BCLRB No. B34/2015

BRITISH COLUMBIA LABOUR RELATIONS BOARD

CONSTRUCTION LABOUR RELATIONS ASSOCIATION
OF BRITISH COLUMBIA

("CLR")

-and-

BARGAINING COUNCIL OF BRITISH COLUMBIA
BUILDING TRADES UNIONS

("Council" or "BCBCBTU")

-and-

INTERNATIONAL ASSOCIATION OF HEAT AND FROST
INSULATORS AND ALLIED WORKERS, LOCAL NO. 118

("Heat & Frost 118")

-and-

BRITISH COLUMBIA REGIONAL COUNCIL OF CARPENTERS

("BCRCC")

-and-

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING
AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL NO.
170

("Local 170")

-and-

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NOS. 213,
230, 993 and 1003

("IBEW Locals")

-and-

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, LODGE 359

("Boilermakers")

-and-

MILLWRIGHTS, MACHINE ERECTORS AND MAINTENANCE UNION, LOCAL 2736

("Millwrights")

-and-

TEAMSTERS LOCAL UNION NO. 213

("Teamsters")

-and-

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 280

("Sheet Metal Workers")

-and-

CONSTRUCTION, MAINTENANCE AND ALLIED WORKERS BARGAINING COUNCIL

("CMAW")

-and-

CONSTRUCTION AND SPECIALIZED WORKERS' UNION LOCAL 1611

("Local 1611")

-and-

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL NO. 138

("IUPAT")

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 115

("IUOE")

-and-

UNITE HERE, LOCAL 40

("Local 40")

-and-

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, LOCAL NO. 919

("Local 919")

-and-

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL NO. 97

("Iron 97")

-and-

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, FLOORLAYERS' LOCAL NO. 1541

("Local 1541")

-and-

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 2 BRITISH COUMBIA

("Bricklayers")

(collectively, the "constituent unions")

PANEL:	Ken Saunders, Vice-Chair and Registrar
APPEARANCES:	Barry Y. Dong, for CLR David L. Blair, for the Council John MacTavish, for Heat & Frost, 118 & IUOE Arnold P. Berry, for BCRCC & Local 1541 Theodore C. Arsenault, for Local 170, IBEW Locals, Boilermakers, Millwrights and IUPAT E. Casey McCabe, for the Teamsters Derrill Thompson, for Sheet Metal Workers, Local 919, Iron 97 and Bricklayers Mark Olson and Kevin Blakely, for Local 1611 Bruce Laughton, Q.C., for CMAW Jim Pearson, for Local 40
CASE NO.:	67722
DATE OF DECISION:	February 27, 2015

DECISION OF THE BOARD

I. INTRODUCTION

1 This decision is aimed at resolving systemic problems regarding the practice of collective bargaining between CLR and the Council: BCLRB No. B121/2014.

2 I begin with a brief review of the policy rationale for the creation of the Council and describe how the bargaining system has fallen short. That is followed by an explanation of the Council's status as a bargaining agent under Section 41 of the Code. Next, I address some objections to the Board's foray into this matter. That is followed by a review of previous decisions on this topic and a prescription for change. In conclusion, I have addressed three issues that I expect will continue to challenge the parties and the Board going forward.

II. GENERAL BACKGROUND

3 The *Labour Relations Code* (the "Code") establishes a system to access and facilitate collective bargaining between employers and trade unions. A bedrock principle of that regime is that a certified union acts as the exclusive bargaining agent for a group of employees that is appropriate for collective bargaining: Section 27 of the Code.

4 Ordinarily, the choice of bargaining agent is left to employees and the unit is defined by reference to a single employer. This model is adaptable to many employment settings. However, it has not proven to be suitable for construction projects. A construction project typically involves many employers whose employees are organized on the basis of separate crafts. Many of the crafts interact at multiple points of contact, akin to an assembly line work process.

5 Industrial unrest is a systemic feature of single trade bargaining in this setting. That is because a labour dispute involving one employer will impact everyone working on the project. In *Construction Labour Relations Association of British Columbia,* BCLRB No. B244/2001 ("*CLR*"), the Board described the problem as follows:

> In 1978, the Board made a conscious decision to adopt the multi-trade format of collective bargaining for building trade employers and unions engaged in institutional, commercial and industrial construction ("ICI Construction"): *1978 Building Trade Inquiry*, p. 3. *The reason underlying this choice was to terminate the intolerable pattern of specialty building trade unions holding out for improved wages and benefits after the other trades had settled, thus creating a never ending sequence of leapfrogging with its attendant sequence of work stoppages and industry-wide shutdowns: 1978 Building Trade Inquiry, p. 4. ... .* (emphasis added; para. 6)

6 Section 41 of the Code is designed to address such mischief. It does so by designating a council as the appropriate bargaining agent for a group of trade unions. Under Section 41.1 the Council is authorized to bargain on behalf of its constituents with members of CLR. CLR is the bargaining agent for its member employers. Underpinning the legitimacy of the Council's mandate is governance by majority rule, balanced by its duty of fair representation to individual constituents.

7 The policy objective behind the creation of the Council is to establish a process of multi-trade, multi-employer bargaining. This is supposed to be implemented under the Council's constitution. Under that framework, issues of common concern are bargained between CLR and the Council at a main table, while issues particular to each constituent are bargained at individual trade tables between the respective constituents and CLR. The result should be a single bargaining process, resulting in one overall agreement.

8 The Board administers Section 41 in furtherance of its Section 2 duties as well as two pressing and substantial objectives: 1) to secure and maintain industrial peace; and 2) to promote conditions favourable to the settlement of disputes: Section 41(1) of the Code.

9 The first objective has been met. There has not been a labour dispute for many years.

10 The second objective has not been met.

11 A number of explanations for that failure emerge from the submissions and the Board's decisions over the years. The following is not meant to be exhaustive.

12 Bargaining has taken years to complete. Following litigation advanced by dissident minorities in the past, the Council has favoured decision-making by consensus, rather than forcing collective bargaining outcomes by majority rule. This dynamic, combined with an absence of a dedicated staff, has undermined the Council's ability to effectively coordinate and supervise bargaining at the trade tables and to conclude collective bargaining in a timely manner.

13 Over time, common issues bargained at the main table have taken a back seat to a bargaining agenda dominated by trade-table issues. There, trade level agreements are often reached and implemented in exchange for money and other promises, prior to agreements at other trade tables or prior to the settlement of main table issues. This practice is referred to as "enabling" and is addressed more fully below. Enabling is encouraged in part by long-term delay in concluding trade level bargaining. That in turn has led to deadlocks, both between the constituents and between the Council and CLR. A key source of that deadlock is that once a majority of trades have concluded their trade level agreement, they have no practical incentive to conclude leftover unresolved trade level agreement(s), either by voting to strike, or by voting to conclude those outstanding agreements by another mechanism, such as arbitration. Minority constituents complain there is no avenue for effective input about trade table settlements that are subsequently thrust upon them as an industry pattern. Others complain that bargaining is based on misaligned communities of interest between the constituent unions. These parties seek to bargain with other trades with whom they see common interests.

14 None of the parties defend the *status quo.* The Board raised pointed questions about the viability of the collective bargaining system as it has evolved to date: *Construction Labour Relations Association,* BCLRB No. B39/2012.

15 Against this backdrop, the Board undertook on its own motion—under Sections 41, 139 and the unfair labour practice provisions of the Code—to consider appropriate measures, including amendments to the Council's constitution to address these issues: BCLRB No. B121/2014.

16 The Board convened a pre-hearing conference and identified issues arising from that exchange of views. The parties then filed written submissions. Some raised objections to the Board's jurisdiction should the Board amend the Council's constitution, as well as objections under the *Canadian Charter of Rights and Freedoms* (the *"Charter"*). Others asked for the appointment of an Industrial Inquiry Commissioner—which is not a matter within the Board's authority.

17 I have decided not to amend the Council's constitution at this particular juncture. Thus, it is unnecessary to address arguments aimed at forestalling that outcome. Nonetheless, a number of issues must be addressed concerning the Council's role as exclusive bargaining agent and its duty to constituents. I will also address objections under the *Charter*. Once those issues are addressed, I will set out what in my judgment, is an appropriate mechanism to facilitate bargaining in future rounds.

A. The Council's bargaining authority

18 The Council's bargaining status emanates from the Code, not simply a voluntary grant of authority from its constituents. Section 41.1(2) of the Code deems the Council to be a council of trade unions established under Section 41 of the Code. That deeming provision is without limitation. It follows that the Council is in the same position as a certified council under the Code: Section 41. Accordingly, like any other certified bargaining agent under Section 27 of the Code, the Council is the exclusive bargaining agent for its constituents, subject to the duty of fair representation under Section 12 of the Code. The Council represents constituent unions who bargain with members of CLR. As a corollary, the Council owes a duty to bargain in good faith to its employer counterpart CLR, as does CLR to the Council. This is the model of majoritarian exclusivity that underpins every collective bargaining relationship under the Code.

19 The Council's constitution contains a number of procedures for main table and trade table bargaining. That includes provisions for the resolution of trade table issues on the basis of majoritarian principles. Under this scheme, each constituent administers its standard trade agreements day-to-day. Each also enjoys latitude to negotiate trade-table issues. However, the ultimate authority to conclude an overall memorandum of agreement—which includes trade level agreements—is vested in the Council.

B. *Charter* arguments

20 In its initial submission, Local 170 argued that it had a "*Charter* concern regarding any legislative or Board action which has the effect of giving the Bargaining Council control over matters which are bargained at Trade Level", and that any Council structure "that would place control over a constituent members ability to present proposals and engage in collective bargaining in the hands of other unions at the Trade Level would violate s. 2(d)...". It says the *Charter* "precludes a Board-authorized bargaining structure that allows a union's process of engagement (with the employer to which it is certified) to be substantially impeded by other unions with divergent interests".

21 IUPAT, the Boilermakers, the Millwrights and the IBEW Locals adopt Local 170's submission on this point.

22 In response, a number of other parties submitted that Local 170's *Charter* concerns are premature, as the Board has yet to take action. They further note that *Charter* issues cannot be decided in a factual vacuum, and that the Board has stated on numerous occasions that it will not issue declarations where the facts have not crystallized and no valid labour relations purpose would be served.

23 In its final reply submission, Local 170 stated that the parties responding to its Section 2(d) *Charter* issue, "have misunderstood how the *Charter* applies in this proceeding". Local 170 says what is at issue in this proceeding is the potential development of a new bargaining structure for the Bargaining Council and its member unions and CLR, and that it, "cannot be disputed that any new structure of the Council has to be consistent with Section 2(d) of the *Charter* in its application to the Member Unions of the Council". Local 170 further submits that the, "legal glue" which holds the member unions of the Council together is the constitution and therefore, "the Constitution itself must embody a bargaining process which is consistent with the constitutional protection of the right to meaningful collective bargaining guaranteed by Section 2(d) of the *Charter*".

24 Local 170 submits that therefore the application of Section 2(d) of the *Charter* to any amendment of the Constitution or restructuring of the Council, "is something which needs to be addressed throughout the process underway in this proceeding...Section 2(d) is the very foundation upon which the new Council structure must be erected". Local 170 further states: "Clearly the task at and which faces the Council and its Member Unions and CLR and the Board is to bring the Council bargaining structure and Constitution into the present day and to remodel it in compliance with Section 2(d) of the *Charter*". In that regard, Local 170 submits, without further elaboration, as the last sentence of its final reply, that the Council's constitution as it presently exists, "does not meet the requirements of Section 2(d) of the *Charter* because if literally applied, the language of the Council's Constitution would deny its Member Unions (and their respective members) the right to a meaningful collective bargaining process".

25 I find Local 170's *Charter* arguments are premature, insofar as it challenges future action the Board might take with respect to the Council's constitution or the bargaining structure between the Council and CLR. The necessary factual context is missing because action has not been taken on either front. I am also not persuaded it would be appropriate for the Board to provide an anticipatory declaration in these circumstances. How *Charter* rights and values apply in the context of the particular issues before the Board can be decided, if necessary, when considering appropriate steps to finalize the bargaining protocol, as contemplated below.

26 In addition, Local 170 has not identified precisely which provisions of the Code or actions of the Board are alleged to infringe the *Charter*—it has not provided the required notice of a constitutional challenge to Section 41 of the Code, or to any other Code provision: see Section 8 of the *Constitutional Question Act*, RSBC [1996] Chapter 68.

27 In any event, it appears that Local 170 is not in fact raising a *Charter* challenge to legislation or Board action. Rather, as indicated in its final reply submission, its concern is that the Board and the parties give due consideration to the Section 2(d) guarantee, in addressing the issues at hand; in particular the right to a meaningful collective bargaining process. In my view that is an appropriate approach, and consistent with the Board's duty to encourage the practice and procedure of collective bargaining under Section 2 of the Code.

28 My only additional response is I do not accept that requiring a union to be part of a Section 41 council of unions, and to be governed by the Council's constitution, is in itself a denial of the *Charter* guarantee to a meaningful collective bargaining process. The definition of "trade union" under the Code expressly includes councils of trade unions. Accordingly, those employees represented by a council of trade unions continue to be represented by a "trade union" within the meaning of the Code, and that council has the right to engage in a meaningful collective bargaining process on behalf of those employees, as does any other trade union under the Code.

C. Is the Council estopped from exercising its authority to control Trade Table bargaining?

29 Local 170 submits that the Council has not exercised its authority to control main table and trade table negotiations in the last several rounds: See Article IX of the Council's Constitution. Local 170 submits that as a result of that inaction, the Council is now estopped from asserting that authority: *B.C. Rail Ltd.*, IRC No. C152/92 (Reconsideration denied BCLRB No. B128/93). Specifically, Local 170 submits that in past rounds, it has relied to its detriment on the Council's inaction to negotiate and enable its trade level agreements with CLR. Local 170 submits the doctrine of estoppel precludes the Council from now asserting its authority.

30 I conclude on the basis of the facts alleged, that Local 170 has not established the Council is estopped from asserting its rights under the Code or under the Council Constitution. The fact the Council allowed trades to negotiate, conclude and implement the terms of trade level agreements in past rounds, does not amount to an unequivocal representation about how it would approach bargaining in future rounds. Nor has Local 170 established that its past reliance on any Council inaction, gives rise to a particular unfairness should the Council adopt a more active stance in future rounds. Therefore, Local 170 has not established the necessary detrimental reliance to invoke estoppel for present purposes.

31 Local 170 also relies on the Board's policy in *Automatic Electric (Canada) Limited,* BCLRB No. B26/76, [1976] 2 CLRBR 97 ("*Automatic Electric*"). Local 170 argues the Board should not allow the Council to control trade level bargaining, in a manner that conflicts with its successful trade level negotiations or enabled trade level agreements. I do not find this policy is applicable to the issues at hand.

D. What steps must be taken to encourage a successful bargaining process?

32 Many of the submissions advocate for an effective protocol between the Council and CLR. By a protocol I mean rules that govern how bargaining begins, continues and concludes. I find this is an attractive method to address the delay and deadlock encountered in previous rounds. That must include a mechanism to force the timely conclusion of a protocol between CLR and the Council. Bargaining has taken too long to conclude and the Council has not coordinated trade table negotiations in a manner that is consistent with Section 41 objectives.

33 The Board has extensively described these systemic problems. It has also prescribed solutions: *Construction Labour Relations Association of British Columbia,* BCLRB No. B322/2004; BCLRB No. B50/2005, ("B50/2005") at paras. 17, 29-30; B119/2005 at paras 10-11; BCLRB No. B90/2006, ("B90/2006") at para. 34; BCLRB No. B39/2012; BCLRB No. B100/2012.

34 In BCLRB No. B322/2004 the Board exercised its jurisdiction further to its Section 2 duties and under Sections 11, 133(1(f) and 134 of the Code to intervene and impose a bargaining format that is conducive to successful bargaining.

35 Later in that same round, the Board explained that although the Council's constitution provides a general format for bargaining based on main table and trade table issues, there is no effective mechanism to bring bargaining format issues to a conclusion as between CLR and the Council. In *Construction Labour Relations Association of British Columbia,* BCLRB No. B119/2005 the Board explained shortcomings with the bargaining structure as follows:

> In general terms, the collective bargaining structure of these parties involves a two-tier structure made up of Main Table and trades level bargaining. The CLRA Constitution contemplates that, for its part, it may decide which matters should be bargained at the Main Table and which should be dealt with at the trades level. The BCBCBTU Constitutional provisions dealing with bargaining are much more extensive than those of CLRA. The BCBCBTU Constitution, in part, provides the process by which key demands will be formulated and that, while a trade may negotiate any item including a key demand, a trade cannot concede such a demand at the trade table. The BCBCBTU Constitution also contemplates that once the parties reach agreement on issues at the Main Table and enough trades have entered into individual trades agreements, that composite or overall agreement is put to the Policy Committee to decide whether to recommend it for ratification.
>
> The parties have historically had difficulty agreeing what issues should be negotiated at the Main Table and which should be negotiated at the trades level. That fluidity has resulted in associated problems related to when trades bargaining and Main Table bargaining should begin and end. This has resulted in the parties essentially being involved in extensive and difficult negotiations about format before real collective bargaining occurs. (paras. 10 - 11)

36 In B50/2005 the Board also observed that the benefits of two-tier bargaining are offset by the absence of an effective method for the timely resolution of trade level negotiations, once a majority have concluded their trade level agreements:

> The two-tiered approach to collective bargaining between these parties, which involves a Main Table and Trades level negotiations, was intended to provide for some flexibility in collective bargaining. However, the current impasse highlights some potential structural deficiencies in that regard. There are no constitutional provisions to deal with the impasse which has occurred here and in fact, as noted in BCLRB No. B322/2004, that impasse in part, reflected the parties' views of their respective constitutional provisions. (para. 17)

37 Further, in B50/2005 the Board identified the necessity for a mechanism to bring an overall memorandum of settlement to conclusion:

> In my view, the process by which trades negotiations end is an important element of the collective bargaining process or format.
>
> The parties have developed a practice and understanding of the meaning of an "overall settlement". Based on my review of the Constitutions and the limited evidence of the parties' practice before me, the overall settlement appears to be made up of an agreement with respect to the Main Table items as well as a majority (as that term is contemplated under the Constitution) of trades having reached trades agreements. The parties agree on the overall settlement at the Main Table. There is no real dispute between the parties that they retain a right of strike/lockout if no overall settlement is reached. However, I have a concern based on the history of collective bargaining between these parties relating to how trades issues that are outstanding where an overall settlement is reached, are to be concluded. For example, the last round of collective bargaining involved several years of bargaining and several more years of litigation before an overall agreement was ultimately achieved.
>
> In my view, the parties have a right to strike/lockout with respect to the overall settlement. *On the other hand, consistent with Section 2(e) of the Code, there needs to be a mechanism by which those trades issues are concluded. That process should be fair to the individual trades as well as ensuring the expeditious resolution of collective bargaining.* Accordingly, once agreement is reached at the Main Table regarding Main Table items, each trade will provide CLRA with its trade proposals forthwith. CLRA will provide its trade proposals within one (1) week of the trade's proposal and advise the Council when each of its trade proposals is delivered. If no overall settlement is reached within four (4) weeks, the parties may exercise their respective right of strike/lockout.

> As part of the overall settlement, the parties must attempt to negotiate a process by which unresolved trades issues are to be concluded. *A collective bargaining structure which permits the unresolved issues of a single trade (or even several trades) to prevent an overall settlement being put in place is not consistent with a rational, effective, productive collective bargaining structure. A failure to negotiate in good faith regarding such a mechanism in this round of collective bargaining may constitute a breach of Section 11.*
>
> The process set out above applies only to the current round of collective bargaining. (emphasis added; paras. 27-31)

38 I do not find that amending the Council's constitution is an effective means to address these underlying problems *at this time*. I have reached that conclusion for three main reasons. First, the bargaining format must be enforceable between the Council and CLR. CLR is not bound by the Council's constitution, so any changes would only be binding on members of the Council. As a practical matter, any such constraints would only be effective to the extent the Council pursued their enforcement. Second, a successful bargaining protocol must be flexible, both in order to adapt to the needs of a particular round and in order to respond to problems experienced in previous rounds. Enshrining a particular format in the Council's constitution undercuts that flexibility. Finally, it appears on the basis of the submissions to date, that the Council has the necessary authority to negotiate a bargaining protocol under its current constitution. The Board will revisit that question if it becomes necessary.

39 Section 11 of the Code requires that CLR and the Council make *every reasonable effort to conclude a collective agreement.* As held in B90/2006, the Board's duty under Section 2 of the Code is to encourage rational and productive collective bargaining. This duty is particularly acute given that this particular bargaining structure is intended to promote conditions favourable to the settlement of disputes: Section 41(1) of the Code.

40 The Board has traditionally adopted a policy of restraint in supervising collective bargaining under the duty to bargain in good faith. However, I find this particular case to be exceptional. In these particular circumstances, the absence of a binding and effective protocol does not meet the requirement that CLR and the Council make every reasonable effort to conclude a collective agreement. This is contrary to Section 11 and does not meet the objectives of Section 41(1) of the Code.

41 Accordingly, I declare that CLR and the Council must bargain a protocol to govern each future round of bargaining in order to meet their respective duty to bargain in good faith. The Board will resolve impasses between CLR and the Council concerning that protocol to ensure compliance with Section 11 of the Code.

42 The elements of a bargaining protocol that meets the statutory requirement to bargain in good faith will at minimum, contain the following elements:

- timelines for beginning, continuing and concluding bargaining, including a mechanism for the timely conclusion of unresolved trade level agreements;
- a joint mediation/facilitation process to move bargaining toward resolution;
- a procedure governing agreements between CLR and individual trades to implement terms of trade-level agreements before an overall memorandum of settlement is concluded;
- the identification of main table industry issues and trade table issues;
- an expedited procedure to conclusively resolve disputes under the protocol.

43 The current collective agreement expires April 30, 2016. It is fair to infer that CLR and the Council will differ regarding the terms of a protocol to govern the next round. This apprehended difference constitutes a dispute under the Code. Accordingly, the Board appoints Vice-Chair Jacquie de Aguayo (the "Investigator") under Section 124 of the Code, to investigate and attempt to settle the terms of a protocol agreement governing the next round. The Investigator will conclude this initiative with a report to the Board, including recommendations. Failing resolution, the Board will act on its own motion to take submissions and to establish a protocol that meets the duty to bargain in good faith: Sections 133 and 139(h) of the Code.

E. "Enabling", "Interest Arbitration" and "Sectoral" Trade-Level bargaining

I have addressed the above-noted topics because I expect they will continue to pose a challenge.

1. Enabling

44 Enabling involves an agreement between an individual union and a contractor to amend provisions of their standard collective agreement to enable a competitive bid on a particular job. Agreements between CLR and Council constituents to "enable" trade level agreements are different. This involves an agreement between CLR and a Council constituent to implement all or part of that trade level agreement, before an overall collective agreement is settled between the Council and CLR. Sometimes that is done in exchange for a promise to pay monetary increases, subject to the resolution of main-table issues. Sometimes, it includes an express commitment by the constituent trade union not to vote in favour of a strike. That practice most definitely attracts review as interference with the administration of the Council under Section 6(1) of the Code.

45 As described above, the payment of "up-front" money to conclude trade level agreements can rob the incentive for individuals in the majority (with concluded trade agreements), to force a timely resolution of trade level bargaining on minority hold outs. Given the option to do nothing and the Council's unwillingness to force a resolution by majority rule, some rounds have dragged on for years.

46 Trade level agreements can have a profound impact on the negotiation of other trade agreements in that they establish a pattern of settlements. This is particularly acute when trade level agreements are resolved by arbitration.

47 Enabling presents some advantages in this context. There is a cogent argument that each trade is in the best position to negotiate its monetary issues at its trade table. Contractors may need to pay an increase in order to compete for labour. It also creates an incentive to settle first. The latter consideration is of key importance to a functioning system of two-tier group bargaining.

48 For these reasons, it is critical that the constituents fully appreciate that the impact of a decision to enable a trade level agreement is not confined to a particular trade. Rather it is a decision touching on all Council constituents—it is a matter at the center of their collective interest given its influence on bargaining going forward.

49 Ultimately, I view the merits of enabling as a question of overall bargaining strategy to be decided by Council, acting in accordance with a majority mandate and with due regard for its duty of fair representation. That means that the Council, like any exclusive bargaining agent, must actively supervise and coordinate negotiations, such that agreements to "enable" trade level agreements occur with the knowledge and authorization of the Council. This, combined with the elements of a protocol as set out above, should attenuate the negative effects of enabling while preserving its benefits and respecting legitimate claims for autonomy. As matters presently stand, I do not see a blanket prohibition on enabling to be a necessary or proportionate response to the mischiefs at hand.

2. Is Interest Arbitration required in order to settle unresolved TLMOA's?

50 The parties differ about the merits of interest arbitration as a mechanism for the timely settlement of unresolved trade level agreements.

51 The criticisms are familiar. Mandatory interest arbitration can distort the collective bargaining process by distracting the parties' attention from making the difficult trade-offs necessary to achieve a settlement. Interest arbitrators avoid breakthrough settlements in order to encourage bargaining in future rounds. For that reason it can lead to conservative results, even when headway is needed on important issues.

52 On the other hand, I agree with Board's conclusion in B50/2005, that a collective bargaining structure which permits the unresolved issues of a single trade (or even several trades) to prevent an overall settlement for indeterminate periods, does not meet statutory requirements. If the Council is unable or unwilling to force the timely conclusion of trade level issues on its own, or to obtain a timely strike vote in order to

leverage a resolve, such a mechanism may be required in order to meet the duty to bargain in good faith. That is a question the Board may have to decide at the appropriate time, but only if the parties cannot arrive at a protocol with the assistance of the Investigator.

3. Should Trade Level bargaining be organized by sector?

53 I find there is nothing under the current statutory framework or the Council constitution that prevents a group of trades and CLR from agreeing to coordinate trade level bargaining, including bargaining trade level agreements at a single table. I see the potential for efficiencies in that regard. However, I am not persuaded that trade level bargaining by sector is a matter that must be enshrined in the constitution or necessarily be made a matter of binding protocol.

III. CONCLUSION

54 The Code gives the Council exclusive bargaining agency for its constituents with the authority to bind them to a collective agreement, as well to coordinate and to conclude trade level bargaining.

55 CLR and the Council must bargain a protocol to govern each future round of bargaining in order to meet their respective duty to bargain in good faith. The Board will resolve any impasse between CLR and the Council concerning protocol, to ensure joint compliance with Section 11 of the Code.

56 An Investigator has been appointed to attempt to settle the protocol for the next round, and to issue a report with recommendations.

57 The Board retains the jurisdiction to answer any question concerning the interpretation, application or implementation of this decision.

LABOUR RELATIONS BOARD

"KEN SAUNDERS"

KEN SAUNDERS
VICE-CHAIR AND REGISTRAR