Unfair Advantage:

Construction Industry Double Breasting
A labour relations system where enterprises can acquire, dispense with and otherwise manipulate bargaining relationships at will is fundamentally inconsistent with the right of employees to engage in collective bargaining through freely chosen trade union representatives. If union-avoidance strategies are tolerated and encouraged, they will be taken advantage of. Naturally, if one or more key players in an industry find ways to avoid their collective bargaining commitments, and are perceived as having thereby improved their competitive positions, others will follow.

Where multiple companies controlled by the same individuals or the same corporate parents are structured so that one operates “union” and one “non-union” (or through an organization such as the Christian Labour Association) bargaining rights are rendered meaningless and union members suffer real losses. The practices of “double breasting” and even “triple breasting” have become commonplace in Alberta since the late 1980s.

This trend is not unique to Alberta, but Alberta’s laws, and the way they have been interpreted and applied, have led the way. This was no accident – in fact, Alberta’s laws have been crafted to target important legal achievements by unions in this area of the law.

Although successorship and unfair labour practice provisions are also important tools for protecting bargaining rights against erosion, this paper focuses only on the law of common employer. Only minor changes to Alberta’s “common employer” laws are required in order to provide the tools to reverse this trend. Reversing the culture that has grown up, and undoing decades of damage to the unionized construction industry may prove to be a bigger challenge.

**The Premise of Common Employer Law**

The principle that labour relations obligations should adhere to a unionized enterprise without regard to the corporate or other forms through which that enterprise is carried out is not surprising or novel. Legal rights are only as effective as the remedies that back them up.

Labour law in Canada has long recognized that whether businesses are carried out by individual proprietors, single corporations, subsidiary corporations, joint ventures, limited partnerships (all of which are legitimate ways to structure an enterprise) they should not be permitted to undermine hard-won employee rights.

The underlying assumption about common employer and successorship laws is that they protect union bargaining rights from being undone by otherwise legitimate changes in the corporate form of the employer. The notion that enterprises should be able to choose structures in order to eliminate or compartmentalize unionization is one which has no place in any modern system of labour law. There is simply no legitimacy to such a goal, any more than there is legitimacy to a “runaway plant” which is shut down to avoid a unionized work force. Despite that rather obvious point, in Alberta that fundamentally illegitimate goal has been normalized in both law and practice. In fact, under the previous government Alberta has responded legislatively to minimize the usefulness to unions of these important provisions, and has sought to enable fundamentally destructive union avoidance practices.
The premise of this paper is that the current common employer provisions in the Code represent an unwarranted and, frankly, anti-union departure from their predecessor provision in the Labour Relations Act. Further, they were specifically aimed at undoing important decisions of the Labour Relations Board that were protective of labour, and at promoting and enabling double breasting in the construction and related industries, and that they have accomplished that goal. A government that takes collective bargaining rights seriously should, at a minimum, return to the language that existed before the current language came into existence. The damage that has been done will not be easily undone, but at least the restoration of the Board’s powers to undo the mischief caused by double breasting is a good first step.

The Language

In the predecessor legislation the Labour Relations Act, section 133 read:

133. On the application of a trade union or on its own motion when, in the opinion of the Board, associated or related activities or businesses, undertakings or other activities are carried on under common control or direction by or through more than one corporation, partnership, person or association of persons, the Board may declare the corporations, partnerships, persons or associations of persons to be one employer for the purposes of this Act.

The current section 47(1), which does not apply to the construction industry but applies to all other industries covered by the Code including maintenance (often carried out by the same tradespersons that work under construction collective agreements) reads:

47(1) On the application of an employer or a trade union affected, when, in the opinion of the Board, associated or related activities or businesses, undertakings or other activities are carried on under common control or direction by or through more than one corporation, partnership, person or association of persons, the Board may declare the corporations, partnerships, persons or associations of persons to be one employer for the purposes of this Act.

(2) If, in an application under subsection (1), the Board considers that activities or businesses, undertakings or other activities are carried on by or through more than one corporation, partnership, person or association of persons in order to avoid a collective bargaining relationship, the Board shall make a declaration under subsection (1) with respect to those corporations, partnerships, persons or associations and the Board may grant any relief, by way of declaration or otherwise, that it considers appropriate, effective as of the date on which the application was made or any subsequent date.

(3) This section does not apply with respect to employers engaged in the construction industry in respect of work in that industry.

Section 192, which applies to the construction industry, reads:

192(1) On the application of an employer or a trade union affected, when, in the opinion of the Board, associated or related activities or businesses, undertakings or other activities are carried on under common control or direction by or through more than one corporation, partnership, person or association of persons, the
Board may declare the corporations, partnerships, persons or associations of persons to be one employer for the purposes of this Act.

(2) If, in an application under subsection (1), the Board considers that activities or businesses, undertakings or other activities are carried on by or through more than one corporation, partnership, person or association of persons in order to avoid a collective bargaining relationship with a trade union in a part of the construction industry, the Board shall make a declaration under subsection (1) with respect to those corporations, partnerships, persons or associations of persons and the Board may grant any relief, by way of declaration or otherwise, that it considers appropriate, effective as of the date on which the application was made or any subsequent date.

(3) Notwithstanding subsection (2), if a trade union makes an application under subsection (1), the Board shall not make a declaration under subsection (1) in respect of a corporation, partnership, person or association of persons that does not employ employees who perform work of the kind performed by members of the applicant trade union.

A review of this language reveals changes that include:

- Applications can be made by an affected employer or trade union and not just a trade union. In itself this is not a surprising or troubling proposition – common employer orders are not just about unions chasing runaway employers, and they have many other legitimate labour relations uses. However, it should be noted that the restriction in section 192 (3) only applies to applications by trade unions – presumably an employer could seek a common employer finding including an entity that did not employ workers who perform work of the kind performed by union members, although I do not believe there has ever been such a case.

- The restriction in section 192(3) was new – it was enacted in an apparent attempt to overrule certain Board and Court decisions that were favourable to unions.

- The language of sections 47(2) and 192(2) is basically about preventing any kind of serious retrospectively or retroactivity of a common employer order. It represents a serious diminishment of the Board’s ability to craft meaningful remedies where union and employee rights have been eroded. It will be noted that the language specifically directs the Board to make an order to the maximum extent of its retroactive powers in cases where an intent to avoid a collective bargaining relationship is found. With respect, this appears to be little more than window dressing – the Board formerly had discretion to make orders that would rectify erosion as it considered necessary, and it hardly needs a direction in this regard. While paying lip service to the principle that enterprises ought not to spin off new entities for the purpose of avoidance, in fact the entire scheme of section 192(3) is to enable just that mischief.

As can be seen, the changes to the common employer powers were all to the detriment of labour. This becomes even more evident when viewed in the context of legal developments which took place shortly before the changes were enacted.
The Background - Key Developments in Alberta and Elsewhere

The cases discussed in this section provide a basis for understanding what was done by the government of the day in Alberta and why. Lengthy excerpts have been provided not only for easy reference, but because they provide worthwhile discussion of the policies underlying this area of the law, and because in large measure they represent the labour board conclusions that the current Alberta laws were created to undermine. Although the first decision referred to is from British Columbia it served to focus the debate that led to the current status quo. It should also be noted that over the years, developments in British Columbia and Alberta in regard to construction industry issues have been related in many ways, and that some key players operated and continue to operate in both jurisdictions. Developments in these two provinces in the 1980s were closely monitored by practitioners in both jurisdictions.


This decision of the Labour Relations Board of British Columbia in 1986 served to frame the debate surrounding common employer and successorship law in the construction industry for other jurisdictions such as Alberta as well. It confirmed an expansive remedial approach to the common employer power, and rejected a call by unionized contractors wishing to establish double breasting operations to change that approach. What is evident from the following lengthy excerpt from Part V of this decision is that the Board perceived the mischief inherent in double breasting, and was not prepared to adopt a policy which condoned and enabled the practice:

Having reviewed the purpose behind Section 37 of the Labour Code and the approach the Board takes to its interpretation and application in the construction industry as well as the approach taken in other jurisdictions to the interpretation and application of their analogous provisions or doctrines, we now turn to consider the specific changes in approach that we are requested to adopt by the Applicants, CLRA and the Business Council.

With respect to the common control or direction prerequisite, counsel for the Applicants submits that if two companies are operating separately and independently, the Board should find that they are not under common control or direction even if there are close associational links between the two companies. In advancing this requested change in approach, counsel seeks a return to the approach followed in the Comet Drywall Ltd., supra, line of cases which required direct evidence of the existence of operational control by one individual.

As we have indicated above, this approach was considered and rejected by the Board in the reconsideration of Zagreb Construction Ltd., supra, and by both panels in Wills Enterprises Ltd., supra. We have considered that approach again and we remain of the same view for the same reasons mentioned above. Common control or direction may exist between two entities even in the absence of operational control being vested in one individual. If the Board restricted itself to this one criterion, entities which were in fact under common control or direction would be able to escape their obligations to trade unions and their employees and frustrate or defeat the rights vested in those trade unions and employees. Such an approach to the interpretation and application of the common control or direction prerequisite would not be consistent with the protective purpose behind Section 37 of the Code.
Both counsel for the Applicants and counsel for CLRA submit that the Board should change its approach to the labour relations purpose prerequisite such that a declaration will only be made if it can be proved that the establishment of a non-union company will actually result in the loss of work for the union company. In this regard, counsel for the Applicants submits in his written argument that:

“We now have a distinct non-union market in B.C., where union contractors cannot be competitive. It makes no labour relations sense to prevent union contractors from forming non-union entities to participate in this non-union sector. The work would not otherwise go to unionized firms.”

In the past, the Board has recognized that there are several distinct sectors to the construction industry. However, this distinction has not been made on a union versus non-union basis, but instead has reflected the different kind of structures being built. For example, in the case involving An Inquiry Regarding the Structure of Bargaining by Building Trade Unions with Construction Labour Relations Association, BCLRB No. 6/78, [1978] 2 Can LRBR 203, the Board distinguished between institutional, commercial and industrial construction performed by CLRA members and the roadbuilding, pipeline, hydro engineering and residential sectors of the industry.

We pause here to note that there is a difference today amongst the participants in the construction industry about the scope of the residential sector of the industry. In using the terms “residential sector” and “institutional, commercial, and industrial sectors” in this case, we do not wish to be regarded as commenting in any way on the merits of that difference, or defining the limits of those sectors.

During the 1970s and early 1980s, contractors whose employees were not represented by a trade union operated principally in the residential sector of the industry. In the past few years however, those contractors have moved outside of that sector and are now competing with unionized contractors who have certifications and collective agreements with the building trades unions affiliated with the BCYT, in the institutional, commercial and industrial sector of the industry. What is occurring is union versus non-union competition in a sector of the industry where such competition did not exist a few years ago. It is that competition which forms the underlying basis of this application. On the other hand, over the past year or so, we have seen efforts by CLRA on behalf of its union contractors to negotiate collective agreements with the Bargaining Council that would permit its contractors to compete in the residential sector of the industry, the traditional preserve of the non-union contractors. Based on our overall experience with the construction industry, we cannot accept the concept that the industry is now divided into distinct and definable non-union and union sectors. Such a concept is inconsistent with the competition that underlies this application.

In the face of this competition in the institutional, commercial, and industrial sector of the industry, what would likely happen if the Board adopted the approach of requiring proof of the actual erosion of rights and loss of jobs before it would make a Section 37 declaration?
With respect to this approach, counsel for the Applicants submits that the Board should look at the specific project that forms the backdrop to the Section 37 proceedings before the Board and at the contractors who have submitted bids on it. If the project has not been bid by any unionized contractors, or if a unionized contractor would not have been successful because of lower bids submitted by contractors whose employees are not represented by a trade union, counsel maintains that the Board should conclude that no labour relations purpose would be served by making a Section 37 declaration. A unionized contractor would not have obtained the work anyways, and therefore, no erosion of rights or loss of jobs would have occurred.

If the Board adopted this approach, a unionized contractor would then be able to establish his non-union arm to bid on contracts in the institutional, commercial and industrial sector. The contractor could control the projects he used his non-union arm to bid on to ensure that those projects were only ones where a unionized contractor would not have obtained the work anyways. If the Board required proof of the actual loss of jobs or erosion of rights before making a Section 37 declaration, the contractor would then be in the position of being able to unilaterally determine the result of the Section 37 proceeding. The contractor would also then be working through his non-union arm, in which case we would see little incentive for him to seek to resolve his collective bargaining differences with the building trades unions in order that his union arm could better compete for work. In our view, the contractors' union arms would be virtually abandoned with the consequent loss of certification and collective agreement rights of the building trades unions and their members.

In summary, we are satisfied that it would not be consistent with the protective purpose behind Section 37 of the Labour Code to adopt this approach to the labour relations purpose prerequisite of a Section 37 determination put forward by counsel for the Applicants and counsel for CLRA. If the Board was to exercise its discretion under Section 37 in the manner requested, we are satisfied that the result would be to permit unionized contractors to escape from their obligations to the building trades unions and their members under their certifications and collective agreements. We remain of the view that the likelihood of the loss of jobs or the erosion of rights will be sufficient to satisfy the Board that a labour relations purpose will be served by making a declaration under Section 37. That approach is consistent with the protective purposes behind Section 37. Finally, we would note that the Board's approach to this issue is consistent with the approach taken by the Ontario Labour Relations Board and by the United States Court of Appeals, District of Columbia Circuit in the Peter Kiewit case.

Counsel for the Business Council suggested that one possible change to the Board's approach to the interpretation and application of Section 37 of the Labour Code could be the adoption of the Alberta Labour Relations Board's approach in Stuart Olson Construction Limited, dated June 1, 1983 (unreported). The Board has already considered and rejected that approach in Armeco Construction Ltd., supra. In that case, the Board commented on the Alberta Board's decision in these terms:

“In our opinion, the adding of a fifth legal prerequisite to the making of a Section 37 declaration, i.e., that all of the corporations, individuals, firms, syndicates or associations
must each be employers within the meaning of the Labour Code, is not justified by the express wording of Section 37. If the Legislature had intended that factor to be a legal prerequisite, it would have used language like that contained in Section 133 of the Canada Labour Code. In this regard, we would also point out that Section 133 was enacted in 1972, at least one year before the B.C. Labour Code and, in particular, Section 37 was enacted.

If the argument made by Counsel for S.C.M. was accepted, it would be a relatively easy matter for the principal of a unionized construction company to frustrate or destroy the collective bargaining rights of the building trades unions and the employees they represent. This could be done simply by the principal incorporating a construction management company and subcontracting out all the work. Of course, the work would no doubt then be subcontracted to non-union firms, thereby resulting in a loss of work for the members of the building trades unions.

In view of these potential consequences, we have concluded that the interpretation of Section 37 proposed by Counsel for S.C.M. is not consistent with the remedial nature of the Labour Code nor the legislative purpose behind Section 37.” (at 18-19)

In summary, all of the changes in approach to the interpretation and application of Section 37 of the Code put forward by the Applicants, CLRA and the Business Council are more restrictive than the full and liberal approach reflected in the Board’s decisions in Baywood Enterprises Ltd., supra, Intermountain Industries Ltd., supra, the reconsideration of Zagreb Construction Ltd., supra, Wills Enterprises Ltd., supra, and others. We are satisfied that it would not be responsive to the legislative purpose behind Section 37 to adopt those changes, and we reaffirm the full and liberal approach to the interpretation and application of Section 37 as reflected in the decisions referred to above.

Finally, counsel for the Applicants and counsel for CLRA submit that the Board takes a different approach to Section 37 applications in the construction industry from that taken in other industries. We agree that there are some decisions of the Board that support this proposition. Not all do, however. We note, though, that a number of those decisions were made on or about the same time as the decision in Comet Drywall Ltd., supra and reflect the approach taken in that decision. We are satisfied that the approach described above on the common control or direction prerequisite and the labour relations purpose prerequisite is the proper one for the construction industry, having regard to the protective purpose of Section 37 of the Labour Code. Any differences in approach to the interpretation and application of Section 37 in industries outside the construction industry will have to be resolved when the appropriate case from outside the construction industry, comes before the Board. (emphasis added)

There are two important aspects to this aspect of Concerned Contractors. First and foremost, the Board was not prepared to bless the notion that construction companies or groups of companies should be able to establish new companies for the purpose of competing in a “non-union” sector – as a matter of discretion, the Board perceived that to do so would simply be to invite employers to let their “union” operations languish in favour of their non-union arms.

Second, the Board rejected the call to take a narrow view of what constitutes “common control”. That of course makes good sense – large enterprises will hire management teams in place to carry
out their objectives, but the real control always rests with those who have ownership and are able to exert overall control as necessary.


The historical importance in Alberta importance of Concerned Contractors cannot be overstated. In what, but for unfortunate changes to the legislation ought to have become the leading case in this jurisdiction, the Alberta Board resoundingly adopted the approach taken in British Columbia, and rejected the arguments in favour of double breasting. Empire Iron, had it not been undone legislatively, would no doubt still be a leading case today. The following excerpts from Parts IV and V of that decision illustrate this point, and set the stage for understanding the intentional erosion of common employer protection that followed:

The Board has broken down Section 133 into its four statutory elements on several occasions. For example, this Board said in:

Teamsters Local 362 v. MacCosham Cartage Co. Ltd. (McBain, April 19, 1982)

Examination of Section 133 establishes:

a) That the application must be made by a trade union.

b) The second component of the section, compels the Board to determine whether there exists in the opinion of the Board “associated or related activities or businesses, undertakings or other activities”.

c) The third component of this section requires the Board to determine whether the activities, business, undertakings or other activities set out in paragraph (b) “are carried on under common control or direction”.

d) The final determinant to make the section operative is that paragraphs (b) and (c) must be “by or through more than one corporation, partnership, person or association of persons”.

Obviously items (b), (c) and (d) are interrelated; a factor recognized by the McBain panel in MacCosham at p. 14:

"There appears to be a considerable overlap in factors that may be relevant in determining whether businesses are associated or related with the factors that may indicate common direction and control, and this was recognized by the Canada Labour Relations Board in their decision in Canadian Wire Service Guild Local 213 of Newspaper Guild and Canadian Press et al [1976] 1 Can. L.R.B.R. 354 where M. LaPointe stated at page 359:

“More difficult to ascertain is if the businesses are related or associated and if so, to what degree. The factors used in determining this interrelationship can and do overlap with those used in establishing common control and ownership. To be considered is the degree of interrelationship of the operations of the various enterprises. Do they provide similar services and product? Are they part of a vertically integrated process whereby one business
carried out one function, for example, mining ore, and another business, in the organization, processes it? In determining whether the companies are associated or related, the Board would look into what extent ownership or management of the enterprises are common. An indication of the fact that the enterprises are related is not necessarily decisive. Two or more enterprises may have common shareholders and the ownership of the assets may be held in common. However, the companies themselves may function as distinct, autonomous units. A more decisive test is the extent of common direction or control. The Board does not require total commonality of control in that all the enterprises are controlled by the same group of individuals. There may very well be a breakdown of functions whereby different persons have different responsibilities and play different roles in each of the companies involved or possibly no role at all in one or more of the companies. If it is established, however, that the policies of the various enterprises are closely coordinated integrated and subject to joint direction, even though the individuals are not directly tied to all of the companies involved, this would appear to show common direction and control.”

There is no dispute over the first element. The Applicant is clearly a trade union. Are we dealing with associated or related activities or businesses, undertakings or other activities? Again the MacCosham's case provides some guidance on the meaning of “associated or related”. At p. 14 the Board said:

"What then is intended by the words "associated or related; that question remains to be answered. The word "associated" is defined in Webster's New World Dictionary as follows:

"ASSOCIATE: join; connect in the mind; join (with) as a partner, etc. (partner, colleague)."

In the same dictionary the word "relate" is defined as

"RELATE: narrate; connect, as in meaning; have reference to."

Each word then is one of considerable scope and the Board must give a broad meaning to each."

In this case we have no doubt that they are associated or related. Both companies are engaging in the same type of work. The only difference we can discern is that Empire may fabricate structural steel whereas Emron does not. Their modes of acquiring business, and the areas in which they seek that business, are virtually identical. In fact, up until the decision is made by Mr. Gaul about which way to bid, the estimating process is one process. Most work in this industry is obtained by this competitive bidding process.

The day to day operations of the two companies are carried on in the same place with no apparent effort to separate them in any meaningful way. The equipment Emron used on at least some projects was Empire's equipment. The office and payroll facilities appear identical. No one came forward to point to any differences. When jobs are ongoing Mr. Scott and Mr. Gaul supervise and manage the work. Again there is no evidence of any difference in the manner in which the two companies carry this out.
Are both businesses (Emron and Empire) being "carried on"? They clearly are. Both are actively seeking work even if they have been unsuccessful in getting it. There is no evidence that either business has shut down or fundamentally changed the nature or focus of its operations.

Is there common control and direction? There has been a great deal written about the test this expression imposes. We will review some of the more relevant decisions. An extremely helpful analysis on this point is contained in a recent decision of the British Columbia Board in:


That decision was an application by various parties to have the B.C. Board reconsider and vary its approach to their s. 37. The panel consisted of the Chairman and six Vice-Chairmen of the Board. We will not repeat large sections from that decision but we have considered it and have reviewed the many helpful authorities it relies upon.

The principles we draw from the authorities are as follows. Firstly, asset out in Willis Enterprises Ltd. (B.C.L.R.B. 79/84) "an assessment of whether two corporations are under common control or direction can only be made by a practical judgement based on the realities of the entire business relationship between the two entities." In looking at this overall relationship, the Board will pay particular attention to a number of factors that are indicia of control and direction. It is the totality of those indicia, not the presence or absence of any specific element, that will ultimately produce the decision. Interrelated shareholdings and directorships are significant as are family relationships between the various participants. Financial arrangements that give rise to an element of influence or control are also relevant. Managerial control is significant including the existence of a single or guiding force in the affairs of the two businesses. The degree of integration between the two enterprises is significant including any physical integration of plant, equipment or office facilities and any functional dependence in terms of the way the product of the business is arrived at. For example, a retailer and wholesaler may be so integrated, albeit by what is called vertical integration, which common control and direction exists because of that relationship. Similarly where one company supplies the equipment and the other the labour to a project where both are essential to the ultimate result, this integration, with other elements, may be important to a finding of common control and direction.

The Ontario Board has indicated the factors it will consider in


"21. The indicia or criteria which the Board considers relevant in making a determination as to whether the activities or businesses of one or more corporations, individuals, firms syndicates or associations, or any combination thereof are carried on under common direction and control and therefore may be treated as one employer are — (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. No single criterion is likely to decide the issue. Rather, as has been stated,
the Board's determination undoubtedly will be based on an appraisal of all of them in the light of the particular facts before it. It hardly need be said that in applying the above criteria, the greater the degree of functional coherence and interdependence which the Board finds among the associated or related activities and businesses the more probable it is that the Board will conclude that the entities carrying on these activities should be treated as one employer. We would mention here also that the indicia or criteria themselves obviously overlap. For that reason, in applying them to the facts of the instant case we have not attempted to deal with each criterion on an individual basis."

A similar list was set out in:


"This is a case in which what does not exist in the relationship between two entities is more readily apparent than what does exist. There is no common ownership, directors or officers; no common head office; no common solicitors or accountants; no common telephone listing (sic); no common cheques; and in the usual sense of the terms, no common management, office or premises, or common control of wages, benefits and working conditions. These circumstances are a natural consequence of the fact that there is no corporate interrelationship between Foley and Kingston Aggregates. But section 1(4) both allows and requires the Board to examine the degree of functional interdependence which exist between business entities so it must also look at the contractual and economic arrangements between them, and, in fact, at all elements of interdependence."

The Canadian Wire Service Guild case (supra) quoted above reviews the similar position of the Canada Labour Relations Board.

In the case at hand, a number of factors point to common control and direction. The area manager for Empire is Mr. Gaul. While Empire is a Winnipeg based operation it appears that he has a good deal of local control. Mr. Scott's evidence makes it clear that Mr. Gaul is of equal influence in both Empire and Emron. He is the guiding force in both operations at least locally. The two operations are run virtually as one. We are not persuaded by the fact that Empire's address is office 201A and Emron's is 201B at the same location. Both companies use the same secretarial and payroll staff, and the same persons to do the estimating and bidding. Empire allows Emron to use its facilities and equipment, at least on occasion. While we have no direct evidence of how this is costed or accounted for, in the absence of any alternative explanation, we infer that Empire simply lends Emron its equipment, as it appears to have been done on the Rossdale and Bank of Montreal jobs.

Labour Relations between the two appear to be run in the same way. Mr. Scott has the power to hire, fire and deal with the Union for both companies. The payroll records for the June and July period illustrate at least some confusion about who worked for which company.

At the corporate level the control is obvious. The shareholders of Emron, Mr. Gaul, Mr. McIntyre and Mr. Becker are all shareholders of Empire. The Directors of Emron are Mr. Gaul and Mr. McIntyre both of whom are shareholders of Empire. Mr. Gaul is, of course, the person referred to above as the "guiding force of the local operations".
On the question of representation to the public it appears that there is little public advertising of the Emron name; however, in the absence of any contrary explanation we infer that the name was picked for its similarity and obvious link to the Empire Iron name. Given the silence we assume it is simply a contraction of "Empire" and "Iron" designed to indicate to the clientele of Emron that the firms are linked and that the one should be identified with, and extended the goodwill of, the other.

All these circumstances convince us that there is common control and direction. Our conclusion is reinforced by the apparent ease of takeover of the Bank of Montreal job which started out being done by Empire under contract and, after the strike, was concluded by Emron. Again, in the absence of any explanation we infer from the surrounding circumstances that Empire simply obtained the consent of the general contractor to have Emron finish the job, standing in Empire's shoes. We suspect that a similar request was made in relation to the Rossdale project and that Emron was treated as nothing more than the alter ego of Empire. The fact that Empire's trailer and welder was on site and that at least the security guard thought Empire was on site support this view, as does Mr. Wayne Scott's supervisory role on the project.

The fourth element is clearly met in this case. The operations are carried out by two corporations; Emron and Empire.

The Respondent in its written argument suggests, in speaking of the time at which the Board's determination is to be made, that "this is important because a fundamental component of any declaration must be that there exists two employers who are to be declared as one employer". This argument harkens back to an argument advanced in a previous case which has caused a degree of controversy, over the question of whether s. 133 has an implicit "fifth element", i.e. a requirement that the corporations, partnerships, persons or associations of persons involved must each be "employers" within the meaning of the Act (specifically s. 1(1)(l) and (k)).

This argument was the subject matter of a Board decision in:

Operative Plasters and Cement Masons Local 924 v. Stuart Olson Construction Ltd et al. (Mellors, Vice-Chairman, June 1, 1983)

and a subsequent decision from Justice Stratton of the Court of Queen's Bench, (the "Stratton decision") on a motion to quash the Board decision by certiorari. The argument Counsel put to the Board in that case was, as set out at page 5 of the decision:

"Mr. Ross, Counsel for the employers, argued before the Board that in order for the Board to declare that the corporations, partnerships etc., are one employer for the purposes of the Act they each must be employers as defined in the Labour Relations Act."

In that case, it was argued that as one corporation was an employer and the other was not, no declaration should issue. The Board made a number of comments in that decision from which it might be inferred that the argument had been accepted. In particular, there is the following paragraph at page 13:
"The Board agrees with the position taken by Mr. Blakely that Section 133 does not make any reference to employees but at the same time must point out that the section states "one employer for the purposes of the Act" and employer is defined in Section 1(1)(l) of the Act as "means a person who employs an employee". If the Board may declare the corporations, partnerships, persons or associations of persons to be one employer it is safe, in the Board's view, to interpret that what the legislature contemplated in Section 133 was that the corporations, partnerships, etc., are employers and that the Board in finding that they are employers and, passing the other tests detailed in the Economy and MacCosham decisions, are one employer for the purposes of the Act. With the definition of employer as contained in Section 1(1)(l) of the Act it would not make labour relations sense to assume otherwise. The result of this decision adds a fifth determinant. The Board must be satisfied that the corporations, partnerships, person or associations of persons who are sought to be determined as one employer pursuant to Section 133 of the Act are each employers as defined in the Act."

This led to a certiorari challenge; the main thrust of which was that by adding a fifth criteria the Board had either added to the statute, which was an error of law, or else that it had fettered its discretion by saying, in each case, that if a corporation had no employees it would not exercise its discretion to issue a s. 133 declaration. Justice Stratton dealt with those arguments in the following way at p. 7:

"The Applicant contends that the Board misinterpreted s. 133 by reading into it the requirement that before a "one employer Order" could be issued, the entities involved must be "employers".

It is interesting to note that the comparable section of the Canadian Labour Code includes this very requirement by express words, but obviously that is not the situation in s. 133. If the Board misinterpreted the section by reading into it that requirement, in my view, it would have made an error in law which, subject to the "patently unreasonable" test referred to below, may well justify this Court in interfering."

and again at p. 10:

"The Board states in the paragraph in question that "it is safe...to interpret that which the legislature contemplated in s. 133 was that the corporations, partnerships, etc. are employers". The Board goes on to say that "the result of this decision adds a fifth determinant". This is an allusion to the Board's earlier conclusion on pp. 9 and 10 of its decision that s. 133 had four statutory requirements or determinants. If this Court were to accept the interpretation suggested by Mr. Blakely as I have observed earlier, it would, in my view, be clear that the Board committed an error in law.

The other interpretation of this paragraph, and the one accepted by this Court, is that the Board, in adding the requirement that the corporations, associations, etc. each be "employers" gleaned this "determinant" not from an interpretation of the section but from an exercise of its discretion as authorized by the section. This discretion was exercised on the basis of, among other things, what would make good labour relations sense. Support for my
interpretation of the Board's meaning comes largely from a consideration of how this paragraph operates in the context of the decision as a whole.

In summary, the Applicant's second argument fails because it is this Court's view that the Board did not reject the s. 133 application because the Board misinterpreted the Act, but rather because the Board felt, in an exercise of its discretion, that to make the Order would not make labour relations sense."

On the argument that the Board had fettered its discretion by adopting a fixed rule that it would not grant a declaration unless the companies each had employees the Court said at p. 13:

"If the Court were of the opinion that the Board had fettered its discretion in this manner, the Court would conclude that the Board had committed a jurisdictional error.

While I realize that the Board stated the issue on page 8 of the decision very narrowly and in such a manner that the issue of employees would arise and be determinative in all s. 133 applications, it is my view that the Board was not taking this approach. It must be kept in mind that the Board was addressing its mind exclusively to this issue on the request of counsel. It is clear that counsel had agreed that all elements of the s. 133 application had been fulfilled by the Applicant, and that the parties were at odds over only one issue. Thus, it is not surprising that in this case, the Board treated the issue of "employees" as determinative, and, in the process, gave that issue an apparent exalted status in the Board's exercise of discretion.

Moreover, in reviewing the law with respect to what factors to consider in exercising its discretion, the Board cites passages from the decisions in Bramalea Carpentry Associates 81 C.L.L.C. 16,121 and Canadian Airline Employees' Association (1979) C.L.B.R. 535. In both of these decisions, the Boards involved were clearly exercising their discretion with respect to the individual facts in each case. Indeed, in the Canadian Airline case, it is stated at p. 549 that, "we [the Board] might add that this discretion is exercised by the Board in the context of the particular facts of each case." I cannot see how the Board in the case at bar could have cited those passages, which emphasize that discretion is always exercised in light of the particular fact-situation before the Board, yet lay down a rule governing its discretion which applies in all situations, regardless of the facts. Therefore, in my view, the Applicant's third argument fails because the Board did not improperly fetter its discretion or exercise its discretion in such a way that it amounted to an amendment of the Act. The Board exercised its discretion with regard to the particular situation before it and in response to the narrow issue put before the Board by the parties."

The net effect of Justice Stratton's observations on s. 133 are in the Board's view, as follows: It would be an error of law for the Board to add a fifth determinant to s. 133 by saying the section requires, as a matter of law, that all corporations, etc. be employers within the meaning of the Act. It would be an improper fettering of the Board's discretion and thus a jurisdictional error to say as a matter of discretion or policy that the Board would decline to grant a s. 133 declaration in all cases where all corporations etc. are not employers. What the Board is entitled to do is consider what impact the fact that one or more corporations are
not employers has, as one amongst other factors to be weighed by the Board, in the exercise of its discretion. The influence of the "employer" factor will be assessed when we review the discretionary aspects below.

We therefore conclude that all the statutory requirements for a declaration under s. 133 have been met in this case and we now turn to the question of our discretion.

...

In our view, no single factor is, as a general rule, determinative of whether a declaration should or should not issue. A series of considerations need to be reviewed and weighed together. It is important to appreciate that while s. 133 has been and continues to be of particular interest in the construction industry, it is a section that applies to all the enterprises whose labour relations are governed by the Act. One of the purposes of the section is to prevent the artificial erosion of properly obtained bargaining units by corporate reorganization. In this case it is the Board's view that Emron was created, and continues to be operated for the purpose of enabling Empire Iron Works Ltd. to bid on and obtain work in the same marketplace as it has always done without being fettered by the bargaining obligation that it is fixed with by virtue of Certificate No. 145-84. We see no other purpose. We are convinced, on all the evidence, that this was the motive behind its creation and continued operation. Section 133 is intended in part, to prevent this type of situation.

...

In this case, it is important to consider the fact that we are dealing with the construction industry, and with a branch of the construction industry that is governed by a form of mandatory registration.

The very essence of a registration system is that enterprises operating in the same market are by law bound to adopt a common bargaining position and advance that position through an agency entitled and obliged to bargain on behalf of them all. The collective agreements that result from this bargaining, by and large, involve wage rates that will apply equally to all those operating in that field of endeavour. It is a system that is mandatory. That is, by virtue of s. 54, it is a system that all contractors whose employees choose to be represented by the trade union in question, or to whom an employer has accorded a form of recognition (whether under 54(1(a) or(b)) are bound to by operation of law. For those enterprises the element of wage rate competition has been removed in favour of a system of common wage rates, and common negotiating positions to which all are bound by law, through the agency of a Registered Employers' Organization. This statutory reduction in the available areas of competition was born out of an unsatisfactory system, where trade unions dealt with each employer individually, and used one employer to "leap frog" over another. Registration was designed to reduce the employer's vulnerability to union bargaining power, but at a price of reducing an employer's freedom to individually negotiate wage rates with the Union and thus to affect its competitive position.

The significance of the mandatory aspects of Registration to the issue of what makes "labour relations sense" in s. 133 is this: in an ordinary non-construction situation a company "spinning off" to a related corporate entity may result in a loss of bargaining rights for the trade union and its employee members. However, it may only have a very minor effect on that company's competitors.
In construction trades under Registration, a similar "spinning-off" will enable an entity that was previously bound to pay the same wage levels as its competitors to suddenly under-bid those competitors, perhaps drastically. Construction companies are particularly vulnerable to such abilities, because their work is virtually always obtained by competitive bidding, and wages always form a substantial component of any bid. They are not only vulnerable, but immediately vulnerable. Construction contracts are often short term, and the loss of a bid is an immediate loss of work. Construction contractors simply do not have the long-term supply contracts a manufacturer might have.

The upshot of this is that in considering whether to issue a s. 133 declaration under construction registration, the Board must appreciate not only the bargaining rights of a union and its employees but also the commercial position of other employers bound by registration.

Having ventured into the realm of commercial reality, however, we cannot ignore the other feature of registration. While s. 54 (1)(a) and (b) binds many contractors to a common bargaining stance and ultimately a common collective agreement and wage rate, it does not bind contractors who do not have a bargaining relationship, and those contractors too are competitors in the marketplace. They have always had that freedom to negotiate wage levels individually with their employees. They have the benefits and burdens of that freedom. In times of short supply they have difficulty recruiting skilled labour. In times of oversupply they can hire skilled labour at low rates and provide formidable competition. Not infrequently in times of scarce employment, it is the union employee who will accept work with the unorganized employer.

While the competitive position of the unorganized employer may ebb and flow with the economy and the supply of labour, the scheme of the Alberta Labour Relations Act, which we administer, does not. A registration collective agreement is binding on all s. 54 employers in good times and bad. If it was the Legislature's view that open wage competition between unionized construction employers was a desirable goal overall, in the present times, it would repeal or amend registration. It has not. With the retention of this system goes the need to maintain the integrity of the scheme of registration by ensuring that one contractor does not spin off or redirect his business to a related employer not caught by an agreement so as to obtain an unfair competitive advantage over its fellow contractors.

We appreciate that no one contractor can insist on their position being accepted by the Registered Employers' Organization as its bargaining stance, let alone by the trade union. However, it is no solution to say that a contractor who does not like the agreement the Registered Employers' Organization and his fellow contractors have negotiated is free to set up another company as an alter ego and compete with those fellow contractors at reduced rates. (emphasis added)

A similarly mainstream and, from the point of view of protecting bargaining rights, promising approach to common employer law was evident in this leading decision from 1987. In short, an attempt to avoid a bargaining relationships with the International Union of Operating Engineers, Local 955 by using a “construction broker” parent company which employed no tradespeople as a firewall against the bargaining relationship was unsuccessful. The Board declared the construction broker and the company with the bargaining relationship to be a common employer. Unfortunately for the union in that case, a “labour broker” was the employer of record of the non-union employees doing the work, and in the absence of a subcontracting clause in the collective agreement the union was not successful in achieving a useful remedy in terms of the situation that gave rise to the litigation. Still, Kiewit represented a significant win for the union side, and was seen as a major defeat by the forces in the construction industry who were seeking to promote double breasting at the time.

It is important to recognize that there was nothing surprising about the Kiewit result in terms of the prospects for a double-breasted industry. Concerned Contractors was an important decision, but it essentially followed mainstream thinking, and the fact that the Alberta Board adopted the same approach in Kiewit (and in Empire Iron before it) was something that common sense demanded, as the following passage from Kiewit (at page 29) illustrates:

Kiewit has formed K.M.L. so that it can continue to use its accumulated credibility in the industry, with its resources and its expertise, to attract the same type of project it attracted before, free of any ability this union may have to negotiate clauses that would require it to pay, directly or indirectly, collective agreement rates for the inevitable work component of the activities its contracts generate. This is in our view sufficient to give a labour relations purpose for a s. 133 declaration. It may not be a strong purpose, given that we are dealing with a collective agreement that currently has no prohibition on subcontracting. We must assess what factors might counterbalance this.

There is, as we see it, no purpose for which K.M.L. was established, aside from avoiding the consequences of the Labour Relations Act, that would in any way be frustrated by the grant of a s. 133 declaration. K.M.L. is not in any real way independent from Kiewit and is for all intents and purposes Kiewit in a new corporate guise. This is not a countervailing factor that argues against granting a s. 133 declaration and accordingly Kiewit and K.M.L. are declared to be common employers for the purposes of the Labour Relations Act.


After Kiewit, the legislation was amended to its current form. As can be seen, the language of what is now section 192 (3) specifically prohibits the Board from making the finding that was made in Kiewit. Although the Board, in this 1990 decision rejected an interpretation that required current employees employed in the target entities, it was clear that the door had been opened to the defeat of bargaining rights by having parent entities that were not themselves directly engaged in employing construction trades workers.
How do we interpret section 190(3)? We begin with the proposition that in most situations involving common employer declarations, there is an employer (usually a single person or corporation) that has, or is about to have, a bargaining relationship with the applicant trade union. We will call this the original entity. The trade union seeking the common employer declaration is trying to protect its bargaining rights, so that the work the original entity should do under the collective agreement (or the bargaining it should do because of the bargaining relationship) is not done through some other person or corporation which we will call the second entity.

The original entity is presumptively an employer. It is an entity with a bargaining relationship. We believe this is why section 190(3) says "...the Board shall not make a declaration under subsection (1) in respect of a corporation [etc.]... that does not employ employees who perform work of the kind performed by members of the applicant trade union."

We read this as telling the Board not to bind a second entity to a bargaining relationship, using a common employer declaration, except when that entity employs people who do the kind of work done by members of the applicant trade union.

When an employer bound by a bargaining relationship seeks to avoid that bargaining relationship by using a common employer situation, s. 190(2) says the Board must make a declaration. The most common method of achieving such avoidance is to divert employment from the original entity into a second related entity. The original entity would cease to do the work, and therefore cease to employ the employees. Instead, the second entity would hire different employees to take over the same work. It would make section 190(2) pointless if we were to interpret section 190(3) to mean that we could not make the mandatory common employer declaration called for under section 190(2) because the original employer no longer had any employees, even though they remained in the same business.

Instead, we see section 190(3) designed to protect corporations etc. related to the original employer, that do not have the potential for taking over the work that would otherwise be done by the original employer. This is because they do not employ that type of employee. Examples of this might include, for example, for an Electrical Contractor, a related engineering firm, a related survey firm, a retail shop, or a project management company, none of which employed electricians. (Page 19, emphasis added.)

Although the applicant was successful in the Midwest case, what was clear that had the arrangement been structured so that it involved an entity such as a project management company as a buffer, no common employer declaration could issue in the construction industry.

**The Result of the New Language**

In the result, only less sophisticated construction actors are likely to get caught by common employer applications. But that will be a rare event, because there is relatively little incentive for unions to pursue them. The removal of retroactivity (which will be addressed more fully below) means that any remedy will be limited to the date of application. By the time the Board has heard and determined a common employer application (a process that experience tells us can take months or even years) whatever work was underway will be done, and the target company will almost
certainly be inactive. That will also be so in the maintenance industry, which comes under section 47 – the limitation on retroactivity means that no real prospect of work for union members will flow from a successful application.

What the previous government intended, and what it achieved, was the wholesale gutting of common employer protection in the construction and maintenance industries. Double breasting (and as shall be seen, triple breasting) became the norm.

**Organizing in a World of Double Breasting**

In theory, Unions that have lost out to double and triple breasting have the ability to organize and seek certification, thereby regaining some of their lost market share. Over the years, some building trades unions have worked hard to do that. However, they have been confronted by many inappropriate obstacles, and as a result success has been hard to achieve.

**The Rise of the Christian Labour Association of Canada**

Assuming an organizing drive is successful, and a building trades union becomes certified, the unfortunate reality is that the organized entity will simply be replaced by a non-union or CLAC alternative. Through the nineties and beyond, however, it became clear that the CLAC alternative was a better hedge against becoming organized.

There are a number of reasons why that is so. First, if a CLAC collective agreement is in place, applications for certification may only be made during the “open periods that generally (with minor exceptions) occur during the last two months of a collective agreement. A company with a “fresh” CLAC agreement can be on and off most construction or maintenance jobs without its collective agreement ever coming open.

Second, the existence of a CLAC relationship, even though many such relationships have been achieved by obvious employer support for CLAC (which might well run afoul of the Code) makes it harder to prosecute unfair labour practice complaints alleging discrimination based on union affiliation. An entity with a CLAC relationship is therefore a much safer bet. History shows that construction companies thought so as well – CLAC obtained and continues to obtain certifications in large numbers, in the vast majority of cases with no apparent resistance by employers, through the use of “Noah’s Ark” applications involving the minimum number of two tradespeople per bargaining unit. That this is so is not speculation – it is a matter of public record.

A CLAC relationship in itself was not perceived as providing sufficient protection, however. A practice was developed whereby CLAC contractors would negotiate new collective agreements prior to the expiry of the predecessor agreements in order to prevent “open periods” during which raiding by the traditional building trades unions would be possible. For years the Labour Relations Board permitted this practice. After a long history of litigation the Board finally found, in *Firestone Energy Corporation*, [2009]A.L.R.B.D. No. 22, that this “raid proofing” as the Board called it, was not lawful.
Firestone itself was a company with no infrastructure, no apparent assets, and no active management. It was used as a corporate alter ego for Flint Energy, which was involved in a major project at Suncor, and served as the employer of record for CLAC employees on that project. Because it became the target of a major organizing drive by two unions, the history of Firestone and its CLAC relationships was eventually uncovered in detail. That history of the Firestone litigation, and the predecessor case involving the J. V. Driver Group of companies, could fill a book. But it was highly instructive in terms of exposing the lengths to which construction entities and CLAC were willing to go to establish and protect CLAC relationships and to frustrate building trades organization.

The Firestone decision documented a number of practices that were shocking. In what the Board called a “double flip”, after a filed CLAC representation vote for a three-person unit of electricians, employees were moved between the payrolls of different companies to ensure that they could not be organized. Then Firestone contrived to have CLAC certify an electricians unit of two individuals who were ostensibly working in the Flint parking lot in Sherwood Park. Only then did electricians working on the Suncor project get flipped back to the Firestone payroll (in the interim they had been ostensibly working for another Flint Company with a fresh CLAC agreement). Firestone and CLAC attempted to “close the open period” by a ratification vote in the lunch trailer with virtually no notice – a vote that the Board found to be deficient on a number of accounts. All of this was done in order to protect Firestone from union organization, as the Board’s decision made clear.

Firestone itself was long inactive by the time the litigation was finished. A certificate naming Firestone would have been a hollow victory for the unions in any case, unless other companies were found to be successors or common employers. But in any case, by the time the Firestone decision was issued, the organizing drive that led to it had been over for four years. The use of multiple companies, together with a union of convenience, would have prevented a formidable obstacle to any lasting success.

The facts of Firestone were hardly unique. It had by that time become established practice in the Alberta construction to build, in addition to the corporate firewalls that the new legislation was aimed at enabling, collective agreement firewalls against organizing activity. A couple of prior cases are worth mentioning.

In *Vertex Construction Services*, [1999] Alta. L.R.B.R. 183, a voluntary recognition agreement entered into with the CLAC had been struck down because it was the product of unlawful employer support. This had the effect of rendering an application for certification by a building trades union timely, although certain aspects of that decision were overturned on reconsideration. That decision was not the first decision to expose the dangers of voluntarily recognizing a non-representative organization in order to defeat union organizing, but after that time certification applications replaced voluntary recognition as the means of bringing CLAC aboard.

A new tactic was attempted in *J. V. Driver Installations Ltd.*, [2003] Alta. L.R.B.R. 282 – the contractor in that case entered into to different collective agreements with CLAC – a provincial agreement with one expiry date and a project agreement with another. The position taken by the employer was that there would never be an open period. Although certain aspects of the Board’s decision upholding the employer position were found by the court to be unreasonable on judicial
review, the tactic was nonetheless successful in terms of defeating the organizing drives that led to the litigation.

In the construction of the CNRL oil sands plant in the mid-2000s CNRL obtained a special project designation under Division 8 of the Code, entered into a project collective agreement with CLAC, and sought thereby to prevent any organizing on the project.

All of these cases were highly complex, and involved multiple stages of hearings, decisions, reconsideration applications, and judicial reviews. However, these details do not detract from the fundamental point, which is beyond dispute. In every case, the strategy was to use entities with CLAC bargaining relationships to defeat union organizing efforts. At the heart of these efforts was the fundamental belief that construction enterprises had the right to choose and manipulate bargaining relationships to work union, non-union or CLAC at will.

Although in some of the more egregious cases the Labour Relations Board did disapprove of these practices, a remarkable and troubling level of tolerance has been evident over the years. With respect, when one reads of the antics of the employers and CLAC in cases like Firestone and J. V. Driver it is difficult to accept that these bargaining relationships have been taken seriously. However, the underlying problem is that the construction employer community was given to understand that it had the right to pick, choose and discard its bargaining relationships. The fault can be primarily attributed to the prior government’s willingness to undermine unions.

It should be noted that the current sections 34.1, 52(4.1), 52(4.2). and 53.1 are specifically crafted to discriminate against construction workers and their unions affected by registration bargaining. The scheme involves an unrealistic period of employment before employees are eligible to vote in representation or revocation votes, and an ability to seek almost immediate revocation of a newly issued certificate unless an employer voluntarily agrees to be bound by a collective agreement or an agreement is ratified (something that can be easily accomplished with CLAC agreements, but cannot be done in the case of building trades unions affected by registration). These 2008 amendments were intended to make it nearly impossible for traditional building trades unions to become certified in the construction industry. When one views this in conjunction with the weak common-employer protections, it is clear that the prior government took steps to make sure that the playing field was heavily tilted against unionized construction.

The discussion above is a superficial snapshot of what has been a complicated and troubling period in terms of labour relations in Alberta, but the simple fact is that by the time Firestone was issued, calling into question many of the existing practices, the damage was already substantially done. It is a matter of record that double-breasted and triple-breasted operations have been permitted to develop in Alberta, and that efforts to organize in the construction industry by unions that are not essentially invited by employers will achieve no lasting results.

**Limitations on Effective Date of Common Employer Orders**

Both section 192 and section 47 only permit the Board to make orders that have effect to the date of application. Accordingly, if a spin off company is being used to escape the application of a collective agreement, there is no remedy until the affected union or unions uncover the activity, do
sufficient research to persuade them that a case for a common employer finding exists, and file the application.

This is precisely the problem the B.C. labour Relations Board, Supreme Court and Court of Appeal identified in *Lorne W. Camozzi Co.* [1983] B.C.L.R.R.B. No 12 (BCLR B); 1984 B.C.J. No. 2876 (BCSC); [1985] B.C.J. No. 2580 *(BCCA)* more than thirty years ago. The Supreme Court of British Columbia perhaps said it most elegantly: “To interpret the section to say that the order spoke from the date of pronouncement would mean that there is more justice for one who is fleetest of foot.” Sadly, that is precisely the intention of the existing legislation.

The issue of determining from when a common employer declaration operates is best left to the Board’s discretion, as was the case in the days of the *Labour Relations Act* and Section 133. Again, the conclusion that the prior government was seeking to eliminate effective remedies through common employer applications is inescapable.

**Onus**

Common Employer litigation in Alberta is prohibitively expensive and acrimonious. The reason is, in large measure, that enterprises are permitted to play their cards as close to their chest as they wish, and unions bear the onus of proving the statutory prerequisites of common control or direction and associated or related activities. There is no obligation on respondent companies to provide any information about corporate interrelationships, financial control or anything else.

Unions that seek to use the Board’s powers to compel production of key records are inevitably faced with claims that they are involved in “fishing expeditions”. While the Board often sees through these kinds of objections, still the lack of an onus to at least disclose information means that Unions are routinely accused of acting based on mere “suspicions”, even where such suspicions are well-founded.

There is no detriment to respondent companies if they are required to disclose the basic nature of their interrelationships. The desire of a double or triple breasting group of companies not to get caught is not an interest worthy of the law’s protection.

It would be a simple matter to legislate a reverse onus, so that the entities who are claimed to be under common control and direction and engaged in associated or related activities rests with those entities. As a practical matter, this will mean that the existing incentive to hold back pertinent information will be gone. Rarely will those statutory prerequisites be an issue except where a legitimate question exists. In many cases, this will mean that parties will simply get on with the business of making submissions about the discretionary aspects of the Board’s inquiry, with substantial savings of time and of resources both public and private.
**Concluding Observations**

The current common employer language condones exactly the mischief that common employer provisions are supposed to alleviate. Enterprises are encouraged to structure their affairs in a way that avoids collective bargaining obligations. While paying lip service to the notion that avoidance is a bad thing, the effect of the legislation is to the opposite effect. What happened in Alberta in the late 1980s, therefore, was that the failed attack on bargaining rights evident in the 1986 *Concerned Contractors* case in B.C. was imported into Alberta and explicitly adopted.

There is no policy basis for continuing a legislative scheme that was designed to foster union avoidance. The current sections 47 and 192 should be replaced with a provision similar if not identical to the old section 133. A new provision reversing the onus in respect of the “common control or direction” and “associated or related activities” prerequisites should be added.

Finally, sections 34.1, 52(4.1), 52(4.2) and 53.1, directed as they are at preventing successful organizing in the construction industry, are integrally connected to the same anti-union agenda that motivates the legitimization of double breasting. They are almost certainly unconstitutional in any event, and should be promptly repealed.