FIRST REPORT

OF THE

STANDING COMMITTEE ON LAW AMENDMENTS

Second Session

Fifty-sixth Legislative Assembly

of the

Province of New Brunswick

May 28, 2008

MEMBERS OF THE COMMITTEE	
Hon. Mr. Burke, Q.C., Chair	Mr. Brewer
Mr. Kennedy, Vice-Chair	Mr. C. Landry
Ms. Lavoie	Mr. MacDonald
Mr. B. LeBlanc	Mr. Urquhart
Mr. Fraser	

May 28, 2008

To The Honourable
The Legislative Assembly of
The Province of New Brunswick

Mr. Speaker:

I have the pleasure to present herewith the First Report of the Standing Committee on Law Amendments.

The Report is the result of your Committee's deliberations on Bill 60, *An Act to Amend the Industrial Relations Act*, which was introduced during the First Session of the Fifty-sixth Legislative Assembly and referred to your Committee for consideration.

The Report outlines your Committee's recommendations with respect to the issue of introducing common employer provisions into the *Industrial Relations Act* of New Brunswick.

On behalf of the Committee, I wish to thank the many presenters who appeared at the public hearings, those individuals and organizations who submitted written briefs, and, specifically, Mr. Dennis Browne, Q.C. who assisted the Committee in its deliberations.

In addition, I would like to express my appreciation to the members of the Committee for their contribution in carrying out our mandate.

And your Committee begs leave to make a further report.

I move, seconded by the Member for Victoria-Tobique, that the report be concurred in by the House.

Respectfully submitted,

Hon. Thomas J. Burke, Q.C.
Chair

May 28, 2008

To The Honourable
The Legislative Assembly of
The Province of New Brunswick

Mr. Speaker:

Your Standing Committee on Law Amendments begs leave to submit this, their First Report of the Session.

On May 9, 2007, during the First Session of the Fifty-sixth Legislative Assembly, Bill 60, *An Act to Amend the Industrial Relations Act*, was introduced by Mrs. Blaney, the Member for Rothesay. The intent of the Bill is to introduce common employer provisions into the *Industrial Relations Act*.

On May 10, 2007, by resolution of the House, Bill 60 was referred to the Standing Committee on Law Amendments. This resolution is the order of reference and forms the basis of this Report.

On June 6, 2007, your Committee met and determined that members of the public should be invited to provide input and advice to the Committee with respect to the issues raised by Bill 60. Accordingly, public hearings were held on October 17, 2007, in the Legislative Council Chamber. A total of 13 written submissions were received by your Committee. Your Committee also met with representatives from the Department of Post-Secondary Education, Training and Labour. On November 6, 2007, your Committee met to review the submissions received.

On April 3, 2008, your Committee engaged the professional services of Mr. Dennis Browne, Q.C. of Browne Fitzgerald Morgan & Avis, who is a mediator, arbitrator, and former Chair of the Newfoundland Labour Relations Board, to assist the Committee in its deliberations.

Your Committee wishes to note that Bill 60 has since died on the Order and Notice Paper as the First Session of the Fifty-sixth Legislature was prorogued on July 6, 2007. Nonetheless, the mandate of your Committee to review the subject matter of the Bill remains in effect. Your Committee is pleased to offer its recommendations.

Your Committee expresses appreciation to the presenters who appeared at the public hearings and to those individuals and organizations who submitted written briefs.

EXECUTIVE SUMMARY

Your Committee strongly believes in the preservation of bargaining rights as negotiated in collective bargaining agreements. Your Committee acknowledges that some employers in the construction industry, referred to as "elusive employers", have attempted to circumvent collective bargaining agreements with their employees by creating non-union entities. Your Committee finds that this practice is detrimental to the collective bargaining process and the benefits it provides to New Brunswickers. Your Committee also finds that the *Industrial Relations Act* of New Brunswick does not currently contain an adequate mechanism to address this practice.

Your Committee supports in principle the intent of Bill 60, which is the introduction of common employer provisions into the *Industrial Relations Act*. The common employer provisions would provide the Labour and Employment Board with the power to determine whether an employer established a new business entity for legitimate business purposes or solely to avoid their obligations to a union under a collective bargaining agreement.

Your Committee does not recommend the enactment of Bill 60 in its current form. Your Committee is in agreement that the Bill requires certain revisions to more adequately address the needs of the construction industry. Your Committee supports the approach taken in the *Labour Relations Act* of Newfoundland and Labrador.

Therefore, your Committee recommends that the government consider the advisability of amending the *Industrial Relations Act* to introduce common employer provisions that address the practice of double breasting by an elusive employer who creates a new business entity with the intent of avoiding their obligations under an existing collective bargaining agreement.

SUMMARY OF FINDINGS

Your Committee has reviewed the provisions of Bill 60 and considered the written submissions received and the presentations made at the public hearings. As a result of its review, your Committee has determined that the following issues should be addressed: Defining the Issues; Construction Industry in New Brunswick; Collective Bargaining and the Practice of Double Breasting; Benefits of Bill 60 and Common Employer Legislation; and Concerns with Bill 60 and Common Employer Legislation.

I. Defining the Issues

Bill 60 amends the *Industrial Relations Act* and introduces common employer provisions which provide the Labour and Employment Board, where in its opinion related businesses are carried on by more than one entity under common control, with the power to treat the entities as one employer. Bill 60 amends section 1 of the Act, which, respondents submitted, has the effect of applying to all of the industries subject to the *Industrial Relations Act*. Your Committee agrees with this assessment, and for the purposes of this Report, your Committee wishes to limit its comments and recommendations to the construction industry, given that all of the respondents were either representatives of employers or employees in that particular industry.

Throughout the public consultation process, your Committee was provided with various definitions

of the terms “double breasting” and “elusive employer”, neither of which is defined in the *Industrial Relations Act*. It appears that representatives of the employers have one perspective on the practice, while representatives of the employees have another. The employer respondents submitted that the practice of double breasting involves the operation of related business entities under common ownership in the construction industry, one entity being unionized, while the other is not. The employer respondents further submitted that this is often a legitimate business tool to take advantage of different markets in the construction industry.

The employee respondents agreed that the practice of double breasting involves the operation of related business entities under common ownership in the construction industry, one entity being unionized, while the other is not. Employee respondents further submitted that this practice, as defined, includes the intent to avoid the obligations of an existing collective bargaining agreement, meaning, the practice occurs when a business entity is unionize and the employer creates a new entity for the specific purpose of avoiding their obligations under an existing collective bargaining agreement.

For the purposes of this Report, and in the interest of clarification, your Committee wishes to define “double breasting” to have occurred when an employer operates related or parallel business entities under common ownership and control within the construction industry and one entity is unionized, subject to the obligations of a collective bargaining agreement, while the other is not. In addition, your Committee wishes to define an “elusive employer” as one who practices double breasting with the specific intent of avoiding their obligations under an existing collective bargaining agreement. In the opinion of your Committee, this would be an illegitimate form of double breasting.

II. Construction Industry in New Brunswick

All respondents agreed that the construction industry is a vital component to the economy of New Brunswick. Respondents submitted that the industrial sector of the construction industry is predominantly unionized, while the commercial, residential, institutional, and road building sectors are generally not unionized (it was suggested that 85% of these sectors are not unionized.) Respondents noted the economy of New Brunswick is small compared to other jurisdictions and the construction industry is cyclical in nature, so many employers rely on smaller projects, such as non-union residential projects, to sustain their businesses until the larger industrial unionized projects become available. In addition, respondents submitted that employees in the non-union sectors generally receive lower wages and lesser benefits than their union counterparts working in the industrial sector.

Respondents submitted that the practice of double breasting usually occurs in the construction industry where businesses have low start up costs, project based operations, and minimal capital infrastructure. It was submitted that unionized employees in other industries are not generally affected by the practice.

III. Collective Bargaining and the Practice of Double Breasting

Employee respondents submitted that collective bargaining is a public good that gives employees a voice, contributes to economic vitality with higher wages, greater purchasing power, and better

living standards for employees. Employee respondents advised the Committee of the important stabilizing effect collective bargaining has on the construction industry. It was submitted that collective bargaining induces employers to compete on a level playing field and to be more efficient and productive, instead of cutting wages, or engaging in unscrupulous business practices to lower costs. In addition, it was submitted by employee respondents that collective bargaining helps maintain a pool of skilled workers that employers can draw upon to meet the variable demands of the industry, and it allows the industry to replenish that pool through training and apprenticeship programs. Respondents noted that New Brunswick relies on the construction industry to provide the vast majority of apprenticeship training to young workers. Employee respondents also noted the high risk of injury in the construction industry and suggested that collective bargaining and a stabile industry leads to better health and safety programs, and less reliance on worker compensation systems.

Your Committee also heard from employer respondents who operate in the non-union sectors without collective bargaining and who submitted that they place great emphasis on training and safety, employ the majority of apprentices in the industry, and provide competitive wages and affordable benefit programs as well.

Employee respondents submitted that collective bargaining leads to equality in bargaining power, which is often undermined by the practice of double breasting by an elusive employer, in that it negates the purpose of labour relations by allowing an employer to disregard their obligations. Employee respondents noted the fiercely competitive nature of the industry, its vulnerability to conflict, and its natural boom and bust cycles that exert pressure on employers to cut costs. These factors, it was submitted, may give an elusive employer the incentive to practice double breasting with the intent of circumventing their obligations under a collective bargaining agreement.

Employee respondents submitted that there are wide-reaching economic and social consequences of double breasting by an elusive employer. It was submitted that this form of double breasting decreases wages and benefit coverage, weakens apprenticeship programs, erodes the foundation for labour and management co-operation, undermines the trust and fairness in labour relations, and decreases productivity and construction quality. Respondents also noted the costly litigation and work stoppages that often result when there is an inequality of bargaining power. Your Committee was also informed of numerous situations where as soon as a business entity was certified, it would then spin off into a non-unionized entity, leaving those employees who endured the certification process left wondering about their future employment.

Employer respondents submitted that they have the right, as recognized by the Labour and Employment Board, to operate business entities in both the union and non-union sectors of the construction industry. They submitted that parallel union and non-union entities are only objectionable when their purpose is to undermine established bargaining rights.

Employer respondents submitted that the practice of double breasting is necessary to allow employers to compete in traditionally non-union sectors, where unions may be unwilling to negotiate fair terms or unable to supply adequate labour. Respondents noted that there is a greater volume of

non-union work, compared to union work, available in the province. In addition, it was submitted that double breasting provides employers with the ability to retain and advance better performing employees within their business. It was also submitted that being competitive in multiple sectors keeps more tradespeople employed, for longer periods of time, and that the legitimate practice of double breasting keeps costs low in the non-unionized construction sectors to the benefit of consumers. It was submitted by employee respondents that any savings by an elusive employer as a result of a decrease in construction costs are captured by the employer, not the consumer.

IV. Benefits of Bill 60 and Common Employer Legislation

Employee respondents were in favour of the intent of Bill 60, which, in their opinion, is to preserve, not create or expand, bargaining rights. Employee respondents noted that pursuant to the Bill, the Labour and Employment Board will always maintain the discretion not to grant certification where it considers an applicant union is misusing the common employer provisions. It was submitted that Bill 60 simply re-enforces and preserves the constitutionally protected right of an employee to join a union and the collective bargaining process. The Bill provides the Board with the powers to protect that right.

Respondents agreed that every Canadian jurisdiction, except New Brunswick, has conferred upon its Labour and Employment Board the discretionary power to deem clearly related business entities as a "common employer" if they have common ownership, are under common management, and engage in substantially the same business. Employee respondents advised the Committee that the Supreme Court of Canada, in the *Lester* decision, stated that unless there is explicit statutory authority, a Board can not make a common employer finding. Thus, it was submitted, legislation is necessary. In addition, the Supreme Court also stated a common employer determination can only be made if there is a labour relations purpose, which, it was submitted, does not prevent an employer from establishing multiple business entities, both union and non-union, in the construction industry for legitimate business reasons.

Employee respondents submitted Bill 60 simply restores what the Labour and Employment Board was practicing prior to the *Lester* decision. The Bill allows the Board to "pierce the corporate veil" in order to determine the intent of the double breasting. The Bill allows the Board to look behind the corporate structure and analyze the actual employment relationship. If the employment relationship has been adversely affected for labour relations purposes, and not for commercial or business purposes, then the employees' rights under a collective bargaining agreement can be protected.

Employee respondents noted the Bill is modeled after the Ontario common employer legislation, which, it was submitted, is beneficial as the New Brunswick *Industrial Relations Act* is modeled after the Ontario legislation as well. Thus, any existing Ontario case law would be pertinent and relevant to the New Brunswick Labour and Employment Board when it comes time to interpret the common employer provisions.

Employee respondents submitted that the intent of Bill 60 to eliminate the practice of double breasting by an elusive employer will restore fairness, balance, and stability in the industry; reduce

tension and conflict; minimize workplace accidents and workers compensation costs; decrease the negative effects of an underground economy; enhance the supply of skilled labour; preserve the quality of construction; and maintain competitive construction costs.

Employee respondents further submitted that the practice of double breasting by an elusive employer is resulting in the exodus of tradespeople from New Brunswick and suggested the Bill would encourage skilled workers to remain in the province. It should be noted that employer respondents suggested there is no evidence to substantiate this claim. Employee respondents also noted that since New Brunswick is the only province without common employer legislation, that puts the province at a disadvantage in labour recruitment and retention. There is a labour shortage in the province among tradespeople and the province needs to create an environment that increases productivity and competitiveness. Employee respondents submitted that not allowing an employer to circumvent their obligations sends the message that the province is serious about having labour market standards that are comparable with the rest of Canada.

V. Concerns with Bill 60 and Common Employer Legislation

Employer respondents acknowledged that New Brunswick is the only province without common employer legislation, but submitted that the province is unique and requires legislation that addresses its specific needs. Most employer respondents agreed that the problem of an elusive employer does exist in the construction industry, however, employer respondents believed that Bill 60 should be more specific to the elusive employer issue. It was submitted that the Bill does not differentiate between common ownership, and common ownership for the purpose of undermining a bargaining relationship. Employer respondents submitted that Bill 60 is too broadly worded and has the potential to interfere with their right to operate business entities in both the union and non-union sectors of the construction industry. They suggested the Bill should clearly state the Labour and Employment Board can only make a common employer determination if the intent of establishing another business entity was to avoid obligations under a collective bargaining agreement. Common ownership, except for the purpose of nullifying an agreement, is a legitimate and appropriate occurrence in the construction industry and the Bill should differentiate between the two practices. Respondents noted that many employers operate legitimate businesses in the industrial, unionized sector, as well as the commercial and residential non-unionized sectors.

Employer respondents submitted there is no clear instruction to the Labour and Employment Board as to what factors should be present in order to make a common employer determination. These respondents cited the Newfoundland and Labrador *Labour Relations Act*, which specifically requires a "labour relations purpose" to be present and only allows the Board to make a common employer determination if it is necessary to preserve bargaining rights from infringement or to prevent an employer from avoiding the Act. It is important to note that some employee respondents were also supportive of the additional language found in the Newfoundland and Labrador Act, while other respondents felt it was not necessary as the language is based on case law from other jurisdictions that the New Brunswick Labour and Employment Board would be guided by, regardless of whether the specific language is found in the New Brunswick Act.

Respondents also noted that the Newfoundland and Labrador legislation grandfathered existing

business entities created prior to its enactment. It was suggested that any common employer legislation in New Brunswick should do the same.

Some employer respondents submitted that the New Brunswick *Industrial Relations Act* already addresses the practice of double breasting by an elusive employer. Respondents noted the following mechanisms: successorship declaration; unfair labour practice complaint; and reconsideration of accreditation orders. In addition, respondents noted that unions have the opportunity to negotiate anti-double breasting provisions into collective bargaining agreements. Employee respondents disputed this claim and submitted that these mechanisms do not adequately address the practice of double breasting by an elusive employer, specifically, that successor rights are only applicable if there is a sale or transfer of a business. Common ownership between two business entities is insufficient to obtain a successorship declaration. In addition, employee respondents submitted an unfair labour practice complaint is also an insufficient mechanism, as it is generally used during the certification process to establish an employer did not make a reasonable effort to reach a collective agreement and is not designed to address the practice of double breasting. Employee respondents also submitted that if a remedy already exists, then there should be no opposition to further legislation clarifying the rights of employees. Finally, a representative from the New Brunswick Labour and Employment Board acknowledged there is a problem with the mechanisms available to employees under the existing legislation, but would not speculate on the significance of the problem.

Employer respondents were concerned that the common employer provisions would be abused to expand bargaining rights to legitimate non-union business entities. Respondents suggested that employers would no longer be able to compete in the non-union sectors and, accordingly, jobs would be lost. Thus, it was submitted, certification could be forced upon employees, without consultation, to their detriment. In addition, some employer respondents, who operate in the non-union sectors, stated they may no longer be interested in entering the union sector for fear it would result in the certification of their non-union business. However, your Committee was advised that the history in other jurisdictions demonstrates that common employer provisions have generally been used as a shield, not a sword, meaning to preserve, not expand, bargaining rights. In addition, it was submitted that similar legislation in other jurisdictions did not result in abuse, or a high volume of applications.

Employer respondents submitted that the Bill unfairly targets employers who wish to operate in both the unionized and non-unionized sectors of the construction industry, while ignoring the employees who decide to work both union and non-union jobs, free from interference. The construction industry is mobile by its nature, as employees seek out the best opportunities for work and adequate wages, and the employer respondents submitted they should be able to maintain their right to operate in both union and non-union sectors as well. In response to this submission, employee respondents submitted that the Bill does not prohibit employers from establishing both union and non-union business entities for legitimate business reasons, and suggested that most employees would prefer to work in a unionized sector for better wages and benefits.

Employer respondents submitted that Bill 60 is an overreaction to a problem that rarely occurs in

the industry, given the low number of common employer complaints. They also submitted that the Bill was introduced prematurely before the extent of the problem is known and the impact of the legislation on the industry is determined. Employee respondents suggested that there is a low number of common employer applications because the mechanism does not exist in New Brunswick. Employee respondents also submitted to the Committee a list of 47 companies who they believe are elusive employers practicing double breasting, although many of these companies refuted this claim.

Employer respondents submitted that before any amendments are made to the *Industrial Relations Act*, representatives of the employers and employees should reach a consensus on those changes, which did not occur for Bill 60. They submitted industry consensus is crucial and government has always been reluctant in the past to make changes to the Act without it. It was submitted a change to the labour laws of the province for political reasons, without negotiation and consensus, would be a complete departure from the successful labour relations of the past. Respondents credited the consensus model and the tradition of developing "in house" solutions among the stakeholders, as the reason for stabile labour relations in the province for the past 30 years. It should be noted that employer respondents did not favour the application of a deadline for reaching a consensus, for fear it would impede negotiation.

On the issue of consensus, employee respondents submitted that double breasting by elusive employers has been a long standing issue, there is no obvious middle ground, the opportunity for consensus has past, and it is time for the government to take action to address the issue through common employer legislation. Employee respondents also suggested the reason the province has stabile labour relations is the willingness of the unions to agree to long term agreements, and their willingness to allow certain projects to use both union and non-union employees in the hope of demonstrating to employers that the union employees have superior training and skills.

RECOMMENDATIONS

Your Committee gave serious consideration to the advice and input received through the public consultation process and provided by Mr. Dennis Browne, Q.C. Your Committee strongly supports and encourages collective bargaining and the principle of fair wages for all employees. Your Committee also strongly believes in the preservation of bargaining rights as negotiated in collective bargaining agreements. Your Committee supports the right of employers and employees to operate in both union and non-union sectors of the construction industry, as long as they do so without undermining any obligations under an existing collective bargaining agreement. Your Committee acknowledges that some employers in the construction industry, referred to as "elusive employers", have attempted to circumvent collective bargaining agreements with their employees by creating non-union entities. Your Committee finds that this practice is detrimental to the collective bargaining process and the benefits it provides to New Brunswickers. Your Committee also finds that the *Industrial Relations Act* does not currently contain an adequate mechanism to address this practice. Your Committee finds that the implementation of appropriate common employer legislation would address this issue and would not limit the rights of employers to operate business entities, for legitimate reasons, in both the union and non-union sectors of the construction industry.

Your Committee supports in principle the intent of Bill 60, which is the introduction of common employer provisions into the *Industrial Relations Act*, however, your Committee does not recommend the enactment of the Bill in its current form. Your Committee is in agreement that the Bill requires certain revisions to more adequately address the needs of the construction industry.

Your Committee supports the approach taken in the *Labour Relations Act* of Newfoundland and Labrador, which requires a labour relations purpose to be present and allows the Board to make a common employer determination if it is necessary to preserve bargaining rights from infringement. Your Committee also finds that consideration should be given to enacting legislation which grandfathers existing business entities.

Your Committee therefore recommends that Bill 60, *An Act to Amend the Industrial Relations Act,* not be proceeded with at this time.

Your Committee further recommends that the Legislative Assembly urge the government to consider the advisability of amending the *Industrial Relations Act* to introduce common employer provisions that address the practice of double breasting by an elusive employer who creates a new business entity with the intent of avoiding their obligations under an existing collective bargaining agreement.