BRITISH COLUMBIA LABOUR RELATIONS BOARD

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

(the "Applicant" or the "Insulators")

-and-

CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF BRITISH COLUMBIA

("CLR")

-and-

BARGAINING COUNCIL OF BRITISH COLUMBIA BUILDING TRADES UNIONS

("BCBCBTU" or the "Council")

-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

("Plumbers")

-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")

PANEL:	Ken Saunders, Vice-Chair and Registrar
APPEARANCES:	John MacTavish, for the Applicant Barry Y. Dong, for CLR David L. Blair, for BCBCTU Arnold P. Berry, for BCRCC Theodore C. Arsenault, for the Plumbers, IBEW Locals, Boilermakers and Millwrights E. Casey McCabe, for the Teamsters Derrill Thompson, for Sheet Metal Workers
CASE NO.:	66387
DATE OF DECISION:	June 26, 2014

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Insulators apply under Section 42 of the *Labour Relations Code* (the "Code") to leave the Council.

II. POSITIONS OF THE PARTIES

A. The Insulators

2 The Insulators contend that in practice, the present bargaining model has evolved so that all matters, with the exception of duration and protocol, are deferred to trade level bargaining between each member of the Council ("Member") and CLR. Trade level bargaining results in a Trade Level Memorandum of Agreement ("TLMOA"). Bargaining has evolved so that CLR and the respective Member agree that monetary increases negotiated under a TLMOA became part of the subsisting (yet to be renewed) collective agreement through a mechanism called "enabling".

3 Under the Council constitution, a strike must be supported by a double majority. So once a Member has received money under their "enabled" TLMOA it has little incentive to vote for a strike that assists the minority who find themselves at the tail-end of trade-level bargaining. That disincentive significantly affects the bargaining position of remaining Members once a double majority has accepted the benefit of their "enabled" TLMOA. Once that threshold is crossed, the remaining Members' practical options are narrowed to accepting what CLR offers or to have the pattern of TLMOA settlements imposed by an interest arbitrator. The Insulators submit that even the first option has been removed in some recent TLMOAs. That is because the money paid under some enabled TLMOAs comes on the condition that the respective Member does not support a strike at the Council table. The Insulators submit in part:

> Indeed, trade level "bargaining" is itself generally a misnomer. At the trade level, unions are faced with a stark choice—accept an agreement early in the process or risk being one of the tail end unions that have no mechanism to force an agreement.
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> …
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> To make things more difficult for the unions that do not have a TLMOA early in the process, the CLR and individual trades have taken to "enabling agreements"—providing the wage increase to members once a TLMOA has been agreed upon. As members of all trades work together on construction projects, some receive wage increases years before their fellow workers. This creates

> additional pressure to settle early and also pressure to resist a strike vote.
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> In case these factors were not sufficient to ensure that unions accept what they are offered early in the process, the CLRA has started to insert into some TLMOAs a provision which actually prohibits the union from supporting strike action.
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> Taken cumulatively, this ensures that once the CLRA has negotiated a threshold number of TLMOAs there is effectively no means for the remaining unions to apply pressure upon the CLRA to consider or accept their proposals.
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> CLRA can, essentially, take whatever position it chooses and the remaining unions must simply accept those positions as they are without the ability to resort to job action.
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> In the end result, the tail end unions must accept interest arbitration as the only way to move forward after having lived under an expired collective agreement for years while their members work alongside members of other unions that, in the meantime have enjoyed a series of annual wage increases. Those interest arbitrations then follow the pattern set by the agreements other unions were forced to reach at risk of being one to the tail end unions.

4 The Insulators also assert that it is required to bargain with CLR members under the auspices of the Council, when in fact a minority of its contractors (8 out of 37) are members of CLR. CLR is a voluntary organization.

5 The Insulators submit that the overall result is that bargaining is protracted, taking several years to complete. Moreover, given that the Insulators are left to accept the pattern or have it imposed, there is no meaningful opportunity to make changes to modernize the Insulators' trade section. This impacts the Insulators' relationship with non-CLR employers because the Council-CLR collective agreement is used as the industry standard to guide negotiations. The Insulators say it is impractical to bargain the "standard agreement" with non-CLR employers.

6 The Insulators argue that the bargaining structure is inconsistent with Section 2 duties and the purpose of the Council. It further submits that the Board wrongly decided in *Bargaining Council of British Columbia Building Trades Unions,* BCLRB No. B115/2002 that Council membership is mandatory for unions in a bargaining relationship with CLR members.

7 Finally, the Insulators contend that concerns arising from the instability associated with labour disputes on construction job sites are unjustified. The Insulators submit that today—and unlike in 1977—there are essentially no closed shop sites (apart from those governed by project labour agreements which contain no strike provisions in any event). The Insulators submit:

> Construction in BC is now performed on a managed open shop basis and the Union['s] ability to have an impact beyond their employer would be severely limited.

8 The Insulators state that it is not seeking the imposition of an Industrial Inquiry Commission under Section 79 of the Code. It also submits that it has proposed a Constitutional amendment for the Council, that it is primarily up to the Members to redress the system, and that if its proposal or another measure were adopted to allow for a rational bargaining process, its concerns would be addressed.

B. The Council

9 The Council supports the Insulators and submits that it joins "in effect" as a co-applicant. It emphasizes CLR's inability to attract the majority of insulator contractors as members, combined with what it says is the ability of CLR contractors to withdraw their delegation of bargaining authority to CLR "at any time". The Council also submits that the Insulators departure will not lead to instability as that would impact less than one percent of the employees covered by CLR bargaining. The Council further observes that the Constitutions of CLR and the Council allow them to release a particular craft and their employers to bargain separately in a particular round. The Council submits that the threat of instability is overstated, particularly given the low incidence of labour disputes between non-CLR employers and craft unions.

C. The BCRCC, Teamsters and Sheet Metal Workers

10 The above-noted parties support the Insulators.

D. The Plumbers, IBEW Locals, Boilermakers and Millwrights

11 The above-noted parties support a Section 79 Industrial Inquiry Commission into the current collective bargaining structures and seek to form a mechanical trades sector within the Council.

E. CLR

12 Although CLR opposes the Insulators' application, it does support a critical review to find appropriate and necessary changes to the bargaining structure and process. CLR's main concern is that allowing the Insulators to bargain independently outside the Council would contribute to instability, contrary to Section 2 duties and contrary to Section 41 of the Code.

13 CLR asserts that its member contractors employ a majority of the Insulator members actively employed in the Province. It also argues that the Insulators have had an opportunity to bargain a modernized collective agreement with their non-CLR insulator contractors but have chosen not to do so. Instead the Insulators have chosen to sign the CLR standard agreement with that group of contractors.

14 CLR adds that membership in the Council is mandatory under Section 41.1of the Code, and *Bargaining Council of British Columbia Building Trades Unions,* BCLRB No. B115/2002.

15 CLR argues that the application is simply founded on the Insulators' desire to act independently so it may strike employers. Moreover, it submits that the Insulators have not shown how its recent proposals would have the effect of modernizing the collective agreement in order to reverse the loss of work and enhance industry standards.

16 CLR also submits that the Council ultimately controls its members' conduct at TLMOA bargaining level by majority rule, but has chosen not to exercise that authority. So it is the Council that has authored the devolution toward TLMOA bargaining and enabling. CLR argues that lack of cohesion that has led to difficulties in commencing and concluding bargaining. CLR submits in part as follows:

> Within the Bargaining Council, constituent members are not only permitted to act independently, but are often enabled by the Council to do so despite the Bargaining Council's Constitution and By-Laws. Individual building trade unions actively pursuing their own craft interests regardless of any majoritarian principle, and the Bargaining Council does not act as the bargaining agent for its members.
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> …
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> As stated in the Fleming Report, a major problem is commencing and concluding bargaining. The current constitution of BCBCBTU which allows for main table bargaining with CLR and delegation of trade level bargaining with each trade union member of BCBCBTU, and a strike vote based on a double majority of trade union members and industry hours. However, it contains no process for commencing bargaining or conclusion of trade level bargaining for those unions electing to seek more favourable terms and conditions after a majority of trade union members, representing a majority of industry hours have concluded bargaining.

17 CLR submits that it would support a Section 79 Industrial Inquiry Commission into the current collective bargaining structures and any subsequent and necessary Section 41 proceedings.

III. ANALYSIS AND DECISION

18 I find that the Insulators have raised significant issues concerning the collective bargaining practice between the Council and CLR as it has evolved to date. There is no substantive dispute about the Insulators' characterization. In particular, the Insulators have raised serious questions in connection with the alleged practice of concluding TLMOAs in exchange for money and/or a promise not to support a strike.

19 From a practical standpoint, this practice encourages Members to conclude TLMOAs early in exchange for money. An effective system of two-stage—trade-table/ main-table—bargaining requires incentives for a union or employer to "go first" at the trade table. However, the model the parties have developed comes with significant costs to Members caught at the tail-end of bargaining. An effective system of bargaining also requires real incentives to bring stalled negotiations at the trade-tables to a timely closure at the main-table. That may be arbitration or job action. Either way, Council decision-making must operate by majority rule, with the minority of Members protected by the duty of fair representation.

20 The Board has identified such concerns in previous decisions. For example, in *Construction Labour Relations Association*, BCLRB No. B39/2012 the Board observed that this type of enabling raises serious questions touching on the duty to bargain in good faith. It also leads to a systemic disincentive for the majority of Members to force the conclusion of outstanding "tail-end" trade agreements at the main table:

> The question that needs to be addressed is whether the Council authorized the BCRCC to make interim changes to its subsisting collective agreements by the mechanism of enabling. I add that even if the BCRCC acted outside the scope of its actual authority, the parties also need to consider whether changes to the subsisting collective agreements were concluded on the basis of the BCRCC's ostensible authority to act. Has enabling been used to effectively sidestep or finesse the Council's bargaining authority?
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> The parties also need to consider whether the practice of enabling (described by the BCRCC) results in a bargaining process that is consistent with the purposes of Sections 2(e) and 41 of the Code. If money and term are concluded under a TLMOA and collective agreements are subsequently "enabled" to incorporate the respective TLMOAs; does that leave any real incentive for members of the Council to bring bargaining to closure at the main table? Does this dynamic lead to deadlock in view of voting requirements under the Constitution? (paras. 30-31)

21 In *Construction Labour Relations Association*, BCLRB No. B100/2012 the Board dismissed an application by CLR to revisit the Council constitution. In that case the Board held that the parties were too far into that particular round to re-write the rules. However, the Board did observe that the process was unsatisfactory:

> In my judgement—based on current circumstances—it is not appropriate to review the Council's Constitution. My primary concerns relate to timing and competing mischiefs. The parties are presently in bargaining. Invoking a review of the Constitution now might address any systemic problems in the medium to long term. However, it would divert the parties' attention from getting a deal in the short term. It would do so by encouraging the parties to pursue serial litigation and to bargain for the purpose of creating a record of conduct, all with the hope of influencing the Board's ultimate determination. So although the Board raised serious questions in BCLRB No. B39/2012 about structural incentives to conclude a deal at the main table, I find collective bargaining is best served by re-focusing the parties' efforts away from generating issues for litigation.
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> I recognize this round of trade table bargaining has taken a long time to complete. It is undisputed that the parties met to discuss what is described as the "paralyzed state" of Local 1611 trade table bargaining. It is fair to infer from the materials on file that the deadlock arises in part from Local 1611's determination to resist a "BCRCC-like" TLMOA.
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> I do recommend that the parties take a step back and consider whether the current structure is serving their constituents' interests in the medium to long term. It is understandable why CLR might see it to be in its interest—at least for some of its members—to adopt a strategy of setting a pattern at individual trade tables with a view to imposing that pattern on other trades. It is also understandable why some individual trades might cooperate with CLR. Given the practice of "enabling" individual TLMOAs, there is little downside and something to be gained (including money) for individual trades to conclude their own TLMOA with CLR, regardless of the downstream consequences on other Council members. What is difficult to understand is why the Council might see it to be in its members' *collective* interest, to abide by a structure that encourages this sort of dynamic, particularly if it generates the paralysis at hand. The same point applies to CLR given the uncertainty visited on those members who do not have the benefit of an "enabled" TLMOA. (paras. 21-23)

22 No one disputes the Board's authority to amend the Council's constitution. That authority is found under Section 41(6)(f) of the Code, and *Bargaining Council of British Columbia Building Trades Unions*, BCLRB No. B115/2002, at paras. 10-11.

IV. CONCLUSION

23 I find this is an appropriate time for the Board to consider amendments to the Council's constitution. Matters have progressed to the point where the question is not simply why the Council would abide by the process described above, but how the Board should actively step in to address these issues in the period leading to the next round of bargaining (the current round is approaching conclusion).

24 Accordingly, the Board will inquire and consider appropriate constitutional amendments. This will include an inquiry on the Board's own motion combined with appropriate declarations under Section 143, about whether conduct raised in the submissions contravenes the unfair labour practice provisions of the Code. The Insulators have indicated in their submissions that they have proposed an amendment to the Council constitution. CLR and others have indicated a willingness to consider changes that result in a viable collective bargaining process.

25 On balance I find it is appropriate to address the Insulators' concerns in this manner before considering the more drastic step of permitting them to bargain outside the Council. The application is denied on that strictly limited basis. I find it is unnecessary to decide the dispute about whether leaving the Council is permissible.

26 The Board will contact the Council, CLR, the Insulators, as well as interested parties to develop a procedure moving forward.

LABOUR RELATIONS BOARD

"KEN SAUNDERS"

KEN SAUNDERS
VICE-CHAIR AND REGISTRAR