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**PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - TRIAL DIVISION**

BETWEEN:

POLAR FOODS INTERNATIONAL INC.

APPLICANT

AND:

**LABOUR RELATIONS BOARD (PRINCE EDWARD ISLAND),
UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 864, LINDA EPPING, FRANK BRYANT,
JOHN PERRY, TRACY BENOIT, and GERALDA DOUCETTE**

RESPONDENTS

BEFORE: The Honourable Justice Wayne D. Cheverie

Murray L. Murphy	-	Solicitor for the applicant
Eugene P. Rossiter, Q.C.	-	Solicitor for respondent United Food & Commercial Workers Union, Local 864 et ors.
M. Lynn Murray	-	Solicitor for respondent P.E.I. Labour Relations Board
Place and date of hearing	-	Charlottetown, Prince Edward Island April 25, 2002

Place and date of judgment

-

Charlottetown, Prince Edward Island
August 28, 2002

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Prince Edward Island Supreme Court - Trial Division
Before: Cheverie J.
Heard: April 25, 2002
Judgment: August 28, 2002
[14 pages]

Judicial Review - Labour Relations Board (Prince Edward Island) - appropriate standard of review - whether the Labour Relations Board has the power to order remedial certification - application dismissed.

STATUTES CONSIDERED: *Labour Act*, R.S.P.E.I. 1988, Cap. L-1, ss. 9, 10, s-ss. 1(b), 4(1), 4(2), s.11, s-s. 11(3), ss. 12, 13; *Judicial Review Act*, R.S.P.E.I. 1988, Cap. J-3; *Interpretation Act*, R.S.P.E.I. 1988, Cap. I-8, s. 9.

CASES CONSIDERED: *Ward v. University of Prince Edward Island*, [1998] P.E.I.J. No. 6 QL (P.E.I.S.C., T.D.); *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Royal Oak Mines v. Canadian Labour Relations Board* (1996), 133 D.L.R. (4th) 129 (S.C.C.); *Bank of Montreal* (1985), 10 C.L.R.B.R. (N.S.) 129; *Michelin Tires (Canada) Ltd.*, 80 C.L.L.C. 469; *IWA Canada v. ZCL Fiberglass Ltd.* 1997 Carswell Ont. 5289 (O.L.R.B.).

TEXTS CONSIDERED: George W. Adams, *Canadian Labour Law* (2nd ed.) Aurora, Canada Law Book, 2000; Wright and Raso, *Labour Relations Board Remedies in Canada*.

Murray L. Murphy	-	Solicitor for the applicant
Eugene P. Rossiter, Q.C.	-	Solicitor for respondent United Food & Commercial Workers Union, Local 864 et rs.
M. Lynn Murray	-	Solicitor for respondent P.E.I. Labour Relations Board

Cheverie J.:

Introduction

[1] During late 1999 and the early part of 2000, an effort was made to unionize employees at the fish processing plant operated by Polar Foods International Inc. (“Polar”) in the City of Summerside, Prince Edward Island. This move to unionization was spearheaded by the United Food and Commercial Workers Union, Local 864 (the “Union”) and a number of other individuals, five of whom are named as respondents in this case. As a result of the opposition from Polar to this movement, on February 4, 2000, the Union and five individual complainants, filed with the Labour Relations Board of Prince Edward Island, (the “Board”), an unfair labour practice complaint. The complaint alleged Polar violated ss. 9 and 10 of the *Labour Act*, R.S.P.E.I. 1988, Cap. L-1. The Board heard this complaint between April 3, 2000 and February 5, 2001. The hearing comprised some 22 days of testimony, including 14 witnesses; with 30 exhibits tendered on behalf of the complainants and 43 exhibits tendered on behalf of the respondents.

[2] On June 7, 2001, the Board issued its unanimous decision in favour of the complainants and ordered a number of remedies. The one which is of most concern to Polar was the order for “remedial” or “automatic” certification of the union as the bargaining agent of the employees of Polar in the Summerside plant. On July 5, 2001, Polar filed an application for judicial review pursuant to the *Judicial Review Act*, R.S.P.E.I. 1988, Cap. J-3.

Factual background

[3] An application for judicial review under the *Judicial Review Act* requires this Court to determine whether or not authority conferred on a tribunal, like the Labour Relations Board, by an enactment, like the *Labour Act*, has been exercised in accordance with that *Act* in respect to a decision of that tribunal in relation to one of the items listed in s-s. 1(b). There is no dispute but that the Board is a tribunal within the meaning of the definition in s-s. 1(h) of the *Judicial Review Act*; and there is no dispute that the decision it rendered on June 7, 2001 is one that is subject to judicial review. As Jenkins J. said in *Ward v. University of Prince Edward Island*, [1998] P.E.I.J. No. 6 QL (P.E.I.S.C., T.D.): “Administrative law is concerned with process, and whether the tribunal acted properly within its statutory authority and proceeded fairly in making the decision, and not with the merits or wisdom of the tribunal’s decision on the appeal as indicated by the result.”

[4] While my task is to determine whether or not the decision of the Board ought to be interfered with, and not to re-try the matter or substitute my decision for that of the Board, I believe in this case a review of some of the details that were before the Board may be of assistance in putting its decision in context.

[5] In its decision, the Board dealt extensively with the factual situation before it and made a number of findings of fact. It found Polar came into existence on May 1, 1998 as a result of an amalgamation of six processing plants. It found one of those plants was located in the City of Summerside, Prince Edward Island. The Board heard extensive testimony about the working conditions at that plant, which at times required employees to warm their hands and feet by soaking them in pails, and other containers, of warm water. The Board heard testimony there were ammonia leaks within the plant, as well as other health and safety concerns. Also of concern were the wage levels at the plant in Summerside when compared to other Polar plants in the organization. The Board noted that on the 1st of May, 2000, after the commencement of the unfair labour practice complaint, Polar granted a pay increase to its employees.

[6] The Board found it was a combination of working conditions, health and safety considerations and the matter of wage parity between sister plants that formed the basis for the employees' decision to make contact with Union representatives. A number of meetings were held and then on January 19, 2000, during the morning break at the plant, the plant manager held what is known as a "captive audience" meeting. He was angry and upset. He told the employees present he was aware the Union was attempting to organize the workers at the plant. He had called Polar's head office concerning this. He referred to padlocks on the doors and he referred to product being shipped elsewhere for processing. The Board went on to find the reaction of the employees to these messages was profound. They were fearful and concerned for their jobs, and they felt intimidated by the plant manager.

[7] Between January 19, 2000, and January 31, 2000, Polar hired twelve new employees, the majority of whom showed up for work within two hours of the plant manager becoming aware of the Union activities. The hiring of these new employees at this time of year was unusual. Then, on January 24, 2000, Jack Quinn, Vice-President and head of production with Polar, arrived at the Summerside plant. He spoke to the employees during their afternoon break and indicated to them the plant could not run with a union. He also explained it was possible padlocks could be put on the doors and product could be shipped elsewhere, and he clearly stated he did not want to see the plant unionized. The Board accepted that Mr. Quinn indicated he didn't want to see people lose their jobs, but he would not have employees telling management when and how employees would work, and further, there would be no raise in May of 2000. The Board found the employees were concerned following this meeting, as it confirmed what happened at their earlier meeting with the plant manager and served to heighten their fear.

[8] Over the next period of time, product was diverted from the Summerside plant to other Polar plants. On January 31, 2000, the five individual complainants (now the respondents) were laid off and records of employment were issued with the notation "shortage of work" as the reason for the layoff. The Board noted the five individuals were involved in the Union, and that

Polar was aware of this. As a result of these layoffs, the Board heard evidence these individuals had difficulty paying their bills, one was required to obtain social assistance and use a food bank and other additional stresses were enumerated. On May 30, 2000, Polar advertised for workers at which time some of the respondents who had been laid off on January 31 were still on layoff and were not called back. The Board found if there was a shortage of work, as management stated in the records of employment it issued to these five individuals, surely they would have been recalled when the work picked up. There were other factors, but in the end the Board indicated it had no hesitation in coming to the conclusion Polar had perpetrated an extraordinary range of unfair labour practice complaints against the individual complainants and the Union. The Board categorized the complaints into seven categories, and found Polar had, in fact, perpetrated complaints in six of the seven categories. At p. 18 of its decision, the Board summarizes its findings as follows:

In summary, in regard to the initial issue of whether the actions of the Employer constitute Unfair Labour Practices, the Board finds in the affirmative in relation to six (6) of the seven (7) groups of allegations of Unfair Labour Practices. As noted above, these are made out by the activities involving management attending at the Employee's lunch room on the plant site at Summerside, the discussions that took place during both of those meetings on the 19th day of January, 2000 and the 24th day of January, 2000, the identification of Union supporters, the layoffs, the circulation of a petition, the diversion of business and the change of job duties. The effect of all of that would have been to impact upon the Employee's exercise of their rights under the *Labour Act* in the circumstances of this case.

[9] The Board went on to say Polar used coercion, intimidation, threats or undue influence to achieve purposes prohibited by the *Labour Act*. At p. 26, the following graphic statement appears: "The Unfair Labour Practices committed by the Employer here are the most far reaching in terms of substance and impact that the Board has ever seen."

Relevant Statutory provisions

[10] The sections of the *Labour Act* which are particularly relevant to this case are s-ss. 4(1) and 4(2), ss. 9, 10 and 11. For convenience, I am setting those out in their entirety:

4. (1) The board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the board thereon is final and conclusive for all purposes, but nevertheless the board may at any time, if it considers it advisable to do so, reconsider any decision, interim order, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

(2) No decision, interim order, order, direction, declaration or ruling of the board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of an application for judicial review, or otherwise, to question, review, prohibit or restrain the board or any of its proceedings.

....

9. (1) Every employee has the right to be a member of a trade union and to participate in the lawful activities thereof.

(2) No person ceases to be an employee within the meaning of this Part by reason only of his ceasing to work as the result of a lockout or lawful strike or by reason only of dismissal contrary to this Part or to a collective agreement.

(3) Where employees go on strike or are locked out in circumstances permitted by section 41, they are entitled, subject to subsection (4), upon the termination of the strike or lockout to return to and be reinstated in their employment without discrimination and subject to the terms and conditions of employment applicable on the termination of the strike or lockout.

(4) An employer is not obliged under subsection (3) to reinstate particular employees where the business of the employer has declined with the result that the employer

(a) no longer has persons engaged in performing work of the same or similar nature to work which those employees performed prior to the strike or lockout; or

(b) has suspended or discontinued the operations performed by those employees prior to the strike or lockout,

but if the employer resumes those operations, he shall first reinstate those employees.

(5) Replacement persons engaged by an employer to fill the positions of employees of the employer who are on strike or are locked out, in circumstances permitted by section 41, shall be considered temporary employees for the duration of the strike or lockout, and upon the termination of the strike or lockout, the employment of the persons engaged to replace the employees shall, without notice, be deemed to be terminated, subject only to the terms and conditions of any agreement relating to the return to work of the striking or locked out employees.

(6) Every employer has the right to be a member of an employers' organization and to participate in the lawful activities thereof.

(7) Nothing in this Part restricts or interferes with the right of an employer to suspend, transfer, lay off or discharge employees for just cause.

(8) Nothing in this Part shall be deemed to deprive an employer of his freedom

- (a) to express his views on collective bargaining, or the terms and conditions of employment, so long as he does not use coercion, intimidation, threats, or undue influence;
- (b) to permit an employee or the bargaining committee or officers or other representatives of a trade union to confer with him or to attend to the business of a trade union without deduction of wages for loss of time so occupied;
- (c) to provide free transportation to representatives of a trade union for purposes of collective bargaining; or
- (d) to permit a trade union the use of the employers' premises for the purposes of the trade union.

(9) Nothing in this Part prohibits the parties to a collective agreement from inserting in the collective agreement a provision granting preference of employment to members of a specified trade union or requiring as a condition of employment membership in or the payment of dues or contributions to a specified trade union but no bargaining agent shall require an employer to discharge an employee for non-membership in such trade union, if membership is not available to the employee on the same terms and conditions generally applicable to other members. R.S.P.E.I. 1974, Cap. L-1, s.8; 1987, c.39, s.1; 1994, c.32, s.5 *{eff.}* Jan. 5/95.

UNFAIR LABOUR PRACTICES

10. (1) No employer, employers' organization or an agent or any other person acting on behalf of an employer or employers' organization shall

- (a) interfere with, restrain or coerce an employee in the exercise of any right conferred by this Act;
- (b) participate or interfere with the formation, selection or administration of a trade union or other labour organization or the representation of employees by a trade union or other labour organization; or contribute financial or other support to such trade union or labour organization;
- (c) suspend, transfer, refuse to transfer, lay-off, discharge, or change the status of an employee or alter any term or condition of employment, or use coercion, intimidation, threats or undue influence, or otherwise discriminate against any employee in regard to employment or any term or condition of employment, because the employee is a member or officer of a trade union or has applied for membership in a trade union;
- (d) refuse to employ any person because such person is a member or officer of a trade union or has applied for membership in a trade union or require as a condition of employment that any person shall abstain from joining or assisting or being active in any trade union or from exercising any right provided by this Part;
- (e) fail or refuse to bargain collectively in accordance with this Act;
- (f) call, authorize, counsel, procure, support, encourage or engage in a lockout except as permitted by section 41.

(2) No employee, trade union or person acting on behalf of a trade union shall

- (a) interfere with the formation, selection or administration of an employers' organization or the representation of employers by an employers' organization, or by intimidation or any other kind of threat or action, seek to compel an employer to refrain from becoming or to cease to be a member, or officer or representative of an employers' organization;
- (b) except with the consent of the employer, attempt at the employers' place of employment during working hours to persuade an employee of the employer to join a trade union;
- (c) fail or refuse to bargain collectively in accordance with this Act;
- (d) call, authorize, counsel, procure, support, encourage or engage in a strike except as permitted by section 41;
- (e) use coercion or intimidation of any kind with a view to encouraging or discouraging membership in or activity in or for a trade union or labour organization. R.S.P.E.I. 1974, Cap. L-1, s.9; 1990, c.27, s.1; 1994, c.32, s.18 {*eff.*} Jan. 5/95.

11. (1) Where a complaint in writing is made to the board that an employer, employers' organization, trade union or other person is committing or has committed an act prohibited section 10 or otherwise prohibited under this Act, the chief executive officer or an officer of the Department of Community and Cultural Affairs, appointed by him shall inquire into the complaint and endeavour to effect a settlement of the matter complained of.

(2) The chief executive officer or the officer appointed by him shall report the results of his inquiry and endeavours to the board.

(3) If the chief executive officer or other officer appointed by him, as the case may be, is unable to effect a settlement of the matter complained of, the board shall conduct a hearing on the complaint, and, if the board is satisfied that an employer, employers' organization, trade union or other person is committing or has committed an act prohibited by this Act, the board, shall, by order, make such award, give such direction, or take such other action as the board considers just and necessary in the circumstances and, without restricting the generality of the foregoing, may, by such order or subsequent order,

- (a) direct the employer, employers' organization, trade union or other person to cease doing the act and to rectify in such manner as the board considers just any violation of this Act;
- (b) direct an employer to pay to an employee a sum equal to the wages, salary or other remuneration lost by the employee by reason of the employer's violation of this Act;
- (c) direct an employer to reinstate an employee in his employ at such date as in the opinion of the board is just and proper in the circumstances in the position that the employee would have held but for a suspension, transfer, refusal to transfer, lay off, discharge or change of status of the employee done or made by the employer

contrary to this Act;

(d) direct an employer to employ a person at such date as in the opinion of the board is just and proper in the circumstances in the position that the person would have held but for the refusal of such employer to employ such person contrary to this Act.

(4) The board may in any order made under subsection (3) declare the manner of service of such order upon any employer, employers' organization, trade union or other person to whom such order is directed.

(5) Where any such complaint arises out of the suspension, transfer, refusal to transfer, lay off, discharge or change of status of an employee or the refusal to employ or re-hire any person, the burden of proof that the suspension, transfer, refusal to transfer, lay off, discharge, change of status, or refusal to employ or re-hire, was for just cause and not in violation of this Act, is upon the person charged. R.S.P.E.I. 1974, Cap. L-1, s.10; ...

It should be noted the decision of the Board on June 7, 2001, which is the subject of this review, was unanimous. The three member panel included one management representative and one union representative, together with the Chair. All were in agreement.

Standard of review

[11] In cases of judicial review, the first question to be answered is: what is the proper standard of review? Of assistance in determining the answer to this question are numerous decisions of the Supreme Court of Canada. Bastarache J. in the case of *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, suggests the court should invoke what has been dubbed “the pragmatic and functional” approach. However, he goes on at p. 1005 to say “the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal”. The spectrum of review moves from one of correctness at the low end, to one of patent unreasonableness at the high end.

[12] Counsel for the Union takes the position that the correctness test only applies when the Board enters upon a hearing and considers the complaint. He argues that once the Board enters upon the hearing and then proceeds to issue a remedy, the test then becomes the patently unreasonable test. Counsel for the Board submits the standard of review is one of correctness in relation to issues about whether or not the Board acted within its jurisdiction, and once it is established the Board acted within its jurisdiction, then any decision flowing therefrom is subject to a standard of review based on the patently unreasonable test. Counsel for Polar takes the position the standard of review is really that of correctness throughout. He says if the Court finds the Board acted within its jurisdiction, then that is an end to the matter as far as Polar is concerned. Given the strong privative clause which is found in s-ss. 4(1) and (2) of the *Labour Act*, counsel for Polar concedes if the Board has the power to order remedial certification, then

the standard of review with respect to the exercise of that power is very high.

[13] After considering the arguments advanced by counsel for all of the parties, and the various authorities cited, I find the standard of review to be applied to the Board in determining whether or not it had the power to order automatic or remedial certification is one of correctness. Once it is determined the Board has the power to order the remedy, then that remedy can only be reviewed on the standard of patent unreasonableness. Given the position of Polar's counsel, I need only be satisfied the Board correctly interpreted its own statute that it had the power to order automatic or remedial certification. Polar does not challenge the decision of the Board beyond that.

[14] Support for my conclusion is found in the reasons of Cory J. in the Supreme Court of Canada decision, *Royal Oak Mines v. Canadian Labour Relations Board* (1996), 133 D.L.R. (4th) 129 (S.C.C.). Paragraph 59 at p. 152 of that decision is particularly relevant. It reads:

[59] The Canada Labour Relations Board has been granted the power to impose remedies by s. 99(2) of the Code. Thus, the question as to whether the board may or may not impose remedies on the parties is jurisdictional in nature. If the board concluded that it could not impose a remedy to counteract a breach by one of the parties, the aggrieved party would have the right to argue before a reviewing court that the board had incorrectly interpreted its enabling statute. The court, in addressing this jurisdictional question, would then be entitled to review the board's decision, on a correctness standard, to determine whether in fact the board did have the power it claimed to lack. However, once it has been established by the provisions of the empowering legislation that the board does, in fact, have the jurisdiction to order certain remedies, the question of which of these remedies the board chooses to impose in any given situation is a question within the board's jurisdiction. Since the board's order falls within its jurisdiction, it should be assessed on a patently unreasonable basis.

Cory J. breaks down the exercise into two parts: first, he says the court is entitled to review the Board's decision on a correctness standard to determine whether it had the power at all, but second, once it's been established the provisions of the empowering legislation allow the Board to order certain remedies, then the remedy it chooses is reviewable on a patently unreasonable basis.

Was the Board correct in interpreting the relevant sections of the *Labour Act*?

[15] Polar argues the Board incorrectly interpreted s-s 11(3) of the *Labour Act*. In particular, it argues remedial certification is an exceptional remedy which is not available at common law and the power to grant such a remedy exists only where it is specifically authorized by statute. Clearly, s-s. 11(3) does not specifically give the Board the power to order remedial

certification. It is not specifically empowered to do so. However, is that an end to the matter? Does a fair and reasonable interpretation of that subsection disclose a legislative intent to give the Board that power under the umbrella of the broad powers that it has so designated?

[16] In support of its position on this point, Polar refers the Court to the learned author, George W. Adams, *Canadian Labour Law* (2nd ed.) Aurora, Canada Law Book, 2000, at p. 7-91 to 7-92. After referring to labour relation statutes in a number of provinces which allow their respective boards to certify a bargaining agent without a representation vote, and after referring to the removal of that specific power in Alberta, the learned author had this to say: “The authority to grant certification without a representation vote on the finding of an unfair labour practice has, in Canada, only flowed from specific statutory enactments.” As I carefully read this quotation, I understand the learned author to say at the time he formulated this proposition, the authority for remedial certification “only flowed” from specific statutory enactments. In other words, that might have been the only interpretation available. Notably, Adams did not say in this quotation relied upon by Polar that the remedial certification “only flows” from specific statutory enactments. Subsection 11(3) of our *Labour Act* may very well be broad enough to contain this power. The Board was referred to the legislation in other Canadian jurisdictions on the question of automatic or remedial certification, and I believe it correctly concluded at p. 20 of its decision as follows:

...While the Board found the analysis of the legislation of other provinces interesting, it is this Board’s opinion that it must focus on the interpretation of the legislation in place in Prince Edward Island and must uphold its mandate to foster harmonious industrial relations within the province.

[17] The most important words in s-s. 11(3) apply after the Board has conducted a hearing on a complaint, and made a finding as it did that Polar is committing, or had committed an act prohibited by the *Act*. The Board, shall then, by order, make such award, give such direction, or take such other action as the Board considers just and necessary in the circumstances, and, without restricting the generality of the foregoing, may, by such order or subsequent order, (a) direct the employer...to rectify in such manner as the Board considers just any violation of this Act; This whole case boils down to whether or not those words on their proper interpretation grant the Board the power to order remedial certification.

[18] Wright and Raso in their text *Labour Relations Board Remedies in Canada* comments on s-s. 11(3) as follows:

The Prince Edward Island Board is empowered to make such order “as the board considers just and necessary in the circumstances” [s. 11(3)] including, without restricting the generality of the power, an order to “rectify” the violation “in such manner as the board considers just” [s. 11(3)(a)]. A list of more specific remedies also illustrates the general power without restricting it.

This provision would seem particularly well-designed to enable the Board to offset the impact of a violation. The general power to make a “just and necessary” order is not limited by the other remedial powers, but provides a basis for elaborating upon them. This includes elaboration of the already broad power of rectification. Moreover, rectification is linked to the violation, not merely to the action constituting the violation. This would encompass consideration of the context and allow the emphasis to be placed on offsetting the situation created by the violation. The reference to what is “just and necessary in the circumstances” should also encourage the Board to act with particular attention to the requirements of the individual case and to act in a discretionary fashion on the basis of equitable principles.

This would appear to be a reasonable interpretation of s-s. 11(3). Insofar as this analysis supports the conclusion that the Board does have the power to order automatic or remedial certification, I agree.

[19] Polar takes the position that leading jurisprudence confirms remedial certification is not available, absent an explicit statutory provision authorizing it. Again, since the *Labour Act* does not give the Board that specific power or jurisdiction to grant remedial certification, then it does not possess such power. Respectfully, I disagree. For this proposition, Polar relies heavily on a decision of the Canada Labour Relations Board known as *Bank of Montreal* (1985) , 10 C.L.R.B.R. (N.S.) 129 . In reaching its decision, the Canada Labour Relations Board simply stated it did not have the power to counteract the violation of the act committed by an employer by issuing a certification order, as some other boards do, on the grounds the right of the employees to freely choose has been hopelessly compromised.

[20] In its factum, the Union offers six reasons why the *Bank of Montreal* case should not be followed. In part, the Union states this decision of the Canada Board has never been followed or considered by any court or tribunal since it was rendered in 1985. More importantly, I am inclined to accept the Union’s submission with respect to the *Bank of Montreal* case on the basis it has been effectively overruled by the Supreme Court of Canada in *Royal Oak*. For these reasons, I decline to follow the *Bank of Montreal* case as authority for the proposition relied upon by Polar.

[21] In its factum, Polar cautions that even in jurisdictions that have specific remedial certification powers, Boards in those jurisdictions take a conservative and cautious approach when exercising such power. Polar goes on to say the Board’s objective is to restore the injured party, that is, to provide the Union with representation rights, if it would have obtained them but for the unfair labour practice. Punishment should not be an acceptable objective, and a union should never be certified simply to punish an unfair labour practice. Rather, Polar says the Boards have explicitly struck a balance between the deterrent value of remedial certification and

the importance of ensuring that the union is supported by the employee. With all of this, I completely agree. Polar cites as authority the case of *Michelin Tires (Canada) Ltd.*, 80 C.L.L.C. at p. 469. (1979 decision of Nova Scotia Labour Relations Board.) The facts of that case are quite different from the case at bar and should be reviewed carefully before applying it. However, in considering appropriate remedies, in the present case the Board found at p. 24 of its decision: “In the situation facing this Board, the Employees were not only threatened with job loss, several Employees did lose their jobs. In addition, product was transferred to another location resulting in additional job loss to numerous employees.”

[22] The Board reviewed a host of cases before reaching its determination, but one which it particularly noted was that of *IWA Canada v. ZCL Fiberglass Ltd.* 1997 Carswell Ont. 5289 (O.L.R.B.). In that case the Ontario Board held the pattern of behavior was so invasive and destructive and so ignored and trampled upon the legal rights of employees in concrete and visible ways that no remedy, short of remedial certification, could sufficiently reassure the employees that they will be able to freely express their views in a representation vote without fear of reprisal. Referring back to Polar’s stated position that Boards have explicitly tried to strike a balance between the deterrent value of remedial certification and the importance of ensuring the Union is supported by the employees, I find the Board in this case was very mindful of that proposition where it stated at p. 24 of its decision: “This Board is satisfied that remedial certification is not punitive and the objective is not to punish the Employer (although consideration may be given to deterrence of future violations by this employer) but rather to restore the injured party, in this case, the Union on behalf of the Employees, the bargaining rights, if any, that would have been obtained in the absence of Employer interference.”

[23] Polar submits s-s. 11(3) of the *Labour Act* does not extend the jurisdiction of the Board to grant remedial certification. It adopts this position for two reasons: (1) As it argued previously, remedial certification is available only where the statute specifically authorizes it. I have already dealt with that argument. (2) Subsection 11(3) must be interpreted in the context of the *Act* as a whole, and specifically in the context of the Board’s power to certify. In this regard, Polar specifically refers to s-s. 13(3) of the *Labour Act*, which it says directs the Board to take all steps necessary to determine employees’ wishes and to ensure the Union has at least majority support. Polar then goes on to refer to s-s. 13(5) which deals with certification where the Board is satisfied a majority of the employers wish the applicant trade union to be certified, and then again s-s. 13(7) which requires the Board to dismiss a certification application where it is not satisfied the applicant trade union is entitled to be certified, or, in other words, where the Union does not have majority support. All of this is very interesting within the context of certification, but there are two comments to note. First, the Board concluded that given the facts in this case, it would be virtually impossible to determine the wishes of the employees given the conduct of Polar. Second, the following appears at p. 19 of the Board’s decision. “Before turning to the second main issue, the Board acknowledges that the parties agreed the provisions of section 13

of the *Labour Act* was neither pleaded, nor applicable in relation to the circumstances of this case.” In terms of its argument that s-s. 11(3) must be interpreted in the context of the *Act* as a whole, Polar now argues the specific references to s. 13 of the *Labour Act*. While I accept the argument for the purposes of a contextual approach, given the position taken by the parties before the Board, I do not accept it for any more specific application.

[24] For its part, the Union addresses ss. 12 and 13 of the *Labour Act* which deal with applications for certification of a bargaining agent within the context of the Board’s interpretation that it had the power to order remedial certification. At para. 121 of its factum, the Union suggests:

121. In addition, if the Board had concluded that it could not order remedial certification it would have:

- (1) rewarded Polar for, and allowed it to profit from, its illegal conduct by allowing it to achieve its desired objective;
- (2) ensured that the right of Polar’s employees to freely choose unionization would be delayed indefinitely, if not defeated altogether by Polar’s misconduct;
- (3) denied itself the ability to provide appropriate redress to the Union for Polar’s interference with its right to organize and to Polar’s employees for its destruction of their right to free choice;
- (4) promoted swifter and more coercive action by Polar and other employers in the Province generally in response to union organizing campaigns;
- (5) led employers in the Province to believe that the benefits of committing repeated and severe unfair labor practices in order to defeat a union organizing campaign far outweigh the ultimate cost that can be imposed by the Board;
- (6) failed to foster harmonious industrial relations;
- (7) undermined the integrity of the Labour Act, supra, and of the Board itself.

I agree with the Union proposition that there is nothing in ss. 12 and 13 of the *Labour Act* that would indicate the Legislature ever intended any of these results.

[25] As for the policy considerations in remedial certification, Polar correctly states such a remedy is an exceptional power to be exercised by a labour relations board. Polar then suggests

the remedy has the potential to inherently conflict with the employee's right to choose whether or not they wish to be represented by a union, or alternatively, by which union the employees wish to be represented. Of course, on the facts of this case, one might question how the Board would ever determine those free and voluntary wishes of the employees. While remedial certification is an exceptional remedy, it is a remedy. It does serve to strike an appropriate balance in an appropriate case - and this is an appropriate case. No further comment on the policy considerations of this issue are warranted.

[26] For all of the foregoing reasons, I find the Board properly interpreted its empowering legislation and acted within its jurisdiction. Therefore, the application for judicial review is dismissed. I find the Board was correct in its analysis and conclusion that it had the power pursuant to s-s. 11(3) of the *Labour Act* to grant an order for remedial certification. I make this finding after reviewing all of the arguments of the parties, and the law which has been referred to, and being mindful of s. 9 of the *Interpretation Act*, R.S.P.E.I. 1988, Cap. I-8: "Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." Given the underlying principle of labour legislation to maintain industrial peace and harmonious industrial relations, the Board's interpretation of its own statute, in this case, serves to promote and carry out its true function. Furthermore, a reading of the decision of the Board clearly indicates a detailed, thoughtful, and pragmatic approach to the difficult fact situation with which it was confronted.

Costs

[27] The Union shall have its costs on the application against Polar. In addition, the Union has referenced Rule 57.19 of the *Rules of Court*. It reads:

The court may deal with the costs of a proceeding transferred or removed to the court from any other tribunal, including the costs arising both before and after the transfer or removal, as it deems just.

This rule is quite broad and ultimately discretionary, but in fairness to all parties, its interpretation for the purposes of application to the case at bar has not been fully argued. That being the case, if the parties cannot otherwise agree upon the question of costs, they may contact the Court no later than September 30, 2002 in order to determine how the interpretation and application of Rule 57.19 might be more extensively canvassed.

August 28, 2002