BCLRB No. B282/95

BRITISH COLUMBIA LABOUR RELATIONS BOARD

MARILYN COLEMAN and DOUG LEANEY

("Coleman", "Leaney" or the "Applicants")

-and-

DARLENE RENTZ and OFFICE AND
TECHNICAL EMPLOYEES' UNION, LOCAL 378

("Rentz", the "OTEU" or the "Union", and the "Respondents")

PANEL: Stan Lanyon, Chair
Enzo Accardo, Member
Wayne Carkner, Member

COUNSEL: Kate A. Hughes, for the Applicants
Bruce Laughton, for the Executive Board of the Union

CASE NO.: 19159

DATES OF HEARING: September 26 and 27, 1994

DATE OF DECISION: July 19, 1995

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Applicants apply under Sections 2, 4, 5, 10, 14, 133 and 145 of the *Labour Relations Code* for an Order setting aside disciplinary sanctions imposed by the OTEU against them on May 5, 1994. Prior to that date, each of the Applicants held elected positions with the Union. Coleman was Vice-President and Leaney was an Executive Councillor.

2 The challenged discipline arose as a result of charges laid by a member of the Union, Darlene Rentz, on September 23, 1993. After the charges were filed, the Executive Board of the OTEU conducted an eight day hearing into the charges on various dates between November 1993 and May 1994. The Applicants were ultimately found to have acted in a manner contrary to their oath of office and the best interests of the Union. Both Applicants were removed from their elected positions with the OTEU and were barred from holding any appointed or elected position within the OTEU until March 1, 1996.

3 The Applicants submit that the disciplinary sanctions imposed by the OTEU should be set aside on the grounds that the Union violated the principles of natural justice contrary to Section 10(1) of the Code and acted in a discriminatory manner in imposing the sanctions contrary to Section 10(2) of the Code.

II. BACKGROUND

4 The background facts are taken from a transcript of the evidence given at the disciplinary proceedings which are the subject of this application. Each of the parties agreed that the facts drawn from the transcripts were uncontradicted and properly formed the basis for this decision. Accordingly, there was no evidentiary hearing held by the Board. The parties were given the opportunity to present oral argument on the legal issues arising from the facts.

5 The discipline imposed by the OTEU on Coleman and Leaney arose as a result of their

conduct during an attempted raid by the OTEU of the Vancouver Municipal and Regional Employees Union (the "VMREU") membership at Vancouver City College and Emily Carr College.

6 In early July 1993 the OTEU decided to raid the VMREU membership at the two colleges. The initial authorization for the raid was given by the OTEU's President, Ron Tuckwood. By mid-July Mick Maguire, the OTEU organizer, had already commenced organizing the VMREU members by circulating leaflets.

7 On July 22, 1993 the Executive Board of the OTEU met and endorsed the raid. At that meeting both Tuckwood and Maguire advised the Executive Board of their views concerning several aspects of the raid. First, they suggested that the attempt to organize the VMREU members did not really constitute a raid. Rather it was a "liberation". Second, they advised that, in any event, the B.C. Federation of Labour (the "BC Fed") approved the raid. Third, they advised that the Canadian Union of Public Employees ("CUPE"), with whom the VMREU was negotiating a service agreement, did not oppose the raid. Fourth, they advised that the VMREU would be "swallowed up" and lose its identity. Finally, they advised that the VMREU members would not have a vote. On the basis of this advice, the Executive Board approved the raid.

8 After the July 22 meeting, both Coleman and Leaney received a number of enquiries from OTEU members concerning the propriety of the raid and the accuracy of the information that the Executive Board had been given when it decided to approve the raid. As a result of these enquiries and their own concerns, Coleman and Leaney decided to make their own enquiries to determine the accuracy of the information that they had been given. These enquiries included contacting the BC Fed and CUPE to ascertain their views concerning the raid. More importantly for the purposes of this case, after being contacted by representatives of the VMREU, Coleman and Leaney agreed to meet with these representatives to listen to their views concerning the raid. It was this meeting that led to the challenged discipline.

9 Coleman, Leaney and Lorraine Dame, a third officer of the OTEU against whom disciplinary charges were ultimately dismissed, agreed to meet with the officers of the VMREU on September 13, 1993. At the meeting all three listened to the views of the VMREU representatives. The Applicants state that they did not disclose any confidential information

about organizing tactics or information about the raid during the meeting.

10 The Applicants did not advise the other members of the Executive Board of the meeting prior to it taking place. According to Coleman, she did not discuss the meeting with Tuckwood because in her view he would simply have stated that the raiding activity of the Union was proper and that she should leave the matter alone. While the Applicants did not expressly advise the other officers of the meeting, they did not take active steps to be secretive about the fact or purpose of the meeting. The meeting took place openly in a restaurant. Indeed, another Executive Officer, who later became a witness against the Applicants, was at the restaurant having dinner at the time and observed the meeting.

11 It was the intention of the Applicants to independently gather information about the raid and to communicate this information at the next meeting of the Executive Council of the OTEU so that the Executive Board's earlier decision to endorse the raid could be revisited on the basis of more complete information. The next Executive Council meeting was held on September 20, 1993. At this meeting Coleman, Leaney and Dame informed the Executive Council of their meeting with the VMREU and attempted, unsuccessfully, to have the issue of the raid re-addressed. Rather than revisit the decision to raid the VMREU, the discussion centred on the propriety of the Applicants having met with the VMREU.

12 On September 23, 1993, Rentz, an Executive Councillor with the OTEU, filed a written complaint against the Applicants and Dame. This complaint was addressed to the President and Executive Board of Local 378 OTEU/OPEIU and reads as follows:

> Dear Brothers and Sisters,
>
> > I wish to make a complaint under Article XVI of our Local Constitution and in accordance with Article XIX, Section 10 of our International Constitution.
> >
> > I name Marilyn Coleman Vice-President of Local 378, Lorraine Dame Executive Councillor, Doug Leaney Executive Councillor as having violated the Oath of Office of our Local Union and engaged in activities contrary to the best interests of our Local Union.
> >
> > On the 20th September 1993 in the presence of the Executive Council convened for the purpose of conducting the business of our Local Union the above mentioned officers of our Local Union made known the following.

1. They did meet and consort with members and agents of the executive board of the Vancouver Municipal and Regional Employees Union and did discuss the organizing activities of our Local Union with these parties who are adversely affected by such activities.

2. They did meet with the aforementioned and by such did provide comfort to these persons contrary to the interests of our Local Union.

3. By discussing matters of a confidential nature to our Local Union with persons adversely affected by our activities have acted in a manner contrary to the interests of our Local Union.

I respectfully await your deliberations under Article XVI of our Local Constitution.

In Solidarity

Darlene Rentz
Executive Councillor

13 This letter initiated the disciplinary proceedings against the Applicants and Dame. The charges were dismissed against Dame when she resigned from her employment and relinquished her Union membership.

14 The Trial Board conducted a lengthy hearing into the charges against the Applicants. Following the trial, both Coleman and Leaney were found guilty. The penalty imposed barred them from holding their elected positions for the remainder of their term -- approximately two years.

III. POSITION OF THE PARTIES

15 Both the Applicants and the Respondents filed detailed written arguments in advance of the oral hearing into this matter. In addition, the parties supplemented their written arguments in the course of the oral hearing. The following is a summary of the arguments advanced by each of the parties.

A. Position of the Applicants

16 The Applicants argue that the discipline imposed against them by the OTEU should be set aside because the Union's disciplinary procedures denied the Applicants the right to the application of the principles of natural justice contrary to Section 10(1) of the Code. Further, in imposing the discipline, the Union was acting in a discriminatory manner contrary to Section 10(2) of the Code.

17 The Applicants argue that the principle of natural justice requires more than the tribunal merely acting fairly in its proceedings. This is particularly true when professional or employment issues are at stake. Natural justice includes: (a) reasonable notice of the charges and the nature of the charges; (b) the decision must be based upon the evidence adduced; (c) the hearing must be conducted in good faith and without bias; and (d) no individual can sit in judgment of his own cause.

18 In recognition of the importance of the principles of natural justice, the Applicants assert that the Board should be careful not to impose too narrow a scope of review of the Union's conduct.

19 The Applicants challenge the discipline imposed on them by the Union on a number of grounds. We will deal with each of these in turn.

1. Protected Activity under the Code

20 The Applicants argue that their conduct in meeting with the VMREU is protected activity under the Code. It is a fundamental principle under the Code that employees have a right to participate in a process surrounding a raid and applications for certification. This participation cannot be read too narrowly. It is not appropriate for a union to use its constitution to thwart or prohibit participation in activities sanctioned by the Code. As the Applicants were suspended from office for engaging in such protected activity, the suspensions ought to be set aside as contrary to the principles of the Code.

2. The Changing Nature of the Charges

21 The Applicants argue that the disciplinary process was defective as the charges laid

against the Applicants were overly vague, impairing the ability of the Applicants to defend themselves against the charges. Further, the Applicants argue that the charges against them changed during the course of the hearing as the evidence unfolded. The Applicants were originally charged with "consorting with" the VMREU to "discuss organizing activities" and "providing comfort" to the VMREU. The original charges also included an allegation that "by discussing matters of a confidential nature" the Applicants acted contrary to the best interests of the Union. At the commencement of the disciplinary hearing further particulars were given to the effect that the Applicants' disclosure of confidential information had resulted in the cessation of the OTEU's raid of the VMREU.

22 The Applicants argue that at the close of the Trial Board hearing there was no evidence that the Applicants had disclosed any confidential information concerning the OTEU's organizing activities to the VMREU. It was also clear that the conduct of the Applicants had not resulted in the cessation of the raid. As a result, the Applicants made a no evidence motion. This motion was dismissed by the Executive Board acting in its capacity as the Trial Board in the following terms:

> …In our opinion it is not accurate to view the charge as requiring the passing of in camera information. Rather, a reading of the charge and the particulars as a whole shows that the essence of the charge is the discussion of the organizing activities of the OTEU with the VMREU and thereby providing comfort to that union. (Volume 2, p. 303)

23 The Applicants argue that this response to the no evidence motion resulted in a re-characterization of the charges against them and thereby constituted a denial of natural justice. The charges no longer referred to the disclosure of confidential information or the allegation that the conduct of the Applicants resulted in the cessation of the raid. Rather, the Applicants were charged with "meeting" and "discussing" with the VMREU.

24 Finally, the Applicants note that at the end of the hearing the convictions entered against them were for simply meeting with the representatives of the VMREU with no reference to the Applicants either having discussed confidential information or the organizing activities of the OTEU. There was also no mention of the conduct of the Applicants having resulted in the

cessation of the raid.

25 In summary, the Applicants argue that the charges laid out in writing and particularized at the outset of the hearing were not proven. The Applicants were convicted of some unknown or unparticularized charges, contrary to the principles of natural justice. The evidence was not as expected but this should have been a reason for dismissing the charges, not widening them after the fact to fit the evidence.

3. Decision not based on the evidence adduced

26 In the Trial Board's decision concerning Leaney, the Board stated that:

> …The Board believes Brother Leaney engaged in more than just a fact finding exercise by communicating with the VMREU in mid-August, 1993, almost a month prior to meeting in September, 1993.

27 The Applicants argue that Leaney was never charged in connection with the communication that is alleged to have occurred in mid-August 1993. There was no *viva voce* evidence of any such communication, nor was Leaney cross-examined with respect to any such communication. The only evidence of any communication was on the reverse side of an OTEU leaflet showing that Leaney had faxed a copy of an OTEU leaflet dated August 12, 1993 to a member of the Executive Council of the VMREU. Leaney was never asked about this leaflet during his direct examination. The first mention of the leaflet was by the Executive Board in its May 5, 1994 decision.

28 The Applicants submit that where a disciplinary tribunal considers evidence not made available to the accused this is a fundamental failure to observe the requirements of natural justice. The Executive Board, in finding Leaney guilty with respect to an alleged communication in mid-August 1993, without ever charging him with making the communication or questioning him about the communication, breached natural justice.

4. Bias of Executive Board

29 The Applicants argue that a crucial element to the principle of natural justice is the rule against bias which in simple terms requires that no person shall be a judge in their own cause.

30 The Applicants assert that in order to find a violation of Section 10(1) of the Code it is not necessary for the Board to find that the Executive Board of the Union exhibited actual bias. Rather, it is sufficient to find a reasonable apprehension of bias or a real likelihood of bias on the part of the Executive Board.

31 The courts consider a number of factors when determining whether a reasonable apprehension of bias exists. These factors include whether the Trial Board had preconceived notions about the conduct of the Applicants, evidence of antagonism between the tribunal and the Applicants and whether the members of the tribunal had a personal interest in the outcome of the proceedings. The Applicants note that in this case they themselves were known political opponents of the majority of the members of the Executive Board appointed to hear their case. Further, the Executive Board trying the Applicants and the witnesses against the Applicants together constituted the Executive of the Union. This Executive Board had voted in favour of the raid on July 22, 1994. Having those same Executive members on the Trial Board raises a reasonable apprehension of bias as the Executive members, in judging the Applicants, were in effect "judges in their own cause".

5. Bias re Ardell Brophy

32 Ardell Brophy was one of the members of the Executive Board appointed to sit on the Trial Board. Sometime during the course of the trial the Applicants learned that Brophy had been hired as a staff representative by the Union and was currently on probation. In her paid position, Brophy reported to Tuckwood. The Applicants note that Tuckwood was also one of the key witnesses against them.

33 The Applicants argue that Brophy was in a particularly vulnerable position because she was both subject to the direction of Tuckwood and a probationary employee. The Applicants submit that a reasonable apprehension of bias exists with respect to Brophy as it is reasonable to assume that she, intentionally or unintentionally, would not actively displease her employer by finding in the Applicants' favour. Accordingly, Brophy ought to have been disqualified from

sitting as a member of the Trial Board: *Bethany Care Centre* v. *United Nurses of Alberta* (1983), 29 Alta. L.R. (2d) 3 (C.A.).

34 The Applicants argue further that a reasonable apprehension of bias with respect to one member of the tribunal is sufficient to disqualify the whole tribunal. The mere presence of an individual who is tainted by bias is enough to void the whole decision: *Wire Rope Industries Ltd.*, IRC No. C19/88 (1988), 18 CLRBR (NS) 347.

6. Discrimination

35 The Applicants argue that the disciplinary action imposed by the Union should also be set aside on the grounds that the discipline was imposed in a discriminatory manner contrary to Section 10(2)(a):

> 10. (2) No trade union shall expel, suspend or impose a penalty on a member or refuse membership in the trade union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the trade union or council of trade unions
>
> (a) if in doing so the trade union acts in a discriminatory manner, or

36 The Applicants submit that the reference to discrimination in Section 10(2)(a) should be read widely, to include discrimination arising with respect to internal union affairs: *Gerald Abbott -and- International Longshoremen's Association, Local 1953*, [1978] 1 Can LRBR 305; *Victor M. Maylon*, BCLRB No. B191/94 and *Terry Matus -and- International Longshoremen's and Warehousemen's Union, Local 502*, [1980] 2 Can LRBR 21.

37 The Applicants argue that discrimination occurred in a number of ways. First, the charges and conviction are illegal in the sense that they are *ultra vires* or beyond the scope of the OTEU's Constitution. Second, the charges and conviction are arbitrary in the sense that they are not based on any general rule, policy or rationale. In this regard, the Applicants note that in other similar circumstances in the past, either no charges were laid or, if charges were considered, they were investigated first. Third, the decision to discipline is unreasonable because it bears no relationship to the charges or the evidence. The Applicants note that the transcripts

make clear that the Union originally thought that confidential information had been given to the VMREU, when in fact it had not. The only evidence adduced was that the Applicants had met over dinner with the VMREU. This is not a sufficient basis for a finding of guilt.

38 The Applicants argue that while the Union may have the constitutional right to discipline its members and officers, this right must not be exercised in an oppressive manner. The rights of the individual members of the union must be protected against undemocratic and tyrannical practices: *Bimson* v. *Johnston et al.*, [1957] O.R. 519 (H.C.).

39 The Union notes that in the present case, the charging party was seeking, through the trial process, to quash dissent. The effect of the charges and trial was to limit the manner in which the Applicants and other members of the Union could obtain information, where that information would contradict decisions of the Executive Board. The Applicants argue that these kinds of rigid limits imposed on the gathering and disseminating of information are inimical to the basic notions of free speech and freedom of expression within a trade union. The discipline imposed to enforce such limits was therefore *ultra vires* or beyond the scope of the Union's constitutional power to discipline. For this reason, the decision of the Executive Board to discipline the Applicants in the circumstances of this case was discriminatory and therefore contrary to Section 10(2) of the Code.

40 In support of this proposition, the Applicants refer to a number of Supreme Court of Canada decisions interpreting the scope of freedom of expression and association under the *Charter*. The Applicants do not argue that the *Charter* is applicable in this case. They argue, however, that the *Charter* principles ought to at least provide a guide to the Board in interpreting Section 10 and the Constitution and bylaws of the Union.

41 In support of the second example of discrimination referred to above, namely that the charges and conviction were arbitrary, the Applicants refer to two past incidents where the Union applied different standards in its approach to the discipline of other Union officers. These incidents were referred to as the "pink letter" incident and an incident involving member Jerry Turney.

a) <u>The Pink Letter</u>

42 On July 11, 1989 a number of the Officers of the Union published a letter (known as the "pink letter") which publicly criticized the President of the Union. The pink letter was signed by Terry Herrett, then Vice-President of the Local, who was the Chair of the Trial Board hearing the charges against the Applicants; by Brophy, a member of the Trial Board; and by Jerri New, Ron Tuckwood and Jacqueline Brown, who were witnesses called by Rentz. Approximately 7,000 copies of the pink letter were distributed by these Officers to the members of the Union.

43 A short time after the publication of the pink letter, a number of other Union members, including Rentz, published a document in the form of a petition containing over 70 signatures in which they accused the signatories of the pink letter of having:

> …totally bypassed the democratic workings of this union, putting personal political motives ahead of the best interests of this union.

and of having:

> …openly undermined and weakened this union to attack both from management at the bargaining table, and from outside raiding unions.

44 A further petition dated July 20, 1989, again signed by 70 or more members of the Union, publicly criticized the signatories to the pink letter. This petition suggested that the internal dissent at the level of the Executive Board had "created the perception of a union going to wrack and ruin", and "…The actions of a few dissenters within the O.T.E.U. provide I.C.T.U. with an opportunity with which to mount a raid".

45 The Applicants argue that the conduct of the Executive Officers in publishing the pink letter was much more damaging to the Union than the conduct of the Applicants in this case. Despite the seriousness of the pink letter incident, no charges were laid and no penalties were imposed against the signatories of the pink letter. The Applicants rely upon the absence of discipline in relation to the pink letter incident in support of their contention that the Union, in charging and disciplining the Applicants for the less serious act of meeting with the VMREU, has acted in a discriminatory manner.

b) The Jerry Turney Incident

46 This incident refers to a complaint that was filed in 1993 against Jerry Turney, a shop steward with the OTEU. In that case, the Executive Board decided to conduct an investigation into the complaints against Turney before any formal charges were laid against him. As a result of that investigation, there were ultimately no charges laid. The Applicants argue that the Union acted in a discriminatory manner by failing to conduct an investigation into the conduct of the Applicants before laying formal charges against them. In the case against the Applicants, it was simply assumed that they had released confidential information to the VMREU and charges to that effect were laid. An investigation would have disclosed, as was disclosed at the hearing, that no confidential information was released. The Applicants submit that had this been determined, the formal charges against them and the hearing into their conduct could have been averted.

47 The Applicants argue that the Union's failure to conduct an investigation prior to laying charges constitutes discriminatory conduct on the part of the Union that justifies the discipline against the Applicants being set aside.

48 In conclusion, the Applicants argue that the disciplinary proceedings brought against them were brought for political purposes. Coleman, Leaney and Dame had run against Tuckwood and other members of the Executive as part of a "coalition". Coleman was successful in obtaining, by democratic vote, the position of Vice-President despite the opposing "slate", which included the accusers and the majority of the Executive Board. As a result of the disciplinary findings, Coleman and Leaney were removed from elected office and barred from holding any appointed or elected position with the OTEU until March 1, 1996. This effectively removed all political opposition to the remaining members of the Executive Board. The Applicants submit that both the intent and effect of the disciplinary action was to silence the dissenting political voices and to harass and hound selected political opponents out of the Union. This falls into the definition of discrimination and is exactly the type of conduct that is prohibited under Section 10(2)(a) of the Code.

B. Position of the Executive Board

49 The Executive Board argues at the outset that the Board's jurisdiction is restricted by the words of Section 10(1) and (2) to deciding two matters:

> (1)whether a person has been denied a right to the application of the principles of natural justice; and
> (2)whether a trade union is acting in a discriminatory manner with respect to the imposition of a penalty.

50 Allegations which fall outside of the scope of these two headings cannot be considered by the Board.

51 The Executive Board notes that consideration of these issues in the context of union disciplinary proceedings is not new. Such issues have been dealt with by the courts since the 1920's. In approaching the case, the Board should respect the courts' decisions. The courts have been very realistic in dealing with such matters, recognizing that unions are not independent courts of law required to act judicially. The courts have never required perfection by domestic tribunals like trade unions, but have recognized that the concept of natural justice is a flexible one that is context dependent: *Pearlman* v. *Manitoba Law Society Judicial Committee* (1991), 84 D.L.R. (4th) 105 (S.C.C.).

52 The flexibility the courts have brought to the concept of natural justice has also been applied by the Supreme Court of Canada in recognizing that administrative bodies are not saddled with the notion of "procedural perfection". In reviewing the conduct of an administrative tribunal the aim is not to import the rigidity of all the requirements of natural justice observed by a court. The courts allow administrative tribunals to work out a system that is flexible, adopted to their needs and fair. The aim is to achieve a balance between the need for fairness, efficiency and a predictability of outcome: *Knight* v. *Indian Head School Division*, [1990] 1 S.C.R. 653.

53 In reviewing the conduct of the Union in this case, the Board is not sitting in appeal from the internal union decision and cannot substitute its judgment for that of the Union. The Board's task is to ensure that the Union's discipline standards are free from discriminatory practices: *Carbin* v. *International Association of Machinists and Aerospace Workers* (1984), 59 di 109, 85

CLLC ¶16,013.

54 In determining whether a union has acted in a discriminatory fashion, the Board should not concern itself with technical violations of procedural rules or the union's Constitution. The Board should not apply a standard that would negate the informality provided for in the constitutions of some trade unions. Instead, it should adopt a realistic approach and consider human and plausible explanations from unions for their conduct: *Ronald Wheadon et al. -and- Seafarers' International Union of Canada et al.* (1983), 5 CLRBR (NS) 192.

55 In addition to these general arguments, the Executive Board also responds to each of the specific grounds raised by the Applicants. These will be dealt with in the same order as was followed in the review of the Applicants' arguments.

1. Protected Activity

56 The Executive Board submits that the decision of a union to raid is not a decision made by the affected "employees" but rather by a union executive. Once a union attempts to organize another group of employees, those employees are given rights under the Code to join or not join the raiding union. There is no statutory provision in the Code which regulates an internal union decision to organize employees.

57 In this case, none of the employees affected by the raid have made any complaint to the Board or allege that their rights set out in Sections 2, 4 and 5 of the Code have been violated. All of those rights are given to those employees and not the Applicants. In this case, the Applicants were not penalized for exercising a right under the Code. Rather, the Applicants were functioning simply as Union and Executive members and their conduct had the effect of giving comfort to the VMREU which was being raided.

2. Changing Nature of the Charges

58 The Executive Board argues that the charges against the Applicants did not change in the manner suggested by the Applicants. Rather, during the course of the disciplinary proceeding the Applicants attempted to restrict or fetter the charges before the Executive Board so that a

conviction on the charges required proof of what was said by the Applicants in the meeting with the VMREU. The Executive Board argues that this is an overly strict and unrealistic interpretation of the charges. Clearly, no member of the OTEU, other than the Applicants themselves, could prove what was said at the meeting with the VMREU.

59 The Executive Board notes that before the Applicants called witnesses in their defence, their lawyer made a no evidence motion. The no evidence motion was based on the absence of evidence concerning the passing of confidential information to the VMREU by the Applicants. The Executive Board could have dismissed this aspect of the charge without commenting further on whether the balance of the charges had been satisfied. In its reasons for dismissing the no evidence motion, the Executive Board went beyond this and put the Applicants and their counsel on notice as to the essence of the charges as a whole; namely, that the charge concerned the conduct of the Applicants in discussing the organizing activities of the OTEU with the VMREU, the effect of which was to provide comfort to the VMREU. In other words, the Applicants were given a clear indication of the essence of the charges against them before they had called any witnesses. The Applicants had the opportunity to call any witnesses they chose and, in fact, did recall a number of witnesses that had already been examined by Rentz and cross-examined by the Applicants prior to the no evidence motion.

60 The Executive Board argues that the Applicants and their counsel were aware that the conduct of the Applicants referred to in the reasons for dismissing the no evidence motion were part of the original charge against the Applicants. However, the Applicants simply chose not to focus on that aspect of the charge in their defence.

61 In summary, the Executive Board argues that there were originally three charges against the Applicants. At the end of the disciplinary hearing, the Applicants were convicted on one charge; namely, that they met with the VMREU and by meeting provided comfort to the VMREU contrary to the interests of the OTEU. While this charge was the weakest of the original charges, there was sufficient evidence in support of the charge to support a conviction and the punishment imposed by the Union.

62 The Executive Board notes Leaney's evidence before the Trial Board:

> …there was very little information on our part given to them at all regarding the raid. We were there mostly to hear what they had to say" (Volume 4, p. 378)

63 The Executive Board submits that this passage makes it clear that at least some information was communicated by the Applicants to the VMREU during their restaurant meeting. Further, Leaney acknowledged that he communicated the fact that neither he nor Coleman supported the raiding activities of the OTEU. Leaney stated:

> Well, basically the only thing that we really put forward on our part was we did tell them that we had an Executive Council meeting coming up fairly soon. And we told them we would take the issue forward there and discuss it with the rest of the Council and the Executive Board, tell them how we felt about it, and have a debate on the issue there. (Volume 4, pp. 379-80)

64 The Executive Board argues the reference to the word "debate" in this passage makes it clear that Leaney was communicating the fact that there was dissension on the OTEU Executive Board concerning the propriety of the raid. There are two sides to a debate: the accused in favour of not raiding and the other members of the Executive Board in favour of raiding. The VMREU would take comfort from the knowledge that there was some dissension on the OTEU Executive Board concerning this matter.

65 It is submitted by the Executive Board that it is clear from the above passages that there was at least some evidence that the Applicants engaged in the conduct that they were ultimately convicted of.

3. Decision Not Based on the Evidence Adduced

66 The Executive Board's response to the allegation that the fact of Leaney's communications with the VMREU in mid-August 1993 was not put to him in the disciplinary hearing is that this was simply one factual finding of the disciplinary tribunal concerning Leaney. This finding of fact was not made with respect to Coleman, but Coleman was ultimately convicted of the same offence as Leaney. Therefore, it is apparent that this finding of fact was not an essential finding of fact in support of the conviction.

67 The Executive Board also notes that the OTEU leaflet that was faxed by Leaney to the Executive Council of the VMREU was put into evidence by the Applicants in the course of their defence of the disciplinary charges. The Applicants' defence was that they were merely engaging in a "fact finding exercise". The Trial Board simply rejected this defence, relying in part on the Applicants' own evidence. Because the Applicants themselves had entered the faxed leaflet into evidence the Trial Board was justified in considering the leaflet in reaching its decision. Further, because the evidence was tendered by the Applicants, there was no obligation on Rentz to cross-examine the Applicants with respect to the document.

68 The Executive Board argues that the evidence of the faxed OTEU leaflet is critical as it establishes that Leaney had communicated with the VMREU in August 1993, some time before the September meeting. This shows some evidence of a friendly relationship between Leaney and the VMREU. The evidence altogether supports a conclusion that comfort was being given by the Applicants to the VMREU.

69 Finally, the Executive Board argues that in weighing the significance of the faxed OTEU leaflet the Board must simply consider whether there was an evidentiary basis for the ultimate decision reached by the Union. In order to find a breach of natural justice, the Board must find that there was an absence of evidence on the matters leading to the conviction. If there was any evidence to support the conclusion of the Trial Board then the Board cannot overturn that decision. In this case there was the faxed communication to show that Leaney communicated with the VMREU in August, and Leaney's own evidence that he communicated information to the VMREU in September, contrary to the best interests of the Union.

4. Bias of Executive Board

70 The Executive Board argues that with respect to a domestic tribunal, actual bias must be shown in order to find a breach of the principles of natural justice: *Vlahovic* v. *Teamsters' Joint Council No. 36 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers et al.* (1979), 17 B.C.L.R. 277 (S.C.). In this case, the Applicants acknowledge in their submissions to the Board that they have no evidence of actual bias. Accordingly, there can be no denial of natural justice.

71 The Executive Board disagrees with the Applicants' argument that the Union Trial Board is a statutory tribunal rather than a domestic tribunal because its activities are regulated by the Code. In determining whether a tribunal is a domestic tribunal or a statutory tribunal the question is whether the tribunal is established by statute, not whether it is regulated by statute. In this case, the Executive Board of the OTEU is created not by statute but by the Union's bylaws and Constitution. Those bylaws and Constitution are considered at law as a contract amongst members. Accordingly, the parties are bound to resort to the internal discipline procedure by agreement and not by statute. This is a critical distinction in determining whether the tribunal is statutory or domestic: *Roberval Express Ltd.* v. *Transport Drivers, Warehousemen & General Workers' Union, Local 1106* (1982), 144 D.L.R. (3d) 673 (S.C.C.) and *Skoreyko et al.* v. *Belleville et al.* (1991), 47 Admin. L.R. 228 (Alta. C.A.).

72 In the alternative, the Executive Board submits that the facts advanced by the Applicants do not establish a reasonable apprehension of bias. The Applicants suggest that the issue in this case was the correctness of OTEU's decision to raid the VMREU. This encapsulation of the issue is not correct. Rather, the issue is whether the Applicants had violated their oath of office and acted contrary to the best interests of the Union in creating the appearance of weakening the resolve of OTEU in pursuing the raid. Whether they agreed with the raid or not did not matter. It was their conduct with the VMREU that was in question.

73 Accordingly, the members of the Executive Board hearing the charges who may have voted in favour of pursuing the raid did not have to consider the correctness of that decision in reaching the conclusion that they did in a disciplinary hearing.

74 Even if the decision to raid was quite wrong, it was still reasonable to expect that members of the Executive would keep their dissenting opinions within the Union and not take them to the Union's rival, the VMREU.

75 In conclusion, the Executive Board submits that there is no evidence to show that the members of the Executive Board did not bring to their task a will to reach an honest conclusion. In any Union setting persons will have views with respect to the correctness of decisions which have been taken. This is not sufficient to found an allegation of bias.

5. Bias re Ardell Brophy

76 Here again the Executive Board argues that the appropriate standard to apply is whether there is actual bias, not whether there was a reasonable apprehension of bias. In this case, the bias allegations against Brophy do not support a finding of actual bias.

77 In the alternative, the Executive Board submits that Brophy's employment with the OTEU is not sufficient to establish apprehension of bias. The reality which arises with respect to internal union matters is that total independence is an impossible goal. Because the proceedings must be constituted in accordance with the Union's Constitution, and because that Constitution draws on elected officials and members to function as judges, there will always be an overlap in terms of functions.

78 In this case, the Applicants have advanced theoretical and speculative theories which would show that Brophy could have been dismissed if she did not side with Tuckwood's view of the case. Such a serious allegation (namely that Brophy would succumb to such pressure and that Tuckwood would exercise it) requires more that speculation.

79 Accordingly, the Executive Board submits that this ground does not establish a breach of Section 10(1) of the Code.

6. Discrimination

80 The Executive Board argues that the Applicants are seeking to expand the term "discrimination" as used in Section 10(2) of the Code. This expansion extends to matters encompassing illegal, arbitrary or unreasonable conduct. The Executive Board submits that the concept of discrimination properly relates to "the application of membership rules to distinguish between individuals". The Executive Board relies upon the Supreme Court of Canada decision in *Law Society of British Columbia et al.* v. *Andrews et al.* (1989), 56 D.L.R. (4th) 1, for the proposition that discrimination is the drawing of a distinction, whether intentional or not, based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individuals or groups not imposed upon

others.

81 In this case, there is no evidence to establish that the Applicants have been treated differently from any other Union members or that the standards for selecting persons against whom charges are to be laid has resulted in discriminatory conduct with respect to the Applicants. Further, no distinction has been advanced based on personal characteristics or group affiliations. The Executive Board argues, therefore, that the general allegation of discrimination with respect to the treatment afforded the Applicants is without foundation.

82 The Executive Board argues that the "freedom of speech argument" advanced by the Applicants does not fit within the ground of discrimination. The predecessor to Section 10(2) of the Code was Section 5(2) of the *Industrial Relations Act*. That Act gave the Industrial Relations Council the power to control trade union discipline where, "in the Council's opinion" the cause for discipline was not "fair and reasonable".

83 Under the Code no such jurisdiction exists. Rather, the Board must find that the trade union acted in a discriminatory manner. There is no jurisdiction for the Board to interfere with an internal decision of the trade union simply on grounds that it was unfair or unreasonable, unless it offends an express provision of the Code: *Charles Johnston*, BCLRB No. 14/76, [1976] 1 Can LRBR 321.

84 In the alternative, the Executive Board argues that if discrimination is equated to a right of free speech such an argument overlooks the restrictions that can reasonably be placed on union members and elected officials in connection with their conduct. The evidence shows that the Applicants acted to the detriment of their Union and it was this conduct which resulted in their being disciplined. That discipline was not enforced in a discriminatory fashion and did not offend Section 10(2) of the Code. The Applicants were elected officials of the Union. They had, in addition to their obligation under the Constitution as members, an additional obligation by reason of their oath of office which required them at all times to devote their efforts to further the objectives and best interests of the Union.

85 In this case, the objective of the OTEU was to conduct a raid of certain bargaining units held by the VMREU. The Applicants, through their conduct, undermined the resolve and

solidarity which had to be brought to such a decision. It was reasonable in all the circumstances for the Union to find that such conduct was contrary to its best interests, those of the members, and contrary to the Applicants' specific obligations under the Union's Constitution.

a) The Pink Letter

86 The Executive Board argues that the fact that there were no charges laid in the pink letter incident does not support the Applicants' contention that the Union acted in a discriminatory manner by processing charges in the present case.

87 The Executive Board submits that this ground ignores the fact that the bringing of charges is a right given to individual Union members under the Constitution. Article XIX, Section 10(a) of the Constitution provides that:

> …Charges may be brought in writing by any officer or members of the Local Union or of the International Union by filing same with the secretary-treasurer of the Local Union.

88 This section goes on to require the Local Union to hold a trial to hear these charges. No discretion is given to the Local Union with respect to such charges.

89 The Executive Board notes that in the case of the "pink letter" no Union member sought to bring charges against the signatories of the "pink letter". If such charges had been brought and the OTEU had refused to process them, then in those circumstances a factual basis for alleging discrimination could be shown.

90 In this case, there is no evidence which shows that the Executive Board dealt with the charges against the Applicants in any manner different from charges which had been handled in the past. This is not a case where the two Applicants were selected from a group for special treatment nor is it a case where the disciplinary procedures of the Union were applied in an unequal fashion to those who came before the Union. Accordingly, it cannot be said that the actions of the Union were discriminatory either in fact or at law.

b) The Jerry Turney Incident

91 The Executive Board argues that the fact that the Union did not conduct an investigation prior to charges being laid against the Applicants as was done in the Jerry Turney case does not support the Applicants' argument that the Union has treated the Applicants in a discriminatory manner.

92 The Executive Board notes that in the Turney case, a request was made for an investigation prior to the charges being laid, and the Union agreed to conduct such an investigation. In the present case, Rentz did not come to the Executive Board prior to laying charges and request that an investigation be conducted into the activities of the Applicants. Rather, she laid the charges against the individuals without consulting the Executive Board. Once a charge is laid, the Executive Board has no jurisdiction under the Union Constitution to conduct an investigation.

93 Had Rentz requested an investigation prior to laying the charges against the Applicants, and had the Executive Board refused to conduct an investigation, then a factual basis for alleging discrimination could be shown. As this did not happen, it cannot be said that there was different treatment of individuals arising out of a similar set of facts. Accordingly, it cannot be said that the actions of the Union were discriminatory.

94 In conclusion, the Executive Board submits that upon a reasoned view of the evidence and the relevant law the Applicants have not established a breach of their right to natural justice or their right to be dealt with in a non-discriminatory manner.

95 The specific allegations are either unsupported by the facts or require the Board to depart from established legal principles. The Executive Board submits that no such departure is called for in this case. Rather, the Executive Board urges this Panel to bring to this matter a recognition of the realities of Union discipline, realities which can never result in perfection or "icy impartiality". On the evidence, the Board can be satisfied that the adjudicators brought to their task a willingness to reach an honest conclusion and a resolve not to make up their minds before hand.

IV. ANALYSIS AND REASONS

1. Nature of Trade Unions

96 At common law, trade unions were treated as unincorporated associations. This meant they were neither natural persons nor corporate bodies. This raised the issue of whether a trade union could sue or be sued in its own name (the Supreme Court of Canada in *Teamsters Local 213* v. *Therrien* (1960), 22 D.L.R. (2nd) 1, found a union liable in tort). Today, most provincial labour relations statutes make trade unions legal entities for the purposes of those statutes.

97 As a voluntary unincorporated association, trade unions do not depend upon the legislature for their creation. However, for a trade union to gain statutory rights under provincial labour legislation it must comply with that legislation, the first of which is the definition of "trade union". In British Columbia that definition is contained in Section (1):

> …"trade union" means a local or Provincial organization or association of employees, or a local or Provincial branch of a national or international organization or association of employees in British Columbia, that has as one of its purposes the regulation in British Columbia of relations between employers and employees through collective bargaining, and includes an association or council of trade unions, but not an organization or association of employees that is dominated or influenced by an employer;…

98 The criteria listed in this definition are common to many different jurisdictions, the most important of which are: it must be an organization of employees and its purpose must be the regulation of relations between an employer and its employees; it must have a constitution and bylaws adopted by its membership; it cannot be dominated by an employer; and finally, the organization must be local or provincial, but it may have a national or international parent.

99 The structure of a union is dictated by its primary responsibility -- the negotiation and administration of collective agreements. Whether it is a small or large union there will typically be full time staff who have worked their way up from the shop floor. They have handled grievances, attended labour education schools, acted as delegates at conventions, participated in bargaining and attended arbitration and labour board hearings.

100 A small union may only have one or two staff members; as a consequence it will be heavily dependent upon volunteer assistance. However, even the largest union, with a central headquarters and regional branches, with staff to provide research, education, legal, technical and administrative support, is dependent upon its membership to function effectively. Finally, most local unions are affiliated to larger national and international unions, as well as to a provincial federations of unions (such as the BC Federation of Labour) and to large national federations (such as the Canadian Labour Congress).

101 An essential element of the structure of a trade union, at the local level, and between the local and any parent organization, is its constitution and bylaws. It is the key document upon which the trade union and its membership govern themselves. The constitution and bylaws contain the rights and obligations of the members to one another and towards the union; it contains the different levels of decision making, as well as the powers and duties of the officers involved in that decision making; it includes provisions outlining the relationship of the local to the parent; and it sets out the requirements for the elections of officers and for the setting of conventions.

102 At each convention there is an opportunity for the union to amend its constitution, and indeed there may be lively debate around this process of amendments. A union's constitution is a vigorous social and political document, drafted by trade unionists themselves. Therefore, the constitution and bylaws ought not to be read (in the words of Laskin, J., as he then was) "…as if it was a common law conveyance. The construction should be liberal, not restrictive…": *Astgen et al.* v. *Smith et al.* (1969), 7 D.L.R. (3d) 657 at 684 (Ont. C.A.).

103 A union's constitution became the focus of the courts' analysis of the internal affairs of trade unions. The rules, the bylaws and the constitution of the union, formed a contract that regulated the relationship between union members. As a contract it was subject like any other contract to the courts' jurisdiction. There has always existed a conceptual difficulty as to the exact form of this contract. The best view appears to be that there is a "…single multi-party contract which an individual union member adheres when he or she joins the union": G.W. Adams, *Canadian Labour Law*, 2d ed. (Aurora, Ont.: Canada Law Book, 1995) ¶14,980. In the words of Rand, J., in *Orchard et al.* v. *Tunney* (1957), 8 D.L.R. (2d) 273 (S.C.C.):

> …That means that each is bound to all the others jointly. (p. 281)

This contract theory of membership was applied not only to the rights of members as between one another, but also to the area of trade union mergers, successorship and parent-local relationships.

104 However, there is a growing consensus among labour relations boards and in academic writings and public policy documents that this common law view of a trade union (as essentially a private club) is no longer a viable analysis and has little relevance to the actual role and structure of trade unions today: Ontario: *United Food and Commercial Workers Union -and- Waterloo Spinning Mills Ltd.* [1984], OLRB REP. MARCH 542; Alberta: *IWA-Canada, Local 1-207* v. *Zeidler Forest Industries Ltd. et al.* (1988), 8 CLLC ¶16,038; Canada: *Matus*, *supra*; *Canadian Labour Law, supra*; A.W.R. Carrothers et al., *Collective Bargaining Law in Canada*, 2d ed. (Vancouver: Butterworths, 1986); Mac Neil et al., *Trade Union Law in Canada* (Aurora, Ont.: Canada Law Book, 1994); *The Report of the Task Force on Labour Relations, Canadian Industrial Relations*, (Ottawa: Privy Council Office, 1968) (Chair: H.D. Woods). (The task of interpreting the constitution as the contractual source of members' rights and duties does of course remain essential to the determination of compliance with those documents.)

105 Perhaps the changing role of trade unions in our society was never more clearly stated than some twenty five years ago in the Woods Task Force Report:

> 485. Trade unions originated as voluntary, unincorporated associations of craftsmen who banded together to set rates at which they agreed to sell their services and secure job opportunities for their members. Today, many interests of trade unions are vested in the legal framework of collective bargaining, including monopoly bargaining rights. They can no longer claim the status of private associations whose internal affairs are solely their concern. They have become quasi-public bodies, if not public institutions, and the public has acquired an interest in their internal operations.

106 It is, of course, collective bargaining which is at the core of a trade union's existence and it is the provincial labour relations schemes (which have evolved since the Second World War)

which set out the statutory rights of employees and trade unions with respect to collective bargaining. The purposes and objectives of our *Labour Relations Code* are set out in Section 2:

> 2. (1) The following are the purposes of this Code:
> (a)to encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees;
> (b)to encourage cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and promoting workplace productivity;
> (c)to minimize the effects of labour disputes on persons who are not involved in the dispute;
> (d)to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions;
> (e)to ensure that the public interest is protected during labour disputes;
> (f)to encourage the use of mediation as a dispute resolution mechanism.

107 From these purposes it is readily apparent the significant role that collective bargaining occupies in our society and the importance of the public interest in the regulation of industrial disputes. Underlying this collective bargaining scheme is the majoritarian principle. From certification to decertification, from the ability to strike to such self-imposed trade union practices as the ratification of a collective agreement, this democratic principle pervades the entire statutory scheme.

108 When a trade union applies for certification it becomes the exclusive bargaining authority for all employees. A certification is granted based upon either a vote (50% plus 1) or an application which enjoys greater than 55% of the employees having signed membership cards. Even if a significant minority of employees are opposed to the union (ie. 40%) they may be compelled to be members of the union once a collective agreement is reached (ie. a union security clause). These individuals will also be bound by any collective agreement which is negotiated.

109 Once certified, an employer has a statutory duty to collectively bargain with the union. The Code authorizes and regulates the union's right to strike and to picket; as well as the

employer's right to lock out. The union has the ability to strike in areas of essential services such as hospitals, emergency services, public utilities and government; all of which have a significant impact on the public. Collective bargaining disputes are no longer seen as private disputes.

110 Trade unions have emerged as significant social and political forces in our society. They have statutory rights unlike any other voluntary unincorporated association. Throughout the workplace they embody the principle of freedom of association; and the collective agreements they negotiate set out what has often been described as "the rule of law" in the workplace.

111 The new Section 10 moves the review of the internal affairs of a trade union in regard to natural justice from the Courts to the Board. The courts are the final arbiter of natural justice and the jurisprudence that it has developed in this area is now a matter of legislative policy. We do not see this transfer of jurisdiction as premised upon an increased concern about the abuse of democratic rights within trade unions, but rather premised upon an increased public interest in the political and social role of trade unions. Further, the Board's tripartite administrative structure, and its experience and expertise in the area of labour relations, will allow it to develop a more complete public policy in regard to the internal affairs of trade unions.

112 There are different, and indeed higher, social expectations of trade unions. No matter now efficient authoritarian decision making may be in other legal or organizational settings, trade unions are accepted (statutorily and socially) for the purpose of employees fulfilling their desire for freedom of association at the workplace. Therefore trade unions are expected to reflect this principle in the manner in which they conduct themselves.

113 Individual members of a trade union must be permitted to pursue their own trade or profession, earn a living, participate in the internal affairs of their union, and not be interfered with in any manner other than a lawful one. Conversely, trade unions find their greatest strength in their collective nature and this may involve compromises between the interests of individual members and the collective interests. It is the enforcement of these trade-offs and the requirement of a strong and united front that may involve a degree of control or discipline over those who may be seen to threaten that collective good.

114 It is clear that the democratic tradition, which trade unions uphold, is strengthened not

weakened by the fair balance which they strike in the administration of these trade-offs. It is this view of the nature and role of trade unions in our society that will inform the framework for our interpretation and administration of Section 10 of the Code.

2. Natural Justice

(a) Generally

115 The early position of the courts in dealing with the internal affairs of a trade union was to strictly construe its constitution and bylaws. A court would declare the expulsion of a member invalid (*ultra vires*) because the union had failed to follow the precise requirements of the constitution: *Bruce* v. *Baker* (1944), 60 B.C.R. 243 (S.C.) and *Kuzych* v. *Stewart* (1944), 61 B.C.R. 27 (S.C.). A second ground of intervention was that the decision had to be made in good faith -- an absence of discrimination or unreasonableness: *Orchard* v. *Tunney*, *supra*; *Bimson* v. *Johnston*, *supra*. Finally, the third ground of intervention was that the disciplinary process had to meet the requirements of natural justice: *Lee* v. *Showmen's Guild of Great Britain* [1952], 2 Q.B. 329 (C.A.).

116 There has long been a recognition by the courts that the rules of natural justice are context dependent. They will vary depending upon the circumstances of the case, the nature of the inquiry, the statutory provisions and the seriousness of the case: *Pearlman*, *supra*. Domestic tribunals, for instance, are not required to comply with the standards imposed upon judicial or quasi-judicial tribunals.

117 In the case of trade unions, their constitutions are not always drafted by lawyers and disciplinary hearings are usually not conducted by legally trained individuals. Additionally, these hearings are not bound by the strict rules of evidence. In reviewing the duty of a trade union to observe the rules of natural justice, attention ought to be given to the following cases: *Lee*, *supra*; *Bimson*, *supra*; *Fisher* v. *Pemberton* (1969), 8 D.L.R. (3d) 521 (B.C.S.C.); *Jurak et al.* v. *Cunningham et al.* (1959), 21 D.L.R. (2d) 58 (B.C.S.C.); *Shaw et al.* v. *McLeod et al.* (1982), 35 O.R. (2d) 641 (H.C.); *Mostert* v. *International Association of Machinists Vancouver Lodge 692 et al.* (1968), 1 D.L.R. (3d) 191 (B.C.S.C.); *Thomson, McLellan and Lapoint* v. *Labourers International Union of North America, Local 602* (1979), 16 BCLR 6 (S.C.); *Edith*

Lake Services Inc. et al. v. *City of Edmonton* (1981), 132 D.L.R. (3d) 612 (Alta. C.A.); *Gee* v. *Freeman et al.* (1958), 16 D.L.R. (2d) 65 (B.C.S.C.); *Kennedy* v. *Gillis et al.*, [1961] O.R. 878 (H.C.); *Tippett et al.* v. *International Typographical Union Local 226 et al.* (1975), 63 D.L.R. (3d) 522 (B.C.S.C.).

118 From these cases we can draw the following requirements which the courts have implied into the constitution of trade unions, but which must now form a part of the legislative policy of this province with the enactment of Section 10 of the Code:

(1)Individual members have the right to know the accusations or charges against them and to have particulars of those charges.

(2)Individual members must be given reasonable notice of the charges prior to any hearing.

(3)The charges must be specified in the constitution and there must be constitutional authority for the ability to discipline.

(4)The entire trial procedure must be conducted in accordance with the requirements of the constitution; this does not involve a strict reading of the constitution but there must be substantial compliance with intent and purpose of the constitutional provisions.

(5)There is a right to a hearing, the ability to call evidence and introduce documents, the right to cross-examine and to make submissions.

(6)The trial procedures must be conducted in good faith and without actual bias; no person can be both witness and judge.

(7)The union is not bound by the strict rules of evidence; however, any verdict reached must be based on the actual evidence adduced and not influenced by any matters outside the scope of the evidence.

(8)In regard to serious matters, such as a suspension, expulsion or removal from office, there is a right to counsel.

119 Many of these matters are familiar to trade unions. They form part of their current practices and reflect the current policy of the courts. However, several matters need additional comment.

120 First, the internal trial conducted in this case was a formal hearing. It included the participation of experienced legal counsel, there were preliminary motions in regard to the issue of bias, demands for particulars, no evidence motions, and extensive legal arguments. Most internal trials do not have this degree of formality, nor are they required to. The parties may of course consent to a more informal and expedited process. The natural justice requirements which we have listed should not be seen as imputing an undue increase in the procedural and evidentiary requirements such as exists in civil litigation. Rather, in any hearing the procedural emphasis (which may vary) is on the underlying value of fairness. In regard to serious matters, however, close attention must be paid to the requirements set out above.

121 Second, there is the right to counsel. Some trade union constitutions contain provisions which do not allow a member to retain counsel at discipline hearings. This received initial support from the courts in *Gee*, *supra*. However, a more recent decision by the BC Court of Appeal (*Boe* v. *Hamilton* (1988), 33 B.C.L.R. (2d) 49, leave to appeal to the Supreme Court of Canada refused [1989] 1 SCR ix, 101 NR 232n) reviewed these statements, and concluded that there is a right to counsel in regard to serious disciplinary matters:

> …since that time, the winds of change have blown with some force in this area. The cases are numerous and by no means all consistent. There is much support to be found in them for the view acted upon by Huddart J. that the emphasis now is upon the seriousness of the consequences facing the individual subjected to disciplinary proceedings so that, where the potential consequences are serious enough, there is a right to counsel. (p. 58)

122 Third, there is no requirement for a transcript in internal trade union hearings. In serious matters, where counsel are present, and a request is made for transcripts to be taken, the cost of this will be borne by the person making the request. In addition, the individual requesting the transcript must provide, without fee, copies to the other parties.

123 Fourth, although Section 10(1)(a) is directed to "all disputes relating to matters in the constitution of the trade union", the rules of natural justice set out above are in relation to Sections 10(1)(b) and (c) -- disciplinary matters including, of course, expulsion from membership.

(b) Bias

124 The next issue under natural justice is bias. The common law rule against bias was expressed in the maxim that "…no person shall be a judge in their own cause". This aspect of natural justice deals primarily with who is on the tribunal and the relationship of that person to the respective parties to the hearing. Bias falls into two categories: a "reasonable apprehension of bias" (reasonable suspicion of bias, a real likelihood of the probability of bias) and "actual bias".

125 Actual bias is rare. An example of actual bias would be any pecuniary interest which the trier of fact has in the subject matter of the hearing.

126 A reasonable apprehension of bias involves an assessment of all the circumstances and a conclusion that there is "the probability of a reasoned suspicion of biased appraisal and judgment, unintended though it be": *The Committee for Justice and Liberty et al.* v. *The National Energy Board et al.*, [1976] 1 S.C.R. 369 at 391. Even where a reasonable apprehension of bias is the applicable standard, the courts have allowed for the "flexible application of the reasonable apprehension of bias test to take into account different administrative contexts": *Pearlman*, *supra*, at p. 117. This has generally been the standard applied to different statutory tribunals.

127 The standard established by the courts to impugn a domestic tribunal has been the requirement of actual bias. This has traditionally been the situation in the administration of internal discipline in educational institutions, professional associations and trade unions. Those who are required to make disciplinary decisions in such organizations will be familiar with not only the issues but also the personalities involved in those issues. In addition, these decision-makers may often be a part of the administration of these organizations. The courts have therefore tempered the rules of bias with a realistic sense of how these organizations function. In respect to trade unions, Mr. Justice Gould set out such a test in *Vlahovic*, *supra*:

> In a domestic tribunal such as the one with which we are concerned here, a reasonable likelihood of bias very often exists. Indeed, the plaintiff, by his membership in the union and consequent agreement to abide by the constitution, has impliedly consented to be subject to the disciplinary machinery of the Teamsters, and the jurisdiction of the trial panel for which the constitution provides:

> *Maclean* v. *Wkrs.' Union*, [1929] 1 Ch. 602. The trial panel was constituted in accordance with the Teamsters' constitution, and it so happens that those people who duly constituted the trial panel were, not surprisingly, of the old guard, rather than supporters of the plaintiff. In such a situation, as with a statutory tribunal which is specifically authorized by the legislature to act, the Plaintiff must show the existence of "actual bias". *Re Schabas and University of Toronto* (1974), 6 O.R. (2d) 271, 52 D.L.R. (3d) 495 (D.C.). (p. 281)

128 One final consideration in regard to the issue of bias. Although we have accepted the test of actual bias (and have therefore rejected the test of a reasonable apprehension of bias) this relates to the structure of the entire trial process as it is established in the constitution and bylaws of the union. It is to these constitutional provisions which the courts have traditionally given deference.

129 However, where a trade union deals with members of the trial board in some manner not contemplated by the constitution and bylaws, then a reasonable apprehension of bias may be sufficient in regard to this extra-constitutional conduct. That is not to say that every instance of such change in conduct would attract a violation of Section 10. For instance, a particular change may enhance or give effect to certain constitutional provisions. However, where the conduct towards members of a trial board is not in accordance with the constitution, the Board will exercise an increased vigilance in its review of the union's conduct.

130 We will now turn to the particular issues in dispute and deal with these matters in the following order: constitutional provisions, natural justice and bias, and discrimination.

V. ISSUES

1. Constitutional Provisions

131 The Constitution which is in evidence is the Office & Professional Employees International Union's Constitution as amended at the Nineteenth Convention, Bal Harbour, Florida, June 22-25, 1992. There is also placed before us an excerpt from the June 9-12, 1980 International Union's Constitution (as amended at the Fifteenth Convention, New York, New York). This excerpt contains Section 10 of Article XIX which sets out the discipline procedures

for local unions in Canada until they have established their own constitution and bylaws. The authority of local unions in Canada to discipline their members is set out in the above two documents. Article XIX, Local Unions, Section 10, page 40 of the 1992 Constitution reads:

> Local Unions in Canada may discipline their members or officers for violation of the International Constitution or the Local Union's constitution or bylaws or for engaging in any activity or course of conduct which is deemed to be contrary or detrimental to the welfare or best interest of the Local Union in accordance with procedures as set out in the Local Union's constitution and bylaws provided such procedures are approved by the International President and provided such procedures and penalties if imposed are not contrary to prevailing law. Local Unions in Canada shall be governed by the discipline procedures which were set out in Article XIX, Section 10 of the International Constitution in effect on June 12, 1980 until such time as the Local Union establishes procedures in the Local Union's constitution and bylaws and such procedures are approved by the International President.

132 The Local Constitution and Bylaws (October 30, 1990 -- Exhibit 18) rely upon the procedures established in the 1980 International Constitution, Article XIX, Section 10 (a), (b) and (c):

> Sec. 10, a. Local Unions may discipline their members or officers by expulsion, suspension or fine for violation of the International constitution, or the Local Union constitution or bylaws. Charges may be brought in writing by any officer or member of the Local Union or of the International Union by filing same with the secretary-treasurer of the Local Union. The secretary-treasurer of the Local Union shall immediately thereafter serve a copy of such charges upon the accused and as soon as practicable but no later than fifteen (15) days following the Local Union's receipt of charges shall notify the accused of the time and place of trial or hearing upon such charges. Trial shall be held before the executive board of the Local Union and any representative designated by it in the same manner and procedure as is set forth in Article XV, Section 2.
>
> b. The charging party or his representative shall first present evidence of the charged violation and upon completion of such evidence the accused shall have an opportunity to fully present such

> evidence as he may have in his behalf, including witnesses, documents, statements, or defense. Any accused member shall have the right to be represented in his defense by any other member of the Local Union and shall have the further right of advice and consolidation of legal counsel, if desired, but no attorney-at-law shall be entitled to be present in any such proceeding.
>
> c. At the close of the evidence, the executive board shall decide by majority vote whether or not a violation has been found and shall affix such penalties as the executive board deems reasonable and proper. Where the penalty for any violation found is expulsion from membership, such penalty may be appealed to the next regular meeting of the Local Union, where a two-thirds (2/3) vote of those members present and voting shall be necessary to sustain such expulsion, or where a Local Union by its own laws, provides for some other appellate authority, then such appeal must be filed in the manner prescribed by the Local Union and where a two-thirds (2/3) vote of the members present and voting shall also be necessary to sustain an expulsion. Appeals which do not involve expulsion may be sustained by a majority of the appropriate authority present and voting. Failure to take any appeal within twenty (20) days after a decision has been rendered shall cause the matter to stand as decided, and no further appeals may be taken thereafter.

133 Discipline is set out in Article XVI of the Local Constitution. This provision simply repeats the authority to discipline as set out in the International Constitution:

> XVI DISCIPLINE
>
> A. The Executive Board of the Local shall have the power, within its discretion and in accordance with the procedure hereinafter set forth to suspend, expel and discipline by fine or otherwise a member or an Officer of the Local for violating the Constitution of the International Union, or the Constitution or By-Laws of the Local, or for engaging in any activity or course of conduct which it is deemed by the Executive Board to be contrary or detrimental to the welfare or best interests of the Local Union, including but not limited to failure to maintain any financial obligation owed or due to the International Union or to the Local.

B. Any proceedings pursuant to Section A. of this Article shall be in accordance with Article XIX; Section 10 of the International Constitution.

134 The relevant portions of the duties of officers of Local Unions is set out in Article XIX, Sections 6(a), (b) and 7:

> Sec. 6. The duties of officers of Local Unions shall include the following:
>
> a. It shall be the duty of the president to preside at all meetings of the Local Union; to preserve order during its deliberations; to sign all orders on the treasury when ordered by the Local Union; to appoint all committees not otherwise ordered; and to transact such other business as may of right pertain to the President's office and which may be necessary for the proper functioning of the Local Union.
>
> b. The vice president shall perform the duties of the president in the absence of that officer and, in case of the resignation or death of the president, shall perform the duties of the president until such vacancy is filled as provided for by the Local Union constitution. The vice president shall also preside when called upon by the president and at times when the president may be temporarily unable to discharge the duties of the office of the president.
>
> Sec. 7. The duties of executive boards of Local Unions shall be only such as are specifically prescribed in the Local Unions' constitutions and bylaws; provided, however, that Local Unions may not prescribe for their executive boards in their constitutions and bylaws any duties, functions or authorities vested in any other person, board, or body under the International constitution.

135 Finally, the Union's oath of office reads:

> I, _____, do solemnly pledge my word and honor before these witnesses that I will, to the best of my abilities, perform the duties of my office. At the close of my official term, I will turn

> over to my successor all books, records, and all other properties, including funds, of this Local Union, that may be in my possession. I will also deliver all such properties to the International Union upon lawful demand. I will at all times devote my efforts to further the objectives and best interests of my Union.

2. Natural Justice

136 We will begin our examination of the specific issues arising under natural justice at the start of the trial process as it is set out in Article XIX, Section 10, in the 1980 International Constitution.

137 Charges may be brought in writing by any officer or member of the Local Union. This was done by Rentz, a member of the Union, who on September 23, 1993 wrote to the President and the Executive Board charging three persons: Marilyn Coleman, Vice-President; Lorraine Dame, Executive Councillor; and Doug Leaney, Executive Councillor; with the following:

> (1)They did meet and consort with members and agents of the Executive Board of the Vancouver Municipal and Regional Employees Union and did discuss the organizing activities of our Local Union with these parties who are adversely affected by such activities.
>
> (2)They did meet with the aforementioned and by such did provide comfort to these persons contrary to the interests of our Local Union.
>
> (3)By discussing matters of a confidential nature to our Local Union with persons adversely affected by our activities have acted in a manner contrary to the interests of our Local Union.

138 No issue was raised as to the adequacy of notice or that the time lines set out in the Constitution had not been met. Article XIX, Sec. 10(a) of the 1980 Constitution specifies that the "Trial shall be held before the executive board of the Local Union and any representative designated by it in the same manner and procedure as is set forth in Article XV, Section 2". (Article XV, Section 2 allows the Executive Board to appoint any officer or agent of the Union as a hearing officer).

139 This trial was held before the Executive Board although not everyone on the Executive

Board was able to continue as a member of the Trial Board. The Trial Board consisted of the following eight Executive Board members: Terry Herrett, Barry Jarvis, Vince Spencer, Paul Darling, Bruce Farmer, Doug Hill, Petra Vicic and Ardell Brophy. The following Executive Board members were not able to serve on the Trial Board because they were witnesses: Mick Maguire, Ron Tuckwood, Jerri New, Penny Whiteford, and Rosalyn Warburton. Brian Walton was excused because of jury duty. Karen Rockwell voluntarily stepped down after being challenged.

140 The trial consumed eight days of hearing from November 17, 1993 until May 4, 1994. There are six volumes of transcripts. Both the Applicants and the Trial Board itself were represented by experienced counsel. At the first day of the hearing particulars were demanded by the Applicants and provided. All objections raised (preliminary and otherwise) were handled reasonably and fairly by the Trial Board. Each side was entitled to and did call witnesses and introduce documents they felt essential to their case. The Applicants were given the benefit of cross-examination and were able to provide themselves with a full defence including extensive legal argument. All these factors were in compliance with the Constitution and bylaws of the Union and with the requirements of natural justice. Finally, the decision was the result of a majority vote of the Trial Board.

141 The first issue of natural justice that arises is the authority for the charges in the Constitution. Section 10(a) deals with the ability of the Union to expel, suspend or fine members or officers who violate the Constitution. This power is exercised when a member or officer engages "in any activity or course of conduct which is deemed to be contrary or detrimental to the welfare or best interest of the Local Union…". The Local Constitution merely repeats this authority to discipline.

142 It is clear that a provision in the Constitution which simply gives the Union the power to deem an offence does not meet the requirements of natural justice. Such a provision is repugnant to natural justice because it allows the Union the ability to create offenses after the fact. This was clearly rejected by the court in *Boe* v. *Hamilton*, 90 CLLC ¶14,032, in which Mr. Justice Bouck stated:

> The power of a Union to expel a member must be set out in its constitution at the time the alleged offence occurs. There is no

> inherent power in the majority of the union to create a charge after the event: *Dawkins v. Antrobus*, [1881] 17 Ch. D. 615 at 620:…
>
> Because there was no section of the constitution authorizing a charge of assaulting an officer at the time of the alleged event on the 4 April 1986, the majority of Local 170 could not create such a charge by their vote on 9 May 1986. (p. 12,281)

143 That does not mean that a union's constitution or its bylaws must have an extensive listing of every conceivable offense that could be committed by a member or officer of the union.

144 Most union constitution and bylaws contain a list of offenses which govern the relationship between the union and its members. It will often include issues such as the conduct of members at meetings, the requirement to maintain membership, conduct related to the person's place of employment, rules concerning the expectations of members in regard to collective bargaining, and so on. If this Union, Local 378 of the OTEU, wishes to discipline members or officers in the future it would be prudent of the Union to pass local bylaws setting out specific offenses. In the absence of a specified offence, a general provision, such as in the OTEU's deeming provision, will be relied upon only to the extent that an offence is either an express or implied term of the constitution. However, this does not dispose of the matter before us.

145 Courts do on occasion imply terms into contracts. They do so not on the basis of reasonability but necessity: *Boe, supra*. They also imply terms in order to give practical effect to intended contractual meanings and to give effect to issues of public policy -- for example, the rules of natural justice.

146 It is our view that these charges related to the duties of these three individuals as officers of this Union. Coleman is a Vice-President and member of the Executive Board; Leaney and Dame were members of the Executive Council. The Executive Board and the Council are the governing bodies of the Union. It is in that role that they administer the Constitution of the Union and oversee the business of the Local (Article XIX(7) and Article XIII). The duties of the president, vice-president and executive board of the local unions are set out in Article XIX(6)(a), (b) and Section 7, respectively, (all these specific references are to the 1992 Constitution).

147 A brief review of the conduct of the Applicants while they were officers of the OTEU and

the factors that led to their conviction is appropriate.

148 On July 22, 1993 the Executive Board approved a raid by OTEU, Local 378 on the VMREU at Vancouver City College and Emily Carr College. This raid had actually commenced on July 14, 1993 with instructions from President Tuckwood to Maguire, the raid co-ordinator.

149 Following the Executive Board meeting of July 22, 1993 there developed among some members of the Executive and the membership a strong difference of opinion over the following issues: whether the OTEU organizing activity constituted a raid; whether this organizing drive was approved by the BC Fed; and finally whether the VMREU would eventually be merged into CUPE and under what terms. Tuckwood and Maguire took the position at the Executive Board meeting that the OTEU's organizing activity was not a raid because the VMREU was not an affiliate of the BC Fed; further, that the BC Fed approved of the raid; and thirdly, the VMREU would be swallowed up by CUPE and the membership would not be entitled to a vote.

150 Following the meeting, and over the months of August and early September, the Applicants and Dame were questioned by various members of the Union about the OTEU's raid on the VMREU. Further, each had enquired, and had others enquire on their behalf, about the issues in contest. Enquiries were made of the BC Fed, CUPE and the VMREU.

151 The Applicants and Dame came to the following conclusions: the OTEU's organizing activity was a raid; the BC Fed opposed raids but would not interfere in this one because the VMREU was not an affiliate; CUPE opposed the raid; and finally any merger between VMREU and CUPE would ensure that the VMREU would remain separate and distinct. We express no findings about these matters with the exception of the OTEU's organizing activity on the VMREU membership. Clearly the OTEU's conduct amounted to a raid under Section 19 of the *Labour Relations Code*. Although Tuckwood and Maguire initially termed the raid "a liberation", Maguire later admitted before the Trial Board the fact that the organizing activity amounted to a raid:

> QSo the hard fact was that it was a raid, in your view?
> AOh, in my mind it was. I've read the Labour Code. I know what the animal is. (Volume 2, p. 205)

152 The trial itself concerned a meeting that the Applicants and Dame attended with members

of the VMREU Executive Board and its staff. It appears that the invitation was extended by the VMREU to these individuals and others. The charges and the particulars concerned not only the fact that the Applicants met with officers and staff of the VMREU, but that the Applicants and Dame had passed on confidential matters which resulted in the failure of the OTEU's organizing activity.

153 At the end of the Union's case the Applicants made a no evidence motion in regard to what they characterized as the essential nature of the charges:

> a. that they disclosed confidential information; and b. that led to the cessation of the organizing drive. (Volume 2, p. 280)

154 In response to a question from the Chair of the Trial Board that the charges also contemplated the fact (and the evidence supported this) that the Applicants met with the VMREU officers and staff and discussed the raid, counsel for the Applicants agreed, but stated:

> …that doesn't constitute anything, any evidence whatsoever of any violation of any Constitution. (Volume 2, p. 298-99)

155 The Trial Board dismissed the no evidence motion stating:

> …In our opinion it is not accurate to view the charge as requiring the passing of in camera information. Rather, a reading of the charge and the particulars as a whole shows that the essence of the charge is the discussion of the organizing activities of the OTEU with the VMREU and thereby providing comfort to that union. (Volume 2, p. 303)

156 A fair reading of the six volumes of transcripts confirms that there was no evidence of disclosure of confidential information or that the meeting on September 13, 1993 between the Applicants and the VMREU was a direct cause of the cessation of the organizing drive. Indeed, it appears that the organizing drive was all but spent by the date of the meeting. (Nor was it ever seriously contended that the Union had established the requisite membership support in order to make an application for certification.)

157 Subsequent to the dismissal of the no evidence motion, counsel for the Applicants then called each of the Applicants and five other persons including three persons from the VMREU. However, prior to the conclusion of the hearing Lorraine Dame resigned her employment and her membership from the Union (Volume 5, p. 593). As a result, the charges were dismissed against her.

158 The Trial Board's decision in relation to Leaney reads as follows:

> 2. Doug Leaney:
>
> The Board decided by majority vote that:
>
> Doug Leaney has acted in a manner contrary to his Oath of Office and the best interests of the Union by meeting with the VMREU while OTEU 378 was actively engaged in raiding VMREU's membership. Brother Leaney is an experienced Officer of OTEU 378 and his participation was not authorized, consequently his actions were harmful to OTEU 378 objectives by giving the appearance of weakening the resolve of OTEU 378 in pursuing the raid. The Board believes Brother Leaney engaged in more than just a fact finding exercise by communicating with the VMREU in mid-August 1993, almost a month prior to the meeting in September 1993.
>
> Discipline:
>
> Doug Leaney is to be removed from Office immediately and is to be barred from holding any appointment or elected position within OTEU, Local 378 from now until 1 March 1996.

159 The Trial Board's decision in relation to Marilyn Coleman reads as follows:

> 3. Marilyn Colemen:
>
> The Board decided by majority vote that:
>
> Marilyn Coleman has acted in a manner contrary to her Oath of Office and the best interests of the Union by meeting with the VMREU while OTEU 378 was actively engaged in raiding VMREU's membership. Vice-President Marilyn Coleman is an experienced

> Officer of Local 378 and her participation was not authorized, consequently her actions were harmful to Local 378 in pursuing the raid.
>
> Discipline:
>
> Marilyn Coleman is to be removed from Office immediately and is barred from holding any appointed or elected position within OTEU 378 from now until 1 March 1996.

160 In regard to Leaney, the Trial Board's decision states "The Board believes Brother Leaney engaged in more than just a fact finding exercise by communicating with the VMREU in mid-August 1993, almost a month prior to the meeting in September 1993". Counsel for the Applicants states that this "belief" never formed any part of the evidence of the hearing and that it could only have arisen from an exhibit (Tab 7, Exhibit 3, Page 9) showing that Leaney had faxed a copy of an OTEU leaflet dated August 13, 1993 to a member of the VMREU Executive.

161 The document was put into evidence by the Applicants and therefore was properly before the Trial Board. However, there is a distinction between what is properly in evidence, and what inferences or conclusions may be drawn from that evidence. A review of the transcripts reveals that this issue was never raised during the hearing and Leaney was given no opportunity to address it. As a result, we place no reliance on this part of the decision.

162 Second, in relation to Coleman the decision states "…her actions were harmful to Local 378 in pursuing the raid". If the intention of this passage is that the meeting of September 13, 1993 led to the cessation of the organizing drive there is no evidence in the transcript to support this.

163 However, notwithstanding these two difficulties with the decisions, it is our view that the meeting of the Applicants with the VMREU over the raid did provide comfort to the VMREU, whose interests were adverse to the OTEU, once the OTEU Executive had decided to raid the VMREU. And indeed, had the raid not dissipated by this time, the meeting would certainly have had the potential effect of hurting such an organizing drive. The VMREU could have used such a meeting for its own political benefit in resisting the organizing activity of the OTEU. This could have simply been accomplished by the VMREU pointing to the obvious split over the raid

among the officers of OTEU.

164 This leads us back to the issue of what is implied in the duties of an officer of a union in a situation such as a raid. First, all jurisdictions in Canada permit union discipline of a member who seeks to displace their own union in favour of another union as the certified bargaining agent. However, in this Province the law equally restricts the effect of this discipline (for dual unionism) by preventing the loss of employment of any such member disciplined: Section 15 of the *Labour Relations Code*.

165 The actual practice of unions in British Columbia has been to not discipline members in a contested raid situation, with the exception of perhaps its own officers who may have initiated or participated in such raids: *Johnston, supra*. Thus, there is a recognition that officers will attract greater discipline than will an ordinary member of a trade union for the same kind of conduct (ie. raiding). This is because an officer is elected not only to uphold the constitution (to further the aims and purposes of the union) but also to maintain its exclusive bargaining authority (the negotiation and administration of its collective agreements).

166 When an officer of a union who is entrusted with these powers and duties consequently seeks to replace their own union, that officer violates not only the constitution to which they are contractually bound, but also deliberately undermines the statutory rights of the trade union. This represents a serious breach of trust. Therefore, it must be implicit in the constitution of the union (as set out in the powers and duties of an officer of a trade union and in the oath of office), and as a matter of public policy under Section 10 of the Code, that that union have the right to remove such officers for any such breach of trust. It cannot, as a matter of public policy, be the case that a trade union is powerless to deal with its elected officers who fundamentally breach their duties. In this respect, the duties of an officer of a trade union are not unlike those of officers and directors of corporations: *Food & Service Workers of Canada* v. *Shuster et al.* (1987), 37 D.L.R. (4th) 731 (B.C.S.C.).

167 In this case, of course, the Applicants were taking the position that the OTEU should not be raiding another union. They were not seeking to displace their own union. It must be stated that to take a stand against raiding is an issue of principle in the trade union movement. A clear example of this is the BC Federation of Labour's policy against raiding.

168 The power of discipline and the principle of majoritarian rule cannot be used by a union executive or its officers to silence the views of a minority or to take away the right of an individual member to dissent from the majority view. Each member of the union must have the right to stand for office, criticize the union and its officers, support political parties and express political beliefs of any persuasion, and to take a stand on any public issue which may be directly in conflict with their own union's position, without the fear of reprisal or discipline.

169 Conversely, the union must have the ability to discipline for violations of its constitution and bylaws and to be able to deal with breaches of confidentiality, breaches of trust, corruption and destruction of property. Critical to the union's collective bargaining strength is its ability to deal with members who break strikes and cross their own picket line. An individual member of the union who acts like a strike breaker directly confronts both the will of the majority in its conduct of a lawful strike and undermines the exclusive bargaining authority of the trade union. That person attempts to gain benefits denied to all others during the strike, and to share in the benefits the majority was able to achieve after the strike.

170 These are some of the difficult trade-offs within the trade union context between the rights of individuals and the rights of the majority.

171 The intention of these Applicants was to gain facts about the OTEU's raid on the VMREU. In order to do this they made enquiries of the BC Fed, CUPE and the VMREU itself. They intended to bring back this information, which they felt contradicted the statements made by Tuckwood and Maguire, to the Executive Council meeting on September 20, 1993. It was at that meeting that the Applicants informed the Executive Council for the first time that they had met with the VMREU officers and staff. (The VMREU attended at this OTEU meeting and leafleted members going into it.) With this new information the Applicants hoped the Executive Council would reconsider the OTEU's decision to raid the VMREU. However, the result was that they were severely criticized for their conduct. Approximately three days later the three were charged with the offenses that are now before us.

172 Each of the three individuals were of course free to obtain information from the BC Fed, CUPE or other places and to present this information to the Executive Council. They also had

the right to express their views that the OTEU was in fact raiding (a correct view) and that they were strongly opposed.

173 However, they were not free to meet with the Officers and staff of the VMREU. To do so, in our view, was a breach of trust of their duties as Vice-President of the Union (Coleman) and as members of the Executive Council (Leaney and Dame). In doing so, the Applicants also violated their oath of office and engaged in activities "contrary to the best interest of our local union". They were bound by the majority decision of their Union and as officers of the Union had an additional obligation to ensure that they did not act in any manner adverse to the OTEU's interest. As stated, the ability of a trade union to deal with an officer's breach of trust must be seen as implicit within the constitution (the powers and duties of officers) and as necessary to protect the very integrity of the trade union. As a matter of policy there need not be a specific charge in the constitution regarding a breach of trust.

174 Therefore, we see the Trial Board's decision sustainable to the extent that the meeting of the Applicants with the officers and staff of the VMREU to specifically discuss the raid represented a breach of trust of their duties and their oath of obligation, and would indeed have provided comfort to the VMREU in resisting the OTEU's organizing activities.

175 Two other matters need to be addressed briefly. First, the Applicants argue that the Union was required to conduct an investigation. The lack of an investigation may result in a breach of natural justice or perhaps a finding of bad faith (ie. the lack of particulars, or charges laid out of political malice). However, where, as here, the Applicants have been given reasonable notice of the charges, and provided with particulars, and have had the opportunity of a full hearing, the lack of an investigation raises no issue of natural justice. Nor does an issue of discrimination arise on the facts.

176 Second, the Applicants argue that the charges continued to change during the hearing. The Applicants argue they initially were charged with the passing of confidential information and the effect this had on the OTEU's raid; later, however, the charges were simply about a meeting between the Applicants and the VMREU. In our view, it is clear that the original charges (and the particulars) contemplated more than just a meeting; but it is also equally clear that they did include the fact of a meeting and the "comfort" that such a meeting gave to the VMREU. The Applicants were successful in refuting the allegation of breach of confidentiality and any adverse

effect their meeting had on the OTEU raid of the VMREU. However, when the Applicants' no evidence motion was dismissed it was made clear, prior to calling of their case, that the charges contemplated the fact that the Applicants had met with Officers of the VMREU and had discussed the OTEU raid. Although the Applicants did not feel this was a sufficient basis for a charge, we have found that such conduct did represent a breach of trust, and sustained the Trial Board's decision in this regard.

177 However, this does not end the matter. Several other issues still require determination. These are the issues of bias and discrimination.

3. Bias

178 In relation to bias we have determined that the standard required under Section 10 is that imposed by the courts upon domestic tribunals: actual bias. The one exception to this rule is if a union acts in some manner towards the members of the trial board that is outside the parameters of the constitution. In such limited circumstances a reasonable apprehension of bias may be sufficient to find a denial of natural justice.

179 The Applicants argue that the Trial Board consisted of their opponents from the last election. Further the Trial Board, which in effect is the Executive Board, had voted to support the raid.

180 The Trial Board was made up of members of the Executive Board who ran against Coleman and Leaney. Leaney was actually an unsuccessful candidate against Tuckwood for the position of President. Coleman ran successfully for Vice-President on the same slate as Leaney.

181 These are precisely the circumstances which the court speaks of in *Vlahovic*, when it stated:

> …The trial panel was constituted in accordance with the Teamsters' constitution, and it so happens that those people who duly constituted the trial panel were, not surprisingly, of the old guard, rather than supporters of the plaintiff. (p. 281)

Many of the officers of an executive board will be personally familiar with the membership of their union and their stances on different issues. These officers may have voted on a wide variety of issues, from constitutional amendments to a decision to strike. In all these circumstances, where a reasonable apprehension of bias may exist, the courts have stated that this is not a sufficient basis to impugn the disciplinary structure of a domestic tribunal if that structure is in accordance with its own constitution and bylaws. The rationale for this is, of course, the contract theory of membership -- an individual has agreed to abide by the constitution and consented to the disciplinary machinery contained within it.

182 That is not to say that executive boards inevitably end up being the trial panels within trade union constitutions. Indeed, even the International Constitution of the OTEU contemplates the designation of different hearing panels which may be set up by the executive board. Many trade unions in their constitutions and bylaws set up trial boards which are independent of the executive board or may bring individuals from different locals of the same union to conduct internal trials. Certainly this is to be encouraged as it enhances the perception of the fairness of the internal trial process. However, in this instance the Applicants argue that notwithstanding that the Union is in compliance with its Constitutional provisions, the test ought to be a reasonable apprehension of bias. We have rejected the reasonable apprehension of bias test and as a result reject this ground of appeal.

183 The second issue of bias concerns Trial Board member Brophy. This is a more difficult issue. During the course of the hearing Brophy was hired as a staff representative of the Union. There was an admission that as an initial hire she would be on probation to Tuckwood. As well, Brophy was ultimately subject to Tuckwood's supervision. Tuckwood was one of the principal witnesses against the Applicants. Counsel for the Applicants objected to Brophy's continuation on the Trial Board. This objection was dismissed. In regard to Brophy the Applicants argue a reasonable apprehension of bias, not actual bias.

184 It will often be the case that some officers of a trade unions will participate in the trial process. Also true is that some of those officers will be full or part-time staff of the trade union itself. The constitution and bylaws may give these particular officers a role, perhaps quite an extensive one, in regard to the trial process. If these duties are performed pursuant to the constitution, a reasonable apprehension of bias may be present, but will not be sufficient to impugn the trial process.

185 However, we are troubled by the change of the personal status of Brophy during the course of the trial. There was of course nothing in the Constitution which required the hiring of Brophy at any time during the trial process. Presumably, therefore, in relation to the trial process Brophy could have been hired before or after the trial. If the hiring was an urgent matter and Brophy was required to take on some immediate duties, presumably she could have stepped down on her own. No explanation of any kind, never mind one that related to the constitutional trial process (ie. a quorum), was put forward for her continued existence on the panel. In other words, the hiring of Brophy in no way facilitated, enhanced or was necessary for the trial process.

186 On the other hand, any reasonable observer is left with the conclusion that a member of the Trial Board has, halfway through the trial, been hired by one of the principal witnesses (Tuckwood) against the Applicants; and secondly, this Trial Board member is not only on probation to this witness but also under his supervision.

187 In very limited circumstances where a union for whatever reason deals with the trial board or members of it in some extraordinary way, which is not contemplated by the constitution, and a reasonable apprehension of bias is present, that may be sufficient to find a violation of Section 10(1). In our view, these limited circumstances are present in this case. Brophy ought to have stepped down from the Trial Board when she was hired by the Union midway through the trial. Therefore, we have concluded that Brophy be removed.

188 It is clear that had we found actual bias we would have impugned the entire trial process. Indeed, that is often the result, not only in regard to actual bias but also in regard to a finding of a reasonable apprehension of bias in relation to a statutory tribunal (one exception is *Bennett* v. *British Columbia (Superintendent of Brokers)* (1993), 87 B.C.L.R. (2d) 22 (CA), where the court removed one of the members of the tribunal and allowed the hearing to continue; however, the tribunal had not reached a final determination).

189 However, we have only found a reasonable apprehension of bias; and that is not a sufficient basis to impugn the trial panel in a domestic tribunal. The one exception we have created is that in certain circumstances the Board may remove one or more members of a trial

panel if the union has acted towards an individual or panel in some manner that is not contemplated by the constitution, and an issue of a reasonable apprehension of bias is present.

190 We have removed Brophy from this Trial Panel on the basis of reasonable apprehension of bias and in that sense imposed a higher duty. We therefore see our decision not to impugn the entire trial process consistent with the law and policy of bias and domestic tribunals (where the standard imposed is actual bias). We also see this result as consistent with the overall policy governing the administration of the internal affairs of trade unions as set out in this decision -- specifically, the contract theory of membership (and adherence to the disciplinary structure), the nature of and deference given to domestic tribunals, the increased social and political role of trade unions, and the balancing of individual rights with the collective interests of trade unions. In this sense it is a "contextual" application of the issue of bias and natural justice under Section 10 of the Code to a very difficult labour relations issue.

4. Discrimination

191 Section 10(2) reads as follows:

> 10. (2) No trade union shall expel, suspend or impose a penalty on a member or refuse membership in the trade union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the trade union or council of trade unions
> (a)if in doing so the trade union acts in a discriminatory manner, or
> (b)because that member or person has refused or failed to participate in activity prohibited by this Code.

192 The words "in a discriminatory manner" in Section 185 of the *Canada Labour Code* were considered by the Canada Board in *Matus, supra*, where the criteria set down by Chair Innis Christie in *McCarthy -and- International Brotherhood of Electrical Workers, Local 625*, [1978] 2 Can LRBR 105, were adopted:

> In our opinion the word "discriminatory" in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the Human Rights Act, S.N.S. 1969,

> c.11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that bears no fair and rational relationship with the decision being made. (p. 108)

193 Like the Nova Scotia and Canada Labour Boards, we find this to be an appropriate test and adopt it. We also add to this test the remarks made by the Canada Board in *Abbott, supra*, where it stated that no individual should be:

> …singled out for special treatment either in a decision to charge, the procedural format or the penalty. (pp. 317-18)

The focus of the inquiry therefore is not simply on the result but also on the process.

194 The Applicants argue that this was the first time in the history of Local 378 that members of the Union had been charged. This was, in effect, confirmed by Tuckwood in a letter dated May 12, 1994 to the membership, which enclosed the Trial Board's decision:

> While it has never happened before, OTEU, Local 378 members have the right, under our Constitution, to bring charges against anyone in the Union for what they believe to be wrong doing.

Additionally, the Applicants argue that members of the current Trial Board and Executive published a letter on July 11, 1989 (the "pink letter") attacking, at that time, the incumbent president for her inability to "manage the affairs of the Local". The letter also asked for her resignation and proposed a motion of non-confidence:

> …We feel we must state that we have lost all confidence in the ability of the President to manage the affairs of the Local and we feel her resignation would be in the best interests of the members. We propose the Executive Board entertain a motion of non-confidence in the President in her ability to manage the affairs of Local 378 and look to whatever steps are necessary to get the affairs of the Local back on track.

195 The authors of this letter distributed approximately 7,000 copies to the membership of the Union. In response, petitions of support were circulated for the incumbent President. The preamble to the first of these petitions read, in part, as follows:

> The Board Members who have signed their names to this letter have totally bypassed the democratic workings of this union, putting personal political motives ahead of the best interests of this union.
>
> We question and particularly resent the participation of the combined bargaining unit board members. It is clear that you, not only do not have our interest at heart, but have openly undermined and weakened this union to attack both from management at the bargaining table, and from outside raiding unions.

196 Rentz, the author and prosecutor of the charges against the Applicants, was called as a witness for the Applicants. In the course of her examination, the Applicants argue she admitted to the seriousness of the allegations set out in the pink letter:

> QAnd the things you accuse them of are really much more serious. You accuse them of undermining and weakening the Union to attack from both management at the bargaining table and from outside raiding unions. So not only in your view were they making the Union vulnerable management attacks, to raiding union attacks, but also to management attacks, correct?
> A(no answer)
> QWell, that's what you say. Is it correct?
> AIf that's what I say, yes, it must be.
> (Volume 5, p. 513)

In response to the issuance of the pink letter and the subsequent petitions, a special Executive Council meeting was called on January 22, 1989. A motion was moved and carried that the authors of the pink letter be censured and a second motion was carried that the Executive Council support the President. The Applicants state that the seriousness of these past events and the discrepancy between the motion of censure and the two year bar from office, amounts to

discriminatory treatment. Further, both the decision to charge and the penalty do not relate to any general rule or policy and are consequently unreasonable.

197 First, the fact that this is Local 378's first trial is not in itself grounds for discrimination. More is required in order to show that the selection of these Applicants for trial was discriminatory. It must be remembered that the charges were brought by a member of the Union, Rentz, and prosecuted by her. Further, the Union is compelled under Section 10(a) of the 1980 constitution to proceed with the charges once filed. Finally, no charges were laid in relation to the pink letter. Therefore, there was no discrimination present in the selection of the applicants for the Trial Board.

198 Second, there is a significant distinction between the events involving the pink letter and those involving the OTEU. That distinction is important in terms of the Board's involvement in the internal affairs of a trade union.

199 The pink letter involved an internal political struggle and jockeying for power that played itself out in the next election of OTEU officers; and the authors of the pink letter eventually proved successful. Although the pink letter may have inevitably been read by persons outside the union -- management, other trade unionists -- its purpose was directed at this internal political struggle.

200 However, the OTEU raid involved a meeting between OTEU officers and VMREU officials, when the VMREU was clearly adverse in interest to the OTEU. Further, charges were laid under the constitution, a violation was found and discipline was imposed. The distinction is not so much that charges were laid in one instance and not the other (although that is a factor) but, more importantly, discipline resulted in one (Coleman and Leaney) and not the other.

201 A motion of censure may be seen as a form of discipline; but in reality it was political censure, and no consequences flowed from it in regard to employment, constitutional rights, monetary or other penalties. If something had flowed that would of course be important. For instance, a trade union could not select some individuals for certain kinds of treatment (ie. censure) and others for trial, and impose different penalties for similar conduct. Nor could a union simply discipline without laying charges and argue that since no charges had been laid, the Board had no right to interfere.

202 The Board does not want to insert itself into the political life of trade unions. There must be a violation of the constitution, a breach of natural justice or a violation of an individual's basic democratic rights before the Board will insert itself into the internal affairs of a trade union.

203 We therefore do not see the pink letter as a comparison with which to measure the discipline given to Coleman and Leaney. For that reason, we find no discrimination. The penalty therefore stands.

204 Finally, in regard to the issue of penalty, the Board will be hesitant to enter into that realm. As a matter of policy there will be a wide range of reasonableness with which we will not interfere.

VI. CONCLUSION

205 Brophy is removed from the Trial Board and the matter is remitted to the Trial Board for a new vote to determine if there is a majority in favour of conviction. If a majority is not obtained that is the end of the matter against the Applicants and the Board retains jurisdiciton 1over the issue of remedy.

206 If a majority vote is obtained the conviction and penalty are sustained.

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