvassed above, I cannot find the Employer shared that assumption. I need not repeat my analysis of the evidence; suffice it to say the evidence does not establish the Employer was even aware of the Guild's position that the clause applied to work from an employer not in a

newspaper, publishing or related business. As I assess it, the evidence does not establish that the Employer had a position on the matter. In the circumstances, there was no shared assumption and the estoppel argument therefore fails. The Employer is not estopped from disagreeing with the Guild's interpretation.

90 One further consideration confirms the Guild's interpretation must be rejected. As the Employer submits, it would render the second branch of the struck work clause entirely redundant. If the first branch of the struck work clause entitled the Guild and its members to refuse to perform any work from or for any employer involved in a strike or lockout, that entitlement would encompass work from or for a supplier of essential materials. The interpretation is therefore contrary to the seventh of the *1995 Pacific Press* principles: "All clauses and words in a collective agreement should be given meaning, if possible".

Second tier: work from or for a supplier of required material

91 The interpretive exercise in this respect is different from the process followed in relation to the first tier, principally because there is no extrinsic evidence. The Joint Council considered the addition of the second branch in 1975 to be an expansion of the rights afforded by the struck work clause. But, as far as the meaning of the language is concerned, there is no extrinsic evidence whatsoever. None of the Guild's witnesses participated in the negotiation of the language. Nor is there any suggestion of a relevant practice.

92 The Employer's interpretation proceeds from the restricted scope of the first tier. I have alluded to this position; the Employer contends the parties inserted more stringent requirements for the right to refuse to perform work from or for an employer outside of the newspaper or publishing industry. The rationale, it is submitted, is that such disputes have less potential to impact labour relations at the Times Colonist, any benefit to the employees would be "more remote". The stricter test is that the employer "must furnish supplies or material required for the normal operation of the Times Colonist". In the

submission of the Employer, an advertiser such as Telus does not furnish supplies or material in the sense intended by the clause. On the contrary, it is the Times Colonist which is furnishing advertising space. The Employer also submits the Telus advertisements were not required for the normal operation of the newspaper, and relies on the undisputed fact that the newspaper was published on each of the days Telus advertisements were not handled.

93 The Guild relies on the Employer's concession before the Board (BCLRB No. B265/2005, paragraph 3) that advertisements constitute "materials", which the Employer confirmed in this proceeding. In the Guild's submission, advertising can thus fall within the second tier of the clause. To deflect what it submits is the Employer's concentration on the word "furnishes", the Guild tenders a definition of "supply" from *The Canadian Oxford Dictionary*. The Guild submits the question of whether Telus advertisements are required for the normal operation of the Times Colonist does not depend on whether the newspaper could be published without those advertisements. The Company's position in this regard, it is submitted, erroneously isolates a single advertiser.

94 The one persuasive Guild argument is that the Employer posits the wrong test for whether the advertisements were required for the normal operation of the newspaper. I refer to the contention that the publication of the Times Colonist on the days the employees refused to handle Telus advertisements is proof the advertisements were not required. The argument would unduly restrict the scope of the provision to employers which happen to be the sole supplier of a material. The Employer is frank about this effect; it emphasizes that the words of the provision do not reference material "involved in" or "used" in the normal operation of the newspaper; rather, the material must be "required for" normal operation. The Employer also draws support from the words "any employer" at the beginning of the second branch of the provision, arguing this reinforces the implication that the right pertains to a single employer supplying all of the required material. And the Employer argues by way of example, referring to the two materials on which there is a consensus between the parties, ink and newsprint, because each is

generally secured from one supplier. The argument is that the right to refuse to perform work is thus reasonably and appropriately applied if there is a strike or lockout affecting the single employer responsible for the supply of materials. The refusal to execute the work would force the Employer to purchase the required material from an employer not embroiled in a labour dispute.

95 It is not clear on the evidence whether there are materials required for the operation of the Times Colonist which are sourced from more than one vendor. It would be surprising if there were none. But the Employer's interpretation would not allow employees to rely on the struck work clause in respect of work related to an employer supplying essential material if it happened to be one of several suppliers of the material. The rationale for this restriction offered by the Employer is not persuasive. The right to refuse would be no less "reasonable and appropriate" in scope if it did apply in such circumstances. Replacing the struck employer's supplies would presumably be less burdensome than replacing a monopoly supplier. And it would place pressure on the supplier in support of its employees, which is the purpose for which the clause was negotiated.

96 The Employer's interpretation, in my view, accords excessive meaning to the words "required for". The words modify "supplies or material" and I am unable to discern any reason why they should be construed to import the additional element of monopoly or sole source of the required material. I conclude the parties could not have intended such a meaning. Thus, I agree with the Guild's submission that the Employer engages an irrelevant test when it argues the publication of the Times Colonist without Telus advertisements is proof that the advertisements were not required. The test should focus on whether the material is required regardless of whether the employer furnishing the material is the sole supplier or one of many.

97 The Guild's remaining arguments are not as persuasive. The alternative definition of "furnishes" simply adds two relevant meanings the Employer would likely embrace:

“provide or furnish (a thing needed)” or “provide (a person etc. with a thing needed)”. Each conveys the meaning on which the Employer relies. The related definition of “supplies” in *The Canadian Oxford Dictionary* includes a specific meaning the Employer would hasten to adopt: “food or other materials necessary for maintenance or for a specific activity”.

98 To test the Employer’s interpretation, it will be helpful to consider what Telus furnishes when it places advertisements. It may provide a form of the advertisement in a more or less complete state of preparation for insertion into the newspaper. If so, the purpose is to secure the service which Telus is purchasing. I agree with the Employer in this regard. The substance of the transaction is that the Employer is selling a service – the publication of advertisements. If Telus is furnishing or supplying anything, it is only revenue. But that is not the intent of the word “furnishes” in the phrase “furnishes supplies or material required for the normal operation of the Times Colonist”. The plain and ordinary meaning conveyed by “furnishes” in this context is, as the Employer contends, to sell and supply something to the Employer which is used and essential to the composing, printing and publication of the newspaper. The agreed examples of ink and newsprint illustrate this, and the above definition of “supplies” is consistent with this sense of the phrase.

99 In short, the word “furnishes” contemplates a transaction in which the Employer pays for materials it needs, not a transaction in which the Employer provides a service in exchange for revenue it receives. Telus did not furnish any material in the sense intended. The second tier of the struck work clause is therefore not available to protect the refusal to handle Telus advertisements.

Conclusion

100 Article 19(7)(a) entitles the Guild and its members to refuse to perform work from or for an employer involved in a strike or lockout. But it is a limited right. The provision

breaks down into two branches or tiers, each of which defines the scope of the right by restricting the employers in relation to which the entitlement may be exercised. Under the first branch, the employer must be a newspaper, or in publishing or a wire service. Under the second, the employer must sell and supply to the Employer something which is used and required to compose, print and distribute the newspaper. Telus did not fall into either of these categories. Article 19(7)(a) therefore did not apply to the work related to Telus advertisements in 2005; the refusal to perform that work was a violation of the collective agreement.

101 Since an advertiser does not fall within the second category, it follows that the only possible advertisements the Guild and its members may refuse to handle are advertisements from employers in the newspaper or publishing industry. I recognize the Guild has long believed the right to refuse to perform struck work applied to advertisements more broadly. But, for the reasons given, neither the Guild nor the Joint Council has yet negotiated an entitlement to refuse to perform work associated with advertisements from employers which are not newspapers, publishers or wire services.

102 The grievance therefore succeeds. I retain jurisdiction to determine any remedial matters the parties are unable to resolve by agreement, as well as any other issue related to this Award.

103 Dated in Vancouver, British Columbia, this 29th day of November 2010.



Rod Germaine, Arbitrator