

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

A REPRESENTATIVE OF CERTAIN EMPLOYEES

("Certain Employees")

-and-

PACIFIC PAINTING & SANDBLASTING

(the "Employer")

-and-

INTERNATIONAL BROTHERHOOD OF PAINTERS AND  
ALLIED TRADES, LOCAL NO. 1163, INTERNATIONAL  
BROTHERHOOD OF PAINTERS AND ALLIED TRADES,  
LOCAL NO. 138

(the "Union")

PANEL: Laura Parkinson, Vice-Chair

COUNSEL: Randy J. Kaardal, for Certain Employees  
Lindsay M. Lyster, for the Employer  
Richard L. Edgar and Elena Miller, for the  
Union

CASE NOS.: 32326 and 32477

DATE OF DECISION: March 21, 1997

## DECISION OF THE BOARD

### I. NATURE OF APPLICATION

1           Certain Employees apply under Section 33 for cancellation of the certification. A  
representation vote has been conducted, and the ballots sealed after challenges were  
lodged.

2           In response to the decertification application, the Union filed an unfair labour  
practice complaint asking for the representation vote to be set aside. I ruled earlier that,  
with one exception, the complaint did not disclose a *prima facie* case of interference  
with employee wishes under Section 33(6). I ruled that the Board would only proceed  
with one aspect of that complaint which raised a *prima facie* case under Sections 9 and  
6(3)(a), but that complaint would not be consolidated with the decertification application  
given the lack of connection of that alleged incident to the Employer's workplace. As  
the Union did not advise the Board of its intent to proceed with this remaining complaint  
within the deadline in my ruling, it is deemed to be abandoned.

### II. ISSUES

3           At the initial hearing, and in subsequent case management discussions, the  
Union raised the issue of the employee status of three journeymen painters: Arne  
Holmberg, Steven Lozinsky and Bob Eckert. In written submissions filed later, the  
Union referred to two other individuals, Mike Hotovy and Ross Gamble, whom the Union  
argued should be considered an employee. The Union argues that these five  
individuals must be included on the list; it also argues that one individual on the list, Ed  
McCleay, should be excluded. The Union argues that he is a superintendent on salary;  
it also says he should be excluded because of his familial relationship with the owner.

4           The Employer maintains that Ed McCleay is not a member of management and  
is a working foreman who is paid in accordance with the collective agreement. The  
Employer also relies on the dues and payments remitted on his behalf throughout the  
course of his employment.

5           Apart from the dispute about employee status for purposes of determining the  
45% threshold for the decertification application to proceed, there are four challenged  
ballots. The Union initially challenged the ballots cast by the two employees on the  
tentative Voters List, Beckman and McCleay. The Union later advised it was  
abandoning its challenge to Beckman. The Employer challenges the ballots of Lozinsky  
and Eckert, two of the employees in the group the Union seeks to have added to the  
List.

6           Through the case management process, the parties agreed to deal with two  
preliminary issues on the basis of written submissions. Those issues are whether the  
45% threshold for an application for decertification had been met, and whether a single

person craft unit can decertify. The first issue relating to the bargaining unit constituency focuses on the application of the 30/30 rule in *BAT Construction*, BCLRB No. B444/94, (Leave for Reconsideration of BCLRB Nos. B102/93 and B178/93) to decertification applications.

7 I agreed to provide my ruling on these two issues in advance of the hearing scheduled for March 26, 1997 as my determination may render the remaining issues relating to the status of McLeay and the challenged ballots academic.

### III. FACTS

8 The following facts are derived from the submissions of the parties; where there is disagreement between the parties, that difference is noted. However, I have determined that there is no material dispute which would require an evidentiary hearing to resolve at least the issues of the application of the 30/30 rule in *BAT Construction* to the disputed group of employees, and of the ability of a single employee to seek decertification of a craft unit.

#### 1. Background

9 The Union has represented a craft unit of employees since October 1991.

10 The application for decertification was filed on January 27, 1997.

11 The Industrial Relations Officer's investigation of the payroll records reveals two individuals were employed as of the date of application when the 30/30 rule is applied. The two individuals who appear on the Voters List prepared by the Officer are: Beckman and McLeay.

#### 2. Beckman

12 According to the Union, Beckman is not a member of the Union, and was employed under a permit. Beckman has worked for the Employer since September 1996. The Employer has reported him to have worked a total of 656 hours to the end of January 1997.

13 Under the collective agreement, the Employer has the right to employ permit workers where the Union is unable to supply qualified workers within a certain time. That permit is revocable on notice by the Union. When such notice is provided the Employer is required to replace the permit holder with a Union member not more than 24 hours after the notice was received.

#### 3. McLeay

14 Ed McLeay is the father of the owner, Richard McLeay. As already noted, there is a dispute as to whether Ed McLeay is included within the bargaining unit. That

dispute over the status of Ed McLeay is one of the issues slated to be addressed in evidence at the hearing, should that prove necessary.

4. Remittance Reports

15 The Employer reports to the Union on a monthly basis the number of hours worked by persons employed in the bargaining unit on Remittance Reports.

16 A review of those reports show that the employee complement in January and February of each year is consistently lower than the balance of the year. The average monthly complement during those months ranges from 1.5 to 2 employees. The Remittance Reports show that the average monthly complement of employees when assessed on an annual basis for 1994 is 4.3, for 1995 4.67 and for 1996 4.91. The highest number of employees are recorded in the summer months and early fall.

17 Although the Union tendered these Remittance Reports with its submission, an issue was raised as to the accuracy of these documents. The Union alleges the Remittance Reports contain only the minimum number of employees. It says the Employer does not always report the employment of all employees within the bargaining unit.

5. Gamble

18 To illustrate its complaint of under-reporting, the Union gives the example of Ross Gamble whose name does not appear on the Remittance Reports. It provides copies of paycheque stubs and Records of Employment for him. However, the Records of Employment issued to Gamble bear the name of a different corporate entity, Lovich Enterprises Ltd., although paycheque stubs are in the name of the Employer.

19 Those Records of Employment show that Gamble was employed between August 22, 1995 and November 24, 1995 and June 12, 1996 and September 21, 1996. Some of the timesheets filed by the Union indicate that he worked doing sandblasting, painting and spraying as well as working in the shop. Those areas of work of sandblasting and preparatory work the Union says are within the scope of its bargaining unit under Article 1.2 of the collective agreement.

20 The Employer disputes the Union's allegation of a failure to report. It says Gamble was not employed as a painter, and that a Union representative was aware of the arrangement for Gamble to assist with security, general clean-up and loading of equipment.

21 In reply, the Union asserts there was no authorization for Gamble to perform painters' work without being properly hired under the terms of the collective agreement. It says no clearance was provided for Gamble to perform any painter's work.

22 It is unnecessary for me to resolve this evidentiary dispute. I will accept for purposes of this decision that Gamble worked within the scope of the bargaining unit.

However, the employment records filed with the Board indicate that his employment, regardless of which capacity he was employed in, was well outside of the 30/30 rule. According to those documents, he last worked on September 21, 1996, some four months before the application for decertification. Accordingly, I will consider him within the group of other employees raised by the Union, subject to my observations below on the propriety of the Union raising this objection in a belated fashion.

6. Holmberg

23 Holmberg worked 674 hours in 1994, primarily between August and November. He worked 1024 hours in 1995 and 844.5 hours in 1996 during roughly the same periods. His total number of hours reported over the two years between 1994 to 1996 was 2542.5. He was laid off and then recalled twice during his employment.

7. Eckert

24 Eckert began his employment in November 1995 and worked a total of 130 hours over the last two months of that year. He was laid off and then rehired to work beginning June 1996 through to October 1996 when he worked 675.5 hours during that year. His total number of hours over 1995 and 1996 amount to 805.5.

8. Lozinsky

25 Lozinsky appears to have worked only 133 hours in 1995. (I note that the Union's submission erroneously referred to a total of 1306 hours in 1995 for the 27 hours in November and 106 hours in December. I assume that the total indicated of 1306 is a typographical error as the Remittance Reports confirm he worked only 27 hours in November and 106 hours in December). Lozinsky worked 665 hours in 1996 in June through October.

9. Hotovy

26 Hotovy worked 858.5 hours in 1996 beginning in July 1996. He worked a total of 166 hours in December. From the Remittance Reports it is impossible to determine which dates Hotovy worked during that month; only a total figure for the month is provided.

#### IV. ARGUMENT

##### 1. Union

27 The Union submits that the 30/30 rule should not be applied because it makes no labour relations sense in the context of a decertification application. The Board should instead apply the sufficient continuing interest test set out in *Wheaton Construction Ltd.*, BCLRB No. 327/84. A differing test is justified by the distinctions between a certification and a decertification application: *M & J Woodcrafts Ltd.*, BCLRB No. B366/96, at p. 2.

28 The Union acknowledges that reference is made in *BAT Construction* to decertification applications, but it notes that decertification was not an issue in that case. None of the parties made submissions on the appropriate employee complement in a decertification application.

29 It also asserts that the policy considerations which led the Board to adopt the 30/30 rule make no labour relations sense in a decertification application. In relation to the policy concerns over the timeliness of the process, the Union argues that the same dynamic is not present in decertification applications. Unlike certification applications, the Union asserts that it is a rare case where employees lose interest in decertification due to the passage of time.

30 As for the policy issues of affording respect for individual rights and access to collective bargaining, the Union argues that it is unfair to allow an unrepresentative few to decide the fate of the entire bargaining unit. The Union points out that the application is made during the traditional low point in the Employer's hiring pattern. If the 30/30 rule is applied, two individuals with no community of interest with the Union members who will be working for this Employer over the next few months will be the ones to decide. Union journeymen who have been laid off and recalled on a number of occasions have a greater stake in the future of the workplace, but they are effectively disenfranchised if the 30/30 rule is applied.

31 In the result, the Union submits that if the Board does not apply the 30-30 rule, the bargaining unit constituency is six employees, even if McCleay is included in the bargaining unit. Since only two signed the petition, the application must be dismissed.

32 Alternatively, if the 30-30 rule does apply and McCleay is excluded, the Union argues that a one person craft unit cannot be decertified. A craft unit must consist of a group of employees and not just a single employee: *State Building Maintenance*, BCLRB No. B103/93. As a consequence, the decertification petition must then be signed by not less than 45% of that group of employees. Since one employee does not constitute a craft unit, that employee cannot apply for decertification under Section 33(2).

##### 2. Employer

33 The Employer objects to the Union raising the status of the fourth employee, Hotovy, at this late stage when at the hearing it only advocated the inclusion of Holmberg, Eckert and Lozinsky. Even if the Board were to consider the status of Hotovy over its objection, the Employer says all four employees are properly excluded under the 30/30 rule. The Employer argues that in *BAT Construction, supra*, the Board authoritatively determined the test for employee status in the construction industry for purposes of either a certification or decertification application. It argues that the policy reasons for employing the 30/30 rule apply with equal force to a decertification application.

34 The Employer argues there is no impediment to a single person craft unit being decertified. The fact that more than one employee is required in order to apply for certification of a craft unit does not mean that a single person craft unit cannot apply for decertification. The Employer relies on the definition of "unit" contained in Section 1 of the Code of "an employee or a group of employees". The Employer argues that the law remains as set out in *Demac Construction*, BCLRB No. 240/86, (1986), 13 CLRBR (NS) 300 and *Beta Construction Co. Ltd.*, BCLRB No. 78/87.

### 3. Certain Employees

35 Certain Employees argue there is no policy reason for not applying the 30/30 rule in *B.A.T. Construction* to decertification. The same need to reduce litigation and to avoid delay tactics by unions opposed to decertification exists as with employer opposition in certifications. It also asserts that the inherent right to decertification is no less recognized under the Code than is the right to certify. The statement of purposes in Section 2(1)(a) underscores the requirement that a union be the "freely chosen" representative of the employees.

36 Certain Employees argue that those actually working under the contract have a more significant interest in the choice of continued union representation than those on layoff.

37 On the single employee decertification issue, Certain Employees note that Section 21 only requires that before a craft unit may be certified, there must be a group of employees that apply. The Code imposes different preconditions for the coming into being of a bargaining unit as opposed to the preconditions for the continued existence of a unit or the dissolution of one.

V. ANALYSIS

1. Relevance of Unfair Labour Practice Allegations

38 Before turning to an assessment of the arguments on the two substantive issues,  
I will address the objections to the Union's reference to the Employer's conduct and the  
employment history of other individuals beyond the three originally identified.

39 I will not consider the assertions advanced in the Union's submissions that were  
originally contained in the Union's unfair labour practice complaint. I have already ruled  
that, for a large part, that complaint does not disclose a *prima facie* case and the sole  
allegation that passed the *prima facie* hurdle would not be consolidated with these  
decertification proceedings. In the face of that ruling, it is not open to the Union to  
attempt to resurrect that complaint. In any event, I do not find those assertions directly  
relevant to the question of whether the individuals in dispute were employees within the  
meaning of the Code at the time of the decertification application and vote.

2. Timeliness of Challenge to Hotovy

40 The Employer and Certain Employees correctly point out that the Union did not  
make reference to the status of Hotovy or Gamble when the issues were first identified  
at the original hearing. In subsequent pre-hearing case management conferences, and  
in a response to request for particulars, the Union listed only three individuals it says  
should be added to the list if the 30/30 rule were not applied. The Union acknowledges  
that it did not raise its objection earlier, but asserts it is nevertheless entitled to raise the  
status of Hotovy and Gamble because of the jurisdictional obligation on the Board to  
ensure that the 45% threshold requirements in Section 33(2) are complied with.

41 I have some obvious concerns about now permitting the Union to enlarge the  
issues. To do so may undermine the Board's efforts through the case management  
process to narrow the issues in dispute. However, whether it is open to the Union at  
this late stage to raise the status of additional employees because of the jurisdictional  
nature of the issue to be considered, I find that, even if I were to permit the Union to  
enlarge the number of disputed employees, the inclusion of Hotovy and Gamble on the  
disputed list would not alter my conclusion. The application of the 30/30 rule would  
make Hotovy and Gamble equally ineligible as they fall within the same category of  
employees as the others.

42 According to the Industrial Relations Officer's investigation, the payroll records do  
not show Hotovy as falling within the 30-30 rule, although the Remittance Reports show  
that he worked a total of 166 hours in December 1996. I have no evidence establishing  
that Hotovy worked in any of the 30 days preceding January 27, 1996, the date of the  
decertification application. Indeed, the Officer's investigation proves otherwise. As  
already noted, Gamble has also not worked in the 30 days preceding January 27, 1996.  
Unless the Union can persuade me that the 30-30 rule has no application in

decertification applications, all five individuals identified by the Union are in the same category of ineligibility for inclusion in the list or for voting.

3. Application of 30/30 rule to Decertification Applications

43 On reviewing *BAT Construction*, I am not persuaded by the argument that the reconsideration decision is not definitive. That reconsideration panel was faced with deciding the broad question of who is an employee for purposes of the Code in the construction industry. That question includes employee status for purposes of decertification.

44 I acknowledge that the reconsideration panel's comments about decertification are *obiter* (i.e., non-binding statements) since the issue of decertification was not directly raised by the individual cases before it. Nonetheless, the *BAT Construction* decision was a significant policy pronouncement issued by a panel headed by the then chair of the Board. Submissions were widely solicited from intervenors with a recognized interest in the industry. By design, the rule adopted was intended to provide a clear statement of the approach to be taken in future cases to promote consistency of decisions and to provide predictability of outcome to the labour relations community.

45 Decertification was not an issue directly raised by the cases before the reconsideration panel in *BAT Construction*, but it cannot be said the issue of decertification was not considered or argued. The parallelism of the arguments in relation to certification and decertification was an issue argued by at least one intervenor, ICBA (at p. 18). Not only did the reconsideration panel consider many policy issues which went beyond the scope of the particular applications, but it specifically referred to decertification in its statement of the rule. It is evident from the following passage in the decision that the test was adopted for both certification and decertification applications in the construction industry:

This rule will be employed under the Code to determine who is an employee for the purposes of calculating the numerical percentages required for certification and **decertification**. Such persons would also be entitled to vote should the Code require a vote. Other persons who are eligible to vote, although not calculated into the statutory threshold requirements are "new hires" under Section 39 - new employees who have been hired (bona fide) after the date of the application for certification but prior to the vote (in the reverse in **decertification**). (p. 37, emphasis added)

46 Contrary to the Union's argument, the context in which the decision was made did not exclude consideration of decertification. Rather than the fact of certification or decertification, the more important context was that of the character of the industry. The reconsideration panel in *BAT Construction* recognized the seasonal character and intermittent nature of employment in the construction industry, factors that are common for both certification and decertification applications.

47 Having rejected the argument that *BAT Construction* is not definitive on the issue of decertification, I turn to the Union's argument that the policy concerns influencing the adoption of the 30-30 rule have no application in decertification. The three policy factors identified for the adoption of the rule were: the timeliness of the Board's process, access to collective bargaining, and respect for individual rights.

48 The major policy thrust in *BAT Construction* is to create a test which is sufficiently objective and predictable such that it will lessen the need for time consuming, costly litigation: *BAT, supra*, at pp. 37-38. The 30/30 rule has the advantage of providing a predictable objective measure, but it may well be at the expense of the minority who do not happen to be working on the date of application. Subsequent panels applying the 30-30 rule have also acknowledged the tension between respecting individual rights and employee choice of union representation with attaining the policy goal of lessening litigation by certainty and objectivity. They recognize that the application of that rule in a particular case may have the effect of disenfranchising some individuals who may have a history of employment with an employer, but on balance, adoption of the rule makes good labour relations policy as it may decrease the need for litigation: *Tercon Contractors Ltd.*, BCLRB No. B83/96.

49 I consider those policy concerns of timeliness to be no less compelling in the instance of decertification. The same policy objective of minimizing delay and providing a predictability of outcome apply in the context of cancellation of a certification as they do in the acquisition of that certification.

50 I also note the similarity in the nature of both types of applications. Certification and decertification deal equally with representational choices, and the exercise of the right of franchise under the Code. The reconsideration panel in *BAT Construction* grappled with the difficulty of giving meaning to individual rights in establishing a rule that accomplishes the goals of expediency. Again, the balance struck may be imperfect in its application in some cases involving both certification and decertification but the policy concerns identified above may outweigh the policy concerns for individual rights: *Tercon Contractors*, *supra*, at 21.

51 I do not accept the Union's argument based either on the non-binding nature of *BAT Construction* or the policy factors that the 30/30 rule should not apply to decertifications. As a result of the application of the 30/30 rule in these circumstances, I find Holmberg, Eckert, Lozinsky, Hotovy and Gamble are not in the bargaining unit for purposes of determining the 45% threshold since none were working on the day of the application or 30 days prior to that date. Since none of these employees meet the first arm of the test, it is unnecessary for me to consider the reasonableness of their expectation of recall within 30 days following the date of application.

52 In summary, I find the disputed individuals named above are not employees for purposes of this application. This is not a case where any of the employees fall within the 30/30 rule, with the enumerated exceptions for employees on various leaves of absences, or within any special circumstances justifying the exercise of a residual discretion to the strict application of that rule. As the reconsideration panel in *BAT*

*Construction* observed, a substantial onus is placed on a party who seeks to have an exception made to the 30-30 rule. I do not see any special circumstances here justifying a departure from the rule. All the arguments on the special features of the industry and its variable nature of employment advanced by the Union to persuade me to depart from the 30/30 rule were all factors considered by the *BAT Construction* reconsideration panel when it devised the rule. As has been pointed out in *Tercon Contractors, supra*, those very same arguments on the pattern of employment and seasonal layoffs were factors considered and dealt with in *BAT Construction* in the context of the nature of the employment in the industry as a whole (at p. 23). Those considerations were built into 30/30 rule and do not provide grounds to depart from it.

#### 4. Decertification of Single Employee Craft Unit

53 I begin my consideration of the arguments relating to the ability of a single employee to apply for cancellation of a craft unit with an analysis of the relevant statutory provisions.

54 The decertification provision, section 33(2), reads in part:

If a trade union is certified as bargaining agent **for a unit** and not less than 45% of the **employees in the unit** sign an application for cancellation of the certificate.... (emphasis added)

55 Section 1 was amended in 1992 to define "unit" to mean:

...**an employee or a group of employees**, and the expression "appropriate for collective bargaining" or "appropriate bargaining unit", with reference to a unit, means a unit determined by the board to be appropriate for collective bargaining, whether it is an employer unit, craft unit, technical unit, plant unit or another unit, and whether or not the employees in it are employed by one or more employers. (emphasis added)

56 With the amendments introduced at the same time with Bill 84, section 139(i) now reads:

The board has exclusive jurisdiction to decide a question arising under this Code...including... any question as to whether

(i) **an employee or a group of employees** is a unit appropriate for collective bargaining... (emphasis added)

57 Section 21(1), the provision allowing for craft certification, states:

If **a group of employees** belongs to a craft or group exercising technical or professional skills that distinguish it from the employees as a whole, and they are members of one trade union pertaining to the craft or skills, the trade union may, ....apply to the

board to be certified as the bargaining agent **for the group**....  
(emphasis added)

58 The language of section 21 establishes a requirement for a group of employees. Section 21 does not allow for certification of a single employee craft unit: *State Building Maintenance, supra*.

59 Unlike the result with Section 21, I conclude there is no prohibition on the face of Section 33 preventing a single employee from decertifying. The operative word in Section 33 is the reference to "unit" which is in turn defined to include a one employee unit.

60 Nonetheless, I do not accept the Union's argument that it is impossible for a craft unit to consist of one person. The logical consequence of the Union's argument is that a craft unit may have no existence if the number of employees decline to only one: *Demac Construction, supra*, at p. 304. I do not draw the inference the Union advocates from the repeal of the former Section 52(8) of the *Industrial Relations Act, R.S.B.C. 1979, c. 212*. In *Demac* the panel did refer, as the Union argues, to the existence of Section 52(8), but its effect was only one factor in its analysis. The principle remains as a matter of law and policy that a unit does not depend for its existence on the presence of more than one employee: *Demac Construction, supra*, at p. 304.

61 The amendments to the definition of "unit" in Section 1 and to Section 139(1) to specifically include a reference to an individual employee underscore this point that a single employee may apply to decertify a craft unit. The legislature amended the definition of "unit" to eliminate the previous bar to certification of a bargaining unit containing a single employee. Prior to the amendments one employee decertification was permitted, but one employee certifications were not allowed: *Rookes Cartage Ltd.*, BCLRB No. 96/87 and *Hemlock Valley Recreation*, BCLRB No. 29/79 and *McPherson Playhouse Foundation*, BCLRB No. 214/83, 83 CLLC ¶16,053.

62 The result of these legislative amendments is that one employee can apply for certification and decertification of a non-craft unit. A one employee craft unit cannot be certified, although it can be decertified. I find the imbalance in this result to be anomalous, but the inevitable result of the different wording of the certification and decertification provisions in the legislation. The anomaly lies more in the prohibition against certifying a one person craft unit, than in the universal application of the decertification provisions to one employee craft and non-craft units. As already noted in *State Building Maintenance, supra*, the Board as a statutory tribunal only has such authority as is conferred by the statute. Had the legislature intended to permit certification of single employee craft units, the necessary amendment to Section 21 would have been an easy measure to accomplish. There may well be valid labour relations reasons to have a parallelism in the handling of certification and decertification of craft units. No matter how overwhelming those policy considerations may be in favour of an even-handed approach to certification and decertification, I cannot interpret these provisions so as to effectively amend the statute. Section 33(2) is clear in allowing 45% of the employees in the "unit" to apply for cancellation of the certification,

whether that unit consists of one employee or several. Section 21 does not permit an individual to apply for certification because of the wording "a group of employees". This anomaly may well be a matter that deserves to be addressed in future legislative review.

VI. NEED FOR HEARING

63 Both the Employer and Certain Employees have indicated that if they succeed in their arguments, it is unnecessary for the panel to decide whether Ed McLeay ought to be excluded from the unit as they are content to have the application decided on the basis solely of Beckman's inclusion in the unit and vote. From that statement of their position, and the result of my conclusions, I assume that it will not be necessary for the hearing to proceed on March 26. However, the Union has not formally indicated its agreement with that procedure. I will allow the Union until March 24 by 4 p.m. to advise the Board and the other parties in writing whether or not it disputes the need to proceed and if so, on what basis. If the Union does so, I will convene a case conference call immediately to discuss the need to conduct a hearing.

LABOUR RELATIONS BOARD

LAURA PARKINSON  
VICE-CHAIR