

HUMAN RIGHTS CONFERENCE—2009

PAPER 6.1

Timeliness Pursuant to Section 22 of the Human Rights Code

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TIMELINESS PURSUANT TO SECTION 22 OF THE HUMAN RIGHTS CODE

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I. Introduction

The Human Rights Tribunal (“Tribunal”) typically addresses timeliness issues that arise under s. 22 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (“Code”) early in the processing of a complaint.

Most commonly, such issues arise where, as part of its complaint screening process, the Tribunal identifies a timeliness issue before accepting the complaint for filing. Where the Tribunal identifies such an issue, the process is generally as follows:

- The Tribunal will, further to Rule 14 of the Tribunal’s Rules of Practice and Procedure, deliver notice of the request to file a complaint outside the six-month time limit to the respondent and to the complainant, and enclose a Form 4 Time Limit Response Form for the respondent to complete and a Form 5 Time Limit Reply Form for the complainant to complete.

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- The parties will be provided with deadlines for the completion of the Time Limit Response Form (for the respondent(s)) and the Time Limit Reply Form (for the complainant(s)).
- If a complainant has included “new information or submissions” in the Time Limit Reply, respondents can also then apply to the Tribunal for leave to file a Sur-Reply to the Time Limit Reply Form. The practice is for respondents to file an application to file a Sur-Reply, with an attached draft Sur-Reply, for the Tribunal’s consideration. The Tribunal has discretion to then determine whether it will consider the Sur-Reply. Consult Rule 24(6) and (7) of the Rules of Practice and Procedure and *Kruger v. Xerox Canada* (No. 2), 2005 BCHRT 24, at paras. 17 and 22.
- On receipt of the completed Time Limit Response Form and Time Limit Reply Form (and any Sur-Replies), the Tribunal will make a decision regarding whether all or parts of the complaint are timely, and if not, whether to exercise its discretion to accept all or parts of the late-filed complaint for filing pursuant to s. 22 of the *Code*.

The Tribunal dedicates considerable resources to deciding timeliness issues. Timeliness issues can also be of paramount importance to the parties, as the Tribunal’s decision on a timeliness issue may fundamentally affect the outcome of a complaint and could deny the complainant the ability to obtain a remedy for a violation of the *Code*. In the period covered by the 2008-2009 *Annual Report*, which is available on the Tribunal’s web site, the Tribunal decided 91 time limit applications at the screening stage and dismissed the complaint in 56 of those applications. During the same period, the Tribunal dismissed six of 27 complaints in whole or in part on an application by a respondent pursuant to s. 27(1)(g) of the *Code*.

The focus of this paper will be on the Tribunal’s legal approach to s. 22 issues during the process outlined above and, in particular, on the Tribunal’s application of ss. 22(1), 22(2), and 22(3) of the *Code*. We also provide a more detailed analysis of the decisions regarding two factors that complainants frequently rely on when attempting to have late-filed complaints accepted.

While other stages of the Tribunal’s processes where timeliness issues arise do not form the main focus of our paper, we wish to note that many of the decisions we discuss may be applicable, for example, in the following circumstances:

- the Tribunal may request submissions after accepting the complaint on discovering it has overlooked a timeliness issue (*Seifi v. North Shore Multicultural Society*, 2009 BCHRT 144);
- a respondent may write to the Tribunal asking to file a s. 27(1)(g) application outside the normal process for filing a s. 27(1) application and prior to deciding whether to attend an early settlement meeting (*Eldor v. University of British Columbia*, 2009 BCHRT 204 (“*Eldor*”));
- in an application under s. 27(1)(g) of the *Code* by a respondent to dismiss a complaint on the basis that the contravention alleged in the complaint or part of the complaint occurred more than six months before the complaint was filed;
- if a complainant applies to amend a complaint to add an allegation that occurred outside the time limit for filing the complaint (*Churchill v. Coast Mountain Bus Co.*, 2008 BCHRT 44 (“*Churchill*”)); or
- at the hearing itself, if the Tribunal decides it is appropriate to defer consideration of the timeliness of the complaint to that time (*Basic v. Strata Plan #BCS 1461*, 2007 BCHRT 165).

II. The Tribunal's Approach to Determining Whether a Complaint has Been Filed Within Six Months of the Alleged Contravention, as Required by Section 22(1) of the Code

Section 22(1) of the *Code* states that:

- (1) A complaint must be filed within 6 months of the alleged contravention.

In a frequently cited decision of the Tribunal, *Chartier v. School District No. 62*, 2003 BCHRT 39 (*Chartier*), the Tribunal commented on the purpose of s. 22 as follows (at para. 12):

The limitation period contained in s. 22 is a substantive provision which is intended to ensure that complainants pursue their human rights remedies with some speed and to allow respondents the comfort of performing their activities without the possibility of dated complaints.

As noted above, upon receiving a complaint, the Tribunal will screen it to ensure, *inter alia*, it alleges a timely contravention of the *Code*. To be accepted for filing, a complaint must allege acts or omissions, which, if proven, could contravene the *Code* and all of which occurred within the six months prior to the date the complaint was filed.

If all of the allegations occurred within the six-month time limit, there will be no timeliness issue. However, if the allegations, in whole or in part, fall outside the six-month time limit, the Tribunal will consider—as discussed below under sections “III” and “IV” of this paper—whether the complaint should nonetheless be accepted pursuant to ss. 22(2) and 22(3) of the *Code*.

When determining whether the alleged acts or omissions occurred within the time limit in s. 22(1), a key question for the Tribunal is whether the alleged incidents could actually constitute a contravention of the *Code*. To be accepted pursuant to s. 22(1) of the *Code*, the complainant must not only make at least one timely allegation, but this timely allegation must on its own, if proven, constitute a contravention of the *Code* (*Strickland v. Surrey (City)*, 2008 BCHRT 406 at para. 8).

The Tribunal will focus on the actions constituting the alleged discrimination, not on any on-going effects of the alleged discrimination (*Dawydiuk v. Insurance Corp. of British Columbia*, 2005 BCHRT 427, petition filed November 17, 2005). So, for example, if a complaint relates to the termination of the complainant's employment, the key date for the purposes of timeliness under s. 22(1) is the date the employer notified the complainant of the termination of his or her employment (i.e., the date on which the discriminatory action occurred), not the last day of employment or the date the notice period, if any, ended.

Further, the time limit does not run from the date the complainant says he or she learned of the allegedly discriminatory act, but rather from the date that act or omission actually occurred. Recently, the Tribunal confirmed this approach in *Stewart v. Victoria Habitat for Humanity*, 2009 BCHRT 100 (*Stewart*). An application for judicial review was filed in *Stewart* on May 7, 2009. In *Stewart*, the Tribunal emphasized that the Tribunal will not apply principles of discoverability when determining whether a complaint was filed outside the s. 22(1) six month time limit.

While *Stewart* is currently under judicial review, there is BC Supreme Court authority that suggests the Tribunal is unlikely to allow late-filed complaints on the basis of the discoverability principle in the near future. The Court stated in *Insurance Corporation of British Columbia v. Yuan*, 2008 BCSC 1703 (at para. 22, appeal allowed in part on other grounds 2009 BCCA 207): “there is no room in this legislation [i.e. the *Code*] to introduce notions of ... discoverability in determining whether or not a complaint has been filed within the six months of the alleged contravention.”

It is important to be aware, however, that in *Stewart*, the Tribunal did affirm it might consider principles of discoverability when determining whether to exercise its discretion to accept a late-filed complaint. Thus, the date of discovery of the allegedly discriminatory act can be relevant, but it should be addressed under s. 22(3) of the *Code* (the public interest factor), not under s. 22(1).

III. The Tribunal's—and Courts'—Approach to Determining Whether there Has Been a Continuing Contravention Pursuant to Section 22(2) of the Code

Section 22(2) of the *Code* states that:

- (2) If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of the contravention.

When a complainant alleges more than one incident of discrimination, some of which occurred more than six months before the filing of the complaint, s. 22(2) of the *Code* should be read in conjunction with s. 22(1). Section 22(2) permits otherwise untimely allegations to be accepted, so long as they meet the definition of a “continuing contravention.”

In *Dove v. GVRD (No. 3)*, 2006 BCHRT 374 (“*Dove*”), the Tribunal stated that in determining whether a complaint alleges a continuing contravention of the *Code* (at para. 20):

It must do so in light of the purposes of the *Code*, including ensuring that individuals who claim to have suffered discrimination are given a means of redress while at the same time ensuring that respondents are treated fairly ... [T]he determination of whether a continuing contravention is alleged, and the length of that contravention is, as stated by our Court of Appeal in *O'Hara v. British Columbia (Human Rights Commission)*, [2003] B.C.J. No. 709, 2003 BCCA 139 (“*O'Hara*”), a discretionary one. In the end, all one can hope to do is to draw the line in a fair, principled and reasoned way.

The concept of “continuing contraventions” is directed at striking the right balance between these countervailing policy considerations, when considering allegations that have occurred over a long period of time.

The Complaint Form, not surprisingly, plays a significant role in the Tribunal’s determination of whether the complaint alleges a continuing contravention. As the Tribunal held in *Dove* (at para. 11):

The Tribunal must rely on the complainant’s description of the events alleged in determining whether they constitute a continuing contravention. As the burden is on the complainant to establish that their complaint does describe a continuing contravention, this is not entirely inappropriate. However, the manner in which a complainant chooses to frame their case may, as a result, have a significant effect on the analysis.

In Box F of the Complaint Form, if “everything” did not happen in the last six months, a complainant is asked:

<p>Was there continuing discrimination?</p> <p><input type="checkbox"/> Yes, it was an ongoing situation or <input type="checkbox"/> Repeated incidents of the same kind</p> <p><input type="checkbox"/> No</p> <p>If yes, explain how there was an on-going situation. Or, if there were separate incidents, say how they were similar or related and how much time was there between each incident. If there are gaps between the incidents, say what was happening.</p>

The Tribunal asks a complainant to identify whether there is an ongoing situation or repeated incidents of the same kind because it has identified those two categories of continuing contravention in various decisions on the issue (as discussed in more detail below).

However, the use of the word “or” in this section of the Complaint Form is potentially misleading. In *Dove*, the Tribunal said (at para. 18): “[o]f course, many cases have aspects of both sorts of continuing contravention. Many allegations of an ongoing failure to accommodate an employee have features of both.” A complainant should consider checking both boxes if alleging a continuing contravention.

The effect of the Tribunal finding a continuing contravention is that all those incidents which are part of the continuing contravention will be timely and accepted by the Tribunal, assuming:

- the complaint is filed within six months of the last alleged contravention and the timely allegation or allegations constitute a contravention of the *Code*; or
- the state of affairs continues until the complaint was filed and the complaint alleges a situation that constitutes “active dereliction” by the respondent (*British Columbia (Ministry of Employment and Income Assistance) v. McGrath*, 2009 BCSC 180 (“*McGrath*”)).

If successful in establishing a continuing contravention, a complainant may be able to raise events that occurred considerably outside the six-month limitation period.

A. The Two Categories of Continuing Contravention

Although a plain language interpretation of s. 22(2) suggests at least one actual “alleged instance” of discrimination should fall within the time limit for the Tribunal to find a continuing contravention, the Tribunal, as noted above, has recognized two categories of continuing contravention, one of which may require no specific action by a respondent within the six-month time limit, but merely an allegation that a discriminatory state of affairs exists.

The Tribunal had—until recently—a fairly stable body of case law it applied to determine what constitutes a continuing contravention. That has recently changed for an allegation that there is an ongoing discriminatory situation, but remains largely unchanged for the more frequently encountered allegations of repeated incidents of the same kind. We discuss each of the types of continuing contravention below.

I. Ongoing Situation or State of Affairs

In *McGrath*, Mr. Justice Brown reversed a finding of the Tribunal that allegations relating to “a statutory scheme, policies and procedures” constituted a continuing contravention. The complainant grandparents in *McGrath* had alleged a scheme under which the province paid foster parents more than the complainants to care for their grandchildren discriminated against them on an ongoing basis because of their family status, and against their grandchildren because of their family status and disability. *McGrath* also decided similar issues in an application for judicial review of a case with comparable facts (*Verkerk v. British Columbia (Ministry of Children and Family Development)*, 2006 BCHRT 484).

Brown J. concluded that a number of decisions of the Tribunal, including *Dove*, as well as the decisions of the Tribunal at issue on the judicial review, were incorrect (at para. 223): “[a]t least insofar as they can be taken to say that the mere existence of legislation constitutes a continuing contravention...”

He accepted as definitive the statement of what constitutes a continuing contravention in *Manitoba v. Manitoba (Human Rights Commission)* (1984), 2 D.L.R. (4th) 759 (Man. C.A.) (“*Manitoba*”), as adopted in BC in *O’Hara and Lynch v. British Columbia (Human Rights Commission)*, 2000 BCSC 1419 (“*Lynch*”).

The Court in *Manitoba* described a continuing contravention as follows (at para. 19):

To be a “continuing contravention,” there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences.

In *Manitoba*, the Court had rejected the argument that there was a continuing contravention because the government had continued to apply its mandatory retirement policy to employees after it had done so to the appellant complainants (at para. 14):

The Government's employment practices are not on trial. The Government may have contravened provisions of the Act in its dealings with other employees. However, that, in my view, is irrelevant to the issue of whether or not the complaints of Galbraith and Lylyk were filed in time.

However, in *McGrath*, Mr. Justice Brown did allow some leeway for a continuing state of affairs to constitute a continuing contravention (at para. 223):

... [I]n some cases, such as those outlined in *Dove*, a continuing existence of a state of affairs such as impaired access to a building, or discriminatory denial of employment benefits, *may constitute a continuing contravention, as a kind of active dereliction is involved*; and in such instances, the dereliction could be correctly seen as ongoing, obviating the need of ongoing futile attempts by the complainant to access the service. [emphasis added]

We do not propose to offer a definition of “active dereliction;” however, we do make two observations.

First, at the time this paper was written (a number of months after the decision in *McGrath*), the Tribunal had not amended its complaint form to remove ask complainants to identify how the ongoing situation, if alleged, constituted a situation of “active dereliction.”

Second, we are unsure if decisions of the Tribunal pre-dating *McGrath* would be found to involve “active dereliction” by respondents, for example:

- in *Nasute Fauerbach v. College of Physicians and Surgeons of British Columbia*, 2008 BCHRT 105 and 2008 BCHRT 276, the Tribunal found a complaint alleging the College's and UBC's policy of refusing to approve fellowship applications for Canadian citizens whose base training was not recognized in Canada was an (at para. 56 of 2008 BCHRT 276) “ongoing deprivation of a right or opportunity which complainant might otherwise enjoy”; and
- in *Churchill*, the Tribunal found that Coast Mountain's decision to require new Transit Supervisors to successfully complete training for the positions of both Transit Supervisor and Transit Communications Supervisor disproportionately affected women, including the complainant, could fairly be characterized as a policy and as acting as a bar or impediment to the fulfilment of the purposes of the *Code*.

When we were preparing this paper, the Tribunal had not yet discussed how it will approach the concept of active dereliction.

2. Repeated Incidents of the Same Kind

The other, and more frequently encountered, category of continuing contravention is an allegation of repeated conduct by a respondent against the complainant.

In *Dove*, the Tribunal held that so long as the alleged incidents are sufficiently similar in character and occur with sufficient frequency or are sufficiently close in time, a continuing contravention may be established, but that (at para. 18) “many difficult questions may arise as to whether the conduct alleged is sufficiently similar in character, sufficiently frequent, or sufficiently close in time, to qualify.” *McGrath* did not address this aspect of the Tribunal's decision in *Dove*.

Regarding the issue of whether alleged incidents are “sufficiently similar in character,” the archetypal case involves repeated incidents of harassment related to a prohibited ground of discrimination (see *Dove* at para. 39 and *Webber v. Alcan Incorporated*, 2004 BCHRT 52).

In determining whether the alleged incidents of discrimination occur with “*sufficient frequency*” or are “sufficiently close in time,” the Tribunal will focus on whether there are any significant gaps in time between any of the alleged incidents in the continuing contravention. The Tribunal stated in *Dickson v. Vancouver Island Human Rights Coalition*, 2005 BCHRT 209 (at para. 17) that “[t]he assessment of whether discrete sets of allegations, separated in time, will constitute a continuing contravention is a fact specific one which will depend very much on the individual circumstances of each case.” The Tribunal has said that it does not employ a “formula” to determine if a gap is too large (*Bakhtiyari v. BCIT*, 2006 BCHRT 122 at para. 29).

Notwithstanding this statement by the Tribunal that it avoids formulas, we note that the Tribunal has held in the last year that a gap of approximately six months was too great to constitute a continuing contravention (*Michelson v. The Salvation Army*, 2008 BCHRT 339) and gaps of six months and nine months between different sets of allegations were too great (*Aitken v. VIHA*, 2008 BCHRT 47).

B. If it is Not a Continuing Contravention, What is it?

In the spirit of a comment of the Tribunal in *Dove*, that (at para. 19) “[i]t is sometimes easier to identify what is not a continuing contravention than what is,” respondents tend to argue that a complaint does not allege a continuing contravention of the *Code* but alleges instead either one alleged contravention with continuing consequences or reiterations of past discrimination.

1. One Incident of Alleged Discrimination with Continuing Consequences

As noted by the court in *Manitoba* (at para. 19) “one act of discrimination which may have continuing effects or consequences” is not a continuing contravention.

For example, in *Callaghan v. University of Victoria*, 2005 BCHRT 589, aff’d 2006 BCSC 1503 (“*Callaghan*”), the Tribunal found the fact that that complainant’s transcript continued to bear marks from her attendance at University, that she had incurred large student debts, and that she lost scholarships were all continuing effects or consequences of previous alleged contraventions and not contraventions of the *Code* and therefore the complaint was not timely.

2. A Reiteration of a Past Alleged Contravention

The Tribunal has consistently applied the principle that a reiteration of a past contravention is not discrimination (*Callaghan; Eldor*). For example, in *Rai v. Annacis Auto*, 2003 BCHRT 31 (“*Rai*”), the complainant had been laid off in February 2001, was not rehired when others were in May 2001, and sought to establish a continuing contravention that included those events by calling the employer in February 2003 to ask to be rehired. The Tribunal in *Rai* held that a reiteration of a past contravention is not a continuing contravention.

In other words, complainants typically cannot re-start the clock by reiterating a demand and arguing the respondent’s denial of that demand forms a continuing contravention (or that the reiteration of the earlier demand forms a timely allegation, to thereby “draw in” untimely allegations).

IV. The Tribunal’s Approach to Determining Whether it Should Exercise its Discretion to Accept a Late-Filed Complaint Pursuant to Section 22(3) of the Code

Section 22(3) of the *Code* states that:

- (3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that
 - (a) it is in the public interest to accept the complaint; *and*
 - (b) no substantial prejudice will result to any person because of the delay.

Sections 22(3)(a) and (b) set out a two-pronged test the Tribunal applies when deciding whether to exercise its discretion to accept a late-filed complaint. The complainant bears the onus of satisfying the Tribunal it should exercise its discretion to accept the out-of-time complaint at both stages (*Dickson* at para. 19; relying on *O'Hara*).

A. Public Interest

When deciding whether it is in the public interest to accept a late-filed complaint pursuant to s. 22(3)(a) of the *Code*, the Tribunal in *Riceman v. British Columbia (Hydro and Power Authority)*, 2005 BCHRT 475 (“*Riceman*”) stated (at para. 17): “the analysis of whether it is in the ‘public interest’ to accept a late-filed complaint is a multifaceted one where several factors may be considered, in the context of the purposes of the *Code* and the circumstances of the particular case.”

Having said that, the Tribunal almost invariably considers the following two factors:

- the length of delay; and
- the reason for the delay.

A third factor that is relatively frequently referred to is:

- the public interest in the complaint itself.

However, the Tribunal has emphasized that the above list of factors is not exhaustive; rather “[o]ther factors may be relevant in any given case” (*Fontaine v. Ainsworth Lumber Co.*, 2005 BCHRT 565 (“*Fontaine*”) at para. 21). Additional factors the Tribunal sometimes considered will be discussed further below.

1. Length of the Delay

The Tribunal has held that late-filing of *any length* can result in it refusing to accept a complaint (see *Suter v. Casbah Day Spa*, 2008 BCHRT 314 (“*Suter*”), where the Tribunal declined to accept a complaint that was filed four days beyond the statutory limit).

However, as may be expected, the Tribunal has emphasized that the concern with late-filing generally becomes more acute as more time passes. For example, in *Montesi v. Vezina*, 2009 BCHRT 119 (“*Montesi*”), the Tribunal held that (at para. 3):

... When the delay in filing a complaint *measures in years as opposed to days or months, a complainant will have a significant hurdle to overcome in persuading the Tribunal to accept a late-filed complaint.* [emphasis added]

Correspondingly, it is fair to say that the concern with late-filing is less acute where the delay is relatively short (generally meaning a delay of days or weeks, although in a few cases this has included delay of two or three months). For example, in *Fontaine*, the Tribunal emphasized the (at para. 25) “relatively brief length of the delay.”

However, the length of delay should not be considered on its own; rather, the Tribunal will make a global assessment, considering the length of the delay as well as any other relevant factors.

2. Reasons for the Delay

As noted above, the complainant bears the onus to provide a satisfactory reason for the delay, whatever its length. While the reasons for delay are obviously important, the Tribunal has emphasized that, regardless of the length of the delay, “...although there is no doubt that the reason for the delay is an important factor in considering a public interest analysis, it is not necessarily determinative of the issue” (*Riceman* at para. 17 (and the cases quoted therein)).

When assessing the complainant's reasons for the delay, the Tribunal has emphasized a number of general points:

- the mere assertion that the complainant was unaware of his or her rights under the *Code* does not generally justify accepting a late-filed complaint (*Gill v. Canadian Forest Products*, 2005 BCHRT 455 (“*Gill*”) at para. 18);
- however, the Tribunal is typically more lenient where the complaint was filed in a timely manner, but is procedurally incorrect in some fashion, for example where an unrepresented complainant failed to name a respondent thereby making the complaint untimely against one particular respondent (*Naser v. Zellers Inc.*, 2006 BCHRT 427 (“*Naser*”));
- the complainant must make more than “vague statements” about the reason for the delay; rather, the complainant must provide sufficient particulars to support his or her reasons (*Gillis v. Davey*, 2004 BCHRT 444 (“*Gillis*”) at para. 16); and
- even where the complainant provides a reasonable explanation that might justify *some* delay in filing, if the delay has been lengthy the complainant will likely be expected to provide particulars to “adequately explain” why he or she could not file the complaint for the *duration* of the delay (*Gibson v. Vancouver (City)*, 2009 BCHRT 151 (“*Gibson*”) at paras. 10-11).

There is no specific list of reasons that is generally considered sufficient. Rather, to the contrary, what constitutes a sufficient reason appears to largely depend on the length of the delay. Where the length of the delay is short, lack of English language skills, receipt of incorrect information, or other similar reasons may be sufficient for the Tribunal (*Libonao v. Honeywell Ltd.*, 2009 BCHRT 184 (“*Libonao*”). However, where the delay is significant (a significant delay certainly includes a delay of many months or years, but can also include a delay of only a couple of months or more), the Tribunal often refuses to accept the complaint absent compelling reasons.

In sum, as would be expected, the lengthier the delay, the more compelling the reasons must be, not only in nature, but in terms of adequately addressing the entirety of the delay.

3. The Public Interest in the Complaint Itself

As noted above, some Tribunal decisions have referred to this third, more elusive, factor (*Fontaine* at para. 15). This factor appears to date to have rarely been successfully relied on. However, there certainly are cases where both respondents and complainants have successfully relied on, at least in part, this factor to support, or defend against, the Tribunal accepting the late-filed complaint.

For example, the Tribunal accepted a complaint that had been filed one week late on the basis of the public interest in the complaint, noting that it did so because the complaint raised “serious” allegations, namely that the respondent had a “policy of discrimination against persons of aboriginal ancestry” (*Hansen v. Lyncorp Drilling Services Ltd.*, 2009 BCHRT 156 (“*Hansen*”) at paras. 24-26).

While ultimately refusing to accept the complaint because the delay was too inordinate (and insufficient reasons were provided to explain the delay), the Tribunal in *obiter* appears to have indicated it might otherwise have accepted the late-filed complaint on the basis of the public interest in the complaint itself where the complainant alleged that he “experienced adverse treatment” because of his autism, which the Tribunal described as a “poorly-understood disability” (*Wilkinson v. Edgewood Treatment Centre*, 2009 BCHRT 155 (“*Wilkinson*”) at para. 22).

Notably, the Tribunal has refused to accept late-filed complaints due to a *lack of public interest* in the complaint, where, for example, the complaint is similar in nature to many other complaints the Tribunal considers regularly (that were filed in a timely manner) or where because of other ongoing proceedings accepting the complaint would result in an unnecessary duplication of resources (*Gibson* at paras. 15-16).

4. Other Factors

There are also a number of other factors the Tribunal has considered when deciding whether it is in the public interest to accept a late-filed complaint, depending on the factual scenario, including but by no means limited to the following:

- where the complainant retained legal counsel well before the complaint was filed, or filed a grievance through his or her trade union relating to the same or similar factual allegations, the Tribunal has found that the complainant was capable of pursuing his rights “in a resourceful and timely manner” or “had the ability to pursue his interests” (*Gill* at para. 19; *Gibson* at para. 13);
- where a complainant filed an unrelated human rights complaint in the past, the Tribunal has held that this “indicates a level of awareness” with the human rights process (*Dickson* at para. 22);
- the Tribunal may also consider whether the complaint is the “only means of redress available” to the complainant (*Gibson* at para. 16);
- similarly, the Tribunal may consider “fairness to the parties and ensuring that vulnerable persons have access to the Tribunal” (*Eldor* at para. 64);
- the Tribunal may consider the fairness of denying a complainant the opportunity to file a complaint where he or she was unaware of material facts in time to file a timely complaint and could not, with reasonable diligence, have become aware of those facts (*Stewart*; *Sandhu v. International Forest Products*, 2005 BCHRT 161 at para. 21);
- the Tribunal will, in certain circumstances, accept a late-filed complaint where a medical condition, at least in part, caused the delay; and
- the Tribunal will, in certain circumstances, accept a late-filed complaint, where the delay was caused by ongoing settlement negotiations relating to the human rights issues, and the human rights complaint was filed within a short period of time after said discussions broke down. However, the Tribunal will generally decline to accept as timely allegations outside of the six-month time limit that culminated in a settlement agreement. It is not surprising that the Tribunal would decline to accept an out-of-time complaint in these circumstances considering its decisions under s. 27(1)(d)(ii) of the *Code* that it may not further the purposes of the *Code* to proceed with a complaint where the parties have entered into a settlement agreement (*Thompson v. Providence Health Care*, 2003 BCHRT 58).

The latter two scenarios will be discussed in further detail below under section “V” of this paper.

B. Substantial Prejudice

If the Tribunal accepts that it is in the public interest to accept a late-filed complaint, the Tribunal will then consider s. 22(3)(b) of the *Code*; namely, whether accepting the late-filed complaint would cause substantial prejudice to the respondent. The Tribunal has held that the legal test is “substantial prejudice,” not “any prejudice” (*Fontaine* at para. 27).

Notably, while the complainant bears the onus under s. 22(3)(a) of the *Code*, the Tribunal’s approach to evidence required to establish substantial prejudice often varies significantly based on the length of the delay.

Where the delay has been significant, the Tribunal may infer substantial prejudice, in the absence of evidence to the contrary (*Lynch* at para. 28).

However, where the delay has been months in length rather than years (or at least where it has only been a few months or less), the Tribunal generally expects the respondent to provide at least particulars of any *actual* substantial prejudice they are asserting. In other words, the Tribunal is looking for “actual” prejudice, and often will not “infer” it in cases where the delay has been short. Therefore, despite the complainant bearing the onus, where the delay is short the Tribunal sometimes relies on a lack of particulars of substantial prejudice to determine that there has been no substantial prejudice (even where prejudice has been asserted by the respondent) (*Shields v. Source Interlink Canada Inc.*, 2007 BCHRT 164 (“*Shields*”) at paras. 12-14).

The Tribunal in *Shields* explained its rationale for this approach as follows (at para. 14):

While it is true that the complainant bears the burden of establishing both elements under s. 22(3), the fact is that the circumstances which could give rise to substantial prejudice are far more likely to be within the respondent's knowledge than the complainant's. Here, Source Interlink [the respondent] has failed to point to any circumstances which could give rise to substantial prejudice.

Thus, where a respondent asserts substantial prejudice and the delayed filing measures in months rather than years (and perhaps even where the delay has been longer, out of perhaps an excess of caution), respondents are well advised to provide particulars, or even supporting evidence, of substantial prejudice. Where they do so, for example, by establishing that witnesses are unavailable or documents have been destroyed due to the delay, the Tribunal often refuses to accept the late-filed complaint (*Sloan v. Catalyst Paper Corp.*, 2006 BCHRT 226).

On the other hand, the Tribunal has on occasion relied on facts asserted by the complainant to counter an assertion by a respondent that there has been substantial prejudice. For example, complainants have been successful in asserting this where a respondent employer was aware of the allegations contemporaneously (for example, where an internal complaint was filed (*Read v. Century Holdings Ltd.*, 2003 BCHRT 52 at para. 82)). Therefore, complainants would be well-served to also turn their minds to whether they have knowledge of any facts they could rely on to counter an assertion of substantial prejudice by the respondent.

V. A More Detailed Analysis of Two Frequent Factors in Late-Filed Complaints

In this section, we review the Tribunal's decisions in two particularly well-developed areas under s. 22(3) of the *Code*: (a) situations where a complainant alleges his or her medical condition caused the late filing of the complaint; and (b) situations where the parties had been engaged in settlement discussions which the complainant alleges delayed the filing of the complaint, or where the parties engaged in settlement discussions that ultimately resulted in a settlement agreement.

A. Medical Condition

While the Tribunal will, in certain circumstances, determine that the public interest favours accepting a late-filed complaint where a mental or physical condition has caused the delay, the Tribunal has repeatedly held that it will not simply accept “vague statements” that the condition was the cause of the delay (*Gillis*). Rather, the complainant must prove that the medical condition at least in part contributed to the delay.

In *Lynch*, the delay in filing the complaint was held by the Tribunal to be clearly attributable to the complainant's mental condition, the effects of which were described by the complainant's physician as follows (at para. 19):

There is no question in my mind that he was incapable, by reason of mental incompetence, of communicating effectively about the very stressful events that took place in 1993 and that this impairment persisted until late 1996.

However, despite the presence of a medical condition that contributed to the delay, the Tribunal refused to accept the complaint at the substantial prejudice stage; in other words, while the complainant's medical condition may have justified some delay, it did not outweigh the substantial prejudice caused by such a lengthy delay. *Lynch* thus further supports our opinion that a lengthy delay in filing—four years in this case—creates a greater burden for the complainant to overcome under s. 22(3) of the *Code*.

In situations where the delay is not as clearly linked to the complainant's medical condition, the Tribunal will review thoroughly the medical evidence provided by the complainant. In *Gillis*, the Tribunal declined to accept a claim of discrimination because although the complainant provided medical documentation that her mental illness contributed to the delay, the Tribunal remained unconvinced, citing a *lack of particulars* (at para. 16):

... [Ms. Gillis] acknowledges the six-month time limit, but asks that her complaint, filed four months late, be *accepted because of her mental illness*. However, there are insufficient particulars of Ms. Gillis' illness, her treatments, and her present medical situation, to find this is a defence to her late filing. [emphasis added]

Further, the Tribunal will distinguish between evidence that a complainant suffers from a medical condition, and evidence that the *medical condition accounted for the duration or bulk of the delay*. Medical conditions that cannot account for the *entire* delay create a significant burden for the complainant to overcome. For example, in *Gibson*, the Tribunal refused to accept a late-filed complaint, noting that even if the medical condition would justify some delay when the complainant was (at para. 11) "in relapse and early recovery," it did not justify such a long delay (21 months) where the complainant "has not provided information that adequately explains why he did not file his complaint significantly earlier than he did."

One of the difficulties in overcoming a lengthy delay rests in the Tribunal's approach of asking whether the complainant has been and is capable of pursuing his rights "in a resourceful and timely manner" (*Gill*). Thus, where evidence of the complainant's medical condition cannot establish that *for the duration* of a lengthy delay the complainant was unable to pursue his/her rights, the chances of the Tribunal accepting the late-filed complaint diminish greatly.

In comparison, in *Shields*, the Tribunal exercised its discretion under s. 22(3) to accept the late-filed complaint, acknowledging that during the three-month delay, the complainant (at para. 8) "was on a medical leave for a variety of conditions, including depression, diabetes, shingles and requiring a knee replacement." The complainant's medical conditions, coupled with settlement discussions with the respondent, formed a (at para. 10) "combination of circumstances provid[ing] an adequate explanation for Mr. Shield's delay in filing his complaint."

A complainant may satisfy the Tribunal that it is the public interest to accept the late-filed complaint even in situations where the medical condition is not *solely* the cause of the delay. In *Kruger v. Xerox Canada Ltd.*, 2004 BCHRT 179, the Tribunal reviewed the complainant's (at para. 20) "medical, personal and family circumstances" to determine that the combined effect of these factors accounted for the delay, and thus justified accepting the late-filed complaint. Notably, *Kruger* involved a delay of only approximately six weeks.

However, where a complainant argues that a medical condition accounted for the delay, other conduct by the complainant that contradicts an alleged inability to pursue their claim in a timely manner may cause the Tribunal to dismiss the late-filed complaint. For example, in *Fox v. Traction Creative Communications Inc.*, 2008 BCHRT 84, the Tribunal cited the complainant's shifting claims of a medical diagnosis and her participation in settlement discussions—she emailed her employer and reviewed and accepted a severance package and release—as reasons for finding it unlikely that her

condition impaired her ability to file the complaint. This aligns with the Tribunal's general policy that "pursuing other avenues of redress does not justify a delay in the filing of a human rights complaint" (*Maughan v. University of British Columbia*, 2006 BHCRT 33 at para. 107).

Therefore, it would be prudent for a complainant wishing to have the Tribunal accept a late complaint on the basis of a medical condition to establish that the condition caused or contributed to all or the majority of the delay, and that the complainant was actively pursuing his/her rights. Long periods of delay not directly attributable to a medical condition will create a significant barrier to the acceptance of a late-filed complaint.

B. Settlement Discussions

That the parties engaged in ongoing settlement discussions about a potential human rights complaint may, in certain circumstances, lead the Tribunal to accept a late-filed complaint. The Tribunal has repeatedly emphasized that it is in the public interest to encourage parties to enter into voluntary negotiations. In *Hansen*, the Tribunal summarized the value it places on voluntary negotiations (at para. 18):

The Tribunal has held that it may be in the public interest to permit a complainant to delay making a complaint under the *Code* while pursuing resolution through an employer's internal process.

The Tribunal has also held that negotiations in the context of a grievance procedure may justify a complainant's delay in filing a complaint. As the Tribunal stated in *Kanetsuka v. City of Vancouver*, 2005 BCHRT 412, to do otherwise (at para. 14) "could have a chilling effect on parties' willingness to engage in a good faith efforts to resolve complaints through such internal processes."

A number of Tribunal decisions have confirmed that there is a public interest in accepting late-filed complaints where the parties were engaged in settlement discussion; however, the Tribunal has been very clear that the subject of the discussions must be the settlement of the human rights issues. In *Gerini v. Roman Catholic Archdiocese of Vancouver*, 2003 BCHRT 42, the Tribunal stated that (at para. 25):

... as noted in *Chartier*, where a party attempts to engage in *negotiations to resolve a human rights issue*, and in the absence of prejudice to the respondent, the balance of fairness dictates that the person should have the opportunity to file a complaint within a reasonable period of time past the six month time limit. [emphasis added]

Complainants wishing to have a late-filed complaint accepted on the basis of ongoing settlement discussions bear the onus of establishing that the subject matter of the human rights complaint was a topic included in the settlement discussions (*Cheng v. Scenic Fashion Trading Ltd.*, 2004 BCHRT 312 ("*Cheng*") at para. 7). Where the complainant does not establish this, the Tribunal is unlikely to allow the complainant to rely on the discussions to support his/her request to have the late-filed complaint accepted (*Cheng* at para. 8).

Where settlement discussions are *unsuccessful*, the Tribunal has stated that the complainant must file the complaint "within a short period of time" after the breakdown of discussions (*Cheng* at para. 9).

Therefore, it is advisable for complainants to actively pursue settlement negotiations in a timely manner, and to indicate in writing to the potential respondent that the parties are engaging in the discussions on the understanding that any related delay will not be used to defend against a human rights complaint if the settlement negotiations are not successful. This way, should negotiations prove unsuccessful, and a complaint is filed shortly thereafter, the complainant stands a much better chance of establishing that a subject matter of the discussions was the human rights complaint and that the negotiations accounted for the delay, thus increasing the likelihood that the Tribunal will accept the late-filed complaint.

Specifically in a unionized employment environment, where settlement discussions are *successful*, resulting in a settlement agreement between the union and employer, the Tribunal has declined to exercise its discretion to accept as timely events outside of the six-month time limit that culminated in the settlement agreement. In *Vieira v. School District No. 42 (Maple-Ridge Pitt Meadows)*, 2005 BCHRT 115 (“*Vieira No. 1*”), the Tribunal refused to accept any time-barred portions of the complaint, in part because the trade union had negotiated a settlement agreement of the complainant’s grievance. The Tribunal stated (at para. 21):

... Ms. Vieira was actively pursuing her concerns through her harassment complaint and grievance and the resulting arbitration. All parties expended substantial resources through those processes. *In the circumstances of this case, it would not be in the public interest to force them to revisit those issues through the acceptance of the untimely parts of Ms. Vieira’s complaint.*
[emphasis added]

The Tribunal in *Vieira No. 1* accepted allegations regarding the settlement agreement itself as timely, as the agreement had been executed within six months of the filing of the complaint.

However, in *Vieira v. School District No. 42 (Maple Ridge – Pitt Meadows) (No. 2)*, 2005 BCHRT No. 350 (decision on the merits of those allegations held not to be time-barred in *Vieira No. 1*), the Tribunal took a highly deferential approach to completed settlement agreements: where the (at para. 25) “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,” the purposes of the *Code* are not furthered by allowing the complaint to proceed.

Unless the settlement agreement is discriminatory on its face, it is highly unlikely that the Tribunal will revisit issues settled by the parties that are otherwise out of time.

VI. Conclusion

When faced with a timeliness issue in a complaint before the Tribunal, be alive to the legal principles set out in this paper regarding timeliness under s. 22 of the *Code*, as well as to the potential implications of such issues for complainants and respondents alike.

Ultimately, in making decisions regarding timeliness issues—and in seeking to find the balance between remedying discrimination and protecting respondents against dated complaints—the Tribunal must rely on the Complaint Form and the submissions of the parties. In preparing a Complaint Form or submissions, a consideration of the legal principles discussed above, as well as establishing an adequate factual foundation for the Tribunal to decide whether a complaint is timely and whether it should exercise its discretion to accept an untimely complaint, is, as the Tribunal itself has observed, important to success on a timeliness application.