BLACK GROPPER
LABOUR & EMPLOYMENT LAWYERS
1640 - 401 West Georgia Street
Vancouver, BC V6B 5A1

Allan E. Black, Q.C.* | S. Michelle Blendell | Shanti P. Reda | Jessica L. Burke | Pamela R. Costanzo

TRADE UNION RESPONSIBILITY UNDER SECTIONS 13 & 14 OF THE *HUMAN RIGHTS CODE*

Shanti P. Reda
Stephanie T. Mayor

Black Gropper

INTRODUCTION

Trade unions are no strangers to the *Human Rights Code, R.S.B.C.* 1996, c. 210 (the "*Human Rights Code*"). Whether through the grievance or human rights process, trade unions are often strong advocates for their members with respect to human rights issues.

However, trade unions are not immune from exposure to liability under the *Human Rights Code* themselves. This paper will focus on the latter, more rarely discussed issue, namely the responsibilities and liability of trade unions pursuant to the *Human Rights Code*. We will not address the trade union's role and responsibility as "employer" as such is beyond the scope of this paper.

OVERVIEW

Sections 13 and 14

There are two sections in the *Human Rights Code* pursuant to which a trade union generally risks exposure to liability for its actions (or inactions): Sections 13 and 14. It should be noted that a trade union may simultaneously face a duty of fair representation complaint under Section 12 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the "*Labour Relations Code*"), and a complaint under the aforementioned sections of the *Human Rights Code*, with respect to the same or similar facts. At the same time, they could be advocating for the same member who is pursuing a human rights complaint against them, for example by representing the member in an ongoing grievance.

Section 13 states that a person (which includes a union) must not:

a. Refuse to employ or to continue to employ a person; or

b. Discriminate against a person regarding employment or any term or condition of employment;

based on a prohibited ground of discrimination. (emphasis added)

Section 14 states that a trade union, employers' organization or occupational association must not:

a. Exclude any person from membership;

b. Expel or suspend any member; or

c. Discriminate against any person or member;

based on a prohibited ground of discrimination.

Although the distinction between s. 13 and s. 14 is not always clear, generally speaking:

a. Liability for a trade union under s. 13 arises when the alleged discrimination touches on the employment relationship; whereas

b. Liability under s. 14 arises when the alleged discrimination concerns the complainant's membership in a trade union.

The Human Rights Tribunal (the "Tribunal") has described this difference as follows:

> When an allegation of discrimination is made against a union in an organized workplace, a union may be found liable under s. 13 or s. 14, or both. For example, if the union negotiates a provision in a collective agreement that has a discriminatory effect on the complainant or impedes the reasonable efforts of an employer to fulfill its duty to accommodate a complainant, it will contravene s. 13 of the *Code* but not s. 14 ... If the union discriminates against a member with respect to the internal operation of the union in a manner that does not extend to the relationship with the external employer, then it will contravene only s. 14…
>
> Generally, s. 13 is engaged where a union discriminates against a member in a manner that touches on the employment relationship between the member and the employer. Where the union discriminates against a member as a member rather than as an employee, s. 14 will apply. The two provisions are not mutually exclusive…
>
> ***J.J.* v. *Coquitlam School District No. 43***, [2007] B.C.H.R.T.D. No. 448 ("***J.J.***"), at para. 112, quoting from ***Ferris* v. *Office and Technical Employees Union, Local 15*** [1999] B.C.H.R.T.D. No. 55. ("***Ferris***"); emphasis added

Prima Facie Discrimination

As with other sections of the *Human Rights Code*, the Tribunal will engage in a 2-step process to determine whether a trade union has violated s. 13 or s. 14:

a. *Prima Facie* Case of Discrimination: The complainant (in this case, the member(s) who file(s) a human rights complaint) first has the onus to establish a *prima facie* case of discrimination against the respondent (the person(s)/organization(s) named in the complaint); and

b. Defences: Only if the complainant is successful in this first step will the onus shift to the trade union to establish any defence(s) it wants to rely on, including, *inter alia*, the defence of accommodating to the point of undue hardship.

This paper will focus on the first step – how and when a trade union might expose itself to having *prima facie* discriminated against a member contrary to s. 13 and s. 14.

In s. 13 and s. 14 complaints, the Tribunal applies the traditional 3-part test to determine whether a complainant has established a *prima facie* case of discrimination:

a. Is the member a part of a group protected under one or more of the enumerated grounds?

b. Has the member suffered some adverse treatment with respect to her membership in a union?

c. Is it reasonable to infer that the adverse treatment was because of, or related in some way to, a prohibited ground of discrimination?

   See, for example, ***Reekie, supra,*** and ***Waters v. Coca-Cola Bottling Co.***, [2005] B.C.H.R.T.D. No. 557.

The burden rests on the complainant to prove a *prima facie* case, which the Tribunal describes as "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer" (***Cheung v. International Longshore and Warehouse Union, Local 500***, [2009] B.C.H.R.T.D. No. 63 ("***Cheung***")**,** para. 64).

While this test has not changed, in at least a few cases the Tribunal has taken into account the entire context, including competing public policy concerns and/or values (such as a complaint concerning the internal process of a trade union), as discussed below.

Defences to Prima Facie Discrimination

Although this paper focuses on *prima facie* discrimination, numerous potential defences to a complaint may also be open to a trade union depending on the precise factual scenario.

Section 13(4) states that a statutory exception to this is a refusal, limitation, specification or preference based on a bona fide occupational requirement (a "BFOR"). Interestingly, Section 14 does not explicitly refer to the availability of the statutory BFOR defence. However, it is clear that although the Tribunal recognizes its absence (***Miller v. BCTF (No. 2),*** [2009] B.C.H.R.T.D. No. 34 ("***Miller***"), para. 39), the Tribunal has had no difficulty in imputing the availability of

such a defence (***Reekie v. International Longshore and Warehouse Union Local 400***, [2008] B.C.H.R.T.D. No. 336 ("***Reekie***"), para. 68).

For example, the union may argue a BFOR on the basis that the accommodation would negatively impact other members' seniority, as was argued in ***Sauve v Coast Mountain Bus Company Ltd. and CAW Locals***, [2006] B.C.H.R.T.D. No. 81, para. 28.

Other defences may include delay or a failure of the complainant to participate in the accommodate process, to name only a few examples.

SECTION 13: PARTICIPATING IN A DISCRIMINATORY WORK RULE OR IMPEDING ACCOMODATION

Scope of Section 13

It is important to keep in mind that a trade union wears different hats. In different scenarios, they can face liability under s. 13 both as an employer (when interacting with its employees) or as a trade union representative (when interacting with an employer or its members in this capacity). In the former scenario, the same principles would likely be applied when analyzing whether a trade union, acting as employer, has violated s. 13 as with any other employer.

However, in the latter capacity, there is a separate body of jurisprudence regarding the role and responsibility of trade union's under s. 13.

The leading case in this area is ***Graham v. Richmond School District No. 38***, [2005] B.C.H.R.T.D. No. 520 ("***Graham***"). In ***Graham***, the complainant alleged that her union had failed to properly represent her with respect to a duty to accommodate issue. The Tribunal summarized the two ways in which a trade union (in its trade union role) could generally become party to discrimination under s. 13 (thus triggering a duty to accommodate to the point of undue hardship) as discussed in ***Central Okanagan School District No. 23 v. Renaud,*** [1992] S.C.R. 970 ("***Renaud***"), paras. 53-55:

a. By participating in the formulation of a work rule that is discriminatory itself or has a discriminatory effect on the complainant. For example, this might apply if a union participated in or agreed to a discriminatory collective agreement provision or work rule/policy; and

b. By impeding or blocking the reasonable efforts of the employer to accommodate the complainant. For example, this might apply if a union blocks employers' efforts to accommodate by arguing that seniority should prevail, rather than the employer's duty to accommodate.

In ***Renaud***, the Tribunal held that the complainant's allegations did not fall into either of these categories. Rather, her allegations related to the trade union's representation of her in her dealings with the employer. Absent exceptional circumstances, a union's alleged failure to represent its members' interests adequately cannot ground a complaint under s. 13 (para. 57). The Tribunal noted that the complaint would have been more appropriately dealt with under s. 12 of the *Labour Relations Code* or s. 14 of the *Human Rights Code*. As a result of the complainant abandoning its s. 14 complaint, the Tribunal dismissed the complaint against the union.

Ferris, supra, is one of the few cases where the "exceptional circumstances" noted in ***Graham***, ***supra***, were found to exist. In ***Ferris***, a trade union was named as a respondent under both s. 13 and s. 14 for alleged representational inadequacies. In ***Ferris***, the complainant was a transsexual who alleged that her union discriminated against her with respect to its response to the employer's handling of a complaint concerning her use of the women's washroom and the events that flowed from it. The Tribunal dealt with a complaint under both sections, finding that the complaint not only challenged the adequacy of the union's representation of the complainant as a member, but the union's role in a series of events that affected the complainant's employment (para. 81).

In ***Graham***, the Tribunal elaborated that this case was exceptional as the union had "departed so far from even a minimal standard of responsibility," went "far beyond a failure …to represent a member's interest adequately" and that the union had treated the complainant "worse than it would have treated another member in the circumstances" (para. 58). The Tribunal has subsequently confirmed this as a very exceptional case (***Allen v. Communications, Energy and Paperworkers' Union of Canada, Local 456***, [2008] B.C.H.R.T.D. No. 277 ("***Allen***"), paras. 43-45).

Another leading case interpreting the scope of s. 13 is ***Dow v. Summit Logistics and RWU Local 580***, [2006] B.C.H.R.T.D. No. 158 ("***Dow***"). In ***Dow***, the employer terminated the complainant because of excessive absenteeism. The complainant's union filed a grievance on his behalf, but ultimately decided against proceeding to arbitration. The member filed a human rights complaint against the union and the employer, which included various allegations against the union. The Tribunal dismissed parts of the complaint on the basis that the complainant failed to particularize the allegations in any meaningful way. Allegations "framed at a high level of generalization, without reference to specific alleged facts" will not sustain a human rights complaint of discrimination on the basis of a disability (para. 26). These included general allegations without any specific facts that the union impeded or blocked his return to work, that the union failed to assist accommodation (para. 56), that the union made discriminatory statements about the complainant (para. 63), and that the union departed from standards of responsibilities towards disabled employees and union members (para. 66).

In reviewing the applicable law, the Tribunal recognized that "allegations of mere inadequacy of representation will not establish union liability under section 13" (para. 33). Rather, there is a "high standard for liability to be imposed" under s. 13 where the union must have actually "blocked or impeded the employer's efforts" (para. 33).

The Tribunal also dismissed allegations against the union that an attendance management program (the "AMP") was discriminatory and had a discriminatory effect on the complainant. The Tribunal held that this part of the complaint had no reasonable prospect of success pursuant to s. 27 (1)(c) of the *Human Rights Code*. The evidence suggested that the AMP was a unilateral employer program, and the complainant could not identify any article of the collective agreement that dealt with the AMP or was in fact applied to him. The Tribunal also dealt with parts of the complaint under s. 14, which will be discussed below. However, the Tribunal accepted that if the union was the joint author of the AMP or relevant collective agreement provisions (which were discriminatory or had a discriminatory effect) then the union would be liable under s. 13 (para. 36).

Another significant case in determining the scope of s. 13 is ***Daley v. British Columbia (Ministry of Health),*** [2007] B.C.H.R.T.D. 170. In this case, a trade union applied to dismiss a complaint against it by one of its members. The complainant primarily alleged that certain articles of the collective agreement discriminated against him and that the union was a co-author of these provisions. In discussing whether the complainant had any reasonable prospect of establishing that the union discriminated against him, the Tribunal noted that the complainant failed to describe what the provisions said or did. As the provisions were on their face neutral and not inherently discriminatory, there was no basis to find the union in contravention of s. 13 (paras. 37-46). The Tribunal recognized that although the provisions could be applied in a discriminatory manner, that was an issue concerning the employer's actions and not the question before the Tribunal (para. 41).

The complainant also made a number of highly generalized allegations against the union, including that the union made discriminating statements, departed from standards of responsibility, and blocked and impeded the employer's accommodation efforts (notably contradicting the complainant's assertion that the employer failed to provide any accommodation). The Tribunal applied ***Dow*** and dismissed the allegations on the basis that they lacked any particulars (para. 30). The complainant also alleged certain representational issues with respect to the union's decision not to pursue the complainant's grievance, which will be discussed below.

As a consequence of these decisions, trade unions have applied and successfully dismissed a variety of complaints raised against them pursuant to s. 13 (see ***Allen*** and ***Harborne v. B.C. (Ministry of Attorney General – Sheriff Services) and BCGEU***, [2010] B.C.H.R.T.D. No. 205).

Of note, on at least one occasion, the Tribunal has ruled that if an employee is terminated for a non-discriminatory reason (ie., a prohibited ground of discrimination is not "a" factor in the decision to terminate), s. 13 does not apply to any subsequent events that occur on the basis that the employment relationship has ended (***Polly v. Royal Canadian Legion No. 54***, [2006] B.C.H.R.T.D. No. 430, para. 49). Although this case did not involve a complaint against a union *per se*, it follows that the Tribunal would not likely find a union in contravention of s. 13 for events occurring subsequent to a non-discriminatory termination.

Adding a Trade Union as Respondent

Another issue that may arise with respect to complaints under s. 13 is the possibility that the employer will apply to add the trade union as a respondent even where the complainant does not wish to do so. Under s. 27.3(2)(k) and s. 27.3(3) of the *Human Rights Code*, the Tribunal has the jurisdiction to add a respondent.

The seminal case on this issue is ***Matuszewski v. Min.of Competition, Science and Enterprise***, [2004] B.C.H.R.T.D. No. 46. In this case, the complainant alleged that he was not credited with seniority while on long-term disability and this amounted to discrimination under the *Human Rights Code*. The employer applied to add the complainant's union as a respondent on the basis that the issue really concerned a provision in the collective agreement, which necessarily involved the union.

The Tribunal outlined the following three criteria relevant to determining whether to grant the employer's application:

a. Whether there were facts outlined in the complaint form or particulars of allegation which made it apparent that the union may have contravened the *Human Rights Code*;

b. Whether the natural justice concerns of the parties would be better served by adding the union as respondent; and

c. Whether adding the union would facilitate a timely resolution of the case.

The Tribunal placed considerable importance on the wishes of the complainant under the natural justice and timeliness concerns, noting that the wishes of the complainant would likely only be outweighed by natural justice concerns that could not be addressed any other way and where a remedy sought could not be achieved without adding the union. As a result of the complainant's objection to the application and the absence of any other significant factors, the Tribunal dismissed the application. A similar conclusion was reached in ***Lund v. Vernon Women's Transition House Society***, [2004] B.C.H.R.T.D. No. 68.

However, the Tribunal has also granted such applications in other cases. In ***Stevens v. British Columbia Rapid Transit Co.***, [2006] B.C.H.R.T. D. No. 530, two unionized employees filed a human rights complaint against their employer with respect to a failure to accommodate. The Tribunal noted that if the complaint was successful, shift schedule changes would be necessary to accommodate the complainants and this would impact the collective agreement and other members of the union. The Tribunal also recognized that on the basis of the facts alleged in the complaint, it was possible that the union may have contravened the *Human Rights Code*. As a result, the Tribunal added the union as a respondent to the complaint.

In exceptional circumstances, the Tribunal has itself added a trade union as a respondent (see ***Cominco Ltd. (Certain Kimberly Operations Employees) v. Cominco Ltd.***, [2001] B.C.H.R.T.D. 46, para. 70).

More recently, the Tribunal has emphasized the role of the facts contained in the complaint itself in determining whether to add the trade union as respondent. In ***Guy v. School District* No. 44**, [2008] B.C.H.R.T.D. No. 17, the complainant was a retired teacher who sought subsequent employment as a substitute teacher. He alleged that the employer's practice of giving priority of work opportunities to regular teachers over those who were retired discriminated against him with respect to employment on the basis of age, contrary to s. 13. The employer applied to add the trade union as a respondent on the basis that the union had agreed to the impugned practice. The union opposed the application and the complainant made no submissions.

The employer and the union diverged on whether the Tribunal could take into account facts that were not alleged by the complainant in his complaint (albeit raised by the employer respondent) in determining whether to add the union as a respondent. The employer relied on facts that were not alleged by the complainant that suggested the union may have violated the *Human Rights Code*. The union argued that the only relevant facts were those in the complaint. The Tribunal noted that such an application is not analogous to third party procedures set out in the courts. Rather, the Tribunal will look to the complaint as framed by the complainant:

> Regarding an application by a named respondent to add another entity as a respondent, I agree with the reasoning set out in *Matuszewski*. (para. 31) Of fundamental significance is the fact that it is Mr. Guy's complaint and it is up to him to frame it as he wishes. To look to allegations made by the NVSD against the NVTA, in the absence of any reference to the NVTA in Mr. Guy's complaint, is contrary to this principle.
>
> Section 17 of the *Administrative Tribunals Act*, S.B.C. c. 45, as amended, supports the view that complainants have control over their complaints.
>
> Paras. 20, 22 and 23; emphasis added

In ***Guy, supra,*** the Tribunal dismissed the application on the basis that there were no facts in the complaint to support any potential liability against the union.

Similarly, in ***Churchill v. Coast Mountain Bus Company*** (No. 3), [2008] B.C.H.R.T.D. 272, the employer applied to add the trade union as a respondent where the complainant filed a complaint against the employer for a discriminatory term of a Letter of Understanding entered into between the employer and the union. The Tribunal applied ***Guy***, ***supra,*** determining that there was no basis for liability against the union and therefore dismissing the application. What is particularly noteworthy about this case is that the complainant was seeking a full remedy that may have included apportionment of liability against the union. The Tribunal recognized that not adding the union would risk limiting the complainant's potential claim of damages. However, the Tribunal appeared satisfied with the union's willingness to rescind the Letter of Understanding and accommodate seniority adjustment if the complaint was successful (paras. 25-26).

SECTION 14: DISCRIMINATING WITH RESPECT TO MEMBERSHIP

The other section of the *Human Rights Code* that a trade union ought to be aware of is s. 14. Although the Tribunal has dealt with complaints under s. 14, the exact parameters of this section remain relatively vague. What is clear is that allegations that a trade union has discriminated in its representation of a member are generally framed under this section (***Dow***, para. 34).

A common complaint appearing to fall squarely within the scope of s. 14 is that a union has discriminated against the complainant by failing to pursue a grievance. In ***J.J.***, the complainant alleged that her union did just that. In determining whether the union violated s. 14, the Tribunal paid particular attention to the union's reasons. The Tribunal recognized that the complainant and the union had very different interpretations of the collective agreement. However, there was no basis to suggest that any part of the union's position was because of the complainant's sex, the prohibited ground upon which the complainant relied (para. 128).

The Tribunal held that the union's decision not to pursue the complainant's grievance was based on its interpretation of the collective agreement, which the Tribunal noted was non-discriminatory and consistent throughout. Rather than failing to represent the complainant, the union represented the complainant diligently by meeting with the complainant on numerous occasions and explaining the reasons for its position (para. 132).

In ***Dow***, ***supra,*** as discussed above the Tribunal analyzed the majority of the complaint under s. 13. However, the Tribunal considered two allegations more properly falling under s. 14: that the union did "nothing" to help [the complainant] during a termination meeting, and that the union's "decision not to pursue the grievance was 'predetermined'" (para. 68). The Tribunal emphasized that the *Human Rights Code* does not "provide a general springboard for assessing the adequacy of a union's representation of its members"; rather, the union "must have discriminated against its members in that representation" (para. 69; emphasis added).

In the circumstances, the Tribunal held there were no materials to substantiate a finding of discrimination by the union in response to the complainant's termination. This finding arose from the following facts: after the termination meeting the union asked for medical evidence that would allow the complainant to return to work and challenge the termination; the complainant provided this to the union, who in turn provided it to the employer; the union also filed a grievance with respect to the termination; and the union made the decision not to pursue the grievance when subsequently denied by the employer (paras. 70-72). The Tribunal commented that the complainant must have been disappointed about the union's decision but "…[w]hether the union was right or wrong in that decision is not for me to decide…" (para. 72). The fact that the union decided against pursuing the grievance was not enough to demonstrate that the union discriminated against him.

Similarly, in ***Daley***, ***supra,*** the Tribunal dealt with the complaint primarily under s. 13. However, the complainant's allegation that the union also discriminated in its representation of him was dealt with pursuant to s. 14. Specifically, the complainant alleged that the union had failed to grieve a number of issues and that the union refused to provide him help that he requested. The Tribunal dismissed this part of the complaint primarily on the basis that the complainant never in fact

requested that the union file a grievance with respect to his termination, and because despite numerous attempts by the union to contact him the complainant was generally unresponsive (paras. 55-56). The Tribunal noted that in order to be liable under this section, "more than merely inadequate or negligent representation must be established" (para. 57).

One of the few s. 14 cases that have proceeded beyond an application to dismiss is ***Reekie, supra***. In this case, the complainant alleged that the union discriminated against him on the basis of his political beliefs. His primary complaint related to the union's decision not to grieve his termination.

The basis for the complaint relied on one incident in which the complainant noticed a political party using the union's office for campaign activities. When the complainant raised this with the president of the union, the president stated that the union was not making any political contributions. The complainant was in a rival political party. The complainant alleged that the union ended his membership and did not grieve his termination as a result of the complainant's rival political affiliations.

The Tribunal held that the complainant had established a political affiliation and further held that expulsion from union membership and not having his termination grieved were adverse consequences. However, the Tribunal also found that the complainant at no time informed the union as to the details of his political affiliation and/or established that the union knew them by other means (para. 54). As a result, the complainant had not established that his political beliefs played any role in the union's decision to expel him and not to pursue a grievance on his behalf. The Tribunal dismissed the complaint, persuaded by the union's evidence that it chose not to pursue the complainant's grievance solely because it was out of time, and terminated his union membership as a result of the complainant's failure to pay dues for several months (paras. 46, 71).

Another issue that arose was the union's request for costs as it argued the complainant's allegations were merely an attempt to extract a monetary settlement from the union. In reviewing the Tribunal's jurisdiction with respect to costs pursuant to s. 37 (4) of the *Human Rights Code*, the Tribunal held that while the complainant's evidence was not credible, the Tribunal was not prepared to conclude that the evidence clearly indicated a calculated attempt to mislead.

The Tribunal has also dealt with complaints under s. 14 that go beyond allegations of a failure to pursue a grievance. In ***Miller***, the complainant, a teacher who was also a parent of two children who were students in the public school system, filed a complaint against her union for allegedly discriminating against her on the basis of family status by the operation of an internal union protocol.

The complainant had a son who was in a class taught by another teacher who was also a member of the complainant's union. The complainant was also the parent class representative to the Parent Advisory Committee for her son's class. The incident that led to the complaint involved the complainant sending an email to the parents of students in her son's class that implicitly criticized her son's teacher. Her son's teacher then filed a complaint with the union against the complainant alleging a breach of the *Code of Ethics* in that the complainant failed to follow a procedure by which teachers were expected to voice concerns about other teachers. The complainant subsequently filed a complaint alleging that this aspect of the *Code of Ethics* was in fact discriminatory.

The Tribunal first engaged in an analysis of the *prima facie* test given the decision of ***R. v. Kapp***, [2008] S.C.J. No. 42, paras. 10-15. The Tribunal found that in most cases, *prima facie* discrimination will not need to determine whether a breach has occurred in a purposive or substantive sense. However, such an analysis may be needed in some circumstances:

> In short, in order to establish a *prima facie* case of discrimination there must be discrimination in a substantive or purposive sense. In many cases, *prima facie* discrimination in this sense will be readily established on proof of the existence of adverse treatment related to a ground prohibited under the *Code*. In others, particularly those where competing valid public policies or values are in issue, something more may be required, and the *Law* factors, and the focus they bring on human dignity, may be of assistance in deciding whether *prima facie* discrimination has been established: see, for example, *Preiss* at paras. 234 – 235.
>
> Para. 15; emphasis added

The Tribunal found the required protocol in the *Code of Ethics* represented a limitation of a teacher's freedom of expression, and that the pending application with respect to her alleged violation of the protocol resulted in stress and potential penalties sufficient to establish adverse treatment. The Tribunal also found a nexus in that the union created the protocol and required it to apply to all member teachers, whether parents or not. As a result, the protocol had an adverse or differential effect on the complainant because of her status as parent.

However, as a result of the competing values involved, the Tribunal held that the complainant had to show that the *Code of Ethics* and its application to her "resulted in discrimination…in the substantive or purposive sense…considered in the specific context in which her complaint arises" (paras. 29-39). The complainant failed in this regard:

> The extent of the adverse effect is not, in my opinion, particularly substantial. That is because, provided they abide by the protocol established in Clause 5, teacher-parents remain free to criticize other teachers. They may speak their minds, and take effective steps to resolve any concerns they may have about their children's education, provided they do so in accordance with its terms. To the extent Clause 5 requires them to stay silent in the face of other parents' criticisms, that restriction is not closely related to their uniquely parental interest in acting in their own children's best interests, including, as they may think necessary, being critical of their child's teacher.
>
> The BCTF's policies, including the Code of Ethics and the procedures for addressing complaints under Clause 5, are the result of its internal democratic processes. Members of a trade union, who receive the benefits of membership, can reasonably be expected to abide by the results of the democratic decision-making of their union: see *Manning v. Sooke Teachers' Association and others*, 2004 BCHRT 281, para. 15.

> …
> In order to determine whether discrimination in the substantive or purposive sense has been established, the matter must be considered as a whole, including: the context in which Ms. Miller's complaint arose; the purposes for which Clause 5 of the Code of Ethics was created; the nature, extent and effect of the limitation on teachers' ability to criticize other teachers, and more importantly, the nature, extent and effect of the limitation on teacher-parents' ability to criticize their children's teachers; the nature of Ms. Miller's conduct giving rise to Mr. Kushner's complaint against her, and how closely related it was to her parental obligations; the hearing and appeal procedures adopted and applied by the BCTF; the range of penalties available to the BCTF where a breach of Clause 5 is found; and the actual penalties imposed on Ms. Miller for her breach.
>
> While Ms. Miller believes that Clause 5 should not apply to her at all in her communications relating to the teacher of her child, and is distressed both to have had a complaint filed against her, and to have been unsuccessful in her attempts to have that complaint dismissed, it cannot be said that her human dignity has been negatively affected by any of these events.
>
> Paras. 54-55 and 66-67; emphasis added

Thus, the Tribunal held that taking into account all these factors, the complainant had not established that the clause discriminated on the ground of family status in a substantive sense pursuant to s. 14 (para. 68). Although subsequent decisions have affirmed and applied this approach (***Vasil v. Mongovius and another (No. 3)***, [2009] B.C.H.R.T.D. No. 117, para. 391; ***J and J obo R v. B.C. (Ministry of Children and Family Development) and Havens (No. 2)***, [2009] B.C.H.R.T.D. No. 61, para. 245), this decision may be seen as somewhat at odds with subsequent cases that have commented that the *prima facie* test has not in fact changed (***Armstrong v. British Columbia (Ministry of Health)*** 2010 BCCA 56, para. 27).

However, as long as this case is not interpreted as adding another factor, the Tribunal's emphasis on examining all relevant contextual facts where there are competing values is entirely in line with human rights law. For example, the minority opinion in ***McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de L'Hopital general de Montreal***, 2007 SCC 4 took into account social policy considerations, such as the role of a union and employer, in determining whether a *prima facie* case existed (paras. 55-57).

While it is not clear that such this *prima facie* test will be followed in other cases involving trade union's, a trade union is well advised to emphasize the competing values involved in a complaint as a result of a trade union's unique role. As recognized by the Tribunal, membership in a trade union involves a number of unique trade-offs:

> Membership in a trade union involves, at its core, a number of trade-offs. In return for gaining the financial and other advantages of collective bargaining, members agree to be bound by the collective decision-making of the union. Instead of individual workers bargaining directly with their employer about the

> terms and conditions of their employment, their union is given the right, and the employer the obligation, to bargain with one another. The member also gives up the right, with some exceptions, notably a complaint under the *Human Rights Code*, to take individual action against their employer about workplace issues, and instead gains the right to use the grievance procedure established under the collective agreement. The member is, in turn, given the right to participate in the democratic decision-making of the union about the goals and objectives and workplace strategies which it will adopt. Members of a trade union are typically expected to honour the collective actions of their trade union, and unions are entitled, in accordance with their internal constitutions, to take actions to require them to do so. Modern labour legislation, and the labour relations boards set up to administer it, have been created to establish, maintain and oversee this complex system of interactive rights and responsibilities.
>
> ***Manning v. Sooke Teachers' Association,*** [2004] B.C.H.R.T.D. No. 281, paras. 15; emphasis added

Another example of how a trade union can be exposed to liability under s. 14 is exemplified by the decision of ***Cheung***, ***supra.*** In ***Cheung, supra,*** the complainant alleged that his union discriminated against him on the basis of his Chinese ancestry by improperly expelling him from the union in contravention of s. 14 (b) of the *Human Rights Code* and failing to represent him when he was charged for violating the union's constitution in contravention of s. 14 (c).

The complainant started a business whose employees belonged to another local of the union. The business competed with yet another business whose employees belonged to the same local. The complainant's union charged the complainant for engaging in activity that discredited the union in violation of the constitution by operating a business that threatened to take jobs away from members of the union's other local. One of the penalties potentially faced by the complainant was expulsion from the union. However, the complainant appealed the union's decision and was ultimately successful.

Before dealing with the representational issues, the Tribunal held that s. 14(b) was not triggered as the complainant was not in fact "expelled" as a result of a successful appeal process. The Tribunal also noted that although in some circumstances the mere fact of having an expulsion hanging over one's head may be sufficient to constitute an adverse impact, in the circumstances the complainant had failed to demonstrate any actual adverse consequences (he continued to hold his union membership, he continued to be employed, he lost no income, his own business continued to operate and he provided no evidence that his business suffered financially) (para. 77). As a result, the Tribunal found that the threat of expulsion did not establish an adverse impact, a necessary element of the *prima facie* test.

The Tribunal also found the complainant failed to establish *prima facie* discrimination with respect to his allegation that the union improperly represented him during the charge and appeal process. The complainant alleged that the union denied him representation during the meetings and at various levels of the appeal process, which he needed as a result of English being his second language. The Tribunal held that any adversity endured by the complainant during those meetings was not as a result of race, but his own failure to secure representation prior to the meetings.

As a result the complainant failed to establish the necessary nexus for *prima facie* discrimination:

> …He was fully aware that he could have representation at the meeting and he chose not to exercise that right until he was in the meeting. He asked another member to read his statement but that member was unable to do so. Although this may have adversely affected Mr. Cheung's ability to defend himself before the membership, I find that the adverse effect had nothing to do with his race; it had to do with his failure to secure representation prior to the meeting. I agree with Mr. Haines' assessment that, given the seriousness of the Charge and the penalty imposed, Mr. Cheung's failure in this respect was surprising….he made the choice not to secure union representation before the meeting and cannot afterwards complain about how he felt in having to read his own statement.
>
> Paras 90- 91; emphasis added

More recently, the Tribunal dismissed a s. 14 complaint that was brought against a specifically named executive member of a trade union (***Cox v. Victoria Shipyards and others***, 2010 BCHRT 223, paras. 36-37). The Tribunal confirmed that a complaint against an individual does not fall within the scope of s. 14.

TRADE UNION'S KNOWLEDGE (OR LACK THEREOF)

Another issue that trade union's need to be aware of is their potential liability when a member is disabled. In particular, trade union's need to keep in mind that the lack of express knowledge of a disability is not always a complete defence to an allegation of discrimination by a disabled member.

To provide some context to this statement, it is true that in general, if a respondent is unaware that a complainant has a disability, a complainant will not be able to establish that the alleged adverse treatment was based, at least in part, on a prohibited ground of discrimination. Thus, the complainant will not be successful in establishing a *prima facie* case of discrimination.

Another way of describing this concept is that a complainant generally has a duty to inform a respondent of his/her disability, in order to trigger a duty to accommodate. See, for example, ***Williams v. Chintz & Co. Decorative Furnishings Inc.***, [2003] B.C.H.R.T.D. No. 30, where the Tribunal held that "[t]here is no obligation on an employer to accommodate a disability about which it had no knowledge, real or imputed" (paras. 89-92).

However, one important caveat to this is that the Tribunal will, in certain circumstances, impute knowledge of the disability on the respondent (i.e. hold that the respondent should have known of the disability or had a duty to inquire into its potential existence) based on findings about the complainant's actions or inactions prior to the alleged adverse treatment.

In ***Gardiner v. BC(AG)***, [2003] B.C.H.R.T.D. No. 40 ("***Gardiner***"), the Tribunal explained this concept as follows:

> It is well-established that the employee has a duty to bring to the attention of the employer the facts relating to discrimination: Central Okanagan School Dist. No. 23 v. Renaud (1992), 16 C.H.R.R. D/425 (S.C.C.). It is also a generally accepted principle that a respondent must know, or ought reasonably to know, that an employee is suffering from a disability before the duty to accommodate will arise. The obligation is normally on the complainant to communicate the nature of the disability to the Respondent: Mager v. Louisiana - Pacific Canada Ltd., [1998] B.C.H.R.T.D. No. 36 at para. 47. The Complainant is also obliged to participate in the efforts at reasonable accommodation. A Respondent's failure to make inquiries regarding the health of an employee before taking steps that adversely affect that employee's employment situation, where the Respondent has reason to suspect that a medical condition may be impacting in the employee's ability to work, has been found to be discriminatory in certain instances: Willems-Wilson v. Allbright Drycleaners, [1997] B.C.H.R.T.D. No. 26; Martin v. Carter Chevrolet Oldsmobile, 2001 BCHRT 37; and Sylvester v. B.C. Society of Male Survivors of Sexual Abuse, 2002 BCHRT 14. ...
>
> Para. 163; emphasis added

For example, in ***Mager v. Louisiana – Pacific Canada Ltd.***, [1998] B.C.H.R.T.D. No. 36, while the complainant did not advise the respondent that she had a disability, she did inform the respondent that "she was having trouble eating and sleeping, she hated her job, her life ... she was extremely depressed and crying all the time and she needed help" (para. 53). This was sufficient to trigger an obligation on the part of the respondent to inquire about whether she had a disability.

More recently, the Tribunal held that in the absence of any demonstrative evidence of a change in behaviour or job performance, the respondent is not required to make inquiries. In ***Stevenson v. Dave Wheaton Pontiac Buick GMC (No. 2),*** [2010] B.C.H.R.T.D. No. 67, the Tribunal held that nothing in the complainant's behaviour after he returned to work did or should have alerted the respondent to the fact that his disability was affecting his ability to do his job (para. 57). As the complainant previously had performance issues, the fact that he continued to have such issues was "not so unusual as to impose…a duty to inquire whether [the complainant's] physical disability was affecting his performance" (para. 57).

The Tribunal also reviewed the duty to inquire as it relates specifically to unions in ***Ryan v. Canada Safeway***, [2007] B.C.H.R.T.D. No. 428. In this case, the union grieved the complainant's termination. However, during the grievance process, the trade union and the employer entered a settlement. After the settlement was finalized, the complainant filed a complaint against the employer and union alleging that her termination was related to her alcoholism. Specifically, the complainant alleged that both the employer and the union failed in their duty to accommodate based on not satisfying their duty to inquire.

The Tribunal held that the complainant had not established that the union was under a duty to inquire in the circumstances. Although the Tribunal recognized that some employees may have known about the complainant's alcoholism, there were no facts to suggest that the union was aware both of the fact of her alcoholism and that it was a factor in her termination:

> On the materials before the Tribunal, it is possible that some Canada Safeway staff knew that Ms. Ryan had a drinking problem. That does not mean, however, that the Union knew or ought to have known that Ms. Ryan was an alcoholic. Ms. Ryan speculates that Ms. Lincoln must have told Mr. Brunner about her drinking problem, but Ms. Lincoln denies having done so. For her part, Ms. Ryan had ample opportunity to inform Mr. Brunner or Mr. Pozzobon of the fact that she is an alcoholic. She did not do so until after the settlement was finalized, on July 4. By then, it was too late.
>
> I turn to the second premise upon which the complaint against the Union is based. In my view, Ms. Ryan has no reasonable prospect of showing that the Union was under a duty to inquire whether there was a relationship between her alcoholism and the conduct which led to her termination. As I have already said, Ms. Ryan did not disclose her alcoholism to anyone in the Union prior to July 4. Nor was the Union in possession of sufficient information to have led it to make inquiries in that regard. Nor is there anything about Ms. Ryan's conduct in taking the money from the till and not returning it for some days which would reasonably have led the Union to consider whether Ms. Ryan was an alcoholic and whether her alcoholism played a role in that behaviour.
>
> Paras. 26-27; emphasis added

Although looked at in the context of a disability, knowledge is an important factor in the *prima facie* test even in cases involving other prohibited grounds (see for example ***Reekie, supra***).

IMPACT OF SETTLEMENT AGREEMENT

Another related issue is what comfort a trade union can realistically take from a finalized settlement it has entered into with an employer, where a member did not execute the settlement agreement, if the union is subsequently named in a human rights complaint by the member.

The Tribunal has recognized that it may not further the purposes of the *Human Rights Code* to proceed with a complaint where the underlying dispute has been resolved (***Williamson v. Mount Seymour Park Housing Co-operative and others***, [2005] B.C.H.R.T.D. No. 334, paras. 10-11). In ***Thompson v. Providence Health Care***, [2003] B.C.H.R.T.D. No. 58, the Tribunal outlined a variety of factors to determine whether the complaint ought to proceed in the face of a settlement. These include: the language of any release, unconscionability, undue influence, existence of independent legal advice, duress, knowledge of party executing release and other considerations such as mutual mistake or forgery (para. 38).

One of the few cases exploring this issue in the context of a union entering a settlement is ***Vieira v. School District No. 42 (Maple Ridge – Pitt Meadows)***, [2005] B.C.H.R.T.D. No. 350 ("***Vieira***"). In this case, the union and the employer settled a grievance, despite the member's

clear and known opposition. The complainant filed a human rights complaint against the trade union pursuant to s. 13, alleging that the settlement was fundamentally unfair.

The Tribunal in ***Vieira***, relying on Labour Board decisions, held that a union has the right to decide whether to settle a grievance with the employer, regardless of its member's consent (paras. 22-23). Such a complaint would be more properly framed as concerning the union's duty of fair representation, which is outside the jurisdiction of the Tribunal:

> … The question of whether a union complied with the duty of fair representation under s. 12 of the Labour Relations Code is not, however, a matter within the Tribunal's jurisdiction. The Tribunal's jurisdiction in such circumstances is limited to the question of whether the union discriminated against the employee contrary to the Human Rights Code when it agreed to the settlement. ... Sound and effective labour relations require unions to make frequent decisions about whether to proceed with grievances, drop them or settle them. The Tribunal will not sit in review of a union's decision to enter into such a settlement, absent some allegations of fact about the union's conduct which could support a finding of discrimination ....
>
> Para. 23; emphasis added

Even in the context of s. 12 complaints under the *Labour Relations Code*, the Labour Board has recognized that a union fulfills its duty of fair representation when it makes its decision with respect to whether to proceed with a grievance on relevant workplace factors, such as its interpretation of its collective agreement, the effect on other employees or its assessment of the merits of the grievance (***Judd (Re)*** BCLRB No B63/2003, para. 42).

In ***Vieira***, the Tribunal held that the complainant would have recourse to the Tribunal if the settlement itself was discriminatory. However, given the absence of any discriminatory terms, strong public policy reasons existed to dismiss the complaint:

> With the School district and the Union having entered into the Settlement Agreement, its terms became binding upon all parties, including Ms. Vieira. Ms. Vieira is unhappy with this, but it is the law. Again, Ms. Vieira would have recourse to the Tribunal if there was anything in the Settlement Agreement which was discriminatory. I have reviewed the Settlement Agreement, and can see nothing in it which could contravene the Code. The Tribunal has stated in the past that it may not further the purposes of the Code to allow a complaint to proceed in the face of a settlement agreement.
>
> While a settlement agreement cannot, in my view, legally deprive the Tribunal of jurisdiction, it may, however, mean that allowing a complaint to proceed would not further the purposes of the Code. There is a strong public policy interest in encouraging parties to resolve their disputes on a voluntary, consensual basis ....
>
> Para. 24; emphasis added

In sum, the Tribunal dismissed the complaint because the "Settlement Agreement resolved the past dispute between the parties, is not itself contrary to the Code, and the subsequent conduct of which ... [the complainant] complains was all undertaken in compliance with its terms" (para. 25). The Tribunal appeared to have only conducted the most superficial analysis of the contents of the settlement agreement; absent anything on its face discriminatory, the Tribunal simply dismissed the complaint.

Similarly, in ***Begon v. Simmons Canada and Retail Wholesale Union, Local 580***, [2005] B.C.H.R.T.D. No. 502, the complainant alleged a number of inadequacies in the union's representation of him through the grievance and arbitration process, including the union's decision to enter a settlement purportedly in contravention of s. 14. However, the complainant did not outline what was specifically wrong with the settlement agreement nor provide any nexus between the purported representational issues and his disability. As a result, the Tribunal dismissed those parts of the complaint for failing to establish a breach of the *Human Rights Code*.

CONCLUSION

A trade union has responsibilities, and risks exposure, under both s. 13 and s. 14 of the *Human Rights Code* in various contexts, including but by no means limited to:

a. By participating in the formulation of a potentially discriminatory work rule;

b. By potentially impeding or blocking the reasonable efforts of the employer to accommodate a member;

c. By treating a member in an adverse fashion with respect to his/her membership in a union, because of, or related in some way to, a prohibited ground of discrimination; and/or

d. By entering into a settlement agreement with an employer, that is not executed by the member (or is executed by a member who lacks capacity), where the member has or may have a disability.

The following points can be gleaned from the case law interpreting s. 13 as it relates to trade union's:

- Issues of discrimination in union membership, such as not pursuing a grievance, do not generally fall under s.13 absent exceptional circumstances; they are more appropriately dealt with as a s. 12 complaint under the *Labour Relations Code* or pursuant to s.14 of the *Human Rights Code*;

- A union is generally only liable under s. 13 where it: i) participated in a discriminatory work rule, such as a term in a collective agreement, letter of understanding with the employer or was joint author of an employment program; and/or ii) impeded and/or blocked the accommodation efforts of the employer;

- There is a high threshold for establishing liability under s. 13 with respect to the actions or inactions of a trade union;

- A trade union likely faces limited liability under s. 13 for events subsequent to a non-discriminatory termination;

- A trade union likely faces limited liability under s. 13 where a term of a collective agreement is neutral, not discriminatory itself nor in its effect, and may only be applied in a discriminatory manner by the employer; and

- Where there are no facts in a complaint to suggest liability as against the union and a union has expressed a willingness to cooperate with any potential remedy, a union will likely be successful in opposing an application to add it as a respondent by the employer.

The following points can be gleaned from the case law interpreting s. 14 as it relates to trade union's:

- Complaints against individuals, even if executive members of a trade union, are generally beyond the scope of this section;

- Liability generally only arises where a trade union acts in a discriminatory fashion in relation to internal union matters such as representing a member, or disciplining a member under internal policy;

- More than mere inadequate or negligent representation is needed – there must be discrimination;

- Failing to file a grievance, take it to arbitration or entering a settlement of that grievance, generally falls within the scope of this section, where discriminatory;

- The Tribunal focuses on a trade union's reasons for not pursing a grievance. However, whether a union is right or wrong in this decision is not for Tribunal to decide – only whether it was discriminatory or not. As a result, if a trade union makes a decision solely based on its non-discriminatory interpretation of collective agreement, it is likely not liable under s. 14; and

- Where the complainant alleges representational failure, a trade union will likely not face liability if the complainant has failed to ask for help and/or failed to respond to inquiries from the trade union.

Practically, if named in a complaint under either section, a union is well advised to consider (and obtain legal advice with respect to) applying to dismiss all or parts of the complaint against it, as union's have traditionally been fairly successful with such applications (depending of course on the particular factual matrix). To increase the chance of success, such applications should not only be made based on principled arguments, but also based on procedural arguments such as a

lack of particularization of the alleged discriminatory act. In such applications, a trade union would also be well advised to emphasize any competing values raised by the complaint and, if possible, to provide evidence disputing any potential adverse treatment suffered by the complainant.

Where a respondent employer applies to have a trade union added to a complaint, a trade union should consider opposing the application as trade union's have also faced some success in this, although the complainant's wishes will be of the utmost importance to the Tribunal.

In an accommodation scenario, where a trade union has no direct knowledge of a disability but thinks there is or may be a potential disability issue, it ought to consider the following types of questions:

a. What information did the complainant provide to the union?

b. Did the complainant, while not referring to a specific disability, refer to the medical effects/symptoms of the disability in conversations with the union?

c. Did the complainant's behaviour change over time, so that the union should have known that something was wrong?

d. Was the union aware that the complainant had seen a doctor, or had recently taken a medical leave?

e. Should the union be asking the complainant for further medical information?

Furthermore, where a trade union is considering entering into a settlement with an employer and is concerned about potential liability *vis-a-vis* its member(s), a trade union ought to take into account the following:

a. A trade union generally has authority to enter a settlement on behalf of its members;

b. However, settlement itself will not prevent a complaint from going forward;

c. A Tribunal will generally consider the following factors in determining whether to dismiss the complaint where there is a settlement: the language of the release, unconscionability, undue influence, independent legal advice, duress, knowledge and other related factors; and

d. If the settlement resolves a past dispute, is not discriminatory in and of itself, and if the complaint concerns conduct taken in compliance with the settlement, then a trade union has a very good chance of succeeding at applying to dismiss.