



IN THE MATTER OF:

THE LABOUR RELATIONS CODE

-and-

NEVILLE TOPPIN

Complainant

-and-

**UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND
CANADA, LOCAL UNION NO. 488**

Respondent

FILE NO.: GE-04770

BOARD MEMBERS

J. Leslie Wallace - Vice-Chair
Lynn Ervin - Member
Reg Basken - Member

APPEARANCES

For the Complainant: Bob Graham (Counsel), Neville Toppin
For the Respondent: Micah Field (Counsel), Rob Kinsey

REASONS FOR DECISION

[1] On April 29, 2005, Neville Toppin (the “Complainant”) filed a complaint against the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 488 (the “Union” or “Local 488”). The complaint alleges breaches of section 151(h), unlawful union discipline, and section 151(f), anti-union coercion and intimidation.

[2] Both parties acknowledge that the complaint was filed well after the expiry of the 90-day discretionary limitation period in section 16(2) of the *Labour Relations Code*. Depending upon the date one chooses as the date when Mr. Toppin “knew or ought to have known” of the circumstances giving rise to the complaint, it was filed from seven and one-half months to 18 months later. Local 488 objected that the complaint should be dismissed as untimely. The Complainant contended that the Board should exercise its discretion to allow the complaint to proceed.

[3] At the close of a hearing directed solely to the issue whether the complaint should be dismissed as untimely, the Board orally dismissed the complaint with reasons to follow. We use this opportunity to provide written reasons clarifying the approach this Board takes to late-filed complaints.

I. Facts

[4] Neville Toppin is an experienced pipefitter welder who owns his own welding rig. He has been a member of the Union since 1982. He has worked on a number of unionized jobs. According to his complaint, he has also worked substantial periods of time for employers that neither have a bargaining relationship with Local 488 nor are signatory to any agreement to adhere to a Local 488 collective agreement. Some of these employers have been non-union construction companies. Others have had bargaining relationships with a local union affiliated with the Christian Labour Association of

Canada (“CLAC”). CLAC is a rival union to Local 488 and other member locals of the Alberta & Northwest Territories Building Trades Council. It is well known to this Board that the Building Trades and CLAC are embroiled in fierce competition for work in Alberta and have often been in litigation against one another and against employers who enter into bargaining relationships with their rival. It is one aspect of this competition that Local 488 and other members of the Building Trades from time to time consider it necessary to invoke their union’s constitutional powers of discipline against members who work for contractors not bound by a Building Trades collective agreement.

[5] On or about October 22, 2003, Mr. Toppin was observed working for one of the Ledcor group of construction companies at the Suncor Energy oil sands plant site north of Fort McMurray. Ledcor does not have any collective agreement relationship with Local 488. Some of the Ledcor group of companies have a relationship with CLAC. The next day, October 23, one Brad Steele filed charges under the Union’s constitution against Mr. Toppin. He charged that Mr. Toppin had violated Section 194 of the Union’s constitution and Article 4.09 of Local 488’s Bylaws and Working Rules by working for a non-signatory employer. The charge under Section 194 of the constitution was ultimately not proceeded with, and nothing more need be said about it. Article 4.09 of the Local’s Bylaws reads:

4.09 Any member working at the trade, accepting a job with an employer who is not signatory to our Local or National Agreements, will be subject to disciplinary action. (...)

[6] Mr. Toppin acknowledges that he was aware these charges would be filed against him before he received formal notice of them. On November 20, 2003, as is the practice, a Union membership meeting accepted the charges. A trial date was set for January 23, 2004. Mr. Toppin was sent a formal notice of the charges and his trial date on December 30, 2003. He received and signed for these materials by Canada Post courier on January 5, 2004. He decided not to attend his trial in Edmonton because it would require him to leave a lucrative job in Fort McMurray. He did not seek an adjournment, and the trial

proceeded in his absence. The Trial Board found him guilty of violation of Article 4.09 of the Bylaws and assessed a fine of \$5,000.00. This finding and fine was reported back to the Local 488 membership on March 20, 2004.

[7] A fine of this magnitude must be confirmed by the Union's General Executive Board in Washington, D.C. by a petition process. On March 22, 2004, Local 488 notified Mr. Toppin of the finding of guilt, the amount of his fine, and that it was petitioning the General Executive Board for confirmation of the penalty. On April 6, 2004, the Union's General Secretary-Treasurer, Thomas Patchell, wrote to Mr. Toppin advising that it had received Local 488's petition, enclosing a copy of the petition, telling him of his right to appeal the penalty, and soliciting a statement of his position in the controversy. According to his complaint, Mr. Toppin telephoned the Union's international headquarters to advise that there was no controversy, he had done nothing wrong, and would not be filing a response. In cross-examination, he asserted that he did not participate in the International Union's process because, in his words, "I have the right to work".

[8] While this was happening, Mr. Toppin had ceased paying dues to Local 488. According to his complaint, he stopped paying dues in January 2004 because he believed that they would only be set off against the \$5,000 fine that he did not intend to pay. From this we conclude that Mr. Toppin knew of his fine almost immediately after the trial on January 23, 2004. We note that the Union's version of Mr. Toppin's dues status is different. It says that Mr. Toppin was six months in arrears in March, 2004 and was expelled for non-payment of dues on April 1, 2004. The Board ruled that Mr. Toppin's dues status was not relevant to the issue of whether the complaint was timely and declined to hear evidence about it at the preliminary stage.

[9] On September 10, 2004, Secretary-Treasurer Patchell wrote to Mr. Toppin to advise that Local 488's \$5,000 fine had been ratified by the General Executive Board and had to be paid before he could be readmitted to membership. On September 22, 2004, Local 488 gave its own notice to Mr. Toppin that the fine had been upheld.

[10] It was sometime in April or May of 2004 — Mr. Toppin could not be specific — that he first sought help in his dispute with Local 488. He approached the Edmonton office of the law firm of McLennan Ross, which is highly experienced in labour law matters, and was referred to one of its members. In cross-examination Mr. Toppin said that he contacted a lawyer then because at that point the Union had fined him. It is clear from the other evidence that Local 488 had indeed found him guilty of one charge and assessed the \$5,000 fine by this time, but that General Executive Board ratification was required and that process had only just commenced. Mr. Toppin allowed in cross-examination, however, that he was aware of the charging process and that he knew the fine would likely be upheld by the International Union.

[11] Mr. Toppin was vague about his dealings with the McLennan Ross law firm, saying only that he called his lawyer several times by telephone, that he was “waiting on the lawyers” for a time, and when he eventually attended in person he learned that his lawyer was on a maternity leave and his file had been transferred to another lawyer.

[12] On December 22, 2004, Mr. Toppin took the step of contacting his present counsel of the Burnet, Duckworth & Palmer law firm. Mr. Toppin stated that he got the firm’s phone number from a friend, who he named. Eventually, on April 28, 2005, he filed the present complaint.

II. Argument

[13] The issue in this case is the proper application of section 16(2) of the *Labour Relations Code*, which says:

16(2) The Board may refuse to accept any complaint that is made more than 90 days after the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

[14] Mr. Toppin argues that he knew or ought to have known of the circumstances giving rise to the complaint only on September 10, 2004, when he learned that the General Executive Board had upheld the \$5,000 fine. Any complaint filed prior to that would have been premature: *Ron Sorensen v. UA, Loc. 496* [1996] Alta. L.R.B.R. 232. Therefore, the complaint was filed seven and one-half months after the triggering event. This, he argues, is not extreme delay; most complaints dismissed by the Board for “extreme delay” are from one to three years old. Mr. Toppin says that the Board’s complaint process should not be too difficult to access. He was a long-time Union member asserting important rights to pursue his livelihood, and he was taking timely steps by contacting the McLennan Ross firm when he did. In these circumstances, the onus should be on the Union to show reasons why the complaint should *not* be heard: *IBEW, Loc. 424 v. Athabasca Construction Joint Venture* [2002] Alta. L.R.B.R. 411. It should be required to show that it is prejudiced by the delay: see *Vijay Gulerya v. ATU* [1994] Alta. L.R.B.R. 495. No prejudice to the Union’s ability to litigate the case, as for example by missing documents or unavailable witnesses, is apparent.

[15] Local 488 argues that this complaint was much more than seven and one-half months old. Mr. Toppin knew of the charges in October 2003, and the intimidation and discrimination complained of is properly the filing of the charge, not the finding of guilt. In any event, the time runs against Mr. Toppin as of January 23, 2004, when the trial board found him guilty, or March 22, 2004, when he received official notice of the conviction and penalty. Approval of the International Union was only approval of the quantum of the penalty, not the finding of guilt, so the delay in that process does not assist him. Local 488 points to the facts that Mr. Toppin did not participate in the International’s process, that he knew a ratification of the penalty was likely, and that he contacted legal counsel around this time. It says that the latest date the time started to run against Mr. Toppin was April 6, 2004, when he received the International Union’s letter asking for his side of the story and decided not to participate. By these measurements, the complaint was anywhere from 12½ months to 18 months old.

[16] Local 488 says that even by the Complainant's theory that September 10, 2004 is the operative date, the delay was too long because it is totally unexplained. It argues that prejudice to the litigation is not a necessary element of an untimely complaint. The Board's jurisprudence, it says, has steadily moved away the analysis offered in the *Gulerya* case. The position now is that prejudice to litigation is only one factor, and not the most important factor, that the Board looks to. Prejudice can be presumed from passage of time. Other factors, like the sophistication of the complainant, the complaint's chances of success, and (above all) the reasons for the delay, are also important. Local 488 also takes issue with the suggestion in *Gulerya* that it mitigates delay for a complainant to show that he received poor legal advice or inaccurate information, even from the Board itself.

III. Decision

[17] We start by disagreeing with one of the arguments put by Local 488 about the date that Mr. Toppin knew or ought to have known of the circumstances giving rise to his complaint. The complaint cites section 151, subsections (f) and (h). They read:

151 No trade union and no person acting on behalf of a trade union shall

(...)

(f) use coercion, intimidation, threats, promises or undue influence of any kind with respect to any employee with a view to encouraging or discouraging membership or activity in or for a trade union;

(...)

(h) expel or suspend a person from membership in the trade union or take disciplinary action against or impose any form of penalty on a person by reason of the person having refused to perform an act that is contrary to this Act;

The circumstances that give rise to a section 151(f) complaint are the coercive or intimidating activity, the making of a threat or promise, or the exercise of an undue influence. It is arguable that the mere filing of union charges is coercive or intimidatory, or amounts without more to a threat, so Mr. Toppin had the basis to make a complaint as early as October, 2003. We think that the better view is that charges under a union constitution are coercive or intimidatory, either instead or additionally, when they are pursued through to a trial and a finding of guilt. So even if the section 151(f) complaint could have been filed in October 2003, as the Union says, the trial and finding of guilt would generate a new opportunity to file such a complaint. By this logic, the date when Mr. Toppin knew or ought to have known of the circumstances supporting a complaint was March 22, 2004, when he was officially notified of the trial board's finding of guilt and the \$5,000 penalty.

[18] That March 22, 2004 is the date from which to assess the timeliness of Mr. Toppin's complaint is also supported by the allegation that the Union violated section 151(h) of the *Code*. The essence of that sub-section is the taking of disciplinary action or the imposition of a penalty. The earliest time at which the Union could be said to have imposed a penalty or disciplined Mr. Toppin was when it communicated his finding of guilt and the penalty on March 22, 2004. So this allegation, at least, could found a complaint after that date. As that date coincides with one of the available dates on which Mr. Toppin knew or ought to have known that a s. 151(f) complaint could be pursued, it makes most sense to evaluate the timeliness of the entire complaint by reference to that date. That is the date that we would choose for purposes of timeliness, except that the penalty required General Executive Board ratification.

[19] Turning to that question, s. 203(a) of the Constitution of the Union says:

203. (a) No Local Union of the United Association shall impose an assessment of more than \$1,000.00, suspension or expulsion upon any member of the United Association unless approved by the General Executive Board.

We interpret this to mean that while the trial board's finding of guilt is final subject to an appeal or recourse to an external tribunal like the Board, the punishment set by the trial board is only provisional. Local 488 lacks the power to levy a fine of more than \$1,000.00 against a member unless approval by the General Executive Board is forthcoming. The fine is in the nature of a recommendation only, and it is perfected as a "penalty" within the meaning of section 151(h) only when it is approved.

[20] *Sorensen, supra*, stands for the proposition that a suspension, expulsion or major fine under the UA Constitution must be ratified by the International Union before time will run against a member complaining under section 151(i) of the *Code*. Mr. Toppin's complaint cites section 151(h), which similarly refers to expulsion, suspension, disciplinary action or imposition of a penalty. It follows that we agree with the Board's finding in *Sorensen* that a complaint about discipline or the imposition of a penalty under s. 151(h), filed before General Executive Board approval, is premature.

[21] It is not clear, however, that the International's approval of the penalty generates yet another chance to complain under the other subsection of the *Code* mentioned in the complaint, section 151(f). This subsection refers to coercion, intimidation, threats, promises and undue influence. In our opinion, however, it is unnecessary to make any fine distinctions between the timeliness of the section 151(f) complaint and of the section 151(h) complaint. We are prepared to assess the timeliness of the entire complaint on the basis that the date Mr. Toppin knew of the circumstances supporting his complaint was September 10, 2004. We are prepared to do this because nothing turns on what date we choose to assess the section 151(f) part of the complaint. In either case, the complaint was late; and we may assess Mr. Toppin's state of knowledge and his conduct prior to September 10, 2004 in deciding whether there are mitigating circumstances and reasonable explanations for the subsequent delay. We elaborate on this shortly.

[22] While we agree with Mr. Toppin's submission that the date for assessing the timeliness of his complaint is September 10, 2004, we are also in substantial agreement

with the Union's argument that the *Gulerya* case, *supra*, is no longer authoritative in a case like this.

[23] The *Gulerya* case was the Board's first major case on application of the discretionary 90-day time limit after it was introduced to the *Code*. The case featured an inexperienced complainant who had received faulty legal advice to sue for wrongful dismissal when his only recourse was the grievance that his union had just dropped. He was not told that a duty of fair representation complaint against the union was available. He filed his duty of fair representation complaint six months after his grievance was dropped. In allowing his complaint to proceed, the Board said:

(...) The purpose of time lines such as this is to encourage the speedy resolution of disputes. Festering disputes can detrimentally impact the labour-management relationship. In addition, as time passes, evidence can become less available or reliable given fading recollections, unavailability of witnesses and the potential for disposal of documents. This affects the fairness of future hearings should the complaint succeed.

(...)

In determining whether to exercise its discretion in a case involving an employee's complaint, the Board must balance the interests of the employee on the one hand and those of the union and the employer on the other. In the case involving an employee's complaint, the discretion should not be exercised unless the Board is satisfied that the union or employer would be prejudiced if the complaint proceeds on its merits. While the Board considers a number of factors when balancing the interests in a given case, each case is evaluated on its own merits.

A number of factors may be considered in assessing an employee's interests, including the nature of the grievance, the reasons for the delay and the remedy claimed in the complaint. As well, the Board takes into account when the complainant became aware of the alleged violation, the experience or sophistication of the complainant in labour relations matters, and whether the complainant has retained counsel. The Board also considers the actions of the employee during the delay period – has the employee continued to pursue the matter through other avenues or has the employee done nothing in the meantime?

On the other side, the Board considers the matters identifying prejudice to the employer or union. These include the amount of delay and the impact

of the delay on the potential evidence. Has the passage of time impaired the union or employer's ability to bring key witnesses to testify, to produce documents or to otherwise have a fair hearing? The Board is also aware that the union and the employer seek closure of the matter and some finality in the resolution of disputes. In some cases, the passage of time alone may create a presumption of prejudice. Finally, we consider any other circumstances creating prejudice.

[24] In applying these considerations to the case before it, the Board observed as follows:

First, the delay is approximately three months after the stipulated 90 days. While six months is a significant time, we are not prepared to characterize it as extreme delay, especially where there are mitigating circumstances. Second, there was no suggestion that evidence will be difficult to produce or witnesses are no longer available either on the complaint or the merits of the grievance. Third, the grievance involves a dismissal of a long term employee. Fourth, the complainant seeks a Board order which, in part, would waive the time limits in the collective agreement and direct the grievance to arbitration.

We characterize Mr. Gulerya as inexperienced in labour relations matters (...)

These factors convince us not to exercise our discretion to refuse Mr. Gulerya's complaint. Neither the ATU nor the Employer raised any other matters which would identify any prejudice if the Board continues to process the complaint. There is no prejudice in a legal sense in just being exposed to a complaint or grievance that would otherwise be untimely. (...)

(...) We do not consider that simply consulting a lawyer should disentitle an employee from filing a duty of fair representation complaint after the time limit. It seems unfair to suggest that an employee who has received and relied upon incomplete legal advice should, as a matter of course, have to resort to other legal avenues when accepting the late complaint causes no obvious prejudice to the union or the employer.

The threshold level for an individual employee to access the Board's process should not be too restrictive. In our view, it does not advance the principles of labour relations to deny an employee access to the Board in the absence of any allegation or evidence of prejudice to the other parties.

[25] *Gulerya* contains ideas that can and have been used by both sides to debate whether to take a strict or a lenient approach to the 90-day time limit in s. 16(2). Some passages suggest that the complaint will be allowed to proceed unless a respondent can show the delay has caused actual prejudice to its ability to litigate the case. Another passage, however, says that prejudice can be inferred from the lengthy passage of time. The decision mentions the consideration that late complaints can “detrimentally impact the labour-management relationship”; but it also makes much of the need for individual employees to have easy access to a Board complaint procedure. It suggests categories of ordinary and “extreme” delay, which might be defined in part by the equities of the case, like the activity or passivity of the complainant, the length of the complainant’s employment, and whether or not the complainant has been led astray by poor advice. With so many ideas available to either side of the debate, it is perhaps not surprising that *Gulerya* has been considered this Board’s leading case on the topic for as long as it has.

[26] When parties rely on *Gulerya* for a lenient approach to the 90-day time limit, however, they sometimes ignore what the Board has actually done in subsequent cases. Most of these are short letter decisions. As early as 1996, the Board emphasized the idea that extreme delay implies a prejudice that is sufficient to dismiss a late complaint. In *Lorne Parton v. Federated Co-operatives Ltd.* [1996] Alta. L.R.B.R. 149, a reconsideration panel upheld a decision to dismiss an 18 month-old complaint where the complainant had not advanced “compelling reasons to convince the Board to waive that delay”. It noted (at para. 17):

(...) on a close reading of the *Gulerya* decision, nowhere does it say that evidence of actual prejudice must be shown by the union or employer. Nor does it say that the Board must be satisfied that there will be actual prejudice. Indeed, the decision states that there may be cases where the passage of time in and of itself raises a presumption of prejudice.

[27] In *Valerie Csilics et al. v. HSAA* [1999] Alta. L.R.B.R. 650, the Board dismissed a two year-old complaint where the delay was unexplained, without a finding of actual prejudice to the respondent. Many other complaints have been dismissed as untimely after the Board concluded there were no extenuating circumstances or valid reason for delay, and again without proof of actual prejudice to a respondent:

Vernon Hauck v. Edmonton Fire Fighters Union [1999] Alta. L.R.B.R. LD-074 (eight months delay)

BSOIW, Loc. 805 v. Angel Merchandising Services Ltd. [2000] Alta. L.R.B.R. 108 (four months delay)

Don Buziak v. OE, Loc. 955 et al. [2000] Alta. L.R.B.R. LD-002 (two years delay)

Shirley Ricketts v. CUPE, Loc. 38 [2000] Alta. L.R.B.R. LD-032 (twenty months delay)

Eulalia Jalotjot v. United Personal Care Aides Society [2001] Alta. L.R.B.R. LD-001 (seven months delay)

Jeff Neiman v. Labourers, Loc. 92 [2001] Alta. L.R.B.R. LD-022 (five and one-half months delay)

Larry Kristman v. CEP, Loc. 501-A [2001] Alta. L.R.B.R. LD-062 (ten months delay)

Casurt Morgan v. CUPE, Loc. 37 [2001] Alta. L.R.B.R. LD-068 (ten months delay)

Pierre Dugal v. Ironworkers, Loc. 720 [2002] Alta. L.R.B.R. LD-080 (sixteen months delay)

ATU, Loc. 987 v. Lethbridge Handi-Bus Association [2002] Alta. L.R.B.R. LD-088 (five and one-half months delay)

Peter Grabowski v. IATSE, Loc. 210, [2003] Alta. L.R.B.R. LD-020 (twelve to 36 months delay)

Mohammed Hussain v. CSU, Loc. 52 [2003] Alta. L.R.B.R. LD-074 (twenty-one to 41 months delay)

Sam Post v. UA, Loc. 488 [2005] Alta. L.R.B.R. LD-030 (thirteen to 16 months delay)

[28] The Board may even dismiss an extremely old complaint as presumptively prejudicial, without proof of actual litigation prejudice and without enquiry into extenuating circumstances:

Steve Rendall v. CUPE, Loc. 150 [1998] Alta. L.R.B.R. LD-022

[29] The Board's jurisprudence on the 90-day time limit also features these propositions:

- Where the delay is extreme, a complainant must show "compelling reasons" to justify proceeding to a hearing: *Peter Grabowski v. IATSE, Loc. 210, supra*
- Actual prejudice to a respondent, for example through the death of a witness, is a strong factor against allowing a late complaint to proceed: *Daniel Busslinger v. IBEW, Loc. 424 et al.* [2002] Alta. L.R.B.R. LD-073
- A minor delay may be ignored by the Board where there is no indication of actual prejudice: *IAFF, Loc. 237 v. City of Lethbridge* [1999] Alta. L.R.B.R. LD-004 (Delay of 98 days); *Colin Anten v. ATU, Loc. 583* [2000] Alta. L.R.B.R. LD-072 (five months delay); *Kevin Wakeford v. Edmonton Police Assn.* [2000] Alta. L.R.B.R. 587 (five and one-half months delay)
- The strength or weakness of the case that is apparent to the Board on a review of the file is a factor that may be considered in exercising the Board's discretion to waive the time limit: *Casurt Morgan v. CUPE, Loc. 37, supra*
- A party "sophisticated in labour relations matters", like a trade union, faces a burden of explanation to justify even a short delay: *ATU, Loc. 987 v. Lethbridge Handi-Bus Association, supra*

- Delay may be excused where the complaint concerns a continuing policy or practice rather than a discrete set of events: *UNA, Loc. 23 et al. v. Chinook RHA* [2002] Alta. L.R.B.R. LD-056
- Though the Board may infer from delay that a respondent has been prejudiced, the inference may be negated by the fact that a timely grievance was filed about the same transaction: *UNA, Loc. 23 et al. v. Chinook RHA, supra*
- The Board may not waive prejudicial delay just because the complainant may have received faulty legal advice: *Daniel Busslinger v. IBEW, Loc. 424, supra*

[30] Our purposes in writing these reasons are to pull together the strands of thinking in the Board’s case law since *Gulerya*, to re-examine some of the principles behind the 90-day time limitation in s. 16(2) of the *Code*, and to attempt a concise restatement of the Board’s current approach to that limitation. In our opinion, the correct approach to the 90-day time limit, and the approach that best reflects this Board’s actual practice is as follows:

1. The 90-day time limit is a legislative recognition of the need for expedition in labour relations matters.
2. “Labour relations prejudice” is presumed to exist for all complaints filed later than the 90-day limit.
3. Late complaints should be dismissed unless countervailing considerations exist.
4. The longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed. There is no separate category of “extreme” delay.
5. Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:
 - (a) Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?

- (b) Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?
- (c) Has the delay caused actual litigation prejudice or labour relations prejudice to another party?
- (d) And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complaint?

We elaborate below.

[31] *Labour relations prejudice presumed to exist.* We start our task from the proposition that it is highly meaningful that the Legislature has set a time limitation, even a discretionary one, of 90 days upon the filing of complaints before this Board. Compared to the limitations for commencement of most civil actions in the Courts, this is a short limitation period indeed. It is reminiscent of the 30-day limitation period for filing of applications for judicial review of the Board's decisions in s. 19(2) of the *Code*. In our opinion, both provisions address what the Board in the *Sam Post* case, *supra*, called the "peculiarly prejudicial effect of delay in labour matters" (at ¶19).

[32] Delay in labour relations litigation is peculiarly prejudicial and corrosive for at least these reasons that we can discern. First, instead of the ordinary two-sided employment relationship, labour relations statutes govern the much more complex three-sided relationship of employer, employees and trade union. They do this partly through the instrument of the collective agreement, which is itself a product of a complex process, not just of balancing employer interests against employee interests, but of balancing among competing employee interests. Seniority provisions are just one example of a collective agreement term that balances among competing employee interests. Second, labour relations statutes create systems of workplace governance with many time-sensitive features. Once the right of collective bargaining is established, one party can periodically compel the other to bargain. If bargaining is not successful, parties can as a last resort have recourse to the drastic economic pressure of a strike or lockout, subject to some complex rules about process and timing. Once a collective agreement is reached, it

is an agreement for a term, not of indefinite duration; and that term determines the times at which another round of bargaining may begin, and when employees may abandon collective representation or replace their bargaining agent. And a collective agreement must feature a method of resolving differences arising out of the agreement, which is almost universally a grievance procedure with short time limits, culminating in grievance arbitration through which reinstatement of employment is a common remedy.

[33] These factors mean that labour relations disputes typically affect many persons, not just the immediate litigants. Let us take a grievance arbitration example. When an employee is terminated, another employee often replaces him or her. Often this sets off a chain of job postings and job bids resolved by some combination of ability and seniority. Employees leave old jobs, inside or outside the organization, to take up new ones, and they rely on the stability of the new job in making their employment choices. The longer the termination is in dispute, the longer that the post-termination state of affairs can be only provisional. Another example concerns Labour Relations Board proceedings. When bargaining is underway, the terms and conditions of employment for many employees hang in the balance. Outstanding grievances affecting employees might also hang in the balance, because grievances are often adjusted and resolved as part of the larger collective bargaining process. Any delay in the bargaining is felt far and wide; and any delay caused by disputes over the bargaining process itself, like a bad-faith bargaining complaint, multiplies this impact. And let us take one last example, closer to the considerations in this case. Construction building trades unions normally operate hiring halls and internal systems of discipline to ensure equitable distribution of available work among their members. These domestic rules are often the subject of deeply-held views among union members. They are relied upon by union members in deciding when to work, for whom to work, and for whom not to work. Challenges to the operation of hiring halls and internal union disciplinary rules call into question the integrity of those systems and diminish the certainty of the rules that many members take into account in fashioning their working lives. Delay in litigating challenges to these rules is prejudicial to the interests of all the persons involved. If this prejudice is not so tangible as a loss of income or a disciplinary incident on one's record, it is nevertheless real.

[34] Because the impact of a typical labour relations dispute is so broad and diffuse, there is a compelling public policy need to air and resolve those disputes quickly. The entire structure of the *Labour Relations Code* and the system of workplace governance that it sponsors, is aimed at airing, mediating, adjudicating and otherwise resolving those disputes with a minimum of delay. The prevalence of abbreviated grievance time limits in collective agreements, and the abbreviated 30-day time limit for judicial review of a Board or arbitrator's decision, are important features of this structure. The 90-day time limit for filing complaints in s. 16(2) is entirely consistent with this statutory approach.

[35] We are reinforced in this assessment by case authority. One of the tersest but most often-cited statements of the guiding principle is that of Estey, C.J.O. (as he then was) in *Journal Publishing Co. of Ottawa Ltd. v. Ottawa Newspaper Guild* (Unreported, Ont. C.A., March 31, 1977) that “[the] overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied”. The Ontario Labour Relations Board in *City of Mississauga* [1982] O.L.R.B. Rep. Mar. 420 said this of delay in filing complaints, notwithstanding that it had no statutory time limit to apply:

In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship — quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section [96] and decline to entertain them.

[36] The Canada Industrial Relations Board said this of delay in *NABET v. Dartmouth Cable TV Limited* (1991) 91 C.L.L.C. ¶16,043:

The 90-day time limit on the filing of complaints may not always ensure that perfect justice is done to those affected by employer, union or individual violations of ... the Code; its purpose, however, is to give some finality to matters which arise in the course of industrial relations, the idea being that on balance it is important in industrial relations to get on with life rather than to leave matters open to the potential for litigation over a prolonged period.

[37] In *Richard Verreault v. Société des Arrimeurs de Québec Inc., and Canadian Union of Public Employees, Local 3810* (2001) 69 C.L.R.B.R.(2d) 154, the Canada Board repeated this theme when it rejected an application to extend the discretionary 90-day time limit for a complaint with these words (at 160):

(...) it is the Board's opinion that this is not a case where it should exercise its powers ... and extend the time limit for filing the complaint. The Board's discretion in this regard must take into account not only individual rights, but also the objectives of the *Code* with respect to industrial peace. (...)

The Board also considers the principle that both the employer and the union are entitled to know with certainty the period during which they are vulnerable to a complaint and the moment this liability ends. It is the essence of labour relations and of the relevant legislation that complaints must be filed and settled quickly. Except in unusual circumstances, the Board upholds this principle.

[37] This Board in *Valerie Csilics, supra*, voiced similar thoughts in this passage (at 655):

Workplace environments are fluid. Employers and trade unions must adapt quickly to challenges as they present themselves. If an employee feels unfairly represented by the trade union at some point in the grievance procedure, the *Code* encourages the employee to promptly file a complaint with the Board. The longer the matter is outstanding, the more difficult it will be in the event the complaint is accepted and granted on its merits, to

put the affected employee back at the stage he or she would have been in but for the trade union's unacceptable conduct. This is one reason, among others, section 15(1.1) [*now section 16(2)*] refers to a 90-day time period. After a period of time, there must be some closure and certainty in the workplace, to permit parties to a collective bargaining relationship to move forward.

[38] We conclude that it is far too limited an approach for the Board to look only for the litigation prejudice — the damage to a party's ability to litigate the dispute — produced by the delay. The prejudice with which the Board should be concerned is broader. The Board must recognize the prejudice delay creates to the entire set of labour relations relationships in the workplace. It must keep in mind the corrosive effect of delay upon a labour relations system that is both statutorily and in practice extraordinarily sensitive to time. It must place some value on the maintenance of "industrial peace".

[39] We consider that this broader form of prejudice should be presumed to exist in all cases of delay beyond the 90-day time limit. It is not practical to expect the Board, or even the immediate parties to the dispute, to be able to identify with precision all the negative effects that delay in filing a complaint has had or may have on someone connected with the workplace in question. This means that a late complaint is presumptively bad and should be dismissed unless countervailing considerations exist in the case.

[40] This is a stricter approach than in *Gulerya*, which suggests that prejudice might be presumed only in cases of "extreme" delay. In our view, however, the approach as we have stated it more accurately reflects the Board's actual practice since *Gulerya*: it looks not for prejudice, but for extenuating circumstances and reasonable explanations. This approach also removes the need to create any firm rules about what distinguishes "extreme" delay from ordinary delay. The Board's case law has not really attempted to establish any such rules. The cases better stand for the proposition that "extreme" delay is just a far point along the continuum of delay, and cases at all points along that continuum still have to be assessed on their own merits. Naturally, extreme delay is

harder to justify. “Compelling” reasons may be required for the complaint to proceed. But extreme delay is still different from ordinary delay in degree, not in kind.

[41] So, in cases of late complaints, labour relations prejudice is to be presumed and the length of the delay affects the strength of the countervailing considerations required before the lateness is excused. What countervailing considerations might be available? We do not intend by this discussion to close the categories of things that can influence the Board to waive or not waive the 90-day time limit. Case law and careful reflection, however, tell us that the following factors are relevant. We consider the application of these factors to this case item by item below.

[42] ***Who is seeking the relief against the time limit?*** The most important general consideration in favour of a lenient approach to the 90-day time limit is the need to maintain reasonable and meaningful access to the Board as a forum for resolving labour relations disputes of statutory proportions. “Reasonable” and “meaningful” access is a practical standard, and it is an important practical consideration that not all parties to labour relations proceedings have the same knowledge, resources or sophistication. Employers and trade unions are presumptively knowledgeable and sophisticated about labour relations or have the resources to enlist the assistance of people who are. Employees are rarely knowledgeable and sophisticated about labour relations, and often do not have the means to get professional assistance. This observation is borne out by the distribution of cases involving the 90-day time limit. They are overwhelmingly cases where employees have filed the complaint late. By far the largest number of them is duty of fair representation cases.

[43] The cases suggest that late complaints by employers or trade unions will not proceed unless there are strong reasons to waive the time limit: e.g., *Lethbridge Handi-Bus Association, supra*; *Angel Merchandising Services, supra*. Late complaints by employees, on the other hand, will generally be allowed if the delay is short. The cases noted above suggest that a “short” delay is roughly two months or less: *City of Lethbridge, supra*; *Colin Anten, supra*. Beyond this point, employee complaints are

likely to be dismissed: *Jeff Neiman, supra; Eulalia Jalotjot, supra; Vernon Hauck, supra.*

[44] In this case, Mr. Toppin is an employee. Although he has experience with Union disciplinary matters and long membership in the Union, he can not fairly be characterized as knowledgeable in labour relations matters like an employer or trade union is. He is entitled to the benefit of the more lenient standard described above.

[45] ***What rights does the complaint seek to assert? And what is the apparent strength of the complaint?*** Again, if the balancing of interests required in a s. 16(2) timeliness objection is a practical exercise, it is a practical consideration whether the right asserted by the complaint is relatively important or relatively trivial; and whether the initial appearance of the complaint is that it is well-founded, or weak or speculative. Too much should not be made of this factor. One person's important right can be another's trivial right. Many strong-looking complaints turn out to be weak and vice versa when all the evidence is heard. Even a strong-looking complaint about important rights will almost never overcome extreme delay. In relatively close cases, however, the Board is likely to be influenced by considerations of how sound the complaint appears to be, and whether it affects important rights of many employees, or a minor right of one employee.

[46] In this case, the complaint falls somewhat to the "important" end of the spectrum. The \$5,000 fine is not insignificant, the expulsion from the Union impacts Mr. Toppin's ability to practice his trade, and the complaint might have impact beyond the complainant because it calls into question whether s. 151 of the *Code* forbids any application of union discipline against members who work for a non-signatory contractor. Against this must be balanced the consideration that this last aspect of the case would appear to give s. 151 a general prohibitory force that the Board has not applied to date, and to that extent it appears at least somewhat speculative. We would consider the strength and importance of this complaint to be a factor that could justify a discretionary waiver of the time limit in an otherwise close case.

[47] *Why did the delay occur? Are there extenuating circumstances?*

Aggravating circumstances? The Board will be interested in, and will often demand, a reasonable explanation why the complaint was not filed in a timely fashion. Examples that come to mind are the complainant's incapacitating illness; misrepresentation or obstructionism by a respondent in its dealings with the complainant; and continuing or repetitive complaints, where a complainant has perhaps decided to commence litigation only after repetition or after the failure of more conciliatory approaches (it should be noted that in such cases, the 90-day time limit may still be relevant for purposes of selecting the appropriate remedy). There are undoubtedly other reasonable explanations that the Board will accept.

[48] It is easier to discern from the cases what the Board will not accept as a reasonable explanation. Lack of knowledge of one's rights and the process to be followed is not a reasonable explanation for a party deemed to be knowledgeable about labour relations matters, like employers and trade unions. Lack of knowledge by employees is a consideration already built into the Board's tolerance of brief delays by employees that we note above, and will generally not avail an employee where the delay is lengthy: *Casurt Morgan, supra*; *Sam Post, supra*. Complainants are expected to exercise due diligence in learning about their rights and understanding what process to follow. It is not a reasonable explanation that the complainant has pursued remedies in other forums without success: *Peter Grabowski, supra*; *Sam Post, supra*. It is not a reasonable explanation for a trade union that it was preoccupied with internal political issues: *Boilermakers, Loc. 146 v. Premetalco Inc.* [2001] Alta. L.R.B.R. 52, Nor is it a valid reason for an individual complainant's delay that he or she was away from home on another job: *Jeff Neiman, supra*.

[49] *Gulerya* suggests that it is a reasonable explanation for delay that the complainant has received faulty legal advice. We wish to express our disagreement with this proposition. Experience has shown the Board that this occurs with regrettable frequency. Lawyers unfamiliar with labour and employment law may recommend a wrongful dismissal or other civil action, not realizing that the law has almost completely closed off

these avenues in a collectively-bargained workplace in favour of grievance arbitration or complaints before the Labour Relations Board. Operating on this faulty understanding, the lawyer may follow the more leisurely time frames that apply to civil actions in the Courts. Only long after the events, perhaps even when the wrongful dismissal action is struck by the Court, does the complainant seek to file an untimely grievance, or complain to this Board that the bargaining agent failed to represent him or her fairly. Complainants seeking relief from the 90-day time limit argue that it is no fault of theirs that the complaint was late. That may be so, but neither is it the fault of the respondents, who must live with the prejudice created by the delay. In such clear-cut cases the fault rests squarely on the lawyer. It strikes us as unfair for the Board to relieve against that fault, for which the lawyer may well be liable, at the expense of the other parties to the collective bargaining relationship.

[50] Finally on this point, we would note that just as there may be extenuating circumstances to a delay, there may be aggravating circumstances. This case points out one possibility. There well may be others. It is not always easy for the Board to fix the point in time at which the complainant “knew or ought to have known” about the facts giving rise to the complaint. Sometimes the complainant gets the advantage of the time limit starting to run only long after the complainant was aware of the outline of the dispute. In this case we have fixed September 10, 2004 as the date the 90-day time limit started to run. This was the date of only the final step in the Union’s disciplinary process. Mr. Toppin was in fact well aware for months that he was on a collision course with the Union over these charges. He did nothing of substance to contest the discipline before the International Union approved it. He should have been ready to proceed very quickly after September 10, 2004. Although he could have filed his complaint in the 90 days after that date as of right, he did not do that. It ill becomes him to seek a discretionary extension of the 90-day limit when he had anywhere from five to eight additional months of time during which he knew the Union intended to impose this discipline and that he did not intend to contest the discipline internally. This is a serious aggravating factor that militates against extending the time limit.

[51] Nothing presented to this panel suggests a reasonable explanation or other extenuating circumstances for the delay. Mr. Toppin did not even advance an explanation. He relied entirely on the claim that the Union had suffered no prejudice to its ability to litigate the case in the meantime and argued that he was therefore entitled to a discretionary extension of the time limit. In particular, he did not claim that he had received faulty advice or inadequate legal representation. Counsel for both sides took pains to make clear that no such thing was alleged or apparent from the evidence. We have already stated our opinion that this is not a factor favouring extension of the time limit; but we also want to note that the evidence in no way supported a conclusion of negligent or inadequate representation. The evidence of Mr. Toppin's dealings with his former law firm were, as we said, vague, amounting to not much more than that matters did not proceed as quickly as he liked. There may be any number of legitimate reasons for this. Disputes over retainers or inadequate instructions are only two of the possibilities.

[52] *Has the delay caused actual litigation prejudice or labour relations prejudice to another party?* The Board will wish to hear of any actual prejudice that a party has suffered from the delay. A late complaint that it might otherwise be disposed to hear is very likely to be dismissed if a respondent shows that the delay has compromised its ability to litigate the case. If because of the delay, for example, important documents have been destroyed or lost without fault to the respondent, or necessary witnesses have died or left the jurisdiction, the Board will give great weight to this fact. We would also leave open the possibility that a respondent can invoke actual, specific labour relations prejudice as a reason to decline to hear a complaint. As an example, consider an employee filing a late duty of fair representation complaint alleging that his union wrongly failed to advance his grievance. If the union and employer (inside or outside of collective bargaining) settled a number of grievances involving the same article of the collective agreement as a full and final settlement of the dispute, the Board might be unwilling to let the dispute be resurrected by the late complaint, contrary to the union's and employer's expectations.

[53] Considering all these factors together, we decline to extend the 90-day time limit in this case. The delay in filing the complaint was seven and one-half months, calculated charitably to the complainant. This is two months more delay than the Board will typically allow for even an unknowledgeable employee complainant. Prejudice to the respondent, broadly defined as labour relations prejudice, is presumed. The delay is unexplained. Any claim upon the Board's discretion is fatally undermined by the aggravating circumstance that Mr. Toppin in fact knew about the looming dispute for many months (and in fact sought legal advice before his time limit even began to run). Though the complaint involves a significant penalty and might have important consequences for Mr. Toppin and others, on the other factors this is not a close case in which that consideration might make a difference.

[54] The complaint is dismissed.

ISSUED and **DATED** at the City of Edmonton in the province of Alberta this 10th day of March, 2006, by the Labour Relations Board and signed by its Vice-Chair.

J. Leslie Wallace, Vice-Chair