Crown Corporation Collective Bargaining and Bill C-60

On April 29th of this year, the federal government introduced Bill C-60. Division 17 of Bill C-60 makes amendments to the *Financial Administration Act* and will affect the way in which Crown Corporations engage in collective bargaining.

Crown Corporations are an important part of Canadian economic life. There are currently 48 Crown Corporations in Canada providing services to various sectors of the Canadian economy including, transportation, energy, agriculture, fisheries, financial services and government services. They employ about 88,000 workers, most of whom are represented by unions.

While these Crown Corporations are wholly owned by the government, they are distinct legal entities and their mandate, powers and objectives are set out either in legislation or in articles of incorporation under the *Canada Business Corporations Act*. Additionally, while the Prime Minister and Cabinet play a major role in the administration of Crown Corporations, the corporations are structured (and operate, to a large extent) like private or independent enterprises.

Under the present *Financial Administration Act*, the government has the power to issue ministerial directives to most Crown Corporations "if it is in the public interest". However, the government must report any such directives to parliament. Some Crown Corporations, such as the Canada Broadcasting Corporation, the Canada Pension Plan Investment Board, the Bank of Canada and the Public Sector Pension Investment Board, are specifically exempt from the issuance of directives. This is to minimize the possibility of political interference in the operation of these Crown Corporations and the areas they service.

Crown Corporations and Collective Bargaining

While the government sets a mandate and an overall framework for collective bargaining by Crown Corporations, Crown Corporations currently do their own bargaining in accordance with the collective bargaining process set out in the *Canada Labour Code*, i.e., Crown Corporations negotiate collective bargaining proposals with their respective unions, without government interference. Approximately 97% of all such bargaining in the federal jurisdiction ends with the parties reaching a collective agreement.

Division 17 of Part 3 of Bill C-60 gives the Governor in Council the right to direct

a Crown Corporation to have its negotiating mandate approved by the Treasury Board for the purpose of the Crown Corporation entering into collective bargaining. If the Governor in Council makes such a direction with regard to a Crown Corporation:

- the Treasury Board may impose requirements on the Crown Corporation with regard to that negotiating mandate;
- the Treasury Board can ask the Crown Corporation to allow an employee under the jurisdiction of the Secretary of the Treasury Board to attend collective bargaining sessions; and
- the Crown Corporation can enter into a collective agreement, **only with the Treasury Board's approval**.

Bill C-60 further makes it clear that the Treasury Board is a **third party** by stating that it is not the employer of the employees of the Crown Corporation or an employer representative of the Crown Corporation or a person acting on behalf of the Crown Corporation.

The proposed amendments also gives the Treasury Board the power to directly set wages, working conditions and all other employment terms of non-union employees of Crown Corporations.

Unlike the current legislation which specifically exempts some Crown Corporations from the issuance of government directives, the changes proposed by Division 17 of Part 3 of Bill C-60 will apply to all Crown Corporations.

How the Proposed Changes will Affect Collective Bargaining

- A third party will be enforcing the bargaining mandate of a Crown Corporation without a proper understanding of the challenges faced by the Crown Corporation.
- The presence of a third party in collective bargaining sessions to "observe" the process is contrary to the purpose and spirit of collective bargaining.
- It allows a third party to dictate the terms of the negotiations and impose terms and conditions of employment without having to face the consequences. As a result, it does not serve to "build" a relationship between the parties, which is an essential component of the collective bargaining process.
- The Treasury Board has a veto on any tentative agreement that is reached between the Crown Corporation and its union. This degree of intervention by a third party will jeopardize the freedom of the parties to bargain collectively with a view to entering into a collective agreement as required by the *Canada Labour Code*.
- The degree of government intervention permitted by Bill C-60 could significantly jeopardize the independence of Crown Corporations, including the Canadian Broadcasting Corporation, the Bank of Canada, Canada Post and Via Rail, thus increasing government interference in broadcasting, transportation, financial services, etc.

If the Governor in Council directs a Crown Corporation to have its negotiating mandate approved by the Treasury Board and thereby permits the changes proposed by Division 17 of Part 3 of Bill C-60 to be set in motion, it is the writer's opinion that it will defeat the purpose of the constitutional right to bargain collectively as recognized by the Supreme Court of Canada in the *Health Services* decision and reinforced in the *Fraser* decision.

According to *Health Services* and *Fraser*, employees have a constitutionally protected right to engage in the collective bargaining process and to negotiate with employers on workplace issues or terms of employment. This right imposes a correlative duty on employers to bargain in good faith. The *Canada Labour Code* also casts a duty on

parties to the collective bargaining process to bargain in good faith in addition to the duty to make every reasonable effort to enter into a collective agreement. The changes proposed by Bill C-60 will make it difficult for Crown Corporations to satisfy the requirement to make every reasonable effort to enter into a collective agreement because the final word on any tentative agreement will be in the hands of a third party. It is also questionable whether Crown Corporations would even be in a position to bargain in "good faith", given the amount of third party interference that Bill C-60 contemplates.

If this legislation is passed, the unions are likely to challenge it on the basis that it "substantially interferes" with the process of collective bargaining as protected by section 2(d) of the *Charter*.

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About the Author

Heather Hettiarachchi is Chair of the firm's Labour & Employment Practice Group. She is also a member of the Higher Learning Group. Her practice focuses on all aspects of employment and labour law, human resource management issues and mediation services.

Heather's background differs from that of many other labour and employment lawyers as she has a unique combination of legal expertise and extensive, hands-on human resources management and labour relations experience. Prior to being called to the British Columbia Bar, she was a Human Resources Manager at a large Canadian University and Labour Relations Advisor to Vancouver's oldest community college. Before immigrating to Canada, Heather managed the human resources of a large private insurance company.

Heather articled with a leading labour and employment boutique firm in Vancouver and was an associate in the labour and employment group of an eminent national firm prior to joining Clark Wilson.

While at university, Heather was actively involved in collective bargaining with CUPE and gained considerable experience in job evaluation, job classification and compensation, return to work issues, and health and safety. She was also on the President's advisory committee on discrimination and harassment.

Heather was called to the Bar of British Columbia after attending law school at the University of British Columbia in order to obtain Canadian Accreditation of her legal qualifications. She previously graduated with a LL.B. (Honours) degree from the University of Colombo, Sri Lanka, in 1992. Heather also earned an M.Sc. in Training & Human Resources Management from the University of Leicester, UK, in 2001.

Heather has taught labour law as a Visiting Lecturer at the Faculty of Law, University of Colombo and the Open University of Sri Lanka.[/author]