INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 119, Applicant v. CORNERSTONE CONTRACTORS LTD., WESTCOR SERVICES LIMITED, STEEPLEJACK INDUSTRIAL INSULATION LTD. AND BROCK CANADA INC., Respondents

LRB File No. 309-13; June 5, 2015

Chairperson, Kenneth G. Love, Q.C.; Members: Don Ewart and Maurice Werezak

For the Applicant Union:	Mr. Larry Kowalchuk and Mr. Micah Kowalchuk
For the Respondent Cornerstone Contractors Ltd.:	Mr. Larry Seiferling Q.C.
For the Respondents Westcor Services Limited, SteepleJack Industrial Insulation Ltd. and Brock Canada Inc.:	Mr. Christopher J. Lane

Sucessorship – Union claims successor rights for related company purchased by holding corporation for US parent company – Board reviews evidence related to successorship and finds no successorship

Common/Related Employer – Union claims that Canadian holding company for US parent company and two subsidiary companies are related or common employers – Section 37.3 of *The Trade Union Act* – Board reviews criteria and finds that companies could be common/related employers. On facts of this case, Board determines that common/related employer provisions would not apply as there is no "non-union" company engaged in "double breasting"

Common/Related Employer – Discretion to issue declaration - Board reviews facts of case and determines issuance of a declaration would be contrary to purpose of common/related employer provisions of *The Trade Union Act* – Additionally, the Board finds that granting of declaration would be contrary to the right of employees to be represented by trade union of their choice.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Chairperson:** The International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 (the "Union") applied to amend its certification order dated October 16, 1997 which certified the Union to bargain on behalf of employees of those employees set out in the order employed by SteepleJack Industrial Insulation Ltd. ("Steeplejack Insulation") within the Province of Saskatchewan.

[2] The Union has also applied to amend its Order dated July 12, 2004 which certified the Union as the bargaining agent for employees, as set out in the Order of Westcor Services Ltd. ("Westcor") within the Province of Saskatchewan.

[3] Alternatively, the Union sought declarations and orders that identify the successor/common employer/related employer as Steeplejack Industrial Group Inc. ("Steeplejack" or "Brock") and its subsidiaries Cornerstone Contractors Ltd., (also known as Cornerstone Industrial Ltd.) ("Cornerstone") and Westcor Services Limited ("Westcor")

[4] The filing of the application and the facts with respect to this matter arose prior to the proclamation of *The Saskatchewan Employment Act*[1]. Accordingly, the Board, with the concurrence of all parties, has heard and determined this application pursuant to the provisions of *The Trade Union Act*[2] (the "Act") and the provisions of *the Construction Industry Labour Relations Act* [3](the "*CILRA*").

[5] For the reasons which follow, the applications are dismissed.

Facts:

Relevant statutory provision:

[6] Relevant statutory provisions of the TUA are as follows:

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[1] S.S. 2013 c. S-15.1
[2] R.S.S. 1978 c.T-17
[3].S.S. 1992 c. C-29.11

37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.

37(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:

> *(a) determining whether the disposition or proposed disposition relates to a business or part of it;*
>
> *(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:*
>
> > *(i) an employee unit;*
> > *(ii) a craft unit;*
> > *(iii) a plant unit;*
> > *(iv) a subdivision of an employee unit, craft unit or plant unit; or*
> > *(v) some other unit;*
>
> *(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);*
>
> *(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);*
>
> *(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;*
>
> *(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).*
>
> *. . .*

37.3(1) On the application of an employer affected or a trade union affected, the board may declare more than one corporation , partnership, individual or association to be one employer for the purposes of this Act if, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through those corporations, partnerships, individuals or associations.

37.3(2) Subsection (1) applies only to corporations, partnerships, individuals, or associations that have common control or direction on or after October 28, 1994.

[7] Relevant statutory provisions of the CILRA are as follows:

18(1) On the application of an employer or a trade union affected, the board may declare more than one corporation, partnership, individual or association to be one unionized employer for the purposes of this Act and The Trade Union Act where, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through those corporations, partnerships, individuals or associations.
(2) Repealed. 2000, c.69, s.11.
(3) In exercising its discretion pursuant to subsection (1), the board may recognize the practice of non-unionized employers performing work through unionized subsidiaries.
(4) The effect of a declaration pursuant to subsection (1) is that the corporations, partnerships, individuals and associations:

> *(a) constitute a unionized employer in a specified trade division; and*
> *(b) are bound by a designation of a representative employers' organization*
> *pursuant to section 9.1 or 10 or by a determination of a representative*
> *employers' organization pursuant to section 10.3.*

(5) The board may make an order granting any additional relief that it considers appropriate where:

> *(a) the board makes a declaration pursuant to subsection (1); and*
> *(b) in the opinion of the board, the associated or related businesses,undertakings or activities are carried on by or through more than onecorporation, partnership, individual or association for the purpose of avoiding:*
>
> > *(i) the effect of a designation or determination of a representative employers' organization with respect to a trade division; or*
> > *(ii) a collective bargaining agreement that is in effect or that may come into effect between the representative employers' organization and a trade union.*

(6) Where the board is considering whether to grant additional relief pursuant to subsection (5), the burden of proof that the associated or related businesses, undertakings or activities are carried on by or through more than one corporation, partnership, individual or association for a purpose other than a purpose set out in subclause (5)(b)(i) or (ii) is on the corporation, partnership, individual or association.
(7) An order pursuant to subsection (5) may be made effective from a day that is not earlier than the date of the application to the board pursuant to subsection (1).

Employer's arguments:

[8] There are a number of corporations involved in this matter. Testimony and documents provided at the hearing show the following (in chronological order):

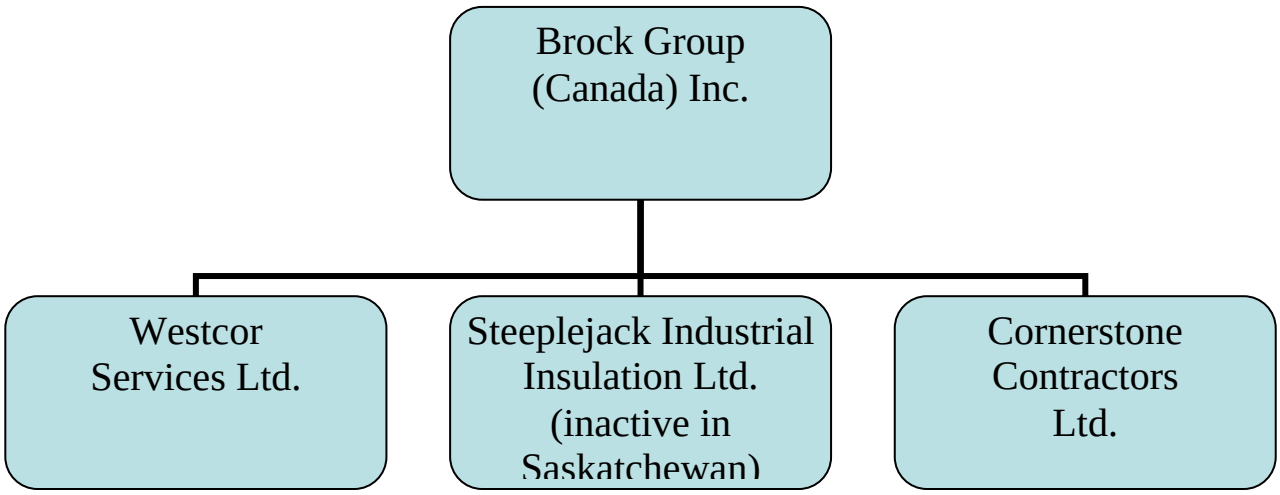
1. In October, 2007, The Brock Group, Inc., an American Company headquartered in Houston, Texas, purchased Steeplejack. Prior to the purchase, Steeplejack had been a publically listed Canadian corporation which was the parent company for numerous corporations, including Steeplejack Insulation.

2. In May, 2008, Steeplejack acquired Westcor from its owner, Mr. Willi Hamm. When Westcor was acquired by Steeplejack, Mr. Hamm was advised that he would be the sole Canadian employee of Steeplejack and would be the nominal President of all of the Steeplejack subsidiaries, including Steeplejack Insulation, Westcor, and Cornerstone.

3. In November of 2008, Steeplejack acquired Cornerstone, an Alberta Corporation incorporated under the name Cornerstone Capital Ltd. Cornerstone Capital Ltd. changed its name to Cornerstone Industrial Ltd. When registering the Corporation extra-provincially in Saskatchewan, that name was not available, so it was registered in Saskatchewan as Cornerstone Contractors Ltd.

4. Steeplejack later changed its name to Brock Canada Inc. ("Brock").

[9] As a result of the transactions listed above, the following diagram shows the ownership structure (as of the date of the hearing) of the various corporations noted above:



[10] Westcor is a unionized contractor within the Province of Saskatchewan pursuant to this Board's Order dated July 12, 2004. Steeplejack Industrial Insulation Ltd. is also a unionized contractor pursuant to this Board's order dated October 16, 1997. However, corporate searches filed by the Union show that this corporation was struck from the corporate registry in Saskatchewan. Other documents show the corporation to be active and conducting business in Alberta.

[11] Employees of Cornerstone do not have a bargaining representative certified to represent them for the purposes of collective bargaining. An application for certification was filed in respect of those employees by Construction Workers Union, Local 151 ("Local 151") on October 10, 2013. Prior to that application being processed by the Board, the Board received this application on November 5, 2013 from the Union, which the parties and the Board agreed should be determined in advance of the application by Local 151.

[12] The Board heard testimony from 3 witnesses in the course of its hearing. These were Mr. Chuck Rudder, the business manager for the Union, Mr. Joseph Brickner, the General Manager for Cornerstone, and Mr. Willi Hamm, the President and CEO of Brock, Cornerstone and Westcor. It is unnecessary to outline that testimony in any detail here, but relevant portions will be referenced in the analysis below.

Union's arguments:

[13] Counsel for the Union filed written briefs which we have reviewed and found helpful. One of the briefs related to the production of documents published on the internet which

the Union wished to enter as exhibits in the proceedings and which had not been identified by a witness. Counsel for the responding parties agreed to the entering of all of the exhibits except for excerpts from an internet site called Linkedin. In the final result, nothing turns on these Linkedin documents, which were accepted by the Board without specifically ruling on the veracity of the documents or their relevance in the proceeding.

[14] In its argument, the Union raised 3 issues. These are:

1. Whether Cornerstone is a successor under the provisions of the *Act;*
2. Alternatively, whether Cornerstone, Steeplejack Insulation., Westcor and Brock, or any of them, are common/related employers under section 37.3 of the *Act* or section 18(1) of *CILRA*;
3. If the Board finds that there are common/related employers, is there a valid labour relations purpose to reject that designation.

[15] The Union argued that the provisions of section 37.3 of the *Act* governed issue 1, but that issue 2 and 3 should be determined pursuant to section 18 of *CILRA*.

[16] In respect to its successorship argument, the Union cited these cases: *Singh (Re:)*[4]; *Monad Industrial Contructors Inc. (Re:)*[5]*; Edgewood Forest Products Inc. (Re:)*[6]*; KBR Wabi Ltd. (Re:)*[7]*; North American Construction Group Inc. (Re:)*[8]*; Vicor Mechanical Ltd. (Re:)*[9]*;* and *Big Sky Rail Corp. (Re:)*[10]

[17] In respect to its common/related employer arguments, the Union cited these cases: *Edgewood Forest Products Inc. (Re:)*[11]*; KBR Wabi Ltd. (Re:)*[12]*; North American Construction Group Inc. (Re:)*[13]*; International Brotherhood of Electrical Workers, Local 529 and*

[4] [2013] SLRBD No. 1
[5] [2013] SLRBD No 11
[6] [2013] SLRBD No. 2
[7] [2013] SLRBD No. 14
[8] [2013] SLRBD No. 23
[9] [2013] OLRD No. 4101
[10] [2014] SLRBD No. 5
[11] [2013] SLRBD No. 2
[12] [2013] SLRBD No. 14
[13] [2013] SLRBD No. 23

Merick Construction Inc.[14]*; United Steel, Paper and Forestry (Re:)*[15]*; Victor Mechanical Ltd. (Re:)*[16]*; Bur-met Contracting Ltd.*[17] and *Ganawa Co.*[18].

Is Cornerstone a successor to Westcor or Steeplejack Insulation?

[18] The Union analyzed the cases referenced by it in respect to successorship and distilled the factors to be considered by the Board to 6 "appropriate factors" for finding if the "beating heart of a business has been transferred, thereby creating a successorship. They argued that those factors were:

- Has there been a transfer of expertise?
- Has there been a transfer of business contacts?
- Has there been a transfer of management groups?
- Did both the original entity and the successor operate within the same province?
- Did both the original entity and the successor provide substantially the same work and services?
- Is there evidence of anti-union animus?

[19] The Union argued that the Linkedin profiles filed as a part of its exhibits showed that many present and former employees of Steeplejack Insuation who work or worked for Cornerstone satisfied the first 3 criteria set out above. It argued that the 4th criteria was satisfied because both Steeplejack Insulation, and now Cornerstone operate or operated in Saskatchewan. With respect to 5th criteria, it argued that both Cornerstone and Westcor were in the same business, (principally insulation) albeit Steeplejack was in mainly the business of providing scaffolding services. The Union argued that there was sufficient similarity in the business offerings provided by the three entities, as shown by their services listings on their web pages, that this criteria should be satisfied as well.

[20] In respect of the final criteria, the Union argued that the listing on the Brock website that it operated as both a union and non-union business, without any further explanation

[14] [2015] CanLII 19981 (SKLRB)
[15] [2015] CanLII 19986 (SKLRB)
[16] [2013] OLRD No. 4101
[17] [2014] OLRD No. 649
[18] [2014] OLRD No. 1199

as to what, if any, different functions were performed by those divisions, showed anti-union animus. Furthermore, it argued that the non-union side of the business was now to be morphed into a unionized operation through Local 151. This, the Union argued provided evidence that there was an anti-union animus engaged by the reorganization since the establishment of the Local 151 bargaining unit was to prohibit the building trades organizing employees of Cornerstone.

Are Brock, Steeplejack Industrial, Westcor, or Cornerstone Common or Related Employers?

[21] In its arguments, the Union also referenced another corporation Steeplejack Services Ltd. At the commencement of the hearing, it was agreed by the parties that this corporation was not represented at this hearing. Accordingly, we have restricted the Union's arguments to those involving only the above listed corporations.

[22] In its analysis of the Common or Related employer arguments, the Union sought to distill, from the Board's decisions and decisions from other jurisdictions, the factors which the Board should consider in making such determinations. From those cases, the Union distilled the following factors:

- Is there common ownership and/or financial control?
- Is there common management and/or a key individual?
- Is there an interrelationship of operations, including the transfer of employees?
- Is there centralized control of labour relations?
- Do they represent themselves to the public as a single integrated enterprise?
- Is there evidence of anti-union animus?

[23] The Union also argued there must be a sufficient labour relations purpose for the Board to utilize its discretion not to declare a corporation to be a successor pursuant to section 37 of the *Act* or to make an order under section 18 of *CILRA*. It distilled the factors that it argued the Board should consider in respect to the exercise of this discretion as being:

- Are the functions of the company the same?

- Is the employer trying to work in the same trade through two entities, one unionized and one not unionized (i.e.: “double breasting”)?
- Do the companies perform the same work in the same province?

[24] The Union argued that the evidence provided to the Board satisfied all of the above criteria and requested that the Board certify the Union as the bargaining agent for Brock Canada Inc. and Cornerstone Industrial Inc.

Cornerstone’s arguments:

[25] Counsel for Cornerstone also filed a written brief which we have reviewed and found helpful.

Is Cornerstone a successor to Westcor or Steeplejack Insulation?

[26] Cornerstone argued that no evidence had been provided which showed that any business had been acquired by Cornerstone from Steeplejack Insulation. Rather, it argued, Cornerstone was a business which was operating in the Province of Alberta prior to its acquisition by Steeplejack. Prior to its entry into the Saskatchewan market, Cornerstone’s employees were represented by the Alberta local of the Construction Workers Union. It argued that the Union was seeking, in these applications, to become certified without gaining employee support.

[27] In support of its arguments that Cornerstone was not a successor to Steeplejack Insulation, Cornerstone relied upon *C.U.P.E. v. Metropolitan Parking*[19], *Monad Industrial Constructors (Re:)*[20] and *R.W.D.S.U v. Westfair Foods Ltd*.[21]

Are Brock, Steeplejack Insulation, Westcor or Cornerstone Common or Related Employers?

[28] Cornerstone argued that the requirements for a common/related employer declaration were:

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[19] [1979] ORRB Rep. December 1193, [1979] CanLII 815 (ONLRB)
[20] [2013] CanLII 83710 (SKLRB)
[21] [2011] CanLII 75834 (SKLRB)

- Associated or related businesses;
- Carried on under common control or direction; and
- Even if those two items are clear, there must be a labour relations purpose for making the declaration.

[29] Cornerstone acknowledged that in cases such as this, were there are numerous wholly owned subsidiary companies that it is not difficult to find those businesses are related. However, citing *Finning International Inc. v. International Association of Machinists and Allied Workers, Local Lodge No. 99*[22], it argued that "common control or direction" should be focused upon the "day to day" management of the corporations.[23]

[30] Finally, Cornerstone argued that prior to making a determination of common/related employer, there must be a labour relations purpose for the Board making such an order. Cornerstone argued that there was no proper labour relations purpose as the employees of Cornerstone should have the employee's right to be represented by a union of their choice and not by one mandated by the Board through this process. Furthermore, it argued that a common/related employer designation was designed not to expand a union's bargaining rights, but should only protect the erosion of bargaining rights, citing the Board's decision in *Merick Contractors*[24]. It argued that there was no evidence of any erosion of the Union's bargaining rights.

[31] In conclusion, Cornerstone argued:

- There was no evidence of a successorship shown;
- There was no evidence of day to day control of any steeplejack corporation in respect to acquisition or execution of the work done by Cornerstone in Saskatchewan;

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[22] Alberta Labour Relations Board File No. GE-04759 (June 7th, 2005)
[23] In support, Cornerstone also cited the Alberta decisions in *Carewest and Calgary Health Region*, Alberta Labour Relations Board File No. GE-03868 (August 13, 2004), *Canadian Inspection Associates* [2007] Alta L.R.B.R. LD-036, Board File No. GE-05013, and *Commonwealth Construction Co. (Re:)* [2013] B.C.LR.B.D.N. No. B48, Case No. 62692.
[24] Supra Note 15

- There was no evidence of the erosion of bargaining rights of the Union; and

- There was no labour relations purpose for any common/related employer order.

Brock, Steeplejack Insulation and Westcor's arguments:

[32] Counsel for Brock, Steeplejack Insulation and Westcor (collectively referred to as the "Brock Companies") also filed a written brief which we have reviewed and found helpful.

Is Cornerstone a successor to Westcor or Steeplejack Industrial?

[33] The Brock Companies argued that in *North American Construction Group Inc. (Re:)*[25], the Board established a two part test in respect to successorship. They argued that there must first be a determination of the nature of the business of the alleged predecessor and then secondly, whether there is a discernable continuity of that business or a part thereof into the hand of an alleged successor. The Brock Companies argued that the application should be dismissed using this test.

[34] Citing *C.U.P.E. v. Metropolitan Parking*[26] as the source of the analysis conducted by the Board to determine successorship, the Brock Companies relied upon the Board's decision in *K-Bro Linens Systems Inc. et al (Re:)*[27], *Singh (Re:)*[28], *Lester (W.W.) (1978) v. United Association of Journeymen and Apprentices of the plumbing and pipefitting industry, Local 740*[29] and *Pyramid Electric Corp. v IBEW, Local 529*[30] in support of their argument that none of the factors normally relied upon by the Board in determining a successorship were present in this case.

[35] The Brock Companies argued that nothing was transferred from Steeplejack Insulation to Cornerstone when it ceased operations. It argued that any remnants from

[25] Supra Note 14
[26] Supra Note 20
[27] [2014] CanLII 63989 (SKLRB)
[28] Supra Note 5
[29] [1990] 3 SCR 644, CanLII 22 (SCC)
[30] [1999] CanLII 114 (SKQB)

Steeplejack Insulation were absorbed by Westcor. Westcor then continued to provide insulation services in Western Canada and did not transfer any portion of that business to Cornerstone.

[36] Finally, the Brock Companies argued that Brock has never engaged in the insulation business and therefore did not and could not transfer any business to Cornerstone.

Are Brock, Steeplejack Industrial, Westcor or Cornerstone Common or Related Employers?

[37] The Brock Companies, relying upon the Board's decisions in *Re Comfort Cabs et al,* [31] *Canadian Salt Co. V. UFCW*[32] and *Re: Wayne Bus*[33], argued that there are 4 prerequisites for the issuance of a common/related employer declaration. They identified the following:

- The application must involve more than one corporation, partnership, individual, or association, and at least one of those entities must be certified by the Board;
- The entities must be engaged in associated or related activities;
- The entities must be operated under "common control and direction"; and
- There must be a compelling labour relations reason for making the declaration and the benefits of doing so must outweigh the mischief such declaration is likely to cause.

[38] Similar to the position argued by Cornerstone, the Brock Companies argued that the day to day management of the entities must be under common control and direction. They also relied upon *Finning International Inc. v. International Association of Machinists and Allied Workers, Local Lodge No. 99*[34]. Additionally, they argued that the applicants were required to demonstrate direction over the activities that Cornerstone and the Brock Companies engaged in. It argued that the Board should be satisfied that "common control and direction" exists only when the control and direction is in respect of "the worksite and in the productive activity".

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[31] [2015] CanLII 19986 (SKLRB)
[32] [2010] CanLII 65961 (SKLRB)
[33] [1999] Sask. L.R.B.R. 238

[39] The Brock Companies also identified other factors which the Board has, they argued, relied upon in determining whether common control or direction exists. Those were:

- Whether or not there is an interrelationship of operations, including the transfer of employees;
- Whether or not there is centralized control of labour relations; and
- Whether or not the employers represent themselves to the public as a single integrated enterprise

[40] The Brock Companies also argued that, in the present case, the issue was in respect of an insulation services business. It noted that it was necessary to establish that those services were carried on under common control or direction of the Brock Companies. In summary, it argued that none of these factors were met albeit the corporations were all part of the same corporate family.

[41] Finally, the Brock Companies argued that there would be no labour relations purpose in making a declaration that the various entities were common/related employers. It argued that there were 3 purposes recognized for common/related employer designations. These were to:

1. Prevent the diversion of work from a unionized employer to a non-unionized counterpart;

2. Remove obstacles to viable structures for bargaining; and

3. Ensure that the union is able to deal directly with the entity possessing real economic control.

[42] It argued that for the applicant to succeed in having a common/related employer designation made, the purpose for the declaration must be valid in the sense that there is a real or imminent issue and the purpose must be sufficient such that the benefits of making the declaration will outweigh the mischief the declaration is likely to cause. It argued that neither of these elements had been satisfied in the present case.

[43] The Brock Companies requested that the application be denied.

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[34] *Supra* note 23

Analysis and Decision:

[44] The Board appreciates the well thought out and logically presented arguments made by all parties in this matter. Notwithstanding a difference of opinion between the Union and the other parties, the clarity of the presentations is appreciated in allowing the Board to focus on the evidence and issues in this application.

Is Cornerstone a successor to Westcor or Steeplejack Insulation?

[45] The Board's jurisprudence with respect to successorship is well established. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatoon Co-operative Association Limited and United Food and Commercial Workers Union, Local 1400*[35], the Board outlined its jurisprudence with respect to successorship. At paragraph [19] the Board set out the following regarding its jurisprudence:

> **[19]** The Board recently reviewed its jurisprudence regarding successorship in *RWDSU and Charnjit Singh* and *United Steel Workers Union, Local 1-184 and Edgewood Forest Products Inc.* At paragraph [40] of its decision in *Charnjit Singh*, the Board described successorship in the following terms:
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> > *Successorship in labour relations is a legislative creation that provides for the transfer of collective bargaining obligations from the owner of a certified business to another party upon the disposition of that business or a part therein. Without legislative intervention, changes in the ownership of a business would generally have the effect of undermining and/or dislocating the collective bargaining rights of the employees of that business. However, thanks to specific provisions in labour legislation, collective bargaining rights now tend to survive and flow through changes in the ownership of a business (provided there is some sense of continuity of that "business"). Through legislative intervention, it is the "business", not a particular employer to which the collective bargaining rights are seen to have attached and, if that business ends up in the hands of a new owner, previous collective bargaining obligations tend to flow with the transaction through to that new owner.*
>
> **[20]** In *Canadian Union of Public Employees v. Metropolitan Parking Ltd.,* the Ontario Labour Relations Board described the concept of successorship in the following terms:
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> > *A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a*

[35] [2014] CanLII 63997 (SKLRB)

> *dynamic activity, a going concern, something which is carried on. A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a business from an idle collection of assets...*

[21] In its determination of whether a successorship has occurred, the Board routinely examines a number of factors. These include the presence of any legal or familial relationship between the predecessor and the new owner; the acquisition by the new owner of managerial knowledge and expertise through the transaction; the transfer of equipment, inventory, accounts receivable, customer lists and existing contracts; the transfer of goodwill, logos and trademarks; and the imposition of covenants not to compete or to maintain the good name of the business until closing. In *Versa Services Ltd. v. Canadian Union of Public Employees,* the Board referenced the Ontario Labour Relations Board decision in *Re: Culverhouse Foods Ltd.* In *Versa Services,* the Board adopted these words from that decision:

> *In each case the decisive question is whether or not there is a continuation of the business...the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory ,covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was [sic] before, i.e. whether there has been a continuation of the business.*

[22] The Board has often referred to the concept of successorship as determining if, as described by former Chairperson, Sherstobitoff in *R.W.D.S.U. v. Pauline Hnatiw,* the new business "drew its life" from that of the predecessor. That concept has also often been referred to as the Board making a determination of whether or not the "beating heart" of the business has been transferred.[14]

[46] When we consider the *Culverhouse*[36] criteria as adopted in *Versa Services*[37], it is clear that no successorship has occurred in this case. However, even without referencing these criteria, there is one fundamental concern with the Union's argument concerning successorship. That is, that in order for there to be a successorship, there must be a transfer of a business or a part thereof, to another party. While the concept of "transfer" is rather broad, there must be an identifiable business which is being transferred between the parties. In this case we have no evidence of any transfer of any business, any assets utilized to operate a business, in short, no beating heart being transferred.

[47] The Union has argued that when Steeplejack Insulation was wound down by Brock that the assets utilized in that business, or personnel utilized in that business were transferred to Cornerstone. Unfortunately, the oral testimony did not support this hypothesis. Mr. Brickner was not asked if Cornerstone acquired any assets, material, personnel or support from Steeplejack Industrial in either examination in chief or cross examination.

[48] Mr. Hamm was examined regarding the shutdown of Steeplejack Insulation during his examination in chief. He noted that Westcor currently does any insulation work in Saskatchewan that is performed by employees certified to the Union. He noted that Westcor was currently working at the Co-op Refinery site in Regina and at the Pro-pack project. He also testified that the work of one project was moved to Westcor from Steeplejack Insulation when it stopped operating in 2008. He also testified that some of the management personnel from Steeplejack Insulation left when it was closed, and two (2) moved to Westcor Services Ltd. In cross-examination, he noted that Westcor does not share resources with Cornerstone.

[49] The Union argues that there is indication from the Linkedin pages filed with its book of exhibits which shows that various current and past employees have worked for the various Brock companies over time. That, it argued, shows that the companies share personnel between them.

[50] With respect, we cannot agree with this characterization of the Linkedin pages and the nature of the employment history of those persons whose pages were exhibited. Mr. Brickner, himself, testified that he had had a transient work history and had worked at numerous companies during his career, including Steeplejack Insulation. All of this work history was due to

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[36] [1976] O.R.R.B. Rep. Nov. 691
[37] [1993] 1st quarter Sask. Lab. Rep. 174, LRB File No. 170-92

the nature of the construction industry which means employees must follow work projects to remain employed.

[51] When we review the *Culverhouse* criteria, insofar as the relationship between Steeplejack Industrial and Cornerstone is concerned, it is equally clear that no successorship has occurred. There was no identifiable transfer of any goodwill, logos or trademarks. There was no transfer of customer lists, accounts receivable, existing contracts, inventory, non-compete covenants, or other covenants to assist the successor to maintain the business. Any transfer of contracts occurred as between Steeplejack Industrial and Westcor, both of which were certified to the Union.

[52] The evidence from both Mr. Brickner and Mr. Hamm established that Cornerstone did not enter the insulation business until after Steeplejack Insulation had been closed. Prior to that time, Cornerstone was engaged in the scaffolding side of the business. The evidence was that Cornerstone saw a business opportunity with one of its regular customers to get into that business and Cornerstone was encouraged to take advantage of that opportunity.

[53] All of the evidence presented, and our examination of the criteria for establishment of a successorship, lead to the conclusion that there has been no successorship as between Cornerstone and Steeplejack Insulation.

Are Brock, Steeplejack Insulation, Westcor, or Cornerstone Common or Related Employers?

[54] The Board has recently dealt with the issue of common/related employer in *United Brotherhood of Electrical Workers, Local 529 v. Merick Contractors Inc*., *Western Electrical Management Ltd*., and *Western Electrical Constructors Ltd*.[38] That decision reviewed the criteria which the Board will review in determining if a declaration of common/related employer should be made. At paragraphs 101 to 105, the Board said:

> ***[101]*** *Most of the cases cited by the Union, WEM, WEC, and Merick were determined by the Board pursuant to section 37.3 of the Act. Only Dewar Western Inc. (Re:) and North American Construction Group Inc. were cases which involved the construction industry. Dewar is of limited assistance because it did not deal with the issue of common employer other than its finding at paragraph 6 where it says:*
>
> > *The Board finds that the employer of the employees in question is Dewar. We find that Dewar Industrial is also not the employer of the employees in question. It is not necessary for the Board to*

[38] *Supra* Note 14

> *determine if Lakeland is a related employer to Dewar through common ownership or direction as there is no evidence before the Board that Lakeland has performed work in Saskatchewan. If Lakeland commences work in Saskatchewan, it may be that the Union has a good argument to make that it is a related employer within the meaning of s. 18 of The Construction Industry Labour Relations Act, 1992, At the present time, however, this aspect of the application is premature.*

[102] *In North American Construction, the Board did review the criteria for common employer designation. Based upon those criteria, the Board was satisfied that the named companies were operated under common control and direction. However, the Board was not satisfied that a sufficient labour relations purpose would be fulfilled by granting a common employer designation.*

[103] *In the North American Construction case, the Board adopted the criteria set out by the Ontario Labour Relations Board in Walters Lithographing Company Co. Ltd. Those criteria are:*

> *1. Whether or not there is common ownership and/or financial control;*
> *2. Whether or not there is common management;*
> *3. Whether or not there is an interrelationship of operations, including the transfer of employees;*
> *4. Whether or not there is centralized control of labour relations; and*
> *5. Whether or not the employers represent themselves to the public as a single integrated enterprise.*

[104] *In North American Construction, the Board did not specifically deal with these criteria, but, nevertheless, declined to make the requested order on the basis that there would be no labour relations purpose in making it.*

[105] *In Adams, Canadian Labour Law (2nd edition), at paragraph 8.420, the author discusses, in general terms, the preconditions which must be met before a labour board will consider exercising their discretion to declare businesses to be related.*

> *There must be more than one enterprise (and employer) involved; the enterprises must be associated or related; and the enterprises must be under common control or direction. Absent this essential unity of economic activity, there will be no finding of relatedness although this does not require that the primary activities of each enterprise be the same.*

[55] In this case, the first criteria, being whether or not there is common ownership and/or financial control is met. Brock owns all of the entities involved and ultimately bear the fruits of their success or the dismay of their failures. There was evidence from both Mr. Brickner and Mr. Hamm that financial approval was required from Houston in many cases and the limit was a “very low threshold”.

[56] The second criteria of common management is also met in this case. While overall management in the hands of Mr. Hamm through his role as President and CEO of all of the Brock entities, his testimony is that this role was more oversight than management on a day to day basis. Mr. Hamm testified that his role was to oversee financial controls and financial risk analysis on jobs which the companies are bidding on.

[57] Both Cornerstone and the Brock Companies argue in favour of the Board focusing this criteria on day to day management as was done by the Alberta board in Finning.[39] The Finning decision was a reconsideration of a decision of the Alberta board[40] that originally granted both a successorship declaration and a common employer declaration in respect of a component rebuilding facility to be built by O.E.M. Remanufacturing Company Inc. which was a wholly owned subsidiary of Finning International Inc.

[58] In overturning both the declaration of successorship and the common employer designation, the reviewing panel in the *Finning* case, focused on 4 statutory elements derived from its earlier decision in *Teamsters, Loc. 362 v. MacCosham Cartage Co. Ltd.*[41]. These elements were:

1. That the application be brought by a trade union or an employer;

2. Whether or not there were, in the opinion of the Board, "associated or related activities or businesses, undertakings or other activities;

3. Whether or not these activities were carried on under common control or direction; and

4. Were the activities described in 2 & 3 above "by or through more than one corporation, partnership, person, or association of persons?

[59] These criteria, while similar to the criteria utilized by this Board, are not the same. One common element, however, is the requirement that there be common control or direction. The provisions of the *Alberta Labour Relations Code*[42] and the provisions of section 18 of CILRA

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[39] Supra Note 23
[40] [2005] Alta.L.R.B. unreported decision April 7, 2005, File No. GE-04568
[41] Alta. L.R.B.R. No. 82-024, April 19, 1982
[42] Section 47

and section 37.3 of *The Trade Union* Act are sufficiently similar in that the same words "are carried on under common control or direction" are used in both statutes.

[60] In analyzing the Alberta requirements, the Alberta Board, says at paragraph [41] of its decision:

> *The Applicants argue that high level strategic control cannot be a factor in determining whether there is common control or direction. We would not go that far. High-level strategic control could be <u>one</u> of the factors which might be taken into account. However, the primary focus of the analysis of the "common management" criteria must be on the day-to-day management of employees and the work-generating activities. Section 47 of the Labour Relations Code specifies that if the business is "carried on" through common control or direction then the corporations will be declared to be "one employer" for the purposes of the Code. This language directs us to focus on the day-to-day management of employees and the work-generating activities. This is consistent with previous decisions of the Board.*

[61] We agree with the reasoning of the Alberta Board in the Finning reconsideration decision. The CILRA contains the same words as the *Alberta Labour Code* insofar as there are activities "carried on under common control or direction". We also agree, however, that the element of high level strategic control can, in appropriate factual situations, such as is the case here, be a factor in the determination of whether entities operate under common control or direction. In this case the evidence established that each individual entity was permitted (subject to some stringent monetary controls), to pursue business and direct its workforce as necessary to satisfy its customers. Mr. Hamm testified that he was not involved in day-to-day direction of the businesses but took an oversight role which was primarily financial.

[62] However, Westcor and Cornerstone do not act completely independently. There is common management between Westcor, Brock or Cornerstone through Mr. Hamm who is engaged in oversight management of Cornerstone, although he takes a more active role in the management of Westcor, his former company. As such, we are of the opinion that this second criteria is met.

[63] When Brock acquired Westcor, a unionized contractor, Steeplejack Insulation, also a union contractor became redundant in the operation of the business, and was shut down. Brock then acquired Cornerstone who was also a unionized contractor, but was not certified to the Union, but to CLAC. In his evidence, Mr. Brickner was insistent that he was a unionized contractor with CLAC and expected to remain such.

[64] While the day-to-day operations are independent, there is little doubt from the testimony that Brock maintains a firm oversight on both the pursuit of business opportunities (bidding) and the financial risk and reward analysis associated therewith. This is particularly true due to the nature of Mr. Hamm's role as President and CEO of Brock, Westcor and Cornerstone.

[65] The third criteria is not met insofar as there is no interrelation of operations or exchange of employees between Brock, Westcor and Cornerstone. Each maintains its own employees. This would be consistent with the fact that Cornerstone is a unionized contractor in Alberta with CLAC and Westcor is certified with the Union.

[66] The fourth criteria is also not met. Each of the companies (except for Brock who has no employees other than Mr. Hamm) controls its own labour relations. Collective Agreements are negotiated by the companies directly with the union who is certified to represent their employees.

[67] The fifth criteria is met insofar as Brock holds itself out as the general owner able to perform both insulation work and scaffolding work through either Westcor or Cornerstone. The strength and presence of Brock and its US parent is undoubtedly a force in obtaining work for the various entities.

[68] Absent the fact that this application arose out of an application for certification of the employees of Cornerstone by Local 151, this type of ownership arrangement would create a classic case of "double breasting", that is, one company operating in a unionized environment and one operating non-union, which, as noted below, is what the common/related employer provisions of the *Trade Union Act* were enacted to prevent. However, in this case, there is no non-union employer (subject to the certification for Local 151 being approved), but rather two unionized employers, albeit with different union representation.

Should the Board issue a Declaration?

[69] Before making a determination regarding the issuance of a declaration, it is helpful to examine the purpose behind the common/related employer provision of CILRA and the *Act*. That purpose was described by the Board in North American Construction[43] at paragraph [60] as follows:

[43] [2013] SLRBD No. 23

> [60] *In response to the complex and often murky realities of corporate organization, most Canadian jurisdiction have enacted legislation that authorizes labour boards to pierce the corporate veil and find that two (2) or more related businesses ought to be treated as one (1) common employer for the purposes of labour relations. Saskatchewan has such a provision for the construction industry in s. 18 of The Construction Industry Labour Relations Act, 1992. Many corporations operate in an associated or related fashion and these corporations may be operated under common direction and control for a variety of legitimate business reasons. However, if the purpose or effect of a corporate organization or reorganization is to avoid collective bargaining obligations (for example, by permitting the transfer of work that would normally be completed by a unionized company to a non-union a related company operated under common direction and control – a practice commonly known as "double breasting"), then this Board has authority pursuant to s. 18 to pierce the corporate veil, so to speak, and declare both employers to be one (1) for the purposes of collective bargaining. The effect of a common employer designation is to cause the employees of both the union and non-union employers to fall within the scope of a trade union's bargaining unit. Obviously, it is a powerful tool granted by the legislature for the purpose of achieving a particular remedial effect.*

[70] Similarly, in *Graham Construction and Engineering Ltd. (Re:)*[44] at pl 721, the Board made these comments concerning Section 18 of the CILRA.

> *Both provisions are remedial provisions designed to prevent the erosion of a trade union's bargaining rights through the establishment of a new corporate entity (See Adams, Canadian Labour Law, 2nd ed. Para 6;510). Under the provisions, the Board can declare associated or related businesses to be one employer for the purposes of the two statutes. However, before the Board can make a declaration, it must apply the tests set out in the statutes to determine if the companies are indeed, "related".*

[71] The mischief which these provisions interdict is "double breasting", that is the establishment of a non-unionized related business which is then utilized to obtain work which would otherwise be available to the unionized employees. In those circumstances, the Legislature has directed this Board to issue a declaration which would include those non-union workers in the bargaining unit with the previously unionized workers to avoid erosion of the unionized bargaining rights and loss of work to the unionized workers.

[72] Mr. Rudder, the Business Manager for the Union, testified that prior to the certification application being made by Local 151, that he had a "salt" working as an agent for the Union within the Cornerstone workforce. He testified that his agent advised him that the Union

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[44] [1998] SLRBD No. 58

did not enjoy sufficient support among the employees of Cornerstone for the Union to make an application to certify Cornerstone.

[73] A declaration by this Board that Brock, Westcor or Cornerstone are common/related employers would not serve the purpose described above of avoiding unionization or eroding the work of unionized workers. Rather, it would interfere with the rights given to employees under section 3 of the *Act* "to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing…".

[74] Not being able to gain the support of the employees to choose the Union as its bargaining representative, the Union chose instead to collaterally attack an application filed by a rival union (Local 151) through this process. That was not the intention of the Legislature in enacting section 37.3 of the *Act* or section 18 of *CILRA.*

[75] As noted by the Board in Merick[45] adopting the words[46] of former Chairperson Hamilton of the Manitoba Labour Relations Board wherein he described the discretion held by the Board not to make a common employer declaration:

> *(d) The sole issue before the Board is whether it ought to exercise its acknowledged discretion under s. 59(1). In this regard, the jurisprudence of labour boards across Canada has consistently held that there must be a proper labour relations purpose for the issuance of a common employer declaration. It is accepted that the overriding purpose of such a declaration is to prevent an anticipated erosion of existing bargaining rights. Common employer declarations cannot be used to expand bargaining rights. The anticipated erosion of bargaining rights must be real and go beyond a speculation as to what might possibly occur. Therefore, an applicant must demonstrate that there is either an actual or potential erosion of [existing] bargaining rights (see Seamless Industrial Floor Coatings Ltd, and Marble, Tile & Terrazzo Local 31 92012)211 CLRBR (2d) 310, [2012] O.L.R.D. No. 792, at paras. 15 and 16). There are numerous authorities confirming these principles. Their disagreement relates to how these principles apply to the facts of this case.*

[76] To make the order requested by the Union would be expansion of the Union's bargaining rights (something which it was unable to gain employee support for) rather than an erosion of those rights. Another union has already sought to represent the employees of Cornerstone within the Province. That application should not be derailed by these proceedings and thereby circumvent the rights of employees to choose their own bargaining representative.

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[45] Supra Note 14

[46] *UFCW, Local 832 v Sun Gro Horticulture Canada Ltd. and F.P.M. Peat Moss Co,[2013] CanLII 93937 (MBLRB) 249 C.L.R.B.R. (2d) 279 at p. 283 at para 6(d).*

[77] The *Saskatchewan Employment Act*, like the now repealed *Trade Union Act and* the *Construction Industry Labour Relations Act* made provision for changes to bargaining representatives should the employees of Cornerstone become dissatisfied with the representative they have chosen.[47]

[78] Accordingly, until the matter of the application for certification is determined one way or the other, we decline to make the requested order. The Registrar of the Board is instructed to forthwith conduct a count of the ballots cast on LRB File No. 272-13 and report the results of that vote to an "*in camera"* panel of the Board for an appropriate order in respect of that application.

[79] In the event that the application for certification is successful and the employees of Cornerstone choose to be represented by Local 151, no declaration in respect to common/related employer will be made. Should the application for certification be unsuccessful, the question may be returned to this panel of the Board for further consideration as to the issuance of an order.

[80] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **5th** day of **June, 2015.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[47] All of this, of course, assumes that the certification application by Local 151 is successful.