# Planning for Ontario's Building Boom

## Ontario's Construction Industry and the Need to Reform the Labour Relations Act

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GOLDEN HORSESHOE GENERAL CONTRACTORS ASSOCIATION

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# Introduction

The construction sector has grown in recent years to become one of the most important drivers of Ontario's economic prosperity. As of 2021, the construction sector accounts for 7.8% of Ontario's GDP (Statistics Canada. Table 36-10-0402-02 Gross domestic product (GDP) at basic prices, by industry, provinces and territories, growth races (x 1,000,000) DOI: https://doi.org/10.25318/3610040201-eng), with an average of approximately 534,000 people employed in construction jobs (Ontario Construction Secretariat. Jan 12, 2022: Employment (Dec 2021) https://iciconstruction.com/2022/01/12/jan122022_ecoupdate-1/). As Ontario, like other jurisdictions, turns its focus to the post-pandemic economic recovery, the construction sector will be a key part of growth and recovery.

The newly re-elected Ford government has made clear its policy priorities to drive Ontario's economic recovery include the construction of 1.5 million new homes over 10 years and a historic $158 billion investment in infrastructure projects, such as the construction of new hospitals and long-term care homes, as well as major transit and highway transportation projects. It is no coincidence that Ontario's 2022 Budget (which also served as the PC Party's election platform) is titled Ontario's Plan to Build (Bethlenfalvy, Ministry of Finance, 2022). Ontario's construction sector will be a critical player in achieving these government priorities and in driving Ontario's economic recovery.

Ontario's construction sector is vitally important to Ontario's economic prosperity – both as an industry in its own right and as an enabler of other government economic priorities. Yet two

structural issues afflict Ontario's construction sector and could imperil Ontario's economic recovery and growth: a labour shortage and the existing labour relations framework in Ontario.

By now, it is well known the construction sector faces a labour shortage. There simply are not enough skilled workers to resource all of the residential, industrial, commercial and infrastructure projects that are planned. The industry's labour shortage is both a current and a future problem. A survey by the Ontario Construction Secretariat finds that 56% of contractors expect to have difficulty accessing skilled labour today. Looking towards the future, this issue is anticipated to grow, with the prediction that the construction sector will require the recruitment of 71,800 workers between 2022 and 2027 (Buildforce Canada. Construction & Maintenance Looking Forward: Ontario, at p. 1 https://www.buildforce.ca/en/lmi/forecast-summary-reports). Recognizing the potential impact of this labour shortage, the Ford government has been a strong proponent of the skilled trades, introducing new programs and new legislation to attract more people into these trades.

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Unfortunately, there are no current plans to address the other structural issue that is impeding Ontario's construction sector – the labour relations legislation for the industry. The Labour Relations Act (LRA) contains construction sector-specific provisions, but these have not been substantively updated in 40 years. This outdated legal and regulatory framework is becoming more of an impediment to completing projects and to attracting workers to the industry. To ensure the overall health of Ontario's construction sector, the Ontario government can no longer hesitate in modernizing the provisions governing labour relations in Ontario's construction sector.

# Background

The construction industry in Ontario is divided into a number of sectors consisting of the industrial, commercial, institutional (ICI) sector, the residential sector, the sewer and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector, and the electrical power systems sector.

Ontario's construction industry currently employs approximately 600,000 people across these various divisions (Ontario Construction Secretariat. Nov 10, 2022: Employment (October 2022); Employment and labour force participation continue to fall https://iciconstruction.com/2022/11/10/nov102022_ecoupdate/). The construction of hospitals, schools, universities, plazas, office towers and industrial plants and warehouses, for example, falls within the ICI sector. In 2021, the total investment in building construction in the province was $92.12 billion, of which $23.57 billion was in the ICI sector (Statistics Canada). While both unionized and non-union workforces are engaged in the sector, only the unionized workforces are regulated by the ICI provisions of the LRA.

Over the last 40 years there has been no significant amendment to the ICI provisions of the LRA. The construction industry is not stagnant. It has evolved.

In the construction sector, for example, practices and methods have changed. Technology has improved. Training and health and safety have become a major focus in the construction industry and such programs are viewed as being of paramount importance. And the ICI sector

has been a leader in these areas. There are over 100 union/employer training facilities across the province with the unionized construction sector's annual contribution estimated to be just over $146 million in 2019 (Ontario Construction Secretariat Training Report 2022).

The changes experienced in the sector are numerous and varied. For example, skilled workers have been known to move more frequently between the industry's sectors, plying their trade in any relevant project – whether residential, industrial, heavy engineering or something else. Within the ICI sector, there are a growing number of smaller rehabilitation projects occurring alongside larger-scale building projects.

Despite these changes over the past 40 years, the legislation governing labour relations in the sector has not been amended. The construction industry provisions of the Act have remained as they essentially were 40 years ago. This stagnation in such an important facet of the industry has fettered the growth of the unionized sector of the ICI construction industry, limiting the number of jobs that give workers the tools to earn bigger paycheques, with benefits and pensions. In turn, this stagnation negatively impacts the companies engaged in the sector, the people it employs and in turn, the Province of Ontario.

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The unionized sector needs greater flexibility and creativity in addressing the modern day issues facing it, as highlighted in the most recent round of bargaining in the spring of 2022. Even though the projects being worked on are often larger and take longer to build than in the past, the industry is legislatively bound to only negotiate 3-year agreements. Similarly, bargaining and strikes in the ICI sector can theoretically go on indefinitely, drawing out the time and cost to complete projects. But the communities depending on a new or revitalized hospital or school are expecting these projects to be delivered on time and on budget. Reform of areas such as term of agreement and strike/lockout provisions would bring greater stability to the industry and would engender greater confidence in buyers of construction, both local and international.

# History of the Construction Provisions of the LRA

In 1977, the Ontario Government was faced with the impending termination of some 200 local and trade collective agreements in the province. It was anticipated there would be serious labour unrest in the construction industry. In response, and following the release of the Franks Report (Report of the Industrial Inquiry Commission into Bargaining Patterns in the Construction Industry [Toronto]: Ontario Ministry of Labour, 1976), the Ontario government introduced provisions related to the Industrial, Commercial and Institutional sector of the construction industry in the Labour Relations Act. (c. 31 The Labour Relations Amendment Act, 1977).

Accordingly, a new regime of collective bargaining was introduced into the unionized construction industry, one that was essentially based on the past patterns and trade bargaining relationships of collective bargaining between employers and their trade union counterparts. The amended legislation empowered the Minister of Labour to create Employer and Employee Bargaining Agencies (EBA). In many cases, the EBAs lumped together constituents of "like" interest; however, the "like" interests that led to these EBAs being formed was, in some cases, more illusory than real. There existed no defined criteria for the Minister to follow in creating the EBAs. The purpose of the EBA is solely the negotiation and administration of a Collective Agreement. The legislation declared the ICI sector to be province-wide in scope and set the term of Collective Agreements to be two years. The resultant consolidation of negotiating entities into the EBAs reduced the ICI sector to 25 bargaining groups and left to the parties the determination of how bargaining was to be conducted.

In its fledgling state, the negotiating parties were able to deal with the numerous issues presented by moving from localized trade bargaining to a scenario which required them to broaden their range of discussion and interest to one that was provincial in nature. In 1980 and 1982, substantive amendments were introduced to the legislation which made it truly provincial in scope as it applied to each trade and provided for province-wide strikes/ and or lockouts rather than strikes or lockouts being only local in scope. Subsequently, the term of agreements was, by legislation, expanded from 2 to 3 years.

## What's Holding the Industry Back?

As outlined above, since the early 1980s, the construction sector provisions of the LRA have remained in place, essentially unchanged, while the world, the economy and the industry have changed around them. It should be noted that there have been targeted reviews of the LRA in the intervening years, but not of the construction sector provisions. Accordingly, modernizing the LRA provisions governing the construction sector could also be done in a targeted manner, without needing to review the entire LRA.

Amendments to the ICI provisions of the LRA are needed to enhance the economic health of construction projects in the future. Failure to legislate amendments will cost the industry, and ultimately the people of Ontario, millions of dollars. As discussed in further detail in the sections below, there is a need for avenues to encourage long-term planning, the elimination of intermittent and lengthy disruptions, and allowing greater flexibility to those engaged in the industry.

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Inordinate delays at the beginning of, and during, construction projects result in lost time and lost dollars. Reams of administrative backlogs in the processes leading up to the start of a project add months, if not years, to completion dates and further add to project costs. Projects, such as roads, highways and tunnels, are of much longer duration, necessitating more planning time and extension of completion dates. Unexpected delays cause cost overruns which can be avoided in part by legislative reform to the term of ICI collective agreements and to the protocols and practices in collective bargaining.

Some of the major issues in construction labour relations in Ontario include:

## *Enabling Longer-Term Planning*

The Act provides that each ICI Collective Agreement shall expire on April 30 calculated triennially from April 30, 1992. ( S. 162.(3).)

Increasingly, projects are becoming more complex and longer in duration. Given the focus on improving and expanding the province's infrastructure, an emphasis has been placed on undertaking more major projects, specifically transportation, hospitals, roads and universities. As the population seeks more affordable accommodation outside the major centers of the province, the need for increased infrastructure projects is exacerbated. An extended term of Collective Agreements would increase stability in the industry, reduce labour disruption, encourage better planning and scheduling and encourage investment.

In addition, an ancillary advantage may be the introduction of additional tradespeople to the ICI sector of the industry given the enhancement of job stability. As is common knowledge, there is a dire need in construction for increased numbers of tradespeople. It has been suggested that over the next eight years the ICI sector will require an additional 40,000 workers to keep pace with growth in the industry and retirements (Buildforce Canada. Construction & Maintenance Looking Forward: Ontario at p. 3, https://www.buildforce.ca/en/lmi/forecast-summary-reports?year=2021). It is not inconceivable that longer term employment and reduced instability in the industry would appeal to a greater number of potential unionized workers.

Beyond the construction sector, other actors are recognizing the value of providing workers greater stability with a longer-term collective agreement. As an example, in the current round of

bargaining with education workers, the Ontario government has proposed a 4-year agreement and has made certain amendments to make such an agreement possible. Many of the factors that make a longer-term collective agreement in the education sector desirable are also prevalent in the construction industry.

## *Limiting Project Delays from Work Stoppages*

The most recent round of collective bargaining in the ICI sector provides a window to many of the inherent problems with the existing legislative process. Rolling or cascading strikes caused extensive delays to ongoing projects. A number of unions engaged in strikes which not only had their members off projects, but also directly affected non-striking workers. On construction projects, each trade is interdependent upon other trades completing their work before the following trade can commence and complete its work. Should one or more trades be on strike, other non-striking trades will eventually have their work caught up resulting in lost time, lack of work for non-striking tradespeople and serious delays in project completion. In essence, you have a pyramid of delays resulting in substantial time delays and consequential costs.

As an example, in the province, there are at least 3 major hospital projects either underway or scheduled to start. Without legislative reform, the history of the last round of ICI bargaining may well be repeated. Should that occur, the completion of those major hospital projects and likely dozens of additional infrastructure projects will be detrimentally affected. The public will be denied expected access to those facilities and the cost of completion will rise substantially. Legislative reform of the ICI provisions of the LRA can positively address these issues.

The Act provides that there shall be only one agreement for each provincial unit ( S.162.(1)). Currently, in circumstances in which a legal strike is called or authorized, all employees represented by that Employee Bargaining Agency must engage in that strike (S.164.(1)). In addition, the strike is conducted on a province wide-basis. Subject to proceeding through the statutory requirements of the conciliation process and complying with the "no board" time frame, there are no provisions concerning when a strike may commence, nor how long said strike can last. The lack of legislative guidelines results in destabilization of the industry, long and costly delays in completion of projects and erosion of confidence and thus investment on behalf of investors, both local and international.

While the 1977 amendments were introduced in part to dramatically reduce the scope of rolling strikes prevalent at the time, it can be argued that the solution then is the genesis of this problem today. A union today may delay in settling until another or others have reached agreement. It may then authorize strike action sometime after the expiry of its agreement, disrupting progress on sites throughout the province for an indeterminate period of time.

The recently concluded ICI provincial bargaining in the spring of 2022 demonstrated the impact such work stoppages can have. All ICI Collective Agreements expired simultaneously on May 1, 2022. Both the Carpenters and International Union of Operating Engineers engaged in strikes which seriously delayed projects until near the end of May. The Carpenters did not ratify their settlement and authorize a return to work until May 27.

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The Painters union (which includes tapers and insulators) did not even ask for a " no board" report until May 27, thus guaranteeing that a strike could not occur until mid-June. The Painters union did eventually strike, which commenced on June 20, was called off on June 28 and the matter was referred to an arbitrator for binding arbitration.

The Glaziers union engaged in a strike and did not vote on a new proposal until June 29.

Sheet Metal Workers only had a conciliation officer scheduled for May 30.

Without a mandated protocol, the probability of "rolling strikes", serious labour disruptions resulting in uncertainty, lack of industry stability and substantial loss of time and money is a very real issue.

A very similar scenario occurred in the residential sector in Greater Toronto in or about 2005. A series of rolling strikes took place in that geographic area causing havoc in the housing industry. Consequently, strikes were conducted by numerous unions for the duration of the summer, causing untold delays and costs.

The government of the day enacted s. 150.2 – 150.4 of the LRA, which specifically limit strike activity in the residential sector of the construction industry specifically in the City of Toronto and the Regional Municipalities of Halton, Peel and York. It must be pointed out that residential bargaining in this sector in these geographic areas is local in nature and not provincial. As with collective agreements in other sectors of the construction industry, the legislation deems all residential collective agreements in the above geographic areas to expire on April 30 and to be renewed triennially. How these provisions differ, though, is that the legislation provides that no strike or lockout may be called or continued after June 15 of the year the agreement expired. So, strikes in the residential sector in these geographies are legislatively limited to a maximum duration of 45 days (S.150.2 – 150.3(4)). Matters still in dispute after those 45 days will be decided by an arbitrator appointed by the Minister or upon agreement of the parties, given certain preconditions which need not be dealt with here (S.150.4(1) – 150.4(13)).

The above provisions have proven successful in achieving negotiated collective agreements and in limiting delays in building residential developments due to work stoppages and corresponding project delays. The potential disruption and instability – as well as the associated lost time for multiple trades and additional project costs – in, for example, the ICI sector based on the potential for work stoppages to happen at any time and for an unlimited potential duration, could be significantly reduced by implementing similar provisions for other parts of the construction industry. It is unclear why other sectors in the construction industry should not be bound by similar provisions.

## *Fixing the Grievance Process at the Ontario Labour Relations Board (OLRB)*

S.133 allows the parties to a collective agreement in the construction industry to refer a grievance to the OLRB for final and binding arbitration, notwithstanding the grievance and arbitration provisions of the relevant collective agreement. The OLRB must then schedule a hearing date within 14 days from receipt of the Referral.

The intent of this unique-to-construction provision was to provide an expedited process for the resolution of disputes. While expediency is desired, the actual impact is quite the opposite.

More often than not, the recipient of the grievance is unaware of the details leading to the grievance. Particulars are rarely provided in any detail with the grievance and, quite often, the details are only provided mere hours prior to the hearing being held. The parties will convene on the hearing date, at which time particulars will be provided. In the meantime, a Vice Chair of the OLRB has to be scheduled for the hearing and is often kept waiting while the parties engage in discussions. Often, these discussions result in an adjournment request to allow for further discussion or for the provision of further particulars or documentation. All of this occurs, in many cases, without the parties meeting prior to the hearing date. Yet, in all likelihood, the collective agreement would have mandated a meeting prior to the hearing date. If an adjournment is granted, it will, in most cases, be rescheduled months later. The cost in lost time and money, to say nothing of a waste of OLRB resources, is substantial.

## *Increasing Competitiveness for Smaller-Scale Commercial and Institutional Projects*

Contractors bound to ICI collective agreements have essentially been frozen out of certain projects over the years. Contractors that do not have to comply with either the legislative scheme of ICI bargaining nor the requirements contained in union collective agreements now dominate certain commercial and institutional projects. Specifically, projects involving public libraries, municipal or regional sports facilities, retail facilities of less than 50,000 square feet, schools, places of worship, fire halls and police stations all fall into this category. This list is illustrative and not exclusive.

A forward-thinking, innovative approach to this problem should make these workplaces safer, offer skilled trades workers a chance to build their skills, creating the conditions that offer skilled trades workers bigger paycheques, as well as benefits and pensions.

Since the LRA was enacted in the late 1970s, no new sectors of the construction industry have been introduced. (We are aware of but two cases in 40 years in which an application for the creation of a new sector has been made. Both were unsuccessful). It can be argued that the enumerated sectors are not all encompassing, nor is the Legislature restricted from adding another.

We therefore propose the addition of  new "special Institutional and Commercial" conditions applicable within the existing ICI sector.

The relevant bargaining units and Collective Agreements would continue to be trade based, but with flexible hours of work, mobility of manpower and base wage rates below the current ICI wages. Payment of Union initiation dues are to be deferred until the end of the first year of apprenticeship to facilitate the entrance of new workers into the trades, including those working in the non-union domain. Benefits, welfare and pension, for example, would be a definite component of the wage package as would be a defined apprentice period for each trade. Those working in this sector would be dedicated to this sector, thereby creating a workforce which has a continuum of work, steady wages and benefits and the premier training and safety programs.

Currently, workers not subject to the terms of a collective agreement do not, for the most part, enjoy benefits nor a pension. They do not receive the training provided in the unionized sector through apprenticeship programs. A recent survey conducted by the Ontario Construction Secretariat found 76% of unionized contractors reported hiring apprentices compared to 52% of the non-unionized contractors.

A recent study has shown that lost-time injury claims to the Workplace Safety and Insurance Board (WSIB) are 31% lower on unionized building sites than they are in a non-union environment. Similarly, the study found that claims for severe injuries are 29% lower on union job sites. (Updating a Study of the Union Effect on Safety in the ICI Construction Sector).

A category encompassing smaller-scale commercial and institutional work would allow small and medium-sized contractors to better compete in the market, while providing a safe, well-trained and experienced work force on their projects, many of which are funded by the public purse.

At the same time, it is believed that competitive wages, the provision of benefits and a pension, superior training opportunities, higher workplace safety standards and longevity of employment will attract a good number of workers not currently bound by a collective agreement into this new sector.

Making these smaller-scale more competitive for more contractors is also in the public interest. It will relieve some pressure on the cost to the province. Through the improvements in health and safety, these costs will be reduced. By receiving a pension and benefits, workers and their families will enjoy a better quality of life and will be less likely to be a financial burden on government programs in the future.

## *Allowing Greater Flexibility and support When Qualified Sub-Contractors Are Limited or Non-Existent*

Sometimes, when bidding on a job, contractors are unable to access trades which are affiliated with the same union. That is, in a particular geographic area, qualified sub-contractors affiliated to the same union as the contractor are either unavailable or there may only be one possible option. In such cases, these limited contracting options may lead to a bid price that is not competitive relative to other contractors bidding for the work.

The above situation creates a competitive disadvantage for the unionized contractor, which the OLRB has defined as a circumstance that "is so significant that it would make a meaningful difference in its ability to compete with its competitors" (Johnson v. Steam Whistle Brewing, 2012 CanLII 47332 (ON LRB)). Or put another way, "is an unfavourable circumstance or condition that causes a firm to underperform in an industry against a top competitor or industry average for a particular factor." (Simplicable Guide).

Contractors that find themselves at a competitive disadvantage must choose to self-perform the work in question (which is usually not an option, as the contractor does not directly employ workers with the requisite skill or training to perform the work); put forward a bid price which may cause it to be non-competitive; or to work with an unaffiliated sub–contractor (which, if the contractor is successful in their bid, would expose the contractor to a grievance and potential monetary damages).

The current LRA does actually provide potential relief against " competitive disadvantage". Section 163.2(1) allows for local modifications to the provincial agreement. Where a contractor believes a competitive disadvantage exists, it can make an application seeking amendments concerning a number of enumerated matters (S.163.2(4)). The contractor must make a submission to the OLRB that shows the competitive disadvantage they face under existing rules.

However, the enumerated matters in the relevant provision do not include any reference to a lack of available sub-contractors. Sub-contractors are an integral part of the bidding process. In the absence of sub-contractors to provide pricing on a portion of a tender, or in the absence of sufficient numbers of sub-contractors to provide competitive bids, the contractor is at a true competitive disadvantage against those who are not similarly constrained.

## Project Labour Agreements for Government Funded Work

Another avenue through which to improve competitiveness in this area is to have regard to government funded projects. These projects have also been essentially lost to the small and medium sized contractors. The opportunity for contractors bound to collective agreements to once again become players in this market can be achieved by a further amendment to the LRA.

Currently the LRA provides for the creation of Project Agreements in circumstances in which the project is "economically significant" (S.163.1(1)). The  Act also sets out a number of steps which must be followed before such project agreement will be declared. The highlights of a project agreement for our purposes are that during the term of the project agreement there be no strike or lockout, only members of the trade union performing the relevant work are to be employed (no certification application may be made if the contractor is non-union so long as the project is underway), and the provisions of the Agreement may be altered upon agreement subject to stringent safeguards.

While the Section does not have application to the issue at hand, it does offer a viable alternative if amended. It is therefore proposed that the LRA be amended by adding a new section which provides as follows:

On all government projects having a value in excess of $5,000,000, only members of the trade union performing the work may be employed on such projects.

There shall not be an application for certification or voluntary recognition of an employer employing members of a trade union performing the relevant work for the duration of the project.

During the course of the project, there shall be no strike or lockout by the union or its members performing the work nor shall there be a lockout by the employer.

The Provincial Agreement under which the work is being performed may be amended only upon agreement of the Designated Employer and Employee Bargaining Agencies upon request of the Union and Employer.

## How Can the LRA Be Improved?

Above, several significant labour relations issues have been discussed. This should not be considered an exhaustive list, but certainly reflect the key issues facing Ontario-based contractors today. Reform of the construction sector-specific provisions of the LRA can help to resolve these issues.

The following reforms would greatly improve the ability of Ontario's construction industry to build Ontario on time and on budget:

- Lengthen the term of ICI collective bargaining agreements to 4 years. Potential to stagger the timing of contract terms between construction sectors to better utilize Ministry resources;

- Extend the limited strike window that currently only applies in the residential sector to, at minimum, the ICI sector as well;

- Improve the grievance process and optimize the resources of the OLRB by amending s. 133 of the LRA, the section dealing with the process for bringing grievances directly to the OLRB. Specifically, delete the words "grievance and..." in the first line of the section and adding the words "only after all of the steps in the grievance procedure contained in the collective agreement have been taken";

- Establishing new "special commercial and institutional" conditions covering smaller-scale commercial and institutional projects to restore the competitiveness of this sector;

- Recognize, in statute, that a lack of qualified sub-contractors is a situation that can give rise to a competitive disadvantage for contractors; and

- Add a requirement for "Project Collective Agreements" for any project which receives Provincial Government funding of 5 Million Dollars or more.

## Toward a More Competitive Construction Sector and a Stronger Ontario

Ontario's economy is becoming more dependent on the competitiveness and strength of the province's construction industry. The two main threats to this industry are the labour shortage and the rigid, outdated labour relations legislative framework.

The Ford government has made and is making massive strides to encourage more people to enter the skilled trades and address the looming labour shortage. Similar steps need to be taken in reforming Ontario's 1970s-era labour relations framework. This paper has laid some of the major issues that present a problem in the unionized construction industry and also suggested some sensible solutions.

For the sake of Ontario's economic recovery and growth, all Ontarians want to see the construction industry succeed. Modernizing Ontario's labour relations legislation as it relates to the construction sector is a necessary element for that success.

It's been more than forty years – it is time to get labour relations reform done!

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