

BRITISH COLUMBIA LABOUR RELATIONS BOARD

JAMES W.D. JUDD

("Judd")

-and-

COMMUNICATIONS, ENERGY AND PAPERWORKERS
UNION OF CANADA, LOCAL 2000

(the "Union")

-and-

KELOWNA DAILY COURIER, A DIVISION OF THOMSON
CANADA LIMITED/THOMSON CANADA LIMITEE

(the "Employer")

PANEL: Brent Mullin, Chair
Sharon Kearney, Vice-Chair
Jan O'Brien, Vice-Chair

APPEARANCES: James W.D. Judd, for himself

CASE NO.: 48254

DATE OF DECISION: February 21, 2003

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DECISION OF THE BOARD

I. INTRODUCTION

1 Judd applies under Section 12 of the *Labour Relations Code* alleging that the
2 Union breached its duty of fair representation by refusing to take to arbitration a
3 grievance regarding his dismissal from employment with the Employer.

4 We are taking the opportunity in this case to address the rights, obligations, and
5 processes under Sections 12 and 13 of the Code.

II. THE COMPLAINT

6 The background to Judd's Section 12 application is as follows. Judd was
7 employed as an editor with the Employer. He has been dismissed from his employment
8 with the Employer twice. The first time was on June 21, 2001. Initially, the Union
9 declined to pursue a grievance in respect to that termination. However, on August 21,
10 2001, the Union advised Judd that his internal appeal of that decision had been
11 successful and the Union would arbitrate the grievance.

12 On November 4, 2001, Judd filed a Section 12 complaint asserting that the Union
13 had taken far too long to take action and had failed to keep him informed. He also
14 complained that the Union had not provided him with a copy of the supposed grievance
15 it said it had filed on his behalf. The Board wrote to Judd indicating it would not proceed
16 with the complaint until his grievance was concluded. An arbitration hearing
17 subsequently took place and the arbitrator overturned Judd's dismissal and directed that
18 he be reinstated with back pay.

19 After 19 shifts back at work, Judd was dismissed again. He grieved. By letter
20 dated September 24, 2002 the Union advised Judd that after seeking legal advice, it
21 would not be proceeding to arbitration with respect to this dismissal. The letter went on
22 to advise of further avenues of appeal within the Union. Judd again appealed internally
23 within the Union. This time his appeal was unsuccessful. On November 12, 2002 Judd
24 filed the current Section 12 application with the Board.

III. ANALYSIS

A. Sections 12 and 13 of the Code

25 Section 12 of the Code sets out a union's "duty of fair representation" to its
26 bargaining unit members. Section 12 provides as follows:

- 27 12. (1) A trade union or council of trade unions must not act in a
28 manner that is arbitrary, discriminatory or in bad faith

- (a) in representing any of the employees in an appropriate bargaining unit, or
 - (b) in the referral of persons to employment
- whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.
- (2) It is not a violation of subsection (1) for a trade union to enter into an agreement under which
 - (a) an employer is permitted to hire by name certain trade union members,
 - (b) a hiring preference is provided to trade union members resident in a particular geographic area, or
 - (c) an employer is permitted to hire by name persons to be engaged to perform supervisory duties.
 - (3) An employers' organization must not act in a manner that is arbitrary, discriminatory or in bad faith in representing any of the employers in the group appropriate for collective bargaining.

7 The duty of fair representation has existed in B.C. labour relations legislation for a long time. It is in fact a fundamental part of any Canadian labour relations legislation. The interpretation given to the duty of fair representation by the Board has also been longstanding and consistent with the interpretation of similar provisions in other jurisdictions both by the Courts and labour boards. The Board's approach to the interpretation of the duty of fair representation is summarized in the leading decision *Rayonier Canada (B.C.) Ltd.*, BCLRB No. 40/75, [1975] 2 Can LRBR 196 (quoted with a typographical error removed):

...a union is prohibited from engaging in any one of three distinct forms of misconduct in the representation of the employees. The union must not be actuated by bad faith in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.

(pp. 201-202)

8 When it receives a complaint alleging a breach of Section 12, the Board must make an initial determination under Section 13 of the Code as to whether the complaint discloses an apparent breach of Section 12. Section 13 provides:

13. (1) If a written complaint is made to the board that a trade union, council of trade unions or employers' organization has contravened section 12, the following procedure *must* be followed:
 - (a) a panel of the board *must* determine whether or not it considers that the complaint discloses a case that the contravention has apparently occurred;
 - (b) if the panel considers that the complaint discloses sufficient evidence that the contravention has apparently occurred, it *must*
 - (i) serve a notice of the complaint on the trade union, council of trade unions or employers' organization against which the complaint is made and invite a reply to the complaint from the trade union, council of trade unions or employers' organization, and
 - (ii) dismiss the complaint or refer it to the board for a hearing.
- (2) If the board is satisfied that the trade union, council of trade unions or employers' organization contravened section 12, the board may make an order or direction referred to in section 14 (4) (a), (b) or (d). (emphasis added)

9 Section 13 was added to the Code in 1993. This amendment to the Code was a direction from the Legislature to provide the Board with a "process by which the Board could effectively adjudicate fair representation complaints without requiring submissions, or holding hearings, in every case": Recommendations for Labour Law Reform, p. 22. The intent of the direction can be seen in the mandatory terms (i.e., "must") in Section 13, emphasized above. In short, the intent was to streamline the process and reduce the amount of work generated by Section 12 complaints. That intention of the Legislature is readily understandable given the Board's experience with Section 12 complaints.

B. The Board's Experience with Section 12 Complaints

10 The Board advises Section 12 complainants of the *Rayonier* requirements. However, while *Rayonier* provides the general framework for the Board's approach to Section 12 complaints, it is not specific or concrete. Most Section 12 complainants are unrepresented and unfamiliar with the Board's jurisprudence. Unfortunately, in the

Board's experience, the general statements of the legal tests in *Rayonier* seem to provide little practical guidance for many of these Section 12 complainants.

11 We believe that the difficulty in understanding the legal tests in *Rayonier* may be contributing in part to the consistently large number of applications filed every year. The Board continues to receive about 200 Section 12 complaints per year, despite their low success rate (less than five percent are successful). Complainants appear not to be deterred by the strict legal tests or low success rates. Moreover, Section 13, to which we now turn, does not seem to have achieved its intended purpose.

C. The Board's Experience with Section 13 of the Code

12 As noted earlier, Section 13 of the Code allows the Board to proceed with a Section 12 complaint only if it discloses "a case that the contravention [of Section 12] has apparently occurred". Stated another way, the Board may only proceed with a Section 12 complaint if there is "sufficient evidence" that Section 12 has been breached. If there is sufficient evidence of a Section 12 breach, the Board must then proceed to adjudicate the matter on its merits.

13 It is often difficult to obtain from Section 12 complainants material details of what they allege the union did or did not do in respect to representing them, especially since the vast majority of them are lay litigants who are unfamiliar with the Board's processes or jurisprudence.

14 As a result, it has proven difficult for the Board to give Section 13 the full scope and effect which was intended in the 1993 legislative amendment.

D. Section 2 of the Code

15 The guiding principles for all Code provisions, including Sections 12 and 13, are set out in Section 2 of the Code. Section 2 was recently amended in three ways. Section 2 is now a "duties" provision rather than a "purposes" provision as it was formerly. The Board is now required to exercise its functions according to the "duties" set out in Section 2.

16 As well, two new subsections, 2(a) and (b), were added.

17 Section 2 of the Code as a whole states:

2. The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that
 - (a) recognizes the rights and obligations of employees, employers and trade unions under this Code,
 - (b) fosters the employment of workers in economically viable businesses,

- (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
- (d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,
- (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
- (f) minimizes the effects of labour disputes on persons who are not involved in those disputes,
- (g) ensures that the public interest is protected during labour disputes, and
- (h) encourages the use of mediation as a dispute resolution mechanism.

18 The subsections in Section 2 need to be read as a whole and in conjunction with the other provisions in the Code. They set out a comprehensive view of labour relations which is to be followed by the Board and others who exercise powers and perform duties under the Code. Section 2 sets out a vision of labour relations which: describes the goals of the system to the immediate parties; places those goals within a larger, societal context; and emphasizes the mechanisms by which to proceed towards those goals (i.e., the "cooperative participation" of (d) and the mediative approach emphasized in (h)).

19 Subsection 2(a) recognizes the rights and obligations of the three immediate parties to labour relations: the employees, employers, and trade unions. Subsection 2(b) then identifies the goal of ensuring that the labour relations system fosters or encourages the employment of workers in economically viable businesses.

20 Building on that base, subsection 2(c) confirms the critical franchise under which employees in the Code can freely choose to be represented by a union.

21 Once unionization has been chosen by the employees, subsection 2(d) addresses the Code's preference as to how the employer and the union are to meet the challenges they face. Those challenges range from "adapting to changes in the economy" to how the parties are to resolve their workplace issues and generate a productive workforce. That direction, first put into the Code in 1993, requires unions and employers to work together to jointly address these issues through "cooperative participation".

22 The subsections then proceed to: emphasize the need for "orderly, constructive and expeditious settlement of disputes" (subsection 2(e)); place all of these matters

within the larger public interest (subsections 2(f) and 2(g)); and, lastly, encourage mediation as a dispute resolution mechanism in labour relations (subsection 2(h)).

23 Section 2 thus provides a comprehensive roadmap for fostering labour relations in British Columbia, proceeding from the rights and obligations of the parties, to an identification of the goals to be obtained. This comprehensive direction is to be followed by the Board and other persons who exercise powers or perform duties under the Code. It is a view of labour relations in which the three immediate parties (the employees, employers, and trade unions) will benefit by working together. As well, their efforts are to contribute to larger, societal goals in the form of generating and maintaining work in economically viable businesses. At the same time, as well as contributing to that public good, the system will also protect the public interest in respect to disputes.

E. The Board's Approach to Sections 12 and 13 of the Code

24 Employee rights under Section 12 of the Code are rights contemplated by Section 2. Those rights in turn form the obligations owed by unions to employees under Section 12. However, it is important to recognize that a union also has an overall right and obligation to represent *all* of the employees in the bargaining unit: Section 27 of the Code. An employee's Section 12 rights, and the union's concomitant obligations, must be interpreted in the context of the union's obligations to the rest of the bargaining unit it represents. It is not consistent with the overall purposes of the Code for any single employee, or group of employees within the larger unit, to be allowed to inordinately monopolize or drain a union's resources through excessive and unwarranted demands for representation.

25 Every year the Board receives a far greater number of Section 12 complaints than are justified on the facts. This has resulted in excessive demands being placed on the resources of unions and the labour relations system as a whole, including the resources of the Board. While in part this may be due to an increased level of sophistication amongst employees in the workforce in general, in our view it may also flow from a fundamental misconception regarding the nature of the rights and obligations arising under Section 12.

26 Section 12 contains a narrow right and protection. It has long been interpreted that way in this as well as other jurisdictions and that interpretation has been upheld by the Courts. Despite that, Section 12 complainants often have expectations far beyond what is provided for by the Legislature. This has resulted in a consistently large number of unmeritorious complaints, which is contrary to the goals of the labour relations system identified earlier, and diverts critical resources both from unions and from the system as a whole.

27 Accordingly, we find it necessary to set out the Section 12 rights and obligations in more specific and concrete terms and encourage the parties to abide by them. Unions need to be able to know the extent of their Section 12 obligations so that they can ensure that they will have sufficient resources to properly represent the other employees in the bargaining unit and overall attend to the requirements, goals, and

benefits of Section 2 and the rest of the Code. Employees should be aware that once those obligations have been met, they too have an obligation to carry on and act consistently with the principles contained in Section 2 of the Code. In that context, the Board must have the ability to summarily deal with Section 12 applications where appropriate. The addition of Section 13 to the Code in 1993 directed the Board to that end.

F. An Explanation of the Scope of Section 12 and the Section 13 Complaint Process

28 Section 12 prohibits unions from representing employees in the bargaining unit in a manner that is "arbitrary, discriminatory or in bad faith". The Board has described these three terms on many occasions. The Board has also published written materials that attempt to explain these terms in plain language. The Board sends these materials to persons who are considering filing a Section 12 complaint. These materials are also available on the Board's website: www.lrb.bc.ca.

29 It is important that the Board be accessible to people who are unfamiliar with the legal system, so that they can represent themselves before the Board without the expense of hiring a lawyer. At the same time, an individual who wishes to make a complaint under Section 12 needs to understand what that section entitles them to and what they must do to make their case.

30 For example, although the Board has explained that it has no jurisdiction to overturn a union's decision simply because an employee thinks it was wrong, the Board receives a large number of Section 12 complaints which essentially ask the Board to do just that. While these complaints may use the phrases "arbitrary, discriminatory and bad faith", the essence of the complaint is often that the union was wrong. However, it is not the Board's role to decide if a union was right or wrong as long as the union has not acted in an arbitrary, discriminatory, or bad faith manner.

31 There is also misunderstanding concerning the Section 12/13 process. The Board's materials clearly state that a complaint must include details of the conduct that is alleged to have violated Section 12. However, the Board continues to receive a large number of complaints that do not contain sufficient information to allow the Board to conclude whether Section 12 has been violated.

32 Employees need to understand their Section 12 rights in the broad context of workplace organization. Similarly, they must understand the adjudicative process in order to appreciate why details of the relevant conduct must be included in the complaint. The purpose of the following section is to attempt to provide this broader explanation. In the months to come, the Board will also produce and publish a new Guideline explaining these matters in plain and concrete terms.

1. Unionization

33 Under the Code, if a majority of employees in an appropriate bargaining unit vote in favour, the union becomes the exclusive representative of the employees in all matters concerning their terms and conditions of employment. Specifically, the employees have chosen the union to negotiate a collective agreement governing the terms and conditions of employment on their behalf. They have also chosen the union to administer that collective agreement -- i.e., to enforce it. This includes instances where the employer disciplines or dismisses an employee, as the Code automatically includes in every collective agreement a requirement that the employer not discipline or dismiss an employee without just and reasonable cause.

34 Once employees have chosen a union as their exclusive bargaining agent, any decisions regarding the negotiation and administration of the collective agreement are the union's to make. Thus, for example, if an employee feels he was denied a promotion in violation of the collective agreement, or disciplined or dismissed without just and reasonable cause, it is up to the union to decide what to do about that. Generally, it is up to the union to decide whether to file a grievance against the employer on behalf of an employee. Once a grievance is under way, it is up to the union to then decide whether to abandon the grievance, try to negotiate a settlement with the employer, or take the grievance to arbitration. Such decisions are not up to the employee. However, the employee is responsible for making the union aware of potential grievances and asking the union to act on his or her behalf.

35 The Code gives unions this exclusive control because it is necessary in order for a union to be effective in representing the employees as a whole. The power of a union comes from the fact that it represents all the employees as a single entity. A union must speak with one voice in order to negotiate effectively with the employer. A union must be able to make commitments that the employer can rely upon if the union expects to receive anything in return. It would be unable to make such commitments if, in the future, it was required to act in whatever manner it was directed to by various, individual employees.

36 A union must also be able to direct its resources so that they achieve maximum effect. Union resources are limited. If, for example, an employee could insist that his or her dismissal grievance go to arbitration even where on a reasonable assessment there is no case, this could waste tens of thousands of dollars of the union's resources, which come from employees' dues.

37 Through the control of its resources, a union can leverage them to achieve maximum results for minimum expenditure. An employer knows that the union could take any given case to arbitration if it wished. It also knows that the union is likely to accept a reasonable settlement if one is offered. With that type of relationship, the employer may be motivated to make reasonable offers to settle some matters by agreement, without litigating every issue. In that way, employees achieve the greatest gain with the least expenditure. By contrast, if individual employees could take every grievance to arbitration whenever they wished, the amount of litigation in the workplace

would multiply and employees would very quickly find their collective resources depleted. This type of situation would be detrimental to the workplace and, for employees and the union, unaffordable. It may also place an excessive demand on the employer, affecting the business as a whole.

38 As well, a union must be in charge of making decisions given the reality that what is good for one employee in the bargaining unit may be bad for others. An obvious example is where there is a job vacancy and the collective agreement language is unclear. On one interpretation, one member of the bargaining unit should get the job; on another interpretation, a different member of the bargaining unit should get it. The union cannot represent both members by arguing both interpretations. It must be free to argue the interpretation it feels is in the best interests of the bargaining unit as a whole.

39 For these reasons, among others, unions must act as a single entity in order to represent the employees effectively. They must be able to make decisions even where individual employees in the bargaining unit may disagree. In fact, unions are able to exercise collective power *because* employees cannot simply do whatever they wish individually. It is that characteristic which gives unions their bargaining power on behalf of the employees.

40 Employees choose whether or not to unionize, and typically choose the leadership of their union local. Thus, unions are an exercise in workplace democracy. Like all democracies, they are not expected to be perfect, nor to be free from disagreement. In fact, when one considers the type of decisions unions must routinely make -- e.g., whether to expend union resources on a particular employee's grievance, or which position to take when some employees' interests differ from others -- it is inevitable that some employees will disagree. Employees as a group may nonetheless decide to continue with their union and its current leadership. If they do, it is not because the employees believe the union has been perfect or right in all cases. It is because they believe it is, overall, the best option available.

2. The Scope of Section 12

41 As noted earlier, the restrictions which Section 12 imposes on a union's representation are "arbitrary, discriminatory and bad faith". All three of these concepts are abstract in nature. However, considered in the context of the exclusive bargaining agency of the union, they can be better understood.

42 When a union decides not to proceed with a grievance because of relevant workplace considerations -- for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit -- *it is doing its job of representing the employees*. The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are relevant to the workplace, or to its job of

representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of Section 12.

43 The situation is different if a union's decision is not based on these kinds of relevant considerations. A union would breach Section 12 if it misused its exclusive bargaining agency by making decisions based on improper factors, or by making random or unreasoned decisions. For instance, if a union official dropped a termination grievance because the employee opposed his election, or decided the same issue by flipping a coin, the union would no longer be making decisions about the employee's representation based on considerations that are relevant to that task.

44 Section 12 is not an avenue of "appeal" of the merits of union decisions. Rather it is designed to ensure the union exercises its judgment and acts based on proper considerations. If it does, it has done what it is required to do by Section 12 and the Board has no jurisdiction to overturn or change the union's decision.

45 There are three further points we wish to mention about Section 12. First, when assessing a union's conduct in representing an employee, the Board considers the union's conduct as a whole, from the beginning to end of the grievance process. That is because the issue under Section 12 is whether the union has *represented* the employee in a manner that is arbitrary, discriminatory or in bad faith -- not whether it has committed isolated acts that may fit one of those descriptions.

46 Second, Section 12 concerns the duties of unions to the employees they represent. It is not a forum for complaints against the employer. Often, complainants focus on the wrongs they believe they have suffered in the workplace. While events in the workplace may form a part of the relevant background of a Section 12 complaint, the focus is on the union's response to those events. The Board does not decide the merits of an employee's grievance against the employer. Perceived injustice by the employer does not provide grounds for a Section 12 complaint against the union. It is the union's conduct that is at issue.

47 Finally, whether a union's representation has been arbitrary, discriminatory or in bad faith in any given case will depend on the circumstances. As the Canada Labour Relations Board has stated, "Human behaviour is too diverse for the establishment of unequivocal rules": *Lucio Samperi*, [1982] 2 Can LRBR 207 (at 214).

48 We now turn to discuss more specifically the three types of representation that violate Section 12.

(a) Representation in Bad Faith

49 Representation in bad faith will typically involve either representation with an improper purpose or representation with an intention to deceive the employee.

50 Some examples of the first sub-category of bad faith -- representation with an improper purpose -- are listed in *Rayonier*. For example, a union's refusal to proceed with a grievance because of a union official's personal hostility toward the grievor, or a

president of a union local making decisions in collective bargaining or grievance representation to harm his or her rival for the presidency, would be representation in bad faith.

51 Another example of an improper purpose would be if the union conspired with the employer to have an employee terminated: for example, if the union agreed to attempt to bring about circumstances in which the employee was likely to be disciplined. However, the mere fact that the union makes an agreement with an employer that the employee feels is detrimental to his or her interests is neither a conspiracy nor bad faith. It is perfectly legitimate for a union to reach decisions (or make agreements) based on its view of the merits of a case or based on the interests of other employees. Either of those considerations could legitimately result in an agreement that an employee feels is detrimental to his or her interests. That does not mean it is a conspiracy against the employee.

52 Similarly, it is not a conspiracy simply because the union, after assessing a situation, reaches the same view as the employer. For example, there may be tension in the workplace between one employee and others. The employer may conclude it is the employee's fault. The union, after assessing the situation, may agree. That does not make it a conspiracy against the employee.

53 The second sub-category of bad faith -- representation with an intention to deceive the employee -- addresses "dishonesty". However, it is important to emphasize that what is prohibited by Section 12 is bad faith representation. Section 12 does not give the Board any general authority to intervene when someone lied to someone else. However, if a union's dishonesty directly affects the quality of the union's representation of an employee's interests, that could be representation in bad faith.

54 For example, a union may, by mistake, file an employee's grievance after the time limit for doing so has expired. An arbitrator may nonetheless be persuaded by a union to exercise the discretion given under the Code to relieve against the time limits. However, if the union does not want to make that argument, because it is embarrassed at having filed the grievance late and so falsely advises the employee that he has no case, this sort of dishonesty could amount to representation in bad faith.

(b) Discriminatory Representation

55 *Rayonier* gives examples of grounds on which representation could be considered discriminatory; one is unequal treatment on the basis of race or sex or any of the other prohibited grounds set out in the *Human Rights Code*. It is important to note that both the Labour Relations Board and the B.C. Human Rights Tribunal have jurisdiction over discriminatory representation on the basis of the prohibited grounds set out in the *Human Rights Code*. The Board's policy is, if a complaint is filed with both the Board and the Tribunal and is primarily an allegation that the union discriminated on the basis of one of those grounds, the Board will hold its complaint in abeyance until the Tribunal renders its decision provided the Board is satisfied that the Tribunal's decision is likely to resolve any outstanding issues before the Board and the complainant will

have access to an effective remedy: *Carol Ilicic*, BCLRB No. B235/95; *Julie Sutherland*, BCLRB No. B63/99.

56 However, the prohibition against discriminatory representation in Section 12 is not restricted to discrimination on grounds that contravene the *Human Rights Code*. As noted in *Rayonier*, it also includes discrimination based on personal favouritism. Of course, not every instance where people are treated differently amounts to discrimination. The different treatment may be due to some relevant difference in their circumstances. Thus, it is not discrimination to arbitrate one employee's grievance but not another's where there are relevant considerations supporting that distinction (e.g., the other employee's case is weaker).

57 Also, the union is not guilty of discriminatory representation merely because it may reach an agreement with the employer which leaves some employees in a better position and others in a worse position than they were before. This is generally recognized as part of the give-and-take of collective bargaining and the union-employer relationship in the union's representation of the employees. The Board does not substitute its judgment for the union's and the employer's as to what adjustments should be made at their workplace.

(c) Arbitrary Representation

58 The word "arbitrary" has been defined as conduct that is "not [based] upon any course of reason [and] exercise of judgment" (*Black's Law Dictionary*, 6th ed., St. Paul: West Publishing Co.) or "based on ... uninformed opinion or random choice" (*The Concise Oxford Dictionary*, 9th ed., Oxford: Clarendon Press). In the Section 12 context, the Board has held that a union's decision to abandon a grievance is not arbitrary if the union "makes sure it is aware of the circumstances, of the possible merits of the grievance, puts its mind to the case and comes to a reasoned decision whether to proceed": *Donato Franco*, BCLRB No. B90/94, p. 13.

59 Having said that, when the Board is faced with an allegation of arbitrary conduct under Section 12, it takes into account the fact that it is the union's job to represent the employees' employment interests. Therefore, the more serious the matter is for the employee, the more closely the Board reviews the union's conduct. Because the union is the representative of the employees' interests, it can be expected to treat matters involving critically important employee interests -- such as termination of employment or loss of seniority -- with more care and concern.

60 An example of this higher standard would be a case where a union, in deciding not to challenge an employee's termination at arbitration, considered some of the issues, but carelessly ignored a central issue that, if it had been considered, may have resulted in the grievance being successful and the employee being reinstated. The union's decision may not be "arbitrary" in the literal sense of the word, so long as it gave some legitimate reasons for it. But the Board considers conduct to be arbitrary within the meaning of Section 12 if it demonstrates blatant or reckless disregard for the

interests of the employee. The above example, depending on the circumstances, may meet that test.

61 Arbitrariness essentially encompasses three requirements. The union must: (i) ensure it is aware of the relevant information; (ii) make a reasoned decision; and (iii) not carry out representation with blatant or reckless disregard.

(i) Union must ensure it is aware of the relevant information

62 The requirement that the union must "make sure it is aware of the circumstances [and] the possible merits of the grievance" is often referred to in shorthand form as "conducting an adequate investigation". It is important to note, however, that not every case will necessarily require an "investigation". There may be some grievances where the relevant information is already in the union's possession.

63 In the more typical case, however -- for example, when an employee is suspended for alleged misconduct -- gathering the relevant information will require an "investigation". An adequate investigation may include considering the sequence of events, learning the grievor's point of view, obtaining information from potential witnesses, and offering the grievor a chance to respond. There may also be, depending on the circumstances, other ways of testing the employer's assertions. An employee is expected to cooperate and participate with the union in the investigation.

64 The key is that the union must take reasonable measures to ensure it is aware of the relevant information. What is "reasonable" will depend on the particular circumstances -- including the significance of the issue for the employee.

(ii) Union must make a reasoned decision

65 Once it has the relevant information, the union must "put its mind to the case and come to a reasoned decision whether to proceed." In other words, the union's decision must be based on reason. A reasoned judgment is demonstrated by a reasonable and rational connection between relevant considerations and the decision made. It may include considering collective agreement language, the practice in an industry or the workplace, taking into account how similar grievances have been handled in the past, and supplying reasons for a decision. A union may weigh the credibility of the grievor and potential witnesses in reaching its decision. In cases of discipline or dismissal, a union should consider mitigating circumstances and whether the punishment fit the crime. A legal opinion is not required but, if obtained, may be considered as some evidence that the union took a reasoned view of the grievance.

66 Typically where a union gives reasons for its decision it will not be arbitrary. Although it is possible for a union to consider a matter and give "reasons" for rejecting a grievor's position that are so unresponsive to the topic or so divorced from reason that they amount to arbitrariness, it is rare.

67 A reasoned judgment may involve balancing the interests of the bargaining unit members. The Board recognizes that it may be impossible for a union to satisfy all the

employees it represents and that there are competing interests among bargaining unit members on issues such as seniority.

(iii) Union must not carry out representation with "blatant or reckless disregard"

68 If the union does decide to proceed with the grievance it must do so in a non-arbitrary manner. A union which demonstrates blatant or reckless disregard for the interests of an employee in carrying out an employee's representation, will be guilty of arbitrary conduct within the meaning of Section 12.

69 However, that does not mean it is a violation of Section 12 for a union to make a mistake or to handle a matter poorly. Typically, unions must handle a large volume of employee issues with the limited resources provided by members' dues.

70 As well, unions are not law firms. Unions are not expected to meet the standards required of a lawyer in respect to either procedural or substantive matters. It is only when the alleged carelessness of a union reaches the level of blatant or reckless disregard for the employee's interests that the union can be said to be misusing its exclusive bargaining agency and acting arbitrarily within the meaning of Section 12.

3. The Role of the Board under Sections 12 and 13

71 If we were to paraphrase the most common misconception of Section 12, it would be: "If you are not happy with what your union is doing, make a complaint to the Board and they'll look into it." In the previous section of this decision, we have addressed the misconception inherent in: "If you're not happy with what your union is doing". It should be evident from the above analysis concerning the scope of Section 12 that the Board does not have jurisdiction to entertain complaints from employees about what they perceive as poor service from their unions: complaints about rudeness or delay in replying to phone calls or correspondence. Those are matters for the union's internal complaint process or for consideration when the leadership of the union local runs for re-election. We hope we have made clear that there is a vast difference between unhappiness with the union and the Board's jurisdiction under Section 12.

72 In this next section, we hope to correct the misconception: "make a complaint to the Board and they'll look into it". The Board is not a government agency that investigates unions. It is an independent and impartial adjudicative body like a court. If someone alleges a party has violated the Code, and wants to obtain a remedy for that violation, it is up to them to establish that the Code has been violated. It is up to them to make their case.

73 While the Board is an adjudicative body like a court, its procedures are less formal than a court's. Particularly with respect to Section 12, the Board tries to be accessible to people who are unfamiliar with the legal system. Thus, the Board has prepared a Section 12 complaint form which prompts complainants to provide the information necessary to establish their case. It may be that some complainants

misconstrue this as an indication that not much is expected of them -- they simply need to "fill out a form". The word "complaint" may also cause some misimpression. It may lead some to believe that they need only communicate the fact that they feel an injustice has been done to them. However, a "complaint" under the Code is the document that sets out the facts upon which the complainant intends to rely in proving his or her case that the Code has been violated.

74 The Board's written materials for Section 12 complainants emphasize that applicants must set out all the relevant facts concerning their complaint. A large proportion of complainants continue not to do so. Even when the Board's Deputy Registrar and Information Officer call or write complainants to indicate they must set out the facts in more detail, the response is often inadequate. Complainants seem to misunderstand the intent of this request for more information. Rather than seeing it as an attempt to help them understand what is required and provide the facts they need to make their case, complainants appear to assume that the Board wants the details as some kind of bureaucratic requirement.

75 We do not intend these remarks to be critical of unrepresented complainants. Section 12 complainants are not expected to be lawyers or labour relations practitioners. They are employees in different endeavours, and their knowledge and experience is in other fields. However, if they wish to establish a violation of Section 12 of the Code, they have a legal task in front of them.

76 When employees make a Section 12 complaint to the Board, they are asking the Board to adjudicate that complaint and to make a legal determination in their favour. The initial determination which the Board must make is whether the *facts alleged* establish a violation of Section 12. The Board cannot decide that a union violated Section 12 simply because the complainant says the union was "arbitrary" or "discriminatory", "did nothing for me", "disregarded my interests", or "acted in bad faith".

77 Rather, the complaint must show what happened, when it happened, how it happened, who said or did what and what aspects of the conduct are alleged to be arbitrary, discriminatory or in bad faith. If the facts set out in the complaint do not, by themselves, establish a violation of Section 12, the complaint should be dismissed: Section 13(1)(a) (see para. 8 above).

78 Consequently, the facts set out in a Section 12 complaint should include the relevant details, such as the dates each event occurred. For example, if the complaint alleges "three separate times I was told by the union my seniority did not entitle me to the job", for each separate occasion the complaint should say when and where this was said, who said it, and what was said as exactly as possible. If certain details are unknown, such as dates, the complainant should do his or her best to specify. The more important the particular allegation is to the complaint, the more critical it is that details of it should be provided. The complainant must also attach copies of any documents that are relevant to the situation, including any letters from the union explaining its actions or its decision.

79 The Board recognizes that people are unlikely to announce that they have made a decision based on improper factors. In that sense, there may be no admission or "smoking gun". However, if someone reasonably believes a decision has been made based on improper factors, there must be facts that form the basis for that belief. Those facts must be set out in the complaint. The Board will draw inferences from those facts where it is reasonable to do so.

80 We also note that the fact that a complaint is successful does not necessarily mean that the Board will order the remedy the complainant requests. It is up to the panel of the Board that determines the complaint to decide what remedy is appropriate in the circumstances. It is generally a remedy that puts the complainant back in the position he or she would have been in if the union had not violated Section 12. The union may be directed to consider certain information, get a legal opinion, or to take the complainant's grievance to arbitration. The Board does not grant a complainant's grievance against the employer as the result of a Section 12 complaint.

81 We turn now to describe the remainder of the process if the complaint establishes an apparent contravention of Section 12 and therefore passes the threshold in Section 13(1)(a). If this occurs, the union and employer will be invited to file a written submission in response to the complaint, and the complainant will then be invited to file a final reply.

82 The final reply submission is the complainant's opportunity to address any new matters that are raised in the union's or employer's submissions. It is not an opportunity to simply add to the complaint, or to raise other new issues or allegations that could have been included in the original complaint. Portions of the final reply that do not arise from matters raised in the union's or employer's submissions may be disregarded. This is another reason why it is important to put all relevant allegations in the original complaint: it may not be possible to introduce them later, because the union and employer will not have had a chance to respond.

83 If the union or employer have alleged facts in their submissions that the complainant believes are untrue or inaccurate, it is important for the complainant to address that in reply. That is primarily what the final reply is for. The reply should specifically set out which facts alleged in the respondents' submissions the complainant believes are inaccurate and why (i.e., what is an *accurate* statement of the fact(s) in question). That is because the submissions (the complaint, the respondents' submissions, and the complainant's final reply submission) determine what the issues are. If facts are alleged in the respondents' submissions and not disputed in the complainant's reply, those facts are not in dispute.

84 An oral hearing by the Vice-Chair assigned to adjudicate a Section 12 complaint will typically be held only where there are disputed material facts. Section 13 (1)(b) expressly requires that the Board once again determine whether the complaint should be dismissed. The decision to dismiss the complaint or proceed to a hearing at this point is to be made on the basis of the submissions received from the parties. If the complaint does not establish an apparent contravention of Section 12 after the

respondents' submissions and complainant's final reply, it should be dismissed: Section 13(1)(b)(ii).

85 A "material" fact is one that is important in determining the outcome of the case. A hearing is not held simply because facts are disputed if it is not necessary to resolve the disputed facts in order to determine the outcome of the case. However, where there is a disputed fact that the Vice-Chair finds *is* critical to determining the outcome of the case, then typically an oral hearing is held where the parties call witnesses who give evidence and are subject to cross-examination. The Vice-Chair will resolve the disputed fact(s) based on the evidence.

86 Many Section 12 complaints do not require the resolution of disputed facts and are therefore decided by Vice-Chairs based on the written submissions. This is another reason why it is necessary to set out the relevant facts in the complaint.

87 The above describes the typical process, but the Board may employ other processes in adjudicating Section 12 complaints, including Alternative Dispute Resolution (ADR) processes, such as Settlement Conferences.

88 It should be kept in mind that ultimately, if a union has directed its mind to the relevant information, based its decision on relevant factors, and there is no evidence of discrimination or bad faith, then regardless of the degree of skill or strategy that goes into making the complaint, it will inevitably be dismissed at one stage or another. That is because the union did not violate Section 12.

4. Other Points about Section 12

89 What we have said here does not represent a shift in the Board's jurisprudence. We have simply attempted to explain and clarify these concepts. The Board's prior jurisprudence -- which has been consistent since *Rayonier, supra* -- continues to apply.

90 We note, however, that the Board's interpretation of Section 12 is consistent with the amended purposes of the Code. An enlarged interpretation of the Section 12 concepts would undermine the union's ability to control its resources and actions and, ultimately, would be detrimental to the rights of employees: Section 2(a).

91 Furthermore, an interpretation of Section 12 that caused unwarranted litigation in the workplace, i.e., litigation inconsistent with the majority rule, democratic principle at the heart of the Code, in our view would fail to foster the employment of workers in economically viable businesses: Section 2(b). It would improperly focus critical, limited resources of the parties on a non-productive, even counter productive, exercise. It may also thereby discourage the practice and procedure of collective bargaining between employers and trade unions as the system itself could be seen as inefficient and thereby brought into disrepute: Section 2(c). It would also not encourage cooperative participation between employers and trade unions in resolving workplace issues: Section 2(d). Nor would it promote conditions favourable to the orderly, constructive and expeditious settlement of disputes: Section 2(e).

92 We add that it is apparent that poor communication is often the cause of many Section 12 complaints. Where reasonable efforts are not made to communicate with employees in a timely way, or when a union abandons a grievance without discussing it with the grievor, it may not provide grounds for a Section 12 complaint, but it frequently results in one being filed. Complainants too often arrive at the Board with a sense that their complaints have not been heard by the union. Clear and timely communication with grievors may avoid such Section 12 complaints.

93 Similarly, it would generally be helpful for a union to put the explanation for its decisions in writing. As noted above, this may assist the Board in assessing the complaint at the Section 13(1)(a) stage, before requiring a response from the union or its counsel. The Board will administratively require that a Section 12 complainant produce this document if it exists with his or her application.

94 Employees who are considering making a Section 12 complaint should also understand that it is usually to their advantage to cooperate with the union in the meantime. This does not mean they should refrain from telling the union about their dissatisfaction -- in fact, it is generally preferable that they speak up at the earliest opportunity and tell the union specifically what they think is wrong. However, the Board often sees Section 12 complaints where complainants have given the union an ultimatum concerning their representation: e.g., they will not cooperate with the union unless it adopts the particular strategy they advocate. This is almost always a mistake. It should be evident from the discussion above that the union has a wide latitude in choosing the appropriate strategy -- it is not up to the individual employee to dictate. It would be a rare situation where any other strategy than that advocated by the grievor would necessarily be arbitrary.

95 The same rationale applies to settlement agreements. The grievor does not have a veto over whether or not the grievance should be settled, or what the terms of the settlement ought to be. It is of course best for the union to consult the grievor before agreeing to a settlement, though it is not necessarily required. Ultimately, however, whether to accept the settlement agreement is for the union to decide.

96 There are two further requirements we think are sufficiently important to mention. The first is that the complaint must be filed in a timely manner. If there is unreasonable delay in filing the complaint, it will be dismissed, unless there is a compelling explanation for the delay.

97 An acceptable explanation may be that the complainant was waiting for the union's internal appeal process regarding the matter to be completed (if one is available). This brings us to the second requirement, which is that a complainant must exhaust internal remedies. If the union has internal avenues of appeal then the complainant should first use these -- unless it would be impractical or ineffective to do so -- before filing a Section 12 complaint. We have set out below the excerpts from the Board's Practice Guideline regarding the Duty of Fair Representation which discuss these two requirements:

Q: Is there a time limit for filing a Section 12 complaint?

A: A complaint under Section 12 must be filed (in an acceptable form) within a reasonable time after the events that are the subject of the complaint. If not, the complaint may be dismissed on the basis of undue delay. What length of time is "reasonable" depends on the circumstances, but the Board has often said it is "measured in months, not years". For example, a complaint filed within two months is generally acceptable; a delay of several months may cause the complaint to be dismissed; and a complaint filed a year after the event will generally be dismissed unless very compelling reasons for the delay are provided. Where there is significant delay (i.e., more than 3 or 4 months) the complaint should include the explanation for the delay (e.g., if the complainant was pursuing the union's internal appeal process).

Q: Is there anything else I need to do before making my application?

A: You must complete any internal union procedure which is available to you. For example, you may be required to file a grievance. You should also check to see if your local union has an appeal procedure. Your national or international union may hear appeals from decisions by local unions. That process must be completed before you file a Section 12 complaint. The only exception is where you can show the Board that an internal union appeal is not practical because of the length of time you would have to wait, or because of costs such as travel costs which you would have to meet, or there is a good reason to believe it cannot provide you with an appropriate remedy.

G. The Board's Renewed Approach to Section 13

98 In our view, a widespread misunderstanding of the Section 13 complaint process by unrepresented Section 12 complainants, and the Board's sympathy for that predicament, may have operated to challenge the Board's ability to fulfil its statutory mandate under the Code in two respects. First, complaints may have passed through Section 13 that have not satisfied the threshold of "sufficient evidence" of an "apparent contravention". The Board, likely on the basis that many complainants do not understand their responsibilities in the process, may not have dismissed the complaint (as a literal reading of Section 13 would require), but instead invited a response from the union and employer in order to get a better understanding of the situation.

99 While trying to be accessible to individuals who are unrepresented is very important, simply passing these types of complaints through to the next step without fully engaging the Section 13 requirements is, in our view, inconsistent with the legislative emphasis of that section. Despite the Board's existing statutory ability to dismiss *any* complaint or application at any time for failure to make out a *prima facie*

case (Section 133(4)), the Legislature has set a special mandatory threshold for Section 12 complaints. It has established a minimum that must be done before respondents are put to the difficulty and expense of being engaged in litigation. The Legislature has in fact emphasized the requirement of sufficient evidence of an apparent contravention at two points in the Section 13 process for Section 12 complaints. That legislative policy should be given effect.

100 Experience has also tended to cast doubt on whether passing such complaints through the Section 13 threshold is, ultimately, beneficial to complainants. In our experience the vast majority of complaints are still dismissed, but after a full process of exchanging written submissions, potentially holding a hearing or engaging in other processes with the parties, and all the cost and delay associated with this.

101 This leads us to the second way in which the Board's ability to fulfil its statutory mandate has been challenged: delay. The typical Section 12 complaint begins with the filing of the complaint form and some of the relevant documents. Time then passes while the Board's staff prompt the complainant to provide additional documents or details. The file then goes to a Vice-Chair for the first Section 13 determination. If the Vice-Chair decides that Section 13 threshold is satisfied, submissions are invited from the respondents, followed by a reply from the complainant. A Settlement Conference may be held. If there is no Settlement Conference (or if it is unsuccessful), the file will be adjudicated.

102 In many cases there is no need for an oral hearing and the complaint is then adjudicated from the written material on file. What often occurs, however, is that the complainant's allegations, information and documents are not set out in an organized fashion. The Vice-Chair must review the information and organize it into a coherent narrative. The Vice-Chair then writes a decision which sets out the narrative and adjudicates it against the jurisprudence relating to Section 12. If the complaint is unsuccessful, the decision explains in a comprehensive fashion why each of the complainant's allegations do not fall within the scope of Section 12. This is so even where, as often can be the case, the allegations are not in reality close to establishing a violation of Section 12. The whole process takes, on average, six to eight months.

103 We appreciate that much of this process stems from a desire to make the Board's processes accessible. As well, the lengthy decisions dismissing unmeritorious Section 12 complaints are directed at enabling the complainants to understand why Section 12 does not provide a remedy for their assertions.

104 In our view, however, complainants would be better served by a quicker decision that allows them to get on with their lives with some certainty. While their complaint remains outstanding, the complainant may experience considerable uncertainty and anxiety. Depending on the issue that is at stake, this uncertainty may even affect a complainant's life beyond his or her employment.

105 The outstanding complaint may also cause uncertainty for the union and the employer (whose current arrangements may ultimately be undone if the complaint is

successful), and sometimes for other employees who could similarly be affected by the complaint if it is successful and the complainant's grievance is taken to arbitration. It also may have a negative effect on relations between the complainant and the union upon whom he or she may still have to rely for representation.

106 Delay is generally contrary to good labour relations and this applies to Section 12 complaints as well as other matters under the Code. The Board is required under the Code to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes: Section 2(e). Looked at from this perspective, the Board's current Section 13 practices may leave room for improvement in that regard.

107 The Board will therefore take steps to streamline its Section 12/Section 13 processes. First, the mandatory requirements in Section 13 of the Code will be more strictly applied and focused upon.

108 Second, by providing a clear explanation of the scope of Section 12 in this decision, we hope to largely eliminate the need for lengthy decisions in response to each complaint. As a part of this, Section 12 decisions may no longer provide a summary of the factual background, particularly where the case has been decided under Section 13 on the basis of the Section 12 application itself or the written submissions of the parties.

109 Third, if a complaint discloses an apparent contravention of Section 12 and therefore passes the Section 13 thresholds, wherever possible it will stay with the same Vice-Chair for adjudication on the merits.

110 In order to assist these processes, we provide the following specific, concrete guidelines regarding the general requirements under Section 12 of the Code. In general, Section 12 requires a union to:

1. talk to the grievor and learn what the grievor is complaining of;
2. investigate, for example:
 - obtain information from those involved;
 - construct a sequence of events from the information obtained; and
 - offer the grievor a chance to respond;
3. make a reasoned decision, for example:
 - consider the collective agreement language (and potentially the practice in the industry or the workplace);

- take into account how similar grievances have been handled in the past; and
 - provide to the grievor the reasons for the union's decision; and
4. proceed with the grievance (if a decision is made to do so) in a manner which is not in blatant or reckless disregard of the grievor's interests (all the while remembering that the union must represent the bargaining unit as a whole, not simply the interests of the grievor).

While these are the general or most usual requirements, the actual requirements in a particular matter will depend on the facts in that case.

111 In conclusion, we believe that complainants, the other parties, and labour relations in the province are better served by more efficient Section 12 decisions. Along with Section 12 complainants receiving more timely decisions, unions and employers, for their part, are entitled by Section 13 not to be engaged in Section 12 litigation unless the complaint discloses sufficient evidence to establish an apparent contravention. The Board will direct its efforts toward these ends.

H. The Present Matter

112 In light of the above, Judd will be contacted by administrative staff at the Board and asked to respond to the specific, concrete guidelines above and ensure that he has provided the Board with any and all documentation from the Union in respect to these matters. In accordance with the Section 13 procedure which we have set out, the complaint will then be reviewed in order to determine whether it discloses a case that a contravention of Section 12 has apparently occurred (Section 13(1)(a)).

IV. SUMMARY AND CONCLUSION

113 A union's exclusive bargaining agency gives it the right to make all decisions concerning a collective agreement on behalf of the employees. Matters such as whether to proceed with a grievance, whether to settle or drop the grievance, and whether to take the grievance to arbitration are all decisions for the union to make. When a union decides not to proceed with a grievance because of relevant workplace considerations -- for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit -- it is doing its job of representing the employees.

114 Section 12 prohibits a union from representing an employee in the bargaining unit in a manner that is arbitrary, discriminatory, or in bad faith. To meet its duty, the union must ensure it is aware of the relevant information when making a decision concerning an employee's representation. Its decision must be based on reasoned judgment and not on improper factors. Lastly, it must carry out an employee's representation in a manner that does not show blatant or reckless disregard for the employee's interests. If a union does these things, it has not violated Section 12. The

fact that a complainant may disagree with a union's reasons for dropping or settling a grievance does not demonstrate a failure to consider the relevant circumstances, nor blatant or reckless disregard.

115 In order to advance past Section 13, a Section 12 complaint must disclose sufficient evidence to establish that a contravention of Section 12 has apparently occurred. If it does not, the complaint will be dismissed. The Board will endeavour to give effect to the legislative direction in Section 13 and render quicker, shorter decisions that allow the parties to get on with their affairs with certainty.

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