IN THE MATTER OF A DISPUTE

UNDER THE

BY AND BETWEEN LETTER OF AGREEMENT

BETWEEN:

CONSTRUCTION LABOUR RELATIONS ASSOCIATION
OF BRITISH COLUMBIA

(the "CLR")

-and-

BARGAINING COUNCIL OF BRITISH COLUMBIA BUILDING TRADES UNIONS

(the "Council" or "BCBCBTU")

-and-

BOILERMAKERS LODGE 359

(the "Boilermakers")

PANEL:	Jacquie de Aguayo
APPEARANCES:	Mark Colavecchia, for the CLR Michael Shapiro, for the Council Colin Guzikoski and Carolyn Janusz, for the Boilermakers
DATE OF DECISION:	November 3, 2020

DECISION

1 In 2016, the CLR and the Council signed a By and Between Letter of Agreement (the "LOA"). The LOA modified the process by which contractors who have authorized the CLR to represent them in collective bargaining with the Council become bound to one or more construction industry trade level standard agreements.

2 Once authorized by a member contractor, the CLR gives notice to the Council of its intention to add the contractor as a signatory, identifying the particular trade level agreement(s). The LOA added a provision giving the Council the opportunity to object. Specifically, the LOA provides:

> The By and Between Language in any applicable BCBCBTU collective agreement is amended as set out herein:
>
> The parties hereby agree that **before** a CLR member employer is added as an authorized employer under the By and Between Language, the following shall apply:
>
> 1. CLR shall immediately advise BCBCBTU in writing when any member employer has authorized it to bargain a collective agreement covered by the BCBCBTU;
>
> 2. If BCBCBTU objects, it shall do so within 15 days of the date of notice, or such further time as agreed by the parties;
>
> 3. On request, the parties shall meet to endeavour to reach an agreement. Such agreement shall not be unreasonably withheld by BCBCBTU;
>
> 4. If CLR and BCBCBTU are unable to reach agreement, either party may submit the issue to Jacquie de Aguayo for determination and such determination shall be final and binding; and
>
> 5. CLR shall immediately advise BCBCBTU in writing when any member employer has revoked the authorization referred to above.

3 This is a dispute referred to me for determination under paragraph 4 of the LOA.

I. BACKGROUND

4 The CLR is a voluntary association and provides labour relations and other services to construction industry contractor members. One such service is to act as the bargaining agent for member contractors who have authorized the CLR to represent them in collective bargaining with the Council and who are signatories to one or more trade level agreements ("Signatory Contractors").

5 The Council is established as a council of unions under Sections 41 and 41.1 of the *Labour Relations Code* (the "Code"). The Council is made up of 15 constituent member unions ("Member Unions"). The Council is the exclusive bargaining agent for its Member Unions in collective bargaining with the CLR acting on behalf of Signatory Contractors. Membership in the Council by Member Unions is Code prescribed.

6 The Council's Member Unions and the CLR's Signatory Contractors work in industrial, commercial, and institutional construction ("ICI"). The collective bargaining process between the CLR and the Council is complex and has a long history, canvassed in the submissions before me. Its scope is not sectoral, i.e., the entire ICI industry. Rather, the scope of bargaining involves approximately 40 trade level standard agreements that cover work performed by members of the Member Unions for Signatory Contractors represented by the CLR (the "Industry").

7 The Boilermakers are a Member Union of the Council. There is a trade level standard agreement that applies to work performed by its members for Signatory Contractors represented by the CLR in Industry bargaining (the "Boilermakers Industry Agreement").

8 It is well-established that CLR also provides labour relations services for contractor members outside the Industry bargaining process with the Council. It is similarly well-established that Member Unions are certified, or have voluntary recognition agreements, and bargain collective agreements binding on their members who perform work for construction contractor employers outside the Industry bargaining process between the CLR and the Council.

9 For example, for over 40 years, the Boilermakers have collectively bargained with boilermaker contractors outside the Industry bargaining process. Bargaining was conducted through a voluntary association called the Boilermaker Contractors Association (the "BCA") and its predecessor organizations. I will refer to the terms of the collective agreements binding on signatory boilermaker contractors in this context as the "Independent Agreement". The lion's share of construction work in BC for this skilled trade is governed by the terms of the Independent Agreement. It is not in dispute that its terms differ from those in the Boilermakers Industry Agreement.

II. THE DISPUTE

10 On December 23, 2019, the CLR notified the Council under paragraph 1 of the LOA that twelve (12) contractors (the "Contractors") had authorized it to sign the Boilermakers Industry Agreement.

11 The Contractors were members of the BCA before it was dissolved in November 2019. In *CIMS Limited Partnership*, 2020 BCLRB 74 ("*CIMS*") [Leave for Reconsideration denied in 2020 BCLRB 101], the Board dismissed an application by the Boilermakers alleging that the circumstances surrounding its dissolution were in breach of the Code. The facts and context are set out more fully in *CIMS*. Briefly, in July 2019, the BCA sought a re-opener of the Independent Agreement. It maintained that, unless

the Independent Agreement was amended to reflect the terms of the Boilermakers Industry Agreement, its largest contractor (one of the Contractors in this case) would leave, resulting in a likely dissolution of the association. This did, in fact, occur and the BCA was dissolved in November 2019 (*CIMS*, paras. 9-27).

12 In coming to a decision, the Board in *CIMS* noted that, notwithstanding the dissolution, each former member of the BCA, including the Contractors, remained bound by the terms of the Independent Agreement (para. 93). By their membership in the CLR, the Contractors now wish to become signatories to the Boilermakers Industry Agreement (with the result that they will no longer be bound by the Independent Agreement).

13 In accordance with the LOA, on January 7, 2020, the Council objected. On February 12, 2020, the CLR and the Council met in accordance with paragraph 3 of the LOA but were unable to reach an agreement. Under paragraph 4 of the LOA, the dispute was referred to me for final and binding determination.

14 The material question I must decide under the LOA is whether the Council has unreasonably withheld its agreement to adding the Contractors as signatories to the Boilermakers Industry Agreement. The parties filed extensive submissions before me, including with respect to a number of preliminary matters which I address below.

III. PRELIMINARY MATTERS

A. STANDING

15 On August 6, 2020, I granted the Boilermakers' request for standing under the LOA. These are my brief reasons.

16 The CLR submits the Boilermakers' interests in preserving their current bargaining structure and Independent Agreement with the Contractors are "merely interests which will be consequentially affected by the result" of the dispute under the LOA. The CLR submits the Boilermakers will continue to be the bargaining agent for members performing work for the Contractors. It agrees, however, that the Council will replace the Boilermakers as the exclusive bargaining agent under the Code for collective bargaining, that bargaining with the Contractors will become governed by the Industry process, and that the terms of the Independent Agreement currently in force will be replaced by the terms of the Boilermakers Industry Agreement.

17 The Boilermakers are a Member Union of the Council. However, the LOA constitutes an agreement between the CLR and the Council in their representative capacities in Industry bargaining. The Boilermakers seek standing based on their independent status as the bargaining agent for their members performing work for the Contractors under the Independent Agreement. In this context, I am not persuaded by the CLR's position that the Boilermakers' circumstances are analogous to a bargaining unit employee seeking standing at arbitration, that the Council is representing the

Boilermakers' independent interests, or that the Boilermakers' participation will allow it to "finesse" the Council's exclusive bargaining agency.

18 For all the reasons set out, I find that in the particular circumstances of this case the Boilermakers have a direct and legally material interest in the outcome of this dispute as a signatory party to the Independent Agreement. Accordingly, I grant them standing with respect to the issue to be determined under paragraph 4 of the LOA.

B. FAIR HEARING

19 Neither the CLR nor the Council dispute that I have the authority to determine the question of whether the Council's objection is unreasonable. In the course of their submissions, however, each takes issue with how the other has characterized the nature or source of that authority. The CLR says the LOA is clear that my decision-making authority is that of an arbitrator as defined in the Code. The Council and the Boilermakers say the dispute constitutes a Board proceeding.

20 At the outset, the Council asked that I resolve this dispute before dealing with the merits. I declined to do so. In its submissions on the merits, the Council repeated its request. It asks for a stay pending a determination on "which tribunal they are appearing before". The Council also asks that it be given "a fresh opportunity to provide submissions on the merits of the LOU Dispute after being told which tribunal they are appearing before as that would determine the jurisdiction, powers, and procedures" of the decision-maker. The Council says that its submissions on the merits are filed without prejudice and that it does not "attorn" to my authority. It submits that declining its request for a stay, pending an interim decision and further submissions, will result in a breach of its right to a fair hearing.

21 It is well-established that the Board provides assistance to parties on a formal and informal basis, and has done so on issues arising between the CLR and the Council. This reflects the importance of their roles and of the Industry. As noted in the submissions before me, the LOA constitutes a settlement agreement reached in the context of a consensual dispute resolution process conducted with my assistance at the request of the CLR and the Council. That agreement included naming me as the decision-maker under paragraph 4 of the LOA.

22 The LOA is incorporated into each trade level standard agreement. As such, I find the express terms of the LOA provide that this dispute arises under the Boilermakers Industry Agreement, as the Contractors in issue seek to be added as signatories to it.

23 In the circumstances, I find the nature and scope of the authority granted to me by the CLR and the Council under the LOA is that of an arbitrator as defined in the Code.

24 The CLR, the Council, and the Boilermakers each submit that my determination under the LOA must be consistent with Code principles. I agree. Each filed submissions

on the scope and limits of my authority, as well as the Code principles they say support their respective positions on the issue to be determined under paragraph 4 of the LOA.

25 The Council was given the opportunity to, and did, provide full submissions on all the matters at issue, including the merits and its position on the nature and limits of my authority under the LOA and the Code. In the circumstances, procedural fairness does not require that I proceed in the bifurcated manner the Council demands. Accordingly, the Council's request for a stay is dismissed.

C. BARGAINING STRUCTURE

26 The Boilermakers filed extensive submissions with respect to what they say is the nature of their independent bargaining structure with boilermaker contractors formerly represented by the BCA. They request a declaration that the contractors were bound by a multi-employer bargaining unit structure. The Boilermakers say that such a declaration would have the effect of prohibiting the Contractors from joining the CLR until the Boilermakers agree or an application is made to the Board under Section 139 of the Code.

27 The Boilermakers allege that the question of bargaining structure was not fully and directly adjudicated in *CIMS* with the appropriate parties or submissions process. The Boilermakers urge me to address these issues and, as such, submit that this dispute is a Code proceeding.

28 The CLR strongly objects to the Boilermakers' submissions. It says the bargaining structure issue was decided in *CIMS* and the Boilermakers submissions constitute an abuse of process. It refers to the reasons of the original panel in *CIMS*, as well as the arguments made before, and rejected by, the reconsideration panel. The Boilermakers, in response, submitted an unsolicited sur-reply to these and other elements of the CLR's final reply.

29 The Boilermakers' standing in this dispute relates to its status as the exclusive bargaining agent for employees performing work for the Contractors under the Independent Agreement. The material decision I must make under the LOA is whether the Council's objection is unreasonable. In the circumstances, I find the issues raised, and relief sought, by the Boilermakers are addressed in *CIMS* and are not properly before me. In any event, for all the reasons set out, I further find that the relief sought falls outside the scope of my authority under paragraph 4 of the LOA. Accordingly, I decline to determine the issues raised by the Boilermakers on both bases.

IV. DECISION

30 I do not intend to summarize the parties' positions separately. Rather, having considered them, I address only those submissions I find to be relevant to the material issue to be decided under paragraph 4 of the LOA.

31 I note at the outset that the parties' join issue on whether a few historical examples of agreements to add signatory contractors, including where there was a pre-existing bargaining relationship, showed a practice of requiring consent by the Council or a Member Union. This dispute is also touched on in the Boilermakers' unsolicited sur-reply.

32 I find nothing material turns on these examples. Regardless of whether consent was sought or given as of right or out of sound labour relations practice, it is undisputed before me that paragraphs 3 and 4 of the LOA subsequently changed the By and Between process. The CLR confirms it does not assert a unilateral right under the LOA to add a contractor member as a signatory. It acknowledges, and I find, that the LOA establishes a process whereby the Council may object and, under paragraph 4, a contractor may be added as a signatory by order if the Council's agreement is found to have been unreasonably withheld.

33 For the reasons that follow, I find that allowing the Contractors to become signatory to the Boilermakers Industry Agreement unreasonably abrogates Code rights. Accordingly, the Council's objection is upheld.

34 In coming to a determination, I have considered the parties' submissions with respect to *Schindler Elevator Corp*., BCLRB No. B420/94 ("*Schindler*") (Leave for Reconsideration dismissed based on mootness in BCLRB No. B169/95). In *Schindler* the Board declined to allow a contractor member of the CLR to be bound by the Industry process as a signatory under the By and Between language. The case arose in the context of the particular bargaining process in the elevator industry. There were separate, but concurrent, negotations for an agreement for elevator service and maintenance and one for construction for the same bargaining units of employees. The service and maintenance agreement was bargained through a voluntary association called the NEEA. The construction agreement was bargained through the CLR and the Council as part of the Industry.

35 Schindler was a member of the NEEA, but not a member of the CLR during negotiations that led to a 1991-1994 agreement. The Board found that Schindler bargained as an independent. While Schindler was present at the bargaining table when the CLR led bargaining for the construction agreement, the Board found it signed the construction agreement as a "me too", not as a member bound by the Industry bargaining process. During renewal negotiations in 1994, bargaining between the CLR and the Council for construction continued, however, an impasse was reached at the service and maintenance table. The union commenced a strike vote and Schindler applied for membership in the CLR. Its application was expedited and approved within a 24 hour period. Schindler's membership was confirmed the day the union issued strike notice.

36 Schindler applied to the Board under Part 5 of the Code alleging the union's strike in service and maintenance was unlawful. An earlier Board decision found that the union could not strike in service and maintenance where a contractor was also a signatory member of the CLR as they were bound by the Industry bargaining schedule.

Schindler maintained that, as a member of the CLR, it was now similarly bound to that schedule and the strike was unlawful. The union maintained it had the right to strike in service and maintenance as Schindler had participated in construction bargaining as an independent. After considering the By and Between language, the Board dismissed Schindler's application, finding as follows:

> …[T]he "by and between" language contained in the CLRA Standard Construction Agreement does not clearly allow new members to become bound by its terms in the particular circumstances presented by this case. The Employer had a collective agreement with the Union as an independent. The Employer subsequently became a member of CLRA on October 7, 1994, the same date the Union served strike notice, through an expedited process designed to avoid a strike by the Union. In my view, the by and between language negotiated by CLRA and the Bargaining Council does not apply in these circumstances. The parties have not clearly expressed a mutual intention to allow new members of CLRA to become parties to the collective agreement in a manner which abrogates the Union's rights under the Code (*Schindler*, BCLRB 420/94, p.2) (emphasis added).

37 The Council submits the reason the Contractors have joined the CLR is to avoid their obligations under the Independent Agreement and "escape the heavy lifting" of bargaining its renewal. The Council relies on *Schindler* in support of its position that the circumstances of this case will also result in an abrogation of the Boilermakers' Code rights and is, therefore, unreasonable. The Council submits I do not have the authority under the LOA to make an order that would substantively change the terms of an Independent Agreement binding on the Contractors under the Code.

38 The Boilermakers also submit the outcome sought by the CLR is unreasonable because it will result in the Contractors "escaping" their collective agreement obligations under the Code and which have operated outside the Industry for over 40 years. They say this is the Contractors' intent as set out in *CIMS*, paras. 13, 77-78, 85-86. They say that if the Contractors are successful it would be the first time an employer "would be allowed to choose a collective agreement that suits its interest".

39 The CLR submits no union rights are abrogated, only that "certain union rights will be enforced by a different bargaining agent" (the Council). It further submits that, "at most", the Contractors have asked to be covered by the terms of an agreement "which they see as more favourable to their interests, but in a process that still allows for collective bargaining" within the Industry.

40 As is described more fully in *CIMS*, each Contractor and the Boilermakers are bound by the terms of the Independent Agreement. As noted by the Council and the Boilermakers, the bargaining relationship reflected by the Independent Agremeent gives rise to a range of rights, duties, and obligations. These include the duty to bargain in good faith and the requirement that the parties remain bound by the terms of the Independent Agreement as prescribed in the Code (see Sections 47 to 49 of the Code).

41 It is uncontested before me that, by their request to become signatory to the Boilermakers Industry Agreement, the Contractors wish to be bound by the terms of an agreement they see as more favourable to their interests. On the facts in *CIMS*, the BCA, on behalf of its member boilermaker contractors, unsuccessfully sought the Boilermakers' agreement to that outcome.

42 I find the Board's approach in *Schindler* is persuasive and applicable to the circumstances before me. In *Schindler*, the Board declined to interpret the By and Between language in a way that would allow a contractor to become bound to the Industry process where it would abrogate a union's rights under the Code. I find an analogous effect arises here. Rather than bargain changes to the Independent Agreement, the Contractors seek to have those terms unilaterally changed in their favour by becoming signatory to the Boilermakers Industry Agreement. I find this constitutes an unreasonable abrogation of the Boilermakers' Code rights as the bargaining agent signatory to the Independent Agreement.

43 In coming to this conclusion, I have considered the CLR's submissions with respect to the history of bargaining in ICI construction and the creation of the Council. The CLR says a decision in this case can "push the parties towards a stronger, more stable bargaining structure, or it can push the parties back towards unstable single-trade bargaining". The CLR submits that the only result in keeping with existing Code principles is one that promotes stable, multi-trade bargaining.

44 I am not persuaded the Code principles that inform the Industry bargaining process are sufficient to overcome what I have found is the unreasonable effect of adding the Contractors as signatories in the present case. I agree with the Council that the issue before me is not whether it would be a good idea to add the Contractors as signatories. The Code does not require that ICI contractors participate in Industry bargaining, other collective bargaining relationships in ICI construction occur outside the Industry, and collective bargaining for a large share of unionized boilermaker construction work has been independent from the Industry for almost 40 years.

45 Moreover, the Board in *CIMS* confirmed that, on the dissolution of the BCA, each boilermaker contractor is bound by the Independent Agreement and, on notice, to bargain either independently or as part of a voluntary association for its renewal or revision (para. 101).

46 In this context, my authority under paragraph 4 of the LOA is not to make a policy choice as to whether it makes sense to include the Contractors in Industry bargaining or to "push parties towards a stronger, more stable bargaining structure" to address instability concerns such as leapfrogging or whipsawing. It is to determine whether the Council's objection is unreasonable.

47 The CLR also submits no Code rights are abrogated in this case as the Contractor bargaining units will continue to cover the same employees, the same craft and trade, and the same trade jurisdiction but within the Industry bargaining process. The same could be said of the circumstances addressed in *Schindler*. I find that an

abrogation of Code rights is nevertheless a basis for upholding an objection under paragraph 4 of the LOA.

48 The CLR also distinguishes *Schindler* on the basis that the Board found the employer's application for membership was an orchestrated attempt to avoid a lawful strike. The CLR says these are not the circumstances here, noting that the Board in *CIMS* ruled that the Contractors' decision to leave the BCA and its subsequent dissolution were not unfair labour practices.

49 However, the Board in *CIMS* did not determine the issue before me under the LOA. Moreover, I am not persuaded that a finding of an unfair labour practice is a necessary condition for upholding an objection under the LOA. In *Schindler*, the Board dismissed an application for a declaration the union's strike was unlawful. In doing so, it found that it was the By and Between language in the standard agreement that did not "clearly allow new members to become bound by its terms in the particular circumstances presented by this case" i.e., where it would constitute an abrogation of the union's Code rights.

50 I turn now to the parties' submissions with respect to interpreting the language of the LOA. In *Schindler*, the Board found that:

> While the by and between clause may entitle CLRA to add new members to the collective bargaining relationship without the consent of the Bargaining Council or the Union, I do not believe the parties have clearly expressed a mutual intention to add new members in circumstances which abrogate the Union's rights under the Code. The Board has an obligation to harmonize the terms of the collective agreement with the express or implied provisions of the Code wherever possible. In doing so, however, the Board must insist that the parties clearly express their intent to contract out of their respective rights under the legislation. Schindler says the by and between clause entitles it to end one collective bargaining relationship with the Union, enter into a new relationship through CLRA, and avoid a legal strike. In my view, the parties must expressly stipulate this clear violation of the Union's rights; the Board will not infer such a consequence from the language used by the parties in this case (p. 8) (emphasis added).

51 The CLR submits the language of the LOA in the present case is distinguishable. The By and Between language considered in *Schindler* did not require consent. The CLR submits the LOA is completely different and "evinces a very different intention" because there is now a final and binding process for determining whether the Council's objection is unreasonable. The CLR states "the necessary result if the [Contractors] are added to the list of signatory contractors (…) is that they will no longer be bound by the [Independent Agreement]. Such a circumstance is clearly and expressly provided for by the [LOA]".

52 The Council says the language of the LOA is “not a mechanism for voiding hard-fought bargaining rights and existing collective agreements”. The Council submits the LOA does not contain clear and express language to support such a result.

53 I agree with the CLR that paragraph 4 expresses a mutual intention that an order may issue notwithstanding an objection from the Council. However, I find the language of the LOA does not “expressly stipulate” that a CLR member contractor can become signatory to a trade level standard agreement where the impact abrogates Code rights.

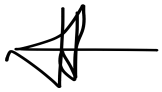
54 I further find no basis on which to infer such an intention. Rather, I find that paragraph 4 reflects a mutual intention to create a binding dispute resolution process under the collective agreement. In *Schindler*, the By and Between language gave the CLR the unilateral right to add a contractor, yet the Board nevertheless declined to do so where it would abrogate the union’s Code rights. The merits of an objection are necessarily contextual and fact specific and I cannot infer from paragraph 4 of the LOA that the parties mutually agreed that an abrogation of Code rights could not be considered in determining whether an objection under the LOA is unreasonable.

55 Finally, I note the Council submits that, by becoming members of the CLR, the Contractors automatically fall within its bargaining unit. It says, however, that the Independent Agreement can and must remain and co-exist side by side with the Boilermakers Industry Agreement. The Council submits an order to that effect can be made in the present case. The CLR submits that a second standard agreement gives rise to industrial instability concerns. It submits that the Council’s “optimistic prediction” that the Independent Agreement can co-exist with the Boilermakers’ Industry Agreement should be viewed “with heavy skepticism”.

56 I find my authority under the express language of the LOA is limited to determining the particular dispute before me, i.e., whether adding the Contractors as signatories to the Boilermakers Industry Agreement is unreasonable. I am not persuaded on the submissions before me that my authority extends to ordering a second trade level standard agreement into effect in this case.

57 For all the reasons set out, I find the Council’s agreement to adding the Contractors as signatories to the Boilermakers Industry Agreement has not been unreasonably withheld. Accordingly, I uphold the Council’s objection.

Dated this 3rd day of November, 2020.



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Jacquie de Aguayo