Preserving Fairness in Ontario's Construction Industry:

The Case for Keeping Section 1(4)

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November 1999

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Executive Summary

1. What Repeal of Section 1(4) means:

A well-financed lobby is seeking the repeal of section 1(4) of the *OLRA*. This lobby is made up of eight of the largest general contractors in Ontario and some of the trade contractors who are economically beholden to them.

Without section 1(4) construction employers would be able to walk away from a signed collective agreement, whenever it suited them, through the simple device of setting up a shell company which would be nominally a different employer. These contractors, who are parties to a signed collective agreement, would then transfer their jobs to their newly minted shell companies and perform the work on a non-union basis.

Taking section 1(4) out of the *Ontario Labour Relations Act* effectively turns the *Act* on its head. Instead of unionization being an employee choice, in the construction industry, unionization would become an employer choice.

2. "Things are seldom what they seem."

Few realistic observers in either the management bar or among employers expect the government to repeal section 1(4). To do so would gut the *Labour Relations Act* in the construction industry and inaugurate a return to the acute conflict that characterized the industry prior to the adoption of section 1(4).

The proposal to repeal section 1(4) is being put forward for different reasons. For their part, the eight general contractors orchestrating the campaign to repeal section 1(4) wish to be released from the province-wide ICI agreements to which they are bound by virtue

of the "working agreements" that they signed. In particular, these eight general contractors want to be released from the province-wide ICI agreements with the *non-civil* trades.[1] It is common place for general contractors to be bound by province-wide agreements with some or all of the civil trades. Finally, it is also likely that the main focus of the eight contractors lobbying against section 1(4) is to be released from the province-wide agreements with the non-civil trades, *outside of the Greater Toronto Area*. That is to say, **regardless of their public posture, the eight general contractors pushing for repeal of section 1(4) are chiefly seeking to be released from the province-wide ICI agreements only for the non-civil trades and only outside of the GTA (Labour Board Area No. 8).**

The trade contractors who employ members of the non-civil trades are quite content to have the eight general contractors bound to the province-wide ICI agreements for these trades. **In contrast with the general contractors, the trade contactors are concerned chiefly with issues that are specific to their collective agreements with the various trades. What the non-civil trade contractors are seeking is additional bargaining leverage in their negotiations with the particular trade unions with whom they have collective agreements.**

The goals of the eight contractors leading the campaign against section 1(4) and trade contractors who currently support them are quite different. Indeed, the goals of the two groups are incompatible. **To paper over their conflicting interests, the eight general contractors who signed "working agreements" and some of the non-civil contractors have become allies of the moment in proposing the repeal of section 1(4).** Their alliance is fragile. Their stated goal is not the real goal. As Gilbert and Sullivan put it: "Things are seldom what they seem."

What is particularly destructive in the lobby to repeal section 1(4) is the damaging mistrust that the campaign is engendering and its diversion of resources from the industry's real needs. The real need is to find industry-based solutions to industry-based problems. Instead of focussing attention on the need for industry-based solutions to industry-based problems, the lobby to repeal section 1(4) misdirects attention to an ill-conceived attack on one of the pillars of stable labour relations in the construction industry.

3. What the Contractors Claim:

The eight general contractors and the trade contactors who support them make two claims. The first, and most important is that fairness requires that construction

[1] In construction industry labour relations, it is common to distinguish between the civil trades and the non-civil trades. There are six civil trades: the Carpenters, the Bricklayers, the Labourers, the Ironworkers (rodmen), the Operating Engineers, and the Operative Plasterers and Cement Masons (cement masons). The other trades are collectively referred to, for industrial relations purposes, as the non-civil trades.

employers be allowed to choose whether to operate on a union or a non-union basis. The second claim is that allowing construction employers to make this choice will significantly reduce construction costs in Ontario. Neither of the claims can be supported by either argument or evidence.

4. Elementary Fairness:

If section 1(4) is repealed, a construction employer could entirely escape its obligation to abide by the terms of a collective agreement or to bargain in good faith simply by changing its corporate guise. No other changes would be needed.

Repealing section 1(4) would confer a unique privilege on construction industry employers. In no other aspect of business is a construction company, or any other type of company, allowed to simply walk away from its legal obligations and carry on, without interruption, as if the legal obligations had never existed. Yet that is precisely the privilege that would be given to construction industry employers if section 1(4) were repealed.

In support of repealing section 1(4), it is claimed that union members can, if they choose, work for non-union, competing contractors. By tortured comparison, it is then argued that construction employers should also have a free choice as to whether to bid a job on a union or a non-union basis. Both the claim and the comparison are specious. In the first place, no evidence has been marshalled to show that there is a widespread practice among union members of working for non-union, competing contractors. In fact, a number of collective agreements in the ICI sector explicitly prohibit or restrict the ability of union members to work for non-union employers. There is no history of unionized employers filing grievances under these contract provisions. Finally, the comparison between an individual worker and an employer is spurious. It is workers to whom the *OLRA* gives the right to choose between being union or non-union, not employers. In the construction industry, repealing section 1(4) effectively transfers that choice from employees to employers. This would turn the purpose of the *OLRA* on its head. It would call out for judicial correction. So compelling is the logic behind section 1(4), that in New Brunswick the labour board has imputed a "common employer" intent to the *Industrial Relations Act*, even in the absence of a specific provision comparable to section 1(4) of the OLRA.

In the construction industry, repealing section 1(4) nullifies the effect of an employee's choice to be represented by a trade union, because his or her employer has the option of bidding work on a non-union basis. For all practical purposes, repeal of section 1(4), nullifies freedom of association in the construction industry by rendering it wholly inefficacious.

5. Repealing Section 1(4) — A Recipe for Labour Conflict:

If section 1(4) of the *OLRA* is repealed, labour relations in the construction industry will be drawn rapidly into a vortex of increasing instability. Without section 1(4) construction unions will be unable to turn to the Labour Board to protect legally *acquired* bargaining rights. To protect those bargaining rights construction unions will be forced to take industrial action. This will be the only way to secure the representation rights that the *OLRA* confers, but the Board can no longer enforce. Work stoppages, work-to-rule, picket lines and secondary boycotts will become endemic in the construction industry. Given the multi-craft nature of construction projects, this will lead to ongoing disruptions of work.

6. Ratcheting Up the Workplace Accident Rate:

Comparative data supplied by the Construction Safety Association show that non-union contractors have accident rates 2½ times higher than unionized contractors.

In Alberta, which has de-unionized most of its construction industry, the lost time accident rate in construction was almost 3 times higher than in Ontario.

The difference in accident rates between union and non-union contractors is so great that in the construction industry there should be separate (and lower) WSIB rate groups for unionized contractors.

7. WSIB Costs:

There is a direct relationship between WSIB costs and the accident rate. If construction in Ontario is de-unionized, construction industry claims will increase by approximately 2.5 times. This cost increase alone would nullify most of the labour cost savings that de-unionization might entail.

In 2000, WSIB premiums in construction will be approximately 8% of covered payroll. Applying the expected increased in lost-time claims would drive *average* premiums to around 20%. Such rates are not unprecedented. In some high incidence sectors in construction, premiums are currently over 20% of covered payroll.

8. The Underground Economy

The general contractors claim that removal of section 1(4) will lead to a frictionless transfer of construction employment from unionized contractors to non-union shell

companies. This reflects a profound mis-reading of the dynamics of the construction labour market. **De-unionization will trigger a sharp increase in underground practices. The most common of these is to style an employment relationship as a sub-contract arrangement. This enables the "sub-contractor" to avoid reporting income and the "contractor" to avoid paying EI, WSIB, EHT and CPP contributions.** In these self-styled sub-contract arrangements, the federal government also frequently loses the GST on labour costs.

The inevitable growth in the underground economy that will ensue in the wake of de-unionization will result in legitimate contractors losing market share. These same contractors would also be left with the burden of the WSIB's unfunded liability and the need to pay for the claims of underground workers whose "employers" conveniently alter their status when an injury occurs.

9. Preserving the Skilled Labour Supply:

Virtually every collective agreement provides for negotiated training trust funds that support apprenticeship training and skills upgrading. Many construction unions operate sophisticated training centres. Without these training centres, for many trades there would be no training capacity whatsoever in Ontario. In other trades, taking the union-sponsored training out of the picture would dramatically reduce the supply of training.

If the general contractors were to succeed in de-unionizing construction, the long-term supply of skilled labour would be significantly undermined.

10. Construction Costs:

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

A comparison of industrial construction costs in the petrochemical industry shows that Sarnia – after the negotiation of a project agreement – now has lower labour costs than Joffre, Alberta. Over the past ten years, increases in construction costs in Alberta and Ontario were virtually identical.

11. Preserving Quality in Construction:

The belief that "a construction job should be done the right way" is deeply imbedded in

the traditions and philosophy of the construction crafts. The condominium construction industry in B.C. is a pointed example of what happens when an industry is de-unionized and craft standards are discarded.

12. Preserving Negotiated Benefits:

In the construction industry, unions typically allocate a significant fraction of their total monetary package to insurance-type benefits. If the construction industry is significantly de-unionized, benefit coverage will be radically curtailed. The reliance on tax supported social programmes, especially during periods of unemployment, will increase sharply.

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For all of these reasons:

Keeping section 1(4) is common sense;
repealing it is not.

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Introduction

A. The Provincial Building Trades Council

The Provincial Building Trades Council represents the unionized construction trades in the province of Ontario. Fourteen construction unions and twelve regional councils are directly or indirectly affiliated to the Provincial Building Trades Council. Through its affiliated unions and regional councils, the Provincial Building Trades Council represents over 100,000 skilled men and women in Ontario's construction industry.

B. The Issues:

A well-financed lobby, organized by eight of the largest general contractors, is seeking the repeal of section 1(4) of the *Ontario Labour Relations Act*. Section 1(4) is known as the 'related employer' provision. As will be discussed later in this submission, the purpose of section 1(4) is to prevent a construction employer from evading its collective bargaining obligations under the *Ontario Labour Relations Act* by transferring work to a non-union shell company. Without section 1(4) unionization in the construction industry would effectively be voluntary, not on the basis of a choice by employees, but on the basis of employer preference. This would make a mockery of the *Ontario Labour Relations Act* in the construction industry.

The Alleged Issues:

The eight general contractors that are orchestrating the lobby to repeal section 1(4) make two claims. The first, and most important, is that fairness requires that

construction employers be allowed to choose whether to operate on a union or non-union basis. The second is that allowing construction employers to make this choice will significantly reduce construction costs in Ontario. Neither of these claims can be supported by argument or evidence. Perhaps this is secondary: fairness and construction costs are not the real issues.

General Contractors and Trade Contractors — Different Interests, Different Agendas:

Employers in the construction industry are either general contractors or trade contactors. General contractors manage construction projects from start to finish. Trade contractors are sub-contracted by the general contractors to complete particular segments of a construction project. Most construction work is undertaken by trade contractors. Some general contractors employ virtually no labour directly. Others do some of the work with their own employees. Concrete forming, for example, is sometimes sub-contracted and sometimes done by a general contractor.

For industrial relations purposes, a distinction is usually made between the civil trades and the non-civil trades. There are six civil trades: the Carpenters, the Bricklayers, the Labourers, the Ironworkers (rodmen), the Operating Engineers, and the Operative Plasterers and Cement Masons (cement masons). The other trades are collectively referred to as the non-civil trades. As will be discussed below, the distinction between the civil and the non-civil trades is germane to industrial relations in the construction industry.

General contractors can be divided into three groups. The first are those general contractors that are non-union. These general contractors may sub-contract to either unionized or non-union trade contractors. The second group comprises a large number of general contractors who are bound by provincial agreements with some or all of the six civil trades. These general contractors are bound to employ union members in the civil trades or to sub-contract such work only to trade contractors who are bound by collective agreements with the civil trades. The non-civil work may be done on either a union or non-union basis. Finally, the third group comprises the eight general contractors who are bankrolling the lobby to repeal section 1(4). What distinguishes these eight general contractors is that they signed "working agreements" which require them to employ only union members or to sub-contract work only to unionized trade contractors. These eight generals are among the largest general contractors in the province.

The Real Issues:

The contractors lobbying for changes to the *OLRA* claim that their central objective is repeal of section 1(4). However, there is reason to doubt that this is the case.

Few construction employers, or members of the employer bar, actually expect the government to repeal section 1(4). To do so would turn the OLRA on its head. In the construction industry, unionization would be voluntary, but on the choice of employers,

not employees. The labour conflict that such a regime would inaugurate would so discourage investment in new construction that it would undermine Ontario's investment-led economic expansion.

The overriding issue for the eight generals is the "working agreements" which they signed with the building trades councils. These "working agreements" require them to hire only union members or to use only unionized trade contactors. **The eight generals had good, business reasons to sign the "working agreements."** For general contractors, the key issue is the terms on which they will have access – either directly or indirectly – to the dispatch systems operated by the construction unions. Large construction projects – especially in the civil sectors and in the industrial and commercial sectors – typically require large numbers of skilled tradespersons. The construction unions are uniquely able to mobilize the skilled labour required, particularly when this requires drawing qualified workers from other regions of the province and, indeed, from across the country or even from the United States. On large construction projects, access to the union dispatch system is strategically important. What the eight general contractors want is selective access, on the basis of *their* choice, to the construction unions' dispatch systems. This may be either direct access, *i.e.*, by direct hiring, or indirect access, *i.e.*, through the use of unionized trade contractors.

The "working agreements," which the eight generals *voluntarily* signed, set out the terms under which they have direct or indirect access to union dispatch systems. The essence of the bargain was this: in order to have access to union dispatch systems on highly profitable, large projects, the eight generals agreed to use union members or unionized trade contractors on all projects, regardless of size. What the eight generals want is to be released from the operation of the "working agreements," either in whole or in part. In some interpretations of their proposals, the eight generals seek to be released from *all* province-wide agreements with the construction trades. In other interpretations, the eight generals are seeking to be released only from the province-wide agreements with the *non-civil* trades. And in still other readings, the eight generals are believed to focus on release from the province-wide agreements with the non-civil trades only outside of the Greater Toronto Area (Labour Board Area No. 8).

The eight generals lobbying for repeal of section 1(4) previously proposed a formula, known as "three-and-out." This formula would have released them from any province-wide ICI agreement where they did not directly employ members of that trade for three years. The "three-and-out" proposal generated considerable opposition among a large number of unionized contractors in the non-civil trades. To overcome these divisions among construction employers, the eight generals have now re-fashioned their proposal as repeal of section 1(4). As noted, this would effectively make the *Ontario Labour Relations Act* voluntary for construction employers. Few trade contactors believe that the proposal to repeal section 1(4) will be taken seriously. However, not wishing to be offside with general contractors on whom they depend for a significant proportion of their work, some trade contractors have extended support – albeit sceptical support – to

the lobby for repeal of section 1(4).

For the trade contractors, neither the "working agreements," nor section 1(4) are the real issues. What concerns the trade contractors are "nuts and bolts" issues related to negotiated provisions in their collective agreements. Many of the trade contractors believe that by associating themselves with the lobby to repeal section 1(4) they will increase bargaining leverage with their respective unions. **What is central to the trade contractors' issues is that they are so specific to their particular industry that they can only be effectively addressed on an industry basis.**

C. Industry-Based Solutions or Legislated Interventions?

As discussed earlier, the real issues are the effect of the "working agreements" under the designation scheme for province-wide bargaining and certain nuts and bolts issues that are specific to individual collective agreements between trade contractors and their respective construction unions. These are undoubtedly important issues for the industry. In some cases, they may affect the profitability of doing certain types of construction work. In other cases, these issues may affect the share of overall construction that is done on a union basis. What will not be affected, however, is the cost of construction work. Most of the owners and developers of construction projects are free to select any general contractor of their choosing, whether union, non-union or partially union.

The Provincial Building Trades Council does not believe that a legislated intervention is either workable or required. Solutions to industry problems should be industry-based. At no point has the Provincial Building Trades Council refused to enter into a dialogue on the issues of concern to construction industry employers.

D. Fairness:

Section 1(4) of the *Ontario Labour Relations Act* is about fairness. Repealing section 1(4) would enable employers in the construction industry to walk away from collective agreements simply by changing their corporate guise. Employers would not have to change their management. The construction work would be unchanged. In no other aspect of business life is a company allowed to simply walk away from a legal obligation and carry on as if that obligation had never existed. There is no legitimate reason why labour relations should be different.

The principles governing our labour relations system are easily captioned: if a majority of the employees of an employer choose to be unionized, then a union is certified to represent them and both parties are either bound to an existing collective agreement or

required to bargain in good faith with a view to negotiating a collective agreement. Repealing section 1(4) would strike at the heart of this system. **If section 1(4) were repealed, an employer could avoid its obligations under collective agreements simply by changing its corporate guise and carrying on as if those legal obligation had never existed. Where is the fairness in that? Where is the equality before the law?**

In support of repealing section 1(4), the eight generals, and their current allies among the trade contractors, claim that union members can, if they choose, work for contractors who are both non-union and in competition with unionized contractors. It is also claimed that this practice is widespread. The lobby seeking repeal of section 1(4) argues that construction employers should have a "similar" free choice, *i.e.*, the right to decide unilaterally whether to bid a job on a union or a non-union basis. This argument and the claim behind it are both specious:

1. **no evidence has been presented demonstrating that there is a widespread practice among union members of working for non-union contractors who are in competition with union contractors;**

2. **contrary to the claim that union members work for competing, non-union contractors, a number of collective agreements in the ICI sector explicitly prohibit or restrict the ability of union members to work for non-union employers.**

3. **there is no history of unionized employers filing grievances under the ICI collective agreements against union members working for competing non-union employers;**

4. **the comparison between an individual worker and an employer is spurious. It is workers to whom the *OLRA* gives the right to choose between being union or non-union, not employers.**

In the construction industry, repealing section 1(4) would turn the OLRA on its head. The purpose of the *OLRA* is to give *employees* a choice. That choice is whether to be employed on an ordinary basis or to be represented by a trade union. The *OLRA* and the regulations under the *Act* set out detailed procedures exercising that choice and acquiring the right to be represented by a trade union. In the construction industry, repealing section 1(4) effectively transfers the choice of whether to be unionized from employees to employers. Employees, of course, would still have the notional right to choose to be represented by a union. However, their employer would have the choice of whether to bid work union or non-union. What is the point of choosing to be represented by a union if your employer can choose to bid work on non-union basis. The effect of your choice to be represented by a union has been effectively nullified. It is not you and your fellow employees who choose whether to be union or non-union, it is your employer who makes the choice for you.

E. Repeal of Section 1(4) is a Recipe for Labour Conflict:

Repealing section 1(4) rips fairness out of the *Ontario Labour Relations Act*. Without fairness, there can be no stability. Repealing section 1(4) is a recipe for labour conflict in the construction industry.

Without the protection now afforded by section 1(4), **unions in the construction industry will have no alternative but to use workplace action** to preserve their bargaining rights. Given the multi-craft nature of construction projects, this will lead **to ongoing disruptions of work.**

F. The Impact of Repeal extends beyond Labour Relations:

Section 1(4) is the underpinning of fairness and stability in Ontario's construction industry. Remove this underpinning and the impact extends well beyond labour relations:

1. **Occupational injuries in the construction industry will ratchet up sharply.** Comparative data, provided by the Construction Safety Association of Ontario, show that non-union contractors have injury rates that are 2-3 times higher than those of unionized contractors;

2. **A major barrier to the growth of the underground economy will be removed.** Statistics Canada estimates that 65% of the net income of unincorporated businesses in construction is concealed from Revenue Canada.[2]

3. **The supply of skilled labour will be undermined.** Construction unions play a critical role in the management of apprenticeship. Most construction unions operate training centres financed by negotiated contributions. De-unionizing construction will pull the rug out from under these investments in skill. This would be particularly ironic, since the government amended its apprenticeship reform legislation to take account of the important role of apprenticeship systems in the construction industry.

4. **Construction quality will be eroded and consumers will suffer.** Craft-based

[2] Statistics Canada, *The Size of the Underground Economy in Canada*, by Gylliane Gervais, (Ottawa), 1995, Cat. No. 13-603E No. 2, p 13, Table No. 2

unions play an essential role in promoting high standards of work. The B.C. condominium industry is compelling evidence of what happens when the commitment to high standards of craft unionism is discarded. The Commission of Inquiry estimated in its Final Report that repair costs arising from poor design and poor quality of construction will range from $500 and $800 million.[3] These are the costs that can result when the construction industry's internal checks and balances are discarded.

5. **The cost of tax-supported social programmes will increase.** This will be an inevitable consequence of rolling back the negotiated benefit programmes that account for approximately 20-25% of labour costs in the unionized sector of construction.

G. Outline of this Submission:

Part One of this submission reviews the history and purpose of section 1(4). Part One also examines the way the Labour Board has applied section 1(4) to the construction industry. Finally, Part One also addresses the fundamental fairness which is the basis of section 1(4).

Part Two examines the broader economic and non-economic issues involved in assessing the importance of section 1(4). Part Two also examines in more detail the real issues behind the lobby to repeal section 1(4).

Part Three summarizes the case for keeping section 1(4) and for relying on industry-based solutions.

[3] *The Renewal of Trust in Residential Construction: Report of the Commission of Inquiry into the Quality of Condominium Construction in British Columbia*, (Dave Barrett, Commissioner), June 1998. See especially Chapter Five: The Magnitude of the Problem. The report is published electronically at: http://www.qp.gov.bc.ca/condo/index.htm#contents

Part One

History and Purpose of Section 1(4)

A. Overview of the Purpose of Section 1(4)

Related employer provisions are part of the mainstream of Canadian labour relations legislation. As the Appendix to this submission shows, virtually all labour relations statutes in Canada contain provisions that are similar to Ontario's section 1(4).

The need for related employer provisions arises from the legal ability of businesses to establish nominally distinct, but nevertheless closely related, entities for the purpose of conducting business operations. *In the construction industry, this practice is the norm*.[4] There are several legitimate motivations for structuring a construction business in nominally distinct corporate shells:

- A contractor may wish to isolate the potential liabilities associated with a particular project.

- Tax advantages may arise when losses or gains accrue in a particular way. Machinery and equipment, for example, are often held in one company and leased to another.

- Separate legal structures may be necessary to accommodate minority investors who participate in some projects, but not others.

Over and beyond these *commercial* reasons for establishing distinct corporate shells, prior to the adoption of section 1(4), there was also an industrial relations motivation. As Paul Weiler comments: "many employers... realized the potential of that device [*i.e.*, using distinct corporate shells] for insulating themselves from any obligation to the trade union."[5]

What is commonly called *double-breasting* works as follows:

1. A majority of the employees of "Company A" join a union. That union applies to the OLRB for certification to

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[2] Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law*, Carswell Methuen (Toronto, 1980): "The multiplication of corporate entities is a long-standing practice in the construction industry. A builder may create a new and distinct company for each project which it undertakes, for a variety of financing, taxation, or personal liability reasons." p 190

[5] *ibid.*, p 190

represent the employees of "Company A" and is duly certified as the bargaining agent for those employees.

2. Company A then transfers the work to "Company B." This effectively frustrates the wishes of the employees to be represented by a union. While the union continues to be entitled to represent the employees of "Company A," that company no longer has any work.

3. If the union now organizes the employees of "Company B," the business responds by transferring the work to "Company C." In a variation on this theme, the business might transfer the work to "Company D," where bargaining rights have already been established by a different union, judged by the business to be compliant.

Section 1(4) empowers the Ontario Labour Relations Board to determine if these nominally distinct companies should be treated as a single employer, for labour relations purposes. **The Ontario Labour Relations Board has been unequivocal in describing the importance of section 1(4) to fairness and stability in labour relations.**

In *Industrial Mine Installations Ltd,* the Board described the purpose of section 1(4) as to "**cure the mischief** that results from being unable to properly define and tie down the employment relationship."[6] *Brant Erecting and Hoisting* pointed to the role of section 1(4) in enabling the Labour Board to "**pierce the corporate veil.**"[7]

Take away section 1(4) and you sanction the use of a "corporate veil" to nullify the bargaining rights that the OLRA was intended to protect.

B. The OLRA without Section 1(4)

Without section 1(4) the *Ontario Labour Relations A*ct would be fundamentally unbalanced and unfair. Although the *Act* would apply to workers and to unions, in the construction industry, employers would effectively be exempt from the *Act*.

Consider the circumstances that would apply if section 1(4) were repealed in the construction industry. Unionized construction employers would establish a new shell

[6] *Industrial Mine Installations Ltd.*, [1972] OLRB Rep. Dec.1029 (at p.1031). [Emphasis added.]
[7] *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 (at p. 948) [Emphasis added.]

company. As before, they would bid on tendered work. However, the *employers* would decide whether to bid the project on a union basis or non-union. The *employers* would decide whether the individuals who did the work were nominally employed by the unionized company or the non-union company. In some circumstances, an employer would choose to bid a project on a union basis. This would apply, for example, where a large number of skilled workers were needed and only the union was judged able to mobilize the required labour. These conditions often apply on large-scale industrial and commercial projects and in the various civil sectors.[8] In virtually all other cases, an employer would bid a job on a non-union basis. If the workers on the project were subsequently organized, re-assignment of the job to another shell company would effectively thwart the certification and ensure that the job continued to be done on a non-union basis. **Unionization, in short, would be a matter of employer choice, not employee choice. The purpose of the OLRA would be turned on its head.**

If section 1(4) were repealed in the construction industry, as a practical matter the duties and restrictions in the OLRA would apply only to unions and workers. A union still would be restricted by the *Act* in when and how it could organize workers and apply for certification. Similarly, a union would be restricted by the *Act* in when and how it applied economic pressure. All of the statutory and regulatory fetters on a union would remain. For a construction employer, however, the OLRA would now be voluntary. As described above, by bidding work non-union or by re-assigning work to a shell company, a construction employer would be able escape all of its obligations under the OLRA. No other change would be needed. All other business relationships would be the same as before. Management would not be affected. The only change would be that any bargaining rights or collective agreement that applied would have been circumvented by virtue of bidding the job non-union or re-assigning the job to a non-union shell company. **For construction employers, the OLRA would have been made voluntary.**

The *Ontario Labour Relations Act* confers on employees the right to bargain collectively through a trade union when a majority of the *employees* so vote in a secret ballot administered by the OLRB. It makes a mockery of this right when a construction business can nullify that choice simply by choosing whether to bid a project as union or non union or by transferring work, after it has been won, to a non-union shell company. **Without section 1(4), the *Labour Relations Act* is rendered largely meaningless in the construction industry.**

C. The Goldenberg Commission

Instability in the construction industry led the province of Ontario to appoint the *Royal Commission on Labour-Management Relations in the Construction Industry* under H. Carl Goldenberg. The Commission reported in 1962. The findings and recommendations of the

[8] The civil sectors are: (1) civil engineering, (2) sewers and watermains and (3) roads.

Goldenberg Commission were the basis for section 1(4).

The Goldenberg Commission heard extensive evidence on the use of shell companies to circumvent the operation of the *Labour Relations Act*. The United Brotherhood of Carpenters and Joiners described the use of corporate shells to undermine the OLRA as follows:

> "The employees continue to work for essentially the same people, under the same supervision, have precisely the same work in the same place and under the same conditions. Yet they find themselves suddenly without a union and without a collective agreement which they had had the day before…[9] "

The Chair of the Royal Commission, H. Carl Goldenberg, stated:

> "It is clear that the situation as described, and which I find to be *a correct statement of the facts*, is not conducive to peaceful industrial relations.[10]"

Earlier in its Report, the Commission commented that:

> "A number of cases were cited to the Commission where employers in the house-building branch of the construction industry *evaded collective bargaining with a certified union merely by effecting a nominal change in the legal entity of the business*.[11]"

It was to address this defect in the *OLRA* that the Royal Commission recommended an amendment to the *Act*. Specifically, the Royal Commission proposed that:

> "Consideration should be given to measures for the protection of acquired bargaining rights in situations arising from certain types of business practices which may affect such rights, for example, where a contractor, engaged on a number of projects in each of which he has a different partner, is in a position to shift employees from a project with respect to which certification has been granted to another."12

The findings and recommendations of the Goldenberg Commission were subsequently incorporated into the *OLRA* through the *Davis Amendments* in 1971.

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[9] *Report of the Royal Commission on Labour-Management Relations in the Construction Industry, 1962* – Commissioner: H. Goldenberg, Ontario, Queen's Printer: Toronto, p 45

[10] *ibid.*, p 45 [emphasis added].

[11] *ibid.*, p 44 [emphasis added].

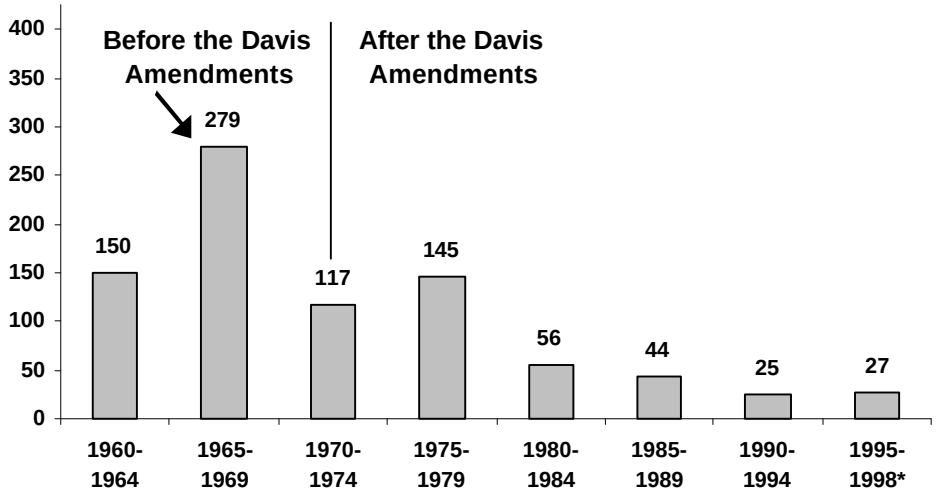
[12] *Report of the Royal Commission on Labour-Management Relations in the Construction Industry, 1962* Commissioner: H. Goldenberg, Ontario, Queen's Printer: Toronto, p 72

D. Ontario Finds a Fair Balance: The *Davis Amendments*

Section 1(4) was part of a package of amendments to the *Ontario Labour Relations Act*. These amendments were introduced in 1970 and enacted in 1971. The *Davis Amendments* covered several aspects of labour-management relations, including certification requirements. However, *the need to stabilize construction industry labour relations was central to the purpose of the Davis Amendments*.

Prior to the *Davis Amendments*, the construction industry was beset by labour conflict. Graph No. 1 shows the number of strikes in the construction industry before and after the *Davis Amendments*. To better illustrate the general trend in construction labour relations, we have used five-year time periods.

Graph No. 1
Number of Construction Industry Strikes in Ontario
(Five Year Periods)
Source: Labour Canada, Ministry of Labour



*1995-1998:
4 years, not 5

In the five-year period before the *Davis Amendments* (1965-1969), there were 279 strikes in the construction industry. Indeed, as Table No. 1 shows, 1969 was one of the worst years for industrial conflict in the construction industry. There was every reason to believe that conditions were deteriorating and that the industrial relations system was failing. The number of workers involved in strike action in 1969 increased sharply. Days lost were among the highest on record. Strikes averaged over four weeks in duration. There was nothing in the industrial relations climate of the time which

suggested that balance and stability were going to return automatically to the construction industry. Indeed, the opposite was the case. The industry was being drawn into endemic and increasing conflict.

Table No. 1
Construction Industry Strikes in Ontario, 1965 to 1969

Year	No. of Strikes	No. of Workers Involved	No. of Days Lost	Average Strike Duration
1965	47	12,445	187,560	15.1 days
1966	82	18,051	112,140	6.2 days
1967	62	24,667	739,170	30.0 days
1968	40	7,218	157,250	21.8 days
1969	48	44,417	1,360,350	30.6 days

The *Davis Amendments* brought needed balance to the construction industry. From the perspective of the construction industry, there were three key elements to the *Davis Amendments:*

first: accrediting employer associations to represent all contractors bargaining with a particular union;

second: introducing the related employer provision – section 1(4) – and strengthening the successor rights provisions, to protect acquired bargaining rights from erosion by sale or transfer of a business,

third: improving adjudicative procedures to expeditiously resolve jurisdictional disputes and thereby eliminate work stoppages over such disputes.

Each of the planks in the *Davis Amendments* contributed to stabilization of the construction industry. Accrediting employer associations reduced the scope for "whipsawing," *i.e.*, negotiating benchmark agreements with vulnerable contractors and using these benchmarks to achieve industry-wide patterns. Employer accreditation also reduced the scope for "leap frogging," *i.e.*, seeking to improve prevailing settlements through successive bargaining with different employers. Accrediting employer associations to bargain for contractors removed from unions the scope to use these bargaining strategies. Had the *Davis Amendments* only dealt with accrediting employer associations, the amendments would have been seen as tilting the system to favour employers. Moreover, accrediting employer associations, on its own, would have done nothing to protect bargaining rights from being undermined by the sale of a business or by operating a business through a non-union shell company, often created for that purpose. The need for industrial action to deter such tactics would have remained. For

this reason the *Davis Amendments* also included the related employer provision – section 1(4) – and amendments to the successor rights provisions**. A fair balance was achieved by counterpoising employer association accreditation with legal protection for acquired bargaining rights.**

The most important fact to keep in mind when reviewing the *Davis Amendments* is that the amendments were a package. Taken together, the *Davis Amendments* created a new balance. This new balance brought needed stability to industrial relations in Ontario's construction industry.

Achieving industrial relations stability in the construction industry is no simple task. There are several factors which complicate industrial relations in the construction industry and make it more vulnerable to endemic conflict. In the first place, the construction industry is subject to a boom and bust cycle. This intrinsic economic instability inevitably puts more pressure on the industrial relations system than in other sectors of the economy where the economic cycle is less severe. Secondly, much of the construction industry is organized along craft lines. Workers are specialized along craft lines. So also are most contractors. The predominance of trade contractors and craft-based unions increases the vulnerability of the construction industry to disruption. Thirdly, the risks of occupational injury and disease are greater in the construction industry than in many other sectors of the economy. A positive industrial relations climate promotes labour-management co-operation to improve health and safety conditions. However, when conflict is the order of the day, occupational health and safety incidents intensify that strife and frequently precipitate work stoppages.

Ontario now enjoys comparatively stable industrial relations in the construction industry. This contrasts sharply with the endemic conflict in the industry prior to the *Davis Amendments*. The *Davis Amendments*, however, were a package. The system requires all elements of that package to be in balance. Take out section 1(4) and the balance that was so carefully crafted by the *Davis Amendments* will be lost. Ontario will return to the chronic instability and conflict that characterized industrial relations in construction before the *Davis Amendments*.

E. The Franks Report

In 1976 the Minster of Labour appointed Mr. D.E. Franks to review the advisability of wider area bargaining.

The Franks report commented on one of the underlying principles of sound labour relations in the construction industry, namely, the preservation of a level playing field. The Report described what it termed as a "very strong ethic in the construction

industry."[13] The essence of this ethic is that a collective agreement must apply equally to all contracting parties. There should be no differentiated application. As the Franks Report observed:

> "… if a union were to offer different agreements to different employers, the obvious result would be that certain employers would have an unfair advantage in the matter of wage costs… Indeed, **it is generally regarded as unethical for a trade union to allow one employer such a competitive advantage over other employers**."[14]

The Franks Report's observation on the ethic of fair play is germane to considering the importance of section 1(4). **Preserving a level playing field in the construction industry requires that both unions and contractors be restrained. Unions must be restrained from seeking to negotiate premiums from contractors who are more in need of skilled labour or otherwise judged to be more vulnerable to "whip sawing" or "leap frogging" tactics. Similarly, construction employers must be restrained from seeking special deals that put them in a favourable position vis à vis their competitors who are party to the same agreement.** Section 1(4) works in conjunction with the geographic application of collective agreements to ensure a level playing field. Standard area agreements, covering a particular geographic scope, ensure that all contractors who are party to a collective agreement are subject to the same economic terms within a geographic area. Standard agreements prevent "whip sawing" of vulnerable contractors by unions. Similarly, section 1(4) ensures that construction employers cannot use the threat to bid a project non-union as a lever to secure special treatment. **The standard area agreements and section 1(4) work in tandem to preserve the level playing field. To remove either of these would push construction labour relations down the path of contractor-instigated special deals and its union counterpart - "whip sawing."**

Some might call contractor-instigated special deals and union "whip sawing" of contractors evidence of flexibility. This is surely a perverse understanding of flexibility. By this definition, the jungle is a flexible place… but no one chooses to live there.

F. The OLRB's Application of Section 1(4)

George Adams, a former Chair of the OLRB and a former justice of the Ontario Court (General Division), described the purpose of section 1(4) **as getting at "the economic**

[13] Ontario, Ministry of Labour: *Report of the Industrial Inquiry Commission into Bargaining Patterns in the Construction Industry in Ontario*, (Franks Report), May 1976, p 19

[14] *ibid*. p 20 [emphasis added]

realities of the [employment] situation."[15] A review of how the OLRB has applied section 1(4) shows that this is a particularly apt description.

Key Themes in the Board's Application of Section 1(4):
In reviewing the most prominent decisions of the OLRB several points arise:

1. the Board has emphasized the overriding importance of the underlying economic realities in an employment relationship as opposed to the surface arrangements;

2. the Board has set out detailed tests for determining when two or more nominally distinct businesses are under common control or direction;

3. in considering whether two or more businesses are under common control and direction, the Board gives particular scrutiny to non-arms length arrangements, especially those involving close family members. In construction, this is particularly important;

4. separate from the common control and direction test, the Board has also identified the factors that determine whether two or more businesses are closely related in terms of their substantive activities;

5. the Board has recognized that a distinct feature of many types of construction is the ease of entry into the industry. That is to say, capital requirements are modest. This, in turn, has led the Board to set out the "key person" principle which is a factor in determining whether nominally distinct businesses are under common control or direction;[16]

6. the Board has rejected as a defence for maintaining separate employment arrangements the desire of a construction employer to operate concurrently on a union and a non-union basis;

7. the Board has rejected efforts of unions to extend their bargaining rights through section 1(4), regarding the purpose of section 1(4) as the protection of existing rights rather than their extension;

8. the Board has rejected the application of section 1(4) when there was no legitimate labour relations purpose involved.

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[15] George Adams, *Canadian Labour Law*, 2nd ed. Canada Law Books, Aurora, Ontario: 1993 (updated) p 8-30 and 8-31

[16] The "key person" principle may also be invoked in successor rights applications. Indeed, the "key person" principle is more commonly applied in the context of successor rights disputes. If section 1(4) were repealed, the operation of the "key person" principle in successor rights applications would continue. Employer criticisms that dwell on the "key person" principle (and often misrepresent it) fail to take into account that the principle is often applied by the Labour Board in successor rights cases.

Purpose of Section 1(4):

(a) Industrial Mine Installations Ltd.

In one of its earliest decisions, *Industrial Mine Installations Ltd.*, [1972] OLRB Rep. Dec. 1029 (at pp.1031-1032), the Board sets out the purposes of section 1(4) as follows:

> "Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.
> Prior to the enactment of section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.
>
> Also, in some situations where a union had been granted bargaining rights for the employees of one employer, the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.
>
> So too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise, and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of situation where section 1(4) was applied is found in *Walters Lithographing Company Limited, et al*, [1971] OLRB Rep. 406.
>
> It is in these types of situations that the interests of the parties in

> having the Board treat separate employers as constituting one employer for the purpose of the Act became apparent, and it is for that reason that section 1(4) was enacted."

(b) Brant Erecting and Hoisting:

The purpose of section 1(4) was reiterated in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 (at p. 948), as follows:

> "Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section [69] which preserves the established bargaining rights and collective agreement when a 'business' is transferred from one employer to another. Section [69] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both."

The prime objective of section 1(4) is thus the same as the objective of the successor rights provisions of the *Act*, namely, the preservation of established bargaining rights when the commercial organization of a business is changed, but the underlying economic realities remain the same. Section 1(4), however, has a critical role to play where the sale of business provisions do not apply. In short, these provisions are complementary. Given the limited scope of the successor rights provisions, **the absence of section 1(4) would leave a critical gap in the *Act*.**[17]

It should be stressed, however, that section 1(4) does not extend a trade union's bargaining rights. Section 1(4) is only about preserving legally acquired representation rights.

Before the OLRB will treat two or more entities as constituting one employer, **the Board must be satisfied that the business activities are carried on under common**

[17] See, *W.W. Lester (1978) Ltd. v. U.A. Local 740*, (1990) 76 D.L.R. (4th) 389 (S.C.C.).

control or direction *and* that the business activities are related. These are necessary conditions. They are not, however, sufficient conditions. As will be discussed, the Labour Board applies rigorous tests to determine whether section 1(4) should be applied.

Common Control or Direction Test:

The Board listed the criteria to determine whether employers are related in *Walters Lithographing Company Limited, et al*, [1971] OLRB Rep. 406. These are:

1. common ownership or financial control,
2. common management,
3. inter-relationship of operations,
4. representation to the public as a single integrated enterprise,
5. centralized control of labour relations.

Generally speaking, in applying section 1(4), the Board will more carefully scrutinize non-arm's length transactions. The attention to non-arm's length transactions is especially important in construction where a shell company can be established in the name of another family member. In *Kepic Wrecking Inc.*, [1993] OLRB Rep. June 516, it was clear on the evidence before the Board that a father and son operated the wrecking businesses in question under joint direction or control and that the creation of the new company by the son was "merely a step in the process of passing the business from Steve to Ronald Kepic and, at the same time, an attempt to remove the business from an unwanted collective bargaining relationship with the Labourers" (at p. 521).

Related Business Activities Test:

As well as being under common control, business activities must be closely related. Three tests are chiefly used by the OLRB to determine whether business activities are closely related (are See *Trans-Nation Inc*, [1980] OLRB Rep. Dec. 1839):

1. whether the business activities have the same general character,
2. whether the businesses serve the same general market,
3. whether the businesses use the same means of production or utilize the same or similar employee skills.

Key Persons Principle:

The unique features of the construction industry afford ample opportunity for undermining legally established representation rights. A distinctive feature of many branches of the construction industry is the modest requirement for investment in fixed capital. For many types of construction, the key are the business ability, expertise and reputation of particular individuals. In recognition of this special feature of the construction industry, the Labour Board developed the "key person" principle. The

term "key person" was defined in *Stucor Construction Ltd* [1987] OLRB Rep. April 614 (at p. 621).

> "The essence of a 'business' in a bid-oriented sector of the construction industry frequently resides in the experience and expertise of its management personnel, rather than, for example, in the physical assets such as tools or a specific location. This is because, to be financially successful, the business needs not only the ability to price and bid jobs successfully, but it must be able to execute the jobs within the self-imposed limits of the bid price. If it lacks expertise in either element, it is unlikely to be successful."

The Labour Board considers the role of key persons when determining whether two businesses are effectively under common control or direction. The key person test has been applied with considerable restraint. In *Yola Construction Ltd*. [1990] OLRB Rep. Mar. 358, the Board found that an individual who owned a business that had ceased operations did not become a key person simply by virtue of acquiring an interest in another company. Similarly when the departure of a key person led subordinates to venture out on their own, the company established by these individuals was not found to be a related employer within the meaning of the *Act*. (See *Rivard Mechanical* [1981] OLRB Rep. May 550.)

Concurrent Union and Non-Union Operations:

One of the purposes of section 1(4) is to prevent an unionized employer from diluting the union's bargaining rights by performing part of its business in an associated non-union company. In *Kustom Insulation Ltd.*, [1979] OLRB Rep. June 531, the Board rejected the argument that section 1(4) should not be applied where the associated company bids on non-union contracts on the basis that the union company could not purportedly submit a competitive bid for such work. The Board ruled (at p. 536)

> "It is not necessary, however, for the union company to fall apart before concluding that an employer's scheme of operating a business through a union and non-union company has undermined a union's bargaining rights...If an employer expands its business the union's bargaining rights automatically encompass the employees doing new work coming within the scope of the collective agreement...Despite the present well-being of Kustom's business, the Board is of the view that H.S. Insulation is eroding the bargaining rights of the union because it effectively carves out from Kustom's business the work that Kustom might otherwise at least try to get and the work in respect of which the union would otherwise represent the employees. The existence of H.S. Insulation effectively nullifies

> the need for Kustom to try to compete with non-union contractors as other unionized employers are required to do."

Similarly, the Board rejected an employer argument that "economic realities" required it to maintain a non-union operation in *Rivard Mechanical*, [1981] OLRB Rep. May 550, and noted that (at p. 553):

> "Clearly, nothing is more fundamentally destructive of a union's rights and interests than operating non-union and 'economic realities' simply cannot be used to justify this."

Board Discretion:

It is important to stress that the application of section 1(4) is not automatic. An application to apply section 1(4) does *not* succeed merely by virtue of meeting the Labour Board's tests to demonstrate the relatedness of the business activities or the common control or direction of the businesses. Rather, **the Board must also be satisfied that there is an important labour relations purpose that requires the application of section 1(4).**

The Board declined to apply section 1(4) where there was no actual threat that the union's bargaining rights would be eroded in the future (*John Hayman & Sons Co. Ltd.*, [1984] OLRB Rep. June 822). The Board also refused to apply section 1(4) where the non-union company existed long before the unionized company and there was no evidence that bargaining rights had been eroded. (See, for example, *Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844). The Board emphasized in *Bramalea* its policy that section 1(4) cannot be used as a substitute for the certification process.)

Section 1(4) should be considered along side and in comparison with the sale of business provisions of the OLRA. The related employer provisions and the successor rights provisions both have the same objective – to preserve legally acquired bargaining and representation rights from erosion by changes in the corporate form of a business. Notwithstanding the common purpose of the provisions, there are nevertheless important differences between them. The application of the successor rights provisions is automatic if there is a finding of fact. As noted earlier, this is not the case with the related employer provisions. In addition to a finding of fact, the Board must also be persuaded that there are sound labour relations reasons to apply the related employer provision. As well, successor rights remedies are applied retroactively. This is not usually the case with section 1(4).

Concluding Observations on the Application of Section 1(4):

In some employer-oriented accounts, section 1(4) is portrayed as a device for expanding union bargaining rights. Nothing could be further from a fair reading of the OLRB's decisions. **The Labour Board has established strict tests for determining when businesses are related and when they are under common control or direction.**

Moreover, there is nothing automatic about the application of section 1(4) even when these tests are met. The Board also requires that a legitimate labour relations purpose be demonstrated.

The Board's jurisprudence also makes clear that **a non-union company which operated *prior* to a union obtaining bargaining rights with a related company is not affected by the union's certification merely by virtue of being a related business and under common control or direction.**

In all of its decisions, the OLRB has been guided by the philosophical principle that its duty is to get at the underlying economic realities. Legal form is not allowed to take precedence over the underlying economic realities that give substance and meaning to an employment relationship.

Part Two

Structure of the Construction Industry and Construction Costs

A. General Contractors and Trade Contractors

General Contractors and Trade Contractors:
There are two types of contractors in the construction industry: general contractors and trade contractors. When a project is put out to tender, it is typically general contractors who submit proposals to owners and developers. These proposals cover all aspects of the construction work to be done. In a building, this involves three types of work: structural work (also known as civil work), mechanical and electrical work and finishing work. General contractors are chiefly project managers, though many general contractors will directly employ workers in the civil trades. The preponderance of actual construction work is done by trade contractors. These include, among others, excavating contractors, forming contractors, masonry contractors, glazing contractors, mechanical contractors, electrical contractors, sheet metal contractors, interior finishing contractors and landscaping contractors.

Most of the owners and developers of construction projects can award a job to any general contractor of their choosing. Selection will be based on cost, reputation and, in some cases, financing factors.

Three Groups of General Contractors:

In Ontario, general contractors may be divided into three groups. The first group are those general contractors that are non-union. These general contractors can employ labour directly or sub-contract work without reference to a collective agreement with a construction union.

The second group comprises those general contractors that are bound by province-wide collective agreements with some or all of the civil trades, but not with the non-civil trades. This group is quite large. These general contractors are not, to our knowledge, associated with the lobby to repeal section 1(4).

The third group of general contractors are those that are bound by "working agreements" with the construction unions. Prior to the advent of province-wide bargaining, it was common for general contractors to sign "working agreements" with the building trades councils. These "working agreements" required them to have all construction work on projects they managed done by union members, whether employed directly by the general contractors or through trade contractors. The "working agreements" operated at a regional level. It was common, for example, for general contractors to be party to "working agreements" in the Greater Toronto Area. In 1977, the *OLRA* was amended to make bargaining in the ICI sector province-wide. This change was widely supported by most unionized construction employers. Moving ICI bargaining to the province-wide level eliminated the opportunity for construction unions to raise wages through sequential bargaining at the regional level. One of the implications of replacing regional ICI agreements with province-wide agreements was that bargaining rights which operated at the regional level necessarily were transferred to the province-wide agreements.[18] In 1979, local area bargaining rights that were founded in collective agreements, including the "working agreements," were extended to a province-wide level through an amendment to the *OLRA*.

There is considerable turn-over in the general contracting segment of the construction industry. Of the general contractors that originally signed "working agreements" decades ago, eight of the largest general contractors in the province are still operating. These are the eight generals that are orchestrating the lobby to repeal section 1(4). While they claim their goal is repeal of section 1(4), there is reason to believe that their real objective is a more focused change. The real objection of the eight generals is to the 1979 amendment to the *OLRA* that extended the bargaining rights founded in "working agreements" or other collective agreements to province-wide scope. Indeed, the eight generals appear to focus their objections only on being bound to province-wide agreements with the *non-civil* trades, chiefly *outside of the Greater Toronto Area* (Labour Board Area No. 8.)

It should be stressed that all of the agreements that bind general contractors to the construction unions were voluntary. These agreements were not imposed by either the

Ontario Labour Relations Act or the Ontario Labour Relations Board.

Why General Contactors Agree to be Unionized:

It might well be asked why the eight generals bound to the "working agreements," *voluntarily* signed those agreements. These agreements, as noted earlier require their signatories to employ only union members or to use only unionized trade contractors. As noted earlier in this submission, **there are certain types of construction projects where unionization is a significant advantage to contractors.**

Large-scale civil projects and large industrial and commercial projects typically require a significant number of skilled tradespersons. In these circumstances, the dispatch system operated by the construction unions is a major advantage to contractors. In addition to being able to draw on local labour supply, a construction union can also draw on skilled tradespersons from outside the local labour market. Indeed, when major construction projects are undertaken, this is extremely common. For example, in 1998 in Hamilton, during the summer months when large-scale maintenance work was being undertaken in industrial plants, 75% of skilled pipefitters were brought in from outside the Hamilton area. Without the ability provided by construction unions to draw on skilled labour from across the province – indeed, from across the country or even from the United States – contractors would have had enormous difficulty in undertaking these construction jobs. Needless to say, given the scale and complexity of large construction jobs, they are also highly profitable. In other words, **general contractors had good reasons to negotiate with the construction unions over the conditions on which the unions' dispatch systems would be made available to them either directly (*i.e.*, for direct hires) or indirectly (*i.e.*, for labour hired by sub-contracted trade contractors).**

A Legislated Solution or an Industry-Based Solution:

If the general contractors had their way, they would prefer selective access - either direct or indirect - to the construction unions' dispatch systems. Obviously there are some projects where such access – whether direct or indirect - is critically important. Equally obvious is that the construction unions have an interest in providing access to their dispatch systems only on terms that are the most advantageous to their members. Clearly this is a bargaining situation in which the parties must negotiate terms that are mutually advantageous. **We can see no reason why a legislated solution to the access issue should be preferred to an industry-based solution. In particular, we can see no reason why *negotiated* agreements should be set aside by a statutory intervention.**

The contractors' lobby is portraying its goal as repeal of section 1(4). As discussed earlier, this is a smokescreen. In actual fact, the principal interest of the eight

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[18] For a review of how the bargaining rights founded in "working agreements" were extended on a province-wide basis, see *Ellis-Don Ltd.*, [1992] OLRB Rep. Feb. p 147.

general contractors who are leading the lobby is to be statutorily released from their province-wide agreements with some or all of the non-civil trades outside of the Greater Toronto Area (Board Area No. 8). What these eight generals are seeking is what they have always wanted - *selective* access, on either a direct or indirect basis, to the construction unions' dispatch system. They have not been able to negotiate *selective* access. They now hope to use political leverage to have the government give them *selective* access through legislation. *Selective* access was behind the earlier efforts of the eight generals to persuade the Ontario government to legislate the so-called "three-and-out" formula that would have released them from most of the province-wide ICI agreements. The efforts of the eight generals to secure this formula sparked considerable opposition from unionized *trade* contractors. So strong was this opposition that it was readily obvious that there was no consensus among employers in the construction industry over a formula that would release the eight generals from the "working agreements" which they had voluntarily signed.

To address the disunity among construction employers, the eight generals restated their objective in terms of repealing section 1(4). For reasons described earlier, repeal of section 1(4) will effectively set aside employee wishes and make unionization in the construction industry voluntary on the part of *employers*. It is not surprising, therefore, that this proposal has found support – albeit sceptical support – among some trade contractors. Trade contractors, after all, have no interest in being offside with the general contractors on whom they depend for sub-contracted work. **Few of these trade contractors, however, expect the proposal to repeal section 1(4) to be taken seriously.**

B. Construction Costs

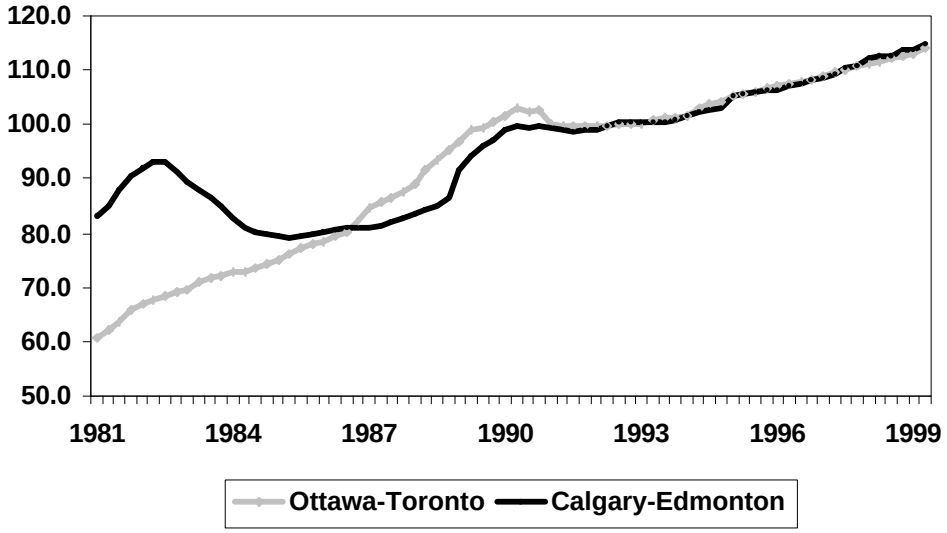
It is claimed by the general contractors that repeal of section 1(4) will reduce construction costs in Ontario. This claim cannot be support by either analysis or evidence.

Alberta / Ontario Comparison – Statistics Canada

Statistics Canada tracks construction costs on a quarterly basis. While we cannot obtain absolute comparisons from the Statistics Canada data, we can derive measures of the *rate of change* in construction costs.

Graph No. 2 compares cost increases in construction in Alberta and Ontario. The graph shows that in the past decade, there was virtually no difference in the rate of change in construction costs in Alberta and Ontario. **Indeed, what is striking is that the increases in construction costs in Alberta and Ontario were virtually identical in the 1990's.**

Graph No. 2
Changes in Non-Residential Construction Prices, 1992 = 100:
Ottawa-Toronto / Calgary-Alberta
Source: Statistics Canada, CANSIM, Matrix 9930



Alberta / Ontario Comparison – Major Petrochemical Projects

An area of particular attention has been comparative construction labour costs between Alberta and Ontario in the construction of major petrochemical projects. Given the scale of these projects and the need to mobilize large number of skilled construction trades, there is no practical alternative to constructing these projects on a union basis. A comparison of Alberta union rates with Ontario union rates is therefore instructive.

In both provinces, specific project agreements have been negotiated to cover major petrochemical projects. In Alberta, these project agreements do not affect the wage rates, but provide for standardized hours. In Ontario, both wage rates and hours are affected by the project agreement.

Table No. 2 compares hourly labour costs between Sarnia, Ontario and Joffre, Alberta. Joffre is a major alternative location for petrochemical investments in Canada. Joffre, it should be noted, is a remote location. Consequently, camp costs must be factored into labour costs. As Table No. 3 shows, the project rate agreed to in Sarnia is approximately $3.95 per hour above the prevailing industrial rate in Alberta. However, when camp costs are factored in, the labour cost comparison shifts to Ontario's advantage. On average, labour costs in Joffre, Alberta are approximately $2.05 higher than in Sarnia for the nine trades compared. Moreover, this margin will widen when significant wage increases, already negotiated in Alberta, come into effect,

Table No. 2
Construction Labour Costs for Selected Trades
Ontario – Sarnia Project Agreement / Alberta (applicable to Joffre Projects)

	Ontario – Sarnia		Alberta – Joffre			Difference
	ICI Rate	Project Rate	Industrial Rate	Add Camp Costs $6/hr*	Total Hourly Cost	
Boilermakers	$ 37.77	$ 36.64	$ 32.71	$ 6.00	$ 38.71	-$ 2.07
Sheet Metal (Industrial)	$ 36.60	$ 35.11	$ 31.53	$ 6.00	$ 37.53	-$ 2.42
Millwright	$ 36.70	$ 35.78	$ 32.29	$ 6.00	$ 38.29	-$ 2.51
Plumbers	$ 37.34	$ 36.47	$ 32.15	$ 6.00	$ 38.15	-$ 1.68
Labourers	$ 29.00	$ 28.34	$ 25.15	$ 6.00	$ 31.15	-$ 2.81
Electrical Workers	$ 39.85	$ 37.03	$ 32.49	$ 6.00	$ 38.49	-$ 1.46
Operating Engineers	$ 37.12	$ 36.14	$ 30.86	$ 6.00	$ 36.86	-$ 0.72
Iron Workers	$ 35.77	$ 34.89	$ 31.11	$ 6.00	$ 37.11	-$ 2.22
Carpenters	$ 34.18	$ 33.25	$ 29.81	$ 6.00	$ 35.81	-$ 2.56

* Because Joffre is a remote location, workers must be housed. Camp costs average $60-$100 per day. Translated into an hourly cost on a 10-hour shift, this is a minimum of $6.00 per hour.

Alberta / Ontario Comparison – KPMG Study

One of the most authoritative sources of data on location costs is the annual publication, The *Competitive Alternatives* by KPMG Canada. The study is supported by 30 corporate sponsors, including the Royal Bank and Bell Canada. Data were collected in 1998 covering eight countries and 64 locations. Construction costs were compared across locations for a "build-to-suit" industrial facility between 50,000 and 120,000 sq. ft. **Seven Ontario cities –Kitchener, Sarnia, Kingston, Windsor, London, Hamilton and Toronto – ranked well below Edmonton in costs.**

The Construction Labour Market:

In Alberta, many branches of construction have de-unionized. Construction prices are determined largely by the bid prices of non-union contractors. In Ontario, there are a significant number of union and non-union contractors in almost all sectors and in virtually all trades. As well, there are both unionized and non-union general contractors. Competitive tendering for work operates across the entire industry. If the prices quoted by unionized contractors exceed those of non-union contractors, work gravitates to non-union contractors.

The competition between the union and the non-union sector in Ontario has three effects:

1. **the bid prices of non-union contractors act as a check on cost**

increases in Ontario. That is why increases in construction costs in Ontario are virtually identical to those in Alberta. From the perspective of owners and developers, the dynamics of the Ontario market are not significantly different. In both provinces, competitive bidding is the norm. Owners and developers are free to select whichever general contractor provides the best mix of cost, quality and reliability.

2. to justify higher wage and benefit costs, the skilled trades in the unionized sector have to provide a productivity advantage that offsets the higher labour costs. This puts pressure on construction unions to channel resources into skill training. **On average, construction unions funnel approximately $8-10 million into skills updating and apprenticeship training.** This is precisely the positive response to competitive conditions that public policy should encourage, not undermine.

3. **the emphasis that the unionized sector puts on training and productivity is a positive check on the non-union sector.**

The *Ontario system* of construction labour relations is based on the principle of balance. Through balance the *Ontario system* achieves stability and, at the same time, delivers an enviable measure of fairness and opportunity. Through balance, the *Ontario system* keeps its costs in line. And through balance, the *Ontario system* ensures that competition is a positive force rather than a negative force. This balance was the product of the *Davis Amendments*. This balance will be undone if section 1(4) is repealed.

C. Restrictions on Workers

It has been argued by some contractors that union members have the option of working non-union. This is claimed as evidence of an imbalance in construction labour relations.

It should be noted, however, that **major construction employer associations have negotiated restrictions in their provincial agreements on the ability of union members to work on a non-union basis**. We cite two major agreements from the ICI sector:

Electrical Constrictors Association of Ontario (ECAO) and International Brotherhood of Electrical Workers (IBEW):

Art 4.02 No member of the Union shall be permitted to work at electrical construction work for anyone who is not Party to this Agreement.

Mechanical Contractors Association of Ontario (MCAO)and
Ontario Pipe Trades Council (UA)

Art. 25 The United Association and its Affiliated Local Unions agree that is members when working in the ICI Sector shall only work for *bona fide* mechanical contactors. Said contractors prior to hiring of UA members will be bound by this Agreement…

We have seen no evidence to support the claim that there is a widespread practice of unionized construction workers also working on a non-union basis for competing contractors. Indeed, the claim strikes us as improbable. In response to these claims, we can only point to language in the above collective agreements which prohibits union members from working non-union. We are not aware of any employer-initiated complaints under the terms of these agreements. Moreover, unionized construction workers also working on a non-union basis for competing contractors has not been an issue at the bargaining table. In the absence of evidence, we believe the claim must be discounted.

Part Three

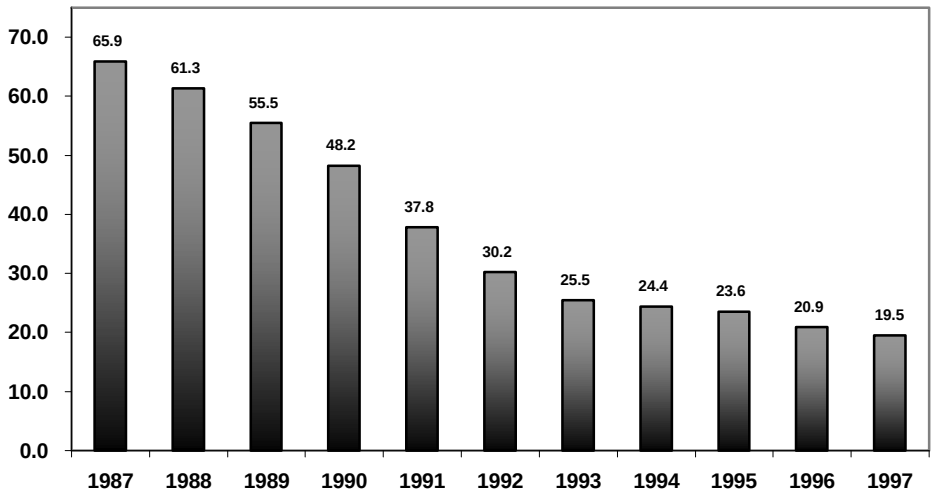
The Broader Consequences Of Repealing Section 1(4)

A. Occupational Health and Safety

Repealing section 1(4) is intended by the general contractors who support this change to remove unions from most segments of the construction industry. As will be evident from the earlier discussion, we believe that instead of a non-union industry, what the general contractors will unwittingly achieve is an industry characterized by endemic conflict over recognition and respect for acquired bargaining rights. The unions in the construction industry will not fade away like old soldiers. It is naïve to think that they will. Let us consider, however, what would ensue in the field of health and safety if the general contractors' goals were realized.

It is useful to note, from the beginning, how much progress has been made in the construction industry over the past decade in reducing the rate of lost time injuries. **From 1987 to 1997, the rate of lost time injuries per 1,000 workers was cut by 70%.**

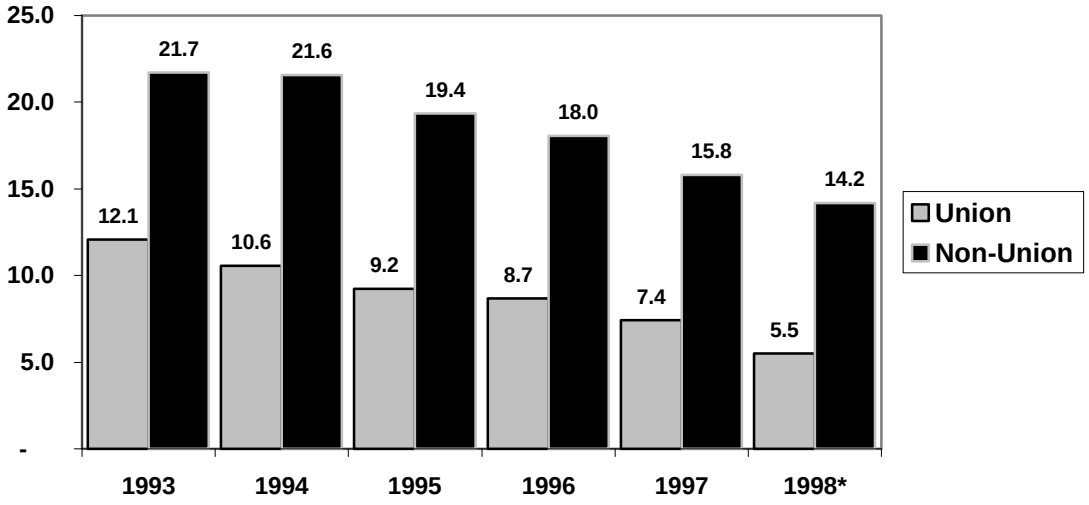
Graph No. 3
Lost Time Injuries in Construction per 1,000 Workers
Source: Statistics Canada, Work Injuries (72-208), The Labour Force Survey (71-001), Ontario Workplace Safety & Insurance Board Annual Report



Further analysis of the data, however, shows that there is a sharp contrast between unionized contractors and non-union contractors. Data have been developed for two trades which are separately rated by the WSIB – the electrical contracting trade and the mechanical contracting trade. (The latter is chiefly the pipe trades and the sheet metal trade.)

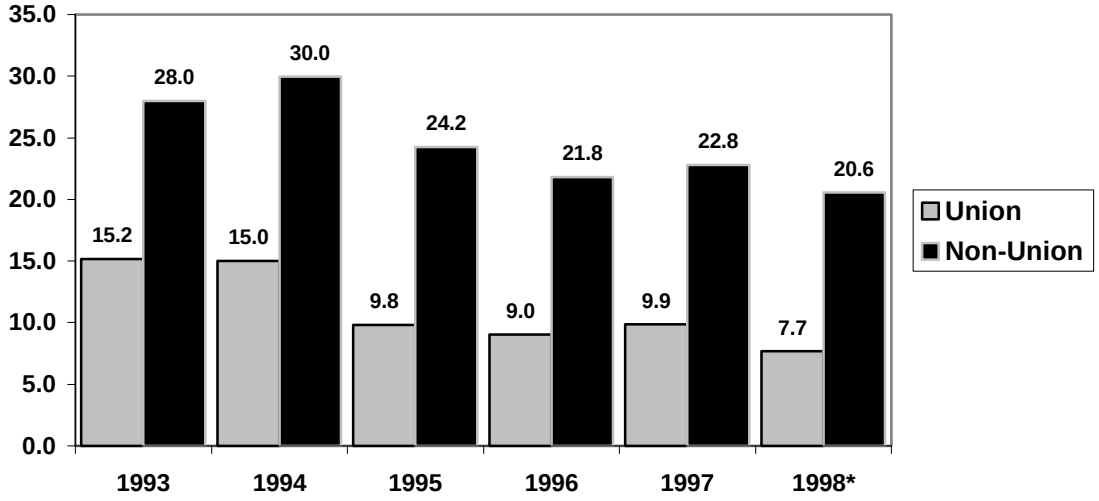
Graph No. 4 compares health and safety performance in the electrical trade. Two important trends are evident. First, health and safety performance among the union contractors is consistently and significantly superior to that of non-union contractors. **In 1998, non-union electrical contractors had a lost time incidence rate that was 2.6 times higher than of unionized contractors.** Second, the rate of improvement among unionized contractors was also superior. From 1993 to 1998 (preliminary data), unionized contractors reduced their lost-time incidence rate by 54.5%. Non-union contractors achieved an improvement of only 34.6%.

Graph No. 4
Lost Time Injuries in Construction per 1,000 Workers
in the Electrical Contracting Industry – Union vs. Non-Union
Source: Ontario Workplace Safety & Insurance Board, Ontario Construction Secretariat



Graph No. 5 shows that virtually the same pattern is evident in the mechanical contracting industry. **In 1998, non-union mechanical contractors reported 2.7 times as many lost time accidents per 1,000 workers as unionized contractors.**

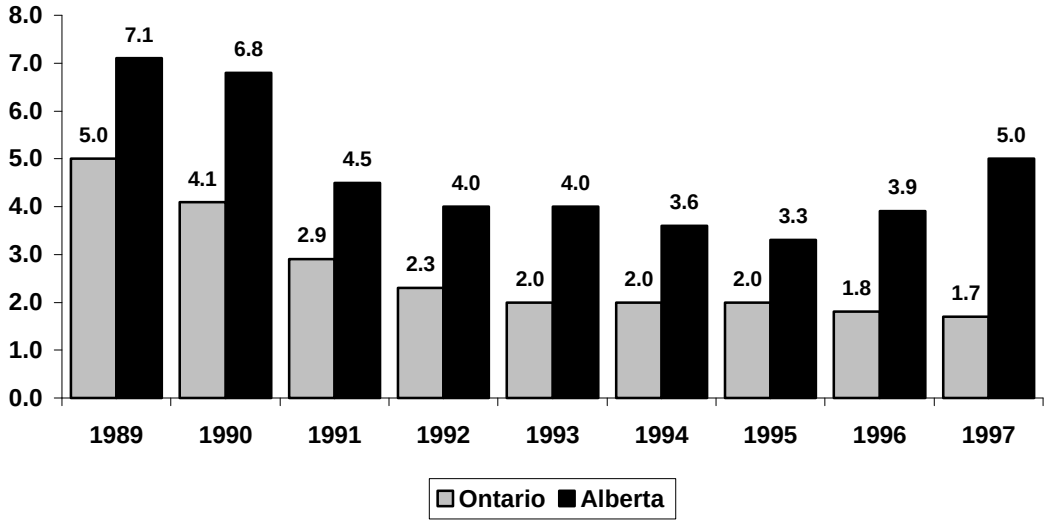
Graph No. 5
Lost Time Injuries in Construction per 1,000 Workers
in the Mechanical Contracting Industry – Union vs. Non-Union
Source: Ontario Workplace Safety & Insurance Board, Ontario Construction Secretariat



The difference in lost-time injury rates between union and non-union contractors is so sharp that there is a compelling fairness case for a separate union and non-union premium rate. More relevant to the issue of labour relations is the likely impact of de-unionizing large segments of the construction industry, as the general contractors hope to achieve by repealing section 1(4). **On the basis of the comparative data, it is reasonable to expect that the result of de-unionization would be an increase in construction industry claims of approximately 2.5 times what they otherwise would have been. The impact of this on premium rates would be dramatic. Indeed, this cost increase alone would nullify most of the wage savings that de-unionization would entail.** In 2000**,** WSIB premiums in the construction industry will range from 3.2% to 19.6%, depending on the rate group.[19] On average, construction industry premiums will be approximately 8%. Prorating premiums by the likely increase in lost-time injury rates will drive average premiums in the construction industry to around 20%. If such rates are thought high, it should be noted that current premiums for some rate groups in construction are currently over $20 per $100 of covered payroll.

Comparison can also be made to Alberta, where the government removed its related employer protection for acquired collective bargaining rights in the construction industry. The result was to de-unionize large segments of the construction industry. Graph No. 6 compares lost time injuries in Ontario and Alberta in the construction industry:

Graph No. 6
Lost Time Injuries in Construction per 100 Workers: Ontario vs. Alberta
Source: Construction Safety Association of Ontario, *Annual Report* (1998)



[19] *Daily Commercial News*, August 13, 1999, p 1

As can be seen, Ontario's performance is both consistently and significantly superior to that of Alberta**. In 1997 – the last year for which comparative data was published – the lost time accident rate in Alberta was almost three times as high as in Ontario.** Over the entire period, 1989-1997, Alberta had an injury rate that was 77% higher than in Ontario. This is a striking difference. **Viewed in light of the data comparing union and non-union contractors, it leads unreservedly to the conclusion that de-unionization of the construction industry in Ontario would be accompanied by a dramatic increase in the injury rate. This increase would be at least of the order of 75% or greater**.

B. Ratcheting up of the Underground Economy:

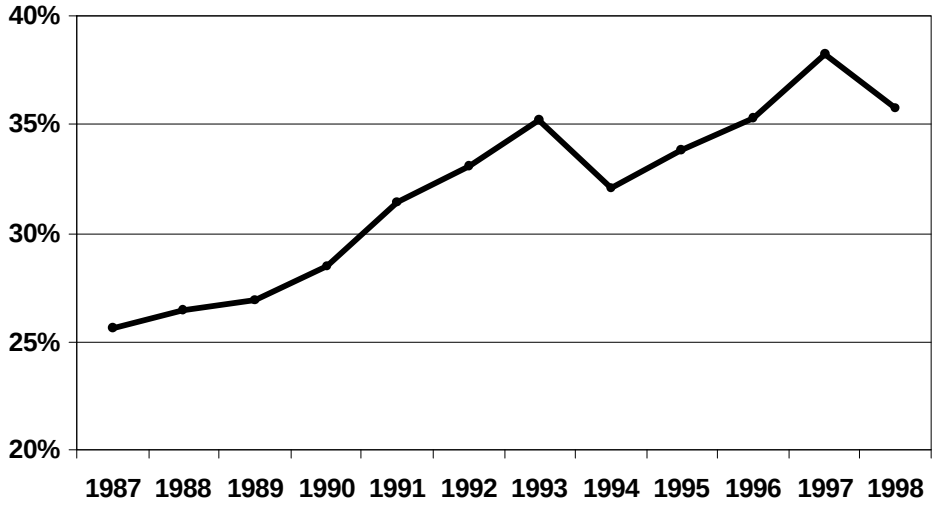
The underground economy refers to contractors and workers in the construction industry who deliberately and systematically fail to declare income for tax purposes and who fail to report their employment for purposes of WSIB coverage. A study undertaken for the Ontario Construction Secretariat estimated that underground employment in the construction industry ranged from 26% to 36%, with a best estimate of 28%. A significant finding of this report and an earlier study was that underground employment had insinuated itself into non-residential construction. The OCS study estimated that in the non-residential sector, underground employment ranged from 11% to 14%, with 12% presented as a best estimate.[20]

An important conclusion of the OCS study and the earlier national study by KPMG was the importance of self-employment as a factor that facilitated underground practices. It is quite common for piece-rate paid employees to be styled as independent operators to avoid reporting income at source and making deductions. Indeed, the boundary between piece-rate employment and self-employment is often blurred.

Graph No. 7 shows the growth in self-employment in the Ontario construction industry.

[20] Ontario Construction Secretariat, *The Underground Economy in Ontario's Construction Industry: Estimates of Its Size and the Revenue Losses to Government and the Workplace Safety and Insurance Board*, prepared by John O'Grady Consulting Ltd., Greg Lampert Economic Consultant Inc. and the ARA Consulting Group, (Toronto), November 1998. See also, KPMG, *Strategic Analysis of Underground Employment in the Construction Industry*, (Ottawa) 1997, for a qualitative discussion of the spread of underground economy practices into non-residential construction.

Graph No. 7
Self-Employment as a Percentage of Total Employment
in the Construction Industry (Ontario), 1987 - 1998
Source: Statistics Canada, *Labour Force Historical Review*, 1998 Cat No. 71F0004XCB



Self-employment, the underground economy and de-unionization are related patterns. The move to de-unionize construction does *not* primarily lead to a shift of work from unionized employees to non-union employees. Rather, the de-unionization of construction chiefly leads to a shift of work from unionized employees to nominally self-employed workers.

Many of nominally self-employed workers are dependent contractors whose employment relationship is styled as a sub-contract arrangement to facilitate concealing some or all of their income and to enable their employer to avoid WSIB payments and other payroll related obligations, such as EI, EHT and CPP. GST may also be evaded by such arrangements, as well. The scale of this non-compliance is evident in a study by Statistics Canada which estimated that in 1991, the last year for which the analysis was done, 65% of the net income of unincorporated businesses in construction was concealed from Revenue Canada.[21]

For the WSIB, therefore, the result of the de-unionization of construction would be a reduction in the proportion of the construction work force that is covered. This, in turn, means that the burden of liquidating the unfunded liability must be borne by a diminishing proportion of the industry.

The growth of underground employment, in response to de-unionization, has other implications, as well, for the WSIB. Many non-union contractors employ workers on a

[8] Statistics Canada, *The Size of the Underground Economy in Canada*, by Gylliane Gervais, (Ottawa), 1995, Cat. No. 13-603E No. 2, p 13, Table No. 2

wage basis during regular hours and on a piece-rate basis after standard hours or on weekends. Often this "moonlight" employment is styled as a sub-contract to avoid tax and WSIB requirements. However, if an accident occurs, there is usually a commitment by the employer to report the accident as occurring on covered time. The result is an asymmetry between liabilities and contributions. The WSIB is still burdened with a large fraction of the claims that arise from "moonlight" employment, but receives no premium payments to cover this risk.

Where accidents or occupational diseases arise and do not entail a claim on the WSIB, there can still be significant social costs. Medical costs will be borne by medicare. Income loss may involve claims on the CPP for disability or on social assistance.

None of these issues are canvassed by the general contractors seeking the removal of section 1(4). **The general contractors ignore the actual dynamics of the construction labour market. In their account, the removal of section 1(4) will lead to a frictionless transfer of construction employment from unionized contractors to non-union contractors.** The impetus de-unionization will give to underground employment is ignored. Yet, it is folly to ignore the way the construction labour market actually works. **De-unionization would ratchet up underground employment in all sectors of construction.** The implications for those contractors that continue to operate legitimately – whether union or non-union – would be particularly serious. **A shrinking proportion of the construction industry would be left to shoulder the burden of the unfunded liability and to pay for the claims of underground workers whose employers conveniently alter their status when an injury occurs.**

C. Erosion of the Skilled Labour Supply:

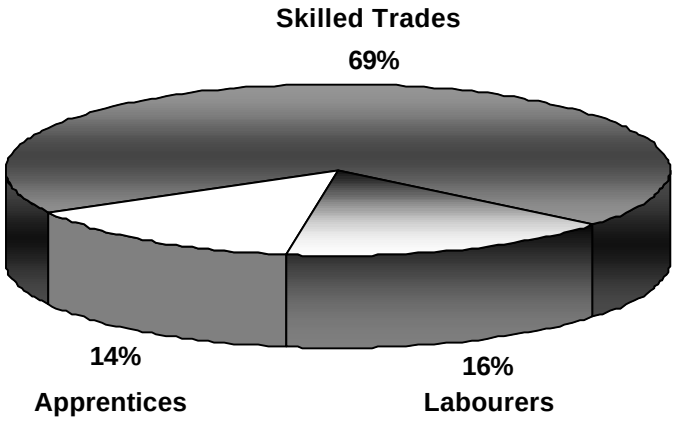
Construction is Skill Intensive:

Construction work is fundamentally different from manufacturing work. This is most evident in the high proportion of skilled labour that must be employed in construction. Virtually all construction work is custom designed. While some components of a construction project can be manufactured off-site, most work must be done on-site. Construction work is custom work: it must meet the exact specifications stipulated by the architects or engineers for the project. No two construction projects are the same. This contrasts directly with a manufacturing process where consistency of output is the objective. In manufacturing, machinery is typically operated by semi-skilled operators. **In construction, most work must be undertaken by skilled tradespersons who understand how to apply trade principles to a particular construction task.**

Graph No. 8 shows that **69% of the construction industry work force are in the skilled trades.** The remainder are approximately evenly divided between labourers and apprentices. It would be a serious error to regard either apprentices or construction labourers as unskilled. Many apprentices have already received significant amounts of

training in their trade. Similarly, a large proportion of labourers have taken construction industry training and have acquired a significant amount of construction skill through experience.

Graph No. 8
Approximate Distribution of Construction Employment: Ontario, 1997
Source: Ontario Construction Secretariat



A shortage of skilled labour leads to five consequences:

1. **Public safety is put at risk.** Consider the crane operator moving tonnes of cement or structural steel. Or consider the risk of an electrical fire in a major office building when work is done by unqualified workers. How are the public and other employees to be protected? If there is a shortage of skilled labour, no amount of inspection will achieve compliance.

2. **Construction projects are postponed** and the production or commercial activity that depends on completion of these projects is also delayed. Economists term this the "bottleneck effect." Economic growth is literally lost because of the inability to bring completed construction work on stream.

3. **Labour costs increase** as contractors increase their wage offers or piece rates to retain their skilled labour. Because of the shortage of skilled labour, an increasing proportion of work must be done on an overtime basis.

4. **Productivity on construction sites declines** as less experienced labour is hired by contractors. Errors increase. More work must be redone. Materials are wasted. This decline in productivity draws out the time to completion and adds to costs.

5. **The quality of work declines and ordinary consumers bear the consequences.** Often, as in the B.C. condominium sector, this deterioration in the quality of work leads to serious structural problems that require major expenditures to retrofit and rebuild.

Maintaining the skilled labour supply is critically important to both the construction industry and to the economy. If section 1(4) were repealed in the construction industry, what would be the impact on supply of skilled labour? This is a question that the general contractors, who are pushing for repeal, do not ask. Yet this question is fundamental, from the perspective of sound labour policy.

Apprenticeship and Construction Unions:

Historically, the construction industry in Ontario has relied on three sources of skilled labour: immigration, inter-provincial migration and apprenticeship. Immigration is a declining source of skilled trades for construction. The traditional source of skilled construction labour was Europe. Rising living standards in Europe and the progress of European integration have dramatically reduced the flow of skilled construction workers from Europe to Canada. Similarly, inter-provincial migration is reducing the supply of construction trades to Ontario. The resource-driven boom in Alberta and the significant increase in construction in Atlantic Canada have provided local employment opportunities that reduce the need to seek work in Ontario. That leaves apprenticeship and continuing training.

Apprenticeship has always been an important source of skilled labour supply. **Given the trends in immigration and inter-provincial migration, the importance of apprenticeship will increase**. The nature of construction skills is that they must be acquired, in large measure, through supervised experience and broad exposure to the range of skills that make up the trade. You cannot learn a construction skill in a classroom. That is why the apprenticeship system has survived. And that is why the apprenticeship system will continue to play an important role in preserving the supply of skilled labour. This leads directly to the role of construction unions.

Construction unions play a key role in the apprenticeship system:

- Most construction unions provide significant amounts of pre-apprenticeship training to new entrants into their trade. This pre-apprenticeship training filters out those entrants who do not have a long-term interest in the trade. Pre-apprenticeship training also ensures that, even in their early employment months, new apprentices will be productive and useful employees. Without this pre-apprenticeship training, the value of new apprentices to employers would be reduced. Employers, in turn, would have less interest in hiring new apprentices. Drop-out rates would be higher. Overall training costs would be higher.

- Construction unions also play a key role in promoting careers in the skilled trades. As trades teachers in the education system will confirm, there is a significant bias against skilled trades work. Without active steps to promote the skilled trades, the flow of new entrants will be insufficient to meet the industry's needs and the economy's needs.

- At the local level, construction unions work jointly with employers to manage the apprenticeship system. Without this uncompensated local management, the apprenticeship system would rapidly fall into decline.

- Construction unions channel funds that are negotiated as part of total compensation into training trust funds that are jointly managed by unions and employers. These trust funds arose in response to legislative changes introduced by the then Conservative Minister of Finance, Larry Grossman. The training trust funds are now a vital part of the skills training system in Ontario's construction industry. **Virtually every construction industry collective agreement now provides for negotiated contributions to training trust funds. This contrasts with non-union employers who typically make no direct financial contribution to trades training.**

- In some instances, negotiated training trust funds directly finance the operation of training centres that provide training programmes formally operated in the community colleges. While numerous examples could be cited, we point to the following by way of illustration:

    - The International Union of Operating Engineers operates a major training centre in Morrisburg to provide instruction in operating heavy equipment, including graders, dozers, back hoes and cranes. Other than crane operating, *no community college provides this training*. Indeed, the costs of acquiring the machinery and maintaining the physical setting for instruction caused Sheridan College to abandon its programme. The IUOE's training centre is now exporting training services to Latin America and the United States.

    - Both the UA (Plumbers , Pipefitters and Refrigeration and Air Conditioning Mechanics) and the IBEW (Electricians) operate major training centres both in the Toronto area and outside of Toronto.

    - The United Brotherhood of Carpenters and the International Brotherhood of Painters and Allied Trades operate a training centre in collaboration with the Interior Systems Contractors Association. This training centre is the only location offering instruction in the GTA in interior systems. There is no

community college based instruction in the GTA.

- The International Brotherhood of Boilermakers operates the only training centre in the country in the skills required to construct and repair high pressure vessels. In many sectors of manufacturing, pressure vessels must go through an annual maintenance process. Often this is required by insurance carriers or by the statutes that regulate pressure vessels. There is no community college based instruction in this trade, anywhere in Canada.

The training centres run by the construction unions use up-to-date machinery and equipment. The costs of this machinery and equipment are financed by the industry. Many colleges are unable to keep up with changing technology, owing to the cost of purchasing new equipment and the fiscal constraints which the colleges confront.

There is already a shortage of skilled labour in the construction industry in many parts of Ontario. We need the co-operative efforts of construction employers and unions to meet the province's need for skilled labour. Training centres run by the construction unions play a critical role in making practical, career-oriented training available, especially outside the GTA. Without these training efforts by the construction unions, there would be a significant reduction in the supply of training outside the GTA.

Without the training centres operated by the construction unions, for many trades there would be no training whatsoever to meet the construction industry's needs for skilled labour. In other trades, taking the union-sponsored training out of the picture would dramatically reduce the supply of training. These are consequences of de-unionization that the general contractors do not address in their lobby to repeal section 1(4). If the general contractors were to succeed in de-unionizing construction, the long-term supply of skilled labour would be directly and significantly affected. The provincial government would have three choices:

1. **Ontario could accept the consequences of the chronic skilled labour shortages brought on by a change in labour policy,**

2. **the provincial government could substantially increase its direct spending on trades training to replace the training that is currently done at union training centres with funds provided by negotiated training trust funds;**

3. **the provincial government could radically increase tuition costs to make up for the lost industry-based training.**

Nowhere in the campaign of the general contractors do we see any recognition of

the relationship between labour policy and the supply of skilled labour. Nowhere do we see any discussion of how de-unionization would erase a large portion of the skill training system in this province. Nowhere in the lobbying of the general contractors do we see any recognition of the importance of the negotiated training trust funds that emerged after the Grossman amendments.

Skill Updating and Construction Unions:

The supply of skilled entrants is not the only factor in preserving the skill base for the construction industry. Changes in technology – new materials, new methods and new machinery and equipment – are an important factor in most aspects of construction. The introduction of fibre optic cabling, for example, required a new cabling and connecting skills. The adoption of steel studding, in place of traditional wood studs, has changed the way that interior systems are constructed and installed. In commercial construction projects, there is much greater use of computer-based controls in all of the mechanical systems. Skills learned in apprenticeship must be updated to meet the construction industry's needs. While governments have acknowledged the importance of updating skills, public funding for skill updating is scarce.

The negotiated training trust funds play the dominant role in keeping the skills of construction workers current. Without the training trust funds and the union training centres, there would be virtually no skill updating in this province. Community colleges generally structure their instruction around full-term courses. While some types of skill updating can be accommodated to this format, most cannot. Skill updating is typically done through short-term, intensive courses. In most cases, such courses are too costly for community colleges to develop and mount. By default, therefore, the responsibility for skill updating in construction has fallen to union training centres, using finances provided by negotiated training trust funds.

If Ontario's construction industry were de-unionized, the flow of resources for skill updating would be reduced to a trickle. It is the trade contractors who would bear the costs of this loss. Trade contractors would be forced to finance update training directly. Lacking the union training facilities to offer such training, the trade contractors would have to purchase it from third parties. **In many parts of Ontario, there would be no training available.** Trade contractors in those parts of the province would have to cope with a construction labour force whose skills have become dated.

Flow of Skilled Trades to the USA:

The American economy is currently experiencing a construction industry boom. Unemployment is at its lowest point in nearly three decades. The de-unionization of American construction has led to a serious skills shortage.

To meet the US construction industry's skill needs, in 1996, a consortium of building trades unions in the United States established Construction Workers Inc. (CWI). CWI is a multi-trade placement agency that operates through agreements with major US contractors. The purpose of CWI is to recruit skilled labour in Canada in co-operation

with the Canadian building trades unions. CWI expedites the processing of the H2B visas which enable Canadian tradespersons to work for up to 8 months at a time in the United States. CWI is a non-profit corporation financed by fees charged to employers needing skilled labour.

CWI adds a new factor to the labour relations equation. We have already discussed how the repeal of section 1(4) will lead general contractors to pressure the trade contractors to transfer work to a non-union shell company. We have also discussed how this will destabilize labour relations and force unions to protect their bargaining rights through industrial action. **CWI will encourage unions to retaliate against corporate shell games by assisting their members to find *union* jobs in the US.** The effect of this will be to exacerbate skill shortages in Ontario.

D. Skilled Labour and the Quality of Construction:

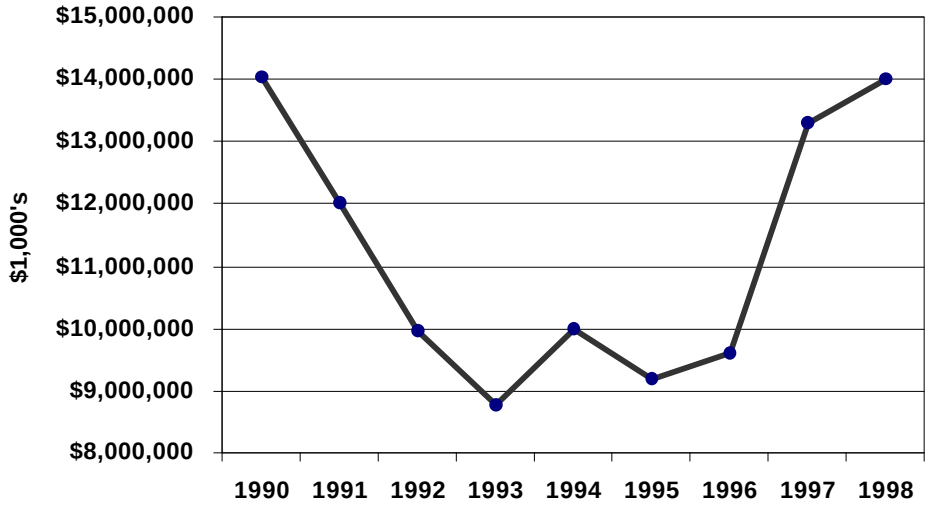
Ontario, like every other province, enforces *Building Code* requirements through a system of permits and inspections. It is important to recognize, however, that the compliance system presumes a broad degree of commitment in the industry to high standards. **The belief that "a construction job should be done the right way" is deeply imbedded in the traditions and philosophy of the construction crafts.** It is a philosophy that is inculcated during apprenticeship.

A review of building permit data reveals how much we effectively rely on the commitment of a skilled work force to "do the job the right way." Graph No. 9 shows the total value of building permit applications for all types of structures. In approximate terms, the increase in permit values anticipates by 12-18 months an increase in the amount of construction activity. As Graph No. 9 shows, building permit applications increased from $9.2 billion in 1995 to $14.0 billion in 1998. This was an increase of 52% in three years. No reasonable person, however, would expect municipalities to have increased the number of construction inspectors they employ by 50%. Indeed, in light of the fiscal pressures that many municipalities are experiencing, it is more likely that they cut back their inspection activity.

A review of the most recently published permit data (July, 1999) shows that in the non-residential sector, 88% of all permits are for project under $250,000 in value.[22] It is the increase in the number of these lower value projects which strains inspection resources during an economic upswing.

[22] Statistics Canada, *Building Permits*, July 1999, Table No. 14, page 73, Cat. No. 64-001-X1B

Graph No. 9
Value of Building Permits – All Types of Structures, Ontario, 1990 - 1998
Source: Statistics Canada, CANSIM, Matrix 991



The system of *Building Code* standards and enforcement through inspection is fundamental to our system of ensuring quality in construction. It would be a serious error to weaken this system. However, we must also recognize that the resources required to enforce high standards are strongly influenced by the extent to which contractors and their employees share a philosophical commitment to high standards. Repeal of section 1(4) of the OLRA is intended to undermine craft unionism. By doing so, repeal will also undermine the system of apprenticeship and the values of high craft standards that are part of the apprenticeship tradition. **The condominium construction industry in B.C. stands as a compelling example of what happens when an industry is de-unionized and craft standards are discarded.**

The widespread deficiencies in construction standards in the B.C. condominium industry led to the appointment of a Commission of Inquiry. Table No. 3, from the Commission of Inquiry's Report compares the actual cost of wall systems installation, the cost of doing the job correctly and the cost of ripping out the incorrectly installed wall system and replacing it with a durable system. As can be seen in Table No. 3, the cost of correct installation was approximately 15-20% higher than the actual installation cost. The cost of removing and replacing the incorrectly installed systems was 2-3 times the original cost.

Table No. 3
B.C. Condominium Construction – Wall System Cost Comparisons
Re-build Cost / Original Cost / Correctly Installed Cost
***Report of the Commission of Inquiry into the Quality of Condominium Construction in British Columbia*, (Dave Barrett, Commissioner), June 1998.**

WALL SYSTEM COST COMPARISONS						
Project	**Wall Area (sq. ft.)**	**Cost to Rebuild (sq. ft.)**	**Cost Original (sq. ft.)**	**Cost Correctly (sq. ft.)**	**Stories**	**Cladding/Framing**
Project A	14,000	$51.70	$22.50	$25.85	8	Concrete
Project B	28,300	$25.72	$13.25	$15.50	14	Stucco/Concrete
Project C	10,000	$26.80	$9.30	$11.25	3	Stucco/Wood

The Commission of Inquiry estimated that the total cost to condominium owners of repairing major deficiencies in the construction of their building envelope and structure would be $500 - $800 million.

The Commission of Inquiry Report also commented on the relationship between skills and construction quality as follows:

> " Pride in producing safe, quality housing has given way, much too often, to the hiring of unskilled labour; cutting corners at various stages of the building process; cutthroat competition; an underground cash economy; and too many occurrences of unreported, unethical practices… The lack of regard for skills and training and a desire to keep wages low has led to a downgrading of the calibre of work." [23]

The lesson from B.C. should not be ignored: inspection is not enough. There must also be a broad commitment among the construction work force to the principle that "a construction job should be done the right way." Breaking the craft unions is the surest way to erase that commitment and that tradition.

E. Negotiated Benefits vs. Tax-Financed Social Programmes:

In the construction industry, bargaining has always been conducted on a total compensation basis. Construction unions negotiate a monetary package which is then divided between direct wages and benefits. On average, the non-wage portion of compensation is 23%. Non-wage benefits are administered through trust funds. The

[23] *The Renewal of Trust in Residential Construction: Report of the Commission of Inquiry into the Quality of Condominium Construction in British Columbia*, (Dave Barrett, Commissioner), June 1998. See Chapter Two, Part VII. The report is published electronically at: http://www.qp.gov.bc.ca/condo/index.htm#contents

benefits that are provided include:

- pension plans
- hospital, drug and other major medical expenses (beyond OHIP),
- dental benefits
- eyeglass benefits
- income support during disability

These benefits are available to members when they are working and also during periods of unemployment. In general, non-union contractors economize on their wage costs by offering either no benefits or far fewer benefits. Indeed, this is the major source of labour cost difference between union and non-union contractors.

It is important to note that, notwithstanding the greater commitment to benefit plans in the unionized sector of construction, the difference in competitive bids – even when unionized contractors are bidding against non-union contractors – is usually within a 10% range. The simple fact is that the construction industry is competitive. Unionized general contractors win jobs because they are competitive. Unionized trade contractors win jobs for the same reason.

If the eight generals orchestrating the campaign to repeal section 1(4) were successful in their bid to de-unionize the construction industry, benefit coverage in the construction industry would be significantly reduced, if not eliminated. Given the seasonal nature of construction work and the boom/bust cycle to which construction is prone, the elimination of benefit coverage in the industry would have significant implications for tax-supported public programmes. To put the matter simply: **the reliance on tax supported social programmes, especially during periods of unemployment, would increase sharply**. Workers who require costly prescription drugs would be forced to seek welfare to have those costs covered. Tying welfare to a work obligation would be no deterrent. Construction workers are not work shy in the first place. In other cases, workers may seek disability benefits either through social assistance or through the CPP.

The unavoidable fact is that de-unionization in the construction industry will shift significant social costs onto tax-supported public programmes. Moreover, we should keep in mind that this shifting of costs will not be accompanied by any reduction in the actual cost of construction. As we saw in the comparison of construction costs between Alberta and Ontario, de-unionization does not change overall construction costs.

The principal purpose of de-unionization is to increase the profit margin of general contractors. De-unionization is not about reducing costs. De-unionization is about re-distributing the construction dollar. That re-distribution is away from construction workers and in favour of general contractors. An unavoidable consequence of this re-distribution will be to increase costs in the tax-supported social programmes to which construction workers will turn to offset the loss of their negotiated benefits.

Conclusion

1. Repealing section 1(4) would effectively nullify employee choice and make it voluntary *on the part of a construction employer* whether to operate on a union or non-union basis. Repealing section 1(4) is not about altering the balance in construction. It is about eliminating balance altogether.

2. If section 1(4) is repealed, construction unions will be effectively denied protection for their legally acquired bargaining rights. In these circumstances, construction unions would have no choice except to use industrial action to protect their representation role. In a multi-craft industry, such as construction, this would imply ongoing disruption of the workplace.

3. Repealing section 1(4) would eliminate the checks and balances in construction labour relations and trigger a return to the era of intense industrial conflict that preceded the *Davis Amendments* and the enactment of section 1(4).

4. The proposition that contractors should have the same right to work non-union as union members flies in the face of logic, evidence and contract language. The proposition is founded on a misleading comparison between individuals and corporations. Releasing contractors of their obligation to respect a union certification will introduce a regime of extreme voluntarism similar to that which prevails in the UK. There is no reason whatsoever to believe that Ontario would be better off by importing its labour relations from the UK. While the UK undoubtedly has many strengths, a constructive labour relations culture is not one of them. Moreover, no evidence has ever been presented to show that union members are regularly working on a non-union basis in competition with the employers who are party to their collective agreements. Indeed, in some cases, major employer associations have negotiated prohibitions against union members working on a non-union basis. There is no evidence of employers filing grievances under these provisions.

5. There is no reason to believe that reducing the role of construction unions would reduce construction costs. The construction industry in Ontario is already a mix of unionized and non-union contractors. Most owners and developers are free to choose whatever general contractor they wish. This competition already keeps costs in check.

6. De-unionization of construction would lead to a sharp ratcheting up of occupational injuries on construction work sites. Comparative evidence from the Construction Safety Association of Ontario shows that non-union contractors have accident rates 2-3 times higher than unionized contractors.

7. Unions represent a major check on the growth of the underground economy in construction. Weakening the role of unions will trigger a further growth in the practice of styling employment relationships as sub-contract arrangements so as to avoid reporting income and paying taxes.

8. Construction unions play a key role in maintaining the apprenticeship system and in upgrading and updating the skills of their members. De-unionizing the construction industry would significantly undermine the supply of skilled labour. Evidence of this can be found readily in the United States which now suffers from a chronic shortage of skilled construction labour and is using the current exchange rate advantage to recruit labour from Canada.

9. Craft traditions and craft unionism are important variables in the quality equation. Take craft unions out of the picture and the quality of construction will be jeopardized. One need only look at the B.C. condominium industry to see how significant these costs can be.

10. Construction unions allocate a substantial portion of their wage package to benefits. Indeed, the chief difference in labour costs between union and non-union labour is the cost of non-wage benefits. A de-unionized construction industry would be an industry in which employment-funded benefit plans would be the exception, rather than the norm. By implication, the demand on tax-support benefit plans would increase.

For all of these reasons, we believe that repeal of section 1(4) would be profoundly damaging to the province of Ontario.

What the unionized construction industry needs is industry-based solutions to industry problems.

Keeping section 1(4) is common sense; repealing section 1(4) is not.

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November 1999

Appendix:

Comparison of Related Employer Provisions

RELATED EMPLOYER LEGISLATION

Jurisdiction	Legislation	Source
Canada	35. (1) Where, on application by an affected trade union or employer, associated or related federal works, undertakings or businesses are, in the opinion of the Board operated by two or more employers having common control or direction, the Board may, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business. Before making such a declaration, the Board must give the affected employers and trade unions the opportunity to make representations.	*Canada Labour Code*
Alberta	45. (1) On the application of an employer or a trade union affected, when in the opinion of the Board, associated or related activities or businesses, undertakings or other activities are carried on under common control or direction by or through more than 1 corporation, partnership, person or association of persons, the Board may declare the corporations, partnerships, persons or associations of persons to be 1 employer for the purposes of this Act. (2) If, in an application under subsection (1), the Board considers that activities or businesses, undertakings or other activities are carried on by or through more than 1 corporation, partnership, person or association of persons in order to avoid a collective bargaining relationship, the Board shall make a declaration under subsection (1) with respect to those corporations, partnerships, persons or associations and the Board may grant such relief, by way of declaration or otherwise, as I considers appropriate, effective as of the date on which the application was made or any subsequent date. (3) This section does not apply with respect to employers engaged in the construction industry in respect of work in that industry.	*Labour Relations Code*
B.C	38. If in the board's opinion associated or related activities or businesses are carried on by or through more than one corporation, individual, firm, syndicate or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Code and shall grant such relief, by way of declaration or otherwise, as the board considers appropriate.	*Labour Relations Code*
Manitoba	59(1) Where on application by any person or in any other proceeding before the board, the board is satisfied that associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association, or combination of them, under common control or direction, the board may treat them as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or other otherwise, as it may deem appropriate.	*Labour Relations Act*

	59(2) Where on the hearing of an application or in the course of a proceeding referred to in subsection (1) it is alleged that more than one corporation, individual, firm, syndicate, association or any combination thereof are or were under common control or direction, the parties affected by the allegation shall adduce all facts within their knowledge which are material to the allegation.	
New Brunswick	128. (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes of this Act. (2) Without restricting the generality of subsection (1), if in any proceeding before the Board a question arises under this Act whether: (a) a person is an employer or employee, … (i) a group of employees is a unit appropriate for collective bargaining … (the New Brunswick Act does not have specific single employer provisions but the Industrial Relations Board has used the above provisions to make such determinations)	*Industrial Relations Act*
Newfoundland	92.1 (1) Where, in the opinion of the board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than 1 corporation, partnership, person, syndicate or association of person, under common control of direction, the board may, upon the application of a person, trade union or councils of trade unions and where, in the opinion of the board, there is a labour relations purpose for the application, declare the corporations, partnerships, persons, syndicates or associations of persons to be 1 employer for the purposes of this Act. (2) Where, in an application or order under subsection (1), it is alleged that more than 1 corporation, partnership, person, syndicate or association of persons is under common control or direction, a respondent to the application shall, when ordered to do so by the board, adduce all facts within his or her knowledge that are material to the allegation. (3) Where a corporation, partnership, person, syndicate or association of persons is the subject of a declaration under subsection (1), the declaration shall not apply to the corporation, partnership, person, syndicate or association of persons in relation to obligations under a contract entered into prior to the coming into force of this section. (4) The Board shall not declare more than 1 corporation, partnership, person, syndicate or association of persons to be 1 employer	*Labour Relations Act*

	unless, in the opinion of the board it is necessary (a) to preserve from infringement bargaining rights held by a trade union; or (b) to prevent an employer from avoiding the provisions of this Act. (5) This section applies only to the construction industry as defined in paragraph 54(1)(b).	
Nova Scotia	21. Where, in the opinion of the Board, associated or related activities or businesses are carried on by or through more than one corporation, firm, syndicate or association, or any combination thereof, under common management or direction, including direction of the work force, the Board may treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purpose of this Act.	*Trade Union Act*
Ontario	1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate. 1(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegations.	*Labour Relations Act, 1995*
PEI	7(3) Where, in the opinion of the board, associated or related activities or businesses are carried on by or through more than one corporation, individual, firm, syndicate or association, or combination thereof, under common control or direction, the Board may treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Part.	*Labour Relations Act*
Quebec	(There is no need for related employer provisions under the Quebec decree system in the construction industry)	*Act respecting labour relations, vocational training and manpower management in the construction industry*

Saskatchewan	**The Construction Industry Labour Relations Act, 1992** 18(1) On the application of an employer or a trade union affected, the board may declare more than one corporation, partnership, individual or association to be one unionized employer for the purposes of this Act and the Trade Union Act where: (a) in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through corporations, partnerships, individuals or associations; or (b) a corporation, partnership, individual or association is sufficiently related to a unionized employer that, in the opinion of the board should be treated as one and the same. (2) Subsection (1) applies only to corporations, partnerships, individuals and associations that commence carrying on business, undertakings or other activities in the construction industry after the coming into force of this Act. (3) In exercising its discretion pursuant to subsection (1), the board may recognize the practice of non-unionized employers performing work through unionized subsidiaries. (4) The effect of a declaration pursuant to subsection (1) is that the corporations, partnerships, individuals and associations: (a) constitute a unionized employer in a specified trade division; and (b) are bound by a designation of a representative employers' organization by the minister pursuant to section 10 or a determination of a representative employers' organization pursuant to section 11. (5) The board may make an order granting any additional relief that it considers appropriate where: (a) the board makes a declaration pursuant to subsection (1); and (b) in the opinion of the board, the associated or related businesses, undertakings or activities are carried on by or through more than one corporation, partnership, individual or association for the purpose of avoiding: (i) the effect of a designation of the minister or an order of the board determining an employers' organization to be the representative employers' organization with respect to a trade division; or (ii) a collective bargaining agreement that is in effect or that may come into effect between the representative employers' organization and a trade union.	*The Construction Industry Labour Relations Act, 1992*

	(6) Where the board is considering whether to grant additional relief pursuant to subsection (5), the burden of proof that the associated or related businesses, undertakings or activities are carried on by or through more than one corporation, partnership, individual or association for a purpose other than a purpose set out in sub-clause (5)(b)(I) or (ii) is on the corporation, partnership, individual or association. (7) An order pursuant to subsection (5) may be made effective from a day that is not earlier than the date of the application to the board pursuant to subsection (1). **The Trade Union Act** 37.3(1) If in the board's opinion, associated or related businesses, undertakings, or other activities are carried on by or through more than one corporation, partnership, individual or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Act and grant any relief, by way of declaration or otherwise, that the board considers appropriate. (2) Subsection (1) applies only to businesses, undertakings or other activities that become associated or related after coming into force of this section.	*The Trade Union Act*