

IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

BLACK PRESS GROUP LTD.

(the “Employer”)

-and-

UNIFOR, LOCAL 2000

(the “Union”)

(Chilliwack Progress Jurisdiction Grievance)

ARBITRATOR: John B. Hall

APPEARANCES: Jessica Thomson and Craig T. Munroe,
for the Employer
William Clements, for the Union

HEARING DATES: February 8, 9, 10 & 26 and
November 1, 2 & 3, 2021
May 2, 3, 4 & 6, 2022
(all by video conference)

AWARD: May 25, 2022

AWARD

I. INTRODUCTION

The Employer made a number of significant changes to its operations throughout British Columbia when revenue “fell off a cliff” in March of 2020 due to the Covid-19 pandemic. The changes included layoffs throughout the organization. At one of its newspapers, the Chilliwack Progress, the Employer decided to offer the vacant editor position to a bargaining unit reporter who would otherwise have been subject to layoff. The reporter, Paul Henderson, accepted employment in the excluded position and a more senior reporter was laid off.

Mr. Henderson had been a highly productive reporter and had previously served in the acting editor role (a bargaining unit position). The Employer recognized there would be a “trade-off” if Mr. Henderson became the editor because there are limits on the extent to which management personnel may perform bargaining unit work. Article 4.01 is a strong jurisdictional clause which provides in part that work within the departments covered by the Collective Agreement “... shall be assigned within the jurisdiction of the Union”. There is, however, an exception in a Letter of Agreement (the “LOA”) which allows management personnel to perform bargaining unit work “... if it was established as a past practice and does not eliminate or involuntarily reduce the hours of bargaining unit jobs”.

The Union filed a policy grievance on May 25, 2020 which complained of “[m]anagement conducting bargaining unit work” based on news stories Mr. Henderson had written and published on seven days during that month. It maintained that the stories were not “breaking news or editorials/columns as per past practice”. The dispute was not resolved in the grievance procedure and was eventually referred to arbitration.

Reduced to its essential elements, the Union maintains that Mr. Henderson, while editor, has continued to investigate, compose and publish news copy at a substantial rate comparable to a

fulltime reporter.¹ It submits his publishing record is different “both in kind and volume” as compared to the story writing that was occasionally performed by previous editors. More specifically, it says Mr. Henderson’s work as editor has included a *de facto* crime and court reporting “beat” which was a major focus of his work while a reporter. The Union additionally maintains that Mr. Henderson’s continued performance of this work has resulted in the involuntary loss of hours to the bargaining unit. It accordingly submits that neither of the two conditions in the LOA have been met and the Employer has breached the Collective Agreement. It seeks several forms of relief, including the posting of a bargaining unit position.

The Employer responds by arguing that Mr. Henderson’s writing as an editor is an established past practice. More specifically, it says editors at the Chilliwack Progress and other newspapers in the Black Press group have written various types of stories and news articles both before and after the LOA was negotiated in 1996. The Employer maintains further that there are no “qualitative or quantitative restrictions” on the extent to which management personnel may perform bargaining unit work. With respect to the second condition in the LOA, it says Mr. Henderson’s writing has not resulted in the elimination or reduction of any bargaining unit jobs. Rather, the layoffs and reduced hours of work were due to the pandemic and there was no “causal link” with Mr. Henderson’s writing. Alternatively, the Employer submits the Union should be estopped from seeking a remedy under the current Collective Agreement because it has acquiesced to the longstanding practice of editors writing news content.

The parties led a considerable body of evidence over 10 days of testimony from 10 witnesses (three called by the Union and seven called by the Employer). Not surprisingly, there was considerable duplication to many aspects of the evidence. Much time was spent reviewing the number and types of news articles written by previous editors. In some instances, this included an individual examination of innumerable articles over a period of years. Several areas of the evidence do not bear directly on the issues raised by the grievance. They have nonetheless been helpful in providing context for the dispute, especially as they relate to the changing nature of news

¹ The bargaining unit position in the Collective Agreement wage schedules is actually called “Journalist”. However, both reporters and editors who testified regard themselves as “journalists”. In part for this reason, and unless required by the context, I will refer to the bargaining unit position in this award as “reporter”. That term was also used frequently by all witnesses at arbitration.

publication and the challenges faced by the Employer's community newspaper operations. The changes include reductions over time to the frequency of print publication, a move to continuous "web first" publication with shorter stories online, and the adoption of social media.

In the course of my deliberations, I have thoroughly reviewed some 340 pages of notes from the hearing, the associated exhibits, and the comprehensive written submissions of counsel. The dispute ultimately turns on the issue of what is meant by the phrase "if it was established as a past practice" in the LOA. This award will only set out the evidence and submissions which have best served to guide my inquiry into that question of interpretation.

II. GENERAL BACKGROUND

The Black Press group is a Canadian publishing company which owns and operates a number of publications, including the Chilliwack Progress in Chilliwack, British Columbia. Its employees are covered by a Collective Agreement with the Union which also applies to seven other newspapers in the Lower Mainland: Surrey Now Leader, Maple Ridge News, Langley Advance Times, Abbotsford News, Hope Standard, Peace Arch News, and Mission City Record, as well as the Classifieds Call Centre. The most recent Collective Agreement had a term from January 1, 2016 to December 31, 2020 and remains in force and effect pursuant to a continuation clause.

Under the Coverage clause in the Collective Agreement (Article 3.01), the scope of the Union's bargaining unit at the Chilliwack Progress is described as all employees "except the Publisher, Editor, General Manager, Circulation Manager, Ad Manager and Stringers who work less than ten (10) hours per week". The composition of the bargaining units at the other newspapers covered by the same Collective Agreement are separately and uniquely described.

The Chilliwack Progress is a community newspaper published in print once a week which has a focus on local content. It is also published online on a regular basis now that the newspaper has moved to a "web first" method of news delivery. Prior to the Covid-19 pandemic (the impact

of which will be described more fully below), the print edition was published twice weekly. It is delivered free of charge to homes, businesses and various newspaper stalls. The newspapers' revenues are derived solely from print ads, online ads, flyer inserts, classified ads and obituaries. About 90% of total revenue is generated by the print edition, as compared to a relatively small fraction which comes from the online publication. The level of advertising effectively determines the size of the newspaper. More specifically, it drives the number of pages and the amount of space which is available to be filled with news content.

There are presently three Journalists (i.e., reporters) in the Chilliwack Progress bargaining unit. A fourth journalist left in 2021 and was not replaced. All are very senior and experienced individuals, and are capable of reporting (and are expected to report) on the diverse areas of news covered by the Chilliwack Progress. That said, reporters generally have regular areas or "beats" which they cover such as: city events and Council meetings; School Board meetings; community and health issues; crime and court; arts and entertainment; and, sports. All do general reporting as well and will cover "breaking news". As the Union maintains, the core function of a reporter's job is to gather news and write stories for publication. This includes investigating a news story through research, interviews and their knowledge of a specific area. Reporters now take photographs and create video content which becomes part of their stories, particularly for publication online. The reporters may be assigned stories by the editor and they are also responsible for developing their own stories.

The excluded editor is responsible for managing the news room and providing editorial direction. This breaks down into many tasks and roles. The position is more formally called "Multi Media Editor" and a job description entered in evidence lists some 20 "key responsibilities". In addition to developing longer term growth and engagement strategies for the newspaper, they include:

- Lead and develop communication strategies and ideas across all key media platforms (Print, Online & Social Media)
- Manage deadlines
- Assign all relevant story text, including photos & pictures galleries along with video clips on a daily basis. Ensure that all journalists are participating in all aspects of writing, social media post, etc.

- Allocate print space for story text, photos, and illustrations according to space parameters and copy significance, using knowledge of layout principles
- Review and approve all story proofs prior to publication
- Proof copy to detect and correct errors in spelling, grammar, punctuation and syntax on all media platforms

Nowhere in the job description is there a primary responsibility for news gathering on the part of editors.² However, editors do write content for the Chilliwack Progress and other Black Press newspapers. This includes “editorials” (which reflect the view of the newspaper), “columns” (setting out personal opinions of the editor) and news stories. The extent to which editors have historically written news content lies at the heart of the present dispute and will be explored at length in a later part of this award. However, it can be said at this juncture, that it has not been the role of an editor to create news articles on a regular or routine basis.

III. NEGOTIATION OF THE LOA

The LOA was negotiated during the round of collective bargaining which led to the parties’ 1995-2002 Collective Agreement (although at the time the business was owned by a predecessor entity referred to as “Trinity”). Three witnesses gave evidence about the negotiations. Eileen Jarrett was a reporter who was active in the Union and part of its bargaining team. The Employer’s committee included Randy Blair, who has since become the CEO of Black Press, and Robin Clarke, who has since become its Vice-President of Human Resources. Aside from one discrepancy which no longer forms part of the Union’s case, there was no material divergence in their recollections regarding how the LOA was developed.

Prior to 1995, there were a number of different collective agreements across the Lower Mainland which included bargaining units for non-mechanical positions as well as craft unions. Some sites had two collective agreements while employees at some sites were non-union. The industry was undergoing significant change at the time. Among other things, the Macintosh

² Of some 20 “key responsibilities” in the job description, the only references to editors writing are in respect of editing press releases or other materials submitted for publication and creating content on key special supplements assigned by the Publisher.

computer had been introduced with “off the shelf software” that was highly disruptive to the traditional printing operation which required had highly skilled compositors. Some wage rates were very high and there were a lot of “demarcations” in the workplace. The company and the unions recognized that they needed to embrace the new technology and, moreover, needed flexibility for that purpose. They ultimately moved to a single master agreement.

Each party had their respective concerns. Among other things, the company wanted to use technology and remove barriers, while the unions wanted some non-union reporters voluntarily recognized as part of the bargaining unit. The company was open to this eventuality but wanted to ensure new “barriers” were not created. Its newsrooms were relatively small and editors did many different tasks including some reporting. The company wanted to ensure that this flexibility continued. Mr. Blair testified that the round of collective bargaining “was about the future” and he identified a document which the company tabled in February of 1995 setting out its “vision”. It read in part:

Like many businesses today, in a variety of industries, we are faced with rapid change. This change is largely a result of the major advances being made in electronic technology. We too, are going into a new era of technology which will ultimately determine whether or not we are able to survive. If we are to survive, and we certainly intend to, we need to compete on a level playing field against a “bigger player” with more resources and overall lower labor costs in the areas where we directly compete.

In order to survive, we must be more agile, more customer sensitive and better able to react to competitive changes in the marketplace. For that to happen we must avail ourselves of more current technology, remove long standing jurisdictional hurdles and come to grips with the next new reality of change. We must do what is right – not just for now, but for the future as well.

It is not necessary to review the exchanges which led to a document dated April 18, 1996 and recorded various “understandings” reached with the assistance of a mediator at the Labour Relations Board. The second point dealt with the subject of “Jurisdiction” (italics added):

2. Jurisdiction - *bargaining unit to be expanded by adding editorial, classified, artists, and (ad control to be determined) in those sites where these positions not in union*

- *parties to negotiate a “seamless environment” including: (but limited to) editors to manage pagination managers to have limited flexibility to do barg unit work (details to be determined)*
- all work currently covered in agreement and new evolving work

Mr. Blair testified that voluntary recognition of non-union reporters (and certain other positions) was “a big ask” by the unions. The company could agree provided there was a “seamless workplace” and managers could continue to perform what would become bargaining unit work. In this respect, he stated there were “no limits” on the type of reporting that could be done by management personnel. The company sought to ensure as part of the “seamless environment” that editors, and in some cases publishers, continued to do the work they had done prior to voluntary recognition. In the case of editors, the amount of news writing they did, and also the type of reporting they did, varied from site to site so there was no way to quantify their news writing. The parties through their discussions came to recognize the pre-existing state of affairs as “past practice”. This gave comfort to the company that the flexibility it wanted would continue. On the other side, the unions wanted some constraint, and it was agreed that management doing bargaining unit work could not cause an involuntary reduction in hours of work. The various exchanges during the negotiations, and the evolution of the LOA, are summarized by the Employer at paragraph 26 of its written argument:

- a. May 1, 1996 – Company Proposal: “Department managers at individual sites will be permitted to perform bargaining unit work consistent with past practice”.
- b. May 7, 1996 – Company Proposal: “Management personnel may perform bargaining unit work if it was established as a past practice and does not eliminate bargaining unit jobs in the respective department”.
- c. May 7, 1996 – Union Proposal: “Department Managers at individual sites will be permitted to perform bargaining unit work for instructional purposes and in exceptional circumstances”.
- d. May 8, 1996 – Company Proposal: “Management personnel may perform bargaining unit work if it was established as a past practice and does not eliminate bargaining unit jobs in the respective department.”

- e. May 9, 1996 – Final Agreement: “Management personnel may perform bargaining unit work if it was established as a past practice and does not eliminate or involuntarily reduce the hours of bargaining unit jobs. Management personnel referred to above are as defined in the collective agreement”.

There is no extrinsic evidence which can be relied upon for purposes of determining what the parties mutually intended when they referred to “past practice” beyond the words they used in the LOA.

The LOA (then No. 4) was signed off on March 31, 1997. At least one other LOA which the parties finalized in the same round of negotiations referred expressly to named individuals performing certain duties at a specific newspaper. That LOA expired upon the termination of employment of the incumbents.

The LOA is now No. 1 in the most recent Collective Agreement. There have been “housekeeping” changes during the intervening years but no substantive or material amendment to the language now under consideration. At no point during any of these renewals³ did the Union raise a concern over management personnel performing bargaining unit work or, more specifically, with editors writing news content.

IV. THE PANDEMIC AND LAYOFFS

As with many operations throughout the world, the Covid-19 pandemic caused significant disruption to the community newspaper business and lead to broad-based structural changes throughout the Employer’s operations. On March 16, 2020 (a Monday), the President and CEO of Black Press Media, Rick O’Connor, sent an email to members of management headed “Business issues related to COVID 19 disruption”. The requirement to implement cost-cutting measures was abundantly plain. The first two paragraphs read:

³ The subsequent Collective Agreements had terms from April 1, 2002 to March 31, 2006; April 1, 2006 to March 31, 2010; and April 1, 2010 to December 31, 2015.

The impact of the disruption caused by the Coronavirus Pandemic has been swift and severe. As you are all dealing with front line issues, you are experiencing this and know that we will have to pivot our business model as the impact on revenue worsens.

As a result, we need to conserve our financial resources more than ever. Effective immediately, please discontinue all business travel except where required in emergency situations, Conference calls, emails and Video Conference may be used to substitute for business travel. Also, effective immediately, please freeze all discretionary spending outside of wages and benefits, necessary supplies and required overhead costs, It may be necessary to run inventory levels below normal thresholds. Also, effective immediately there needs to be a freeze on all new hiring including replacement positions unless authorized in advance by myself.

The Province of British Columbia declared a state of emergency as a result of the pandemic two days later. Mr. O'Connor wrote a letter to all publishers on March 20 (the Friday) which included the decision to reduce publication to once per week and addressed the layoffs of staff:

We are living in unprecedented times brought about by the implications of the COVID 19 Global Pandemic. Orders from various levels of government has greatly affected our daily lives and interrupted the normal commerce we do and the revenue drop off for media companies like ours is precipitous.

While the need for accurate and timely news has never been greater, *we are taking the step of reducing our frequency in markets where we publish free newspapers twice per week.* We view this move as a temporary measure brought about by the implications of the extraordinary times we are currently living in. In addition, *we are undertaking to do temporary layoffs of many of our colleagues.* We will continue to provide our benefits package to those affected employees during this interruption in their employment with us.

For those who are being laid off, it is not an indication in any way of the value of their work. It is simply an economic move to try and deal with a steep drop off of revenue. We hope that this will be for a short period of time and that we can get through this crisis ready to serve our readers and customers when life returns to normal. (italics added)

Management worked “around the clock” during the week of March 16 to address the impact of the pandemic. Revenue “fell off a cliff overnight” and the Employer needed to implement drastic measures to meet ongoing financial commitments. Changes were made throughout the organization, including: the reduced publication frequency; the layoffs of 144

employees (including excluded staff) across the Province; and a reduction in hours for those who remained, including editors. Without subsequent recourse to government funding, there would have been even more reductions.

At the time, the Chilliwack Progress had more reporters than comparable Black Press newspapers in the Lower Mainland and elsewhere. It was decided to reduce the reporter complement by two; reduce sales staff by two; and layoff a circulation clerk. Mr. Henderson was the most junior reporter, followed by Eric Welsh. The editor position was vacant at the time.

Before continuing with the narrative of the pandemic, it is appropriate to digress and elaborate on Mr. Henderson's employment history with the Chilliwack Progress. He had previously been a reporter with a competing newspaper, the Chilliwack Times, which the Employer acquired in 2013. The newspapers were run concurrently until they were merged in 2017. Mr. Henderson was the only reporter with the Times at that point, and he was offered and accepted a position with the Progress. He had strong links to the local community and was a recognized crime and court reporter – an area which had not been regularly filled at the Chilliwack Progress since a reporter with a strength in those areas had retired in 2013.

The editor of the Chilliwack Progress, Greg Knill, retired in February of 2019. Mr. Henderson sent an email on March 1, 2019 to Andrew Holota, the Editorial Director at Black Press Media, which he described as a “formal application for the job of editor at the Chilliwack Progress”. That said, Mr. Henderson was plainly ambivalent about the change, and added almost immediately, “but to be frank, I’m not sure I want it”. His hesitation resulted from his desire to continue writing news stories, and he stated “I can’t picture doing the job of editor while losing my production as a reporter”. Mr. Henderson recognized that allowing him to continue to do some of the things he was already doing might be “a serious if impossible human relations challenge”.

Mr. Holota responded in a short email, appreciating Mr. Henderson's interest in the editor position but nothing developed on that front. Nonetheless, not long after, Mr. Henderson was appointed as the acting editor. This is a position in the bargaining unit and he had previously filled the editor role when Mr. Knill was on vacation. However, the extent of the demands from serving

as acting editor on a regular basis became too much for Mr. Henderson to manage. He wrote Mr. Holota on October 4, 2019 to advise that he was “starting to break down” from doing the two roles of editor and reporter. What Mr. Henderson did not know when he wrote the email was that the Employer was on the cusp of hiring an external candidate as the permanent editor for the Chilliwack Progress. Unfortunately, the individual’s tenure lasted only a few weeks and she departed around Christmas. Mr. Henderson was again appointed acting editor but made a conscious effort to do less reporting. He was still in the acting editor position when the pandemic began.

Returning to the narrative, Mr. Welsh (the next junior reporter at the Chilliwack Progress after Mr. Henderson) was issued layoff notice on Friday, March 20 along with numerous employees throughout the organization. Ms. Clarke was told to “hold off” issuing a layoff notice to Mr. Henderson. She did not think anything about this direction at the time due to the high volume of layoffs and other matters she was having to address. In fact, more senior management had decided to offer the editor position at the Chilliwack Progress to Mr. Henderson because they wanted someone in a leadership position. Mr. Holota testified that this was a recognized “trade-off” because the Employer expected to lose much of Mr. Henderson’s news writing production.

Mr. Blair and Ms. Clarke had a telephone conference call with Jennifer Moreau, the Union’s Secretary-Treasurer, on the morning of March 20 in order to advise of the pending layoffs at Black Press, including those at the Chilliwack Progress. Ms. Moreau testified that she “definitely felt empathy for what [they] were going through”. She realized, however, that Mr. Welsh was the only reporter being laid off in Chilliwack and that this would be out of seniority order. She spoke with Mr. Welsh later that day and learned he would object to being laid off. Ms. Moreau accordingly contacted the local shop steward and instructed her to file a grievance. Ms. Moreau informed the Employer of this step late that day and the Employer advised on March 22 (the Sunday) that “[w]e will be rescinding the layoff for Eric Welsh that was delivered on the Friday”.

When Mr. Blair and Ms. Clarke spoke with Ms. Moreau on the morning of March 20, they knew that Mr. Henderson would be offered the position of permanent editor at the Chilliwack

Progress. However, the offer of employment had yet to be communicated to him, and they did not believe it would be appropriate in those circumstances to disclose the pending offer. As events unfolded, Mr. Holota spoke with Mr. Henderson at some point on the Friday (March 20) and a letter of employment was finalized late in the day. Mr. Henderson agreed to accept the editor position and returned the signed document on the Saturday (March 21) so that he could start work as the editor on the Monday.

Mr. Welsh was issued a new notice of layoff on Monday, March 23. He had by then become the most junior reporter because Mr. Henderson was no longer in the bargaining unit. I accept without reservation the testimony of both Mr. Blair and Ms. Clarke that Mr. Henderson would have been laid off as well had he not chosen to accept the promotion to full time editor.

Ms. Moreau learned on the morning of March 23 that Mr. Henderson had been promoted and emailed Mr. Blair:

I've just been informed by the shop steward that Paul was promoted to editor by my shop steward, who is off sick. This is just a reminder that he cannot do bargaining unit work now if he is out of the union. That means no stories reporters would typically cover, no covering courts, no COVID-19 stories etc.

Mr. Blair responded briefly as follows:

Good Morning Jennifer,
Paul Henderson, as the editor of the Chilliwack Progress, will continue to cover breaking news as did Greg Knill and other previous editors under this collective agreement.

There were two further emails that day on the subject. However, nothing ultimately turns on the exchange and I find Mr. Blair was not intending through his brief responses to fully articulate the Employer's position regarding the extent to which editors may write news content.

The parties entered into a Work-Sharing Agreement under the auspices of Employment and Social Development Canada. This resulted in Mr. Welsh being recalled to work on or about April 6, 2020 (i.e., he was laid off for two weeks). The four reporters who were then employed

by the Chilliwack Progress were all part of a “work-sharing unit” which was reduced from five days to three days a week. Mr. Henderson was part of an editorial unit with the Employer which experienced a similar reduction in days of work. These work-sharing arrangements continued until the fall of 2020 when all Black Press jobs around the Province were brought back to full time once the election was called.

The Union seeks to make much of the Employer’s decision to promote Mr. Henderson to editor so he would not be laid off as the junior reporter. It argues in part:

As the timing of these events makes clear, the purpose of the Employer’s rescission and second layoff was to ensure that Paul Henderson continued to work for the Employer. Further, as the record makes clear, and as will be developed further, the Employer sought to ensure that Paul Henderson continued his work as a Journalist.

Indeed, prior to Eric’s layoffs, Black Press had decided to retain Paul Henderson even in the event of layoff. Direction was given to “hold off” on laying off Mr. Henderson, and a way was then found to retain him as an employee.

Black Press had a special interest in protecting Paul Henderson. Among other things, Paul Henderson had a long history as a successful crime reporter and court reporter, and he has been able to garner significant traffic on Black Press’s online platforms. As Randy Blair remarked when the layoff of Eric Welsh out of seniority was brought up by the Union on the morning of March 20, 2020, Mr. Henderson could “drive the digital audience.” (written argument at paras. 42-44; references to the record omitted)

Despite what the Union believes to be a suspicious – if not an improper – chain events, I find there was nothing objectively untoward about the Employer’s decision to promote Mr. Henderson. The Employer’s witnesses acknowledged that the decision to layoff Mr. Welsh before Mr. Henderson had accepted the editor position was a “mistake” and matters would have been handled differently “with the benefit of hindsight”. Namely, both of the reporters could have been laid off and this would not have precluded the editor position being offered to Mr. Henderson. Some allowance must be made for the extenuating circumstances being faced by the Employer and, moreover, it was entirely reasonable to select Mr. Henderson. Mr. Blair believed very strongly that the Chilliwack Progress needed to appoint an editor to lead the newsroom and be the face of the newspaper in this unprecedented environment. As one of the Union’s witnesses stated,

“people want to know who is in charge and who to complain to [at the newspaper]”. The same witness had previously found it “a little stressful without an editor”. Mr. Henderson was a logical choice given his past experience as acting editor and, on the evidence, he was the only person readily available.

In any event, the grievance before me is not about the layoff of Mr. Welsh and the retention of Mr. Henderson in March of 2020. The grievance was filed about two months later and concerns the extent to which Mr. Henderson may write news content now that he is the full time editor.

V. NEWS CONTENT WRITTEN BY OTHER EDITORS

Various witnesses called by both parties provided their views on the extent to which editors have written news content. Set out below are the more salient points from the testimony of four Employer witnesses who have occupied the position in the past.

(a) Greg Knill

Mr. Knill was the editor at the Chilliwack Progress from 2004 until his retirement in February of 2019. He had previously been an editor for 10-12 years at other newspapers. Mr. Knill testified, however, that he always considered himself to be a journalist. He did not “surrender journalist skills” when he became an editor, although “obviously the roles changed”.

As editor of the Chilliwack Progress, Mr. Knill wrote content when he could, depending on the size of the paper and his responsibilities elsewhere. Those responsibilities impacted his ability to cover events and write features. Mr. Knill testified that he tried to write at least one editorial a week depending on the circumstances and also wrote columns. He additionally wrote “all kinds” of news content while he was editor, which he described generally as “anything that needed to be done”. The topics included sports, politics, community events, breaking news and features, as well as re-writing press releases. In the run up to elections, Mr. Knill might write candidate profiles and, on election night, the newsroom was “all hands on deck. He did not do

court reporting based on his view that it is a specialty which he was not comfortable covering. Some of his writing resulted from “found stories”; e.g., attending an after hours event by invitation because he was the editor which led to an article or unexpectedly coming across a scenario which was newsworthy.

Several of Mr. Knill’s stories placed in evidence reflected his interest in military history and veterans. One of these features which he wrote won second place in its category at the Canadian Newspaper Awards. Mr. Knill regularly covered Remembrance Day events which were held at three locations in Chilliwack while a reporter attended at a different location. When asked in direct examination whether there were any restrictions on the news he wrote, Mr. Knill replied, “Just my time, there were none”. He later stated, “No one has ever complained to me about writing stories, going out to assignments or taking pictures -- it was a normal part of my practice [as editor]”.

In cross-examination, Mr. Knill acknowledged that some of the writing he did was due to the reporter who ordinarily covered the area (e.g., a Council or School Board meeting) not being available because “it is important to cover community events”. Fridays were also a challenge as one reporter who worked Saturdays had the day off. In those circumstances, the “preferred option” would be to see if another reporter was available. However, the newsroom “is a team” and, if something needs coverage regardless of the day, “we do our best to ensure coverage”. This is consistent with the testimony of a bargaining unit reporter who stated that Mr. Knill was regarded as “a helpful addition to the newsroom”.

Mr. Knill was directed to eight crime or court stories which Mr. Henderson wrote between June 12 and 25, 2020. He agreed they were very typical of what Mr. Henderson had written while working as a reporter. He agreed further that the number of Mr. Henderson’s stories was “much more” than he ever produced during an equivalent period when employed as editor at the Chilliwack Progress.

(b) Frank Bucholtz

Mr. Bucholtz was the editor of the Langley Times from 1999 until his retirement in 2015. He had previously worked at other newspapers as both a reporter and an editor after retiring, he continued working for the Employer in various roles, including column writing, until the start of the pandemic.

Mr. Bucholtz testified that he “wrote continuously” while he was the editor in Langley. He identified the various “beats” which existed and were covered by reporters. Sometimes in a particular beat, the work would become more than one individual could handle and he would “backstop”. For example, he has an interest in politics, and he would write Council candidate profiles. He was also expected as editor to attend quite a few types of local events, some of which were on weekends, and he would cover the event at the same time for the newspaper. These events included presentations by Provincial and Federal politicians. He also had an interest in transportation and wrote “quite a bit” on local developments. However, he was not the only person covering transportation.

Mr. Bucholtz was asked whether he believed there were any restrictions on his ability to write news stories, and replied:

Reporters were the primary gatherers of news and that’s what happened. [In] instances where [reporters] were not available or there was too much work, [I would write]. So we took a team approach. If someone needed help, maybe another reporter would help. But if no one was available, then maybe I’d help them.

Mr. Bucholtz explained there is a wide variety of community news and stated he did not consider the type of news when deciding to write a story. He said additionally that “I did not contribute a lot” and only wrote in a beat usually covered by a reporter “on very rare occasions”. One example he gave was covering a Council meeting when the regular reporter was on sick leave and other reporters had their own assignments. He remarked, “Someone had to cover [the meeting] and no one else was available”.

Mr. Bucholtz estimated that his writing on politics was “maybe 40%” of what would be done by other reporters, depending on the season. Election cycles are a particularly intense time when the paper took “an all hands on deck approach”. As a consequence, he would write more “because [we] needed everyone”. He estimated that his writing on transportation was “maybe 25%” of what the reporters contributed.

Like other witnesses, Mr. Bucholtz was taken in detail through numerous stories he wrote while editor, in his case from May 5, 2011 to May 26, 2015. On many dates, and consistent with his general overview, the stories were written because: the regular reporter was unavailable or did not have time; the subject was of personal interest to him or resulted from personal contacts; the story was “breaking news” to be published online; he had been representing the newspaper at an event; or, he collaborated with a reporter on the story.

Towards the end of his direct testimony, Mr. Bucholtz again emphasized that he worked with reporters “as a team”. In his view, it is “essential” that editors in a community newspaper write content because “a lot needs to be covered and by everyone in the newsroom”. In his experience, it has always been this way at the Employer’s newspapers where he has worked as both a journalist and an editor, including the predecessor operations. He repeated that he did not perceive any restrictions on his ability to write, and added “[i]t is considered part of the job as editor”.

In cross-examination, Mr. Bucholtz confirmed the various duties of the editor position and said that dealing with the public is a “significant part” of the job. He agreed with the proposition that the majority of news reporting is done by reporters and he was the “backstop”. As editor, he did not have a specific beat like reporters, but did write a fair number of political stories (especially candidate profiles) and wrote a number on transportation. However, those areas were “shared” with reporters.

(c) Andrew Holota

Mr. Holota has been the Employer's Editorial Director for Western Canada since 2017. He was editor at the Abbotsford News from 2009 to 2017, and had previously been editor at other newspapers in the Black Press group (or its predecessor), including the Chilliwack Progress, going back to the mid-1980s. He began working in the industry as a photographer in 1977.

Mr. Holota explained the various factors which apply when an editor is considering whether to write news content or stories, and stated there is no limit on the number or type. He allowed that there is a "wide spectrum"; that is, "some [editors] don't write much at all [while] others may take on quite a bit". He said limitations would be problematic because they would "hamstring production and [our] ability to respond rapidly [which] is the name of the game now" with online digital publication. Mr. Holota gave his definitions of "breaking news", "soft news" and "hard news" (although the latter categories are not completely delineated) and maintained editors may write "everything".

Mr. Holota was directed in cross-examination to the list of key responsibilities for the position of Multi Media Editor at Black Press. He agreed that the job description aligns with his own experience working as an editor and reflects what is done by the Employer's editors generally. He further agreed that the primary responsibility for news gathering falls on reporters who have areas of focus or specialization. Conversely, editors don't have beats because of their broad responsibilities.

Towards the end of his cross-examination, Mr. Holota was questioned about the difference in the practices between small newsrooms with only one or two persons and larger newsrooms with more reporters. He agreed that in a one person newsroom, the individual will do a lot of news writing as well as things which fall to the editor and "being solo" means handling portions of both jobs. Mr. Holota agreed as well that the style and interest of an individual also made a difference as to how they might write as an editor. For instance, he did not do much writing at either Chilliwack or Abbotsford, with the exception of special projects; further, there was a lot of editing to do in both newsrooms because reporters created a lot of content. In comparison, he said Messrs.

Buckholz and Knill did more writing and, while subjective, were “at the high end” because it was “established practice”.

(d) Kevin Mills

Mr. Mills has been the editor at the Mission City Record since 2015. He previously had experience elsewhere as an editor and worked as a journalist for 20 years at the Abbotsford News.

There was one reporter in Mission when Mr. Mills became the editor. The reporter submitted her resignation a few months later and was not replaced. At times, reporters from Abbotsford wrote in Mission but the work was mostly done by Mr. Mills. He explained, “I did pretty much everything and there were some stories like sports that came from Abbotsford”. Mr. Mills estimated that he wrote 70% of the content in Mission and wrote “whatever need[ed] to be done”. Then, in 2020, a reporter “came over” from Abbotsford to Mission and started writing stories for Mr. Mills. The two individuals now “do everything” as “the editorial team” depending on who is available and how many stories are needed. Mr. Mills said the addition of the reporter has resulted in him doing less writing and having more time for other aspects of his editor role but it has not been a major change.

Mr. Mills also gave evidence regarding the extent to which two editors at the Abbotsford News wrote stories while he was a reporter at that location. He recalled that Gord Kurenoff had a regular column, wrote sports and entertainment stories, and “kept his hand in with the writing”. He conceded reporters wrote “for the most part” but added “anyone could write”. The next Abbotsford editor recounted by Mr. Mills was Rick Rake. He did not write much beyond editorials and columns except for stories about some community events where he was involved. The third Abbotsford editor described by Mr. Mills was Andy Holota. He wrote a few stories” but his normal approach was to assign writing to reporters. More generally, Mr. Mills stated it is a “fluid industry” with some editors writing a lot and others writing less.

VI. INTERPRETATION OF THE LOA

Both parties cite the familiar “rules of interpretation” summarized in *Pacific Press*, [1995] BCCAAA No. 637 (Bird). I accordingly turn to the “primary resource” in any interpretative dispute; namely, the language used by the parties in their Collective Agreement. Article 4.01 provides the Union with express jurisdictional protections over work previously or presently performed by employees in the bargaining unit:

ARTICLE 4 – JURISDICTION

- 4.01** The kind of work previously or presently performed within the departments covered by this Agreement, as described in Article 3, and new or additional work assigned to be performed by employees within said departments is recognized as the jurisdiction of the Union and shall be assigned within the jurisdiction of the Union.
- 4.02** New or additional work which results from the installation of equipment and/or adoption of processes designed a substitute for, or evolution of, work previously or presently performed by employees within the said departments is recognized as the jurisdiction of the Union and shall be assigned within the jurisdiction of the Union.

The specific classification of “Journalist” forms part of the Collective Agreement in the Article 52 wage scales. Letter of Agreement No. 9 is also relevant. It permits editorial employees (i.e., reporters) to “self-assign” breaking news stories “as and when they happen”, including outside their regular shift schedule. This Letter of Understanding recognizes that “... the editor may not always be available to assign a reporter to cover these stories”. This supports the Union’s position that the editor’s function is to assign news stories to reporters and to review their work, with the news content being written by Journalists.

There is, however, the exception created by the LOA and the relevant language is now reproduced in full:

RE: OPERATIONAL PROCEDURES

Notwithstanding the jurisdiction language in this Collective Agreement, the parties agree that there shall be no jurisdictional issues raised by any of the parties to this Collective Agreement in respect to work assignments in the various departments, with the exception of disputes as to whether bargaining unit work is being performed by someone other than members of the Unions.

General

The Company agrees it will not subcontract any work unless it is unavoidable and in no case will it result in the layoff of regular full-time or part-time employees.

Management personnel may perform bargaining unit work if it was established as a past practice and does not eliminate or involuntarily reduce the hours of bargaining unit jobs.

Management personnel referred to above are as defined in the Collective Agreement

Even in the absence of language restricting the ability of excluded personnel to perform bargaining unit work, arbitrators will apply limitations: *Irwin Toy Ltd. -and- United Steelworkers of America (Bargaining Unit Grievance)* (1982), 6 LAC (3d) 328 (Burkett). In considering the exception created by the LOA, I have been guided by the analysis found in *Kamloops -and- CUPE, Local 900*, [1996] BCCAAA No. 611 (Germaine). Among other things, exceptions to limitations on management's right to assign bargaining unit work outside of the unit should not be extended in a manner "which would substantially derogate from the limitation itself" (para. 79).

This is not a case of shared or overlapping work in the traditional sense where work has been performed by both bargaining unit and management personnel and there is no contractual language addressing jurisdiction. Article 4.01 states explicitly that bargaining unit work "... shall be assigned within the jurisdiction of the Union" (italics added). The LOA is an override ("Notwithstanding the jurisdiction language in this Collective Agreement ...") which contains an exception for disputes over whether work is being performed by someone other than members of the Union. Two conditions must be present for the exception to apply. Management personnel may perform bargaining unit work if: (a) it was established as a past practice, and (b) does not eliminate or involuntarily reduce the hours of bargaining unit jobs. One can conceive of situations where only one of these conditions has been satisfied; however, that will not allow the exception to operate. For example, even if bargaining unit hours have not been reduced, the news writing

normally carried out by reporters remains protected bargaining unit work and may not be performed by management personnel to a greater extent than established by past practice.

The LOA provides further that the “management personnel” in question are “as defined in the Collective Agreement”. In this regard, the Employer points to Article 43.01 which states the term “manager” shall refer to excluded personnel. This leads to Article 3.01 where the scope of the bargaining unit is described and each individual newspaper is listed “except” certain positions. The exclusions typically list the Editor and/or Publisher among the positions.

The immediate question becomes what is meant by the first condition of “if it was established as a past practice”. The Union no longer maintains that this captures only management personnel who were in place when the LOA was negotiated. Such a position would be untenable given the specific exceptions made for named individuals in other letters of agreement which were negotiated at the same time. Moreover, the Collective Agreement has been renewed on several occasions without material amendment. I find whatever unchallenged practices have developed over the period leading to the most recent renewal additionally constitute “a past practice” for purposes of the LOA. Further, as the Collective Agreement covers a single bargaining unit, past practice is not defined on a site-specific basis nor by the scope of bargaining unit work performed by a specific editor. A broader or more holistic approach was implicitly intended and a site specific limitation was removed when the LOA was negotiated. On the other hand, I accept the Union’s argument that past practice at a one or two person newspaper cannot “walk itself over” and be applied at one of the larger newspapers where there has historically been a markedly different delineation between the respective roles of reporters and editors – and, especially, the extent to which editors have written news content.

The Employer relies in part on *Spreeuw Enterprises Ltd. -and- IWA Canada, Local 2171*, [1998] BCCA AAA No. 586 (Bird). The facts there bore no resemblance to the present situation, but there are some parallels with the applicable collective agreement language. The jurisdiction clause there recognized that the nature of the workplace had non-union staff assisting with bargaining unit work. In “conformance with past practice”, the employer was expressly permitted to have “management personnel” perform bargaining unit work under several specified

circumstances, as well as “[a]ny current function presently undertaken by management”. Arbitrator Bird concluded that this general language meant “management may perform any function ... which it was doing at the time the collective agreement came into force and which it had done as a matter of practice before even though it is now bargaining unit work” (para. 69). The Employer proceeds to argue as follows:

The evidence has shown that, from 1995 to present, editors have written news content and this practice has never been limited to certain circumstances, except to the extent that it cannot lead to a reduction in bargaining unit hours or elimination of a bargaining unit position. This was the case at the time of ratification of LOA 1 in 1996 and in each subsequent round. It is therefore a “past practice” for the purposes of LOA 1.

Based on the evidence you have heard, writing done by editors is clearly a past practice and they have done so without any qualitative or quantitative restrictions provided it did not result in the elimination or reduction of bargaining unit work.

* * *

This case is on all fours with *Spreeuw, supra*. That is, the parties agreed that management could perform bargaining unit work with certain limitations. The arbitrator’s only task is to determine whether the Employer exceeded those limits.

The uncontroverted evidence from the Employer’s witnesses is that from 1995 to present, editors consistently and regularly wrote both editorial and news content in Chilliwack, and elsewhere, over the last 23 years. Therefore, at the time of ratification of LOA 1 in 1996 and in each subsequent round it was a “past practice” for the purposes of LOA 1. (written argument at paras. 126-27 and 132-33)

In my view, the Employer’s position overstates the scope of the LOA’s exception. The argument effectively asserts that editors can write news content which otherwise falls within the Union’s jurisdiction “at their discretion” unless it reduces the hours of bargaining unit jobs. The fact that editors have not perceived any restriction on their ability to write news content is not probative, let alone determinative. The fact that no complaint was ever raised leads more readily to an inference that their activities fell within the range of what constituted mutually acceptable past practice. Moreover, the Employer’s position of “no limits” reads down the first condition to

the point of rendering it illusory. It is additionally inconsistent with the fundamental principle underpinning the LOA that managers would have “limited flexibility” to do bargaining unit work.

As the Union submits, had the Employer’s interpretation been mutually intended by the parties, the language could simply provide that editors “may perform bargaining unit work at their discretion if it does not eliminate or involuntarily reduce the hours of bargaining unit jobs” (written argument at paras. 33 and 137-138).

The present circumstances bear some resemblance to the situation in *Hamilton Spectator - and- Southern Ontario Newspaper Guild* (1990), 17 LAC (4th) 250 (Gandz). The relevant clause in the collective agreement provided that the jurisdiction of the bargaining unit was “the kind of work either normally or at present” performed by employees, and such work was to be assigned only to employees “except to the extent that it is now performed by ... the excluded positions named [above]”. The excluded positions included the editor who had jointly written an article with a member of the bargaining unit. The majority of the arbitration board found the article could “in no way be compared to the type of writing cited as occasional or commonplace by editors (para. 16), and was work which could well have been done by members of the bargaining unit (para. 17). The majority continued:

... Bargaining unit members were denied an opportunity to work on an important story and incurred some loss as a result of this denial although such loss would be hard to quantify. Certainly were this practice to be extended to the point where editors felt free to do whatever reporting they wanted to do, and the managing editor felt free to assign work to either an included or excluded person, the whole purpose of sections 1(a) and (b) would be severely undermined.

The correct interpretation of "normally" in section 1(a) is that it does in fact provide exclusivity for all work which is "normally" done by bargaining unit members. The union has to make the case that the work in question is normally done by bargaining unit members. If the company can establish that such work was normally done by excluded members of the bargaining unit as defined in section 1(a) then it has an "out", by virtue of section 1(b) to allow that work to continue to be done by such excluded members until the collective agreement is renegotiated or amended. This allows the excluded editors to do editorials, the included employees to report, and excluded people who were reporting when the agreement was signed to continue to report. (paras. 17-18)

The language in the LOA is broader than the exception in *Hamilton Spectator* but similarly allows editors (and other management personnel) to do work which would otherwise be assigned to the bargaining unit “if it is established as a past practice”.

The words “if it is established as a past practice” should be interpreted consistently with the underlying principle of “limited flexibility”. In this regard, I agree with an Employer submission in oral argument that there is a longstanding practice of editors writing content and the question becomes “to what degree and in what circumstances”? This is fundamentally a factual inquiry and I return to the evidence recounted above by various past editors.

Excluding the circumstances of Mr. Mills at Mission (for the reason given above), it can fairly be stated that editors have written news stories on a broad range of subjects and in a wide variety of circumstances. In this sense, I accept the Employer’s submission that there are no express boundaries. A non-exhaustive and non-prioritized list includes when:

- The subject is of personal interest to the editor and is often outside the areas covered regularly by reporters,
- The editor is “backstopping” a reporter who usually covers the area but is absent for reasons such illness or vacation and other reporters are not available,
- Similarly, the event is outside the normal work hours of the regular reporter, falls on a statutory holiday or there is more than one event to cover at the same time,
- The editor encounters a “found story” perhaps by attending an event as the newspaper’s representative,
- There is “breaking news” to cover as quickly as possible and reporters are not available,
- A pending election requires multiple candidate profiles and election night itself becomes “all hands on deck”,

- A press release is re-written for publication,
- A story is being written by the editor in the newsroom with information and images from a reporter in the field, and
- Supplementing regular news stories with special features.

At the same time, the witnesses were clear that writing news stories is presumptively bargaining unit work and that the situations in which editors will write content are, consistent with the LOA, exceptions to that jurisdiction. The core duties of an editor always remain reviewing and approving news content written by reporters, combined with the myriad of other key responsibilities associated with the position. Reporters are the “primary gathers of news” although the inherent “team” approach means editors will on occasion write stories to ensure coverage by the newspaper. However, it is “rare” for an editor to write news content respecting a beat or area which is ordinarily covered by a reporter.

It is next necessary to look more closely at the extent to which Mr. Henderson wrote news content after he became the permanent editor at the Chilliwack Progress in March of 2020.

VII. NEWS CONTENT WRITTEN BY MR. HENDERSON AS EDITOR

Mr. Henderson testified that his writing had “definitely dropped off a cliff” since he became the full time editor at the Chilliwack Progress. He allowed that there was a “transition period” and it took time for him to realize that he had to “assign off” some of the writing he had done while a reporter in the bargaining unit. He explained this was in part due to the “huge network of people” who follow him on social media with the result that he is the first point of contact for a lot of things. He was used to writing those stories and it took time to start assigning them to reporters. At the time of his testimony in November of 2021, he was supporting another reporter at the Chilliwack Progress to obtain her accreditation for court reporting.

Mr. Henderson was asked in direct examination whether he had looked at his “story count” since he became the fulltime editor. He said it was “a lot less” than when he had been acting editor and, over a period of six months averaged less than three stories a week and was closer to every other day. This figure did not include “editorials and opinions” (the latter meaning columns). In that regard, he stated that he does not tend to write editorials but does try to write a column almost every week. Mr. Henderson characterized his writing overall as “a fraction” of what he wrote as a “very high producing journalist” and estimated he wrote 12-15 stories a week as a reporter. In this context, he contrasted “how much journalism you do versus the number of stories”, and said everyone is doing more shorter stories for online publication.

In terms of time spent writing stories, Mr. Henderson said he worked 37.5 hours a week while a reporter and, although hard to quantify, suggested he now spends 5 hours a week writing stories as editor. As a crime and court reporter, he checked the court docket almost every day and would go to the court house daily, “sometimes for hours on end”. Now, as editor, he attends court “once and a while” for a story. The court stories he used to write “don’t get covered”.

Mr. Henderson later elaborated that the “amount of journalism” refers to the amount of research or the time spent on interviews, online research, document review and “going out on site”. Some stories require very little effort and he explained that many of the stories he writes now do not involve a lot of journalism.

Mr. Henderson prepared a “spreadsheet” for a 27 week period between April 30 and October 29, 2020 inclusive which tallied the number of stories he wrote each week. There were 79 stories in total, for an average of just over 3.4 stories per week when weeks during which he was on holidays are removed. He wrote at least one story each week when he was not on holidays; wrote four stories during six of the weeks; and, wrote five stories during five of the weeks. For much of that period, all staff at the Chilliwack Progress were working a reduced schedule of three days a week.

Mr. Henderson was taken by Employer counsel to a “4 month sample” of stories under his byline from April 1 to July 31, 2020 which had been assembled by the Union. He counted 49 stories in total and characterized seven as “court stories”. Some of the trials were cases he had been following as a reporter and the articles were essentially updates building content he had written previously. The remainder of the articles covered a wide range of subjects including several crime stories; many were breaking news, re-writes of press releases or what Mr. Henderson described as “quick hits” which took him 10-15 minutes to prepare. For a considerable period of time, until another reporter has trained in 2021, he continued to write regular real estate articles which he had done for years as a reporter.

Mr. Henderson was asked by Employer counsel how the articles assembled by the Union compared to what he had written as a reporter, and replied:

Maybe three to four are similar ... and even the crime stories are mostly re-written press releases and others are updates of stories written previously. [Those] get [the story] back in the public eye and are quick hits – not a lot of work. I’m not sitting in court (two were sentencing [cases]) but not the indepth crime I’d do [as a reporter] or attending in court.

When asked what was different now that he is editor, Mr. Henderson responded:

I don’t have time [to write stories and] only do it occasionally ... way more rarely. I’m concerned with editorial, email, complaints, phone calls, people who walk in the door [and] human resources things. I’m assigning stories and editing. I’m doing editing things by far most of my time and those four months are 16 months ago. Even then to now has changed vastly. I don’t do that (for example, real estate) or even court cases ... I’m not starting any new ones ...

In cross-examination, Mr. Henderson agreed there was very little court and crime reporting during April and May 2020 due to the pandemic and the courts being closed. When asked if he assigned crime reporting during this period to anyone, he replied “I don’t recall [but] definitely didn’t say ‘here’s your new beat or you are now doing court reporting’ [to a reporter]”. He later said it was not a time for anyone to be learning anything new and the objective was to see if the business could survive. As mentioned, Mr. Henderson “eventually” had another reporter prepare the real estate stories he had written previously. He stated the court reporting “is not easy” and it

was initially “too early and too tumultuous” a time to have someone else do the work. At the time of his testimony, reporters were doing some crime reporting but he said “court [reporting] is a pain, no one wants to do it, and I haven’t pushed it on them”. He was nonetheless training a reporter for the work but not “completely”. On one occasion in September of 2021 he had a reporter cover a court story while he was on vacation.

Exhibits 11 through 15 were entered by agreement after Mr. Henderson had testified. They were taken from the Chilliwack Progress website and show the articles which the website generated from a byline name search from the month of April 2022 for Mr. Henderson and reporters working at the newspaper, as well as articles which one of the reporters also wrote for the Hope Standard. I will return to these Exhibits in my analysis and note only at this juncture that Mr. Henderson was still continuing to write crime and court stories in April of this year, more than two years after accepting the editor position.

VIII. ANALYSIS

It is impossible to draw a “bright line” delineating the circumstances in which editors may write news content. This is an inherent result of the “flexibility” (albeit limited) which the parties intended to enshrine. Nonetheless, a fundamental tenet of the assignment of jurisdiction to the Union (Article 4.01) and the exception created by the LOA is that editors may write news stories on the basis that the work is secondary or supplemental to the work of reporters in the bargaining unit.

In many respects, the number of stories written by an editor is an unreliable indicator. The evidence establishes a shift to more and shorter stories with the move to online publication. This reduces the utility of a numbers comparison in contrast to a period when the newspaper was only published in print. Further, the number of print publications has been reduced from three (pre-2008/2009) to two editions a week, and now to a single print edition each week post-pandemic. Moreover, counting the number of news articles contributed by an editor does not make any

allowance for “the amount of journalism” involved. Some stories may be written quickly while others may be complicated with multiple sources and take much longer to write.

Nonetheless, a comparison of the number and volume (by pages) of stories written by Mr. Henderson while editor and other editors reveals a substantial difference. It will be recalled that Messrs. Burkholtz and Knill were at the “high end” in terms of the number of news stories they wrote as editors. Exhibit 2, Tab 52 was compiled by the Employer and constituted the “bulk” of stories written by Mr. Burkholtz (the most prolific editor in terms of writing news content) between February 2011 and May 2015 (i.e., over four years). Tab 53 of the same Exhibit was a compilation of stories written by Mr. Knill between June 2011 and January 2019 (i.e., approximately 7.5 years). The Union’s Exhibit 1, Tab 17 contained stories written by Mr. Henderson between April 1 and July 31 of 2020 (i.e., a period of only four *months*). It may be that Mr. Henderson’s writing “dropped off a cliff” when he became the editor. Nonetheless, a rough page count of the foregoing compilations shows that Mr. Henderson wrote significantly more news content during those four months than either Mr. Burkholtz or Mr. Knill wrote on an annual basis. Converted to an annual figure, the number of pages attributed to Mr. Henderson was about five times that for Mr. Burkholtz (who was considerably higher than Mr. Knill).

But even leaving all of that aside, the more problematic aspect of the case from the Employer’s perspective is the nature of the articles which Mr. Henderson continued to write after he became the permanent editor. Mr. Henderson acknowledged that he had a specialty as a reporter (i.e., covering crime and court stories) while other reporters had their areas of focus and everyone had “overlapping duties”. It is readily apparent that he continued to fulfill this specialty role -- admittedly on a considerably reduced basis -- and did so to the virtual exclusion of bargaining unit reporters.

While some witnesses eschewed the term “beat”, the evidence as a whole establishes that bargaining unit reporters typically have one or more areas of focus which collectively comprise the core work of Journalists covered by the Collective Agreement. Those areas are typically what some witnesses characterized as “hard news” (a term which was not embraced universally). At

the same time, all reporters pitch in as required and there is no “proprietary claim” to any particular area. It is by necessity, and as several witnesses remarked, a “team” approach in the newsroom.

Crime and court reporting at the Chilliwack Progress have historically been covered by a bargaining unit reporter. Those stories were written by Robert Freeman until he retired in 2013 and the areas were not being covered until Mr. Henderson moved over from the Chilliwack Times in 2017. There is no evidence to suggest that the editor stepped in to cover those areas during the intervening period and thus established regular crime and court reporting as a past practice.

The evidence also establishes that crime and court stories generate considerable traffic and therefore constitute an important source of revenue for the Employer. An article written somewhat ironically by Mr. Henderson in January of 2020 was headlined “Crime and tragedy led the way in 2019 news online”. The article noted that what is read in print “is impossible to precisely ascertain”. However, the Chilliwack Progress does have numbers when it comes to stories people read online. Of the 10 most read news stories from the previous year “according to Google”, the top story “by far” with the most page views concerned a young girl who had been sexually and mentally abused. At least three other stories involved law enforcement authorities and/or crime. Consistent with this list, witnesses at arbitration stated it is well known that crime “drives a lot of traffic”, and that Mr. Henderson was important and “valuable” to the Chilliwack Progress as a crime reporter.

I acknowledge Mr. Henderson’s explanations that the circumstances in March of 2020 made it difficult to transition crime and court reporting to someone else; that the immediate focus was on ensuring the business could survive; and, that there is considerable complexity to the work of court reporting. But these reasons do not overcome the state of affairs which existed in April of 2022 -- more than two years later.

Exhibits 11 through 15 were website generated articles for Mr. Henderson and the Chilliwack Progress reporters from April of 2022. They show that he wrote 22 stories during that month; one reporter wrote 27 stories; a second reporter wrote 34 stories; and a third reporter wrote 33 stories combined between the Chilliwack Progress and the Hope Standard. One of Mr.

Henderson's stories was an opinion piece. But even excluding that article, it is readily apparent that he contributed roughly two thirds as many stories as each of the other reporters. This may be a substantial reduction from what Mr. Henderson contributed as a bargaining unit reporter; however, it is far more than his estimate in direct examination of less than three stories a week. More critically, well beyond the news content written in the past by any other editor.

But even more problematic is the subject matters of the stories Mr. Henderson has been writing as recently as April of this year. Fully 10 of his articles during that month were crime or court stories. In contrast, only a single story on either those topics was written by one of the reporters. The only conclusion to be drawn from the record is that Mr. Henderson has retained the "beat" he followed while a member of the bargaining unit. This conclusion is consistent with the evidence that another reporter covered a court story for Mr. Henderson while he was on vacation, and reverses completely the roles of reporter and editor. The present state of affairs cannot find any support in the extensive evidence led by the Employer regarding past practice.

I accordingly find that the Employer cannot meet the first condition which must be demonstrated before management personnel may perform bargaining unit work. This finding alone is sufficient to establish a breach of the LOA. The second condition (i.e., the elimination or involuntary reduction of bargaining unit hours) is more appropriately considered in the context of remedy. Before turning to that subject, it is first necessary to address the Employer's alternative position based on the doctrine of estoppel.

The Employer submits the LOA sets out a clear bargain which has been consistently applied since it was agreed to by the parties 25 years ago. It says it has relied on the Union's acquiescence to a longstanding and unchallenged practice, through multiple Collective Agreements, of editors engaging in writing "without limitation as to quantity and the nature of the stories covered" (written submission at para. 183). The Union did not take issue with this practice until the present grievance was filed. Thus, it should not be permitted to make any claim until it provides estoppel notice and the current Collective Agreement has concluded.

The Employer's estoppel argument is premised on the proposition that editors may write news content "without limitation". I have rejected that interpretation of the LOU and found that a more specific or granular meaning must be given to the scope of "past practice" as mutually intended by the parties. I have otherwise found implicitly that the extent to which editors had written news content prior to the events which led to the grievance being filed fell within the permitted parameters. Therefore, there was no basis for the Union to complain. For reasons articulated above, the news content written by Mr. Henderson as editor has gone well beyond the established past practices. There was no acquiescence by the Union to work of this volume and kind being performed outside the bargaining unit and, accordingly, no representation upon which the Employer can found an estoppel.

The Union seeks various forms of relief by way of remedy including an order for the Employer to post a Journalist vacancy. It additionally seeks monetary redress for "losses" it says were suffered by the Union and by reporters in the bargaining unit, as well as "[a]ny other declarations or orders that the Arbitrator sees fit in the circumstances".

The evidence amply persuades me that Mr. Welsh would have been laid off regardless of whether Mr. Henderson accepted the editor position. There is accordingly no loss to him resulting from those circumstances. The same can be said for the period of the work-sharing arrangement. The loss of revenue due to the pandemic and the associated reduction to one print publication a week saw staffing changes at the Chilliwack Progress which aligned with equivalent arrangements at comparable Black Press newspapers. Some allowance can fairly be made for a transition period given the unprecedented situation and the challenges it posed for the newspaper. Since then, the Chilliwack Progress has continued to operate with a complement of reporters based on anticipated revenues. Stated differently, I find the continued crime and court reporting carried out by Mr. Henderson has not had any causal relationship with the number of reporters employed at the Chilliwack Progress nor with the hours of work available to the bargaining unit. There has accordingly been no monetary loss to individual employees or to the Union. There is likewise no evidentiary basis to support an order for either a part-time or a fulltime position to be posted as a vacancy.

Nonetheless, there has for some time now been a material and ongoing breach of the LOA by Mr. Henderson which either been expressly or implicitly sanctioned by the Employer. The breach continued as recently as April of 2022 and cannot be ignored. This was well after the Employer had clear notice of the Union's position at arbitration and followed Mr. Henderson's testimony that his former crime and court reporting duties were being transferred to reporters in the bargaining unit. That has manifestly not occurred, and the Union rightly complains that the current situation has impaired the integrity of its bargaining unit.

Unfortunately, the record does not allow me to assess with any degree of precision the extent to which Mr. Henderson continued to write crime and court stories between late 2020 (when the work-sharing agreement at the Chilliwack Progress ended) and April of this year. However, it can be reasonably inferred that bargaining unit reporters lost the opportunity to write news articles in areas which become some of the most popular stories published by the newspaper. Mr. Henderson's activities (again, effectively perpetuating his role as a beat reporter albeit on a diminished basis) violated the jurisdictional language of the Collective Agreement and in this sense caused harm to the Union and its members. I have determined that damages in the amount of \$7500 should be paid by the Employer given the extent and duration of the breach. Future violations could well result in a higher award even in the absence (as here) of any involuntary reduction in bargaining unit hours.

IX. DECISION

I will not attempt to summarize the several determinations reached in this award regarding the extent to which management personnel may perform bargaining unit work under the LOA. The Union is entitled to a declaration that the Employer breached the first condition in the LOA as the bargaining unit work Mr. Henderson has performed as editor of the Chilliwack Progress has not been "established as a past practice". The Employer is hereby ordered to cease its violation of the LOA by returning the work to the bargaining unit and to ensure that Mr. Henderson no longer writes news content except as permitted by this award. The Employer is additionally ordered to

pay the Union \$7500 for its substantive and ongoing violation of the Collective Agreement. The Union's remaining requests for relief are denied.

I will retain jurisdiction for a period of 90 days should the parties be unable to agree on the proper implementation of this award.

DATED and effective at Vancouver, British Columbia on May 25, 2022.

A handwritten signature in black ink, appearing to read "J. Hall", with a large, stylized circular flourish on the left side.

JOHN B. HALL
Arbitrator