Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, Applicant v. COUNTRY CLASSIC FASHIONS LTD. o/a TREATS LOWER PLACE RIEL AT THE UNIVERSITY OF SASKATCHEWAN, Respondent

LRB File No. 235-02; February 25, 2003
Vice-Chairperson, James Seibel; Members: Brenda Cuthbert and Maurice Werezak

For the Applicant: Don Moran and Paulette Caron
For the Respondent: John Beckman, Q.C.

Successorship – Transfer of business – General principles – Board reviews interpretation of Section 37 of *The Trade Union Act* that best reflects objects of section and of *Act* – Fair, large and liberal interpretation required to ensure stability of bargaining rights where business changes hands.

Successorship – Transfer of business – Proceedings before Board at time of sale, as well as orders already in place, attach to business regardless of owner.

Successorship – Certification – Successor employer bound by certification order in place at time of sale.

Successorship – Collective agreement – Proceedings before Board at time of sale, as well as orders already in place, attach to business regardless of owner – Successor employer bound by collective agreement imposed as result of application for first contract assistance pending before Board at time of sale.

***The Trade Union Act,* s. 37.**

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 1975 (the "Union") applies for an Order pursuant to s. 37 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), declaring that Country Classic Fashions Ltd. operating as Treats Lower Place Riel at the University of Saskatchewan ("Country Classic") is the successor employer to Four Star Management Ltd. ("Four Star") with respect to that Treats location and is bound by the orders and proceedings of the Board and the terms of the collective agreement between the Union and Four Star.

[2] By Order dated November 24, 1997, in LRB File No. 310-97, the Board designated the Union as the bargaining agent for a unit of employees at the two locations of Treats operated by Four Star in Lower Place Riel and Upper Place Riel, respectively, at the University of Saskatchewan. In LRB File 220-98, the Board imposed a first collective agreement between those parties pursuant to an application by the Union for assistance in achieving a first contract under s. 26.5 of the *Act*. During the period between the hearing of that application and the date of the Board's decision, Country Classic purchased the Treats location in Lower Place Riel. Country Classic claimed that at the time of the purchase it was unaware that it had purchased a unionized business or that there was an outstanding application for a first contract pending decision by the Board. While it admitted that it was bound by the certification Order, Country Classic took the position that it was not bound by the collective agreement imposed by the Board after the purchase.

Evidence:

[3] The Board heard evidence from three witnesses. There was no real dispute on the facts of the situation.

[4] Jim Holmes is the Union's regional director for Saskatchewan, but for most of the time material to this application he was the Union's representative for its bargaining units at the University of Saskatchewan. Mr. Holmes testified as to the history of the bargaining unit at Treats at the University of Saskatchewan, the various applications to, and decisions of, the Board, and early correspondence and discussions with Country Classic and its principal.

[5] Don Moran is the present Union representative for the Treats bargaining unit. He testified about the more recent correspondence and discussions with Country Classic.

[6] Debbie Mitchell is the principal of Country Classic. She testified about the company's purchase of the Lower Place Riel Treats location from Four Star and subsequent dealings with the Union.

[7] At the time the certification Order was made, Four Star operated three Treats locations. One, located in a Saskatoon shopping mall, was not subject to the certification Order. The two locations certified at the University of Saskatchewan were a bakery and sales outlet in Lower Place Riel and a smaller coffee emporium in Upper Place Riel. Following certification the Union eventually applied to the Board pursuant to s. 26.5 of the *Act* for assistance in achieving a first collective agreement. The Board heard the application and received submissions from the parties over the summer of 2000.

[8] Country Classic purchased the Lower Place Riel Treats location effective April 14, 2001. Apparently the business had been listed for sale and, after having the books reviewed by two accountants, Ms. Mitchell negotiated the purchase with the assistance of a real estate agent. She testified that during negotiations the principal of Four Star, Ron Cummings, did not volunteer the fact that there was an extant certification Order covering the subject Treats business, nor that there was a first contract application pending before the Board. She made no independent inquiries about the labour relations status of the business before the purchase. She spent the week prior to the closing of the sale on site learning the operation, but made no inquiries of the employees regarding such matters.

[9] Mr. Holmes testified that the Union learned in mid-May 2001, when an employee whose employment Ms. Mitchell had terminated approached the Union, that the ownership of the Lower Place Riel location had changed. Mr. Holmes wrote a letter to Ms. Mitchell dated May 23, 2001, proposing arbitration of the dismissal pursuant to s. 26.2 of the *Act*. Mr. Holmes and Ms. Mitchell spoke on the telephone either shortly before or shortly after this letter was sent. Ms. Mitchell indicated to Mr. Holmes that she was not aware that the business was unionized. While Mr. Holmes expressed some sympathy for her plight, he indicated that it did not change the fact of the Union's representation.

[10] Ms. Mitchell consulted a lawyer who wrote to the Union on June 12, 2001 requesting conformation that a collective bargaining agreement was in place. Mr. Holmes responded on June 15, 2001, forwarding copies of the certification Order, the Union's demand for union security, and the historical decisions of the Board regarding

the bargaining unit. Enclosing a copy of the bargaining issues that had been resolved with Four Star, he also advised that, “The imposition of a collective agreement is a matter still pending before the Board.”

[11] On September 18, 2001, the Board issued its decision and Order (reported at [2001] Sask. L.R.B.R 715) imposing a first collective agreement with a term from January 1, 2000 to December 31, 2001.

[12] The Union prepared a draft collective agreement incorporating the terms agreed to by it and Four Star and the terms imposed by the Board, and by letter dated October 16, 2001, provided it to Four Star and Country Classic. The Union also requested, *inter alia*, the information necessary to calculate the retroactive pay due each employee under the agreement. Both Four Star and Country Classic refused to sign the collective agreement.

[13] Four Star raised an issue with the Union about whether wage increases mandated by the Board were applicable to persons no longer employed by Four Star at the date of the Board’s decision. The Union applied to the Board for clarification of the issue. After a hearing, of which Country Classic had notice but elected not to attend, in reasons for decision dated April 24, 2002 (reported at [2002] Sask. L.R.B.R 229) the Board agreed with the Union’s interpretation of the Board’s decision on the retroactivity of the wage increases granted by the first collective agreement.

[14] The Union wrote to Mr. John Beckman, Q.C., the present solicitor for Country Classic, on October 1, 2002, asking that it apply the provisions of the collective agreement, particularly as concerns retroactive pay. On October 3, 2002 Mr. Beckman replied that it was Country Classic’s position that while it might be bound by the certification Order, it was not bound by the Board-imposed collective agreement because it was not in force at the time of the purchase and sale. He also alluded to the fact that it was his understanding that Four Star was challenging the Board’s decisions.

[15] In June 2002, Four Star applied to the Saskatchewan Court of Queen’s Bench for judicial review of the Board’s decisions on the first collective agreement. In a letter to the Union dated October 15, 2002, Mr. Beckman advised that Country Classic

was willing to bargain with the Union after the application for judicial review was heard. Although Country Classic was provided with notice of the application, it did not attend the hearing of the application on November 12, 2002. The application was dismissed by the Court on December 12, 2002.

[16] On November 12, 2002, an employee of Country Classic, Jody Ann Heeds filed an application for rescission (LRB File No. 224-02) of the certification Order. The Union filed the present application on November 22, 2002. In its Reply filed December 11, 2002, Country Classic took the position outlined above: that it was not bound by the collective agreement. The Reply also asserted that the employees at Country Classic's Treats location do not constitute a unit appropriate for collective bargaining, that the Union does not have the support of a majority of employees, and, alternatively, that a vote should be ordered. The Board heard the rescission application on December 9, 2002. In Reasons For Decision dated December 23, 2002 ([2002] Sask. L.R.B.R. 706), the Board deferred decision on the rescission application until after the hearing and determination of the present application.

Statutory Provisions:

[17] Relevant provisions of the *Act* include the following:

> *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
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> *. . .*
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> *26.2(1) Where there is just cause for the termination or suspension of an employee may be determined by arbitration where:*
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> > *(a) no collective bargaining agreement is in force;*
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> > *(b) the board has determined that a trade union represents a majority of employees in the appropriate unit;*
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> > *(c) the employee is terminated or suspended for a cause other than shortage of work; and*

(d) the termination nor suspension is not, and has not been, the subject of an application to the board pursuant to clause 11(1)(e).

(2) Where an arbitration is conducted pursuant to subsection (1), it is to be conducted in accordance with section 26 or 26.3.

(3) The arbitrator shall determine any dispute respecting the application of this section.

. . .

37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.

37(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:

(a) determining whether the disposition or proposed disposition relates to a business or part of it;

(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:

- *(i) an employee unit;*
- *(ii) a craft unit;*
- *(iii) a plant unit;*
- *(iv) a subdivision of an employee unit, craft unit or plant unit; or*
- *(v) some other unit;*

> *(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);*
>
> *(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);*
>
> *(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;*
>
> *(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).*

Arguments:

[18] Mr. Moran, on behalf of the Union, argued four points:

(1) that the existing certification Order is evidence of majority support for the Union;

(2) that there was no evidence that a bargaining unit comprising the employees at the Treats Lower Place Riel location was not an appropriate unit, and that if the Board deemed otherwise, it could adjust the description of the unit under s. 37(2)(e) of the *Act*;

(3) that there was no basis established on which the Board should determine to order a vote; and,

(4) that the interpretation of s. 37(1) put forward on behalf of Country Classic – that is, that it is not bound by the collective agreement because it was not in force when Country Classic purchased the business – is simply not correct.

[19] In support of the third point, Mr. Moran cited the decision of the Board in *United Food and Commercial Workers, Local 1400 v. The Corps of Commissionaires, North Saskatchewan Division*, [2002] Sask. L.R.B.R. 188, LRB File No. 276-00, where the Board declined to order a vote in a case of “deemed successorship” under s. 37.3 of

the *Act.* In that case, a new security contractor, using a fraction of its total workforce, took over services from a unionized contractor at a number of the principal's locations.

[20] In support of the fourth point, Mr. Moran cited the decision of the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd., et al*., [1991] 1st Quarter Sask. Labour Rep. 49, LRB File No. 075-90, in which the Board held that the purchaser of a business that is the subject of a certification application that has been filed, but not heard and determined, is bound, pursuant to s. 37 of the *Act*, by the resulting certification order.

[21] Mr. Beckman filed a written brief that we have reviewed. He agreed that while Country Classic may have been misled as to the unionized status of the Treats location purchased by his client, it was nonetheless bound by the certification Order in place at the time of purchase. However, he argued that the operation of the last half of s. 37(1) of the *Act* is predicated on a collective agreement being in place "before the disposal" of the business in April 2001 and that Country Classic is therefore not bound by the Board's Order of September 18, 2001 imposing a collective agreement.

[22] Second, Mr. Beckman argued that s. 37(2)(b) and (c) of the *Act* require the Board to consider whether the Union represents a majority of employees in an appropriate unit. The fact that there have been three applications for rescission filed since certification casts doubt upon the assertion that the Union enjoys majority support and the Board should order a vote.

[23] Third, Mr. Beckman asserted that the time period between the hearing of the application for first contract assistance and the imposition of a collective agreement had prejudiced Country Classic and the Board should determine that the collective agreement does not apply to it.

[24] In rebuttal, Mr. Moran pointed out that the Board dismissed the first decertification applications on the grounds of employer interference; the Board deferred decision on the third pending the decision of this application. He also referred to the fact that Country Classic had elected not to attend or participate in the judicial review

application where the issue of prejudice occasioned by delay was considered and rejected by the Court.

Analysis and Decision:

[25] First, it was argued on behalf of Country Classic, pursuant to the latter part of s. 37(1) of the *Act*, that while it was bound by the certification Order that was in place at the time of the purchase of the Lower Place Riel Treats location in April, 2001, it was not bound by the first collective agreement imposed by the Board on September 18, 2001. We disagree. The first part of s. 37(1) provides for the instant and seamless continued life of, and binding of the purchaser by, all orders of the Board and "all proceedings had and taken before the Board" prior to the acquisition of the business, and that all such orders and proceedings "continue as if the business…had not been disposed of." In the present case, the certification Order was in place at the time of acquisition by Country Classic, and the application for first contract assistance had been heard and was awaiting determination by the Board. In our opinion, the term "proceedings" includes the latter, and such proceedings continued through and after the disposition of the business as if the disposition had not occurred.

[26] The argument advanced on behalf of Country Classic hinges on the second part of s. 37(1), but ignores the phrase interposed between the first and second parts that the second part must be read "without limiting the generality of" the first part. That is, notwithstanding that the second part of the sub-section refers to orders and collective bargaining agreements in force before the disposal of the business, it does not abrogate or limit the application of the first part of the sub-section regarding "proceedings." To read the sub-section in the disjunctive and divided manner asserted on behalf of Country Classic would violate the generally accepted tenet of statutory interpretation that the provision be read as a whole and with an interpretation that best ensures the attainment of its objects and those of the *Act*. Such an interpretation leads to an obvious inconsistency between the first and second parts of the provision.

[27] We are supported in our view by the Board's decision in *Regina Exhibition Association Ltd.*, *supra*. In that case, the Board held that the purchaser of a business that is the subject of an application for certification that has been heard but not determined is bound by the resulting order pursuant to s. 37 of the *Act*. After referring to

the applicable approach to statutory interpretation enunciated by the Saskatchewan Court of Appeal in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (UA) v. Metal Fabricating and Construction Ltd.* (1990), 69 D.L.R. (4th) 452, and the purpose of s. 37 "to ensure that legitimately acquired bargaining rights are not circumvented by a change in the ownership of the business," the Board states as follows, at 52-53:

> *The Legislature's intention that "...proceedings had and taken before the Board before the acquisition...shall continue...", must be given some meaning. In arriving at that meaning the Board must have due regard to the language and purpose of the section; and to the scheme and objects of the Act as directed by Mr. Justice Cameron in the Metal Fabricating, (supra). The scheme and object of the Trade Union Act and this Board's interpretation of the same was recently reviewed in the RWDSU v. Canadian Linen Supply Co. Ltd. August/1990 LRB 207-89.*
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> *The interpretation which the employer urges upon us is difficult to reconcile with the opening words of Section 37 which make it clear that it is "the person acquiring the business" that the Legislature had in mind when it enacted the Section. That section has nothing to do with the vendor. It would be inconsistent with its express language if the successorship provisions were interpreted in a manner that redirected the effect of Section 37 back towards the transferor. If the phrase "proceedings had and taken" means completed, it is essentially superfluous because completed proceedings always result in an order. Therefore, it would be redundant for the Legislature to provide that a purchaser is bound by orders and completed proceedings if there were no practical difference between the two.*
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> *The employer's interpretation also poses practical difficulties. It would result in proceedings continuing and binding the vendor who frequently is no longer in business and in all events, has ceased to be the employer of the employees affected by the transfer. The vendor is in no position to negotiate a collective bargaining agreement for those employees if the certification application is successful. Accordingly, by this interpretation, the efforts of the employees to bargain collectively would be completely defeated by the sale.*
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> *The employer's interpretation creates further problems if the application that is pending at the time of the sale is for decertification. The purchaser of the business at the date of sale is automatically bound, pursuant to Section 37, by an extant certification order. If the employer's interpretation were correct, the decertification proceedings would proceed only against the original employer, i.e. the vendor, and have no effect upon the purchaser,*

> *with the result that the purchaser remains bound by the original certification order.*
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> *Finally, the Board can see no reason to turn these situations into a foot race. The applicability of Section 37 should not depend upon whether the union can have its application filed and heard before the employer completes the sale of its business. Where there are special circumstances which make it inappropriate for the purchaser to be bound by the order, as in all cases where Section 37 applies, the Board has the jurisdiction to order otherwise.*
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> *In the Board's opinion the interpretation most harmonious with the language and object of Section 37 and the purpose and objects of the Act, is: where a business is sold after an application for certification has been filed, but before the application has been heard and determined, the purchaser is bound by any resulting order.*
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> (Emphasis added.)

[28] We agree with the reasoning in *Regina Exhibition, supra*. In *Corps of Commissionaires*, *supra*, at 206, the Board stated that, in accordance with s. 10 of *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2, s. 37 of the *Act* was to be given a fair, large and liberal interpretation that best attains the objects of the legislation: to ensure the stability of bargaining rights where a business changes hands.

[29] Section 37 makes provision for the Board to "order otherwise" than that a collective agreement be deemed to apply to the purchaser of the business. The second and third arguments advanced on behalf of Country Classic – that the bargaining unit is not appropriate and that, in any event, the Union does not enjoy the support of a majority of the employees in the unit, and that County Classic was prejudiced by the delay in the Board's decision on the first contract application – are really assertions that the Board should so order otherwise.

[30] The Lower Place Riel Treats location purchased by Country Classic is the larger of the two Treats locations at the University of Saskatchewan and is, apparently, functioning as a complete economic unit owned and managed by an employer independent of the Upper Place Riel location. There is no evidence that it is not a viable economic unit. The group of employees affected by the disposition to Country Classic is a discrete group comprising all the employees of Country Classic at the location. There

is no evidence that their status or general duties and functions were affected by the disposition and operational severance from the employees at the Upper Place Riel Treats location such that they do not have a sufficient community of interest to viably engage in collective bargaining. Counsel for Country Classic did not explain why such a unit of employees is not appropriate for the purposes of collective bargaining. Pursuant to the attainment of the objects and purpose of the *Act*, as enunciated in s. 3, the employees have the right to continue to bargain collectively.

[31] The existence of a certification order is *prima facie* proof of majority support of the employees in the bargaining unit: *Prince Albert Co-operative Association Limited v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1982] May Sask. Labour Rep. 55, LRB File No. 535-81, aff'd (1982) 141 D.L.R. (3d) 524 (Sask. C.A.); *Saskatchewan Union of Nurses v. Sisters of Charity of Montreal (Grey Nuns)*, [1985] April Sask. Labour Rep. 46, LRB File No. 378-84. There are no circumstances in the present case that lead us to conclude that a vote should be ordered to determine support. This is not a case where the unionized employees in the vendor's business are intermingled with the purchaser's non-unionized employees in a single enterprise. Rather, as pointed out above, Country Classic acquired a unit of employees that is naturally discrete and independent once management of the location was transferred from Four Star.

[32] Counsel for Country Classic urged that the fact that there is a pending application for rescission of the certification Order, and that there were two such applications in the past, is evidence relevant to the determination of an issue of majority support at this point. We view it differently. The prior applications for rescission were both dismissed on grounds of inappropriate interference by the employer of the day; in the second case, that was Country Classic. Country Classic has refused to recognize or apply the first collective agreement since May, 2001, an act of defiance of the Union's status as bargaining agent that, whether intended or not, might tend to foster a perception among the employees that the Union is a weak and ineffectual bargaining agent. To order a vote in such circumstances would be to defeat the purpose of s. 37 to ensure the stability of bargaining rights on the transfer of a business, and we decline to do so. The panel of the Board hearing the presently pending application for rescission is

in a position to assess the evidence relevant to the issue of rescission and determine whether it is appropriate in the circumstances to order a vote.

[33] Finally, it was argued on behalf of Country Classic that the Board should order that the collective agreement is not binding, because by reason of the Board failing to render its decision on the first contract application within the 45-day period in s. 26.5(6)(b)(i) of the *Act*, Country Classic was prejudiced in that it was entitled to assume that the Board would adhere to the time period and the collective agreement would have been imposed by the time of the purchase of the business.

[34] In our opinion, this assertion lacks merit on three grounds. First, Country Classic was made aware of the certification in May 2001 and sought legal counsel with respect to the issue shortly after that date. The Union advised counsel on June 15, 2001 that an application for imposition of a first collective agreement was pending. Country Classic did not seek to intervene or make submissions in the first contract proceedings then pending before the Board. Second, the evidence adduced discloses that Country Classic made no independent attempt to ascertain the labour relations status of the business under the *Act* at any time prior to the purchase – something that a legal professional acting on the purchase of a business would routinely do. That is, even if the first contract decision had been rendered by the date of the sale, it does not appear that it would have made any difference, because Country Classic did not inquire. Third, the application for judicial review of the first contract decision to the Court of Queen's Bench was specifically adjourned so that Country Classic could be provided with specific notice of the application. The issue of alleged prejudice occasioned by the delay in decision by the Board was specifically argued before, and dismissed by, the Court. Country Classic had elected to not take part in those proceedings.

[35] The Board, therefore, declares as follows:

(1) Country Classic Fashions Ltd. is the successor to Four Star Management Ltd. with respect to the Treats location in Lower Place Riel at the University of Saskatchewan, and is bound by the certification Order dated November 24, 1997 and the collective agreement imposed by the Board on September 18, 2001;

(2) All of the employees of Country Classic Fashions Ltd. operating as Treats Lower Place Riel at the University of Saskatchewan except the general manager are a unit of employees appropriate for the purposes of bargaining collectively;

(3) Canadian Union of Public Employees, Local 1975, a trade union within the meaning of the *Act*, represents a majority of employees in the appropriate unit;

(4) Country Classic Fashions Ltd., the employer, shall bargain collectively with respect to the appropriate unit of employees described in paragraph (2) above.

[36] An Order will issue accordingly.

DATED at Regina, Saskatchewan, this **26th** day of **February, 2003.**

LABOUR RELATIONS BOARD

James Seibel,
Vice-Chairperson