



BY BILL STEWART

# CAUGHT IN A TIME WARP

CONSTRUCTION UNIONIZATION LAWS PRESUME THAT TRADESPEOPLE NEED THE HEAVY HAND OF GOVERNMENT AND UNIONS TO PROTECT THEIR INTERESTS. NOTHING COULD BE FURTHER FROM THE TRUTH.

**H**ISTORICALLY, CANADA'S CONSTRUCTION labour force was controlled by international craft unions. Over the past 20 years, however, the open shop approach became the predominant human resource management practice for construction, an industry employing approximately one million people and responsible for almost one-fifth of Canada's gross national product. Despite the changed landscape, policies governing how construction bargaining units are maintained remain premised on the archaic notion that tradespeople are inherently vulnerable workers requiring the heavy hand of government and craft unions to protect their interests.

Nothing could be further from the truth. In Alberta, more competitive labour markets along with high levels of capital investment are resulting in record employment levels with over 160,000 workers employed during the summer of 2003. Earnings for tradespeople – regardless of whether they are working in unionized or union-free environments – are also at record levels.

Today's skilled tradespeople are a highly sought after human resource capable of evaluating options and selecting the work environment that provides the best balance between financial, lifestyle and career opportunities. Given this, why do Alberta's certification rules continue to force tradespeople into the paternalistic embrace of traditional craft unions? Moreover, why do our labour laws remain predisposed to preserving and protecting craft union interests over the interests of individuals?

## Union Monopolies

THE CURRENT CONSTRUCTION labour relations rules were built on the "corporatist" strategies North American governments embraced following WWII. Fuelled by economic expansion, these policies followed John Kenneth Galbraith's thesis that economic and social problems could be solved through a structured balancing of interests between "big government, big business and big labour."

As economies expanded, so did the fortunes and strength of organized labour. To fulfill their manpower needs, contractors increasingly looked to the U.S.-based Building Trades Unions (BTUs) that provided hiring hall dispatch services. Interestingly, these craft unions gained virtual control over the construction industry through "top-down" organizing – by convincing executives to "voluntarily recognize" their unions. By the '60s, the BTUs controlled upwards of 70% to 80% of most North American construction markets.

This regime was never designed to promote social or economic bonds between companies and tradespeople and resulted in considerable disruption and labour unrest. As University of Toronto Professor John Crispo noted in 1968, "Unlike employers in most other industries, many contractors feel no particular obligation towards most of their workers who in turn offer no loyalty to them. These attitudes and the factors which underlie them explain many of the industry's problems."

To deal with these problems, expert technocrats devised ways to countervail the bargaining power held by construction

ILLUSTRATION BY SYLVIE BOURBONNIÈRE

unions. Contractors formed multi-employer units, more formally known as “registered” or “accredited” employers’ organizations, to bargain collectively on an industry-wide basis with the construction unions. With the trade unions being organized along rigid craft lines spanning diverse markets such as residential, commercial, institutional, industrial and heavy engineering construction, the labour relations process developed into a highly complex multi-layered, multi-party “collectivist” system. And, while these bargaining structures helped mitigate some problems, they did not alter the industry’s tempestuous labour relations environment because companies and tradespeople were further distanced from market place accountability. Operating under monopolistic labour supply conditions, the promised labour relations stability was replaced with labour strife that frequently paralyzed the industry.

### A Paradigm Shift in Thinking

AS EVIDENT IN THE following statistics, the mid-’80s recession was a cataclysmic shock for Alberta’s construction industry. When industry agreements were negotiated in 1982, building values were an unprecedented \$14.5 billion (1981). By 1984, investment plummeted to \$6.5 billion. At peak activity, the industry employed over 120,000 people. In two years, employment fell to 65,000. When unemployment soared to 30%, tradespeople had little alternative but to accept the reduced employment terms and conditions the market was more capable of absorbing. This had a devastating impact on union membership. At the peak of union strength in 1982, 111,000 union members worked in Western Canada. By 1987, union membership decreased to 71,000. By then, market shares dramatically reversed with open shop contractors completing 80% of the work.

Quickly recognizing and embracing the challenges and opportunities this new environment held were the 16 construction companies that founded the Merit Contractors Association in 1986. They believed that construction human resource practices should be based on merit principles. Rather than hiring based on placement on the hiring hall list, they felt employees should be hired according



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to factors such as individual qualifications and prior performance. Compensation was also tied to market place conditions and individual merit compared to standardized negotiated collective agreement rates. And, rather than assign work according to craft jurisdiction rules negotiated between unions at the AFL-CIO’s Building and Construction Trades Department in Washington, contractors assigned work according to whomever was legally qualified and had the appropriate skills. In accepting these fundamental tenets, they sought new human resource management practises based on developing stronger ties between individual contractors and individual tradespeople.

Even though Merit would grow to almost 900 member companies employing over 25,000 people in Alberta, various labour relations experts rejected the notion that practices focussing on individuals, more fre-

quently found in industrial settings, would work for the craft-based construction industry. They clung to the view that the project-based nature of construction employment precluded contractors and tradespeople from forming positive employer-employee relationships. This thinking prevailed when Alberta’s Labour Code was overhauled in 1988 and remains in place today.

One need look no further than the Alberta Relations Board rule dictating that all bargaining certificates be issued on a craft by craft basis. Consider that a general contractor may have crews employing skills falling within the jurisdiction of carpenters, labourers, cement masons and operating engineers unions. In Alberta, four separate bargaining certificates would be required for construction and a further four for service work. This certainly puts Alberta at odds with provinces like British Columbia that amended their rules to permit company-based employee unions and Canadian-based alternate unions such as the Christian Labour Association to obtain “all-employee” bargaining units. This is but one example of the structural bias inherent in some of Alberta’s labour rules.

Given the impact unionization has, it is important that valid processes exist to determine whether a company’s genuine employees want union representation. Yet determining these wishes is frequently confounded by institutional bias favouring unionized work settings. For example, consider how Alberta’s Labour Relations Board dealt with the possibility that two equally sized employment operations – one non-union and one union – would be merged together in 1998. The decision reads, “If one or the other of these contractual regimes must yield, we think that the policy of promoting industrial stability and minimizing employee unrest favours continuation of the collective bargaining regime and the incorporation of the non-union employees into that regime. We say this because the ensemble of employee rights achieved under a collective bargaining regime is almost invariably superior to those enjoyed under an individual contract of employment.” However, ample evidence attests that when employees are given a free and democratic opportunity to

exercise their right to choose, they will reject the paternalistic and archaic assumptions inherent in this decision.

Consider what happened at a Calgary roofing company in 1993. Relying on “stale” membership information as opposed to “fresh evidence of support” (some jurisdictions have outlawed certification applications based on union membership; rather they require direct indication of union support), the union secured an election based on the fact that 16 of 24 employees were union members. When the formal vote was held, all 24 employees voted against union certification! With outcomes like this, it is not surprising that construction unions would devise other ways to manipulate the process in their favour.

### Salt Without Savour

WHEN CERTAIN construction unions lost their labour monopolies, they developed more desperate recovery strategies. These strategies were not necessarily designed to build individual membership support. In fact, they are frequently used to simply bring more contractors and tradespeople under union control. This is evident in the organizing tactic called “salting”.

Upon learning that a non-union contractor is hiring, union agents or “salts”, apply for work in a company. Unlike other



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provinces such as British Columbia where higher thresholds (45%) of support are required, if the combined number of “salts” and union sympathizers reaches 40% in Alberta, the union may apply to have the company certified. When the construction industry’s unique employment and registration features are considered, along with the

Labour Board’s predisposition to protect construction union interests, it is easy to understand why employees and employers find salting threatening to their economic rights, freedoms and social well-being.

Consider what happened to a Calgary electrical contracting firm. In September 2000, the firm with three employees including the owner/proprietor, advertised for electricians. After being approached by the International Brotherhood of Electrical Workers (IBEW), the company naively initially hired two electricians. On the date LRB officials determined there was sufficient union support to hold a representation vote, one of the two employees referred by the IBEW left the company. That same day, a third electrician applied for and obtained work with the company. All three employees were eligible to vote on the unionization issues and the final vote favouring the IBEW was 3-2.

If the union successfully certifies the company, sometimes the “salts” will abandon the company and find employment with another non-union company expanding its workforce. This practice, called “stripping”, was used against a reputable general contractor at a major project in Edmonton.

As its manpower requirements peaked and the availability of tradespeople was particularly tight, the company – a well-known open shop contractor – advertised for

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tradespeople. After a sufficient number of “salts” were hired, the union applied to unionize the company. Immediately after filing the application during a critical construction phase, a large group of employees abandoned their jobs without notice. Despite this and the fact they obviously had no continuing interest in the company, the Labour Board ruled they were still eligible to vote in the certification election. Their additional votes resulted in the company being unionized.

On applying to the Labour Relations Board to have the salts votes disqualified, the Board ruled that, “Those employees who participated in the organizing efforts and left employ continue to have a broad, general interest in the outcome of the certification application. The success of the application impacts on their broader ability to work on union projects in the future. While these employees were no longer employed on the day of the vote, they may be generally interested in seeing this employer unionized because it creates yet another opportunity for them to be dispatched for work there in the future.”

Unlike other industrial settings where a 10-month interval from certification is permitted for the employer, employees and unions to develop a collective bargaining relationship, the current registration system binds newly certified employers and employees to a pre-existing industry-wide agreement. In all other industries, employees have the opportunity to reaffirm their choice in the union with the subsequent collective agreement ratification vote. If the employees change their mind on union representation, the agreement will typically not be ratified and a revocation of union certification may follow. In construction, both the employees with a continuing employment interest in the company and their employer lose their freedom to bargain collectively and ratify the collective bargaining agreement. While it may be argued that the certification vote serves to ratify the agreement from an employee perspective, salting undermines and confounds the democratic selection process.

Unfortunately, under current rules, em-



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ployees with a continuing attachment to a company whose interests are subverted by salting, may only seek to have a union certification revoked in the 23rd or 24th month in which the agreement is in effect. And, unlike other industries, these employees are given no opportunity to reaffirm their desire to certify the Building Trade Union. Considering that these employees are bound to an industry-wide collective agreement making it mandatory for them to become union members, subject to union disciplinary rules and dispatch procedures and required to pay union dues, a strong case can be made for allowing employees of these newly certified companies to apply to revoke the union’s certification at any time.

However, even when employees do attempt to terminate a union relationship under the current rules, they face personal exposure and procedural barriers that do not exist in certification processes. Numerous cases demonstrate the unnecessary frustration and major legal expenses employees frequently encounter when they at-

tempt to exercise what should be a fundamental legal right.

## Bias in Revocation of Certification Process

IN THEORY, DETERMINING union representation is based solely on the wishes of a majority of employees. Subject only to a 90-day period between applications, which the Labour Board may relax, employees can apply to have a union certified as their bargaining agent at virtually any time. Effectively, this ensures that employers are accountable on an ongoing basis for their workplace practices and compensation structures. Yet, there is no similar accountability required for unions. This is particularly troublesome when the union may have used questionable strategies such as salting to obtain the certification. Moreover, it seems apparent that the system is currently stacked against employees seeking to revoke a union’s certification.

That is what a majority of employees in a small southern Alberta company discovered when they decided they no longer wanted the IBEW to represent them. Though they were within the normal time period, technical issues concerning industry-wide collective bargaining stalled their application. The Labour Board ruled that these technical issues, which the employees were not really involved in and had no interest in, superseded their right to even hold an election. In denying their application, the Labour Board’s Vice-Chair wrote, “...this suggests that the wishes of the employees should prevail, which the Board has not always found to be the case. Clearly the legislature contemplated that there may be circumstances where the Board could be convinced not to revoke bargaining rights even if the employees had voted in favour and the application was timely.”

Two years later, following expensive Court of Queen’s Bench litigation, the statutory window for revoking representation reopened to coincide with a new round of industry bargaining. Despite the system, the employees finally revoked the IBEW’s certificate.

The recent case of an Edmonton electrical firm with four employees also illustrates the tremendous obstacle employees face to



meet the standards of current legislation. In 1971, the IBEW was certified to bargain on behalf of the company's employees. The company was sold in 1975 to an employee that understood he had acquired a non-union business. There was no contact between him, his employees and the union prior to him reselling the business. In fact, over the next 24 years, the business was sold and resold and continued to operate on an open shop basis. However, in 1999 the union served notice that it still considered the company to be unionized.

Following complex legal hearings, the Labour Board upheld the IBEW's application. On learning that the company would have to operate as a closed union shop, the employees initiated a revocation procedure just as the industry-wide agreement was being concluded. The IBEW contested this procedure. Almost three years later, and five years from when the issue was raised, the case is still pending!

### Time For An Update

AS IN OTHER JURISDICTIONS, Alberta's construction-related labour laws were developed to foster the formation of structured bargaining relationships between unionized employers and building trade craft unions. Following the recession of the 1980s, these structures effectively collapsed and the unionized sector no longer dominated the industry. Yet the thinking these structures were premised on remains firmly and institutionally entrenched. This is readily apparent in Alberta's Labour Code and Labour Relations Board rulings.

We live in an era where employee rights to freely join and participate in union activities must also be balanced against recent constitutionally determined corollary employee rights to be free from compelled union membership or participation in union activities. As Nobel Economics Laureate Milton Friedman noted in *Free To Choose*, "The most reliable and effective protection for most workers is provided by the existence of many employers. Competition for his services, that is the worker's real protection." Alberta's labour laws and policies need to be updated to reflect this reality. ☐

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