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Panel of Special Advisors
Labour Relations Code Review Panel

Construction Labour Relations Association of BC (CLR) is pleased to provide the attached submission to the Panel of Special Advisors. We appreciate the opportunity to submit and look forward to the results of Panel's review.

Sincerely,

Clyde H. Scollan
President and CEO

SUBMISSION TO THE LABOUR RELATIONS CODE REVIEW COMMITTEE

ON BEHALF OF

CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF BRITISH COLUMBIA

The Construction Labour Relations Association of British Columbia (CLRA) is an organization of contractors established in 1969. Its primary objective is to bring labour relations stability and security to contractors in British Columbia's unionized construction sector. In its representative capacity, CLRA provides a unified voice for contractor employers in negotiating with the building trade unions which represent its unionized craft workforce.

The following submission is provided on behalf of CLRA's members. It is directed to the matters which your Committee will address pursuant to the terms of reference provided to your Committee by the Honourable The Minister of Labour on February 5, 2018. In particular, the issues which CLRA advances on behalf of its members fall within your mandate to review the *Labour Relations Code* (*Code*) and provide recommendations for amendments or updates to the *Code*. This mandate is focussed by the requirement in those terms of reference that the issues your panel will address must ensure workplaces which support a growing sustainable economy with fair laws for workers and business, and promote certainty as well as harmonious and stable labour/management relations.

Relevant Background

This submission is not the appropriate occasion for a lengthy review of the history of labour relations in the construction industry in British Columbia. It suffices to say that, commencing in 1978 with the Inquiry Regarding the Structure of Bargaining by Building Trade Unions [1978] 2 CLRABR 202, various processes have been directed to refining the structure of collective bargaining in the unionized construction sector (Building Trades Sector) with a view to the creation of a stable negotiating environment conducive to the maintenance of industrial peace while providing a fair wage to the unionized construction workers. The unions in the Building Trades Sector are certified on the basis of craft certifications.

Legislative changes and decisions of the Labour Relations Board (LRB) throughout the years have consisted of ongoing refinements to the bargaining structure initially set up in 1978. Those refinements to that bargaining structure have been effective to a point. As a measure of the

success of the bargaining structure, it should be noted that there has not been a strike or lockout in the Building Trades Sector for more than thirty years. However, the success measured by the absence of work stoppages is only part of the picture. Over the same thirty years there has been a continuing erosion of the market share of CLRA members which can be attributed, at least in part, to the issues related to the internal dynamics of the Bargaining Council as discussed later. Further, in saying that the initiatives over the years have been successful, we do not wish to be taken as saying further refinements in the bargaining structure will not be helpful in continuing to ensure and maintain the industrial stability which has been achieved. There is work that remains to be done.

The most recent detailed inquiry into the structure of bargaining in the Building Trades Sector was "*An Interim Report Regarding a Section 41 Inquiry into Labour Relations in the British Columbia Building Trades Sector of the Construction Industry*", prepared by Michael Fleming and issued on December 19, 2012 (the Fleming Report). The Fleming Report examines the state of the industry in detail, noting that since the initial formation of the Bargaining Council of British Columbia Building Trades Union (Bargaining Council) in 1978:

> 52 While there have been improvements in achieving labour relations stability in the Building Trades Sector, it remains characterized by its craft structure, with each union within the Bargaining Council acting very autonomously. It has remained a real challenge to reconcile that character with attempts to coordinate and achieve some measure of cohesiveness in multi-trade bargaining. This tension remains a central feature and challenge of the Sector.

The Fleming Report also traced the decline in market share of CLRA members from a high of 75% in the late 70's to the approximately 20% share which exists today. While some of that decline is attributable to external market forces, another significant element was the instability in the existing bargaining processes. The major proposals we advance will diminish the prospect of further erosion and help recapture market share for unionized building trades and employees.

The Fleming Report was intended to deal with three destabilizing factors in the Building Trades Sector. After a lengthy consultative process, Mr. Fleming identified three significant issues for the Sector and the parties. They were:

(1) The relationship between the constituents of the Bargaining Council and the CMAW and between CMAW and the B.C. Regional Council of Carpenters (BCRCC).

(2) How collective bargaining between the Bargaining Council and the CLRA should begin, continue and conclude.

(3) The need to develop consultative processes to deal with a range of matters between rounds of collective bargaining.

In terms of the first issue identified above, the Fleming Report indicated that the time was not yet right for a final resolution of that matter. CMAW had been included in the Bargaining Council as an interim measure and that status is subject to the LRB's retained jurisdiction to address instability arising from the rivalry between CMAW and the BCRCC.

With regard to the second issue, the Fleming Report indicated that the Bargaining Council essentially operated much more like a coalition than a true bargaining council envisioned under section 41 of the *Code* and, further, a lack of cohesiveness associated with this structure and related fragmentation was an impediment to the development of a vibrant and efficient labour relations framework (see para. 85). He made a number of recommendations with regard to the conduct of bargaining.

Mr. Fleming closed his report, noting:

> 123. The Building Trades Sector of the construction industry has a number of very positive attributes and plays an important role in the B.C. economy. However, it also faces significant challenges which, in my view, need to be very actively addressed by ongoing internal processes to explore realistic solutions to those important challenges.

Unfortunately, internal processes have not been successful in dealing with the refinements to the structure of bargaining necessary to meet the challenges arising from external market forces and building trade unions' inability to bargain together and conclude collective agreements in a timely fashion: Those concerns are set out in detail in the decision in CLRAA B34/2015. This

decision compelled the Bargaining Council to bargain a bargaining protocol to govern each round of collective bargaining and compelled it, like any exclusive bargaining agent, to supervise and coordinate negotiations for agreements to "enable" trade level agreements.

Recommendations

Section 41

Stability in the building trades sector is necessary, not only to prevent continuing erosion of the market share of unionized CLRA contractors, but to provide an opportunity for continued growth. Section 41.1 of the *Code* is the linchpin for that stability. Section 41.1 acknowledges the continuing status of the Bargaining Council as a certified council of trade unions under section 41 of the *Code* and authorizes the Bargaining Council to bargain on behalf of its constituent unions with CLRA. Section 41.1 is the "legal glue" that underlies the stability required for effective bargaining in the Building Trades Sector. It compels the Bargaining Council to deal with CLRA. Any initiative taken to diminish the legal relationship required by section 41.1 would return collective bargaining in the Building Trades Sector to the archaic, ineffective patterns of the past. Any such change would breed further instability. Respectfully, if the craft unit structure of the Building Trades Sector is to be maintained, the constituent elements of the Bargaining Council must remain legally obliged to be bound together for the purposes of bargaining with CLRA. To interfere with the existing legal requirements would destabilize the industry and would be inconsistent with your Committee's mandate.

Section 41.1(3) provides for an ongoing review of the Constitution and By-laws of the Bargaining Council to ensure that they are consistent with the stabilization intended by the creation of a council of trade unions under section 41. Consistent with our previous observation that the structure of the Bargaining Council must remain adaptable, we believe changes are necessary to protect against external commercial realities disrupting the current effective structure.

As noted in CLRAA, B91/2017 (PCA Decision) recent years have seen an increase in customers building major construction projects seeking Project Collective Agreements (PCAs) whereby a

collective agreement is entered into for the life of a project, thereby ensuring stability for its duration. This resulted in the PCA Decision declaring that the Bargaining Council had the authority to negotiate PCAs and bind its members based on fundamental majoritarian principles. However, there has been an increase in the formation of "coalitions" for the purpose of negotiating PCAs which are exclusionary by nature. The PCAs negotiated by these coalitions result in members of the Bargaining Council being excluded from the project and lead to an increase in instability between trades.

CLRA's collective agreements serve as the benchmark for the negotiation of PCAs with these coalitions. There is an obvious unfairness associated with CLRA collective agreements, negotiated using CLRA's expertise and paid for by the dues of CLRA's members, being used without the appropriate recompense being provided to CLRA. In addition, this undercutting of CLRA's role in the bargaining process with members of the Bargaining Council further increases the prospects for instability and contention between trades.

Currently there has been much public discussion of the use of a particular form of PCA (referred to as a Community Benefit Agreement (CBA)) on public infrastructure projects. The discussion focuses on the use of CBAs to ensure that, on these major public infrastructure projects, there are:

- industry standard safety rules and requirements,
- programs to advance women and First Nations,
- increased emphasis on training younger workers in the form of apprenticeships; and
- a guarantee of no labour disruptions to support project completion on time and on budget.

These policy objectives must be achieved in a manner which is congruent with the objects and policies of the *Code* as described in section 2 and in particular the need to:

- foster the employment of workers in economically viable businesses,

- encourage cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity, and

- recognizes the rights and obligations of employees, employers and trade unions.

The only effective mechanism for achieving the policy objectives outlined above in accordance with the objects and policy of the *Code* is to ensure that CBAs are both negotiated and administered by a prudent employer counterpart to the constituent members of the bargaining council and others. CLRA is the only existing, experienced unionized employer representative appropriate to that role. Centralized representation on the employer side during negotiation will alleviate the potential for "whipsawing" and intra-union rivalries. Further, centralized representation with CLRA as the recognized employer representative after the commencement of work on a PCA ensures consistency of interpretation on a project wide basis. The identification of CLRA by legislation as the recognized employer of bargaining council members for PCAs and CBAs will also provide consistency over the range of various types of infrastructure projects being contemplated. Simply put, it makes abundant sense to identify CLRA as the legislated employer component for CBAs. This designation will ensure the highest prospect of success of CBAs.

In light of the foregoing, CLRA recommends that section 41.1(2) be amended to provide that CLRA is the exclusive employer bargaining agent empowered to negotiate PCAs and CBAs with the members of the Bargaining Council.

Section 104

Given the unique craft union structure of the Building Trades Sector, the CLRA collective agreements contain, as part of their dispute resolution processes, references to industry panels of experts as a form of alternative dispute resolution (ADR). The purpose of these types of panels is to perform a form of "fact finding" done by persons conversant with the norms of the construction industry. Further, many CLRA collective agreements contain lists of named

arbitrators agreed upon between the parties. However, given the existence of the expedited arbitration process set out in Section 104 of the *Code,* all of these collective agreement provisions can be bypassed by the simple expedient of one of the parties filing an application under Section 104. The LRB does not invigilate and rule on complaints by someone who is a respondent to an application under Section 104 when they complain that the processes under the collective agreement have not been exhausted which, on its face, is a prerequisite for the use of Section 104. Rather, the Board simply appoints and then defers that jurisdictional objection to an arbitrator.

Respectfully, provisions of the *Code* ought not to be used to overcome the freely-negotiated provisions of a collective agreement or negotiated resort to ADR mechanisms unless there is a reliable body of evidence showing that the existing grievance procedure is being frustrated by delay. In those circumstances either party should have a right to apply to the Labour Relations Board for an order that s. 104 applies. The purpose of Section 104 is to avoid either party inappropriately delaying recourse to arbitration by inordinately delaying agreement to an arbitrator. The provisions of Section 104 of the *Code* ought not to be available in circumstances where there is no evidence of such harm. Without such a finding, the mischief which Section 104 was intended to protect against is not present and Section 104 applications simply become a method for a party to harass its opposite.

The Relationship between CMAW and BCRCC

In *United Brotherhood of Carpenters and Joiners of America,* No. B277/2007 the Board issued an order requiring CMAW and BCRCC to comply with a settlement agreement reached between them relating to the sharing of the craft of carpentry under a craft unit approach. One of the terms of that settlement agreement, which was given the Board's blessing, was that:

> (a) There will be no raid of the existing craft bargaining units or future craft bargaining units organized by the parties on a craft basis. This will not limit or restrict the ability of the parties to supplant craft units on a basis such as all-employer, wall-to-wall.

The introduction of two rival unions within a single craft upset the traditional model for bargaining in the building trades sector, where, normally, a contractor signatory to a craft collective agreement would access work and skilled workers through a single union. The extent to which the decision to permit two rival unions to share a craft upset the established industrial relations model to such an extent that, in a recent decision, the Labour Relations Board noted that it had become "axiomatic" that two unions sharing a craft creates instability.

In particular, the Board has also noted that the sharing of a craft of carpentry has had the effect of dividing signatory employers' access to skilled workers in the craft of carpentry because that employer is signatory to either a BCRCC or CMAW collective agreement. This has an effect on the competitive position of the various employers.

It is time for this instability to end. Further, it ought not to be the case that two parties can reach an agreement whereby employees, the beneficiaries of the *Code*, are prohibited from exercising their foundational right to choose which union they wish to belong to via the process of a raid. It is time for the *Code* to be amended to eliminate the restriction on raiding between CMAW and BCRCC in furtherance of allowing employees, if it is a reflection of their true wishes, to choose which of the two competing organizations they wish to belong. Raids should be permitted based on the scope of the certification order binding their employer. This will treat construction industry employees equally with all other unionized employees covered by the *Code*.

Jurisdictional Assignment Plan

One of the most significant achievements of the parties in the Building Trades Sector was the development of the Jurisdictional Assignment Plan (JAP). The JAP is a unique mechanism providing a domestic dispute resolution mechanism for the resolution of jurisdictional disputes between craft unions. Jurisdictional disputes were, until the formation of the JAP in 1978, the source of numerous work stoppages in the Building Trades Sector. Indeed, the JAP is so entrenched as a part of the framework of the Building Trade Sector collective bargaining in British Columbia that it has been recognized by the LRB as a board of arbitration under the *Code*.

However, the effectiveness of the JAP is being undercut because of the existence of a Canadian jurisdictional assignment plan. This allows parties the opportunity to ”forum shop” and, in some circumstances, by-pass the effective domestic jurisdictional assignment plan.

The *Code* should be amended to clarify that the only recourse, including recourse by way of reconsideration or appeal, of a British Columbia JAP decision is to the Labour Relations Board. There ought not to be an additional, ancillary avenue which is not subject to the *Code*.