

Pleading Before the Canada Industrial Relations Board

Practice Makes Perfect:
Becoming a Better Labour Advocate

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I. Introduction^{1,2}

Someone once asked President Woodrow Wilson how long it took him to write his speeches:

It depends. If I am to speak for ten minutes, I need a week for preparation; if fifteen minutes, three days; if half an hour, two days; if an hour, I am ready now.³

The same sentiment about preparation applies to advocacy.

Our panel at this Ontario Bar Association conference will be reviewing many practical advocacy areas, from different perspectives. These areas include written pleadings, objections, cross-examination, civility and final argument.

This paper will review various substantive points specific to the Canada Industrial Relations Board (CIRB).

Effective advocacy includes substantive knowledge about a particular tribunal. All tribunals have a “culture”. An understanding of a tribunal’s governing legislation, regulations, jurisprudence and practices facilitates the advocate’s work, whether in a formal oral hearing setting or not.

Most Ontario labour lawyers appear more frequently before the Ontario Labour Relations Board (OLRB) than before the CIRB.

Essential instincts developed before the OLRB may, but may not, be appropriate for CIRB cases.

This paper will highlight 15 substantive areas to lessen a newer advocate’s learning curve for cases before the “other” labour board.

¹ The citations in this paper were accurate as of March 6, 2014.

² The comments in this paper are of a summary nature only and do not bind the CIRB or any of its members.

³ Josephus Daniels, *The Wilson Era: Years of War and After, 1917-1923* (Chapel Hill: University of North Carolina Press, 1946).

II. 15 Substantive CIRB Realities

1) The CIRB is not required to hold an oral hearing

Given section 16.1 of the *Canada Labour Code (Part I—Industrial Relations) (Code)*, the CIRB holds many “paper” hearings based solely on the parties’ written pleadings:

16.1 The Board may decide any matter before it without an oral hearing.

The 1999 amendments to the *Code* removed the obligation for panels to travel across Canada to hold oral hearings in virtually every case, no matter how obvious or frivolous the matter might be. The Board now has greater discretion over how to direct its finite resources.

The overall scheme of the *Code* and the *Canada Industrial Relations Board Regulations, 2012 (Regulations)* illustrates that the Board may decide a case on the basis of the materials filed, unless it decides to hold an oral hearing: *NAV Canada v. International Brotherhood of Electrical Workers, Local 228*, 2001 FCA 30.

Issues of credibility, or the existence of contradictory evidence, do not automatically warrant an oral hearing: *McAuley v. Chalk River Technicians and Technologists Union*, 2011 FCA 156; and *Dumont v. Canadian Union of Postal Workers, Montréal Local*, 2011 FCA 185.

The issue of when to hold a hearing is rather one of procedural fairness: *Amalgamated Transit Union, Local 1624 v. Syndicat des travailleuses et travailleurs de Coach Canada - CSN*, 2010 FCA 154.

The Board may decide unfair labour practice complaints based solely on the parties’ pleadings: *Lévesque*, 2011 CIRB 562.

In short, your sole opportunity to plead your client’s case may come from your initial written pleadings.

2) Advocacy in written pleadings

Since the Board may decide cases without an oral hearing, the written pleadings take on added importance.

The Board requires detailed pleadings in order to exercise its discretion under section 16.1 of the *Code: Canadian National Railway Company*, 2009 CIRB 461.

A failure to respond to the merits of an application or complaint by raising only a preliminary objection could lead to a decision on the merits, without further notice: *Wildman*, 2013 CIRB 675. See also *Reid*, 2013 CIRB 693 concerning voluminous documentation filed as a “pleading”.

Sections 10 (Applications) and 12 (Responses and Replies) of the *Regulations* emphasize the need for written pleadings to contain both particulars and supporting documents. Section 10(d), for example, illustrates what an applicant must plead:

10. An application filed with the Board, other than an application to which any of sections 12.1, 33, 34, 36, 37, 40 to 43 and 45 apply, must include the following information:

...

(d) full particulars of the facts, of relevant dates and of grounds for the application;

Subject matter specific applications all contain similar pleading requirements.⁴

3) *Prima Facie* Case Test in Duty of Fair Representation Complaints

The Board has adopted a *prima facie* case test due to the large number of duty of fair representation (DFR) complaints it receives. Rather than ask the respondents in a DFR case for an immediate response, the Board now conducts a screening process, as described in *Crispo*, 2010 CIRB 527:

⁴ See sections 12.1, 33, 37, 40, 41.1, 42, 43 and 45 of the *Regulations*.

[12] The Board conducts a *prima facie* case analysis for the numerous duty of fair representation cases it receives. This *prima facie* case analysis accepts a complainant's pleaded material facts as true and then analyzes whether those material facts could amount to a *Code* violation.

[13] The *prima facie* case analysis weighs the material facts as opposed to legal conclusions. A complainant who pleads a legal conclusion by alleging, for example, that certain conduct was arbitrary, discriminatory or in bad faith does not, by so doing, avoid the application of the *prima facie* case test.

[14] In *Blanchet v. the International Association of Machinists and Aerospace Workers, Local 712*, 2009 FCA 103, the Federal Court of Appeal endorsed the Board's use of a *prima facie* case analysis and its focus on the material facts:

[17] As a general rule, when a court presumes the allegations to be true, they are allegations of fact. That rule does not apply in findings of law: see *Lawrence v. The Queen*, [1978] 2 F.C. 782 (T.D.). It is for the court, not the parties, to determine questions of law: *ibidem*.

[18] It is true that, in the passage quoted, the Board did not specify that it was referring to the applicant's allegations of fact. However, the reference to the applicant's allegations cannot be anything other than a reference to allegations of fact. Otherwise, a complainant would need only to state as a conclusion that his or her union's decision was arbitrary or discriminatory for the Board to be forced to find that there had been a violation, or at least a *prima facie* violation, of section 37 of the *Code* and rule on the merits of the complaint. Thus, the complaint screening process would become a thing of the past.

[15] The issue can be described as follows: if the Board accepts all of Mr. Crispo's factual allegations as true, could it find the CAW violated section 37 of the *Code*?

If, after conducting its *prima facie* test, the Board asks for a response, then the trade union must provide a detailed pleading explaining the process it followed in representing the complainant.

An employer generally has an observer's role on the merits of a DFR complaint: *Singh*, 2013 CIRB 639 at paragraphs 91–93.

4) 90-day time limits in the *Code*

Sections 97(1) and (2) of the *Code* contain explicit 90-day time limits for the filing of complaints:

97. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that

(a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply

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with subsection 24(4) or 34(6) or section 37, 47.3, 50, 69, 87.5 or 87.6, subsection 87.7(2) or section 94 or 95; or

(b) any person has failed to comply with section 96.

(2) Subject to subsections (4) and (5), **a complaint pursuant to subsection (1) must be made to the Board not later than ninety days after 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.**

(emphasis added)

The Supreme Court of Canada once decided that the CIRB's predecessor, the Canada Labour Relations Board, had no discretion to extend the *Code's* 90-day time limit for the filing of complaints: *Upper Lakes Shipping Ltd. v. Sheehan et al.*, [1979] 1 S.C.R. 902.

The 1999 *Code* amendments granted the Board a new discretion to extend these time limits:

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

(*m.l*) to extend the time limits set out in this Part for instituting a proceeding.

However, the Board does not automatically grant extensions: *Kerr*, 2012 CIRB 631 at paragraphs 21–26. Parliament intended for labour relations complaints to be brought expeditiously. The Board respects this intention, subject to the exercise of its discretion in appropriate cases.

5) The card-based certification model⁵

If a trade union has greater than 50% support in the appropriate bargaining unit, as demonstrated by membership cards, then the Board will grant the certification without a vote. The evaluation of support almost always occurs as of the date of the certification application: section 28(c).

⁵ A current Private Member's Bill, C-525, would replace this card-based certification model with one requiring a mandatory secret ballot vote. Bill C-525 would also impact votes in decertification (revocation) matters.

6) Representation Votes

The Board has an overriding discretion to hold a representation vote in any case: section 29(1). The *Code* obliges the Board to hold a representation vote in a certification application where a trade union's support exceeds 35%, but does not exceed 50%: section 29(2)⁶.

Most certifications are granted without a representation vote.

7) Bargain Units: Inclusions, Exclusions and the Board's continuing jurisdiction over descriptions

The Board has the ultimate discretion to determine the appropriate bargaining unit. Similarly, it decides which employees fall within that unit. Employees under the *Code* include supervisors and members of the professions: Sections 27(1)–(6).

The Board in *Viterra Inc.*, 2012 CIRB 633 described the usual, though not exclusive, analytical process it follows for certification applications:

[47] While certification applications, depending on the circumstances, do not always raise the same issues, the Board's analysis frequently focuses on the same questions, including:

1. Is the applicant a trade union? (sections 3 and 28(a));
2. Which individuals are "employees" under the *Code*? (sections 3 and 28(c));
3. Is the trade union's proposed unit appropriate for collective bargaining? (sections 24(1), 27(1) and 28(b));
4. If the proposed unit is not appropriate, what would be an appropriate unit? (sections 16(p)(v), 27(1) and 28(b));
5. Which employees, as defined under the *Code*, should be included in an appropriate bargaining unit? (sections 27(2)–(6)); and
6. Does the trade union have majority support, or sufficient support for a vote, in a bargaining unit the Board has found appropriate for collective bargaining? (sections 28(c), 29(1) and (2)).

In Ontario, the parties can generally negotiate a bargaining unit's scope following certification. The certification order is considered "spent".

⁶ Bill C-525, *supra*, would repeal these sections.

The CIRB, however, has adopted a model used in Quebec and retains jurisdiction over the description of its bargaining units.

The Board described its continuing jurisdiction over bargaining unit descriptions in *Garda Cash-In-Transit Limited Partnership*, 2010 CIRB 503 at paragraphs 28–30.

Section 65 of the *Code* illustrates the Board’s continuing role in this area, since it may be asked to determine, *inter alia*, whether an employee is bound by a collective agreement:

65. (1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for determination.

(2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding.

This continuing jurisdiction may result in newly-created classifications being added to the existing bargaining unit, if they fall within its original scope.

However, if a trade union seeks to add employees who fall outside of the intended scope of the bargaining unit, then it must demonstrate a “double majority”. This means it must show support from a majority of the new employees being added (the union already has a first majority among current employees) before the Board will broaden the bargaining unit’s original scope: *Vitran Express Canada Inc.*, 2011 CIRB 598 at paragraph 19.

8) Bargaining Unit Reviews

Under section 18.1 of the *Code*, the Board can review and merge multiple bargaining units. However, the applicant must satisfy the Board that the current bargaining units are no longer appropriate for collective bargaining: *Canadian National Railway Company*, 2009 CIRB 446, affirmed *Teamsters Canada Rail Conference v. Canadian National Railway Company*, 2009 FCA 368.

Exceptionally, following a sale of a business or single employer declaration, the Board can consider whether to merge multiple bargaining units: *Viterra Inc.*, 2009 CIRB 465. In this special scenario, there is no requirement for the applicant to demonstrate that the bargaining units are no longer appropriate for collective bargaining.

9) First Contract Arbitration

The Minister of Labour has the discretion to direct the Board to consider whether it would be advisable to settle the terms of a first collective agreement (section 80):

80. (1) Where an employer or a bargaining agent is required, by notice given under section 48, to commence collective bargaining for the purpose of entering into the first collective agreement between the parties with respect to the bargaining unit for which the bargaining agent has been certified and the requirements of paragraphs 89(1)(a) to (d) have otherwise been met, **the Minister may, if the Minister considers it necessary or advisable, at any time thereafter direct the Board to inquire into the dispute and, if the Board considers it advisable, to settle the terms and conditions of the first collective agreement between the parties.**

(emphasis added)

The Board also has extensive remedial powers if a party violates its duty to bargain in good faith:

99. (1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6), section 37, 47.3, **50** or 69, subsection 87.5(1) or (2), section 87.6, subsection 87.7(2) or section 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

(b.1) in respect of a contravention of the obligation to bargain collectively in good faith mentioned in paragraph 50(a), **by order, require that an employer or a trade union include in or withdraw from a bargaining position specific terms or direct a binding method of resolving those terms**, if the Board considers that this order is necessary to remedy the contravention or counteract its effects.

(emphasis added)

The remedial language in section 99(1)(b.1) focuses on the specific terms being bargained. In an exceptional case, the Board's order could include a remedy akin to first contract or interest arbitration: *Intek Communications Inc.*, 2013 CIRB 683.

10) Revocation⁷

The *Code* at section 39(2) contains special protections for first time bargaining agents against revocation applications. The same protection exists for all bargaining agents during a strike or lockout:

39. (2) Where no collective agreement applicable to a bargaining unit is in force, no order shall be made pursuant to paragraph (1)(a) in relation to the bargaining agent for the bargaining unit unless the Board is satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement in relation to the bargaining unit.

Trade unions find themselves in particularly vulnerable situations during these collective bargaining periods.

The Board in *Genge*, 2007 CIRB 395 described its analysis for these special revocation situations:

[29] In summary, a bargaining agent can seek the protection available under section 39(2) of the *Code* if:

1. it is negotiating a first collective agreement or if the parties have acquired the right to strike or lockout;
2. it has made a reasonable effort to enter into a collective agreement with the employer; and
3. subject to the nuances in the Board's case law, it has consulted with and kept members of the bargaining unit informed about the progress of the negotiations.

11) Just cause protection

Whether during the period following an initial certification (section 36.1), or after the expiration of the collective agreement and the statutory freeze (section 67(6)), any discipline and/or discharge remains subject to arbitration on a just cause standard.

⁷ Bill C-525, *supra*, would repeal section 39(2) of the *Code*.

12) Reconsideration of recent decisions

Section 18 of the *Code* provides the Board with a broadly-worded review power:

18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

Under its review power, *inter alia*, the Board can modify bargaining unit descriptions, *supra*, and revoke certifications which have been abandoned: *PCL Constructors Northern Inc.*, 2006 CIRB 345.

The reconsideration of its recent decisions is another aspect of its general review power: *Dilico Anishinabek Family Care*, 2012 CIRB 655.

The recently repealed section 44 of the *Regulations* described the main grounds for reconsideration:

44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the *Code* include the following:

- (a) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;
- (b) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board;
- (c) a failure of the Board to respect a principle of natural justice; and
- (d) a decision made by a Registrar under section 3.

The Board removed section 44 from the *Regulations* for the reasons explained in *Treaty Three Police Service*, 2013 CIRB 677:

[11] In 2002, the Standing Joint Committee for the Scrutiny of Regulations (the Committee) questioned the purpose of section 44 of the *2001 Regulations*. In particular, the Committee was concerned that this regulatory provision could fetter the broad discretion given to the Board under section 18 of the *Code*. Ultimately, the Board agreed with the Committee and section 44 was revoked in 2012 with the coming into force of the *2012 Regulations*. While the Board retains the power to reconsider any of its decisions or orders, the grounds for such applications are clearly not limited to those contained in the former section 44. At the same time, the Board extended the time period in which a reconsideration application can be made to 30 days, to be consistent with the time limit for the filing of a judicial review application under the *Federal Courts Act*.

The recently revised *Regulations* have also extended the time for filing a reconsideration application from 21 to 30 days: Section 45.

The Board in *Buckmire*, 2013 CIRB 700 recently confirmed that its reconsideration process continues to focus on the same traditional grounds formerly set out explicitly in section 44 of the *Regulations*.

13) Scheduling and Adjournments

The Board publishes on its website both Information Circulars and Forms to assist parties.

Given the Board's mandate to sit across the country, as well as the *Code's* preference for tripartite representative panels, the scheduling of hearings cannot occur as it does with private sector labour arbitrators.

The Board initially sets hearing dates. A party requesting an adjournment must initially canvass the issue with the other parties rather than with the Board: *Frayling*, 2010 CIRB 506 at paragraphs 20–22.

If a party is unable to provide reasonable availability for a Board hearing, the Board may be forced to impose dates: *Andree*, 2011 CIRB 589 at paragraphs 40-42.

In practice, problems with adjournments and scheduling oral hearings rarely arise. The parties invariably work out these issues.

14) Document and Oral Evidence Production

As a middle ground between civil litigation and labour arbitration, the Board requires significant document disclosure. Sections 10 and 12 of the *Regulations* oblige parties to file supporting documents with their initial pleadings.

Section 21 of the *Regulations* obliges a party requiring further document production to make a request to the other party first, before asking the Board for a production order.

Section 27(1)(a) of the *Regulations* requires a party to file and serve the documents on which it intends to rely in advance of a Board hearing.

Section 27(1)(b) of the *Regulations* also requires parties to exchange summaries of their witnesses' evidence.

A failure to respect these disclosure obligations may lead to the Board refusing to allow a document into evidence or a surprise witness to testify: section 27(4).

15) Occupational Health and Safety (Part II of the Code)

The Board has a narrow jurisdiction to hear a complaint alleging that an employer disciplined or took other actions against an employee because of the exercise of rights under Part II of the *Code*: *Rathgeber*, 2010 CIRB 536 at paragraphs 21–22. The concept is similar to an unfair labour practice under Part I of the *Code*.

The complainant employee, even if represented by a trade union as a designate, remains the party to the complaint: *Isinger*, 2013 CIRB 688 at paragraphs 53–66.

The Board's analysis differs slightly when a work refusal is in issue. For work refusal situations, the employer bears the burden of proof (section 133(6)): *Court*, 2010 CIRB 498 at paragraphs 115–121. For non-work refusal situations, the burden remains with the complainant: *Paquet*, 2013 CIRB 691 at paragraphs 59–60.

Bill C–4, *A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures*, 2nd Sess, 41st Parl, 2013, (SC 2013, c 40) received Royal Assent on December 12, 2013. Among the amendments to federal legislation were changes to Part II of the *Code*, including the definition of “danger”.

These changes to Part II will come into force on a day fixed by order of the Governor in Council (section 203).

III. Conclusion

A first case for a newer advocate before an unfamiliar tribunal can be challenging. This is especially the case if the panel, and the other parties, have significant experience.

Fortunately, advocacy skills are often transferable to any tribunal setting. Tribunals themselves have also attempted to demystify their processes by way of documentation such as Information Circulars.

This paper started with a quote from President Woodrow Wilson about the impact of preparation. Advocacy requires a lawyer to develop a theory of the case at the very start of the file. A clear idea of the crucial points for final argument also need to be identified early on.

The tribunal may not always realize the extent of a lawyer's preparation. But it will almost always notice insufficient preparation. Tell-tale signs include the length and organization of the pleadings, cross-examinations and final argument.

The best advocates always seem to have focussed pleadings, surgically-precise cross-examinations and succinct final arguments.

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