Serving the Public Interest:
Preventing Double-Breasting in the Construction Industry

Testimony Respectfully Submitted to the Standing Committee on Law Amendments
New Brunswick, Canada
October 17, 2007

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Introduction and Overview:

Thank you for the opportunity to offer public testimony concerning legislative remedies for the problem of double-breasting in the construction industry. My remarks reflect a U.S. perspective on the issues before the Standing Committee.

My name is Jeff Grabelsky. I am the Director of Cornell University's Construction Industry Program and have served in that capacity for seventeen years. Our program provides training and education services, and research and technical assistance to practitioners in the construction industry. Over 300,000 individuals across North America have participated in our programs.

I have been a member of the International Brotherhood of Electrical Workers (IBEW) for thirty years and served as the national organizing director of the Building and Construction Trades Department of the AFL-CIO. After September 11, 2001, I represented the Building and Construction Trades Council of Greater New York on the World Trade Center Emergency Project Labor-Management Partnership addressing health and safety issues at Ground Zero. After Hurricane Katrina, I helped plan the Gulf Coast Workforce Development Project to assist with regional reconstruction.

I received my BA in political science from the University of Michigan, my MA in labor history from the Maxwell School of Citizenship at Syracuse University, my MS in industrial and labor relations from Cornell University, and my journeyman classification from the IBEW.

In the interests of full disclosure, let me make clear at the outset that I am not a neutral observer. Rather, I am both a beneficiary and advocate of collective bargaining in the construction industry. My remarks are informed by own personal experience as well as my professional work. I believe that collective bargaining is a public good and that double-breasting is a public problem precisely because it undermines collective bargaining.

In the United States, we sometimes think that anyone who comes from over fifty miles away, wears a tie, and carries a briefcase is an expert. I know you set higher standards here in Canada. So let me begin with a disclaimer: I am not a legal expert on double-breasting and will not comment on the substantive details of Bill 60 or any other legislative remedy you may consider in confronting the problem of double-breasting in the construction industry. Rather, my remarks will be contextual in nature and will address three key questions:

First, why is it in the public interest to support and sustain a stable system of collective bargaining in the construction industry?

Second, how does the practice of double-breasting undermine the stability of collective bargaining in the construction industry?

Third, how has the problem of double-breasting been addressed, rather inadequately, in the United States?

Why is it in the public interest to support and sustain a stable system of collective bargaining in the construction industry?

In every industrial democracy, collective bargaining serves a vital public interest in the economy and society.

When the right to organize and bargain collectively was established for private sector workers in the United States in 1935, our economy was in the grip of a severe depression. At that time, our elected leaders recognized that (quoting from the enabling legislation) "The inequality of bargaining power between employees . . . and employers . . . tends to aggravate recurrent business depressions, by depressing wages rates and the purchasing power of wage earners." In order to promote economic growth and to protect the public interest, the framers of our modern system of labor relations wrote, rather unambiguously: "It is declared hereby to be the policy of the United States . . . to encourage[e] the practice . . . of collective bargaining." (NLRA, 1935)

The wisdom of these political leaders was revealed in the decades that followed World War II. In the 1950's and 1960's, when over 25% of the workforce was unionized, living standards rose more dramatically than during any other period in U.S. history. Union members enjoyed the direct benefits of collective bargaining and non-union workers were uplifted by the union wage effect. During those years, American workers had sufficient bargaining power to win a fair share of an increasingly productive economy. Between 1947 and 1973, productivity doubled and so did the real value of average wages. But from 1973 to the present, while productivity has increased by 67%, average wages have risen by only 15%. Why? Since the early 1970s, union density and membership have steadily declined in the United States. Today, only 12.5% of the total workforce and only 7.9% of the private sector workforce are unionized. As a consequence, U.S. workers have lost bargaining power and wages have stagnated.

So, the intended outcome of our National Labor Relations Act – to raise living standards and stimulate the economy by promoting the practice of collective bargaining – was achieved only when a stable system of collective bargaining was supported and sustained. Once our national commitment to collective bargaining weakened and unionization declined, those intended outcomes became more elusive.

While collective bargaining clearly serves a public interest in the larger society and economy, it plays an even more critical role in the construction industry. Construction is one of the most important and least understood sectors of our economy. In the United States, construction is a one trillion dollar industry, a solid barometer of general economic performance, and the only goods-producing sector that continues to post job growth. In construction, collective bargaining provides a stabilizing infrastructure for an industry that has fiercely competitive, even chaotic dynamics. In three essential ways, collective bargaining plays a vital function in the construction industry: one, inducing contractors to compete constructively on a level playing field; two, maintaining and dispatching a pool of skilled workers to employers that have a variable demand for such labor; and, three, training and replenishing the human capital upon which the industry depends. Let me briefly elaborate on each one of these important functions.

First, collective bargaining induces contractors to compete constructively on a level playing field. As you know, construction is a contract industry in which employers competitively bid on projects. In a highly unionized market, where contractors are bound by the same terms and conditions of an area standard agreement, each competitor plays by the same rules and pays essentially the same costs for labor, equipment and materials. How, then, does one contractor out-compete another? Those employers who engage in progressive human resource management induce their employees to be more productive. Those employers who maintain and provide their employees with state-of-the-art equipment achieve greater competitiveness. Those employers who deliver the right materials to the job at the right time suffer fewer construction delays. Those employers who exhibit uncanny business acumen seize opportunities than average contractors may miss.

In short, in densely unionized markets, contractors compete in ways that encourage the cream to rise to the top and ensure that the best-value buildings are constructed in those markets. Construction users and customers, including governmental entities and the general public, are thus the principal beneficiaries of a stable system of collective bargaining. Coming from a strong union city like New York, I can say we have enjoyed the fruits of this kind of constructive competition that has built one of the most complex and magnificent skylines in the world.

But when unions are driven to the margins and are unable to impose this kind of level playing field on a construction market, what kind of competition emerges? Unfortunately, without the regulatory infrastructure of collective bargaining, in a nonunion market one contractor out-competes another by cutting corners, ignoring regulations, violating codes, abandoning specifications. The business practices that have

become increasingly common in the growing underground economy – misclassifying employees as independent contractors, cheating on wage and hour laws, disregarding health and safety standards – are infecting de-unionized markets and are punishing all legitimate contractors in those markets, union and non-union, alike. Sadly, without the benefits of a stable collective bargaining system, it is not the cream that rises to the top, it is the . . . well, use your imagination. In that event, construction users and customers, including the general public, are the principal victims.

Second, collective bargaining plays a critical role in maintaining and dispatching a pool of skilled workers to contractors in the industry. Given the ebbs and flows of the industry, employers have a variable demand for skilled labor. Few contractors have the resources to maintain an internal workforce of sufficient size to meet their labor needs during peak demand. Building trades unions have historically recruited and dispatched skilled craftsmen to contractors when they needed such workers and have thus removed the worry and burden of employers who would not bid on projects without the confidence that they could secure employees if they won the work. In de-unionized construction markets, nonunion contractors often find themselves scrambling to meet their labor needs.

Third, union-based apprenticeship programs, funded through collective bargaining, play a critical role in replenishing the human capital pool of the industry. Construction has a seemingly inescapable reliance on skilled crafts. Individual contractors generally lack the resources and will to invest in training. Moreover, given the transient nature of employment, it is not unreasonable for individual employers to refrain from training current employees who may go to work for competing contractors in the future. A stable system of collective bargaining compels all signatory contractors to invest in industry-wide training. In the U.S., where less than 20% of the industry is unionized, union-based apprenticeship programs still account for about 90% of the training.

Unfortunately, a shrinking portion of the U.S. construction industry enjoys these benefits offered by a stable system of collective bargaining. Since 1973, construction union membership in the U.S. has declined from 1.6 to 1 million, while construction employment has increased from 4.1 to 8.4 million. During that period, construction union density declined from 39.5% to below 14%. As a consequence, standards in the industry have eroded. For example, average construction wages have declined by about 25% in last two decades. It has become more difficult to attract and retain skilled workers in the industry and labor shortages have become increasingly common and especially severe in regions of our country where the system of collective bargaining is weakest. And, the unscrupulous business practices that were once primarily the province of our underground economy have contaminated construction markets where building trades unions have been marginalized.

There are a number of factors that have contributed to the long-term trend of declining unionization in the U.S. construction industry. I would like to discuss one contributing factor: the proliferation of double-breasting. That leads to second question I will address.

How does the practice of double-breasting undermine the stability of collective bargaining in the construction industry?

Ten years ago, at the Industrial Relations Research Association's annual conference, Jerome Barret, a former official of our Federal Mediation and Conciliation Service, reflected on the range of factors that had contributed to the decline of union membership and collective bargaining. Few construction industry experts were surprised when he included double-breasting on his list. He was, of course, referring to the increasingly common practice of employers operating one company pursuant to a collective bargaining agreement and another company as a non-union entity. This practice enables contractors to build union where it is advantageous or necessary to do so, while at the same time to operate nonunion where it is advantageous and possible to do so.

The statutory framework for collective bargaining in the U.S. is silent on the issue of double-breasting. The case law on the issue has a long and tangled history. The seminal Kiewit case was decided by the U.S. Supreme Court in 1977. Peter Kiewit Sons' Co. ("Kiewit") and South Prairie Construction Co. ("South Prairie") were wholly owned subsidiaries of Peter Kiewit Sons' Inc. Kiewit operated as a union firm, signatory to a collective bargaining agreement with the International Union of Operating Engineers. South Prairie operated nonunion in the same Midwestern markets as Kiewit. The union filed an unfair labor practice charge with the National Labor Relations Board, arguing that South Prairie was obligated to recognize and honor the Kiewit collective bargaining agreement. The Board rejected that claim, the Court of Appeals overturned the Board and found that Kiewit and South Prairie were a "single employer" and the Supreme Court ruled that the lower court had exceeded its authority and remanded the case back to the Board, which dismissed the union's complaint and allowed South Prairie to continue to operate nonunion. In the process, four factors were established to determine if two double-breasted firms were legally a single employer: interrelation of operations, common management, common ownership, and, most importantly, centralized control of labor relations.

There were many subsequent cases that followed Kiewit and examined whether double-breasted firms were single employers, single bargaining units or alter egos. These involved different legal factors, standards and degrees of difficulty in establishing whether or not a double-breasted firm represented an unlawful ploy on the part of a unionized contractor to escape the obligations of a collective bargaining agreement and evade its responsibilities under our National Labor Relations Act. (One of the points I will make momentarily is that the lack of clarity in the legislation seems to have fueled an endless stream of Board disputes and court cases.)

My key point here is that the Kiewit decision in 1977 opened the flood gates and led growing numbers of major contractors to double-breast. In 1983, just five years after Kiewit was decided, 44% of the 50 largest contractors in the U.S. were double-breasted (Steven Allen).

But the immediate question I am addressing is how the practice of double-breasting undermines the stability of collective bargaining in the construction industry. The simple answer is that it is not exceedingly difficult for a unionized contractor to operate a double-breasted nonunion firm and, given the increasingly intense competitive pressures to cut labor costs (given rising land and material costs), employers have a strong incentive to double-breast. To the extent unionized contractors have pursued that business strategy, how has it impacted the system of collective bargaining in the construction industry?

In 1995, Steven G. Allen, a labor economist at North Carolina State University, conducted an econometric study to examine three potential causes of the decline of collective bargaining in the construction industry: increased union costs relative to the open shop, reduced coverage by prevailing wage laws, and expanded double-breasting following the 1977 Kiewit decision. Without me explaining how he conducted his research and controlled for other factors, let me say that his findings indicated that the most plausible explanation for the decline of collective bargaining in the 1980s was double-breasting. Controlling for the other factors, Allen predicted that union density should have risen by 2.4% after 1977 as the relative costs of union construction fell. However, because of Kiewit and the proliferation of double-breasting, collective bargaining coverage actually declined by 14%.

Collective bargaining is a public good that is undermined by the practice of double-breasting. As I have already indicated, destabilizing the system of collective bargaining has had profound consequences for construction users, workers, unions, customers and the general public. This leads to the third question I wish to address.

How has the problem of double-breasting been addressed, rather inadequately, in the United States?

As a growing number of unionized contractors pursued the double-breasting option in the post-Kiewit years, there was rising concern among those industry practitioners who were committed to collective bargaining. While some states may have been inclined to address the double-breasting problem, they were pre-empted from doing so under federal law. By 1986, 80% of the top 25 contractors in the U.S. were double-breasted (Stuart Schulman). The next year, legislation was introduced in the United States Congress to substantially change the law and proscribe the practice of double-breasting.

The House version of the proposed legislation was "A bill to amend the National Labor Relations Act to increase the stability of collective bargaining in the building and construction industry." Its most important provision would have added the following language to the NLRA: "In the construction industry, any two or more business entities performing or otherwise conducting or supervising the same or similar work, in the same or in different geographical areas, and having directly or indirectly (a) substantial common ownership; (b) common management; or (c) common control; shall be deemed a single employer." The law would have extended collective bargaining coverage to the non- union side of a double-breasted unionized employer.

Unfortunately, although HR 281 passed the House of Representatives, its companion S 492 failed in the Senate. Since that time there has been no successful effort to resolve the problem of double-breasting with federal legislation.

The failure to find an effective legislative remedy has meant a continuing lack of clarity about the issue of double-breasting. The unfortunate consequence has been growing instability in bargaining relationships and costly conflicts at the National Labor Relations Board and the courts. Unions have been left to their own devices when they suspect that a signatory contractor has established a non-union firm to unlawfully evade their obligations under a collective bargaining agreement. In those cases, the union can either file an unfair labor practice charge alleging that the employer is unlawfully refusing to bargain (8a5), strike if the employer continues to refuse to bargain, or sue and/or seek arbitration (301) claiming that the employer is violating the collective bargaining agreement by employing non-union workers, contrary to the union security clause.

Each of these alternatives carries costs and risks, not the least of which is poisoning what could have been a constructive bargaining relationship. For example, one case involved twelve costly years of litigation that began when Nor-Cal Plumbing Inc., a unionized contractor, pursued the double-breasting option and opened up a non-union firm. The union trust funds sued the company, claiming that the non-union operation was actually an alter ego set up by Nor-Cal to evade its obligations under the collective bargaining agreement. Ultimately, the U.S. Court of Appeals for the Ninth Circuit ruled against the company and affirmed a $1.8 million verdict to the union funds. Had there been the kind of legislation you are contemplating – legislation that would remove confusion and doubt about the legality of double-breasting – this costly case would never have been initiated.

Just this year, the Road Sprinkler Fitters Union Local 669 engaged in a nationwide strike against contractors represented by the National Fire Sprinkler Association that idled 11,000 workers. One of the key issues in the strike was double-breasting. Bradley M. Karbowsky, business manager of Local 669, asserted that the union needed to protect its market share from "the devastating effects" of double-breasting and that greater restrictions were needed to prohibit contractors from engaging in the practice. Had there been the kind of legislative proscriptions against double-breasting that you could enact, this costly strike might not have taken place.

Conclusion:

Collective bargaining has been and continues to be a public good that gives workers a voice at work and contributes to economic vitality and rising living standards. In the construction industry, collective bargaining provides a stabilizing infrastructure that induces contractors to compete on a level playing without resorting to cutting corners or wages or engaging in a range of unscrupulous business practices that are infecting too many markets today. A stable system of collective bargaining helps maintain a pool of skilled workers from which contractors can draw to meet their variable demand for labor. Through collectively bargained training funds, the industry can replenish its human

capital and avoid the kinds of skilled labor shortages that are endemic to de-unionized construction markets.

Double-breasting is a practice that enables unionized employers to escape the obligations of their collective bargaining agreements and to operate nonunion wherever possible. Double-breasting undermines collective bargaining and represents a significant public problem that could be effectively resolved with thoughtful legislation. I hope you will seize this opportunity to enact a good legislative remedy for a serious public problem that can and should be fixed.

Thank you.