IN THE MATTER OF:

THE LABOUR RELATIONS CODE

- and -

GILLES PRUD'HOMME, ERIC KLYNE and RICHARD CRONIN

Complainants

- and -

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS and LOCAL UNION 424, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Respondents

FILE NO.: GE-04752

BOARD MEMBERS

J. Leslie Wallace - Vice-Chair
Paul Bokenfohr - Member
Reg Basken - Member

APPEARANCES

For the Complainants: Simon Renouf, Q.C. (Counsel), Shasta Desbarats (Co-Counsel)
For the Respondents: Robert J.W. Blair (Counsel), Cherie Klassen (Co-Counsel), Al Brown

REASONS FOR DECISION

[1] Gilles Prud'homme, Eric Klyne and Richard Cronin, collectively the "Complainants", are electricians and members of the International Brotherhood of Electrical Workers ("IBEW" or the "International") and its Local Union 424 ("Local 424," the "Local" or the "Union"). In December, 2004 they were charged under the IBEW Constitution and summoned to a trial before a trial board of the Local. The Local commenced Mr. Prud'homme's trial but suspended it after these proceedings before the Labour Relations Board commenced. Mr. Klyne's and Mr. Cronin's trials have not commenced. The central issue in these complaints is whether the trial board has authority to try the Complainants. There is a secondary issue whether the trial process has offended the procedural protections of the *Labour Relations Code*. The Complainants say that on both issues, their trials offend s. 26 of the *Code* and should be stayed by a cease and desist order. They name both the International and the Local as respondents.

I. Facts

[2] The events behind these complaints occurred against the backdrop of a major dispute inside Local 424 that was the subject of other proceedings before this Board. The dispute involved the suspension of Local 424 business manager Mike Reinhart from office: see *Reinhart v. IBEW, Loc. 424 et al.* [2005] Alta. L.R.B.R. LD-009; [2005] Alta. L.R.B.R. LD-0013; [2005] Alta. L.R.B.R. LD-0014; [2005] Alta. L.R.B.R. LD-016; [2005] Alta. L.R.B.R. LD-019; [2005] Alta. L.R.B.R. 69; [2005] Alta. L.R.B.R. LD-037; [2005] Alta. L.R.B.R. LD-039; [2005] Alta. L.R.B.R. LD-046. We understand that the Complainants' conduct alleged by the charges relate to this internal dispute.

[3] On December 8, 2004, Local 424 Assistant Business Manager Allan Brown wrote to Recording Secretary David Handley to prefer charges against the Complainants. The

three letters alleged breaches of Article XX, the Union's pledge, and Article XXV of the International Constitution, which says this:

> **Article XXV Misconduct, Offenses and Penalties**
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> **Sec. 1.** Any member may be penalized for committing any one or more of the following offenses:
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> (a) Violation of any provision of this Constitution and the rules herein, or the bylaws, working agreements, or rules of a L.U. *[Local Union]*
>
> (…)
>
> (e) Engaging in any act or acts which are contrary to the member's responsibility toward the I.B.E.W., or any of its L.U.'s, as an institution, or which interfere with the performance by the I.B.E.W. or a L.U. with its legal or contractual obligations.
>
> (…)
>
> (j) Making known the business of a L.U., directly or indirectly, to any employer, employer-supported organization, or other union, or to the representatives of any of the foregoing.
>
> (…)
>
> (l) Causing or engaging in unauthorized work stoppages or strikes or other violation of the laws and rules of the I.B.E.W. or its L.U.'s.

[4] The charge against Prud'homme contained the following particulars:

> At approximately 1 PM on Sunday, November 28th, 2004 Brother Prud'homme, accompanied by several others, attempted to enter the witness holding room at the Ramada Inn on 11834 Kingsway Avenue, Edmonton Alberta. When Brother Prud'homme was denied entry he produced a camera/phone and proceeded to take several pictures of the people inside the room. In addition, Brother Prud'homme verbally attempted to disrupt, coerce and intimidate witnesses who were appearing to give testimony before a referee appointed by IVP Fleming of the 1st District of the IBEW. Approximately 1½ hours later, Brother Prud'homme, again accompanied by several others, returned and once

> more tried to gain entrance to the witness holding room. Upon being refused entry for a second time Brother Prud'homme verbally attempted to disrupt, coerce and intimidate the witnesses. Subsequent to these actions and commencing November 28th, 2004 Brother Prud'homme was observed posting and distributing these pictures on the Syncrude site with the intent of causing a work stoppage.

The proceeding in question was an inquiry into allegations against (or as Mr. Handley referred to it, a "trial" of) Mr. Reinhart, the recently-elected business manager of the Local.

[5] Mr. Brown's charge against Klyne was substantially the same. The charge against Cronin was similar, excepting that it omitted the allegation of taking pictures of witnesses, omitted the allegation of posting pictures at the Syncrude site, and added to the allegation of the second attempted entry that Cronin had uttered threats.

[6] On December 22, 2004, Mr. Handley by letter notified the Complainants of the charges and that their trials would take place January 17th and 18th, 2005. This commenced the formal trial process. The Complainants retained Mr. Simon Renouf, Q.C. as their counsel. Mr. Renouf corresponded with Mr. Handley on January 10 in respect of the trials of Klyne and Cronin. He sent a similar letter on January 13 in respect of Prud'homme's trial. In each case he sought an adjournment to prepare the defence, a confirmation that he would be permitted to act as the Complainant's counsel, and particulars of several of the allegations.

[7] Mr. Handley replied to the letter concerning Klyne on January 12, 2005. He acknowledged Mr. Klyne's right to have legal counsel represent him, ruled that the particulars of the charge were sufficient, and set a new time and date of January 22, 2005 at 9:00 a.m. for the trial. In a subsequent exchange of letters, Mr. Renouf sought and Mr. Handley denied a brief adjournment of that date to accommodate Mr. Renouf's schedule. Mr. Handley admitted in cross-examination that the trial board did not meet to make these rulings, but that he had acted on behalf of the trial board.

[8] On January 14, 2005, Mr. Handley responded to the letters concerning the trials of Prud'homme and Cronin. In each case he confirmed that Mr. Renouf could appear as counsel and again stated that the Trial Board considered the particulars of the charges sufficient. Mr. Handley declined to move the trial dates for Messrs. Prud'homme and Cronin, however, on the grounds that the request to adjourn was late and that a rescheduled trial would be too difficult to arrange with the several employers that must grant time off to the members of the Trial Board.

[9] This left Mr. Prud'homme's trial as the first of the three Complainants' trials to proceed, on January 17th; Cronin's to follow on the 18th; and Klyne's to follow on the 22nd.

[10] The relevant provisions of the IBEW International Constitution read as follows:

> **ARTICLE XVII DUTIES OF LOCAL UNION OFFICERS**
>
> (…)
>
> **Executive Board**
>
> (…)
>
> **Sec 10.** A quorum of the board shall consist of a majority of its members.
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> **Sec. 11.** The board shall see that all members, officers, or others who are not entitled to remain in the board meetings, shall retire after they have been heard and submitted their business to the board. When a board member is directly interested or involved in any case before the board, he shall retire.
>
> No board member shall sit in a case which affects his own employer, or which involves a member working for the same employer. In such case the board member shall be disqualified and the president of the L.U. *[Local Union]* shall appoint a substitute or substitutes. If the president is a member of the board and is disqualified, then the vice president shall appoint a substitute or substitutes. If the vice president is also disqualified, then the substitute or substitutes shall be named by the remaining board members. (…)

Sec. 12. The Executive Board shall act as the trial board, hear all charges, and try all members … for any violation of this Constitution, or the bylaws and working rules of the L.U.

ARTICLE XXV MISCONDUCT, OFFENSES AND PENALTIES

(…)

Charges and Trials

Sec. 2. All charges, except against officers and representatives of L.U.'s, shall be heard and tried by the L.U. Executive Board which shall act as the trial board in accordance with Article XVII. A majority vote of the board shall be sufficient for decision and sentence.

(…)

Sec. 5. The trial board shall proceed with the case not later than forty-five (45) days from the date the charges were read at the L.U. meeting or Executive Board meeting. The board shall grant a reasonable delay to the accused when it feels the facts or circumstances warrant such a delay. The accused shall be granted a fair and impartial trial. He must, upon request, be allowed an active I.B.E.W. member in good standing to represent him.

(…)

Appeals

Sec. 12. Any member who claims an injustice has been done him by any L.U., trial board, or by any System Council, may appeal to the I.V.P. *[International Vice-President]* any time within forty-five (45) days after the date of the action of the L.U., trial board or System Council.

[11] In his correspondence with Mr. Renouf and the Complainants, Mr. Handley had been speaking on behalf of an unusually-constituted trial board. The charges against Prud'homme, Klyne and Cronin had come before the Executive Board meeting of December 10, 2004. The Executive Board discussed the trials and the composition of the trial board. Eight members then sat on the Executive Board of Local 424: President Jim Watson, Vice-President John Dolhagaray, Treasurer Jonathan Macneil, Recording Secretary Dave Handley, and members Herb Excell, Andrew Fowler, Gord Spackman

and Darrell Taylor. IBEW International Representative Larry Schell, who has servicing responsibility for Local 424, attended this meeting in his advisory capacity. After discussion and receiving advice from Mr. Schell, five of the eight members recused themselves, for various reasons. President Watson was involved in the Reinhart inquiry and the events referred to in the charge. So were Vice-President Dolhagaray and Messrs. Taylor and Spackman. Treasurer Macneil's situation came up for discussion. He had been the subject of other charges that bore some relationship to the Reinhart dispute — we were not informed of the details — and the Board also discussed the degree to which Mr. Macneil had been involved in the events of the day in question, of which we similarly did not hear details. President Watson suggested that Macneil recuse himself. He did so without objection. Of the other Executive Board members, we did not hear anything about Mr. Fowler's position, or whether he was even in attendance (though Ex. #20 indicates that Mr. Fowler ultimately gave a witness statement at Mr. Prud'homme's trial, and attaches that statement; he would presumably have been thereby disqualified). Mr. Handley was uninvolved in the events around the charges and was willing to serve. Mr. Excell, though uninvolved, declined to serve and told the Board that he had been "getting grief" from other members, which we take to a reference to some of the political ferment within the Local that we know attended the proceedings against Mr. Reinhart.

[12] These recusals left Mr. Handley, in his words, the "last man standing" willing to serve on the trial board for these charges. On the advice of Mr. Schell, he took it upon himself to recruit and appoint substitutes to sit the trials. He appointed members George Gladney, Robin Duke, and Doug Daly. With Mr. Handley this comprised a trial board of four, three of them substitutes, sitting on behalf of the eight-member Executive Board.

[13] In doing this, Mr. Handley and the remainder of the Executive Board acted according to the advice of the International Union as set out in Exhibit #18, an IBEW booklet entitled "How to Conduct a Hearing: A Suggested Guide for Hearing Officials in the Conduct of Local Union Hearings". In the section called "Charges Against Members", the booklet says in relevant part:

TRIAL BOARD PROCEDURE

1. Make sure the Trial Board is properly constituted in accordance with Article XVII, Section 11, of the IBEW Constitution. A quorum is necessary to proceed with a trial. A quorum of the Board shall consist of the majority of its members (*Article XVII, Section 10*).

2. Should any member or members of the Executive Board be disqualified, a substitute or substitutes shall be appointed as provided in Article XVII, Section 11, of the Constitution. We recommend that Trial Board members be disqualified if any reasonable issue is raised concerning their impartiality or eligibility to serve.

Executive Board members preferring charges or directly interested or involved in any case before the Board **must** excuse themselves as Trial Board Members (*Article XVII, Section 11*). Any conflict over the eligibility of a member to serve should be resolved by the other Board members.

3. While full participation by all Board members is not necessary — when, for example, Board members do not attend — any Board member or members who may be disqualified should be replaced. Once the President has made the appointment of a substitute, and should one or more members fail to appear, the Trial Board could still proceed if a quorum of those qualified to serve is present.

[14] Mr. Prud'homme's trial commenced on January 17, 2005. He attended with Mr. Renouf as his counsel. When he arrived at 1:45 p.m., the trial of Mr. Coffin, another member involved in the events of November 28, 2004, was underway. Mr. Prud'homme had to wait while it concluded. At 3:30 p.m. he and Mr. Renouf were ushered in. Early on, Mr. Renouf objected to the composition of the Trial Board, objected to the timing of the trial, and sought an adjournment for time to prepare. Mr. Gladney, who was chairing the board, dismissed the objections and directed that the trial proceed. Though nothing turns on this bit of disputed evidence, we find that at this point Mr. Gladney adjourned briefly to confer with Mr. Schell. Mr. Schell was present outside the room to advise the board if needed, a function that he commonly performs in his role as International

Representative. Mr. Renouf requested to be present when the board conferred with Mr. Schell. This request was refused. We note that Mr. Schell had himself been present during the November 28 proceedings concerning Mr. Reinhart, against the backdrop of which the alleged offences occurred.

[15] When Mr. Gladney returned, the trial board ruled that it would note the objection but the trial would proceed. The trial board heard testimony from several witnesses, including the charging member, Mr. Brown, and received and read several statements from witnesses not present at the hearing. Shortly after 6:00 p.m., Mr. Renouf again sought an adjournment, on the basis that he had not received advance disclosure of the witness statements and required time to prepare. Mr. Gladney again adjourned to confer with Mr. Schell. Mr. Gladney returned from his conference and the Trial Board declined Mr. Renouf's adjournment request. At this point, about 6:20 p.m., Mr. Prud'homme and Mr. Renouf left the trial. Mr. Prud'homme explained to us that he had been "humiliated" by the evidence against him, that the charges and the evidence were "garbage" and untrue, and that he left because he considered the trial board a "kangaroo court" and could not see the trial turning out in a good way. The trial board then recessed to confer again with Mr. Schell. Initially the board resolved to proceed in Mr. Prud'homme's absence and heard a closing statement from Mr. Brown; but shortly after, it suspended proceedings. The board did not deliberate and did not render a verdict.

[16] The next day, Mr. Renouf wrote to Mr. Handley. In his letter he again objected to the composition of the trial board as being contrary to the IBEW constitution. He also alleged that Mr. Prud'homme had been denied fair process for several reasons, including denial of adjournments, admitting improper evidence and consulting Mr. Schell in the absence of Mr. Prud'homme or his counsel. He advised that for these reasons, Mr. Klyne and Mr. Cronin would not be appearing on their scheduled trial dates. The Klyne and Cronin trials did not proceed on those dates.

[17] Mr. Handley replied to Mr. Renouf's letter on January 19, 2005, in separate but similar letters mailed to the Complainants. He advised that the trial board had been

constituted by substitution pursuant to Article XVII of the Constitution and stated that the board was validly constituted. He took issue with Mr. Renouf's various objections to the trial process, but advised that, in Mr. Prud'homme's case the trial board had elected to adjourn the trial after Mr. Prud'homme's departure because of the late hour. In the cases of Klyne and Cronin, Mr. Handley advised that new trial dates would be set because of the "confusion" he attributed to Mr. Renouf. After a further exchange of letters with Mr. Renouf, Mr. Handley rescheduled all three trials to April and May, 2005. These complaints were filed in early April. In the result, neither has Mr. Prud'homme's trial continued nor have Mr. Cronin's and Mr. Klyne's trials commenced.

[18] One other development in the trial bears mention. It is the standard practice of IBEW and its locals to tape record or transcribe *verbatim* their trials. Exhibit #18, "How to Conduct a Hearing", recommends this. Mr. Handley operated the tape recorder during the trial, changing tapes several times. The tapes were deposited in an envelope at Local 424's offices until these proceedings had commenced. In preparation for these proceedings, Mr. Schell sent them to an outside contractor to be transcribed. The contractor discovered that at least one tape was blank, perhaps because it was loaded wrong-side up. Whatever the cause, the blank tape created a gap in the trial record. In June, Local President Tim Brower sought direction from International Vice President Phil Flemming on what to do about the missing tape. Mr. Flemming directed that the trial start anew. As things stand, then, Mr. Prud'homme's first trial is nullified and any trial for him must now commence from the outset.

II. The Parties' Positions

[19] The Complainants say that these proceedings are suspect in their origin and fatally flawed in their execution. They point to the "political flavour" of the charges; the backdrop of ferment in the Local Union over the proceedings against Mr. Reinhart; Mr. Brown's status as an Assistant Business Manager of the Local and hence a member of the Union "establishment"; the recusal of Mr. Macneil, who they say was the one member of

the Executive Board that might have been sympathetic to the Complainants; and the suspicious loss of the audio record of part of the trial. They say that this Board should be alert to discourage the use of union disciplinary procedures to suppress dissent and so should hold the Union to meaningful standards of fair process.

[20] The first standard the Complainants advance is that a fair trial must be one that is conducted by a tribunal validly constituted by the Union's own constitution: *Tippett v. International Typographical Union, Loc. 226* (1975) 63 D.L.R. (3d) 522 (B.C.S.C.). They argue that the tribunal is not properly constituted because the IBEW Constitution requires that trials be conducted by a quorum of the Executive Board. The power of substitution set out in Article 17.11 does not even apply to trial boards; and if it does, Mr. Handley was obliged to substitute for the entire recused or missing membership of the Executive Board (seven members), not just enough to meet quorum. They say that in any event, no quorum was present; a majority of eight is five, not four.

[21] The Complainants argue further that the conduct of the trial was unfair in several ways, all of which offend s. 26 of the *Code*:

- The trial board unfairly refused adjournments to allow Mr. Prud'homme to meet the case against him;
- The charges were inadequately particularized;
- The trial board had improperly taken advice from Mr. Schell, who himself had some level of involvement in the events of November 28, 2004;
- The trial board took advice from Mr. Schell outside the presence of Mr. Prud'homme or Mr. Renouf. They say this is improper, citing the practice of professional disciplinary tribunals;
- The trial board accepted hearsay evidence of dubious reliability without making proper enquiries; and
- The same trial board sat Prud'homme's case as would sit Klyne's and Cronin's cases, and as had sat a similar case against Mr. Coffin, in all of which Mr. Brown

would be present as the charging member. This presented the unfair risk that evidence in one case would influence the others.

[22] The Complainants say that the past practice of the Union is no defence to any of these defects: *Bimson v. Johnston et al.* (1957) 10 D.L.R.(2d) 11 (Ont. H.C.). They argue that these are serious defects and that there is no authority in the Trial Board to restart the proceedings as International Vice President Flemming has directed. For these reasons the Board should direct that the Union cease and desist its breach and not prosecute Mr. Prud'homme further on these charges, effectively bringing his trial to an end. They further say that the trials of Messrs. Klyne and Cronin cannot proceed because the mandatory 45-day time period in Article 25, Section 5 has expired.

[23] The Respondents argue that this Board should be cautious of interfering in the constitutionally-mandated domestic processes of a democratic trade union organization. They urge us to separate fact from surmise and innuendo; there is no evidence that the charges were laid with ulterior purpose, or that the missing audio was anything other than error. They ask us to remember the rights of all members and to leave the merits of the cases to the trial board. They argue that the Board should not demand a standard of perfection from the lay participants in these domestic tribunals, or even apply to them the stricter standards of natural justice that might apply to a statutory tribunal.

[24] The Respondents acknowledge that the "fair trial" requirements of s. 26 of the *Code* take precedence over the Union's constitution. They say that those requirements were met. They point to the irony that the Local might fall afoul of the *Code* by trying to give the Complainants a *more* fair trial, before adjudicators not involved in the events. They stress the absurdity of a restrictive interpretation of its constitution which would make it impossible to try members charged in circumstances where the Executive Board could not or would not sit. They say that the Board should favour interpretations of the constitution that are consistent with s. 26. Substantial compliance with the constitution is sufficient: *Re United Brotherhood of Carpenters and Joiners of America, Local 1998*

B.C.L.R.B. Letter Decision, No. B77/2000. On the issue of quorum, no respondent has yet raised that in the trial proceedings and they remain free to do so.

[25] The International and the Local respond to the allegations of procedural unfairness in this way:

- The charges are adequately particularized. There is no real uncertainty about the events that the charges concern;
- As it transpired, all three accused members received adjournments;
- Mr. Schell's role in providing advice to the trial board was appropriate. His presence at the November 28 proceedings and knowledge of events does not make his involvement in the proceedings of this domestic tribunal objectionable. The trial board remained independent and retained responsibility to make its own decision on the charges, which is the standard applicable to a domestic tribunal.
- Mr. Schell provided his advice outside the presence of *both* parties, including Mr. Brown, the charging member. Again, no higher standard of conduct should apply to a domestic tribunal.
- The question of how to handle the evidence, including hearsay and written statements from persons who might have been available to testify, is one for the trial board. It has not determined what if any weight to give to the evidence.
- The Complainants have no right to differently-constituted trial boards for their separate trials. Practically, that is impossible if the Executive Board must sit all trials. If they are concerned about the impact of evidence from prior trials, their remedy is to seek consolidation of trials.

[26] The Respondents conclude by arguing that the direction of International Vice President Flemming to restart Mr. Prud'homme's trial was within his constitutional authority and was a reasonable approach to the problem of the missing audio. They say that the 45-day limitation period on trial proceedings is directory, not mandatory, so that these trials may continue. The Board should not pre-empt further proceedings by a cease and desist order; that would ignore the rights of charging members to have their charges

adjudicated, and would go further than to place the Complainants in the position they would be in but for the breach of the *Code*.

[27] All parties tell us that some guidance from this Board may be appropriate beyond what is necessary to dispose of the case.

III. Decision

A. General Principles

[28] Section 26 of the *Labour Relations Code* says:

> **26** No trade union shall expel or suspend any of its members or take disciplinary action against or impose any form of penalty on any person for any reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union, unless that person has been
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> (a) served personally or by double registered mail with specific charges in writing,
> (b) given a reasonable time to prepare the person's defence,
> (c) afforded a full and fair hearing, including the right to be represented by counsel, and
> (d) found guilty of the charge or charges, and if a monetary penalty has been imposed, fails to pay it after having been given a reasonable time to do so.

[29] This Board has described s. 26 as "a mandatory 'due process' provision imposed upon any trade union that seeks to suspend or expel a member": *Jan Noster v. CLAC, Local 63* [1999] Alta. L.R.B.R. 211 at 224. It sets specific procedural standards that must be adhered to: personal service of a specified charge, time to prepare the defence, right to counsel, a finding of guilt and time to pay. Subsection (c) also grants the right to a "full and fair hearing", which imports general principles of natural justice into trade union trial procedure: see this Board's recent decision in *Rodney Heinrichs v. United Brotherhood of Carpenters et al.* (As yet unreported, Board File No. GE-04954, September 12, 2006).

[30] Natural justice principles are contextual. They are flexible enough to take into account the wide variety of tribunals that adjudicate legal rights and the very different social and institutional contexts in which they operate. There has long been debate over the appropriate content of the principles of natural justice that should apply to trade union disciplinary procedures. On the one hand, trade unions are private organizations that formulate domestic codes of conduct and enforce these codes through union constitutions that are contractual in nature. They derive much of their strength and legitimacy as institutions from their private, consensual nature and their ability to apply majoritarian principles to harness the collective power of their membership. But on the other hand, trade unions under modern labour relations legislation are granted important statutory roles and rights, principally that of exclusive bargaining agency. They can profoundly affect the abilities of working people to get and maintain employment in their vocations. Democratic liberal societies, like Canada's, tend to lean towards careful protection of the rights of the individual when the interests at stake are as important as the ability to earn one's living. These opposing forces have created cross-currents in the case law on union disciplinary procedures that are admirably discussed in an article by Michael Lynk entitled "Denning's Revenge: Judicial Formalism and the Application of Procedural Fairness to Internal Union Hearings", (1997) *23 Queen's Law Journal* 115.

[31] Professor Lynk's analysis is sharply critical of the Canadian judicial approach to the topic, as being too formalistic and insufficiently appreciative of the democratic nature of trade unions, their collectivist imperative, and the extent to which trade unions typically strive for fairness in their internal affairs. In Alberta, as in some other Canadian provinces, the right of a union member to fair procedure in union disciplinary matters is now codified in labour relations statutes. The principal role in enforcing fair procedure is now, by s. 26 of the *Code*, given to this Board. Any labour relations board operating in this area faces something of a balancing act: to have due regard for the acknowledged pre-eminent expertise of the Courts on matters of fairness in legal proceedings, while dealing sensitively with internal union affairs according to its own understanding of the nature of trade unions and the social and economic interests at play. In carrying out this

balancing act, we can do no better than to cite with approval the analysis of the British Columbia Labour Relations Board in *Coleman and O.T.E.U., Loc. 378* (1995) 28 C.L.R.B.R.(2d) 1 at pp. 22-31, and especially the following paragraphs:

> 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.
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> 111. The new s. 10 *[similar to Alberta's s. 26]* 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.
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> 112. There are different, and indeed higher, social expectations of trade unions. No matter how 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.
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> 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.
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> 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 with this view of the

> nature and role of trade unions in our society that will inform the framework for our interpretation and administration of s. 10 of the Code.

[32] In striking an appropriate balance in this case, we make the following general observations. First, disciplinary proceedings generally serve legitimate trade union purposes in harnessing the collective power of the membership and ensuring that the interests of the collective are not undermined by the actions of individual members. There should be no presumption that union discipline is an instrument of oppression or that it is imposed for ulterior motive. Though oppression and ulterior motive are not unknown in internal trade union affairs, in our experience they are not widespread; and this Board will draw that conclusion only upon evidence of substance.

[33] Second, as important as are the individual interests of union members in disciplinary proceedings, they should not be overstated. These are civil proceedings. The liberty of the individual is not at risk. Standards of procedure appropriate to criminal proceedings are therefore not necessarily appropriate to trade union trials. Even the oft-cited interest of union members in pursuing a livelihood is not necessarily at risk. In Alberta, the *Labour Relations Code* prevents union discipline, even a disciplinary expulsion, from resulting in the loss of the member's employment. Section 151(g) says:

> **151** No trade union and no person acting on behalf of a trade union shall
>
> (…)
>
> (g) require an employer to terminate the employment of an employee because the employee has been expelled or suspended from membership in the trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union;

Section 149(a)(iii) enacts a counterpart prohibition upon employers. Of course, in the construction industry it may be less important for a suspended or expelled member to

maintain tenure in existing employment than to retain access to new jobs through the union's hiring hall. We address this case on the basis that these trials have the potential to affect the Complainants' livelihood.

[34] Third, trade unions are lay organizations. Their members almost never possess legal training. The conduct of internal trial proceedings is an important function, and it enhances the democratic, self-governing nature of the trade union for lay members of the union to conduct them. So long as trials are generally fair, and adhere to any specific procedural standards prescribed by the *Code*, this Board should be tolerant of methods that trade unions use to allow their members to perform internal trials effectively.

[35] In analyzing whether a trial is fair, we find useful the list of principles that the British Columbia Labour Relations Board in *Coleman*, *supra*, extracted from the case law (at 27):

> (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 *Coleman* list addresses the general language of s. 10 of the British Columbia statute, which says that everyone has "a right to the application of the principles of natural justice" in internal union affairs, including discipline. Some of its enumerated principles are duplicated or enhanced by the specific provisions of Alberta's s. 26. The other principles are reasonable protections for the interests of individual union members that we adopt as falling within the s. 26 guarantee of a "full and fair hearing".

[36] With those comments, we turn to the specific allegations of breach of section 26.

B. Substitution and Quorum

[37] We find that the appointment of this trial board is a breach of s. 26 that invalidates Mr. Prud'homme's trial. The substitution of members is not objectionable, but the trial board lacked quorum. We reason as follows.

[38] Article XVII of the IBEW Constitution sets out the duties of officers of Local Unions. Sections 9 to 14 speak of the duties of the Executive Board. Section 10 sets the quorum of the Executive Board as "a majority of its members". Section 12 designates the Executive Board as the trial board with power to hear all charges and try all members except specified officers for violations of the constitution. In between, Section 11 speaks of recusal and substitution. The complete text of Section 11 reads:

> **Sec. 11.** The board shall see that all members, officers, or others who are not entitled to remain in the board meetings, shall retire after they have been heard and submitted their business to the board. When a board member is directly interested or involved in any case before the board, he shall retire.
>
> No board member shall sit in a case which affects his own employer, or which involves a member working for the same employer. In such case the board member shall be disqualified and the president of the L.U. *[Local Union]* shall appoint a substitute or substitutes. If the

> president is a member of the board and is disqualified, then the vice president shall appoint a substitute or substitutes. If the vice president is also disqualified, then the substitute or substitutes shall be named by the remaining board members. That portion of this Paragraph which refers to an employer shall not apply to those L.U.'s where at least seventy-five percent (75%) of the membership is in the employ of one employer.

[39] Two things in this section, at least, cause interpretive difficulty. First, the entire section precedes the section that appoints the Executive Board as the Trial Board. From this the Complainants ask us to conclude that the power of substitution does not even apply to the Executive Board sitting as a trial board. Second, the words "in such case" in the second paragraph of the section, setting out the power of substitution, are not clear: does substitution apply only to recusals that occur because the case involves a Board Member's employer or an employee of that employer? Or does it apply to recusals that occur because of a Board Member's direct interest or involvement of the subject matter of the case?

[40] In looking at both of these interpretive issues, we are reminded that union constitutions are usually drafted by laymen. They are only rarely written with an organizational scheme and a consistency of format and language that a legislative drafter or lawyer might use. Especially for large international unions like the IBEW, these constitutions have also been in existence for many decades. They are amended infrequently, at large international conventions, and almost never undergo a general revision. As a result, anomalies, ambiguities and inconsistencies over time can creep into these documents, which may not have been models of precise drafting to begin with. Yet they are living documents; they govern the activities of thousands or hundreds of thousands of working people, and they are interpreted and applied every day. Flexible and purposive interpretation is appropriate. The British Columbia Board in *Coleman, supra,* says it this way:

> 110. (…) 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.A.,

> as he then was) "as if it was a common law conveyance. The construction should be liberal, not restrictive": *Astgen v. Smith* (1969), 7 D.L.R. (3d) 657, at p. 684, [1970] 1 O.R. 129 (C.A.).

[41] Applying such a liberal approach, we consider that the power of substitution applies to trials as well as to regular Executive Board business. To find otherwise would attach too much meaning to the fact that the power of substitution precedes the mention of trial boards in Article XVII of the constitution. Acting as a trial board is an integral part of the constitutional functions of the Executive Board; nothing of substance in the constitution suggests that this function should be singled out for different treatment. We find it more significant that Section 11 of that Article says that a board member shall retire "in a case …", "in any case …", or "in such case". The word "case" is broad enough to include a trial proceeding, and indeed that is perhaps a better connotation than just a piece of ordinary board business. Purposive interpretation also supports a broad reading of the circumstances in which substitution may be employed. It is not immediately apparent what purpose would be served by the narrow reading that the Complainants suggest, except to generally lighten the hand of union discipline upon the membership. In contrast, reading the power of substitution broadly serves the purpose of mitigating problems of bias or perceived bias in trial proceedings, while still recognizing the union's legitimate purposes in conducting disciplinary process.

[42] The same interpretive approach leads us to the conclusion that the power of substitution applies to all recusals, not just recusals because the case involves an Executive Board member's employer. The Section is unclear on this point not because of any wording that one can readily point to, but because of its paragraph break. If one eliminates the paragraph break, it is much clearer that the phrase "in such case" should refer to all of the circumstances in which a board member recuses himself or herself. Again, we think that it would attach too much significance to the paragraph break to say that substitution is meant to be confined to the narrow circumstances of a case that involves a Board member's employer. It would be especially pedantic to apply that

meaning in the context of a document likely written by laymen, amended many times, and revised rarely if at all.

[43] When one considers the purpose of the substitution power, it is again difficult to see why one would read the power narrowly. The apparent objects of the substitution power are two: to allow Executive Board business to be done where one or more members are legally disqualified from acting; and to avoid unfairness or the appearance of unfairness in cases where a member of the Executive Board may be too "close" to the subject matter of the decision to be seen as making a disinterested or impartial decision. The IBEW constitution requires that members of the Executive Board serve as trial boards; and so, the problems of disqualification and bias are problems in the context of trials at least as much as in the context of normal Executive Board business. Why, we ask, would the constitution leave these problems unaddressed in one of the Executive Board functions, trials, where they are most likely to arise? No answer comes to mind. The wording of Article XVII, Section 11 does not compel a narrow reading of the substitution power, and so we prefer the broader, more purposive reading.

[44] Finally, this reading is supported by the interpretation that the Union itself gives to the substitution power. Mr. Schell testified that substitutes have been appointed to trial boards of this local in the past. The Union's booklet "How to Conduct A Hearing" at p. 5 recommends disqualification of Trial Board members "if any reasonable issue is raised concerning their impartiality or eligibility to serve" — and then advises that "any Board member or members who may be disqualified should be replaced". This booklet is authorized by the Union's International President, whose pre-eminent role in interpretation and application of the constitution is embodied in Article IV, Section 3(b). The Union has therefore taken an approach to its own constitution that reads the substitution power broadly and purposively, and in a way that enhances the fairness of the process to individual members while still allowing charges and trials to proceed. Though the domestic practice of the trade union cannot validate actions that are contrary to the constitution, it is a relevant factor and should receive some deference from this

Board where a constitutional provision affecting trial process is capable of more than one interpretation.

[45] We do not accept the Complainants' argument that all of the eight Executive Board members who recuse themselves must be replaced, not just enough to form a quorum. There is no apparent business purpose to such an interpretation, especially when the effect would be to needlessly dilute the responsibility and expertise of the elected members of the Executive Board who are charged by Article XXV, Section 2 with the task of sitting trials. We prefer to read the relevant words of Article XVII, Section 11 as directory rather than mandatory. The president or remaining board members may, but need not, appoint a substitute for every disqualified Executive Board member; and practically enough must be appointed to establish a quorum, otherwise Article XVII, Section 10 prevents the trial from proceeding.

[46] That said, Mr. Handley did not appoint enough substitutes to establish a quorum. Article XVII, Section 10 is not ambiguous. No amount of deference and purposive interpretation can make four a majority of eight. It follows that Mr. Prud'homme's trial commenced before a panel that did not have the constitutional authority to try him. This offends the principle of *Tippett, supra*, and noted in *Coleman, supra*, that the trial procedure must be conducted constitutionally, including trial by a body with constitutional authority to act. It amounts to a failure to provide a "full and fair hearing" within the meaning of s. 26(c) of the *Code*. Mr. Prud'homme's trial proceedings to date would therefore be invalid even if Vice President Flemming had not ordered a new trial over the missing tape recordings. We later address the issue whether a new trial can be conducted at all.

[47] Though this is the minimum finding necessary to dispose of the complaint, there is an appreciable chance that other issues in the case may arise in any restart or continuation of the Union's trial proceedings. We have been invited by the parties to give guidance on these other matters and believe it appropriate to give our brief opinion on all the matters raised.

C. Particulars

[48] In our opinion, the charges filed against Messrs. Prud'homme, Klyne and Cronin are adequately particularized. Again, these are domestic proceedings, civil rather than criminal. Fairness requires that the accused members know in broad outline the facts that are alleged against them, with approximate dates, places and enough surrounding circumstances that they are in no doubt as to the events that are the subject of the charges. They are entitled to know the offense sections under the constitution that they are said to have violated. But particulars are neither evidence nor argument. The charged members are not entitled to know precisely how or by what evidence the offense is to be proved. Nor are they entitled to know in advance the theory by which the charging member believes the facts constitute the offense, if that is in doubt. Rarely, evidence or argument presented at the trial may be so unforeseeable that the accused may not fairly be expected to anticipate it. In those cases, the unfairness may need to be repaired by an adjournment. Here, the accused members can generally be in no doubt of the events that the charges are about. The charges are not vague. It should not be unduly difficult for them to formulate their defences, determine whether to call witnesses, decide who their witnesses should be, or anticipate the kinds of evidence that will be brought against them.

D. Adjournments and Right to Counsel

[49] Though in the result all of the Complainants have received lengthy adjournments, some comment on the merits of this argument is appropriate. We consider that the trial board's approach to adjournments did not violate the Complainants' right to a full and fair hearing. The initial hearings were scheduled three weeks in advance. That is not a long period of time, and it is possible that an accused member may not be able to marshal the defence in that period of time. But it is also possible that the defence can be marshaled, and so an accused member seeking an adjournment should be prepared to point to some difficulty that he or she faces in mounting the defence. No such difficulty

was advanced in this case. The entire basis for the adjournment request was the commitments of the accused members' counsel.

[50] Section 26 of the *Code* gives accused trade union members the right to legal counsel in disciplinary proceedings. Mr. Handley for the trial board admitted as much and indicated that it would not object to Mr. Renouf's presence. This satisfied the Complainants' right to counsel. We do not ignore the practical scheduling difficulties faced by busy practitioners, and we acknowledge that counsel and trade union often work out acceptable scheduling compromises with professionalism and good will on both sides. But we do not accept that the right to counsel in union disciplinary proceedings amounts to the right to a *specific* counsel, without regard to that counsel's availability. We are unaware of any such right even in criminal proceedings. The Union was not bound to accommodate counsel's schedule, and a refusal to reschedule due to counsel's schedule alone is not unfairness that amounts to a breach of s. 26.

E. Evidence

[51] Much was made of the trial board's handling of evidence. It received written statements, some of them by individuals who appear to have been available to testify. Some of the evidence received was hearsay. Although we decline to make a firm finding on the treatment of the particular evidence received, we sound a caution about over-reliance on written statements. It is true, as the Union argues, that the trial board is not bound by judicial rules of evidence and that whether to receive evidence and what weight to give it are matters upon which the trial board should receive much latitude. This Board will certainly not accept invitations to simply second-guess evidentiary rulings or re-weigh the evidence before the trial board.

[52] Section 26 comes into play, however, where the evidentiary rulings compromise the overall fairness of the trial. As the B.C. Board in *Coleman, supra*, observes, the principles of natural justice include a right to cross-examine witnesses. We doubt that this means that every piece of relevant evidence must be presented orally by a witness

who is available to be cross-examined. It may well be that if this evidence is only peripheral or corroborative of oral testimony, it can be presented as written statements without fatally undermining the fairness of the trial. But a trial board that accepts and appears to rely upon written statements as the principal or only evidence on an important part of the case, risks a finding that the denial of an opportunity to cross-examine is unfair and a breach of section 26. Reviewing the attachments to Exhibit #20, Local 424's letter to Vice President Flemming about the missing audio, and without deciding, we are concerned that Local President Watson's statement, and the statement of Terry Ledingham about the postings at the Syncrude UE-1 site, at least, may fall into this category. As the Union's own booklet "How to Conduct a Hearing" observes at p. 7, "the best testimony is that given personally during the hearing, which is subject to cross-examination by the opposing party". Our counsel of caution to the trial board would be to insist that the most important evidence be given orally, and preferably in person.

F. Outside Advice

[53] We fail to see anything in Mr. Schell's involvement as advisor to the trial board that violates the Complainants' right to a full and fair hearing. It is entirely to be expected that local union trial boards will rely upon the knowledge and experience of the permanent staff of the union, including its international union representatives. We do not accept the suggestion that an advisor in Mr. Schell's position must give his advice in the presence of the parties. A union and its trial boards may make their own rules in this regard. Whatever the practice followed by other tribunals, we think that a domestic tribunal like a union trial board is entitled to seek and receive technical advice *in camera*. We are not satisfied that the contrary rule enunciated in *Carlin v. Registered Psychiatric Nurses' Assn. of Alberta* [1996] A.J. No. 606 (Alta. Q.B.), which Binder J. there states may be subject to some exceptions, is applicable outside the case of a professional disciplinary tribunal exercising powers conferred by statute. A union trial board may take advice privately provided that it does not abandon its independence and its responsibility to make the decision based on what it has heard in the hearing. To find

otherwise would, if anything, impair the ability of the tribunal to seek and receive honest, unvarnished advice.

[54] The Complainants argue that it is improper for the trial board to take advice from Mr. Schell because he had personal knowledge of the events that were the subject of the charges. As such he was a potential witness. In our view this should not bar Mr. Schell from giving advice. He had no reason to believe he would be called to be a witness. If called as a witness, of course, it would be highly detrimental to a fair and transparent process for a representative in that situation to continue to provide advice. And it would be unfair and almost certainly a breach of s. 26 for an advisor to communicate, and a trial board to rely upon, the advisor's own knowledge of events passed on in a private meeting. It should not be assumed, however, that an experienced international representative like Mr. Schell would allow himself to become a *de facto* witness behind closed doors. There should be some evidence that allows that conclusion to be drawn before this Board invalidates the proceedings. No such evidence appears in this case.

G. Multiple Accused

[55] We do not accept the proposition that the Complainants are denied a fair hearing by the same trial board sitting serially the trials of all the "co-accused" in these events. Such a sweeping rule would make it very difficult for unions with a standing trial board, like this one, to ever fairly hear charges against a number of members arising out of the same events. Instead, we think that unfairness arises only if the trial board relies on the evidence in one trial to convict the member accused in another trial, without allowing an opportunity to hear and cross-examine upon that evidence. A trial board that is in possession of important evidence from one trial, unknown to the accused in a following trial, may have a duty to disclose that evidence and allow any adjournment necessary for the accused to test that evidence or meet the case that is known to the trial board. Union counsel has also suggested that any appearance of prejudice might be avoided by a motion to hold the trials jointly. The Union constitution does not say anything one way or another on the subject of joint trials, but that might well be an acceptable approach;

there seems nothing inherently unfair in joint trials. If that is not suitable, the Union is entitled to hold the trials serially if it desires.

H. Time Limits and Restarting the Trial

[56] The Complainants say that the Klyne and Cronin trials cannot now proceed because they have exceeded the 45-day time limitation in Article XXV, Section 5 of the constitution. If the Prud'homme trial were nullified, the same section would prevent it being restarted. Section 5 says:

> Sec. 5. The trial board shall proceed with the case not later than forty-five (45) days from the date the charges were read at the L.U. meeting or Executive Board meeting. The board shall grant a reasonable delay to the accused when it feels the facts of circumstances warrant such a delay. The accused shall be granted a fair and impartial trial. (…)

The Union says that it is not clear that the trials cannot proceed. That would depend upon whether the words "The trial board *shall* proceed …" are read as mandatory or directory. It says that the case law supports a directory interpretation and that the trial board should in the first instance address that question if the trials commence or recommence. The Complainants cite professional disciplinary cases in Alberta and elsewhere where time limits have been read strictly and as mandatory in nature.

[57] We think that it is only fair and proper to allow the trial board to deal with the objection at first instance. We leave this issue to the trial board, with the following observations. It is not clear to us that the professional disciplinary cases necessarily apply to the trial proceedings of a domestic organization like a trade union, and in any event. Whether the word "shall" is mandatory, what it means for a trial board to "proceed" with a case, whether any or all of these cases have been proceeded with within the time limit, and how the time limit relates to the power to grant reasonable delays, are all issues upon which the domestic practice of the trade union may have some bearing. We think that the trial board is also entitled to consider the practical impact of a mandatory reading of the 45-day time limit. This case is an illustration of why a

mandatory time limit is problematic. If accused members can jeopardize a mandatory time limit by procedural objections and vigorous claims of breaches of natural justice, it takes little imagination to conclude that such objections will become a common response to charges and trials.

[58] The Complainants also say that the Union cannot restart the Prud'homme trial because the International Vice President has no power to restart those proceedings after discovery that a part of the audio record is missing. The Union in response points to Article XVII, Section 12, which allows the trial board to "reopen and reconsider" any case it believes appropriate within 30 days of the date decision was rendered, "and it shall do so when directed by the I.V.P. or I.P. *[International President]*." It also suggests that, without having yet done so, the International President can delegate to an International Vice President his power to settle questions in controversy under Article IV, as a possible source of such a power.

[59] This too is a matter for the trial board to deal with at first instance. The question does not arise unless and until there is a specific or a general delegation to Vice President Flemming that can be pointed to as a source of his direction to the trial board, or until there is a "decision" from the trial board that is capable of being reopened. As broad as these powers may appear on the printed page, their application may be qualified by domestic practice or the features of the specific case. Our power under s. 26 of the *Code* is only to ensure a full and fair hearing and that principles of natural justice are generally applied to these trials. We do not think it appropriate to pronounce on the exercise of such constitutional powers unless there is a live issue that might engage s. 26 and a record that adequately informs us of matters that the trial board or the Union considers relevant.

I. Remedy

[60] The Complainants seek not just a declaration of breach of the *Code*, but a cease and desist order prohibiting any further proceedings in the trials, damages and costs.

[61] We have found that Mr. Prud'homme's trial commenced before a trial board that did not have a constitutional quorum. This is a trial before a body without authority to act, and therefore not a "full and fair hearing" within the meaning of s. 26. A breach of s. 26 of the *Code* is made out. The proceedings to date against Mr. Prud'homme are invalid, and we so declare.

[62] We are not prepared to prohibit further proceedings, either the complete trials of Mr. Klyne and Mr. Cronin or a restart of Mr. Prud'homme's trial. Other than the lack of quorum, we have found no defect in the proceedings that amounts to a breach of s. 26. Other possible impediments to further proceedings may loom, like the 45-day time limit and the alleged inability to restart Mr. Prud'homme's proceedings, but we have declined to rule upon them in order to allow the parties and the trial board to address them first. In these circumstances it is appropriate to make no prohibitory order and allow the further proceedings to take place.

[63] The damages claimed in the complaints were not pressed strongly before us, and in any case we are not disposed to grant any. There is no indication that the Complainants have suffered any monetary damages (other than legal costs) from being required to defend themselves before an improperly-constituted trial board. Of the claim for costs, this Board has reserved awards of costs for exceptional cases, egregious breaches of the *Code* and serious abuses of process among them. Nothing in this case falls into an exceptional category that warrants an award of costs. The success of the complaints was decidedly mixed. The claim for costs is undermined by the aggressive and largely unmeritorious procedural and natural justice objections that the Complainants pursued at trial and before us. We particularly disapprove of Mr. Prud'homme's decision to walk out of his trial. Finally, the prospect of further trial proceedings that might be inflamed by an award of costs also argues against any such award.

[64] The complaints are allowed on the limited basis we have outlined in these reasons.

ISSUED and **DATED** at the City of Edmonton in the province of Alberta this 1st day of December 2006, by the Labour Relations Board and signed by its Vice-Chair.

J. Leslie Wallace, Vice-Chair