BRITISH COLUMBIA LABOUR RELATIONS BOARD

JOE FRANK

("Frank")

-and-

ARROW TRANSPORT SYSTEMS

(the "Employer")

-and-

TEAMSTERS LOCAL UNION NO. 213

(the "Union")

PANEL:	John B. Hall, Vice-Chair
COUNSEL:	Stephen Hutchison, for Frank Catherine McCreary, for the Union Walter Rilkoff, for the Employer
CASE NO.:	38868
DATE OF DECISION:	June 17, 1999

DECISION OF THE BOARD

I. INTRODUCTION

1 Frank's complaint under Section 12 of the *Labour Relations Code* was received from his current legal counsel on November 16, 1998. The complaint alleges the Union failed to properly represent Frank after he was terminated by the Employer on August 26, 1996. In response to a request by the Deputy Registrar, Frank's counsel filed a supplementary submission addressing the timeliness of the complaint on December 7, 1998.

2 The file was subsequently assigned to me. I did not make any determination under Section 13(1)(a) of the Code, but instead requested the Registry to invite submissions from the parties regarding both the timeliness and the merits of the complaint.

3 Submissions were received from the Employer and the Union, and a final response was received from Frank. This decision addresses only the timeliness issue. I have accepted the facts advanced by Frank as they relate to the timeliness issue, as well as relevant facts alleged by the other parties which he does not dispute. Much of the information on file concerns the merits of the complaint and will not be reviewed.

II. BACKGROUND

4 As already recorded, Frank was terminated on August 26, 1996. He had worked as a truck driver with the Employer for approximately 17 years. The termination letter cited "a consistent and disturbing tendency to ignore [the Employer's] need to have you start your work shift on time and to consistently finish a complete work shift" over the past several years. Frank filed a grievance on August 28, 1996. The matter was handled by Kirk Dyck, a business representative with the Union. Without detailing the intervening events, Dyck informed Frank on September 24 that the Union would not be proceeding to arbitration. The Union confirmed this in a letter the next day. Frank says he was under considerable stress at the time of termination because of the behaviour of his step-son and the intervention of Social Services. He says this was known to both the Employer and the Union.

5 The complaint records that Frank commenced legal action against the Employer for wrongful dismissal. The Employer's reply provides greater detail about the civil action:

> Sometime after the Union advised the complainant that it would not pursue the grievance, Mr. Frank sought legal assistance. While we do not know when he contacted a solicitor, we do know that on or about February 7, 1997, Mr. Frank signed an authorization for his solicitor, Barry Nordin to receive his personnel records from the

> Company. That was less than six months after his termination. That authorization was not provided to the Company until April 15, 1997 and on May 1, 1997, Mitchell Zulinick, General Manager of Interior Operations for Arrow denied the request.
>
> The importance of this is that Mr. Frank had sought and obtained legal representation within one year after his termination. ... We do not know what legal advice was given. However, we know that it was not until May 6, 1998, over one year later, that a Writ of Summons and Statement of Claim were filed in the Quesnel Registry of the B.C. Supreme Court commencing an action against Arrow Transportation Systems Inc. for wrongful dismissal. The Statement of Claim claimed that Mr. Franks' employment had been terminated on August 16, 1996, rather than August 26, 1996. The Writ was served on Arrow's registered office on June 4, 1998.
>
> On July 22, 1998, on behalf of Arrow Transportation Systems, we advised Mr. Nordin, counsel for Mr. Frank that the courts had no jurisdiction in this matter and advised that if a Consent Dismissal were entered into, Arrow would not pursue Mr. Frank for costs and disbursements.
>
> On July 24, 1998, we filed a Statement of Defence challenging the jurisdiction of the Court and on July 29th, mailed an entered copy of the Statement of Defence to Mr. Nordin in Quesnel. On August 13, 1998, we asked Mr. Nordin for a response to our letters of July 22 and July 29. No response was received and, in fact, service of the Statement of Defence was not acknowledged until October 7, 1998 even though the firm had clearly received it months before.
>
> On October 7, 1998, Mr. Hutchison, now with the firm [and Frank's current counsel], advised that he would soon be meeting with Mr. Frank and would get instructions. By letter dated November 4, 1998, counsel for Mr. Frank advised that they had agreed to the Consent Dismissal Order as we had proposed and that they would be filing a Section 12 complaint. It would appear that the complaint was first filed shortly thereafter.

6 Frank does not dispute this series of events. Instead, he submits it is clear the Employer was aware he was looking to pursue alternative legal measures.

7 Most of the facts asserted in the Union's reply concern the manner in which Frank's grievance was handled. With respect to timeliness, the Union advances the following facts:

> 13. In the summer of 1998, Teamsters Local 213 closed its Kamloops office. All the files were reviewed and much of the contents, such as notes, were discarded.

> 14. Mr. Dyck's notes in this matter have been discarded. There was no notice that they might be required for further matters.
>
> 15. The Union did not know of the Complainant's civil action against the employer.

8 Frank argues the Union does not assert Dyck's notes were discarded at the time the Kamloops office was closed, but "merely says that the notes have been discarded". Frank also disagrees the Union was unaware of his civil action; however, he does no more than "join issue" and provides no particulars regarding how the Court proceeding would have come to the Union's attention.

III. COMPLAINANT'S POSITION

9 Frank identifies three questions which he says are relevant to the timeliness issue: (a) whether the Board has authority to impose a time limit on Section 12 complaints; (b) whether the Section 13 analysis stage is the appropriate time to determine the timeliness of a complaint when there is no statutory time limit within the Code; and (c) whether the Board's jurisprudence in regards to timeliness bars the present complaint.

10 With respect to the first issue, Frank submits the Board has no power to impose a time limit not set out in the Code or the Regulations. He notes that persons governed by a common law employment relationship may initiate a wrongful dismissal action up to six years after termination. The Board's "de facto time limit of one year" is accordingly contrary to fairness and an improper application of the Code. Alternatively, in respect of the first issue, Frank submits any practice or policy which bars a Section 12 complaint on the basis of timeliness is an improper exercise of the Board's discretion to control its procedure. Any limitation based on timeliness must derive from equitable doctrines such as laches.

11 Second, Frank submits that the Board should not make a decision regarding timeliness at the "*prima facie* stage" (sic) of analysis under Section 13(1)(a) of the Code. One of the factors which the Board has stated it will consider under the heading of timeliness is the potential prejudice to the employer and the union. Frank submits that the Board has no evidence of any prejudice or potential prejudice until submissions have been sought from the respondents; nor can prejudice be inferred given the legislature's six year limitation period for wrongful dismissal actions.

12 Finally, Frank submits the mere fact of delay is insufficient to bar a Section 12 complaint. In equity, the doctrine of laches has two requirements: unreasonable delay and the consequences of delay rendering the grounds of relief unjust. Frank says he initiated his Section 12 complaint within approximately six weeks of learning he had to proceed under the Code. He did not sit on his rights during the intervening period because he had launched a civil action against the Employer. Alternatively, the delay is not unreasonable (again, given the six year period for wrongful dismissal actions) and,

even where there is unreasonable delay, there must also be prejudice to the other party in order for the defence of laches to apply.

13 Lastly, even under the Board's jurisprudence regarding timeliness as set out in *Julia Kiraly*, BCLRB No. B8/95, Frank submits his complaint should be heard. The underlying grievance is of the utmost importance: the issue at stake is a job in which he has considerable seniority. There is no prejudice to any party which cannot be resolved through apportionment of damages by the Board or an arbitrator. In his final response, Frank argues that unless the matter proceeds to arbitration there is no avenue by which he can be adequately compensated, as no money can replace his seniority.

IV. ANALYSIS

14 There is no time limit for filing a Section 12 complaint in the *Labour Relations Code*, the Regulation or the Labour Relations Board Rules. However, the Board has in countless past decisions required that duty of fair representation complaints be filed in a timely manner. The approach is summarized in *Michael MacNeil et al*., *Trade Union Law in Canada* (Aurora, ON: Canada Law Book, 1998*)*:

> ... in British Columbia, while there is no statutory time limit within which a complaint must be made, the Board may exercise its discretion and refuse to entertain a complaint which it considers untimely. In the alternative, delay may affect the remedy the Board is willing to provide if it decides on the merits that there was a violation of the duty. The Board has stated that the normal time within which a complaint should be filed is measured in months, rather than years. Where the complaint relates to loss of employment, the Board is less likely to dismiss the complaint because of delay. The Board may also be more flexible about delay if the complainant is able to make out a compelling case that there has been a violation of the duty. Generally, complaints older than twelve months will be dismissed unless compelling reasons are advanced in a timely fashion. The concern is that delay may prejudice the ability of a party to lead evidence in support of their position. While the Board may give more latitude to a lay complainant, it still requires a satisfactory explanation for the delay. Delay in filing a complaint is not justified by a complainant's having chosen to pursue alternative and ultimately unsuccessful means of dealing with the matter. A complainant who waited for more than a year to challenge a discharge did not convince the Board that he was under so much stress that he was incapable of acting on his own behalf at an earlier date. A complainant successfully explained a delay by arguing he had mistakenly relied on his belief that his appeal of the union's decision not to proceed with the grievance was being considered by the union. (para. 7.850; footnotes omitted)

15 Thus, while there is no specific time limit, complaints older than 12 months will generally not be processed unless there is a persuasive explanation for the delay. In

determining whether a complaint is untimely, the Board examines a number of relevant factors including the nature of the grievance, and the potential prejudice to the employer and the union. The factors which often emerge as most important are the actual period of delay and the explanation offered by the complainant: *Balhar Ghuman*, BCLRB No. B21/99 (Reconsideration denied, BCLRB No. B128/99).

16 This is the first occasion on which the Board's jurisdiction to dismiss a duty of fair representation complaint because of delay has been challenged. The policy respecting timeliness is generally well-known and accepted in the labour relations community. The underlying reasons have been documented in numerous decisions, such as *George Stanley Miller*, BCLRB No. B91/93:

> .. lengthy delays are prejudicial not only to the union, but also to the employer and other members of the bargaining unit who have conducted themselves in accordance with unchallenged decisions. Additionally, proceeding with inquiries after excessive periods of time have elapsed brings the evidence which may be adduced into question. Memories fade, people move onto other employers or retire, union officials are replaced, and many other events may have occurred which obscure the facts and reasons. (p. 5)

17 The Board's longstanding policy reflects the practice in Ontario, as described in the following paragraphs from *Ron Boyer -and- International Association of Machinists and Aerospace Workers, Local Lodge 2792 et al,* [1997] OLRB Rep. 183:

> 6. ... section 96 of the Act gives the Board a broad discretion with respect to whether or not to inquire into a complaint, like this one, which alleges a violation of the Act. However, that discretion should be exercised with caution and only in clear cases. Further, this discretion must be exercised judicially having due regard to the circumstances and labour relations considerations applicable to the particular matter before the Board.
>
> 7. Excessive unexplained delay in filing or proceeding with an application is one basis upon which the Board may decline to inquire into an application in the exercise of its discretion under section 96 (the Ontario Divisional Court has confirmed the Board's jurisdiction in that respect in *Re Dhanota and U.A.W. Local 1285*, (1983) 42 O.R. (2d) 73, an application for judicial review of the Board's decision in *Sheller-Globe of Canada Limited*, [1982] OLRB Rep. Jan. 113). It has long been accepted that delay is inimical to labour relations. To put it another way, labour relations delayed are labour relations defeated and denied (*Journal Publishing Co. of Ottawa Ltd. v. Ottawa Newspaper Guild, Local 205 OLRB et al,* (1977) 1 A.C.W.S. 817 (Ontario Court of Appeal)), and delay in labour relations matters often works on fairness and hardship (*Re United Headwear and Builtmore - Stetson (Canada) Inc.*, (1983) 41 O.R. (2d) 287: and see also *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union*

> *of Canada (CAW-Canada) et al.*, (1993) 2 S.C.R. 230 (Supreme Court of Canada)). Whenever the resolution of the labour relations dispute is delayed, some prejudice is likely to exist. The Board and the Courts have long recognized that the speedy resolution of a labour relations dispute is both in the public interest and of real importance to those directly involved. Consequently, there is an expectation that allegations that the *Labour Relations Act*, 1995 or related legislation, has been contravened will be made and pursued within a reasonable time (which time is generally measured in months rather than in years) so that the allegations can be dealt with in a timely manner which is fair to all concerned.
>
> 8. The Board's response to motions seeking dismissal of applications under section 96 of the Act on the basis of delay is not a mechanical one. It is neither possible nor appropriate to draw up an exhaustive list of factors which the Board will consider when dealing with a motion to dismiss on the basis of delay. Each situation must be examined and determined according to the merits of the particular case, although the onus is on an applicant to explain what appears to be an inordinate delay in making or pursuing a particular complaint. [case citations omitted].
>
> 9. While there is no fixed rule, in cases which involve a loss of employment (particularly in an economy in which jobs are hard to come by), the Board will generally not dismiss a complaint which makes out a prima facie case on the basis of a delay which is less than one year, except where a responding party demonstrates actual prejudice and there is no satisfactory explanation for the delay. As a general matter, where the delay asserted is less than one year, the onus is on a responding party to demonstrate actual prejudice (or perhaps some other good reason) sufficient to justify dismissing a complaint without a hearing on its merits. Where the delay is more than one year, the onus is on the applicant to provide a satisfactory explanation.

18 As indicated, Section 96 of the Ontario *Labour Relations Act* provides the basis for the Ontario Board's discretion to dismiss untimely complaints. The provision is similar in most material respects to Section 14 of our Code. It is also instructive to consider the Ontario Board's decision in *Dhanota* cited in the above passage. The facts bear a remarkable resemblance to the present complaint.

19 In *Dhanota*, the complainant was discharged on March 8, 1979. She filed her duty of fair representation complaint some two years and seven months later on October 27, 1981. Both the company and the union took the position that the Board should refuse to entertain the complaint given the extreme delay.

20 The complainant's husband had approached the union shortly after her discharge in order that a grievance might be filed. He asked every day for about one

week. Finally, he told a plant chairman that he was going to a lawyer to have a grievance filed.

21 The complainant and her husband retained a lawyer who wrote to the union and again requested it to file a grievance. The union's president responded on March 26, 1979 by indicating that it did not have the right to file a grievance for an employee. The union stated it had determined there were no grounds for filing a grievance after having investigated the matter, but advised the complainant could file a grievance on her own.

22 The lawyer then wrote to the union's plant chairman stating "my client has instructed me to have the grievance procedures instituted and I am advised that you can take and will take the necessary steps to do so". The union did not respond to this letter, and never did agree to take up the complainant's grievance. No further action was taken by either the complainant or the union with respect to a grievance.

23 The lawyer then suggested that because the union was doing nothing for the complainant she should go to the Human Rights Commission on her own. She did so in 1979. The Commission wrote to her on October 22, 1980. It advised it had found no evidence to support the complainant's claim of discrimination after fully investigating the matter.

24 The complainant and her husband went back to the lawyer. He stated the complainant had a good case and advised he would bring a lawsuit against the company in court. A wrongful dismissal action was commenced in December of 1980. In February 1981 the company's solicitors filed a defence in which they disputed the court's jurisdiction because the complainant's discharge was covered by the terms of a collective agreement. In October of 1981 the lawyer telephoned the complainant's husband and advised him of the error in trying to take the matter to court. He advised the complainant to go to the Ontario Labour Relations Board. She then came in contact with her new solicitor who filed a complaint without delay.

25 The complainant argued that she and her husband had it all times tried to pursue the matter. They had first trusted the Human Rights Commission and then their lawyer. The complainant's husband indicated that he had continued during this period to speak to the union's plant chairman from time to time about the progress of the matter before both the Commission and the court. The complainant argued further that neither the union nor the company had put forth any evidence of prejudice.

26 The Ontario Board found in *Dhanota* that none of the complainant's submissions were tenable:

> 13. A delay of the present magnitude carries with it an element of prejudice which is undeniable. Memories fade, and a party's ability to present a defence will deteriorate for that reason alone. This is particularly true when a party is not on notice that an action against it requiring the litigation of certain events, remains pending. Here the respondent was justifiably under the impression that the grievance route, or any further demands against the union, had

been abandoned in favour of other actions against the company. The lingering discussions which the complainant's husband had with [the union plant chairman] and the stewards were clearly of an amicable nature; they provided no indication that action would subsequently be directed against the trade union itself, so that notes or other forms of evidence could be more actively maintained. The defence of the employer is *not* the defence of the trade union in these proceedings. The Board would be concerned not with the matter of cause for discharge, but rather the steps which the respondent's officials went through in concluding in their own minds that no grounds for a grievance existed. That defence would turn upon the recollections and credibility of the respondent's own officials. It might be noted parenthetically that the Labour Board, in administering the *Labour Relations Act*, is primarily concerned with the ongoing labour relations of a workplace, and such workplaces do not remain static over time. The Board as a result has always been conscious of the need for expedition in its practices and procedures. The delay in the present case raises concerns over an appropriate remedy, if the Board *were* to permit this complaint to now proceed, which are not fully answered by the complainant's concession as to damages. In circumstances such as the present, the onus shifts to a complainant to satisfy the Board that there are compelling labour relations reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.

* * *

15. In the present case, the delay has indeed been "extreme" and the factors put forward by the complainant are insufficient to deliver her from the consequences of that delay. Certainly the Board has no quarrel with the notion of an aggrieved individual investigating other avenues of redress prior to launching a section 68 application with the Board. But a point is reached after a reasonable period of time, when the individual must decide whether it is going to go against the trade union or not, and if so, then overt steps must be taken in that direction. The individual cannot rely indefinitely on the efforts being taken on his or her behalf in other directions, and then come back against the trade union when those efforts prove fruitless. The important point to note here is that the other forms of action being pursued by the complainant were directed solely against the employer. Not a word was said to the trade union during that period to indicate that its conduct was being viewed as unlawful or that its own position might still be placed in jeopardy. The complainant will not now be permitted at this late date, to use section 68 against the trade union as a last resort to reach the employer. (emphasis in original)

27 For these reasons, the Ontario Board exercised its discretion under Section 89 of the Ontario *Labour Relations Act* (now Section 96) and declined to inquire further into the complaint.

28 The complainant sought judicial review: *Re Dhanota et al* (1993), 42 OR (2d) 73 (Div. Ct.). One of the submissions before the Court was that the Ontario Board had no right to hold a "show-cause hearing" and require the complainant to justify the delay before investigating the merits of the application. It was submitted that the Board had no right to fetter its own discretion by adopting this procedure as a "so-called policy". The Court reviewed the Board's analysis (including portions of the paragraphs quoted above) before stating:

> The board has the right to lay down its own procedure. It decided, in this case, to commence with an investigation of the delay in filing the complaint and the reasons therefor. In so doing, it was exercising the discretion that we have found is given to it under s. 89(4). We see no lack of natural justice or even of fairness in the procedure it adopted and, that being so, this court should not interfere. (p. 76)

29 The Court described the Ontario Board's policy on timeliness as a "procedure". I will return to this point in a moment. But regardless of how the policy is characterized, the importance of the case is that the Court approved the Board's policy as an exercise of discretion under Section 89(4) of the *Labour Relations Act*. As set out in the judgment, the Section at that time read:

> 89(4) ... *the Board may inquire into the complaint* of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the ... trade union ... shall do or refrain from doing with respect thereto ... (emphasis added)

30 This provision is now Section 96(4) of the Ontario statute and reads more fully as follows:

> 96(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, *the Board may inquire into the complaint of a contravention of this Act* and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

> (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
>
> (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
>
> (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally. (emphasis added)

31 Comparable jurisdiction is found in Section 14 of our *Labour Relations Code*:

> 14. (1) If a written complaint is made to the board that any person is committing an act prohibited by section 5, 6, 7, 9, 10, 11 or 12, the board shall serve a notice of the complaint on the person against whom it is made and on any other person affected by it.
>
> (2) The board may appoint an officer to inquire into the complaint and attempt to settle the matter complained of, and the officer shall report the results of his or her inquiry and endeavours to the board.
>
> (3) If an appointment is not made under subsection (2), or the officer is unable to settle the matter, *the board may inquire into the complaint*.
>
> (4) If, on inquiry, the board is satisfied that any person is doing, or has done, an act prohibited by section 5, 6, 7, 9, 10, 11 or 12, *it may*
>
> (a) make an order directing the person to cease doing the act,
>
> (b) in the same or a subsequent order, direct any person to rectify the act,
>
> (c) in the case of an employer, include a direction to reinstate and pay an employee a sum equal to wages lost due to his or her discharge, suspension, transfer, layoff or other disciplinary action contrary to section 6 (3) (a) or (b),

> (d) in the case of a trade union, include a direction to reinstate a person to membership in the trade union and pay to that person,
>
> * * *
>
> (6) If in the board's opinion a complaint under subsection (1) is without merit, it may reject the complaint at any time. …(emphasis added)

32 It may well be that the Board does not have jurisdiction to impose a time limit as a matter of "practice and procedure" under Section 126(1) of the Code, given the Saskatchewan Court of Appeal's judgment in *Re Ostrowski and Saskatchewan Beef Stabilization Board Appeals Committee et al*, (1993), 101 DLR (4th) 511. However, the same decision recognizes that equivalent restrictions may be brought about by the exercise of judicial power, and that is precisely how the Board's policy respecting the timeliness of Section 12 complaints has developed. The Board has not purported to establish a fixed and arbitrary limitation period by exercising administrative or subordinate legislative power. Rather, through the exercise of its quasi-judicial authority under the *Labour Relations Code*, the Board has in past decisions determined how it will exercise the discretion which exists under Section 14(3) of the Code to not inquire into a complaint: see particularly *Michael Stuart Winning*, BCLRB No. 95/84, where the panel at page 9 relied on then Section 8(3) of the *Labour Code*.

33 The Board's policy reflects the purposes of the Code (e.g., the expeditious resolution of disputes), and most importantly requires that the circumstances of each complaint be given specific consideration. In regard to the latter, I affirm the discussion found in *McKenly Daley*, [1982] 2 Can LRBR 392 (OLRB), quoted with approval in *Michael Stuart Winning*, *supra*:

> A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: the length of the delay and reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that facing recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years. (p. 397)

34 A point which appears throughout Frank's submissions is that the limitation period for initiating a common law wrongful dismissal action is six years. This comparison loses force when one recognizes the underlying objective of Frank's complaint: namely, to have his discharge grievance proceed to arbitration.

35 In most collective agreements, the time periods for initiating and advancing grievances to arbitration are circumscribed in terms of *days*. This is the more appropriate yardstick for comparing the Board's policy than the common law limitation period for wrongful dismissal. When viewed in such light, a time frame measured in months (with a rough upper range of one year) is exceedingly generous. This conclusion is reinforced by considering the time allowed for filing a duty of fair representation complaint in those jurisdictions which have legislatively addressed the issue. The Canada, New Brunswick and Nova Scotia statutes all impose a 90 day limit from the time when a complainant knew, or ought to have known, of the circumstances giving rise to the complaint. In Alberta, there is a discretion to dismiss a complaint which has not been brought within the same period. In terms of policy in other jurisdictions, the Manitoba Board has said that a delay in excess of six to eight months will be considered undue: *Trade Union Law in Canada, supra*, at para. 7.865.

36 I accordingly find that the Board has jurisdiction to dismiss a Section 12 complaint because of excessive delay. This authority is not based on the Board's general authority to determine its own practice and procedure under Section 126(1); nor does it arise from the application of equitable doctrines such as laches. Rather, the Board has in past decisions established a general policy regarding how it will exercise its discretion under Section 14(3) of the Code to decline to inquire into a complaint. I find the policy is fair and reasonable (and in this sense equitable), given the competing considerations which must be addressed. The policy recognizes the importance of speed and finality in labour relations matters; it also takes into account the circumstances of individual complaints and thus does not constitute a fettering of the Board's discretion: *White Spot Limited,* unreported (May 31, 1995), Vancouver Registry No. A951079.

37 I reject Frank's submission that a Section 12 complaint cannot be dismissed without having heard from the trade union or the employer. The question of timeliness does not arise under Section 13(1)(a) of the Code. I recognize that some prior decisions have expressed a contrary view. However, Section 13(1)(a) is concerned with whether a complaint discloses a case "that a contravention has apparently occurred" *from an evidentiary perspective*. A panel may determine that this threshold has been met, but may nonetheless proceed to dismiss the complaint under Section 14 because of excessive delay.

38 Second, the Board's policy respecting timeliness considers the *potential* prejudice to the responding parties which typically arises from delay. There need not be evidence of actual prejudice, as would be the case if the doctrine of laches was being invoked. Further, a complaint which is properly filed with the Board should contain all of the information necessary for a panel to determine whether it is timely (e.g., the nature of the alleged contravention and the underlying grievance, when the

complainant first became aware of the contravention, the reason for any intervening delay, and so on). In any event, this issue is not a concern in the present case because the Union and the Employer have filed submissions addressing both the timeliness and the merits of Frank's complaint.

V. DECISION

39 I turn then to consider whether Frank's complaint should be dismissed because of excessive delay. Weighing in favour of adjudication on the merits are the circumstances of his grievance: Frank was a 17 year employee who was discharged during a personally stressful period of his life. There may well have been a duty to accommodate which was not explored. On the other hand, the complaint was filed more than two years after the Union advised Frank in writing that it would not be proceeding to arbitration. In addition to the potential prejudice which normally accompanies such periods of delay, the Union has suffered actual prejudice: it says Dyck's notes of his investigation have been discarded due to the lack of notice that the matter would be revisited. It does not matter whether the notes were discarded when the Kamloops office was closed or at some other time; the point is that they no longer exist.

40 The explanation offered for Frank's delay is essentially that he intended at all times to pursue his legal rights, and that legal action was in fact initiated. There are several reasons why this explanation is not sufficient to overcome the magnitude of the attendant delay in coming to the Board.

41 Frank does not dispute the Employer's assertion that he received legal assistance in February 1997. This was approximately six months after his termination. The nature of the advice provided is not known. However, it was not until May 1998 -- or an additional 15 months later -- that the wrongful dismissal action was commenced. No explanation has been provided for the intervening delay. In July 1998 counsel for the Employer advised Frank's then solicitor that the Court was without jurisdiction to hear the matter. A statement of defence challenging the Court's jurisdiction was filed shortly thereafter. The Employer then heard nothing until October 1998 when service of the statement of defence was acknowledged and Frank's current counsel advised he would soon be meeting his client to obtain instructions. The complaint was subsequently filed in mid-November.

42 Frank asserts the Union was aware he was taking further action, but provides no particulars regarding how this alleged knowledge was acquired. The circumstances accordingly seem to more closely resemble the situation in *Dhanota, supra*, where there was no indication that the legal action being pursued would subsequently be directed against the trade union. Further, the defence of an employer in a wrongful dismissal action is not the same as the defence of a trade union in a duty of fair representation complaint.

43 In any event, Frank's legal rights were not being pursued against the Employer with any degree of urgency. The Employer had some contact from his then solicitor in

April 1997 (about eight months after the termination) when the authorization for personnel records was received. The wrongful dismissal action was filed in May 1998, but was not served on the Employer until June 4, 1998. This was more than 21 months after the date of termination. Frank's counsel was put on notice in July 1998 that the Employer disputed the Court's jurisdiction. Yet the present complaint was not filed until November. This sequence of events cannot be ignored simply because Frank's current counsel acted promptly once he became involved in the matter in October 1998.

44 Regrettably from Frank's perspective, numerous cases in this Province and other jurisdictions hold complainants responsible for the actions of their agents. I find no reason to depart from that approach here. Nor does pursuing alternative avenues of relief generally serve to excuse excessive delay in filing a duty of fair representation complaint. As noted in *Trade Union Law in Canada, supra*, "[t]he complainant, not the employer or the union, must bear the burden of bad legal advice" (para. 7.840). See also *Dhanota, supra*; *Barbara Ifill*, [1997] OLRD No. 4268; *William Gordon Switzer*, [1997] OLRD No. 3733; and *Elouise Lord*, BCLRB No. B433/97.

45 In all of the circumstances, I find Frank has not provided a satisfactory explanation for the delay of approximately 26 months between learning that the Union would not proceed to arbitration and filing this complaint. I accordingly decline under Section 14(3) of the Code to make any further inquiry into the complaint.

VI. SUMMARY

46 I will briefly summarize the analysis and decision set out above.

47 The Board has jurisdiction to dismiss a duty of fair representation complaint where there has been excessive delay. This authority does not arise from either the Board's general power to determine its own practice and procedure, or from the application of equitable doctrines. Rather, the Board has for many years had a discretion under what is now Section 14(3) of the Code to refuse to inquire into a complaint. This discretion has not been affected by the enactment of Section 13(1)(a) which is directed to determining whether the evidentiary assertions in a complaint disclose an apparent violation of the Code. Even where that threshold is met, a panel may decline to proceed further if a complaint is untimely.

48 The period for filing a Section 12 complaint is measured in months and not years. The Board has generally declined to proceed where more than a year has passed since the complainant knew, or ought to have known, of the events giving rise to the alleged contravention of the Code. In determining whether there has been excessive delay, complaints are assessed individually having regard to such factors as: the nature of the underlying grievance; the alleged contravention of the Code; the remedy being sought, and whether it would involve retrospective financial liability or could adversely affect relationships which have developed since the alleged contravention; and whether the claim is such that fading recollections, the unavailability of witnesses or the deterioration of evidence would potentially prejudice the respondents and hamper a fair hearing of the dispute. The most important factors are

usually the length of the delay and the nature of the explanation offered by the complainant for not proceeding to the Board at an earlier date.

49 In this case, there was a delay of approximately 26 months between the time the Union informed Frank it would not take his discharge grievance to arbitration and the date on which his current legal counsel filed a complaint with the Board. The circumstances of Frank having been a 17 year employee who was terminated during a period of personal stress weigh in favour of adjudicating the complaint. Conversely, there would be actual prejudice to the Union through the loss of records made at the time. Further, the intervening civil action commenced by Frank's then solicitor against the Employer was not pursued with any degree of urgency. Frank must ultimately bear the consequences of his former counsel's actions – at least to the extent that his complaint to the Board is untimely.

50 For all of the reasons given above, I decline to conduct any further inquiry into Frank's complaint and it is dismissed.

LABOUR RELATIONS BOARD

JOHN B. HALL
VICE-CHAIR