

Update

Cavalluzzo Hayes Shilton
McIntyre & Cornish

JANUARY 2001

Ontario's *Labour Relations Amendment Act, 2000* (*Construction Industry*) - "Bill 69"

On December 16, 2000, the Ontario government passed *Bill 69: The Labour Relations Amendment Act, 2000 (Construction industry)* which amends the construction industry provisions of the *Labour Relations Act, 1995* in a number of significant ways. The following is a summary of the provisions of *Bill 69*. For further information or if you have any specific questions or concerns please contact Rob Gibson at rgibson@cavalluzzo.com or at (416) 964-5518.

1. RESIDENTIAL SECTOR OF THE CONSTRUCTION INDUSTRY

First, in order to prevent successive strikes in the residential sector of the construction industry, *Bill 69* has amended the bargaining framework for the 2001 round of collective bargaining for the residential sector of the construction industry **but only with respect**

CAVALLUZZO HAYES SHILTON MCINTYRE & CORNISH

Barristers & Solicitors
43 Madison Avenue
Toronto, Ontario M5R 2S2
Ph. (416) 964-1115 Fax. (416) 964-5895
www.cavalluzzo.com

If you have any questions, contact:

Rob Gibson (416) 964-5518
rgibson@cavalluzzo.com
or
James Hayes (416) 964-5505
jhayes@cavalluzzo.com

KEY TOPICS COVERED BY AMENDMENTS

	PAGE NO.
1. RESIDENTIAL SECTOR OF THE CONSTRUCTION INDUSTRY	1
2. SINGLE EMPLOYER/SALE OF A BUSINESS PROVISIONS OF THE ACT	2
a. The OLRB and the "Key Person" Principle	2
b. Changes to the "Key Person" Principle in <i>Bill 69</i>	3
3. ICI SECTOR AMENDMENTS	4
a. Mobility/Hiring Hall Provisions	4
b. Amending The Provincial Agreement	5
i. Application Process	5
ii. Arbitration Process	6
iii. Role of the Arbitrator and Issuing a Decision	6

to the geographic areas of the City of Toronto, the County of Simcoe, and the Regional Municipalities of Durham, Halton, Peel, and York.

In this respect, *Bill 69*:

- C provides that all collective agreements covering the residential sector within the above-mentioned geographic area that were in effect on December 16, 2000 or which come into effect prior to April 30, 2001 will be deemed to expire on April 30, 2001 thereby creating a common expiry date for all such residential agreements;
- C permits either party to any such collective agreement to give notice to bargain at any time after December 31, 2000 (one month earlier than the normal period contained in the *Labour Relations Act, 1995*) in order to provide the parties with additional time to bargain;
- C provides for normal collective bargaining, including the right to strike/lock-out, up to June 15, 2001 but prohibits any strikes and/or lock-outs beyond June 15, 2001;
- C provides that if the parties are unable to reach a collective agreement by June 15, 2001, the dispute will be referred to and determined by binding arbitration, paid for jointly by the parties;
- C provides that the parties would then be given an opportunity to agree to an arbitrator and an arbitration process (ie. mediation-arbitration or final offer selection) but if the parties are unable to agree on an arbitrator or the process, the Minister of Labour would select the arbitrator and determine the method of arbitration;
- C provides that all new residential agreements within the above-mentioned geographic area will be for a term of

three years, expiring on June 30, 2004 and every three years thereafter;

- C provides that following the completion of the 2001 round of collective bargaining, these framework provisions of *Bill 69* affecting bargaining in the residential sector of the construction industry, with the exception of the requirement that all such agreements expires every three years on April 30, are repealed prior to the next round of collective bargaining; and
- C provides that at least twice per year beginning in 2001, the Director of Labour Management Services will hold meetings with trade union and employer representatives to discuss collective bargaining and labour relations issues in the residential sector of the construction industry.

2. SINGLE EMPLOYER/SALE OF A BUSINESS PROVISIONS OF THE ACT

Bill 69 amends the long-standing single employer and sale of a business provisions of the *Act*, but only as they apply to the construction industry.

a. The Ontario Labour Relations Board and the "Key Person" Principle

For years, the Ontario Labour Relations Board has interpreted the sale of business and the single employer provisions of the *Act* in a manner which recognizes the reality of the construction industry.

In this respect, in its jurisprudence, the Labour Board has long recognized that in the construction industry, particularly amongst smaller operations, companies often possess very few tangible assets. They move from project to project often shifting their entire operation with them as they do so. For these

businesses, the key assets of the company are not the typical tangible assets of industrial employers. Rather, the key, indeed often the sole, 'assets' of these construction companies are the skills, expertise, reputation and credibility of their principals. In short, the principal of the business is often the embodiment of the business itself. Thus, simply by moving the principal by "winding up" the original business and "starting up" another or by operating both businesses at the same time, these construction companies could easily and effectively defeat the legally acquired bargaining rights and collective agreements which the successor and related employer provisions were designed to protect.

As a result, the Labour Board has developed and applied the "key person" principle to sale of a business/single employer applications in the construction industry whereby the Board takes pre-existing family or corporate relationships into consideration in those applications. In the context of the construction industry, the "key person" concept as developed and applied by the Board is entirely consistent with the intent and purpose underlying the successor and related employer provisions of the *Act*.

b. Changes to the "Key Person" Principle Mandated by *Bill 69*

Despite the fact that the "key person" principle as developed and applied by the Labour Board is consistent with the purposes of the *Act* and merely recognizes the reality of the construction industry, the Ontario government, through *Bill 69*, has amended the sale of a business/single employer provisions of the *Act* as follows:

- C *Bill 69* directs that the Labour Board shall not consider family relationships when deciding sale of a business and/or single employer applications in the construction industry;
- C with respect to single employer applications involving an assertion by the trade union that two companies are single employers because an individual was a key person with respect to both

companies and the time at which the individual was a key person of one company is different than the time at which the individual is a key person of the second company, then in such applications the Labour Board **shall** consider the following:

- (i) the length of hiatus when the individual was a key person with one entity and when they became a key person with the second company;
 - (ii) whether the key person held a management role at the first company; and
 - (iii) whether the first company was able to carry on business without "substantial disruption or loss" when the individual ceased to be involved with that company
- C similarly, with respect to sale of a business applications where the trade union alleges that there has been sale of a business because an individual was a key person with respect to both companies and the time at which the individual was a key person of one company is different than the time at which the individual is a key person of the second company, the Labour Board **shall** consider the following:
- (i) the length of hiatus when the individual was a key person with one entity and when they became a key person with the second company;
 - (ii) whether the key person held a management role with the successor employer; and
 - (iii) whether the first company was able to carry on business without "substantial disruption or loss" when the individual ceased

to be involved with that company.

3. ICI SECTOR AMENDMENTS

Bill 69 has also amended the *Act* to enable employers to override or to seek to amend the provisions of a provincial collective agreement within the meaning of the *Act*. These changes are divided into two separate hearings: (i) Mobility/Hiring Hall Provisions and (ii) Amending the Provincial Collective Agreement.

a. Mobility/Hiring Hall Provisions

Bill 69 amends the *Act* to enable an employer, regardless of the provisions of the provincial agreement, to elect to “name hire” up to 75 per cent of the workers on an ICI project. Moreover, of those 75 per cent “name hires”, as many as 40 per cent may come from outside the local in whose jurisdiction the work is located.

To make the election, which an employer may make with respect to one or more, or all of the contractor’s projects under the provincial collective agreement, the employer merely needs to provide written notice to the EBA advising of its intention to rely on the mobility and name hire provisions of the *Act*.

It should be noted that these provisions do not apply to a project agreement made under the project agreement provisions of the *Act*. The *Act* also states that these provisions do not permit the employer to utilize non-union personnel if it is prohibited by the collective agreement to do so, as most provincial agreements do.

It should also be noted that *Bill 69* enables employers and unions to agree to lesser percentages than those contained in the *Act* or to agree that an employer may not make the election under the *Act* set out above. However, the *Act* also provides that neither party (ie. the trade union) is entitled to bargain such clauses to impasse, as there can be no strikes and/or lock-outs because there is a failure to reach agreement.

These “default” provisions of the *Act* will certainly diminish the role of the trade union in regulating the hiring hall and will undermine the equity of the hiring hall system in providing work opportunities. Moreover, they will negatively impact trade unions and their members in smaller geographic areas since many contractors are based in larger urban centres like Toronto or Hamilton and bring their regular employees when they perform work in the smaller centres. By the same token, the provisions may also result in employees in large urban centres being compelled to travel to distant areas on a regular basis.

There is also considerable risk that these provisions will give rise to abuse by employers, as employees will not wish to enforce the collective agreement or their rights under the *Occupational Health and Safety Act*, the *Employment Standards Act*, the *Human Rights Code*, or other similar legislation for fear of displeasing the employer and thereby prejudicing their future opportunities to be name hired or to move with the employer to remote projects.

It is little comfort that the *Act* enables the parties to agree to provisions other than those contained in the *Act*, or that the employer will not exercise the option under the *Act* at all since the issue cannot be bargained to impasse. Quite simply, the provisions tie the trade union’s hands and give the employers the bargaining power. It will therefore be very difficult for trade unions to successfully negotiate such clauses and will no doubt require them to make “trade offs” in other areas.

b. Amending the Provincial Collective Agreement

Bill 69 enables employer groups to apply to local unions to amend the provincial collective agreement in their areas if they believe that the terms of the provincial agreement put them at a competitive disadvantage. If the employers organization and the local union cannot negotiate a solution which meets the employer organization’s needs, the employer organization can refer the matter to a binding expedited arbitration process in which an arbitrator would have the power to make amendments to the

provincial collective agreement. These changes to the provincial agreement would then remain in effect in that area until the next round of collective bargaining or until an employer group applied for further relief.

The employer organizations may seek amendments to the provincial collective agreements concerning the following matters:

- C wages, including overtime and shift differentials
- C hours of work and work schedules
- C accommodation and travel allowances
- C requirements concerning the ratio of apprentices to journeymen employed by an employer
- C restrictions on an employer's ability to name hire employees
- C restrictions on hiring and employing members from locals outside the geographic area in which the work is being performed

i. Application Process

The following is an overview of the application process for amending the provincial collective agreement:

- C an employer bargaining agency or designated regional employer association first applies to the local union for relief
- C in that application, the employer association must set out a specific type of work, the specified market and the geographic location with respect to which the amendments would apply; set out the employer association's submissions explaining how the existing provisions of the provincial collective agreement make them uncompetitive; and set out the text of the amendments which are being applied for

- C copies of the application must be sent to the affected parties on both the employer and trade union sides such as employer and employee bargaining agencies, and regional employer groups
- C it should be noted that an application may not be made within four months of the expiry of the provincial collective agreement
- C once the application is made and sent to the proper parties, the applicant and the local union can agree in writing to amend the provincial agreement, but it must be approved in writing by the relevant employee bargaining agency
- C if the parties are unable to reach agreement on amending the provincial collective agreement within 14 days from the day on which the application is served on the affiliated bargaining agent, the applicant may give notice that it is referring the matter to arbitration before a single arbitrator
- C the notice of referral must be in writing, must name the arbitrator recommended by the employer organization, must set out the employer organization's final offer with respect to the text of the amendments to the collective agreement, and must be accompanied by the original application sent to the trade union
- C the content of the referral may only include the submissions that were part of the original application to the trade union
- C the referral must be delivered to all of the affected parties
- C within seven days following the referral to arbitration, the affiliated bargaining agent must serve its response
- C the response must be in writing and must set out: whether the trade union

agrees to the arbitrator proposed by the employer organization, and if not its proposed arbitrator; the union's final offer; and the submissions of the trade union with respect to whether the provisions of the provincial collective agreement render the employers at a competitive disadvantage as alleged

ii. Arbitration Process

- C if the parties have agreed on an arbitrator, they jointly appoint him or her
- C if they have not agreed, either party may make written request to have the Minister appoint an arbitrator
- C the Minister of Labour must appoint an arbitrator within 2 days of receiving the request
- C the Act also provides that where an arbitrator is appointed, there can be no challenge to question, prohibit or restrain the arbitrator
- C once the arbitrator is appointed, if the employer organization making the application believes the trade union's response contains a factual error, the organization may make a submission to the arbitrator only to correct the factual error and may contain no new submissions
- C the trade union is then entitled to respond to the employer organization's submissions, but once again the submission may contain no new submissions

iii. Role of the Arbitrator and Issuing a Decision

- C the arbitrator must hold a written hearing but may hold an oral hearing if it is necessary to resolve a factual dispute
- C the arbitrator must first determine if the employer organization is uncompetitive

in the market specified in the application as a result of the collective agreement

- C if there is no competitive disadvantage, the application is dismissed
- C if the arbitrator finds that the collective agreement renders the employer uncompetitive, the arbitrator must select the offer that would remove the competitive disadvantage
- C if neither proposal would remove the disadvantage, the final offer which most reduces the disadvantage must be selected
- C if both the employer's proposal and the trade union's proposal would remove the disadvantage, the arbitrator must select the offer that is least disruptive of the provincial collective agreement
- C an arbitrator has 12 days to render his or her decision, which shall not contain reasons
- C decisions of the arbitrator are in force until the end of the provincial collective agreement
- C applicants who apply and are unsuccessful are barred for 6 months from applying with respect to the same market

4. POWER TO EXTINGUISH BARGAINING RIGHTS

In an extraordinary and very disturbing provision, *Bill 69* also provides the Ontario government with the unprecedented power to extinguish a union's bargaining rights in the ICI sector of the construction industry through a government regulation.

In this respect, section 160.1 of *Bill 69* amends the *Act* to provide that the Lieutenant Governor in Council may, by regulation, deem bargaining rights held by an EBA and its affiliated bargaining agents to be abandoned with respect to an

employer or a class of employers. The provision also provides that it may apply to all of Ontario or only parts of Ontario.

Once such a regulation is enacted, the following take effect immediately :

- C the affiliated bargaining agents of the EBA referred to in the regulation no longer represent the employees of the employer working in the ICI sector in the area to which the regulation applies;
- C the bargaining rights vested in the EBA by virtue of section 156 of the *Act* shall not be exercised for any purpose relating to the employer or class of employers referred to in the regulation in the geographic area to which the regulation applies; and
- C any provincial agreement that was applicable to the employer ceases to bind them in the area to which the regulation applies.

As of the date of preparing this document, the Ontario government has not yet exercised this broad, unlimited power. Nonetheless, the Minister of Labour Chris Stockwell has announced how the government intends to use this power. In that respect, at about the same time as the Ontario government passed *Bill 69*, the Minister of Labour issued a press release in which he stated:

“We are going to propose an amendment that would, if passed, remove general contractors outside of the broader Toronto area from working agreements they signed decades ago with the building trades unions...”

If or when the Ontario government exercises its power to make such a regulation extinguishing bargaining rights and collective agreements, its action may be susceptible to legal challenge by the affected trade unions on various legal grounds. For further information in that regard, please contact Rob Gibson of our firm.