

## ***PRELIMINARY OBJECTIONS***

The Trial Board dealt with several preliminary objections or procedural questions and shall address each in turn. Written objections received by the Trial Board are reproduced here in their entirety as Attachments 1 and 2, except as noted with respect to Preliminary Objection #2 (Attachment 1).

As it deliberated the merits of the preliminary objections, the Trial Board referred, along with the TWU Constitution, to one of the leading cases related to the regulation of internal union affairs, *Marilyn Coleman and Doug Leaney v. Darlene Rentz and Office and Technical Employees' Union, Local 378, BCLRB No. BCLRB No. B282/95*.

In that case, the British Columbia Labour Relations Board reviewed the manner in which the courts had dealt with internal union matters, noting at paragraph 118:

“From these cases we can draw the following requirements which the courts have implied into the constitution of trade unions, but which now must 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.”

The trial board used those guidelines in the task before us.

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### Preliminary Objection #1 (Accusers)- Number of Counsel Present for the Accused

The Accusers raised concerns regarding the number of counsel present for the Accused. They pointed out that the wording in *TWU Constitution Article XVIII, Section F, Number 4* indicates that a “raft of representatives” was not the anticipation. Counsel for the Accused sought a more liberal interpretation of “a” member as described in the Constitution and advised their intent was to have no more than three members at any given time, and that those members would be present on a rotational basis.

#### Trial Board Response

The Trial Board allowed this objection. The Constitution’s use of the term “a member” means one member. They noted this number did not include legal counsel. Counsel for the Accused requested that this decision be included as part of our written decision here and that the number of Accusers present be noted. Peter Massy departed. Neil Morrison stayed as observer/counsel.

The Trial Board wishes to note that the Constitution sets out clearly the terms by which charges may be brought against members. In the case of salaried officers of the Union, at least ten (10) delegates must file charges. It is not the Trial Board’s place to restrict the rights of those members from participating in the very trial they have set in motion.

### Preliminary Objection/Concern #2 (Accusers) – Presence of Legal Counsel for the Accused

Presented not so much as an objection, but rather as a concern, the Accusers indicated that they didn’t anticipate the presence of legal counsel at the hearing and were concerned about “a level playing field”. They suggested they might seek an adjournment to obtain legal counsel.

#### Trial Board Response

The Trial Board denied this objection, advising the Accusers that they would be welcome to seek and obtain legal counsel if they so chose, however, no request for adjournment for that purpose would be entertained.

### Preliminary Objection #1 (Accused) – The Number of Witness/Accusers Present

This objection concerned the number of individuals present in their capacity of Accusers who were also on the Witness List provided by the Accusers. The objection was dealt with immediately by way of compromise. Those Accusers who were on the Witness List would remain in the room only until the Preliminary Objections were dealt with and would leave the room once testimony was to begin. They would be allowed in the room to observe the trial only after their sworn testimony was complete.

Preliminary Objection #2 (Accused) The Trial Board is Biased and Cannot Provide a Fair Hearing.

Counsel for the Accused made verbal and written arguments with respect to this objection. Ms. Bowering argued that each member of the Trial Board has previously voted on the matter of the removal of Mr. Bell and drew attention to the words “sought to be removed” in Section F, Paragraph One. She argued that the matter had already been decided. Counsel suggested there were other ways to deal with the matter and reiterated Brother Bell’s earlier offer (made through pre-trial correspondence) to adopt a process involving a neutral third party(ies). The written argument is reproduced as Attachment 1.

Counsel’s written objection provided allegations of evidence of that prejudgement for each individual member of the Trial Board, as well as for members of TWU’s Executive Council who were not participating in the process. To respect those individuals’ privacy and because none of the allegations were substantiated by any evidence or sworn testimony, they shall not be reproduced here.

The Accusers responded to this objection, indicating they would not comment on the bias of any individual member of the Trial Board, leaving it up to each of them to make their own determination. They felt this matter had been addressed prior to the hearing, in court the day prior, and in correspondence between the two parties. They argued that the Trial Board is obligated to follow the constitution with respect to the procedure on trials, yet agreed that if the Trial Board considered themselves biased they would look to an alternative process.

Trial Board’s Response

The Trial Board’s response to each of the particulars is as follows:

1. The Trial Board made every possible effort to ensure procedural fairness. It is our view that the Trial Board’s handling of the matter before it strictly adhered to the TWU Constitution, and, in addition, met each of the tests as set out in *Coleman*, cited above.
2. The Trial Board is following the process set out in the TWU Constitution, which is very clear on the processes to be followed when there are charges presented under Article XVIII Section F (quoted in its entirety above).
3. The Trial Board agrees with Council that it is paramount that the Accused receive hearing from an impartial Trial Board. The Trial Board noted that the arguments put forward by Counsel were reminiscent of the legal arguments made in the BC Supreme Court before Justice Silverman the previous day, July 19, 2006, when the Accused had sought an interlocutory injunction to halt the proceedings of the Trial Board.

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Upon hearing submissions from Counsel for The Accused and Counsel for Jim Christensen, acting in his capacity of Secretary-Treasurer of the TWU, the Court ruled that there was no evidence of actual bias or apprehension of bias. The Court was of the view that how these persons voted on previous motions (for or against Bell) was not evidence of bias. The Court said “if prior voting were to disqualify panel members, no union would ever be able to have a hearing ... views are well known and long lasting ... past voting alone is not enough to show bias – that is not evidence of bias – it is simply evidence of exercising rights ... there may be some bias, but there is no evidence of it before me in this application.”

This statement echoes the decision in *Coleman* which states as paragraph 184:

“It will often be the case that some officers of a trade union 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.”

4. The Accused swore an oath of office, as set out in the TWU Constitution, Article VIII, as follows:

“I, Bruce Bell, in the presence of these witnesses faithfully promise to obey and enforce the Constitution and Policies of the Union. I also promise to perform the duties of this office to the best of my ability.”

Inherent to acceptance of this oath is an acceptance of the “rules of engagement”, if you will, in the carrying out of the duties of the office. The Trial Board does not accept the argument that the trial process is any way discriminatory because it treats a sworn officer of the Union differently than an ordinary member. It is not a matter of an officer being afforded less fairness; the processes set out in the Constitution are different. All sworn officers of the Union accept this difference upon assuming their positions.

Again, the Trial Board refers to *Coleman* (previously cited) at paragraph 181:

“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 sufficient basis to impugn the disciplinary structure of a

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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.”

5. The Trial Board believes that we gave the most serious consideration to our ability to hear the evidence presented and deliver our judgment accordingly. The Board noted that certain members of Executive Council recused themselves from the matter prior to the commencement of the proceedings. Various reasons were given, including personal bias. One member was excused by the Trial Board. One further member recused himself during the Trial Board’s caucus to discuss the very objection to bias! One more did so prior to the start of final deliberations. To say that this concern was ignored in any way would be a distortion of the reality. It was a difficult process, indeed, and at the end, the Trial Board consists of ten individuals who have gone to great pains to ensure no bias entered into their decision-making or this trial process.

### Preliminary Objection #3 (Accused) – The Charges Do Not Constitute an Offence Known to the Laws of the Union

Counsel argued that if the charges on their face don’t show that the “facts” as presented disclose an offense, then the Trial Board ought not to hear evidence. The allegations must constitute charges recognized as an offense under the laws of the Union. Charges of dereliction of duty, as far as they are aware, have not been used in the history of the TWU. The definition of dereliction of duty implies a wilful or negligent failure to perform assigned tasks; to abandon or fail to do something one had an obligation to do. It is not intended to address whether one did it wrong or did it in a way someone didn’t like.

The Accusers responded, again noting that these concerns had been raised before through correspondence and in court. They do not believe the Accused is the appropriate person to determine a definition of dereliction of duty. They agree with Counsel’s definition of dereliction of duty. They argued that there were specific violations of the TWU Constitution and Policies contained in the charges that could not be dismissed as mistakes and their results were not merely disappointment. The charges arose from serious decisions that had irreparable effect. Viewed cumulatively, their allegations would go to show dereliction of duty.

### Trial Board’s Response

The Trial Board ruled against the objection as follows:

1. Several of the charges presented allege specific violations of specific articles of the TWU Constitution and TWU Policies.
2. The Trial Board reviewed the TWU Constitution and found that there is no pre-approval process contained therein which enables or requires the Trial Board to

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make a pre-trial decision on whether or not the charges are legitimate, or in this case, constitute dereliction of duty or not.

3. See response to items number 1 and 2 above.
4. See response to items number 1 and 2 above.
5. The Trial Board noted that the TWU Constitution offers a safeguard against abuse of the trial process by allowing discipline to be imposed “for bringing charges under Article XVIII without reasonable grounds for believing such charges to be true”.
6. The Trial Board cannot conclude that the allegations amount to or do not amount to dereliction of duty without hearing the evidence.
7. The TWU Constitution enables the Trial Board to proceed if the Accused is absent without satisfactory excuse. While the Accused’s absence does not relieve any of the burden of proof of the Accusers, neither does it mean a halt to the proceedings as set out in the Constitution Article XVIII, Section B (h).
8. N/A