TIMELINESS OF UNFAIR LABOUR PRACTICE COMPLAINTS UNDER THE CANADA LABOUR CODE

*Carl Peterson**

I. INTRODUCTION

The Canada Labour Code, as stated in its Preamble,[1] is designed to facilitate free collective bargaining and to protect the employee's right to organize. In furtherance of this objective Parliament established an administrative tribunal to provide a labour relations arena that is accessible, speedy, informal and inexpensive to those it attempts to serve: employers, employees and unions. The Canada Labour Relations Board is staffed by experienced people from all sectors of the labour relations community. The Board is not bound by the strict rules of evidence, and one need not be legally trained to be a member of the Board or to appear before it. Above all, the Board is to be concerned with the substance, as opposed to the form, of the issues before it. It is to be sensitive to the forces underlying the strict legal issues. It attempts to hear the matter on its merits rather than sidestep the problem by dismissing the application on technical grounds. Given the continuous nature of the relationship between the parties, such a tactic would only

---

* Of the Board of Editors 1981-82.

[1] The Preamble to Part V of the Canada Labour Code, R.S.C. 1970, c. L-1, *as amended by* S.C. 1972, c. 18, s. 1, states:

> Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
>
> And Whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;
>
> And Whereas the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;
>
> And Whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;
>
> Now Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows. . . .

exacerbate the tensions giving rise to the problem in the first place. In the end, the Board examines the application at hand with the entire industrial relations system in mind, and uses its wide discretion to fashion a remedy which not only serves the interests of the immediate parties involved but also the public interest. In short, in keeping with its role as an informal adjudicator, the emphasis is upon substantive, pragmatic and creative problem-solving.

Timeliness provisions, which by their very nature are rigid and formal, seem somewhat out of place in this context. Yet they too serve an important labour relations function. In the interests of stability and industrial peace, applications for certification and revocation are only allowed during fixed periods. A ninety-day time limit for unfair labour practice complaints discourages undue delay, and avoids the buildup of perceived unrequited wrongs.

The danger inherent in provisions of this kind is that they have a tendency to take on a life of their own, and end up thwarting rather than serving sound labour relations policy. "To attach excessive importance to procedures to the detriment of the merits, and to lose oneself in a procedural maze in order to stifle a complaint, is to run counter to the letter and spirit of the Labour Code."[2] The key to avoiding this "procedural maze" is to maintain a proper balance between the need for informality and accessibility, and the need for stability and expedience. Whether the language and structure of the Canada Labour Code offers the Canada Labour Relations Board (hereinafter the CLRB) enough flexibility to maintain this balance is the central question presented by the issue of timeliness.[3]

The main purpose of this paper is to analyze this issue by outlining the provisions governing the timeliness of unfair labour practice complaints and how they have been interpreted and applied by the CLRB. The paper will also attempt to offer guidance in evolving a more coherent legislative approach to what is often a highly technical matter before the Board. The timeliness of an unfair labour practice complaint is calculated "from the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint".[4] As a result, one must determine when the complainant became aware of the action and the elements comprising the alleged unfair labour practice. The ninety-day time limit under section 187(2) cannot be enlarged.

The process of calculating the timeliness of unfair labour practice complaints will be analyzed by outlining the competing policies underlying the question, the purpose of the time bar and the section's

---

[2] Noreau v. C.B.C., 31 di 144, at 160 (1979).

[3] The British labour relations system seems beset by the same problems. *See* Munday, *Tribunal Lore: Legalism and the Industrial Tribunals*, 10 IND. L.J. 146 (1981).

[4] Canada Labour Code, R.S.C. 1970, c. L-1, s. 187(2), *as amended by* S.C 1972, c. 18, s. 1.

legislative context. How the CLRB has handled the timeliness issue on a case by case basis and the concept of the continuing offence will then be analyzed against this background. It is hoped this exercise will aid the labour relations community, unfamiliar with the Canada Labour Code, in computing the time periods and thereby avoid the forfeiture of a hearing of meritorious complaints.

In the course of this analysis it will be shown that the statutory framework as set out in section 187 is clearly deficient. The main problem has been that in dealing with the timeliness of unfair labour practice complaints, the CLRB has been unable to administer the Code in a full and proper fashion without the power to relieve against the ninety-day time limit. The rigidity of the time limit has forced the Board, in some cases, to distort the language of the Code in order to reach a fair and reasonable result. As a consequence, lay people and lawyers unfamiliar with the Code must come to grips with a number of highly technical and conflicting decisions. More importantly, the rigidity of the limit means that an untimely meritorious complaint will be dismissed out of hand. The confusing nature of these decisions erodes rather than promotes the accessibility of the federal labour relations arena. The technical nature of these decisions is also out of keeping with labour law's traditional emphasis upon informal and substantive problem solving. Indeed, the forfeiture of meritorious complaints brings the Code into disrepute and further exacerbates the tensions within the system. It will, therefore, be recommended that the Code be amended to give the CLRB the discretion to enlarge the ninety-day time limit, and, in the process, the necessary flexibility to balance the competing policies inherent in the Code.[5]

---

[5] Mr. J. Dorsey, Vice-Chairman of the CLRB, has recently commented upon the need for constant legislative reform to keep the Code in step with modern labour relations policy:

> The socio-economic environment of the world of labour relations shifts and changes in the local and national community. The multiplicitous combinations of conflict and opposing interests demand constant refinement of existing concepts and require innovation and creativity in responses by parties, advisors and decision makers. The litigious nature of current labour relations requires one to be a constant student in order merely to keep abreast.
>
> In this climate it is important for legislators to keep in step and not allow the important social legislation of collective bargaining statutes to lose their prominence as principal instruments for expression of the balances to be struck among employees, unions and employers. A vast machinery as the collective bargaining system ought not to rely upon unpublished or narrowly circulated decisions of labour boards for full expression of their meaning.

Dorsey, *Amendments to the Canada Labour Code: Personal Reflections*, 39 ADVOCATE 391 (1981).

II. UNFAIR LABOUR PRACTICE COMPLAINTS

In order to place the Code's scheme in its proper context, the timeliness of unfair labour practice complaints will be introduced with a discussion of the practice of the Ontario Board. The Ontario Labour Relations Act, unlike the Canada Labour Code, does not contain a statutory time limit for unfair labour practice complaints.

Instead, the Ontario Labour Relations Board (hereinafter the OLRB) discourages undue delay in the filing of complaints by exercising its discretion whether or not to hear a complaint.[6] The OLRB recently summarized its practice in this regard in the following way:

> The Board as a general rule will not refuse to entertain a complaint under section 79 [now 89] only because of a delay in lodging the complaint Where unreasonable delay has occurred, the Board in most cases will simply take this factor into account in assessing any compensation which might be awarded. In the instant case, however, we are of the view that because of the extreme delay in the filing of the complaint and, in the circumstances, the lack of any mitigating factors which might justify or excuse such a delay, the Board should exercise its discretion under section 79 of the Act and refrain from inquiring into the complaint.[7]

The Ontario Board has not set down any fixed guidelines as to what constitutes an extreme or an unreasonable delay. A delay will be considered unreasonable depending upon the circumstances of the case, such as, the length of the delay, the reasons for the delay and the specific unfair labour practice. Each decision will, of course, rest upon its own particular facts. In this way, the OLRB achieves a great deal of flexibility in balancing the interests of the employer and the complainant. If the delay is unreasonable the employer will not be prejudiced in terms of the compensation awarded. For example, in the case of an illegal discharge, a delay of five weeks was found to be unreasonable and the employee was reinstated without compensation for the period of unreasonable delay. In the circumstances of the case, the Board considered a two-week delay to be reasonable.[8] Conversely the OLRB will refuse to hear complaints only in extreme cases of delay. In practice the Board has considered delays of

---

[6] Labour Relations Act, R.S.O. 1980, c. 228, s. 89

[7] C.C.H. Canadian Ltd. v. Toronto Typographical Union, Local 91, [1977] Ont. L.R.B.R. 351, at 352, 77 C.L.L.C. 16,093, at 16,035-36.

[8] Decor Wood Specialties Ltd. v. International Woodworkers, [1974] Ont. L.R.B.R. 136, at 139. In Ernie's Signs Ltd. v. Desbois, [1976] Ont. L.R.B.R. 404, at 407, the Ontario Board found a delay of three and a half months to be unreasonable and ordered the complainants to be compensated for a reasonable period of two weeks. *See also* Numilk Co. v. Retail, Wholesale & Dep't Store Union, 62 C.L.L.C. 16,236 (Ont. L.R.B. 1962); Hayes-Dana Ltd. v. U.S.W.A., Local 2729, [1968] Ont. L.R.B.R. 89; Romat Ornamental Iron Ltd. v. Union of Gen. Employees, [1969] Ont. L.R.B.R. 885, Canron Ltd., Eastern Structural Div. v. Browne, [1976] Ont. L.R.B.R. 700, at 707.

one year,[9] three years[10] and four years[11] to have been extreme. Given the Board's power to take into account a delay when fixing a remedy, the Board has rarely declined to hear a complaint on its merits.[12]

The simplicity and flexibility of the Ontario approach lies in stark contrast to the rigid ninety-day limit as set out in the Canada Labour Code. It should also be contrasted with the fifteen-day time limit in Quebec,[13] six months in Manitoba[14] and ninety days in Nova Scotia.[15] As a consequence, the Ontario approach should be kept in mind during the following discussion, as a reasonable alternative to the statutory framework of the Canada Labour Code. It also demonstrates the fact that unreasonable delay can be discouraged through a discretionary use of authority as opposed to the use of a rigid time limit.

A person who files a complaint pursuant to section 187(1) alleging a violation of the Canada Labour Code must come within the ninety-day period prescribed by section 187(2):

> (2) Subject to this section, a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days from the date on which the complainant knew, or in the opinion of the Board ought to have known of the action or circumstances giving rise to the complaint.[16]

On its face this section raises one simple question: when does the time limit begin to run? Unfortunately the exercise in arithmetic is not as simple as it appears, for the question is fraught with conceptual and administrative difficulties which have plagued the Supreme Court of Canada as well as the CLRB.

In order to appreciate how section 187(2) has been interpreted by the CLRB (and any other section for that matter), one must have an understanding of the problems involved in the administration of this particular part of the Code. The administration of the Code entails the arduous process of weighing, balancing and ultimately attempting to reconcile a myriad of competing policy interests. This process is reflected in the area of certification and revocation by the provisions ensuring fixed periods of time when employees may express their wishes.

---

[9] *CCH Canadian Ltd.*, *supra* note 7.

[10] Irving Posluns Sportswear v. International Ladies' Garment Workers' Union, [1979] Ont. L.R.B.R. 986.

[11] U.A.W. v. Freeman, [1968] Ont. L.R.B.R. 947.

[12] The following cases are examples of unreasonable but not extreme delay: Concrete Constr. Supplies v. Teamsters, Local 880, [1979] Ont. L.R.B.R. 739 (8 months); *Irving Posluns Sportswear*, *supra* note 10 (11 months); Ontario Paper Co. v. Grecco, [1980] Ont. L.R.B.R. 76 (10 months); Chrysler Canada Ltd. v. Balint, [1980] Ont. L.R.B.R. 650 (4 months); Local 247 of the Labourers' Int'l Union of N. America v. Valente, [1980] Ont. L.R.B.R. 733. It is important to note that four out of five of these cases dealt with an individual employee alleging that a union had violated its duty to represent him fairly and without discrimination.

[13] Labour Code, L.R.Q. 1977, c. C-27, s. 16.

[14] The Labour Relations Act, S.M. 1972, c. 75, s. 22(1).

[15] Trade Union Act, S.N.S. 1972, c. 19, s. 53(2).

[16] R.S.C. 1970, c. L-1, *as amended by* S.C. 1972, c. 18, s. 1.

As a result, a compromise is reached between the need for stability and freedom of expression. In the area of unfair labour practice complaints, this process is reflected in the CLRB's endeavour to interpret and apply section 187(2) in such a way as to accommodate two legitimate policy goals.[17]

It is the policy of the Code to impose obligations upon employers, unions and employees, and prohibit certain conduct in order to promote free collective bargaining and protect the freedom of association of employees.[18] These unfair labour practices, and the remedial authority given to the Board to enforce them, make real what would otherwise remain ideal but hollow pronouncements of principle.

However, there is also the policy, long enshrined in our law, that victims of wrongful action must seek relief within a reasonable period of time after the accrual of the action, or their knowledge of the elements making up the action.[19] In the federal jurisdiction this policy has been implemented in the form of a ninety-day limitation period.[20] The purpose of the time limit is to improve the efficiency, and thereby preserve the credibility, of the legal system "by ensuring complaints based on long past events, vaguely remembered and difficult to prove or defend are precluded from being pursued".[21] In essence, a delay which substantially prejudices a respondent's ability to marshall a defence is unreasonable and as a result deprives the party of a fair hearing.

From a labour relations perspective, the time limit tends to promote industrial peace by encouraging the airing and settling of disputes as quickly as possible. It lessens, for example, the disruptive effect of a

---

[17] Sheehan v. Upper Lakes Shipping Co., 34 di 726, at 740, [1979] 1 Can. L.R.B.R. 531, at 542.

[18] Morrison v. Air Canada, 11 di 5, at 13, 75 C.L.L.C. 16,164, at 1220 (1975).

[19] *E.g.*, the equitable doctrine of laches.

[20] The 90 day limitation period originated with the following and only paragraph of discussion on the subject.

> Uncommitted people generally favoured the 15-day limitation period on complaints of unfair dismissal which is imposed by s. 15 of the Quebec *Labour Code*. Several considered the period too short and suggested 30 days, but all were concerned that without a limitation period the complaint procedure may be abused. It was stressed that the union should not be allowed to keep a number of potential complaints in abeyance to use as bargaining levers. Labour people generally agreed that some limitation period was justified and in many cases suggested 30 days with provision for reasonable extensions. Management people were unanimously in favour of a limitation and most found 15 days acceptable, although some suggested five days and some one month.

UNFAIR LABOUR PRACTICES: TASK FORCE ON LABOUR RELATIONS, STUDY NO. 10, at 39 (Christie I. & Gorsky M. 1968). The Woods' Task Force ultimately recommended "that there be a limitation period of sixty days on unfair labour practice complaints. . . ." CANADIAN INDUSTRIAL RELATIONS: THE REPORT OF THE TASK FORCE ON LABOUR RELATIONS 149 (Woods H. Chairman 1968). The 60 day limit was increased to 90 days when the statute was amended in 1972.

[21] *Sheehan*, *supra* note 17, at 741-42, [1979] 1 Can. L.R.B.R. at 543.

party using an unsettled complaint as a tool in collective bargaining. A degree of certainty is also achieved in that "the employer avoids having the sword of Damocles held over his head for long periods".[22] The CLRB's main task in determining the timeliness of an unfair labour practice complaint is to reconcile these two competing policies.

In 1977, the CLRB in *Mitchell v. Giant Yellowknife Mines Ltd.*[23] provided an example to illustrate the foregoing competing policies inherent in the administration of the duty to bargain in good faith. The Board outlined the course an alleged contravention of the duty to bargain in good faith would take in the following manner. In an ongoing relationship such as collective bargaining, it is assumed an aggrieved party will at least attempt to settle the dispute privately. If this attempt fails, the Code then contemplates, under section 187(5), that the party must attain ministerial consent before complaining to the Board. According to the Board, this step serves an important function and is not a mere formality, for at this stage the Minister of Labour attempts to resolve the dispute through mediation. The emphasis is upon the co-operative resolution of the matter. If this fails, the filing of a complaint remains contingent upon the Minister granting consent. As can be imagined, this procedure with its emphasis upon mediation and self-resolution takes time. "It is not inconceivable, indeed it may be the norm, that such a complaint would be untimely under s. 187(2)."[24]

In practical terms, the limitation period compels a party to eschew private negotiations and co-operation at the mediation stage to preserve his right to complain to the CLRB. Delay, rather than prejudicing the respondent, serves his interests. The Minister is thereby hampered in achieving a collective solution because mediation usually takes time. This outcome effectively undermines the very objective for which the statute was enacted: to promote "free collective bargaining and the constructive settlement of disputes".

The CLRB attempted to reconcile the tension between these two policies by enlarging the ninety-day time limit through the exercise of a plenary power when the overall purpose of the Code warranted it. Due to the rigid nature of the time bar, it was thought that section 118(*m*)[25] gave the CLRB the needed flexibility to consider important and meritorious complaints.[26] In this way expeditious behaviour was fostered without

---

[22] *Noreau*, *supra* note 2, at 151.

[23] 19 di 147, 77 C.L.L.C. 16,082 (1977).

[24] *Id.* at 153, 77 C.L.L.C. at 16,545.

[25] S. 118(*m*) reads as follows:

The Board has, in relation to any proceeding before it, power . . .

(*m*) to abridge or enlarge the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence in connection with the proceeding.

[26] The Board always considered it had the authority under s. 118(*m*) to enlarge the time limit prescribed in s. 187(2). *See* Sheehan v. Upper Lakes Shipping Co., 9 di 29, 75 C.L.L.C. 16,161 (Can. L.R.B. 1975); *Giant Yellowknife Mines Ltd.*, *supra* note 23; Air Canada v. Canadian Air Line Pilots Ass'n, 24 di 203 (1977); S.O.R.W.U.C. v. Bank of Nova Scotia, 28 di 901, [1978] 2 Can. L.R.B.R. 181; *Noreau*, *supra* note 2.

sacrificing the overall goals of the Code to technical arguments. The CLRB's efforts in this regard were frustrated by the Supreme Court of Canada.[27]

In 1979 Laskin C.J.C., speaking for the majority of the Supreme Court, concluded that section 118(*m*) "[did] not empower the Board to alter a substantive provision of the statute prescribing a time limit for filing complaints".[28] Laskin C.J.C. reasoned in the following manner:

> I read this provision as empowering the Board to abridge or enlarge the time for taking steps in a proceeding which is properly before it, as, for example a certification proceeding. If, however, the issue is whether a proceeding is timely under the Board's governing statute, that is, whether the Board can lawfully entertain it at all in the light of s. 187(2), I do not regard its powers under s. 118(*m*) as entitling it to give latitude to a complainant who is out of time under the statute. The correlative would be that if it can enlarge it can abridge, and that would be absurd. A complainant is entitled to the advantage and is subject to the limitation of the ninety day period under s. 187(2). It can neither be restricted to a lesser period by any direction of the Board nor be allowed a greater period.[29]

Laskin C.J.C. embarked upon this analysis of section 118(*m*) without the benefit of counsel arguing the issue before the Court.[30]

With all due respect, there is certainly no labour relations policy which justifies such an apparently narrow and pedantic view of the section.[31] On the contrary, the legislative trend has been to allow suspension of time limits given the appropriate circumstances.[32] The

---

[27] Upper Lakes Shipping Ltd. v. Sheehan, [1979] 1 S.C.R. 902, 95 D.L.R. (3d) 25, *rev'g* [1978] 1 F.C. 836, 81 D.L.R. (3d) 208 (Trial D. 1977), *rev'g* 17 di 14, 76 C.L.L.C. 16,030 (1976).

[28] *Id.* at 915, 95 D.L.R. (3d) at 34.

[29] *Id.*

[30] S. 118(*m*) was not mentioned in oral or written argument before the Supreme Court.

[31]

> It is difficult to understand why the Chief Justice was driven to such a restrictive interpretation of section 118(*m*). The words of the section do not in any way compel such a result, and there is no policy reason which would require it. Provisions such as section 118(*m*) are a recognition of the fact that many of the proceedings brought before the Board will be maintained by persons who are not legally trained or alert to the detailed provisions of the *Code*. Parliament has given the Board power to relieve against situations where, for good reasons, the strict requirements of the *Code* have not been met, so long as the rights of other parties are not prejudiced.

Christie, Langille & Steinberg, *Developments in Labour Law: The 1978-79 Term*, 1 SUP. CT. L. REV. 273, at 292 (1980).

[32] A court has the power to enlarge time limits pursuant to language quite similar to that found in s. 118(*m*):

> The court may from time to time enlarge or abridge the time prescribed by the rules, or by an order, for doing any act or taking any proceeding, and this power may be exercised although the application is not made until the expiration of the time prescribed.

R.R.O. 1980, Reg. 540, s. 178. One author has commented that "the parallel case of court procedure surely demonstrates that Canadian law tends towards a loosening of time requirements in the interests of a settlement based on substantive issues" M. GORSKY, EVIDENCE AND PROCEDURE IN CANADIAN LABOUR ARBITRATION 49 (1981)

legislatures of British Columbia and Ontario responded to the criticism[33] that technical and rigid procedures should be kept to a minimum in labour law by enacting sections 98(*e*)[34] and 44(6)[35] respectively. These sections authorize an arbitrator to extend the time limit contained within the collective agreement. The words of section 118(*m*) in the Canada Labour Code, if given a fair and liberal interpretation, served this purpose for the CLRB. Such a construction is also more consistent with the Board's role as a forum for non-legally trained persons. Chief Justice Laskin's approach has also been criticized because it "is fundamentally at odds with the Court's apparent increased deference to specialized decision-makers in labour law".[36] In effect, the Supreme Court rendered section 118(*m*) meaningless, because if section 118(*m*) does not apply to a "substantive provision" of the "statute", then it can only apply to the time limits in the CLRB's regulations. "But section 117(*o*) clearly gives the Board authority to make such a regulation."[37]

The Supreme Court's reasoning has also been criticized by the British Columbia Labour Relations Board in a case concerning the interpretation of section 35(*l*) (which is almost identical to section 118(*m*)) of the British Columbia Labour Code.[38]

> It cannot be denied that this is strong authority for the proposition that the Board cannot enlarge time limits in certain circumstances, despite the apparent generous wording of the relevant sections. The Supreme Court draws a distinction between a proceeding before it, (in which the power may be used) [*sic*] proceedings which have not yet come before the Board (in which the power cannot be used). In other words, the opening guns of a proceeding must be fired on time, but the salvos which follow may be moved around somewhat.
>
> The distinction is not entirely satisfactory. In the first place, the statutes (both the Canada Labour Code and the British Columbia Labour Code are identical on this point) are confusing at best. Both commence with the words "in relation to any *proceeding or matter before it*" (which assumes that the matter has somehow come to the Board) and then both give the power to enlarge the time "*for instituting the proceeding*" (which assumes that perhaps the proceeding is somehow not before it). The Supreme Court of Canada has cut through this Gordian knot by considering the opening words as referring to the opening of the matter, and the later words as referring to subsequent, derivative proceedings. This must be so, says the Court, because

---

[33] *See* Beatty, *Procedural Irregularities in Grievance Arbitration*, 20 McGILL L.J. 378 (1974). *See generally* Kelleher, *Agreements and the Labour Code of British Columbia*, in CURRENT PROBLEMS IN LABOUR ARBITRATIONS (M. Hickling ed. 1979).

[34] Labour Code, R.S.B.C. 1979, c. 212.

[35] Labour Relations Act, R.S.O. 1980, c. 228.

[36] Christie, Langille & Steinberg, *supra* note 31, at 292.

[37] *S.O.R.W.U.C.*, *supra* note 26, at 906, [1978] 2 Can. L.R.B.R. at 185. S. 117(*o*) reads as follows:

> 117. The Board may make regulations of general application respecting . . .
>
> (*o*) such other matters and things as may be incidental or conducive to the proper performance of the duties of the Board under this Part.

[38] Newfoundland also has a provision similar to s. 118(*m*): The Labour Relations Act, 1977, S. Nfld. 1977, c. 64, s. 17(*i*).

> we could not contemplate abridging the time for commencing a matter, and the later words refer to abridging or enlarging, therefore we could not contemplate enlarging the time for opening a matter. This reasoning is not entirely satisfactory; the party who is not out of time may lose just as much of an "advantage" by an extension during the proceedings as he does at the commencement.[39]

The CLRB in *Sheehan* reluctantly accepted the Supreme Court of Canada's judgment and declared it did not have the authority to enlarge the time limit set out in section 187(2).[40] The discussion to follow should be read in light of this absence of authority, for it is inevitable, given the tension between the competing policies at work, that the Board will be forced to find some of the Ontario Board's flexibility elsewhere. The most available vehicle lies within its power to determine when the complainant "ought to have known, of the action or circumstances giving rise to the complaint".

Although it is impossible to set down hard and fast rules regarding the timeliness of unfair labour practice complaints, it is possible to delineate some general guidelines which can be gleaned from the statute and the cases. Section 187(2) essentially contemplates a two-step process. One must first determine the action or the circumstances comprising the complaint. In the case of an employer disciplining an employee because of his union activities, the final decision to discipline would constitute the action. The second step would be completed and the ninety-day time period would start to run when "in the opinion of the Board" the employee became aware of the decision.

This two-step process was followed in *Morrison v. Air Canada*[41] wherein the complainant alleged that he had been suspended by Air Canada for five days without pay because of his union activities. The CLRB found that the decision of the employer to suspend the complainant without pay constituted the action, or the circumstances giving rise to the complaint. Time began to run when the complainant was informed of the decision by letter. However, not all the CLRB's reasoning is so tidy. In *Gallivan v. Cape Breton Development Corp.*,[42] decided under Part IV of the Code, the complainant, after refusing to work (allegedly in accordance with section 82.1 of the Code), was suspended indefinitely (allegedly in violation of section 97(1)(*d*)). The Board, however, held that the complainant did not know of the action until he received his pay cheque and found the employer was refusing to pay him for the second and last day of the suspension. One would have

---

[39] Hemlock Valley Recreations Ltd. v. United Bhd. of Carpenters & Joiners of America, at pp. 4-5 (unreported, B.C.L.R.B. 17 Mar. 1979, decision no. 29/79) (page numbers refer to the reasons for judgment).

[40] *Supra* note 17, at 731, [1979] 1 Can. L.R.B.R. at 535. The Board also rejected the argument that s. 121 could be used to enlarge the time limit.

[41] *Supra* note 18, at 11, 75 C.L.L.C. at 1218.

[42] (As yet unreported, Can. L.R.B., 1 Sept. 1981, decision no. 332)

thought that the complainant knew of the action, the suspension, when he was told to go home, and that this naturally meant without pay!

Neither is there always unanimity among the members of the non-representational CLRB on the characterization of any one circumstance. The following two cases illustrate the care that the CLRB must exercise to avoid undue confusion for the federal labour relations community. In *Noreau*,[43] the complainant was tied to the CBC by an individual contract of employment set to expire on a fixed date, 29 May 1977. In accordance with this contract, the employer, on 13 May 1977, informed that complainant that his contract would not be renewed. The complainant did not file his complaint, alleging an anti-union motive for the employer's decision, until 19 August 1977. The majority of the Board found that the complainant knew of the action when given notice on 13 May 1977 or at the latest on 16 May when the decision was reiterated by the CBC as final and not in any way tentative. As a result, the complaint was dismissed as untimely. Board Member J. Archambault, in a strong dissent, characterized the actual non-renewal of the contract on 29 May, not the decision as evidenced by the notice, as the action or the circumstances by asking the following rhetorical question: "How . . . can one justify accepting a complaint regarding a refusal to continue to employ even before the contract of employment has, according to the terms of the individual contract expired or been ended?"[44] In his opinion a complaint filed before the expiry of the contract could be dismissed by the Board as premature.

The majority's decision can be justified by examining the purpose behind the unfair labour practice provision of the Code invoked by Noreau. The Code protects an employee's right to join and participate in the lawful activities of a trade union without fear of being disciplined or discriminated against as a consequence. Thus the Code prohibits an employer from using a decision not to rehire someone as a tactic in an anti-union campaign. Fearful for their jobs, other employees may be discouraged from joining the union. The Code is directed at the decision to discipline, as well as its implementation, or as in *Noreau* the expiration of the contract, because that is the *action* which may improperly influence an employee's right to associate freely. The fact that the employer may change his mind two months later and before the actual expiration of the contract does not lessen the potential impact the original decision not to rehire may have had upon the organizing drive. Consequently, the decision not to rehire is the circumstance which gives rise to the complaint. Unfortunately, the majority did not recognize that the decision not to rehire, which is comparable to a threat to dismiss, and the actual non-renewal of the contract could both constitute separate and

---

[43] *Supra* note 2.

[44] *Id.* at 155. This is the position in Quebec. *See* Leclerc v. Le Collège d'Enseignement Général et Professionnel de Victoriaville, 75 C.L.L.C. 14,269 (Que. Lab. Ct. 1975).

viable unfair labour practices. Both actions are in violation of the Code. The time limit would then start afresh with the second action.

Mr. J. Archambault cited *Air Canada v. Canadian Air Line Pilots Association*[45] in further support of his view on what constitutes the "action", and as an example of the administrative difficulties that would ensue "if the date on which a policy is *announced* takes precedence over the date on which an action, event, or decision giving rise to a complaint takes place or is applied".[46] Mr. Archambault's use of *Air Canada* exemplifies the caution one should exercise in using cases which are concerned with different unfair labour practices to support a certain interpretation. The particular application of section 187(2), and the administrative difficulties found in *Air Canada* pertain to a great extent only to the situations involving the unique procedures relating to complaints of a failure to bargain in good faith.

In *Air Canada* the Canadian Air Line Pilots Association (CALPA) complained that Air Canada altered a privilege the pilots enjoyed before the statutory freeze came into effect in violation of the Code. On 14 March 1977, Air Canada during collective bargaining announced its plan, effective 1 May 1977, to withdraw the pilots' privilege of flying first class when deadheading to or from flight duty. CALPA became aware of this announcement of change in policy on 28 March 1977. CALPA refused to give consent to the change and on 12 April 1977 requested Ministerial consent to complain to the Board in accordance with section 187(5). Although consent was granted on 16 June 1977, CALPA did not file its complaint with the CLRB until 11 July 1977. The CLRB was faced with a situation not unlike the one envisioned in *Giant Yellowknife Mines Ltd.*[47] If the CLRB calculated the ninety-day period from the date the union received the employer's announcement, the complaint would be untimely. To a large extent, however, the delay was due to the two months the union had to wait before receiving Ministerial consent. The CLRB resolved the matter by making the following determination:

> [T]he earliest date at which the union could have known of the "*action*" giving rise to the complaint is May 1, 1977, the date of implementation of the change. Until that date, the union could never know if the employer was going to fulfill its announcement or be deterred by the union's expressed communication of withholding its consent.[48]

In *Noreau*, Mr. Archambault interpreted this passage as supporting the contention that the action is not completed or does not accrue until the implementation of the decision. In *Noreau*, this would be the expiration of the contract and, in *Air Canada*, the implementation of the change in policy. It must be remembered, however, that the ninety-day time period

---

[45] *Supra* note 26.
[46] *Noreau*, *supra* note 2, at 155.
[47] *Supra* note 23.
[48] *Air Canada*, *supra* note 26, at 217.

starts when the complainant acquires the requisite knowledge of the action not from the date of the accrual of the action. In *Air Canada*, the CLRB found the employer's decision to change its policy constituted the action. In its discretion, the Board found the union could not have *known* of the action until the implementation of the change on 1 May 1977. Given the context, this conclusion makes sense. During the negotiation stances will be taken and harsh tactics will be employed to force the other party to settle. From this perspective, Air Canada's announcement could have been perceived by the union as just another ploy during hard bargaining. The union counter-punched, so to speak, by requesting Ministerial consent. In addition, the CLRB in exercising its discretion in this way is not discouraging private resolution of disputes. The Board is attempting to give the parties more time to settle their disputes privately and, in the process, alleviate the administrative difficulties outlined in *Giant Yellowknife Mines Ltd.*

This view is also consistent with the purpose of the statutory freeze during collective bargaining, which is to enforce the exclusive authority of the bargaining agent.[49] It was the decision to alter unilaterally the privilege of the pilots that undermined the exclusivity of the bargaining agent's authority. Moreover, if the action did not accrue until 1 May 1977, the Minister's consent related to a set of circumstances not giving rise to a complaint.

Thus in calculating the time period one must determine the constituent elements of the "action" and when the complainant knew or ought to have known of the action within the context of the particular unfair labour practice alleged. That factor and the intended administrative response are inextricably linked not only to how one defines the "action", but also to how the CLRB exercises its discretion in finding when the complainant ought to have known of the action. Consequently, each unfair labour practice must be analyzed separately. The following are the circumstances under the Code that do not accommodate as simple an analysis as is provided in a typical complaint against an employer, as in *Noreau* and *Morrison*.

---

[49]

> The prohibition is imposed on the employer, because Parliament recognizes that in the normal course it is the employer that is in the position to influence the proceedings at the bargaining table by making decisions affecting its operation without prior consultation with the union. *By making such decisions and acting unilaterally, the employer can undermine the authority of the employees' bargaining agent, and also poison the environment within which collective bargaining is being conducted and thereby catalyst avoidable legal or illegal industrial conflict.* Such unilateral action is contrary to the cooperative relationship envisioned by and sought to be promoted in the *Canada Labour Code*, Part V.

Id. at 214 (emphasis added).

A. *Complaints against Unions for Discipline or Denial of Membership*

A complainant alleging the violation of sections 185(*f*) or (*g*) is governed by the framework set out in section 187(3), which is subject to the overriding exceptions contained in section 187(4). Before applying to the CLRB for relief, the complainant must exhaust the union's grievance or appeal procedure. If given ready access to this procedure the complainant cannot apply to the Board until his appeal has been disposed of by the union in an unsatisfactory manner, or six months have passed since he presented the grievance or appeal in accordance with the union's procedure. The complaint must be made to the CLRB within ninety days of the occurrence of either of these two events. This time limit cannot be circumvented by keeping the complaint in abeyance and doing nothing. "It is implicit in section 187(3)(*a*) that the complainant must take some action within a reasonable time."[50] In *Sheehan* the CLRB found that a delay of one year between the union's denial of membership and the filing of the complaint, which was technically premature, was unreasonable.[51] Therefore, after being dealt with by the union in a discriminatory fashion, one should attempt as soon as possible to appeal the decision or determine whether ready access to the procedure is available.

The time limit and the requirement to exhaust or attempt to employ internal union avenues of recourse may be bypassed by the complainant legitimately, however, if the CLRB is satisfied that the circumstances outlined in section 187(4) have been met:

> (*a*) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or
> (*b*) the trade union has not given the complainant ready access to a grievance or appeal procedure.

Although an application coming within either of these two exceptions is not circumscribed by a time limit, the CLRB will only consider complaints made within a reasonable time depending upon the circumstances.[52]

To date this special procedure has been interpreted by the CLRB in two cases. In *Abbott v. International Longshoremen's Association, Local 1953*[53] the complainant, an ex-president of the union, was expelled from the union for not paying a fine within the ninety-day period prescribed by the union's constitution. The new executive of the union did not acknowledge receipt of the complainant's notice of appeal because it held that the decision to expel Abbott was not appealable and the notice was untimely. The CLRB found that the union's non-acknowledgement of the complainant's notice of appeal certainly did not constitute a procedure

---

[50] *Sheehan*, *supra* note 17, [1979] 1 Can. L.R.B.R. at 550.

[51] *Id.*

[52] Cassista v. International Longshoremen's Ass'n, Local 1739, 28 di 955, at 970, [1979] 2 Can. L.R.B.R. 149, at 161 (1978).

[53] 26 di 543, 78 C.L.L.C. 16,127 (1977).

"to which the complainant has been given ready access". Furthermore, even if the complainant had been given "ready access", the Board held that the union "dealt with the grievance or appeal of the complainant in a manner unsatisfactory to him" by declaring the notice untimely. The CLRB also found the complaint warranted consideration without delay pursuant to section 187(4)(*a*), because expulsion from the union caused Abbott a great deal of hardship. Although the Board did not spell out what it meant by hardship,[54] loss of employment due to the disciplinary action would probably constitute an undue hardship. In short, the CLRB decided Abbott no longer needed to attempt to appeal his expulsion and, therefore, the Board had jurisdiction to hear the complaint.

In *Cassista v. International Longshoremen's Association, Local 1739*,[55] the union contended that the complaint filed on 16 January 1978 was untimely because the complainants were aware of the union's policy of not admitting new members a year before applying, a contravention of section 185(*f*). In fact, no one had been admitted to the union since 1972. The union received but did not acknowledge the complainant's application for membership on 6 December 1977. The union also did not provide an appeal procedure. Without an appeal procedure in existence, it could not be said the union had given the complainant "ready access" to a grievance or appeal procedure. Thus the complaint, pursuant to section 187(4)(*b*) which does not contain a time limit, was neither untimely nor premature.

Due to the fact that in both these cases the appeal procedure was either denied the complainant outright or was non-existent, the CLRB has not had the opportunity to determine the full meaning of the phrase "ready access" found in section 187(4)(*b*). The Board in *Abbott* suggested that "ready access" might mean that the internal appeal machinery of the union has to be "reasonable, practical and effective".[56]

---

[54] The Board did quote the following passage from the Wood's Task Force, *supra* note 20, at 151-52, explaining when the Board should short-circuit a union's appeal procedure:

> To avoid short-circuiting internal union appeal procedures, a member should be denied access to either a Public Review Board or the Canada Labour Relations Board until he has exhausted internal procedures, unless he can show that the resulting costs or delay will cause undue hardship. In determining whether such hardship would ensue, it would be relevant for the Public Service Review Board or the Canada Labour Relations Board to consider the fact that under our previous recommendation no person would lose his job for reasons other than non-payment of dues and assessments until he has exhausted appeal procedures.

Id. at 555, 78 C.L.L.C. at 16,923.

[55] *Supra* note 52.

[56] *Abbott*, *supra* note 53, at 556, 78 C.L.L.C. at 16,924.

This test has also found favour in the courts.[57] The experience of the Ontario Board may be helpful in throwing some light on the use of these terms because the OLRB has adopted a policy of deferring to internal union appeal mechanisms when they provide adequate relief. It recently summarized the criteria it considers when exercising its discretion to defer:

> It is well recognized that union members cannot, through their obligation to exhaust internal remedies, contract out of *The Labour Relations Act* or displace the Board's jurisdiction to hear a complaint filed under the Act. As a matter of discretion, however, the Board will normally defer to internal trade union procedures where satisfied that the machinery available is adequate, effective and will afford due process and natural justice (see *Canadian Textile and Chemical Union*, [1971] OLRB Rep Aug 169, *Imperial Tobacco*, [1974] OLRB Rep. July 418 and *Del-Mar Clothes Ltd.*, [1977] OLRB Rep. July 441). However, if the issue involves a violation of public policy, if the alternate remedy is illusory in that it provides inadequate relief or if the speed, economy and convenience of the internal remedy is not approximately equivalent to the remedy available through the Board, it is unlikely that the internal remedy would be deemed satisfactory so as to cause the Board to defer (*see Canadian Textile*, . . . *Imperial Tobacco*, and *General Impact Extrusions (Mfg) Ltd.*, [1972] OLRB Rep. Aug. 798).[58]

B. *Duty of Fair Representation*

In contrast with disciplinary and membership complaints against the union and the practice of the Boards in Ontario and British Columbia, the Canada Labour Code does not require an employee alleging a breach of the duty of fair representation (section 136.1) to engage the union's internal appeal procedure before complaining to the Board. In fact, once an employee is informed the union will not represent him in a certain matter vis-à-vis the employer, or once he realizes the representation he does receive is inadequate, he must turn directly to the CLRB and file his complaint within ninety days.[59] If the employee is also a union member

---

[57] *See* Wood, Wire & Metal Lathers' Union v. United Bhd of Carpenters & Joiners of America, 73 C.L.L.C. 14,169, 35 D.L.R (3d) 714 (S.C.C. 1973), Gee v. Freeman, 26 W.W.R. 546, 16 D.L.R. (2d) 65 (Man. C.A. 1958). For the history and rationale behind the common law rule of exhaustion, see A. CARROTHERS, COLLECTIVE BARGAINING LAW IN CANADA 522-37 (1965).

[58] Amalgamated Transit Union, Local 113 v. Allen, [1979] Ont. L.R.B.R. 917, at 918. *See also* Canadian Textile & Chem. Union v. International Chem. Workers Union, [1971] Ont. L.R.B.R. 469; General Impact Extrusions (Mfg.) Ltd. v. Vermist, [1972] Ont. L.R.B.R. 798; Imperial Tobacco v. Shellington, [1974] Ont. L.R.B.R. 418, [1975] 1 Can. L.R.B.R. 1; Del-Mar Clothes v. Henry, [1977] Ont. L.R.B.R. 441. For British Columbia jurisprudence, *see* Western Carriers Ltd. v. Balfour (unreported, B.C.L.R.B., 21 Dec. 1976, decision no. 91/76); Vancouver Gen. Hosp. v. Hospital Employees Union, Local 180, [1978] 2 Can. L.R.B.R. 508, 78 C.L.L.C. 16,160 (B.C.L.R.B.), G.H. Singh & Sons Trucking Ltd. v. Teamsters, Local 213 (unreported B.C.L.R.B., 8 Feb. 1980, decision no. 11/80).

[59] Lochner v. C.B.R.T., 37 di 114, at 124, [1980] 1 Can. L.R.B.R. 149, at 156 (1979).

he may, at the same time as he applies to the Board, take advantage of any appeal procedure available to him within the union.[60]

The CLRB explains the absence of a mandatory preliminary internal appeal provision in the Code by emphasizing the fact that the union is obliged to represent all the employees in the bargaining unit fairly and without discrimination. The duty speaks in terms of employees, not union and non-union members, thereby establishing a universal standard of representation. Adopting the Ontario and British Columbia approach would result in two procedural standards. In the opinion of the CLRB "[s]uch a situation would discourage union membership and place differing limits on the amount of compensation unions and employers would be exposed to in the two situations".[61] The further delay involved in requiring exhaustion of internal remedies would also prejudice an employer's ability to defend against a grievance.[62] The British Columbia Board, on the other hand, contends that internal union appeal procedures protect union members and the union. The Board should therefore encourage their utilization by deferring to them in the appropriate circumstances.[63] The CLRB recognizes that its approach may undermine exemplary internal union procedures by discouraging union members from using them in favour of the Board. It has concluded, however, that the practical considerations of a universal standard outweigh the apparent advantages of the Ontario and British Columbia approaches.

The CLRB's conclusion can be supported in that it does not necessarily mean unions will not establish or maintain adequate appeal procedures since it is still in their interest to do so. As pointed out in *Lochner*, in some cases the Board will find an appeal procedure relevant in determining whether the union discriminated against the complainant in its initial decision.[64] Conversely, the appeal procedure may also cure an initial breach of the Code. In *Scott v. International Woodworkers, Local 1-71*[65] the British Columbia Board held that although the grievance

---

[60] An employee cannot be discriminated against because he has complained to the Board. Canada Labour Code, R.S.C. 1970, c. L-1, s. 185(*i*)(iii), *as amended by* S.C. 1972, c. 18, s. 1.

[61] *Lochner*, *supra* note 59, at 122-23, [1980] 1 Can. L.R.B.R. at 155.

[62] Maffei v. Brotherhood of Electrical Workers, Local 2085, 37 di 102, at 112, [1980] 1 Can. L.R.B.R. 90, at 98 (1979).

[63] *Western Carriers Ltd.*, *supra* note 58.

[64] *Supra* note 59, at 124, [1980] 1 Can. L.R.B.R. at 156. *See also* Startek v. Teamsters, Local 938, 38 di 228, at 237, [1980] 1 Can. L.R.B.R. 577, at 584 (1979) in which the Board stated:

> However, *if the complaint of the March 15, 1979 incident had been timely such evidence might have served to establish an attitude inconsistent with the business representative's duty to fairly represent a bargaining unit employee* and perhaps provide a basis for a finding that Donovan's action on March 15 was arbitrary. Since we have ruled the complaint based on the March 15, 1979 incident is untimely we cannot now consider the evidence of the executive board's decision to uphold Donovan's initial decision independently from the March 15 decision. (emphasis added)

[65] [1977] 1 Can. L.R.B.R. 497 (B.C.L.R.B.).

committee handled the grievance in a perfunctory manner, the union, through the efforts of its local president, ultimately met its statutory obligations. Thus it is still in the union's interest to establish and maintain procedures that will provide adequate relief to its members.

The CLRB's requirement to complain directly to the Board does raise problems with respect to the heavy onus it places upon a union member. A union member is required to eschew the internal appeal procedures he supports through union dues, and is probably bound to by contract, in order to complain to a somewhat foreign and distant forum. If the union member pursues an internal appeal and complains to the Board, he must be prepared to handle the conflict of loyalties involved. That is assuming, of course, the average union member is fully cognizant of his rights under the Code, the time limit, and the CLRB's policy on the issue as expressed in *Lochner*. Is it not natural for a union member to appeal the union's initial decision and then when all else fails complain to the CLRB? Unfortunately by the time he applies to the Board he will probably be past the ninety-day time limit which begins to run when the complainant learns of the initial decision.[66] This scenario will recur until employees in the federal jurisdiction are fully informed of their rights under the Canada Labour Code, particularly their right of applying to both forums without fear of reprimand.[67]

In addition to raising the foregoing policy considerations, the scheme obliges the Board to determine what constitutes the final decision by the union not to represent a particular employee. In this regard it is important to remember how the CLRB has interpreted the meaning and scope of the union's duty to represent all the employees in the bargaining unit fairly and without discrimination. In *Lochner* the Board made it quite clear that section 136.1 does not give the Board the authority to scrutinize the internal affairs of the union.[68] The alleged misconduct of the union must be in its representation of the employee vis-à-vis the employer.[69] As a result, the Board must distinguish between a final

---

[66] *E.g.*, *Startek*, *supra* note 64.

[67] S. 185(*i*)(iii).

[68] *Supra* note 59, at 124, [1980] 1 Can. L.R.B.R. at 156.

[69] In *Lochner*, *id.*, the business representative of the union decided to abandon the complainant's grievance. In accordance with the constitution of the union, the complainant appealed this decision to the National Appeals Committee. Before the Board, the complainant alleged that the conduct of the Appeals Committee was in violation of the Code, not the actual decision to abandon the grievance. In dismissing the complaint, the Board stated:

> The subsequent events were matters of internal union affairs between the union and a member and although they related to a grievance they arose not as union actions related to its status as bargaining agent on behalf of an employee in a bargaining unit, *but as an organization with constitutional obligations to a member*. This conclusion is reinforced by the right of union members, if successful before the National Appeals Committee, to claim expenses and loss of wages when the grievance has become untimely *The union membership in adopting these constitutional provisions only created rights for members*, not for all employees in bargaining units represented by the union in the many industries in which it represents employees

Id. at 124-25, [1980] 1 Can. L.R.B.R. at 157 (emphasis added).

decision made by an authorized official and an internal confirmation of that decision by the union executive. Being an internal matter, the subsequent clarification or restatement of the initial decision is not within the purview of the Board and thus cannot constitute a new starting date for the time limit.[70]

In contrast with this "hands off" approach, OLRB in a recent decision decided that the internal appeal procedure of the CBRT was in breach of the union's duty of fair representation.[71] The CBRT's constitution stipulated that a non-member of the union could not appeal the decision of a business representative not to proceed to arbitration to the national appeals committee of the union. The complainant became a non-member because he did not pay his union dues, which were traditionally deducted from his pay cheque, for three months after he was discharged. The Ontario Board held that in denying the complainant's appeal the union acted arbitrarily because it invoked provisions of the constitution which were "discriminatory in general terms for the purposes of the duty of fair representation . . . because different treatment is provided for members and non-members".[72]

In *Startek v. Teamsters, Local 938*,[73] the business representative of the union withdrew the complainant's grievance from arbitration. His decision did not require subsequent approval and was therefore final. The complainant applied to the Board, about four months after the union's initial decision, dissatisfied with the conduct of his appeal before the executive board of the union. The CLRB held the executive board's decision to uphold the business representative's action was a mere restatement of the initial decision. As a consequence, the conduct of the hearing could not constitute a fresh failure by the union to represent the complainant fairly and without discrimination. The complaint in relation to the initial decision was, of course, untimely.

It is clear that the ninety-day time limit begins to run when the complainant is informed the union will not go to arbitration with his grievance. This does not mean that an employee may bring forward a claim a year later because he never requested a grievance to be filed and thus never received a reply. The purpose of the time limit is to provide a certain degree of certainty by preventing old and stale claims from being revived. This purpose would be undermined if an employee was allowed to circumvent the administration of the Code in this way. By the same token, a union cannot escape its responsibility by completely abdicating its duty to represent all the employees in the unit.

---

[70] *Lochner*, *id.*; *Startek*, *supra* note 64; Huggins v. C.B.R.T., 38 di 195, at 204, [1980] 1 Can. L.R.B.R. 364, at 371 (1979); *Maffei*, *supra* note 62; Solly v. Communication Workers, Local 49, 81 C.L.L.C. 16,089, at 14,781, [1981] 2 Can. L.R.B.R. 245, at 255-56 (Can. L.R.B.).

[71] Barna v. C B.R.T., [1981] Ont. L.R.B.R. 815.

[72] *Id.* at 823.

[73] *Supra* note 64, at 236-37, [1980] 1 Can. L.R.B.R. at 583-84.

In *Forestell v. U.S.W.A., Local 8562*[74] the CLRB was faced with a situation in which the local union president failed to offer the complainants, who were forced to resign, any advice or support of any kind. The local president simply did not understand his duties as a representative under the collective agreement.[75] The union compounded the problem by not replying to a request, three months later, by the complainants to file a grievance on their behalf. In ignorance of their rights under the Canada Labour Code, the complainants did not retain counsel until, four months after their dismissal, they were advised by the Ontario Board that they were within the federal jurisdiction. The Board held that the complainants knew of the circumstances giving rise to the complaint when the union finally replied to their request and decided not to go to arbitration. The Board reasoned in the following manner:

> In this case we have determined the complainants did not know of any duty owed to them by their union until March, 1980 when they prepared their complaint to the Ontario Board. The union did not apply its mind to grieving on their behalf until March 3 when Henderson and Wareham met. That date is ninety-two days before June 2. [Filed complaint with Board] The results of that consideration were not communicated to the complainants until Wareham's letter on May 14.
>
> When the local union leadership has not applied its mind to or does not understand the grievance procedure under the collective agreement and Hall and Forestell's redress under it, we cannot ascribe greater knowledge to Hall and Forestell. This especially cannot be done when the union leadership they turn to for help offers no counsel on how the discharge may be opposed The entire events from November 20 to March are a sad chronicle of ignorance undispelled by any union education program.[76]

It was plain on the facts of the case that the complainants were not attempting to circumvent the time limit in the Code. At the same time the union offered absolutely no representation. Basically the CLRB used its discretion in section 187(2) to determine when a complainant "ought to have known of the action" in order to reach the desired result. It was

---

[74] [1980] 3 Can. L.R.B.R. 491 (Can. L.R.B.).

[75]

> The local union president saw his sole role as hiding the guilt of Hall and Forestell. Once some guilt was acknowledged he never turned his mind to what would be the appropriate punishment. He did not know if a choice to resign as offered by Montgomery was proper. He was at a loss as to what to do. By 3:45 p.m. time was running out. Hall called him and he had no advice to offer. He opined a resignation and a clean record was preferable to a discharge. He made no mention of filing a grievance. It did not occur to him to protest to Montgomery about the penalty or the short period of time for decision making or the failure to notify the union after the Monday meeting Hall and Forestell called their union for help and received none In the crucial fifteen minutes they were counselled to resign as the lesser of two evils and left on their own.

Id. at 493.

[76] *Id.* at 495. *See also* Haley v. Canadian Air Line Employees' Ass'n (No 1), 81 C.L.L.C. 16,070, at 14,627, [1980] 3 Can. L.R.B.R 501, at 512 (Can L R B)

certainly open to the Board to have held that the complainants knew of the action shortly after they had been dismissed. Given the union's conduct, however, the Board was determined not to let the strict language of the statute, or mere consistency, get in the way of justice in this particular case.[77] In this light, the case should be regarded as an anomaly and be confined to its extraordinary set of facts.[78]

In *Forestell* the CLRB came very close to abusing its discretion in order to save a meritorious complaint. The great potential for abuse in this area is further illustrated by the approach put forth by the dissenting member of the Board in *Semeniuk v. Teamsters, Local 938*.[79] In this case the complainant was discharged as a result of a traffic accident in which he was charged with careless driving. In September 1980 his grievance was denied by the grievance committee. In December 1980 the charge of careless driving against the complainant was dismissed in provincial court. With his name cleared the complainant in January 1981 asked the union to re-open his case, which it declined to do. In April 1981 Semeniuk complained to the CLRB, alleging the union failed to represent him fairly at the hearing. The majority of the Board held the complaint filed in April 1981 was untimely because it only related to circumstances in September 1980 when the hearing was conducted. The Board added that "[t]he fact that the union unsuccessfully responded to his request for reconsideration early in Jan. 1981 does not alter the time of his knowledge of the union's failures as alleged."[80]

Mr. Archambault, in dissent, disagreed with this last point and argued that when a complainant alleges certain conduct violates the Code, rightly or wrongly, those alleged facts give rise to a complaint within the meaning of section 187(2). "The Board cannot ignore 'those alleged facts and circumstances' and cannot refuse to render judgment on the facts alleged in the complaint."[81] The complaint, according to this approach, was timely because Semeniuk did not learn of the union's refusal to re-open the case until March, well within the ninety-day time limit. This reasoning, if followed, would allow the Board to fasten upon any alleged fact, as long as it was within the time limit, to declare a complaint timely. For practical purposes this approach would render the time limit nugatory. Although this argument was clearly rejected by the majority of the Board, it illustrates the extent to which some members of the Board will go to circumvent the rigid time limit.

---

[77] The Board achieved a certain degree of balance in its decision by devising a remedy to fit the circumstances of the case. The Board ordered the union to compensate the complainants for only four out of the nine months they were out of work. *Forestell*, *id.* at 498.

[78] One author has commented upon the arbitral jurisprudence on timeliness in a similar fashion: "The confusing development of the awards is based as much upon an attempt to do justice in individual cases as on any serious difference in law." M. GORSKY, *supra* note 32, at 48.

[79] (As yet unreported, Can. L.R.B., 13 Oct. 1981, decision no. 340) (hereafter page numbers will refer to the reasons for judgment).

[80] *Id.* at 9.

[81] *Id.* at 11.

C. *The Continuing Offence*

In *Upper Lakes Shipping Ltd. v. Sheehan*[82] the Supreme Court of Canada decided that a refusal to hire someone because he had been expelled or suspended from membership in a trade union for a reason other than a failure to pay dues did not constitute a continuous wrong.[83] Unlike the duty to bargain in good faith, which is a continuing one, a subsequent refusal to hire, if based upon the same circumstances, cannot found a new complaint and thus restart the ninety-day time period. In the words of Laskin C.J.C., "one set of circumstances cannot, by multiplying requests followed by refusals, give rise to a continuous unfair practice".[84] Due to the fact that Sheehan, the complainant, knew of the company's blanket refusal to employ him on its ships shortly after it became an unfair labour practice on 1 March 1973, his complaint filed on 23 May 1974 was untimely. The subsequent refusals by the company, though within the ninety-day period before the application, could not resurrect the defunct practice.[85] It was also found as a point of fact that no change in circumstances had occurred between Sheehan's position in 1973 and his position in 1974.[86]

---

[82] *Supra* note 27 (Pigeon, Beetz and Pratte JJ. dissented). Laskin C.J.C. summarized the salient facts of the case in the following manner:

> Sheehan was expelled in 1961 from membership in the Seafarers International Union, of which he had been an officer, because of activities in forming and supporting a rival union, the Canadian Maritime Union, of which he became the first president. The CMU became the bargaining agent for unlicensed seamen employed by the appellant company. In 1970 the CMU merged with the Canadian Brotherhood of Railway, Transport and General Workers, becoming Local 401, CMU, of CBRT and GW. Sheehan was expelled from the CMU in 1964 for a reason other than a failure to pay union dues. From that time on and through the years to the period ante-dating the complaint he attempted to get employment as a seaman on Canadian ships without success. These attempts related to efforts to obtain employment with the appellant company.
>
> Sheehan knew J.D. Leitch, the president of the company, and B. Merrigan, the vice-president of personnel. The record shows that he had met with Leitch at least six times prior to 1974 with reference to possible employment as a seaman and had been refused each time. Indeed, the record shows that, on the respondent's own recollection, he had sought employment on fourteen occasions from 1970 to 1974 and had been consistently turned down.

Id. at 906, 95 D.L.R. (3d) at 27. It is beyond the scope of this paper to cover the extensive litigation arising from the foregoing facts. For a complete history of Sheehan's various attempts to attain redress, *see* Sheehan v. Canadian Maritime Union, Local 401, 40 di 103, at 105-06, [1980] 2 Can. L.R.B.R. 278, at 280-81.

[83] Arbitrators originally developed the concept of the continuing grievance in order to circumvent time limits within collective agreements. M. GORSKY, *supra* note 32, at 150-54 has attempted to define this illusive concept.

[84] *Supra* note 27, at 912, 95 D.L.R. (3d) at 32.

[85] *Id.* at 907, 95 D.L.R. (3d) at 28.

[86] *Id.* at 910, 95 D.L.R. (3d) at 30. *See* Christie, Langille & Steinberg, *supra* note 31, at 289-92 for a critical analysis of the case.

Subsequently, the CLRB in *Sheehan* held that the Supreme Court's reasoning applied equally to Sheehan's complaint against the union. Sheehan alleged that the officers of the union consistently refused to register him for employment as a seaman because he had been expelled from the Canadian Maritime Union earlier as a result of an internal political battle and, furthermore, that applying the membership rules to him in this manner was discriminatory. The Board, in finding no meaningful distinction existed between a refusal to employ and a denial of membership to a union, had to determine what the Supreme Court meant by the phrase "based on the same circumstances".[87] It is within the Board's complete discretion to decide, being a question of fact. Was the complaint in 1974 based upon new circumstances or was Sheehan denied membership for the same reasons as in 1973? According to the Board, whether or not it takes a strict or liberal approach in interpreting the words "action or circumstances giving rise to the complaint" contained in section 187(2) will depend upon the purpose of the section under consideration. Given the important purpose behind the prohibition against union discrimination, the CLRB applied a liberal approach. Nevertheless, it found no change in circumstances between the union's denial of membership in 1973 and its denial in 1974. The Board did reiterate, however, that the addition of a new ground could constitute a changed circumstance.[88] In the end, Sheehan's complaint was dismissed as untimely.

Obviously unsettled by the reasoning of the Supreme Court in *Upper Lakes Shipping Ltd.*, the CLRB offered a few examples to illustrate the important implications of the decision.

> Suppose an employer in a seasonal business in our jurisdiction (such as employment in the Territories or maritime industries) makes a blanket decision not to employ a person because he is a union member. If that person does not complain within ninety days of his knowledge of that reason for the refusal to employ he is precluded from complaining about any subsequent refusal in later years.[89]
>
> . . . .
>
> A denial of union membership can be more serious than a refusal to employ. There may be other employers, but there may not be other unions, even other local unions. In some industries it is common to find one union and only one union representing particular tradesmen or types of employees. The result is that, for example, if a new immigrant to Canada seeks membership in a union that represents people with his skill or trade and it denies him membership because of his ancestry he has only one ninety day period within which he can complain. If he misses that period because of his ignorance of Canadian law and institutions the union can continue to discriminate so long as the circumstances do not change.[90]

---

[87] *Supra* note 17, at 747, [1979] 1 Can. L.R.B.R. at 548.
[88] *Id.*
[89] *Id.* at 747, [1979] 1 Can. L.R.B.R. at 547.
[90] *Id.* at 749, [1979] 1 Can. L.R.B.R. at 549.

The foregoing examples demonstrate how the limitation period, through the Supreme Court's decision, has attained an importance out of all proportion to its purpose. The time limit is meant to infuse some degree of certainty into the adversarial system of collective bargaining by preventing old claims from becoming new causes of action. This rationale is not necessarily applicable where an *individual* is discriminated against by an employer or a union.[91] Laskin C.J.C., by characterizing a refusal to hire and a denial of membership as non-continuing offences, has effectively frustrated the main objective of the Code, which is to encourage and safeguard "freedom of association". This purpose is certainly frustrated when an employer or a union is allowed to discriminate continuously against an individual as long as the circumstances do not change. The problem is exacerbated by the Board's inability to enlarge the time limit. As a result, in contrast with the flexibility wielded by the OLRB, the CLRB is forced to stretch the language of the Code to ensure individual employees are not left unprotected. Sound labour relations policy is essentially being thwarted rather than served by this interpretation of the time limit. Only in some cases can the Board achieve a semblance of order between differing priorities in the Code, either through its discretion in section 187(2), or by characterizing the offence as continuing in nature. It was able to do the latter in the following case.

Mike Sheehan was a persistent litigator. In 1978[92] he complained that the union violated section 161.1, a newly enacted duty of fair referral,[93] by applying the rules of its referral system in an unfair and discriminatory manner. The union contended the application was untimely as an attempt to re-litigate his complaint based upon the earlier proceedings which were found untimely.[94] In finding the complaint timely, the Board made an important distinction (in terms of timeliness)

---

[91] *Id.*

[92] Sheehan v. Canadian Maritime Union, Local 401, *supra* note 82.

[93] S. 161.1 of the Canada Labour Code, R.S.C. 1970, c. L-1, *as amended by* S.C 1977-78, c. 27, s. 58 reads as follows:

> 161.1(1) Where, pursuant to a collective agreement, a trade union is engaged in the referral of persons to employment, it shall apply, fairly and without discrimination, rules established by the trade union for the purpose of making the referral.
>
> (2) Rules applied by a trade union pursuant to subsection (1) shall be kept posted in a conspicuous place in every area of premises occupied by the trade union in which persons seeking referral normally gather
>
> (3) Where a trade union to which subsection (1) applies has not established before the coming into force of this section, rules for the purpose of making the referral referred to in that subsection, the trade union shall establish rules for that purpose forthwith after the coming into force of this section.
>
> (4) In this section 'referral' includes assignment, designation, dispatching, scheduling and selection.

[94] Since s. 161.1 did not come into effect until 1 Jun. 1978, the Board only considered actions after that date.

between a duty of fair referral and sections prohibiting an employer and a union from discriminating against an employee in certain circumstances. In the earlier cases, these latter sections were characterized as individual wrongs. The identity of the complainant and his position vis-à-vis the employer or the union were the key elements in calculating the timeliness issue. In contrast, the major purpose behind the duty of fair referral is to ensure that the union's referral system is administered fairly and without discrimination. The supervision of the various referral systems throughout the federal jurisdiction is a continuous process which must be maintained for the benefit of the public at large.[95] Accordingly, the proper administration of these systems is paramount to the plight of the individual concerned.

> In this spirit Board officers make occasional checks to ensure rules are established and posted. Uninformed unions are advised about the existence of section 161.1. The Board does not wait for individuals to complain about the application of the rules to them. Persons not adversely affected themselves have an interest in the administration of the rules. They may be adversely affected in the future. Employers have an interest in the rules. Complaints may come to the Board from a variety of sources. One or several persons may be wronged. Those wrongs must be redressed when fair and non-discriminatory administration is re-established. *The identity of those wronged is not central to the Board's inquiry into the administration of the system*. The administration may fluctuate from fair and non-discriminatory to unfair and discriminatory from season to season, year to year, or month to month. The Board's task is to keep it on the straight and narrow. Because the same person is adversely affected more than once is incidental. It may be important in fashioning a remedy but it cannot affect the Board's inquiry into how the referral system is being operated. An unfair administration cannot be permitted to continue to operate unfairly because the person complaining is, insofar as it affected him, beyond the ninety-day period in section 187(2). To interpret sections 187(2) and 161.1 in this fashion would flaunt unreasoned logic to serve unfairness.[96]

The consequences of the Supreme Court's decision in *Upper Lakes Shipping Ltd.* can be summarized in the following fashion. In a situation involving similar repeated violations of the Code, there are two options. One can argue that the subsequent complaint is based upon different circumstances, and since this is a question of fact, evidence must be introduced to prove this change in circumstances. As an example, one could argue the complainant was originally refused employment for legitimate reasons while the subsequent refusal was based upon considerations prohibited by the Code. The Board will take a liberal approach to this task if the purpose of the section under consideration warrants it. Secondly, one can argue that *Upper Lakes Shipping Ltd.* does not apply if the complaint involves a continuous unfair labour practice.[97]

---

[95] *Supra* note 82, at 118, [1980] 2 Can. L.R.B.R. at 290.

[96] *Id.* at 118-19, [1980] 2 Can. L.R.B.R. at 290.

[97] *Id.* Apart from the problems concerning similar repeated violations of the Code, a complainant, alleging a contravention of s. 161.1, must still come within the 90 day time limit: *see* Jollimore v. International Longshoremen's Ass'n, Local 269 (as yet unreported, Can. L.R.B., 8 Feb. 1982, decision no. 368).

According to the reasoning of the CLRB, the thrust of a continuing offence is its general public purpose. In contrast with a section that is concerned with the wrong to an individual, in the interests of the public a continuing offence cannot be allowed to continue. The identity and position of the individual complainant is incidental to this public purpose. Thus the time limit begins to run anew each time an unfair labour practice is committed. For example, the duty to bargain in good faith is a continuous obligation.

III. Conclusion

The CLRB is supposed to provide informal and speedy justice to a constituency largely without legal training. Given the breadth of the field, however, a certain degree of complexity is inevitable. Unfortunately, through judicial narrowmindedness, the timeliness provisions of the Canada Labour Code have taken on an importance out of all proportion to their purpose. This has resulted in the development of a complex body of case law of a technical nature, unnatural in the labour relations setting. The administrative difficulties caused by the time limit as outlined in *Giant Yellowknife Mines Ltd.* and *Air Canada*, plus the strained attempts by the Board to save meritorious complaints, indicate that the Board does not have enough flexibility to balance the competing policies inherent in the labour relations system. The fact that the Board had to resort to result-oriented reasoning in *Forestell* is further evidence of the problems inherent in a rigid time limit. Where the CLRB cannot act, the legislator should do so by reordering priorities more in line with sound labour relations policy. It is submitted that the Code should be amended to authorize the CLRB to extend the ninety-day time limit when the overall purpose of the Code warrants it and where the respondent would not be substantially prejudiced as a result. This would give the Board the much needed flexibility it presently lacks. Consequently, the Board could maintain a proper balance between the inherently conflicting forces within the system.