

**SACK GOLDBLATT MITCHELL**

MEMORANDUM

TO: Michael Hurley, OCHU

FROM: SACK GOLDBLATT MITCHELL

DATE: March 11, 2004

RE: Analysis of the Effect of Bill 8 Amendments on the  
Validity and Enforceability of Collective Agreements

---

- 1) As you are aware, on November 27, 2003, the newly elected Ontario Liberal Government introduced Bill 84 in the Ontario Legislature (the *Commitment to the Future of Medicare Act*, or "Bill 8"). In our memo of December 15, 2003, we noted that certain provisions of the Bill, particularly those in Part III of the Bill relating to Accountability, could have been interpreted and applied in such a manner as to override the validity and enforceability of negotiated collective agreement provisions, and/or as to require unions to amend collective agreement provisions inconsistent with "accountability" agreements or Ministerial directive.
- 2) In terms of the possible impact of Part III of Bill 8 on trade unions and collective agreements in the health care sector, it was certainly possible that under these provisions, a union and employer could have been ordered to address certain issues through collective bargaining and in the event that they failed to do so, could have been subjected to an order requiring them to reduce wages or benefits, or to eliminate no-contracting out or successor rights protections contained in collective agreements. Alternatively, the Minister could have simply issued a compliance directive requiring the collective agreement protections to be modified and/or overridden. Similarly, the Minister's powers under Part III could be exercised to require hospitals to consolidate certain operations (e.g. laundry or food services), in the name of Value for money or Fiscal responsibility, and then could have required collective agreements to be modified to facilitate such initiatives.
- 3) However, on March 9, during the committee hearings into Bill 8, the Government proposed and voted in support of key amendments to the Bill, which have significantly narrowed the powers granted to the Minister to impose accountability agreements and issue compliance directives, so that they cannot override collective agreements.
- 4) First, under the initial provisions introduced at First Reading, the Minister could have directed any health resource provider, and any other person, agency

or entity (who was to be prescribed by regulation) to enter into Accountability agreements@ with the Minister or with the Minister and any one or more persons, agencies or entities directed by the Minister. Under the amendments, the term Ahealth resource provider@ is now limited to the following:

“health resource provider” means,

- (a) an entity that operates,
  - (i) a hospital within the meaning of the *Public Hospitals Act*,
  - (ii) a private hospital within the meaning of the *Private Hospitals Act*,
  - (iii) a psychiatric facility within the meaning of the *Mental Health Act*, or
  - (iv) an institution within the meaning of the *Mental Hospitals Act*,
- (b) an approved corporation within the meaning of the *Charitable Institutions Act* that operates and maintains an approved charitable home for the aged,
- (c) each municipality or a board of management maintaining a home for the aged or a joint home for the aged under the *Homes for the Aged and Rest Homes Act*,
- (d) a licensee under the *Nursing Homes Act*,
- (e) a licensee under the *Independent Health Facilities Act*, or
- (f) a community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*,

**but does not include** a physician or practitioner, as defined in the *Health Insurance Act*, or a group of physicians or practitioners, in his, her or its capacity as a physician, practitioner or group that receives any payment for the provision of an insured service to an insured person under the *Health Insurance Act*, or **a trade union**; [emphasis added]

Not only does this amendment limit the definition of “health resource provider” to certain specified institutions, but it also explicitly exempts trade unions from its reach.

- 5) Moreover, under the proposed amendments, there is no longer any authority for entering into accountability agreements with any persons or entities other than health resource providers. In other words, trade unions can no longer be prescribed or included as persons subject to accountability agreements.
- 6) In addition, under the initial provisions of the Bill, while an accountability agreement with an individual could only relate to that part of the individual=s employment or contract that relates to his or her Aexecutive function or position@, the term executive function or position was not defined and was left to be determined by regulation, and we were concerned that by regulation, this concept could be more broadly defined to apply to unionized employees. Under

the amendments, there is no longer reference to altering an individual's employment contract, but only the contract of the chief executive officer of a resource provider, and no longer can the Minister prescribe a broader scope to the term "executive function or position", which in fact has been deleted from the proposed legislation.

- 7) Under the provisions of the Bill at First Reading, the Minister was also empowered to issue directives compelling health resource providers and any other prescribed person, agency or entity to take or refrain from taking any action that is specified in the directive or to comply with one or more of the prescribed compliance measures (s. 22). The only express limitation on the scope of such directives was that an individual could only be directed with respect to that part of his or her appointment, employment or contract that relates to his or her executive function or position (a term to be defined by regulation). More ominously, however, under s. 26 of the Bill as introduced at First Reading, where in the opinion of the Minister, any person or organization failed to enter into or comply with any terms of the accountability agreement, or failed to comply with all or any part of a compliance directive, the Minister would have been empowered to make any order which the regulations may have permitted.
- 8) However, under the amendments passed on May 9, these powers have been eliminated, and replaced with the power of the Minister to issue a compliance directive only against a health resource provider, in the following terms:

**Compliance directives – health resource provider**

22. (1) If any circumstance referred to in a notice under subsection 21.1 (1) [provisions dealing with failure to enter into or comply with an accountability or performance agreement] continues for more than 30 days after the notice was given by the Minister, the Minister may issue a compliance directive to the health resource provider.

**Compliance**

(2) The health resource provider shall comply with a compliance directive.

**Directions**

(3) A compliance directive may require the health resource provider to comply with any directions set out in the compliance directive relating to the following:

1. Requiring the health resource provider to enter into an accountability agreement with the Minister on the terms set out in the compliance directive.
2. Requiring the health resource provider to enter into a performance agreement.
3. Requiring the health resource provider to comply with a provision of this Part, a term of an accountability agreement, or a term of a performance agreement.
4. Requiring the health resource provider to meet with the Minister or any person designated by the Minister, at a time and place set out in the compliance

directive, for the purposes of discussing any non-compliance identified by the Minister.

5. Requiring the health resource provider to carry out or cause to be carried out an audit, as directed by the Minister.
  6. Requiring the health resource provider to study and to report to the Minister on any matter as directed by the Minister.
  7. Requiring the health resource provider to provide any information identified in the compliance directive to the Minister or to otherwise assist the Minister or any person authorized by the Minister to conduct an audit or carry out a study or report in respect of the operations of the health resource provider.
  8. Requiring the health resource provider to develop or implement an education or remedial learning plan for the health resource provider, or to follow an educational or remedial learning plan.
  9. Requiring the development of a budget for the review and approval of the Minister as set out in the compliance directive.
  10. Requiring compliance with a budget as set out in the compliance directive.
  11. Requiring the posting and distribution of any matter as required by subsection 29 (3).
  12. Taking any action or refraining from taking any action that is specified in the compliance directive to correct the circumstance of non-compliance described in the notice under subsection 21.1 (1), to prevent its reoccurrence, or to remedy any effects of the circumstance of non-compliance.
- 9) As a result of this amendment, no longer can unions be subject to Ministerial directives, including directives to alter or amend collective agreements. It is to be noted that when it was first proposed in draft form, this amendment would have also authorized compliance directives requiring health resource providers to comply with directions respecting “any prescribed matters” (which potentially might have included collective agreement matters). However, as a result of OCHU’s efforts and objections, this power to enact such a regulation was removed.
- 10) The Minister is also empowered to issue a compliance order in certain circumstances, in the following terms under the new amended section 26:

(3) An order issued under subsection (1) may require the health resource provider to comply with any directions set out in the order relating to any or all of the following:

1. Requiring a health resource provider to comply with any part of a compliance directive that has been issued to the health resource provider.

2. Requiring a health resource provider to comply with any direction that may be made in a compliance directive.
3. Holding back, reducing or discontinuing any payment payable to or on behalf of a health resource provider by the Crown in any manner and for any period of time as provided in the order and despite any provision in a contract to the contrary.
4. Requiring a health resource provider to enforce any provision of a performance agreement with a chief executive officer.
5. Varying any term of an agreement, as set out in the order, between the Crown and the health resource provider.

However, these orders can only be issued against health resource providers, and do not extend to overriding collective agreements. Again, a power to make regulations prescribing any other matter which might have been included in an order, as initially proposed in the original amended language, was removed as a result of OCHU's insistence.

- 11) Finally, under the provisions of Bill 8 introduced at First Reading, the Minister was empowered to change any person's terms of employment, including reducing compensation, as a result of non-compliance with accountability agreements or directives, and the Bill would have "deemed" such changes or reductions to have been mutually agreed upon. Similarly, under s. 28, the Minister was given the broad power to reduce funding, or vary or discontinue any term of a contract or agreement and as part of his power to issue orders against persons who failed to enter into or comply with accountability agreements or compliance directives. However, under the March 9 amendments, these powers are limited to a "material change in a chief executive officer's terms of employment with a health resource provider", and to "any funding or payment by the Crown to a health resource provider... or any term of a contract or agreement between the Crown and a health resource provider". In other words, collective agreements cannot be subject to or altered or overridden as a result of these amended provisions.
- 12) All of these amendments are to be welcomed, insofar as they remove the authority potentially contained in the initial version of the Bill to impose accountability agreements on trade unions, to issue compliance directives and orders against trade unions, and to amend or alter collective agreements. However, the overall accountability regime is still a fundamental feature of the Bill, and may well be used to facilitate increased centralization, regionalization, and privatization and divestment, of hospital and other health care services.

- 13) Thus, while it has been amended, the power of the Minister to control and direct the operation and restructuring of the health care system through accountability and performance agreements -- entered into voluntarily or not -- with health resource providers and their Chief Executive Officers, is cause for significant concern. This regime vest unprecedented centralized power in the Minister and Cabinet to oversee and compel fundamental restructuring in the delivery of hospital services, with limited public scrutiny and oversight. Of at least equal significance, one of the potential effects and purposes of the entire accountability scheme is likely to encourage or require the "rationalization" of services, including payroll, food services, maintenance and housekeeping. Hospitals and CEOs, having entered into or been required enter into accountability agreements providing for this rationalization, can be expected to seek concessions at the bargaining table in order to implement this restructuring, through privatization, contracting out, divestment or otherwise. Moreover, to the extent the accountability provisions are relied upon to enforce centralization of hospital services, this may well lead to potential disputes over the applicability of collective agreement protections and representational rights. In short, while the power to override collective agreements through direct Ministerial fiat has been removed, there will likely be indirect pressure exerted on collective agreement protections as a result of the Bill's accountability provisions.