

UNFAIR LABOUR PRACTICES DURING CERTIFICATIONS: YOU CAN'T ALWAYS GET WHAT YOU WANT – BUT DO YOU GET WHAT YOU NEED?

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Jurisdictions With Express Remedial Certification Power In the Legislation

British Columbia [*Labour Relations Code, 1996, s. 14(4)(f)*]
Manitoba [*Labour Relations Act, 1987, s. 41*]
New Brunswick [*Industrial Relations Act, 1973, s. 106(8)(e)*]
Nova Scotia [*Trade Union Act, 1989, s. 25(9)*]
Ontario [*Labour Relations Act, 1995, s. 11*]
Federal [*Canada Labour Code, 1985, s. 99.1*]



No Express Legislation but Power to Grant Remedial Certification Where “Just and Necessary”

Prince Edward Island – *Polar Foods v. Labour Relations Board et al* [2002] P.E.I.J. No. 69

Introduction:

It has been said that the test of any legal system is the extent to which its norms are applied in practice. It is a widely recognized labour relations reality that employees are peculiarly vulnerable to the views and actions of the employer because of their relationship of economic dependence. For this reason, an employer's misconduct during a union's organizing drive can have devastating consequences to the union's representation campaign, particularly where the employer views the economic benefit of noncompliance with the law as outweighing the costs of unionization. The extension of a Labour Board's authority to grant automatic certification as a remedy when employers commit unfair labour practices and impair the employees' ability to express their true wishes therefore represents a pivotal step-forward in protecting the right of workers to freely choose union representation.

Nevertheless, the legislated ability of Labour Board's to grant automatic certification has been, and continues to be, a very contentious area of public policy. This was witnessed specifically in Ontario in 1998 with the passing of Bill 31 – the so-called “Wal-Mart Amendment” which stripped the Ontario Labour Relations Board's (“OLRB”) remedial certification power – and then in 2005 with the with the passing of Bill 144 and its reintroduction of the power to grant remedial certification in the Province.

Jurisdictions in Canada With the Power to Grant Remedial Certification and the Differences Among Them:

Labour legislation in Ontario [*Labour Relations Act, 1995*, section 11], British Columbia [*Labour Relations Code, 1996*, ss. 14(4)(f)], Manitoba [*Labour Relations Act, 1987*, s. 41], New Brunswick [*Industrial Relations Act, 1973*, s. 106(8)(e)] and Nova Scotia [*Trade Union Act,*

1989, s. 25(9)] allow for unfair labour practice certification. A specific unfair labour practice certification power was also incorporated into the Canada Labour Code (the “Code”) in the 1998 amendments to the Code. In addition, even though there is no specific provision in the Prince Edward Island Labour Act about remedial certification, the Prince Edward Island Labour Relations Board has the remedial power as a result of the decision by the Prince Edward Island Supreme Court in *Polar Foods v. Labour Relations Board et al* [2002] P.E.I.J. No. 69.

The common string among these jurisdictions which possess the remedial certification power is that the Labour Board’s that apply the legislation each take a conservative and cautious approach in exercising such power. This approach likely has to do with the wording of the empowering provision itself as well as the importance assigned to ensuring that the employees support the union. For instance, the likelihood that the true wishes of the employees cannot be ascertained by a representation vote is a condition precedent under the Manitoba, New Brunswick, Nova Scotia and Ontario provisions. Notably, amendments to the British Columbia statute introduced in 1992 removed the reference to the ascertainability of the true wishes of the employees.

In addition, under the British Columbia, Manitoba, New Brunswick and Nova Scotia provisions, some consideration must be given to the level of union support. Under the British Columbia statute, the Board considers whether the union was likely to have achieved sufficient support for certification in the absence of the employer’s violation. Under the Manitoba and New Brunswick statutes, support adequate for collective bargaining is a prerequisite for remedial certification. Moreover, under the Nova Scotia statute, a minimum of 40% level of membership support is necessary. The minimum level of membership support necessary in the Nova Scotia Act is a considerable hurdle to a remedial certification as it leaves the Nova Scotia Labour Board

without flexibility to consider cases where the union was unable to reach the arbitrary 40% threshold. It may also provide the incentive to intensify anti-union activity to prevent membership from reaching that level.

Unique to British Columbia's empowering provision is the fact that the British Columbia Board possesses the residuary power to certify a bargaining agent, even without a finding of an unfair labour practice, and to impose conditions on that certification.

Finally, even where the conditions precedent are met, the power to grant remedial certification is at the discretion of the respective Labour Board.

Ontario and a Review of its Recent Jurisprudence:

In Ontario, the remedial certification power has been used relatively rarely. Between 1990 and 1997 for instance, the power was only invoked 28 times, that is, on average, 3.5 certificates per year.¹ Remedial certification has generally been considered an extraordinary remedy reserved for the most "egregious" cases, based on an analysis of the severity and swiftness of the employer interference. The OLRB's jurisprudence in this area suggests that the granting of automatic certification in Ontario has involved two components: the use of layoffs and/or terminations to signal to other employees that their jobs may be at risk; and/or employer involvement in a concerted anti-union campaign.²

Moreover, the OLRB is urged by the empowering provision to consider remedies other than remedial certification, including the holding of a representation vote or second vote, sometimes preceded by union meetings, Board postings or other forms of communication. In

¹ Elizabeth Mitchell, "Can Dunmore Be Used to Restore Remedial Certification in Ontario" (2001) 11 C.L.E.L.J. 175 at 178.

² Joseph B. Rose & Gary N. Chiason "Immediacy and Saliency in Remediating Employer Opposition to Union Organizing Campaigns" (1997) 48 Labour Law Journal 662.

fact, under subsection 11(2)(c) of the current *Act* in Ontario, remedial certification may only be awarded where the Board finds that there is no other remedy that would sufficiently counter the effects of the employer's actions.

Historically, the test of whether the true wishes of employees can be ascertained is an objective one where the Board uses its labour relations expertise to assess the impact that the violations would have on the typical employee.³

The OLRB issued its first decision under the new manifestation of section 11 in *1443760 Ontario Inc. (c.o.b. Swing Stage Equipment Rentals Ottawa ("Swing Stage"))*[2007] O.L.R.D. No. 2672. In that case, an inside union organizer (referred to as a "salt") of the Carpenters Union applied and worked for Swing Stage for a total of twelve days before being dismissed. During this time, he would talk to other employees regularly about joining the union. On the twelfth day, all of the employees advised Swing Stage's owner that they had been approached by a union. The following day the union organizer was told not to come to work due to weather, while all other employees were at work. Ultimately, the union organizer was told not to return to the workplace at all on the basis that work was being done more efficiently without him. The Carpenters subsequently filed an unfair labour practice complaint alleging that the organizer's termination was a violation of the *Act* and sought remedial certification under section 11 as a remedy. At the Board hearing, there was no direct evidence that the employer was aware of the employee's union affiliation or organizing activity. Nevertheless, the Board found that the employer could not meet its burden to prove that it had not acted in violation of the *Act* since it found that the employer had been advised by its employees that someone had been attempting to

³ See for instance *Knob Hill Farms Ltd.* [1987] OLRB Rep. December 1531, affd [1990] O.L.R.B. Rep June 697, leave to appeal refused [1990] O.L.R.B. Rep. October 1101 (C.A.), where the OLRB refused to give weight to the fact that the persons called by the Union indicated that their support for the union and their ability to vote was unaffected by the employer's conduct. The OLRB held that the test was an objective rather than subjective test.

organize a union and had likely deduced that the someone was the new employee. The Board found that the union organizer's termination was "*a clear message to the employees: if you are involved with the union, you will lose your job*" and effectively destroyed the union's organizing campaign. The Board went on to say that these actions "*violated the most fundamental right of an employee under the Act to freely choose whether or not to become a member of a trade union*".

However, more recently, in *Lecompte Electric Inc.* [2008] O.L.R.D. No. 1429 ("*Lecompte*") the Board took the view that section 11 relief is not a substitute for "broad-based grassroots organizing" and would require added evidence of the actual impact of the misconduct on union support from the employees. In *Lecompte*, the International Brotherhood of Electrical Workers utilized a number of "salts" in its organizing campaign of the employer. These salts worked for the employer and on occasion would speak to fellow employees about joining the union. Following the commencement of the union's campaign, a number of individuals, including two of the "salts", were laid-off for what the employer claimed was a legitimate lack of work. The I.B.E.W. subsequently filed an application for certification on behalf of 3 out of 15 individuals (for a membership level of 20%) and unfair labour practice complaint alleging several instances of misconduct by the employer, including that the lay-off's were motivated by anti-union animus, and seeking remedial certification. The Board ultimately found on the evidence before it that only the lay-off the more overt "salt", Paul Brunet, was improperly motivated, and also found an unfair labour practice with respect to certain comments and threats made by the employer's management in a meeting with employees. Despite those findings, however, the Board refused to exercise its remedial certification power under section 11 stating that "*the Board cannot possibly find a trade union has failed to meet the 40 per cent membership*

threshold due to the unfair labour practices where the trade union has no meaningful contact with over 60 per cent of the members in the bargaining unit at and around the time the unfair labour practices occurred...no organizing activity occurred after Mr. Brunet's lay-off. Nor is there any meaningful evidence of organizing activity by the applicant after the responding party's December 20, 2005 meeting...". The Board went on to say that "[t]he key legal principle is that the union's failure to attain the 40 per cent membership threshold must occur as a result of the employer's contraventions of the Act. The evidence necessary to prove such a linkage will vary with the circumstances of each individual case."

The *Lecompte* case has made it apparent that, in many respects, an organizing campaign that relies on section 11 relief may require further effort and evidence from the union than an organizing campaign free of unfair labour practice allegations. In light of *Lecompte* it is critical that a union furnish evidence to demonstrate the "chilling effect" of the unfair labour practice on the affected employees after the unfair labour practice occurred as well as demonstrate a linkage that such a "chilling effect" prevented the union from obtaining the support of more than 40% of the employees or from ascertaining the true wishes of the employees in a vote.

British Columbia:

British Columbia Labour Relations Board ("BCLRB") jurisprudence indicates that the remedy of automatic certification is not reserved only for "egregious" employer misconduct but also where the conduct forms a "pattern of sustained unlawful activity". In *Cardinal Transportation B.C. Inc.* [1996] 34 C.L.R.B.R. (2d) 1, the BCLRB applied the objective test and examined the cumulative effect of the employer contraventions including the issuing of a blanket prohibition on the lawful expression of employees' views about union representation on the

lunchroom bulletin board and the implementation of profit-sharing and increased employees' wages. The BCLRB found that the employer's unfair labour practices prevented the union from securing the one additional union member required for certification without a vote of 55%. The BCLRB concluded that "*the Union organizing campaign would have succeeded...had it not been for the chilling effect of the Employer's unfair labour practices at the critical point in the organizing campaign.*"

Federal Jurisdiction:

In *Transx Ltd.* [1999] C.I.R.B.D. No. 46, the Canada Industrial Relations Board recognized that, while its preference is to certify based on free choice, it has a "duty" to certify despite a lack of evidence of majority support "where the possibility of such free choice has been seriously compromised by violations of the Code."

Conclusion:

A review of the jurisprudence across Canada involving remedial certification demonstrates that where a Labour Board is granted the automatic certification powers to respond to an employer's unfair labour practices, they have used this remedy cautiously, and only where the employer's conduct seriously distorts the employees ability to make a meaningful choice concerning union representation. Labour Board's should remain vigilant in protecting an employee's right to seek and choose union representation as well as ensure that an employer does not benefit from its own wrongdoings. The proposition that "rights acquire substance only insofar as they are backed by effective remedies" thus resonates as the pillar to the institution and sustained implementation of remedial certification.