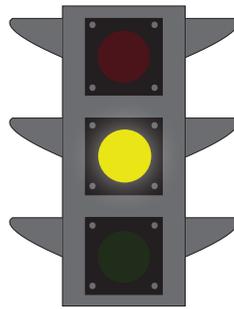


Cardus Construction Competitiveness Monitor:
Ontario Municipal Construction Markets



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1. EXECUTIVE SUMMARY

Construction is a key economic driver in Ontario. Yet, we are unclear about the competitiveness of Ontario's construction sector. We are equally unclear about whether the largest purchasers of construction in the province are gaining the greatest value for their taxpayers' dollars. We are aware that Canada's leading city, Toronto and approximately 25% of Ontario taxpayers are subject to restrictions—created by law—on who can bid on their municipality's construction work. We know that these restrictions affect construction budgets worth hundreds of millions of dollars, and we know that it creates effective labour monopolies—and construction oligopolies—in at least four major public construction markets in Ontario. We also know that these restrictions work contrary to one of the most basic premises of a democratic society, that *all taxpayers, regardless of their private affiliations, should be free to work on projects which are paid for by all taxpayers.*

However, we do not know what these restrictions cost the Ontario taxpayer. We are presented with a wide range of estimates about the increased costs—from 2% to 40%—but we lack any publicly available data or calculations. Both the Ontario taxpayer and our municipal governments are operating in a research vacuum, which does not allow us to make an empirical economic case for or against a restrictive policy which, even without data, seems to work contrary to almost universally accepted economic principles and natural justice.

This paper provides the first glimpse into the scope of municipal construction monopolies in Ontario, detailed analysis of the legislation which enables these monopolies, the size of budgets affected by these monopolies, and points out the need for hard, empirical work to move Ontario towards a labour environment which is open, transparent, and competitive at all levels.

2. INTRODUCTION

A. CONSTRUCTION'S ECONOMIC IMPORTANCE

It is well known that investment in construction is a key pillar of the Canadian economy. With its resource dominated economy and its significant transportation needs, Canada requires construction of roads, infrastructure, factories, and other structures to move and house people, goods, and services. A healthy Canadian economy requires a strong construction sector.

So Canada invests a great deal of money in construction. Statistics Canada notes that construction accounts for 6% of Canada's total Gross Domestic Product (GDP), and that its share of the total GDP has grown at a greater pace than other industries.¹

The industry is also a major source of jobs for Canadians. It employs over a million workers across the country, or 7.1% of Canada's total workforce. As with its share of the GDP, construction's proportion of employment growth in the last decade has outpaced many other sectors.²

And what is true for the country as a whole is also true for the province of Ontario. In 2011, the province spent well over 18 billion dollars in non-residential construction alone.³ If one includes investment in new housing construction, the total investment in construction in Ontario jumps to almost 33 billion dollars.⁴ And Ontario accounts for a significant proportion of Canada's total construction investment; a total of 40% of all construction investment in Canada. At 7% of Ontario's total GDP, there is no doubt of construction's importance to the province's economy.

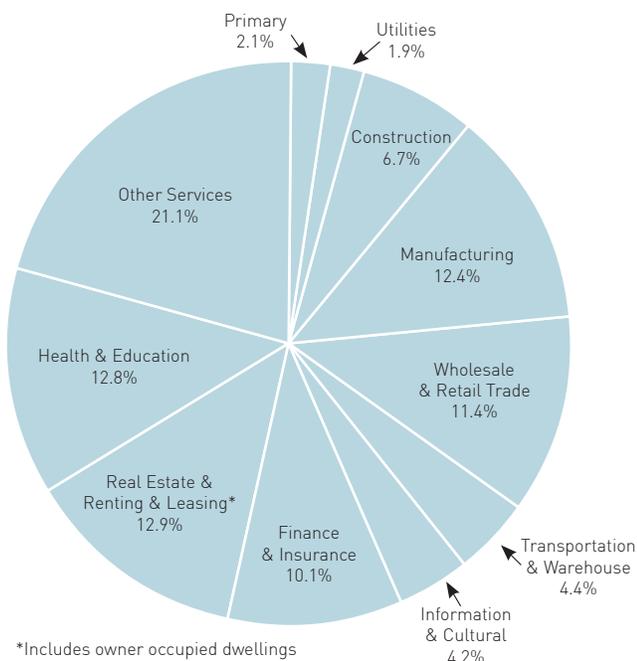


Figure 1: Ontario Economic Accounts

B. MEASUREMENT MATTERS

We know that a lot of money is spent on construction in Ontario, and we know that construction serves as an important signpost of economic health. But we know very little about whether Ontario is getting the best *value* for its construction dollars. Do private and public purchasers of construction benefit from a competitive environment? In short, *is* construction in Ontario expensive? And if so, *why* is construction in Ontario so expensive?

Ray Pennings noted in 2008 that “the relevant data for properly answering the[se] question[s] is not being collected and available.”⁵ One of the key reasons for this lack of data, suggests Pennings, is that,

[t]here are numbers that can be cited to support the thesis that Ontario construction is competitive *or* expensive, depending on the case being made. And in the Ontario discussion, that case to date has always been intertwined (at least in the way that the debate has turned out, if not always in the intentions) with a pro- or anti-union debate.⁶

As Pennings notes in his paper, other provinces have experimented with labour legislation aimed at increasing value for all construction purchasers through innovative solutions to long-standing construction industry problems. This is not the case in Ontario. The pro- vs. anti-union dichotomy has proved a key and lasting obstacle to measuring the competitiveness of the construction industry in Ontario. We have not yet examined the impact of our current labour legislation on the costs of construction because the industry has been focused on maximizing advantages within the current paradigm. This failure to consider possible mutual gains or competitive advantages which might be available within a different labour paradigm has led to a zero-sum discussion where each side aims to protect or encourage legislative advantages which allow various stakeholders to maintain market share.

C. ASSUMPTIONS

This paper is the first in a series of attempts to encourage broader discussion of the impact of labour law on the competitiveness of the construction industry. Our goal is to begin the process of collecting and publishing data which will enable policy makers to determine whether construction buyers in Ontario—both public and private—are receiving the greatest value for their dollars.

Our paper proceeds with two key assumptions:

The first is that, with few exceptions, unions are important contributors to the completion of large-scale construction projects. Thus, we proceed from a standpoint which affirms “the value added by labour organizations to the process [of construction]” and we assume that “the collective organization of labour is an essential feature of how major construction projects are completed in Canada.”²⁷

However, this affirmation of unions as key stakeholders and actors in the construction industry transcends the current pro- vs. anti-union paradigm by suggesting an alternative competitive labour pools paradigm. This paper assumes a paradigm which “protects and even promotes union organization but allows for a competitive environment in the building of construction labour pools with capacity to undertake all forms of construction.”²⁶ These labour pools include craft-based unions, alternative union models and non-unionized labour pools.

It is our working hypothesis that a competitive labour pool model, in which various means of organizing construction workplaces are able to bid and work on construction projects, individually or in tandem, will provide greater value for construction owners and purchasers than the current system which is based on a “winner-take-all” system which creates effective labour monopolies.

Pennings notes there are some who will suggest that “any approach of competition is ‘anti-worker’ in that it provides competition for wages.”

While it is certainly true that competition *can* result in lower wages, it does not necessarily follow that a more competitive construction industry will result in wage loss

for workers. Wages are but one input into the total cost of construction.⁹ They are a significant input, but there are a variety of other factors which contribute to the total cost of construction. Put differently, there are other means for reducing prices than reducing the cost of inputs such as labour. Prices can also be lowered through both technological and human resource innovation (leading to increased productivity)¹⁰ and by the elimination of policies which encourage rent-seeking by industry stakeholders.

Currently, the lack of innovation and government policy seeking to preserve the status quo which privileges a few are hallmarks of the Ontario construction environment. The failure to consider broader, structural changes to the construction labour relations environment comes as a result of a circle whereby government policy protects the few who in turn resist innovation that would risk their privileges.¹¹ Any suggestion that these policies hurt taxpayers and consumers, and even workers themselves, is regarded as evidence of a desire to see “a race to the bottom.”¹²

How then, do we escape this circle? **Is there a way forward which recognizes the social and economic value of labour unions while also ensuring that Ontario’s construction industry is open to innovation and broad competition?**

One helpful way forward is to examine the impact that the current environment—legislative and otherwise—has on construction costs in Ontario. It is our hope that the introduction of the Cardus Construction Competitiveness Monitor will be the first step in providing data which can be used by policy makers to enable Ontario to competitively work in tomorrow’s construction.

3. CARDUS CONSTRUCTION COMPETITIVENESS MONITOR

A. DESCRIPTION

Working from our assumption that a competitive environment, in which all qualified contractors—regardless of which labour pool they use to complete the work—can freely bid on work, the Cardus Construction Competitiveness Monitor (hereafter CCCM) will examine the impact that policies which prevent such competition have on the total cost of construction projects in Ontario.

The CCCM is intended as a series of papers, each of which will examine various aspects of the construction environment in Ontario including the impact of particular policies on public and private construction purchasers, as well as the impact of the broader regulatory

environment on construction costs.¹³ The hope is that the combined research will provide a clearer empirical picture of the state of construction competitiveness in Ontario.

The monitor begins with an examination of one aspect of Ontario construction legislation—“construction employer status”—and surveys the impact that this policy has on public purchasers of construction in Ontario. We focus on three discrete sets of public construction owners:

1. Municipalities (the focus of the current paper)
2. School Boards
3. Major Provincial and Municipal Crown Corporations (including, for instance, Ontario Power Generation and local hydro providers)

4. CONSTRUCTION EMPLOYER STATUS

A. DESCRIPTION

Under current legislation, construction workers employed by municipalities in Ontario can be unionized by construction trade unions in exactly the same manner as workers for private corporations. Section 158(1) of the *Ontario Labour Relations Act* (1995, hereafter *OLRA*) states the following:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of “sector” in section 126 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (2) or by voluntary recognition.

Section 158(1) refers to the process by which a trade union can bring an application for certification to the Ontario Labour Relations Board (OLRB) in pursuit of unionizing (organizing) an employer. Section 126 of the *OLRA* defines an employer in the construction industry as follows:

“employer” means a person other than a non-construction employer who operates a business in the construction industry, and for purposes of an application for accreditation means an employer other than a non-construction employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof . . . The same section differentiates between a construction “employer” and a “non-construction employer.” A “non-construction employer” is defined as follows:

“Non-construction employer” means an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person;

The OLRB has interpreted this language in the following way:

Thus, in order for “compensation” to exist, there must be the presence of an exchange. In the context of the definition of non-construction employer, the person paying the compensation is doing so for having been provided with construction services. Accordingly, to fall outside of the definition, it is not sufficient for an employer to engage in construction activity and receive funds from an unrelated person. Rather, an employer must engage in construction activities and be paid by an unrelated person for having done so.

It is my view that, when read as a whole, the language of the definition of non-construction employer does not exclude employers who undertake construction activity for their own benefit using funds that they may not have generated themselves in circumstances where the giver of the funds does not benefit from the construction work . . . Where the employer is in receipt of funds that are used to pay for construction activity that is for the benefit of the employer and not for the benefit of the payer of the funds, the funds in question are not payment for the performance of construction work and are thus not “compensation” within the meaning of section 126 of the Act.¹⁴

To clarify, if an entity—public or private—performs construction work for another, unrelated entity, and receives funding from that second entity, the first entity is considered a construction employer.¹⁵

It is not unusual, of course, for municipal workers to become unionized. In fact, thousands of municipal employees—librarians, outside workers, custodians, waste collection, and public health professionals—are unionized across Ontario.

However, the designation of municipalities as construction employers subjects municipalities to the unique characteristics of the construction industry and its equally unique labour legislation. One of the defining—and in this case, most relevant—features of construction is that cities almost always contract major construction projects out to the private sector. It is rare—if not completely unheard of—for a city to “self-perform” the work on projects as large, and requiring such specialized labour, as, say, a water treatment plant, or the building of an arena. The realities of construction labour—its cyclical nature in

particular—mean that most cities put public works out to tender rather than performing the work with employees on the municipalities’ payrolls.¹⁶

Ontario’s current definition of “a construction employer” was instituted by the Harris government in 2000 in an effort to recognize these unique characteristics, and to provide employers who were not primarily construction contractors with a way to remove themselves from the province-wide bargaining arrangement in the industrial, commercial, and institutional (ICI) sectors. A recent OLRB decision provides a concise history of the “construction employer” designation.

Up until the enactment of amendments to the *LRA* in 1998 and 2000, the *LRA* provided that an employer “who operates a business in the construction industry” was bound by the construction industry provisions of the *Act*. The jurisprudence of the Board had given a broad interpretation to that phrase to include anyone who effected construction, whether by hiring employees directly or by engaging contractors . . . As a result, a number of employers, both in the private and public sector, were bound by the province-wide collective bargaining scheme in the ICI sector, even though their primary business was not construction, and they were not carrying on the construction business to make a profit. For example, school boards and municipalities had been found to be operating businesses in the construction industry.¹⁷

B. IMPLICATIONS FOR MUNICIPAL CONSTRUCTION PROCUREMENT

The combination of “construction employer status” and the collective bargaining regime set out in the *OLRA* results in a situation in which municipalities organized as construction employers are subject to the province-wide collective agreements mandated by Ontario’s labour law.

The implications of this for municipal bidding are twofold.

The first is that municipalities are considered identical to private unionized construction employers, and are unable to bargain individually within the fiscal constraints imposed on them by other expenditures and revenue streams. Ontario’s legislated requirement that unions negotiate “province-wide” agreements for the ICI sectors places all ICI contractors under one collective agreement per trade.

Second, given that all province-wide collective agreements with craft unions contain subcontracting clauses which mandate that all work—including work done by

subcontractors—be performed by companies affiliated with said craft union, municipal construction purchasers are thus restricted to unionized companies when tendering construction projects. This means that all companies which are either non-union, or which are organized by unions which fall under separate sections of the *OLRA*, are prevented from bidding on municipal construction projects.

The result is a public tendering process which is open only to those associated with particular private affiliations. The public at large is prevented, by law and by contract, from bidding. Municipalities are subject to a labour monopoly rather than to competitive bidding by multiple labour pools—non-union, craft union, or alternative union.

C. A BRIEF HISTORY OF MUNICIPAL ENGAGEMENT WITH THE ISSUE

Municipal focus on this policy has waxed and waned over the years.

The Association of Municipalities of Ontario does not currently take a position on the issue, but documents prior to the current legislation suggest that AMO was supportive of increased flexibility for municipalities in their ability to either negotiate directly with unions or to relieve themselves of the restrictions placed on them by “construction employer status.”¹⁸

In 2007, Toronto for a time made opening construction a priority. In a motion to the council’s executive, Councillor Karen Stintz from Toronto asked,

That the City Manager write to the Province of Ontario in support of the City of Hamilton advocating the Province to make the necessary changes to the *Labour Relations Act*, 1995, section 126, by defining municipalities as non-construction employers.¹⁹

The subsequent report, highlighted above in footnote 10, failed to consider the impact that broader structural changes might have on construction costs in Toronto. Its eventual conclusion—that open bidding would result in cost savings of 1.7%—came via the assumption that cost savings would only come by way of cheaper wages. It did not consider the possibility of more efficient organization of work or any other competitive advantages that might be available to companies operating under different labour structures.

In 2008 the City of Guelph unanimously resolved that

WHEREAS MUNICIPALITIES are not businesses and have a different purpose and mandate from commercial enterprises;

AND WHEREAS the OLRB treats municipalities as businesses for the purpose of the construction industry provisions in the *Labour Relations Act*, 1995;

AND WHEREAS an amendment to the *Labour Relations Act*, 1995 would ensure that municipalities are able to tender construction work in a free and open competitive environment to maximize value for construction expenditures;

BE IT RESOLVED AS FOLLOWS:

1. The Large Urban Mayors Caucus of Ontario asks the Province of Ontario to amend the *Labour*

Relations Act, 1995 by changing the definition of “non-construction employer” in Section 126, by deeming municipalities to be non-construction employers.²⁰

Other municipalities, including the City of Sault Ste. Marie (as early as 2004) approved similar motions.

As is shown by each of these resolutions, municipalities are unable to direct their own course on this matter, and remain subject to the provincial labour laws.

5. ECONOMIC IMPLICATIONS OF RESTRICTED TENDERING ON MUNICIPALITIES

A. LACK OF DATA ON EXTENT OF RESTRICTIONS

While it is clear that these pieces of legislation affect the workers and companies who are shut out of municipal bidding—and the cities themselves—the *economic* implications of this legislation for municipal purchasers of construction remain opaque. Likewise the impact of these policies on municipal taxpayers, and on financial contributors to municipal construction (for instance, the provincial and federal governments) remains unknown.

One reason for this is the lack of information on the extent to which this legislation affects municipalities. Prior to this paper, there have been no studies to date as to how many Ontario municipalities experience the restraints on open-tendering imposed upon them by the law. This section of the paper aims to rectify this research gap.

6. COMPILING THE DATA—FIRST STEPS

A. METHODOLOGY

This section of the paper examines the extent to which construction procurement is *open* or *closed* in 43 Ontario municipalities which are included in Statistics Canada’s ranking of most 100 populous municipalities in Canada. Together, these 43 municipalities make up 74% of Ontario’s population and 28% of Canada’s population as a whole. We chose to focus on the largest municipalities not only because their sizes necessitate the most infrastructure, and therefore, the most construction, but also because large municipalities tend to be leaders in the economic culture in the province. Our study reports on municipalities ranging in size from Belleville to Toronto, and geographically from Windsor in the southwest to Sault-Ste-Marie in the north to Ottawa in the east.

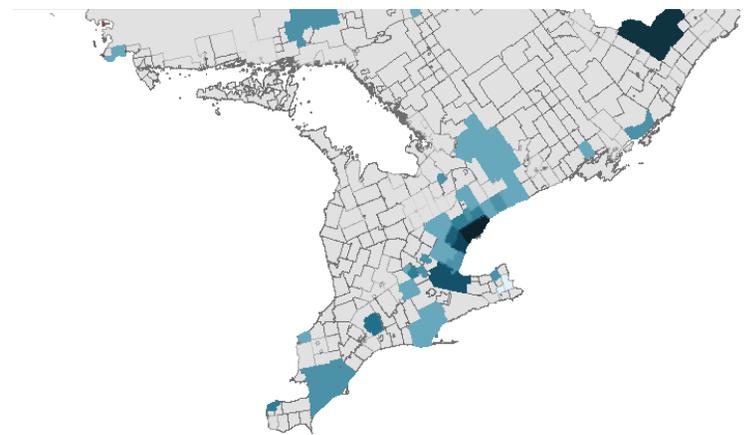


Figure 2: Ontario’s Most Populated Municipalities

By *open* or *closed* we refer specifically to whether a municipality is able to open tenders to companies associated with *multiple* labour pools—craft union, alternative union, or non-union—or whether it is *legally* restricted to *one* labour pool because of the sections of the Ontario labour relations code described above. It measures the extent to which one labour pool—of whatever sort—holds a monopoly on the public works of a given municipality.

It is important to note that we do not comment on so-called “fair-wage policies.” While some might argue that such policies are “uncompetitive” they do not explicitly disqualify a given labour pool from bidding on a project. Rather such policies set common wage levels for all competitors. Further, this study excludes corporations such as local hydro providers which might be considered as municipal entities, as they are more closely tied to broader energy infrastructure than to municipalities themselves. These will be covered in a later study.

We determined whether or not restrictions existed through a variety of means.

First, we examined labour board certificates on file at the Ontario Workplace Tribunal Library. Second, recognizing that binding collective bargaining relationships exist legally apart from certification—through, for instance, voluntary recognition agreements—we also conducted legal searches on each municipality via the Ontario Labour Relations Board database hosted at the Canadian Legal Information Institute (Canlii) to determine whether construction collective bargaining relationships existed outside of labour board certificates. In addition, we examined tendering documents from municipalities to determine whether affiliation with a given labour pool was a legal requirement for bidding.

For ease of reference, we break down the status of a municipality’s construction procurement into three categories. Municipalities marked in green are municipalities which face no restrictions on which private companies or labour pools may bid on construction tenders. Municipalities marked as amber face some restrictions, but these restrictions are limited to sub-trades (plumbing, electrical, bricklaying, etc.). Municipalities marked in red face restrictions on trades which are typically associated with general contractors (carpentry and labourers), or face restrictions in multiple trades. A full description of restrictions is included below in Appendix 1.

B. SURVEY OF ONTARIO MUNICIPALITIES

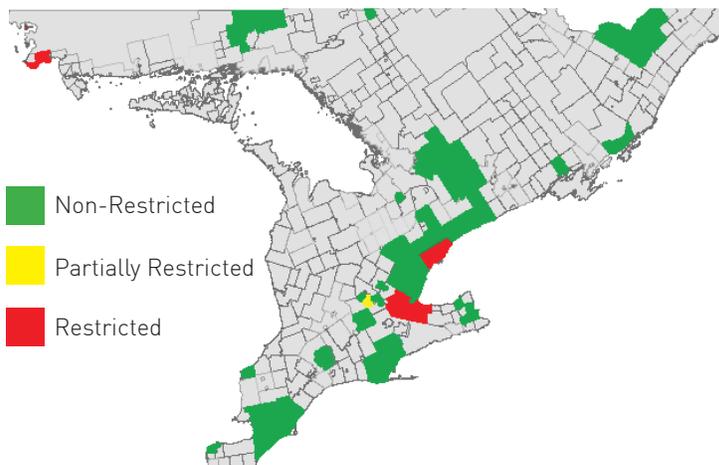
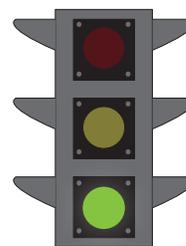


Figure 3: Restricted Ontario Municipalities

At first glance, Ontario’s construction industry appears to be virtually wide open. 91% of Ontario municipalities are open to all labour pools and are not subject to a labour monopoly in construction. Only Toronto, Hamilton, Kitchener and Sault Ste. Marie are subject to labour monopolies. If one judges the openness of the Ontario municipal construction market in strictly geographic terms, the province gets a green light.



C. NUMBER OF TAXPAYERS AFFECTED

A different picture emerges, however, when one examines the number of taxpayers affected by labour monopolies. The four Ontario municipalities which are affected by a construction labour monopoly account for approximately 26% of Ontario’s population as a whole, and almost 11% of the entire Canadian population.

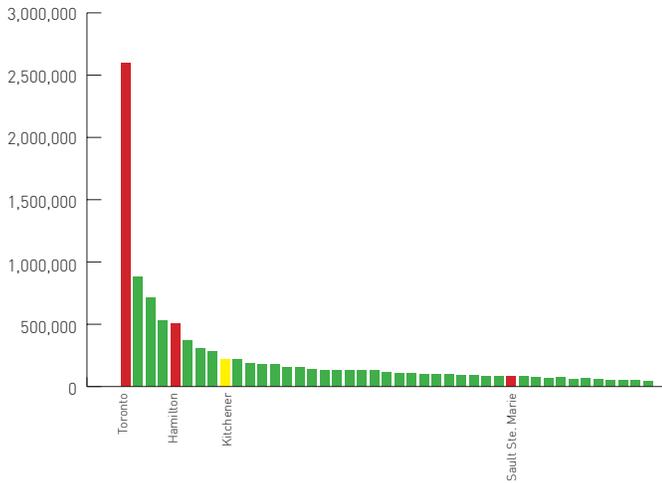


Figure 4: Population of Surveyed Cities

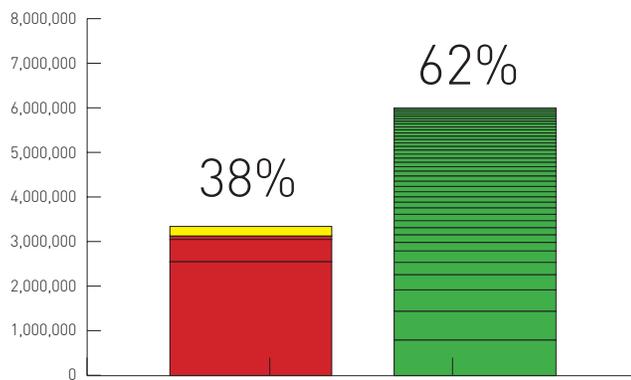


Figure 5: Population of Surveyed Cities, Restricted versus Unrestricted

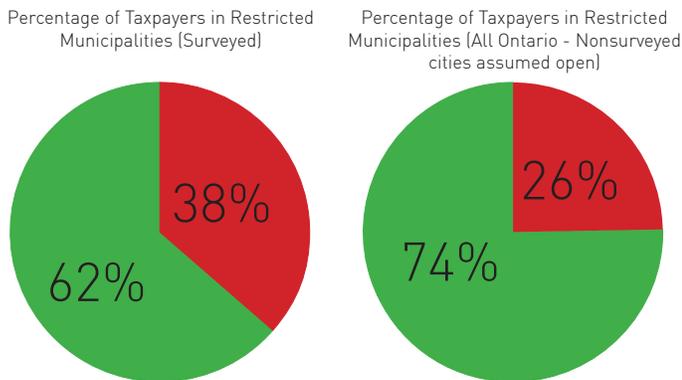
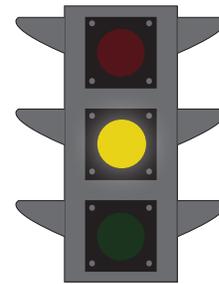


Figure 6: Restricted Population Breakdowns

Given that over a quarter of Ontario's taxpayers live in municipalities which are subject to labour monopolies, the Ontario municipal construction market receives an amber light.



D. SIZE OF BUDGETS AFFECTED

There are also significant amounts of money affected by these monopolies. Using data gained from the budget documents of the restricted municipalities²¹ we determined that construction projects in the City of Toronto worth approximately \$591,000,000 were subject to restrictions due to construction labour monopolies.

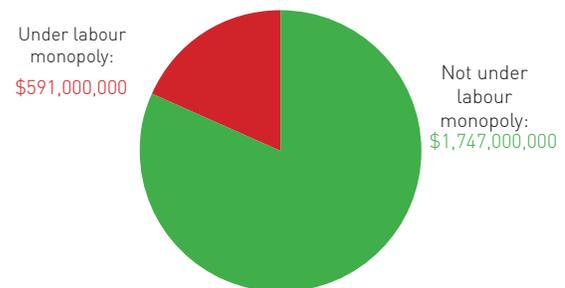


Figure 7: Toronto—Total Capital Budget in 2012

The City of Hamilton's labour restrictions resulted in approximately \$147,000,000 worth of construction projects subject to construction labour monopolies. These estimates include structures being built for the 2015 Pan Am games.

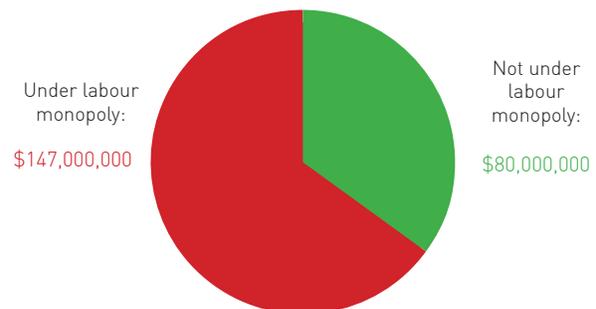


Figure 8: Hamilton—Total Capital Budget in 2012

The City of Sault-Ste.-Marie’s labour restrictions resulted in approximately \$ 8,701,000 worth of construction projects subject to construction labour monopolies.

Combined, there are approximately three quarters of a billion dollars worth of municipal construction work which is unavailable to firms which are non-union or are signatory to alternative unions.

\$8,701,000

Figure 9: 2012 Sault Ste. Marie Municipal Budget Under Labour Monopoly

\$747,000,000

Figure 10: Estimated total amount under restrictions in Hamilton, Toronto, and Sault Ste. Marie

7. ECONOMIC IMPACT OF CLOSED TENDERING

A. MORE HEAT THAN LIGHT

The above information, as helpful as it is for gaining perspective on the openness of the Ontario municipal construction market, still does not answer the question of whether or not municipalities and taxpayers are spending more than they should for their construction, and if so, how much more.

What savings, if any, will be gained by moving to a fully open Ontario municipal construction market?

There is general agreement among all interested parties that competition is an effective tool in keeping costs in check. John O’Grady and Alan Minsky, writing on behalf of the Provincial Building and Construction Trades Council of Ontario, note:

Most owners and developers are free to select any general contractor. Competition among contractors, including competition with non-union contractors, already keeps construction costs in check. If unionized contractors’ costs get out of line, work gravitates to the non-union sector.²²

The corollary to this, of course, is that in places where owners are not free to select any general contractors, construction costs will not be in check. But, again, this does not answer the empirical question at hand. Does closed public tendering cost the public more money, and if so, how much?

B. SURVEY OF PUBLICLY AVAILABLE ESTIMATES

A survey of the publicly available estimates suggests that all parties recognize that there will be *some* increase in cost, but the estimates vary widely.

The Carpenter’s Union Local 18—which certified the City of Hamilton in 2005—suggests that the cost increases are somewhere between 1 and 2%. This number is in line with the City of Toronto’s estimate of approximately 1.7% savings. As noted, however, the City’s estimates focus exclusively on the narrow variable of construction workers’ wages, and fail to consider broader structural advantages that come as a result of competition.

Staffers at the City of Hamilton note that “an exact estimate is impossible” but their calculations suggest that the restrictions add an additional 5% onto construction costs. A consultant hired by the City of Hamilton suggests that cost increases are more likely in the 40% range.²³

While certainly these calculations are not exact, and while they differ depending on the extent of the labour monopoly, the *potential* costs savings of open bidding for the Ontario municipalities are significant. If we extrapolate the estimates from Hamilton and apply them to the total combined construction budgets of the four affected cities, the *potential* effect of open tendering becomes very clear:

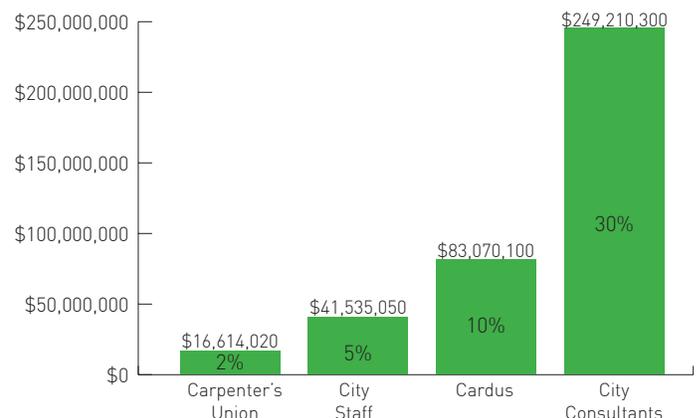


Figure 11: Estimated Savings (2012)

C. LACK OF EMPIRICAL DATA—WHERE IS THE RESEARCH?

But what are the *actual* cost increases, if any? Unfortunately, none of these estimates can be considered scientific and none of the calculations on which they are based—if any ever were conducted—are publicly available.

Theoretically we know that decreased competition *can* lead to higher prices. We also know that a significant reduction in the number of firms in a given sector is cause for concern among competition bureaus. And estimates from the most recent case—the City of Hamilton—suggest that its restrictions reduced the number of firms which could bid on public construction projects by 93%. This effectively suggests that 7% of the total of previously qualified firms control 100% of the City’s work.²⁴

Given the wide range of estimated cost increases, the hypothetical savings that might result from pursuit of open

bidding seem significant enough to warrant further research. It is difficult to understand why a thorough study has not yet been conducted on the financial implications of this policy. The one attempt to do so—in the City of Toronto in 2008—did not actually study the question in terms of the relevant data. As Ray Pennings notes,

the report does not provide the relevant information of how many bids are received on projects. What is the diversity or spread of those bids, also in terms of union affiliation? . . . The report does not account for the fact that a change in the rules regarding city procurement which might make it more possible for contractors affiliated with traditional unions, alternative unions, and non-union to be on city work would, over time, have an effect on the overall construction climate.²⁵

8. CONCLUSION AND NEXT STEPS

Construction is a key economic driver in Ontario. Yet, we are unclear about the competitiveness of Ontario’s construction sector. We are equally unclear about whether the largest purchasers of construction in the province are gaining the greatest value for their taxpayers’ dollars. We are aware that Canada’s leading city, Toronto and large numbers of Ontario taxpayers are subject to restrictions on who can bid on their work. We know that these restrictions affect very large capital budgets, and we know that they create effective labour monopolies—and construction oligopolies—in at least four major public construction markets in Ontario. We also know that these restrictions work contrary to one of the most basic premises of a democratic society—that all taxpayers, regardless of

their private affiliations, should be free to work on projects which are paid for by all taxpayers.

However, we do not yet know what these restrictions cost the Ontario taxpayer. We are presented with a wide range of estimates about the increased costs—from 2% to 40%—without any publicly available data or calculations in support of these calculations. The Ontario taxpayer, and municipal governments are operating in a research vacuum.

This paper provides some clarity about the context about the competitiveness of the Ontario public construction industry. Future papers will expand this clarity, and begin to take steps to fill the research vacuum with credible data.

NOTES

1. Statistics Canada. (2011) *Construction*. Retrieved 05/01/2012, from <http://www.statcan.gc.ca/pub/11-402-x/2011000/chap/construction/construction-eng.htm>
2. 1216805 workers are employed in construction in Canada. An increase of 50.8% since 2000.
3. There was \$18,333,804,000 invested in non-residential construction in Ontario in 2011 of a total \$44,582,003,000 invested in non-residential construction in the entire country.
4. There was \$14,426,283,000 invested in housing construction in Ontario in 2011, of a total \$41,033,392 invested in the entire country.
5. Pennings, Raymond. (2008) *Why is Construction So Expensive in Ontario?* (Hamilton: Cardus), 2
6. *Ibid.*, 4
7. Pennings, 5. See also: Pennings et al. (2002). *Competitively Working in Tomorrow's Construction*. (Hamilton: Cardus).
8. Pennings, 3. For a more detailed description of our approach to labour unions, see Pennings, Ray, Dijkema, B & Sikkema, J. "Competition or Regulation: Reforming Labour Relations in Canada" <http://www.cardus.ca/policy/archives/3295/>
9. Estimates range from 17% (cost of wages) to approximately 33% (total cost of labour). See, for instance, Prism Economics. *A Guide to Construction Cost Source*. 2001. See also: City of Toronto Staff Report to Executive Committee. *Labour and Training Costs in Construction Procurement*. September 23, 2008.
10. Labour productivity in the construction sector, for instance, has been essentially stagnant since 2002. See <http://www.ic.gc.ca/cis-sic/cis-sic.nsf/IDE/cis-sic23proe.html> 2011 rates are .07% below rates in 2002.
11. Pennings, 21. Also "Has Harris Really Changed Things?" <http://www.cardus.ca/comment/article/738/has-harris-really-changed-things> It is important to note that these policies have been perpetuated by governments on both the left and the right.
12. Dillon, Pat. (2012) Business Manager for the Provincial Building and Construction Trades Council of Ontario. *Daily Commercial News*. July 17, 2012.
13. For instance, regulations and legislation which affects investment and labour supply.
14. *Windsor-Essex Catholic District School Board v. United Brotherhood of Carpenters and Joiners of America, Local Union 494*, 2002. CanLII 40737 (ON L.R.B.)
15. *Greater Essex County District School Board v. United Brotherhood of Carpenters and Joiners of America*, 2003. CanLII 37643 (ON LRB) provides some examples of work which would qualify the school board as a construction employer, including i) revarnishing the floor of a community centre owned and operated by the City of Windsor ii) contracting the wiring of a classroom off of school board premises, and being paid to do so by HRDC iii) contracting with a general contractor to build a school which would be built to house a city-owned police station, daycare and library, and being reimbursed by the City of Windsor to do so. etc.
16. For a detailed history of the development of construction labour law in Ontario see Pennings, *Why is Construction so Expensive in Ontario?*
17. OLRB. (2011) Independent Electricity System Operator v. Canadian Union of Skilled Workers. ONSC 81. Page 4, section 9.
18. AMO. (1998) *Amendments to Labour Relations Act Aim to Provide Flexibility for Municipalities*. Retrieved 03/06/2012, from <http://web.archive.org/web/20070818184747/http://www.amo.on.ca/AM/Template.cfm?Section=Home&CONTENTID=39935&TEMPLATE=/CM/ContentDisplay.cfm>
19. City of Toronto Executive Committee Agenda. (2007). Retrieved from <http://www.toronto.ca/legdocs/mmis/2007/ex/agendas/2007-10-29-ex13-ar.pdf>
20. Minutes of Guelph City Council Meeting. (2008). Retrieved mm/dd/yyyy, from http://guelph.ca/uploads/Council_and_Committees/Council/2006/council_minutes_012808.pdf, 26
21. The author surveyed proposed 2012 capital budgets of the City of Toronto, the City of Hamilton, and the City of Sault-Ste.-Marie. A line-by-line review of said budgets was made to determine the value of projects which are restricted. In most cases, the project description provided enough information to determine whether a project was subject to restrictions. In cases where such information was not apparent, the budget line was excluded from the calculation. Information from the City of Kitchener is excluded from this survey as bricklaying costs associated with capital budgets are impossible to gauge accurately from available data.
22. O'Grady, John & Minsky, Alan. (1999) *Preserving Fairness in Ontario's Construction Industry: The Case for Keeping Section 1(4)* Retrieved 06/04/2012, from <http://www.ograde.on.ca/Downloads/Papers/Preserving%20Fairness%20in%20Ontario's%20Construction%20Industry.PDF>
23. Macintyre, Nicole. (2007). "Union Certification Nails City to the Wall". *The Hamilton Spectator*. Retrieved 06/04/2012, from <http://www.thespec.com/news/local/article/205942--union-certification-nails-city-to-the-wall>.
24. The City notes that "of 260 firms registered with the city as large construction contractors, only 17" remained able to bid on large public construction projects. The City of Toronto's study indicates high numbers of bidders, but provides no data on what percentage of possible bidders are excluded.
25. Pennings, 20.

FIGURE NOTES

- F1. Ministry of Finance. (2012). *Ontario Economic Accounts – First Quarter of 2012*. Retrieved 06/04/2012, from <http://www.fin.gov.on.ca/en/economy/ecaccts/>.
- F2. Statistics Canada. (2012). Retrieved 06/04/12, from <http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=301&S=3&O=D>
- F3. Percentages are author's calculations.
- F4. Percentages are author's calculations.
- F5. Percentages are author's calculations.
- F6. Statistics Canada for populations numbers; author's research for restriction levels.
- F7. Author's calculations based on certification, and scope of practice of trades possessing certification (per note 22) from Toronto. Retrieved 06/04/12, from http://www.toronto.ca/budget2012/2012_budget_summary/pdf/capital_summary.pdf, http://www1.toronto.ca/City_Of_Toronto/Information_Technology/Open_Data/Data_Sets/Assets/Files/2012-2021_by_Ward_-_Admin_Recommended.xls.
- F8. Author's calculations based on certification, and scope of practice of trades possessing certification from Hamilton. Retrieved 06/04/12, from http://www.hamilton.ca/NR/rdonlyres/2CF5857B-D399-43F7-BC7A-09174FD6A5E6/0/EDRMS_n240802_v1_4_2_2012_Capital_Budget_Book_1.pdf.
- F9. Author's calculations based on certification, and scope of practice of trades possessing certification from Sault Ste. Marie. Retrieved 06/04/12, from <http://www.sault-sainte-marie.mi.us/docs/12-13proposedBudget.pdf>.
- F10. Combined scope of restrictions by budget. Author's calculations.
- F11. 10% estimate is based on informal Cardus survey of construction contractors who moved from closed to open construction environments (Alberta). Academic studies in construction internationally suggest that anti-competitive tendering leads to significantly higher costs for purchasers. See, for instance, Jens Hoj, Toshiyasu Kato and Dirk Pilat (1995). *OECD Economic Studies*, No. 25, p48. Retrieved 06/04/12, from <http://www.oecd.org/eco/productivity-andlongtermgrowth/15172081.pdf>. Studies in municipal environments in non-construction sectors also indicate cost-savings from the introduction of greater competition—in municipal waste collection, for instance. See Benjamin Dachis. (CD Howe Institute. 2010). *Picking up the Savings: The Benefits of Competition in Municipal Waste Services*. Retrieved 07/24/12, from http://www.cdhowe.org/pdf/commentary_308.pdf. Neither of these studies are direct comparisons to Ontario's construction industry, however, which further underscores the need for empirical data.

APPENDIX 1—RESTRICTIONS ON ONTARIO MUNICIPALITIES BY CITY, TRADE, AND SECTOR

TYPE OF WORK	CITY OF TORONTO*	TORONTO (EXHIBITION PLACE)	CITY OF HAMILTON	CITY OF SAULT STE. MARIE	CITY OF KITCHENER
	I.C.I.	ALL SECTORS	ALL SECTORS	ALL SECTORS	ALL SECTORS
ASBESTOS / INSULATION	●				
BRICKLAYING / MASONRY	●				●
CARPENTRY	●	●	●	●	
ELECTRICAL	●	●			
GLAZING	●				
LABOURERS		●		●	
MECHANICAL	●	●			
PAINTING	●	●			
SHEET METAL	●				
IRON WORKERS	●				

*This includes work for, for instance, Parks Forestry & Recreation, Union Station, but not for the Toronto Library, the Toronto Zoo, the Toronto Transit Commission, or the Toronto Parking Authority. The Toronto Community Housing Corporation is subject to restrictions in the residential sector in three trades: Electrical, Mechanical, and Carpentry. According to its Fair Wage and Labour Trades Obligations Policy, the Toronto Fair Wage Office “will make final decisions with respect to:

- work jurisdictions, in consultation with the industry
- type of work involved
- whether or not union firms/workers must be used, and
- if Labour Trades Contractual Obligations apply.”

APPENDIX 2—MUNICIPAL ATTEMPTS TO RETURN TO COMPETITIVE BIDDING

Construction employer status is not necessarily permanent. Construction employers may apply to the Ontario Labour Relations Board under section 127.2 of the *OLRA* to be deemed “non-construction employers.”

Sault Ste. Marie made such an application in 1999 seeking a declaration that the

United Brotherhood of Carpenters and Joiners of America, and its Locals and Affiliates and Carpenters District Council of Ontario (collectively referred to as the “Carpenters”) no longer represents the employees of the applicant, The Corporation of the City of Sault Ste. Marie (the “City”) employed in the construction industry. Board File No. 3347-98-R is also an application under section 127.2 of the Act brought by the City for a declaration that the responding party, the Labourers’ International Union of North America and Labourers’ International Union of North America, Ontario Provincial District Council, and its affiliated Local Unions 193, 247, 491, 493, 506, 527, 507, 607, 625, 837, 1036, 1059, 1071 and 1089 (collectively referred to as the “Labourers”), no longer represents the employees of the City employed in the construction industry.¹

Likewise, the City of Kitchener, under the same section of the *OLRA* sought a similar declaration with regard to its restrictions from the bricklayers’ unions in 2001.²

Both applications were adjourned, on agreement of the parties. While the decisions do not cite reasons for this adjournment, it is likely that the defence brought by respondents (the respective unions)—which argued that section 127.1 and 127.2 of the *OLRA* was unconstitutional, and in violation of the *Canadian Charter of Rights and Freedoms*—was the reason. It is possible that the cost associated with pursuing such a case through a variety of levels of courts

was deemed too costly for the municipalities and they withdrew. Evidence from the City of Toronto supports the likelihood of this possibility. A briefing document to the incoming city council in 2010, notes the following:

The provisions of the *Ontario Labour Relations Act* provide the City with the option to bring a non-construction employer application before the OLRB. The decision to bring such an application is a matter that rests with Council. However, *it is reasonable to expect that any construction trade union that is the subject of such an application would defend their rights with the City vigorously, likely resulting in protracted and expensive litigation.* (Emphasis added)

Furthermore, recent OLRB decisions found non-construction employer provisions of the *Act* inoperative on the basis that they are contrary to the freedom of association rights guaranteed by the *Canadian Charter of Rights and Freedoms*, and consequently declined to issue non-construction employer declaration.

As a result of the OLRB decision, *municipalities presently in collective bargaining relationship with construction unions will unlikely be able to obtain a declaration terminating rights of a construction union and relieving the City from obligations under the provincial collective agreement.* (Emphasis added)

However, a recent decision from the Court of Appeal for Ontario relating to a similar case noted that these sections do not, in fact, violate the Constitution or the *Charter*. The concerns expressed by the City of Toronto are no longer likely to play as large a factor in municipal decisions about applying for “non-construction employer” status under section 127.2.³

NOTES

1. CanLII 19508 (ON LRB). (1999). *Corporation of the City of Sault Ste. Marie v United Brotherhood of Carpenters and Joiners of America, Carpenters*. Retrieved 10/02/2012, from <http://canlii.ca/t/fr7gb>.
2. CanLII 4578 (ON LRB). (2001). *Kitchener (City of) v. International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers*

and Allied Craftworkmen, International Union of Bricklayers and Allied Craftworkers, Local 12. Retrieved 10/02/2012, from <http://canlii.ca/t/6n7f>.

3. CanLII. (2012) *Independent Electricity System Operator v. Canadian Union of Skilled Workers*, 2012 ONCA 293. Retrieved 10/02/2012, from <http://canlii.ca/t/fr7bd>.

APPENDIX 3—CITY OF TORONTO AND THE TTC

The City of Toronto is subject to the widest labour monopoly in ICI construction in Ontario. Nine trade unions maintain sole jurisdiction over wide swaths of Toronto's construction procurement—ten if you include the Canadian National Exhibition. In many ways, however, Toronto is living with the legacy of a time when cooperation with the craft unions in Ontario was the only way to complete the scope of projects that a city of Toronto's size required. A closer look at the date of certification of many of these unions shows that, of the ten unions, eight received their certificates in the 1970s or 1980s. Only one union was certified since the current “construction employer” legislation was enacted in 2000. While it is certainly true that these unions have legal jurisdiction to do the work, it's important to note that this is as much a legacy of the construction *cultural context* of the 1970s and 80s as anything else. This understanding of Toronto's situation is confirmed by the complete lack of public clarity surrounding procurement for one of the biggest line items in Toronto's budget: the Toronto Transit Commission (TTC). Construction costs related to the TTC were not included in the calculations above, as the TTC remains—for legal construction labour relations purposes—open to all labour pools.¹ However, recent discussions in the *Daily Commercial News* contain conflicting reports on this subject. Greg Meckbach, writing for the *DCN*, notes,

A TTC spokesperson recently confirmed that all contractors must be unionized. Despite repeated requests from the *Daily Commercial News* since early July, the transit agency has confirmed neither that the contractors must be certified with one of the Building Trades, nor the rationale for the policy. But two sources have told the *Daily Commercial News* that the TTC will only accept bids with contractors certified with the Building Trades.²

An article published two days later contained statements from the owner of the light rail project, Metrolinx, which directly contradicted this:

No such restrictions have been in place at Metrolinx, or GO Transit, for the past several decades.” Metrolinx is the operator of GO Transit, which provides bus and train service in the greater Toronto and Hamilton areas. It is also the overall owner for LRT projects in Toronto, to which the province has agreed to contribute \$8.4 billion.³

An article printed two weeks later provides no answer to this riddle, only a statement which raises more questions than it answers. David Salter, press secretary for Minister of Infrastructure and Transportation Bob Chiarelli, noted that

Ontario is evaluating options to consider TTC and City of Toronto procurement practices for the four new LRT lines.⁴

This statement indicates high levels of direct government involvement in determining which procurement practices will be used for a project which it does not directly own. If true, it would indicate that the procurement practices of the owner of the project—Metrolinx—would be overruled in favour of the practices of other, non-owner stakeholders extending beyond, oddly, the Toronto Transit Commission itself. No reason is given for this abnormality. Nor is any reason provided for why the project should fall directly under the City of Toronto's procurement practices—including its requirement to keep bidding closed from multiple labour pools—rather than Metrolinx or the TTC.

Regardless of the cause, the high levels of government and bureaucratic discretion in determining which tenders are open, and which are subject to monopolies, provides further evidence in support of the notion that closed bidding increases rent-seeking activity from economic actors in the municipal construction market. And, as noted above, the elimination of rents can be a key driver in increasing competitiveness and decreasing costs.

NOTES

1. The TTC makes up a significant portion of Toronto's capital budget – approximately 50% if the Spadina subway extension is included. If it was subject to a labour monopoly, the estimates for the total amount of work falling under labour monopolies in Toronto would increase dramatically.
2. Meckbach, Greg. (2012) “Merit Ontario Pushes for Open Tendering at Toronto Transit Commission.” *Daily Commercial News*. Retrieved 08/07/2012 from <http://www.dcnonl.com/article/id51359>.
3. Meckbach, Greg. (2012) “Toronto Light Rail Construction Open to All: Metrolinx.” *Daily Commercial News*, Retrieved 08/09/2012, from <http://www.dcnonl.com/article/id51389>.
4. Meckbach, Greg. (2012) “Toronto Light Rail Projects Open to All or Not?” *Daily Commercial News*, August 27, 2012. http://www.dcnonl.com/article/id51616?search_term=TTC