

WHY IS

Construction So
Expensive in Ontario?

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Executive Summary

The deliberately provocative title is intended to highlight why the relevant data for properly answering the question is not being collected and available. Debates regarding construction labour have been trapped in an ideological pro- and anti-union paradigm. This paper argues that the debate needs to be reframed in a “competitive labour pool” paradigm that opens up new questions and frameworks which, when followed with a subsequent data analysis, may provide suggestions for improving Ontario’s competitiveness.

There is a three-fold relevance for this debate beyond the construction sector: (1) It affects immigration and labour priorities; (2) construction capacity determines the pace at which economic growth can be managed; (3) it has labour mobility implications and hence, impacts where Canadians choose to live.

The paper sketches the development of “a Canadian model” for construction organization which culminated in the adoption of construction-specific craft bargaining structures in virtually all jurisdictions during the seventies. The uniqueness of construction

labour law requirements, in which labour organizations are relied upon to provide various value-added services including placement services and training are reviewed.

The history of how this “consensus model” was challenged in Alberta and British Columbia especially over the past few decades is reviewed. Five factors are identified as leading to the changes which in law have been described as “recent history” that has been given weight in reinterpreting the Canadian model. These are the organizing of the non-union sector with organizations that provided benefit portability and training; a “pilot project” of some significance to try working outside of the consensus model; the resolve of construction owners that they were going to deal with all sectors of the industry and not simply their segment; the development of “wall-to-wall” unions as an alternative to craft unionism; and a change in the approach of the traditional craft unions. The result is that today in Alberta and British Columbia, there is a “competitive labour pool” model. The benefits of this model

can be anecdotally summarized but there has been no careful study as to the correlation of this model with the comparative economic prosperity enjoyed in those jurisdictions.

The paper then turns to review the pendulum swing of frequent labour law changes that characterized the Ontario economy during the comparable period. Not only was the energy and activity focused on public policy rather than “on-the-ground” changes, but the industry became even more polarized with the result

that opportunities for innovation and change were not tested due to the politicization of the issues.

In its conclusion, the paper suggests that instead of paralyzing the debate in a partisan pro- and anti-union framework, there is a need to conduct further study as to the merits for a framework for construction competitiveness that 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.



Introduction

The deliberately provocative title of this paper requires explanation. There are at least three different responses it is expected to provoke. There are many for whom the perception of high construction costs in Ontario is an accepted fact. Not based on any particular set of numbers, the accumulation of conversations between industry leaders, contractors, and investors has established the fact in many people's mind that it costs more to build in Ontario. This causes frustration among many involved in the Ontario construction industry and those charged with encouraging investment in Ontario, who are quick to present various data sets that are intended to refute the claim. And, it must be granted at the outset, that depending on which numbers are selected and who the comparison is made with, Ontario construction might be better characterized as "competitive" as opposed to "expensive." And then there is a third group, undoubtedly the largest, for whom the very subject of construction costs seems an arcane discussion. Before extending significant energy on the subject, they need to be convinced of why it really matters or makes a difference in their lives at all.

This paper is written out of the conviction that the subject is important, not just to those interested in construction, but to all who are concerned about the general economic climate and health of Ontario. It proposes that the discussion, where it is being held, is not taking into account all of the factors that need to be considered if we are to fully understand the questions and potential solutions that face Ontario at this significant time in her economic history. Consequently, it does not get into a "numbers debate" because the consequence of the argument is that the real numbers we need to consider are not readily available. There 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.

The central argument of this paper is that we need to reframe the debate. The collective organization of

labour is an essential feature of how major construction projects are completed in Canada and the value added by labour organizations to the process needs to be affirmed. This paper proposes to frame the issues in an economic framework of competitive labour pools and, using the history of other jurisdictions, demonstrate how this framework can open up new windows of conversation and potentially new solutions for some of Ontario's current economic challenges. Finally, this paper acknowledges that the framework it proposes is a logical and historical framework, but that the hard work of data collection and analysis to understand the impacts and potential of a competitive labour pool framework needs to be done. And so the conclusion is an argument for debate and further study, considering a new way of looking at an old problem.

Why does this discussion matter?

While \$130 billion of annual investment in non-residential construction¹ and an industry involving almost 7%² of the workforce is nothing to sneeze at, for the 93% of Canadians who don't think about construction except when frustrated by a road detour or admiring a

¹ Statistics Canada's estimate for 2008 (Found at: <http://www.statcan.ca/Daily/English/080227/do80227a.htm>, September 2008). I am using non-residential construction since for the most part the residential construction industry is organized very differently and faces a different set of issues than those presented in this paper.

² Found at: <http://www40.statcan.ca/lo1/cst01/econ40.htm>, September 2008.

new building down the street, the connection between construction work and our economy isn't usually top of mind. Except for the general economic data that makes its way into news reports that are ignored by all but policy wonks, discussion of construction work organization usually takes place in the context of recruitment, training, and safety programs or contract negotiations – not subjects that usually inspire widespread interest.

Why go here? Let me suggest three reasons. The skilled labour shortage now experienced in the construction industry significantly influences Canada's immigration and education priorities, to name just two of several areas affected. In 2007, 42,000 new jobs were created in the construction sector. Over the next eight years, some 162,000 new workers will be required to replace retiring baby boomers. An additional 94,000 workers will be required to meet rising demand.³ Given Canada's low birth rate, recruiting and training these workers pose a considerable challenge.

Secondly, the capacity – or lack thereof – of Canada's construction industry to build factories, refineries, and other infrastructure required for a twenty-first century economy will determine the pace at which our economy can grow and adapt. Until a factory, refinery, or other infrastructure capacity is built, no one can use it. Building capacity requires people, and their acquir-

³ Construction Looking Forward: An Assessment of Construction Labour Markets from 2008 to 2016. Ottawa: Construction Sector Council, 2008, p. 1.

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ing the skills and expertise necessary to physically constructing that capacity.

Thirdly, how workers are organized determines their accessibility to specific projects and contractors. This raises the question of labour mobility, given that construction projects are not undertaken where many skilled workers and their families live. This also raises questions regarding the competitive bidding process and the competitiveness of the industry more generally. Until recently, the major contractors with capacity to build major projects all had bargaining relationships with traditional craft unions. This meant that while a construction buyer might solicit multiple bids for a project, all of these bids would be premised on identical labour contract assumptions. Although this is still true in many regions of the country, in some regions, especially Alberta and British Columbia, this has changed. A construction buyer for almost any major project will likely obtain bids from contractors who rely on a non-union, alternative union, and traditional union workforce to complete the project. In other parts of the country and other sub-sectors, alternatives to the traditional “building trades only” option are also contracted. Is this emerging model an aberration? Or, does it signify the beginning of a new model for how workers are organized in construction? Depending on the answer to these questions, there are policy and economic implications. At a time when inter-provincial trade agreements are implemented, that include

expanding the opportunity for labour mobility,⁴ the extent of these concerns is apparent.

To facilitate a discussion of these challenges and questions, I make a modest proposal. These issues, considered to date mostly in the context of the industry, require rethinking in a broader context. We must think about what it means to have a construction industry that is served by various labour pools. Given that the challenge of the future involves employment over unemployment – that is, a worker shortage instead of a worker surplus, what sort of policy changes need to be considered to facilitate these issues? In an era of changing technologies and new construction methods, how do we adapt our present policy and organizational infrastructure, both at the industry and government levels, to get beyond our present presumption of an almost exclusively craft model of work?

Emerging questions

To date, these questions have been discussed primarily by construction labour relations practitioners, and then somewhat reluctantly. This is understandable given the significant organizational self-interests that are in play. It is only natural for those with a stake in the industry to try adapting to the changes, to keep change within their organizational control, and to evolve in a

⁴ One example is the Trade, Investment and Labour Mobility Agreement between the Governments of Alberta and British Columbia. For more information, see www.tilma.ca.

way that maintains their influence and avoids “outside interference” which is harder to control. Hence, one looks in vain for extensive broad-based discussions of these issues and, instead, finds most of the work on these issues within an “intramural” industry context.

Over the past decade, there have been some limited attempts at broader discussions. However, they still unfolded in the context (or avoidance) of labour relations’ “hot potato” issues. Primarily through its annual Best Practices conference,⁵ the Construction Owners Association of Alberta has engaged the industry in a broader discussion which involves all sectors. Attempts have been made with various research initiatives, including those of the Construction Sector Council, to document developments in all parts of the construction sector. But full cooperation from all sectors of the industry has been difficult to achieve as some sectors object to the Council’s representational composition. In 2003, the Work Research Foundation published *Competitively Working in Tomorrow’s Construction* which documented a variety of localized variations on the dominant model of work organization across the country. The report concluded that there “is a continuum of organizational models, with the pure craft model on one side and a pure multi-craft, wall-to-wall

5 These Conferences have convened since 1993 and report on work that is undertaken by COAA committees throughout the year. The COAA has involved non-union, alternative union, and traditional union representatives on the committee since the outset. The conference addresses best practices in the industry and industry-wide concerns. The labour market information program, now conducted on a national basis by the Construction Sector Council, began as a program of the COAA. For more information, see www.coaa.ab.ca.

model on the other.”⁶ It proceeded to posit seven potential implications of this emerging continuum which provided fodder for a conference which involved major representatives from across the spectrum of this continuum.⁷

In 2005, we convened a symposium in Calgary, co-sponsored by employee and employer groups from across the spectrum.⁸ By this time, a labour shortage was realized in various regions of the country and the conference focused on the common problems that were being felt across the continuum of work organization types in recruiting and retaining workers. Some of the structural dynamics that contributed to these challenges were considered, from the lack of a cohesive approach on the part of government’s dealing with construction issues (which in most jurisdictions, involves five to seven ministries) to the nature of data collection and sharing and the need to focus on supply-side solutions rather than simply engaging in demand competition. While all of these efforts engaged all segments of the industry to greater or lesser degrees, none of them has succeeded in really addressing the broader issues directly.

6 Ray Pennings. *Competitively Working in Tomorrow’s Construction*. Mississauga: Work Research Foundation, 2003, p. 49.

7 A summary of this conference is available on p. 55-59 of *Competitively Working*.

8 This included the Building and Construction Trades Council, the National Construction Labour Relations Association, the Christian Labour Association of Canada, the Progressive Contractors Association of Canada, the Canadian Coalition of Open Shop Construction Association, and the Canadian Construction Association.

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What became obvious is that it is really not accurate to speak of a “Canadian construction industry” given the starkly different developments that were occurring in different regions of the country. Although “Red Seal” programs and a centralized program for labour market information⁹ stemmed from certain national assumptions, very different dynamics were present in different parts of the country. While there were (and are) variations in every jurisdiction in the country, it was clear that some jurisdictions, as with British Columbia and Alberta, had the full continuum at work, other jurisdictions, as with Ontario, were dominated by the single, traditional craft model.

At a time when various provincial governments are negotiating TILMAs, in which there are labour shortages (or surpluses), and in which construction costs and construction’s contribution to overall economic performance are being debated, one should ask how the structures of construction labour fit into the equation. How do work organization structures and frontline work condition issues factor in overall economic performance? Is there a connection between the overall economic performance and economic opportunity in a province and the systems that underlie it?

This is an important discussion. But if it is held simply in the context of ideological perspectives regarding desired outcomes for more or less unionism in the

⁹ In recent years, the Construction Sector Council has been producing national and provincial labour market information forecasts. For more information, see http://www.csc-ca.org/english/whatwedo_1.html

construction industry, it will descend into polemic instead of reasoned discussion. Similarly, expecting to deal with the questions as if they were purely economic ones similarly betrays a philosophical predisposition that will stifle conversation. The issues involve a complex intertwine of economic, social, legal, and technological issues and sorting through them involves a broad mix of stakeholders. Reducing a discussion of social architecture, involving the roles and responsibilities of various institutions, to a single dimension brings results similar to reducing a discussion of physical architecture to a single component. No matter how beautiful or unique the windows are on a house, they only serve as windows when they are placed within a wall and the other parts of the building.

Given that this paper is simply arguing for the need for a differently framed discussion, and that entering into that discussion goes beyond its scope, I will briefly sketch the history so that the discussion can be put into context. That history will help illustrate some of the complexity and identify some of the questions which to date have been unexplored but which could be profitably be followed up.

The development of a consensus model

Construction trade unions are organized by craft, meaning that each trade (carpenters, plumbers, electricians et al.) has its own union. This horizontal

model of organization, in contrast to the vertical model where all employees of an employer are organized into a single union as typical in most other industries, has historical roots reaching back to the guilds. In Canada, craft unions have dominated the construction industry since the 1800s, with the Confederation of National Trade Unions (CNTU) in Quebec providing the only major exception to this model.¹⁰ After World War II, the various jurisdictions implemented labour legislation that modeled the principles of the Wagner Act which had been passed in the United States in 1935.¹¹ This provided unions with the legal recognition and the basic framework of labour law that continues through today.

During 1950s and 1960s, there was significant labour instability which resulted in a series of commissions and studies. During the sixties, strikes were commonplace, with person-days lost in Canadian construction increasing over 300% over the previous decade, while wages increased 207 per cent.¹² The *Globe and Mail* editorialized construction as “the sick industry” noting that:

the industry is afflicted by a large number of fly-by-night, irresponsible contracting firms; that exploitation of workers and particularly immigrants, is common, involving not only

¹⁰ H. C. Goldenberg and J. H. G. Crispo, *Construction Labour Relations*. Canadian Construction Association 1968, p. 16.

¹¹ Labour legislation in Canada is primarily a matter of provincial jurisdiction in respect of the construction industry.

¹² Joseph B. Rose, “A Canadian View of Labour Relations in Construction.” *Industrial Relations* 18 2 (Spring 1979):156.

payment of sub-standard wages but in some cases failure to pay even the wages agreed on; and that labour relations are generally turbulent and unsatisfactory, marked by frequent strikes and acrimonious jurisdictional disputes between unions.¹³

The Ontario government commissioned Carl Goldenberg in 1961 “to inquire into and report upon the relations between labour and management in the construction industry in Ontario and such other matters as in the opinion of Our Commissioner may pertain thereto.”¹⁴ The recommendations of this Commission, later refined in a publication that Goldenberg authored with John Crispo in 1969, entitled *Construction Labour Relations*, became the template followed by most jurisdictions. These recommendations included:

- the establishment of special provisions within the Labour Relations Act for the construction industry;
- a special panel within the Labour Relations Board to adjudicate cases that arise from the construction industry;
- Certification of the union by contractor, covering all work they perform within a defined geographic area (rather than certification by site or project, with limited exceptions);
- The ability of trade unions representing the crafts

¹³ *The Globe and Mail* (28 March 1962):6.

¹⁴ H. C. Goldenberg, Report of the Royal Commission on Labour-Management Relations in the Construction Industry, March 1962, p. ix.

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to deal jointly as a council or as a confederation of trade unions in their dealings with employers;

- The coordination of bargaining between the various unions and trades with common expiration dates;
- Various suggestions regarding expedited and binding dispute settlement mechanisms;
- Granting the Labour Relations Board the authority to adjudicate jurisdictional disputes between unions;
- The establishment of rules regarding successor rights, meaning that once a company was certified to a union, projects undertaken by the principals of that company would be covered by that agreement, even if they were completed under a different corporate entity; and
- The establishment of minimum wages for construction workers with protection and enforcement for the collection of wages and vacation pay.¹⁵

The story of how these various recommendations were implemented is complicated and varies by province, with implementation in Ontario taking the better part of two decades and many further studies. However, the direction established by Goldenberg in 1962 ultimately prevailed in shaping the framework of construction labour relations in Canada. It was actually the Construction Labour Relations Association of British Columbia, formed in 1969, that became “the first provincial

¹⁵ Goldenberg, 71-76.

association devoted exclusively to labour relations and signified the initial phase in the movement towards integrated bargaining.”¹⁶

Unique characteristics of construction

- Responses to the wisdom of the Canadian construction relations paradigm predictably vary according to one’s philosophical orientation regarding collective bargaining in a free market economy. But care must be taken to account for the role that construction unions play which is quite different from unions in other industries. As former British Columbia Labour Relations Board Chair Paul Weiler wrote in 1980, “there is a great deal the law can and should do to reshape collective bargaining relationships in construction. But the intelligent use of the law requires understanding of the real-life phenomenon with which it deals. A great deal of damage is done by well-meaning reformers who blithely ignore that truth . . . There are many established ways in which the building trades deal with the contractor that do not conform to the standard legal model we have all learned from industrial relations in a typical plant.”¹⁷

The rhetoric of choice is one that has utilized by those on all sides of construction labour relations battles.

¹⁶ Rose, 160.

¹⁷ Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law*. Toronto: Carswell, 1980, p. 186.

Those who believe that the control that traditional craft unions have been able to exert over sectors of the industry is a bad thing, argue that such dominance prevents choice and effectively “forces” construction workers to join a union, whether they want to or not. Defenders of union practice argue that the various job protection mechanisms employed by unions to prevent work from being assigned to anyone not covered by a union contract are simply means to protect the choices that are made by union members. Construction work is by definition erratic -- when one job is completed, there is no guarantee that there will be a similar job for the workforce to move. It is seasonal – the Canadian winter is hardly an ideal environment to complete certain construction projects; on the other hand, deep freeze temperatures that allow access are the only conditions in which certain other projects can be completed. It is more subject to economic peaks and valleys than other industries – governments have found infrastructure spending to be a useful lever in macro-economic policy. Therefore, one can understand that protecting access to work is a significant concern for construction trade unions.

There are a number of unique characteristics of construction that have resulted in construction unions’ playing a role very different from traditional industrial unions.

Construction trades people often work for many different employers. Given that building projects require

large numbers of specific trades for relatively short period of time, it makes sense for the same workers to perform the same task for different contractors. Although a factory may take a year to build, the different trades arrive sequentially and typically only for a few weeks or months, before they move on to the next job. The union provides a hiring hall service to employers, and trades people are placed through the union to specific jobs. This provides workers with more steady employment since any particular contractor will only rarely be able to arrange their work so precisely that there is continuous employment for the trades people they require. It works to the advantage of all for the union to provide this placement service. Trades people obtain most of their work through the union as well as health and retirement plans, training programs, and other provisions often presumed “employer responsibilities” in other sectors. In construction, these are administered by the union. The result is that workers identify themselves often more closely with their union than they do with any particular employer.

Labour laws still provide processes for employees to “choose” their union through the certification processes. But in practice most of the relationships between employers and unions in the construction industry today are either the legacy of long-standing relationships or the choice of employers who enter into voluntary agreements with a union in order to access the labour pool that the union is able to provide. Although there

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is an industry of legal niceties that has developed in order to ensure compliance with labour codes, the raw politics of front-line construction labour relations today requires that the union provide services that maintain the confidence and loyalty of their members. In turn, the union markets the labour capacity of their membership to employers and obtain work that will keep their members productively employed.

Challenging the consensus

In the mid-1980s, a model developed through a combination of public policy, the activities of the various unions and contractor groups, and the ancillary construction and training organizations in which the capacity to complete major construction projects rested almost exclusively with the traditional craft unions. It was after the recession of the early eighties in Alberta and during the lead-up to Expo 86 in Vancouver, and the construction projects that accompanied it, that this consensus was challenged. The result thirty years later is that in Alberta and British Columbia, although also in other regions to lesser degrees, a very different model is in operation.

Several factors contributed to these changes. The non-union sector organized themselves with aggressive associations that began to provide union-type services. Both the Independent Contractors and Businesses Association of British Columbia (formed in 1975) and

the Merit Contractors Association of Alberta (formed in 1985) have developed portable health and benefit programs and training programs to allow non-union contractors as a group to develop a workforce that could help them compete with unionized contractors.

There were also various efforts by non-craft unions to organize in the construction industry. Unions like the Industrial Wood and Allied Workers of Canada (IWA) and the Communications Energy and Paperworkers Union of Canada (CEP) held bargaining rights for workers at various plants, and mills sought to represent workers who were doing construction work on those projects.¹⁸ Then there was the growth of the alternative union sector: certain traditional industrial unions, including the International Woodworkers, and alternative unions such as the Christian Labour Association of Canada (CLAC), had actively represented workers in the construction industry in various jurisdictions across Canada since 1963. These increased their presence. Instead of organizing workers by craft, these unions organized them on a “wall to wall” basis, avoiding the jurisdictional disputes that come along with the craft model. CLAC has also employed a very different philosophy of bargaining emphasizing partnership. However, until the mid-eighties, it operated on the fringes of the construction industry and had

¹⁸ For example, in 1980 the British Columbia Building Trades union filed a complaint against the IWA performing construction work on a new sawmill, seeking to use non-affiliation clauses to protect their craft union rights. See *Duke Point Development Ltd. V. Vancouver Island Building and Construction Trades Council*, [1980] 1 Can L.R.B.R. 220 (BC).

not developed any significant capacity to deliver major projects. The Canadian Iron, Steel and Industrial Workers Union (CISIWU) and the General Workers Union of Canada (GWU) also formed during this period and operated in the construction industry using the industrial model.

These developments combined with various amendments to labour legislation, labour board decisions, and some bold initiatives led to change within the parameters of labour relations. When the Building Trades Council of Alberta filed a complaint in 1996 with that province's Labour Relations Board arguing that the legislation was designed to allow only craft unions to represent construction employees in that province, their application was dismissed. The Board noted that the application was in effect "a multi-faceted reconsideration application"¹⁹ in which the Building Trades argued that:

in *Construction Labour Relations*, Goldenberg and Crispo set out a system which was subsequently adopted by virtually every jurisdiction in Canada. The nutshell treatment of their text was to the effect that stability in the Construction industry could only be achieved where there was one Collective Agreement across a discreet portion of the Construction Industry having one Collective Agreement, , one expiry

19 *Construction Labour Relations – an Alberta Association et al. V. TNL Industrial Contractors Ltd. Et al.* [1996] Alta. L.R.B.R. 497.

period, and, if necessary, one strike or lock-out per dispute. These provisions were subsequently imported into the Alberta Labour Act, 1970, and have continued in one form or another until the present.²⁰

In response, the Labour Board decision noted that:

the panel recognizes that our scheme of construction industry relations shares its intellectual roots with the rest of Canada, and that the exercise engaged in by Crispo and Goldenberg was as influential here as it was elsewhere. The Construction Industry in this Province, however has been shaped in equal measure by our own unique experiences. Our most recent construction labour law amendments were enacted in 1988 and have as many of their roots in more recent history as they do in Crispo and Goldenberg.²¹

Does "recent history" mean a new model?

"Recent history" continues to unfold in Alberta and British Columbia in respect of alternatives to the craft model becoming commonplace in the construction industry. Where once virtually every contract tendered to a non-craft organized employer attracted attention

20 *Ibid.*, p. 6.

21 *Ibid.* p. 6.

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of the unwanted sort involving litigation or protest, today the presence of multiple labour pools available to major construction projects is simply part of the construction marketplace. A construction buyer in Alberta can put out a tender and realistically expect three bidders who will each employ a different labour pool and model if they win the project. These differences are factored into the bids with the result that over time, the marketplace is being changed for all of the participants, including the craft unions and their employers.

Where they happened, they tended to respond to, rather than initiate, changes that were occurring on the ground. I suggest that there are five more significant factors that in combination contributed to the change in competitive environments that exist in British Columbia and Alberta. What is significant is that none of these factors has occurred in any comparable degree in Ontario:

1. Organizing of the Unorganized.

The traditional building trades craft structure provides significant value to the construction industry. Not only is there a collective bargaining role covering wages and benefits, but in construction the craft unions provide a “labour broker” function. They became the organizing structure through which workers moved from employer to employer (as the short-term nature of construction projects

demands), ensured benefit portability, and they were leaders in training their craft, resulting in a skilled capacity to do the job.

Three decades ago, the entire non-union sector was unorganized in that each contractor was “on their own.” The result was that there was no identifiable alternate labour pool to that of the Building Trades. A key factor in understanding the changes in those provinces has been the organization of previously unorganized contractors into associations like the Independent Contractors and Businesses Association of British Columbia (ICBA) and “Merit” that provided portable benefits, training programs, and other services that created a “pool of workers.”

- 2. A Pilot Project.** It is instructive to note that the changes that occurred in B.C. and Alberta unfolded on the ground first, before they were followed by legislation. There was a decision, with the accompanying risks, on the part of owners and contractors to take on a project without sourcing the labour pool organized by the Building Trades. In some cases, these projects had profile and attracted major protest and opposition (such as the Pennyfarthing False Creek project and Expo 86 in British Columbia). In other cases these were lower-profile projects in which major developers quietly “carved out” smaller projects for non-union

or alternative union contractors to complete, hoping to avoid controversy and stay “under the radar screen.” In both cases, it was the successful completion of those projects that was noticed by others in the industry and created an appetite for investors and contractors to consider how construction might be done differently than the status quo. It should be noted that the motivation for these projects were often perceived abuses of the practical monopoly control that certain unions had in the sector. While the details of each of these will be contested and coloured by one’s perspective on the role and desirability of unions, most will admit that there are some situations in which unions have made short-sighted decisions that have provided the impetus for actions which otherwise may not have occurred.

3. Owners’ Resolve. Closely related, but deserving distinct mention from the obvious involvement of owners in the pilot project, is the collective organization and resolve of owners. Particularly in Alberta, the Construction Owners Association of Alberta has taken a leading role in convening industry participants - open shop, alternative union, and craft union – in focusing on issues such as safety, training, recruitment, and overall best practices. While careful to manage how the sometimes controversial labour relations issues were covered (or avoided) on agendas, the annual

best practices seminar held each May has become a “must attend” convention for the industrial construction industry in Alberta and has provided an opportunity for information sharing, networking, and learning that has contributed substantially to overall capacity of the various labour pools.

4. Wall-to-Wall Unions. The concurrent development of wall-to-wall unions providing an alternative to the craft unions is a significant factor. While much of the public discussion of this has involved unions such as the Christian Labour Association of Canada (CLAC) which by their philosophy and organization fall outside of the mainstream labour movement, the wall-to-wall alternatives to traditional craft unions include established unions like the International Woodworkers Alliance (IWA), Communication Energy and Paperworkers Union (CEP), the Labourers and Carpenters unions among others. In some settings (usually the expansion of plants where local unions have existing bargaining rights or site locations where modular construction is taking place), industrial unions like the Canadian Auto Workers and Steelworkers have competed for some work that was traditionally the exclusive purview of the craft unions.

The growth of alternative labour organization, in most cases through creative legal applications since the construction provisions of labour rela-

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tions acts presupposes craft units, has been a significant factor. The wall-to-wall model is seen by some to provide significant productivity savings in that the workforce mix and avoidance of jurisdictional dispute issues can provide for more efficient work organization. Not having depth of numbers in any specific craft to provide the same intensity of training opportunities is the acknowledged quid pro quo of this model.

- 5. Changing Craft Unionism.** In describing changes that occur over a few decades, it is important to acknowledge the ongoing dynamic nature of the process. Some observers suggest that the most significant change in the way major construction projects are being completed in jurisdictions in Alberta and British Columbia is a result of changed approaches within the traditional craft unions. Undoubtedly some of these changes would have occurred regardless of external pressures, but most would acknowledge that the competitive environment with which the traditional craft unions have been faced has resulted in improved programs, a closer and more constructive working relationship between those unions and their contractors, and an approach to labour relations that would generally be characterized as “more progressive” and cooperative.

Discussions of this sort require the identification of factors and models in order to make sense of the reality. However, it should be noted that these five factors developed concurrently in an organic process, sometimes in complementary and sometimes in conflicting patterns. It is the benefit of a longer historical perspective that enables us to separate out the partisan rhetoric and defence of self-interest that necessarily accompanies debates as they occur and to take a longer view and measured response to the change that has taken place.

While one can find many anecdotes about what the changes have meant, for better or for worse, there has been little formal study regarding the impacts of this model. Has the existence of competitive labour pools resulted in a difference in the cost of construction? Are there efficiencies or productivities being achieved as a result of this competition not evident in other jurisdictions where the craft model continues to dominate? How have these factors affected workers? This model has developed during a time of overall economic growth in these jurisdictions. How will it survive the inevitable economic downturns to come?

Ontario’s labour law debate

The Ontario story since 1978 has followed a very different trajectory. During the early years,

projected increases in construction activity combined with double-digit inflation prompted strong calls from union leaders for large wage settlements. Consequently, while the frequency and overall number of work stoppages declined under province-wide bargaining, the number of workers involved and overall man-days lost increased dramatically in the years immediately following the new bargaining structure.”²²

On one hand, similar pressures were felt across in various jurisdictions (allowing for the cycles of local construction activity) however the response in Ontario was very different. The debate in Ontario turned into an especially polarized pro- and anti-union debate, a debate that reached its heights during the nineties with the passage of Bill 40 by the NDP government which was perceived to favour unions, followed by the passage of Bill 7 in 1995 by the Conservative government, which was perceived to favour employers. The Conservatives followed in 1997 with the passage of Bill 31, the *Economic Democracy Act*, which provided opportunity for “non-construction employers” (municipalities, school boards, corporations who act as their own general contractor on a project) to negotiate agreements outside of the provincial bargaining framework. It also provided for “Project Agreements” whereby major

²² Katherine Jacobs. “Province-Wide, Single Trade Collective Bargaining – 30 Years later.” Found at: http://www.iciconstruction.com/about/news/article_1B.cfm?CFID=2607653&CFTOKEN=70071570, November 2008.

industrial projects that are deemed to have broader economic significance can be completed under a local special agreement.

In 1999 a public lobby took place to repeal Section 1(4) of the Ontario Labour Relations Act. This section essentially enables the labour board to determine that different legal corporations are a single entity for labour relations purposes, a provision designed to prevent employers from “double-breasting” as is done in other jurisdictions in which the same corporate entity performs some work through a controlled Corporation A under contract with one union; perhaps other work on a non-union basis contracted through Corporation B; and in some cases yet other work with alternative labour agreements with Corporation C. Its purpose, in the words of former OLRB chair George Adams, is to see contractual labour relations relationships follow “the economic realities of the [employment] situation,” regardless of the corporate structures.²³

The lobby to change this provision, led by some of the largest contractors who between them performed most of the large construction projects in the province, argued that this change would allow these contractors to compete in sectors where non-union contractors were dominating and also that the result would create a more competitive construction economy. They noted that their contractual agreements with the craft unions came by virtue of decades-old local

²³ George Adams, *Canadian labour Law*, 2nd ed. Aurora, Ontario: Canada Law Books, 1993, pp 8-30 and 8-31.

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“working agreements” which, in the process of moving to province-wide bargaining, were interpreted to have province-wide scope. In response, the Provincial Building Trades Council made two main arguments. First, they suggested that what the contractors were really after was “selective access, on either a direct or indirect basis, to the construction unions’ dispatch system.”²⁴ Secondly, they argued the effects that these changes might have on construction costs, most notably citing statistics that suggested Ontario and Alberta were in fact competitive when the actual numbers were compared. It suggested that whatever increased costs that the Ontario system contained were offset by at least five factors:

- Improved safety which was claimed a result of union organization;
- Limiting the impacts of the construction underground economy, whereby individual subcontract arrangements are entered into as a means to avoid payroll taxes;
- Investing in the development of the skilled trades, which was claimed was disproportionately carried by the unionized sector;
- A better qualified workforce able to perform higher quality construction;
- The provision of negotiated benefits which would lessen pressure on tax-financed social programs.²⁵

²⁴ John O’Grady and Alan Minsky. “Preserving Fairness in Ontario’s Construction Industry: The Case for Keeping Section 1(4).” Found at: <http://www.ogrady.on.ca/pdf/paper7.pdf>, p. 33.

²⁵ *Ibid.*, p. 37-52.

The result of this debate was the passage of *Bill 69: The Labour Relations Amendment Act, 2000 (Construction Industry)* in December 2000. Although Section 1(4) was not changed in response to the lobby, various other amendments were made with a view to addressing the concerns raised during the debate.

These included:

- Restrictions on the right-to-strike for construction unions in the residential sector;
- Amendments affecting how the Labour Board would determine successor rights in the cases of business sales or movement of a “key person”;
- Amendments to the rules surrounding “hiring halls” allowing employers more flexibility regarding who they hire;
- A provision whereby employers can seek local exemptions to the province-wide agreements based on competitive disadvantage.

The pendulum swing of labour law reforms continued with the election of a Liberal government in 2003.

In 2004, Bill 144, *The Labour Relations Statute Law Amendment Act* was introduced, the most significant effect for the construction industry was the reintroduction of automatic certification based on “card check” rather than a representation vote.

Not only has the focus of energy in Ontario been on the pendulum swings of labour law changes, but the

manner in which these changes have been implemented also deserves attention. Given the polarization of the ongoing labour relations debates, a very defensive mindset developed. Even collective bargaining between the parties became framed in the context of public policy battles. In 2004, the Provincial Building and Construction Trades Council reported to their convention that “the latest round of talks was the first in some time where they were able to focus on issues not related to protecting members from employer-friendly labour legislation.”²⁶

An interesting case study illustrating how this environment limits the willingness of construction buyers to take risks or look for innovation is illustrated in a City of Toronto Staff Report regarding “an overview of the construction activities for 2007 including the cost of construction contracts, breakdown of labour costs (union / non-union) and the value of training and legal issues.”²⁷ The sixteen-page report came in the context of a request the City of Hamilton had made to Ontario municipalities to lobby the province for legislative changes to provide municipalities more flexibility in avoiding union subcontracting clauses. The point isn’t the conclusion of the report or to comment on the merits or demerits of the arguments for the Hamilton request. Rather, it is to illustrate how the mindset of the union / non-union paradigm for the debate in Ontario

²⁶ Grant Cameron, “Trades’ report on construction work spots opportunities.”, *Daily Commercial News* (October 29, 2004). Found at: <http://dconline.com/article/id28346>, November 2008.

²⁷ Staff Report, “Labour and Training Costs in construction Procurement”, City of Toronto, September 23, 2008, p. 1.

limits the analysis that takes place and the data that is considered.

The report uses a union / non-union framework where the term “union” is used as a synonym for Building Trades craft construction union, given that the report indicates these unions “require the employers to use unionized workers to perform the work.” Presumably work being completed by contractors affiliated with CLAC is included in the data as non-union, even though that would be a technically inaccurate designation. The framework of alternative unions is not contemplated.

The report goes on to observe that work which falls outside of the jurisdiction of the unions to which the city is bound is open to bidding with the result that “such work is nevertheless frequently performed by unionized firms.” Instead of analyzing the reasons for this (which may in fact be the nub of the argument in support the Hamilton request), the report simply observes, “This indicates both that many unionized firms are successfully competing for City contracts, even where there is no union requirement, and , that there is a high rate of unionization in the construction industry, particularly in respect of high-scale construction.” In the section regarding the City Procurement of Construction²⁸, there is no analysis of the nature of the bidding that the City benefits from. In a report

²⁸ pp. 6-7.

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supposedly designed to answer the questions regarding whether the City should join in lobbying to have the status quo changed, 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 concludes with an array of data that ultimately leads to the conclusion that a savings of 1.7% might be achieved by paying fair wage rates rather than unionized rates if the city were to become a non-construction employer. Given the uncertainty of the legal process and the disruption in the relationship with the city's nine unions, the report recommends against proceeding.

Again, the point is not to argue the report's conclusion but instead to illustrate how the dominant union / non-union paradigm limits even the questions being raised or data being analyzed. 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 bid on city work would, over time, have an effect on the overall construction climate and have impacts well beyond what extrapolation from current numbers indicate. Instead, the circular argument of using the existing conditions and data to illustrate the limited impact that a change of policy might have, without taking into regard the potential impact that the proposed change is intended to have.

Analysis and conclusion

The history of one jurisdiction cannot simply be transplanted into another and it would be foolish to suggest that a model that has emerged over the past few decades in British Columbia or Alberta can simply be adopted in Ontario. Still, just as the Crispo - Goldenberg model provided a consensus framework which has been variously applied in the Canadian jurisdictions, so these subsequent developments and adaptations – the “recent history” – provide lessons and insights that can have broader application.

Although Ontario is hardly the only jurisdiction in which the debate included pro- and anti-union rhetoric, it was a very different debate than that held in other jurisdictions. In other jurisdictions, change happened on the ground and a public policy debate ensued as to the merits (or demerits) of those changes and how the law should be adapted to those. In Ontario, there was an attempt to lead with a public policy debate and it rarely got beyond the polarized ideological discussions. In such an environment, the unionization rate of the industry was the most significant barometer of construction health.

The need for labour law reform as part of improving the competitive environment has been acknowledged in most major studies of productivity in Canada. However, the result of Ontario's nearly annual labour-related law changes in the nineties, brought in by suc-

cessive governments, has been labour instability and polarization rather than any significant change. The irony is that both sides, while perhaps enjoying some short-term advantage in their day to day relationship with their counterpart on the other side of the labour relations table, ended up with a focus of winning the labour relations battles rather than dealing with the larger issues. In fact, the dividing line after time becomes unionized employers and their unions working together to protect and increase their collective market share, and seeking to keep out non-union interlopers. The natural dynamic of such a process is to resist resisting major change but to work together to protect the institutions which are presently involved. In a curious way, it turns both unions and employers into conservatives resisting change. As I noted in a 2001 analysis of the Harris years:

Resistance comes from within the construction and government sectors where particular unions have effective monopoly control—either through legislative protection or established practice—and resist changes necessary for the development of the province. Andrew Sims notes the irony that whereas “Wagnerism was conceived as a tool for change, our restriction to periodic bargaining increasingly runs the risk of being used as a barrier to change, with unions becoming the new conservatives.” The argument certainly holds true at a macro level as well.²⁹

²⁹ Ray Pennings. “Has Harris really Changed Things” available on <http://www.cardus.ca/comment/article/738/>

Critics will suggest that at the end of the day any approach of competition is “anti-worker” in that it provides competition for wages and in the day-to-day carrying out of competition, results in the sometimes undercutting of agreements. That this happens is an acknowledged factor, however the view that this is somehow anti-union or anti-worker is a position that must be rejected as a matter of public policy. Although it is understandable and legitimate for a union to seek to increase its market share or even dominate a market (as the acknowledged strategy of craft unions for most of the twentieth century), that does not suggest that in a free and democratic society where worker choice is a defining hallmark, public policy should be constructed to reinforce such monopolistic tendencies.

It must also be noted that the maintenance of the restrictive Ontario system relies on its own questionable features. In response to the argument that contractors have made that the system is imbalanced in that they cannot compete against non-union whereas union workers can take employment in the non-union sector at times when there is no union work available, clauses have been negotiated into the provincial agreements to off-set this imbalance. For example, the Electrical Contractors Association of Ontario and International Brotherhood of Electrical Workers agreement at Article 4.02(c) states, “No member of the Union shall be permitted to work at electrical construction work for anyone who is not Party to this Agreement.” While this

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can be a difficult clause to enforce, especially in economic circumstances where there is no available work under union collective agreements, the necessity of such a clause and the controlled system it presupposes do raise more fundamental questions with the allegations brought from a different perspective that such a system has “anti-worker” characteristics.

Unions in other jurisdictions continue to be able to represent their workers in a competitive environment. Some admittedly do a better job than others but such are the vagaries of a free society. They also do their job differently today than they would have a few decades ago, but significant change has also occurred in the Ontario labour relations environment. Construction work itself has changed and the ability to adapt is a prerequisite for involvement. It is the currency of worker choice and support for the unions that do a good job that provides the mandate for these unions to continue on, and provides them with the incentive to improve.

Ontario has chosen a very different framework and way of proceeding over the past few decades, as is her right. Defenders of the Ontario model can rightly point to significant innovations and adaptations that have taken place within the craft model, the virtual elimination of work stoppages in the sector, and the development of a capable construction work force. They will make the claim that the system is working.

However, at a time when the province is challenged economically and the framework of the overall economy need to be examined, simply to claim that something is working is not an adequate answer. Is it working as well as it could be? Are there ways to improve? Are there lessons that can be learned from what has been tried elsewhere?

Anecdotally, the alternatives to the consensus model that have emerged in British Columbia and Alberta, coinciding as they have with a period of comparative economic prosperity, merit a more careful look. The data have not been analyzed or, even, gathered, so no one can conclusively say one way or the other as to the correlation between the competitive labour pool environment that has developed in other jurisdictions and their comparative economic health over the past few years. Construction costs and labour organization are certainly not the only explanation, but one can make a credible case that they are a contributing factor.

It is time at least to openly ask these questions, examine the data, and consider what lessons might be learned. Have the changes encouraged investment? Are there lessons for jurisdictions like Ontario, in which the craft system remains very entrenched and the ability for other models to compete is restricted? As the construction workforce experiences significant growth and turnover over the next number of years, is our training infrastructure, built on presumptions of craft organization, in need of an overhaul to adapt to

the changing way in which construction work is delivered on the ground?

As economies and societies change, our institutions must understand and adapt to that change. Sometime new institutions must develop alongside old institutions or even take their places. When it comes to ensuring that we have a construction workforce capable of building the infrastructure needed for our changing economy, it is clear that we face challenges in finding these workers, training them, and organizing them in a

way that is safe, productive, and competitive. Pretending that this is just another chapter in an old union versus non-union turf and balance debate doesn't adequately account for all of the dimensions that must be considered. Instead, we must engage in an honest discussion and study of the issues, comparing and learning from what is developing. If we do, Canadians can be confident of the benefits that a capable construction capacity offers and provides.



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