TAB 28

CUPE·SCFP | *Canadian Union of Public Employees*
Syndicat canadien de la fonction publique

ONTARIO REGIONAL OFFICE
80 Commerce Valley Drive East, Markham, ON L3T 0B2
Tel.: (905) 739-3999 Fax: (905) 739-4001 / cupe.ca / scfp.ca

March 15, 2018

Via Email: president@yorku.ca

Rhonda L. Lenton
President and Vice-Chancellor
York University
1050 Kaneff Tower
4700 Keele Street
Toronto, ON
M3J 1P3

Dear President Lenton:

I write today on behalf of the CUPE 3903 Bargaining Team in response to your March 13, 2018 communication to the York community.

While we share York University's belief that our students should not continue to be impacted by our current dispute, we fundamentally differ on 'the way forward.' It is worth noting that the majority of our members are also students. We are essential members of the York University community.

The distance between the parties is not as unbridgeable as York has led the public to believe. York's public statements with respect to the union's 'initial demands' are neither helpful nor an accurate reflection of the current differences between the parties. We spent six months presenting, discussing, and agreeing on proposals. It was CUPE 3903's perception that meaningful discussions were occurring towards mutual understanding on significant issues.

We believe that the fastest, most effective, and clearest path to a resolution requires both sides to sit down and make their best effort to reach a negotiated settlement. We reiterate our request, which we have extended since March 2 – come back to the table.

On February 28, CUPE 3903 provided – at York's request – a series of modifications to our existing package of proposals. Following our membership's rejection of your last offer, we provided – again, at York's request – a counteroffer on March 5. At the time, York indicated a movement of this nature was necessary for bargaining to resume. Despite the fact that the union provided a meaningful counterproposal, York continues to refuse to return to the bargaining table, calling into question York's commitment to resolve this dispute.

.../2

York's response to CUPE 3903's March 5 proposals:

In the portions of your correspondence under the heading, '*Issues arising from CUPE 3903's March 5 proposals,*' a number of issues are raised.

Proposal 12 – The union accepted York's offer of $100,000 for the post-retirement benefits fund. What is still in dispute is the maximum available funds per year for retired Unit 2 members. This is a non-monetary issue as the overall cost to York has not been increased.

We never had agreement on this proposal; therefore, it is erroneous to claim that it was reintroduced.

Proposal 35 – CUPE 3903 reiterates, without prejudice, our long-standing position of a minimum $15,000 guarantee for Unit 3 members. The amount referenced by York is the result of a clear formatting error and does not supersede the well-established and consistent position we have taken.

Proposal 65 – The changes in proposal 65 regarding incentive funding for conversions reflect the significant reduction in the demand for automatic conversions to a fixed number or percentage of YUFA hires.

Legality of the March 5, 2018 union proposals

The illegality of Proposal 32 was never established at the table. Nor had the university ever asked CUPE 3903 to withdraw this proposal at the table. The path forward remains at the bargaining table, not in the media.

With respect to Proposals 48 and 72, it is CUPE 3903's position that these are neither issues of scope nor have they been bargained to impasse.

With respect to Proposal 48, the offer York tabled on March 1 never responded to the counter we made on February 28. Over the past six months, the union repeatedly asked York to ensure the protection of Graduate Assistants, as we believe York arbitrarily eliminated over 700 Graduate Assistantship positions. This is the first we heard that this is an issue of scope. We disagree, nor has it been bargained to impasse.

With respect to Proposal 72 (not 71, as referenced in your document), the SRCs, as proposed by the university, would never be acceptable to YUFA for the reasons outlined in the following statement: https://www.yufa.ca/yufa-statement-on-src-bargaining-proposal. That is why the union countered with a revised SRC program that models the program agreed upon by YUFA in the past.

On the issues of arbitration, mediation, and a 'way forward'

Since members rejected the employer's last offer, York has repeatedly called for the parties to agree to binding arbitration as a means of settling the dispute and resolving the outstanding issues.

CUPE 3903 acknowledges that while arbitration and other third-party dispute resolution systems have value *in certain circumstances,* as Premier Wynne stated on March 7: "the best agreements come from the bargaining table."

.../3

We ask you to consider the Premier's and Minister of Advanced Education Hunter's request that you return to the bargaining table immediately and do the right thing for York's 50,000 undergraduate students.

You have asked three questions of us.

1. *Will you agree to use interest arbitration for one or more of the bargaining units?*
2. *Will you agree to a non-binding mediator and factfinder to assist the parties for one or more of the bargaining units?*
3. *If you are not prepared to agree to either of the options above, will you provide a realistic counter having regard to university norms in the history of collective bargaining at York and norms in the larger university sector, and withdraw those proposals which are not appropriate as a strike issue?*

Our responses are as follows:

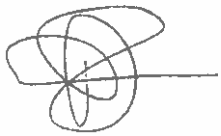
1. At this time, no, as the parties have not exhausted every possible effort to resolve their outstanding issues through negotiation.
2. As indicated in our answer to the first question, York must return to the bargaining table as we have not yet exhausted every possible avenue.
3. We have provided a realistic offer. We are working within a realistic framework. Our proposals reflect the changing needs of our membership that address real concerns around precarious employment and access to public education. All of the remaining issues are legitimate strike issues.

We are now asking York University to answer the following question: Will the university agree to meet with the CUPE 3903 Bargaining Team and the provincially-appointed Conciliation Officer in an effort to resolve the outstanding issues between the parties?

If the answer is yes, we ask that you please provide meeting dates as soon as possible. Our Bargaining Team is prepared to meet whenever it is convenient for you.

We await your reply.

Sincerely,



Devin Lefebvre
Chairperson
CUPE 3903

KW:COPE491/EW

TAB 29

CUPE·SCFP | *Canadian Union of Public Employees*
Syndicat canadien de la fonction publique

ONTARIO REGIONAL OFFICE
80 Commerce Valley Drive East, Markham, ON L3T 0B2
Tel.: (905) 739-3999 Fax: (905) 739-4001 / cupe.ca / scfp.ca

April 11, 2018

Via Email: president@yorku.ca

Rhonda L. Lenton
President and Vice-Chancellor
York University
1050 Kaneff Tower
4700 Keele Street
Toronto, On
M3J 1P3

Dear President Lenton:

Earlier this week, our membership sent a clear message to your administration that York University's current offer of settlement remains unacceptable. The offer members were forced to vote upon was not substantially different from the one members rejected on March 2, just prior to strike action commencing.

While we share your assessment that significant differences remain between our positions, we cannot help but wonder why your administration and legal advisors have repeatedly failed to take the steps necessary to bridge the divide between our respective positions.

Of particular note in your correspondence is your stated desire for the parties to "take a new approach," by agreeing to binding arbitration. York has repeatedly called for the parties to agree to this and this latest appeal to do so raises an important question.

It has been CUPE 3903's understanding that substantial withdrawal of most of the outstanding issues, save and except one or two key issues for each affected unit, would be a precondition of moving the dispute to binding arbitration. Can you confirm that this remains the case, or has York's position now changed with respect to this, is the University administration now calling for *all* outstanding issues to be sent to interest arbitration?

.../2

As a matter of general principle, arbitration should only be considered as a last resort when the parties *have exhausted all possible efforts to resolve their outstanding issues through negotiation.*

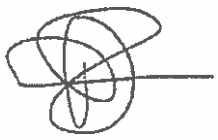
Over the past six weeks, CUPE 3903 has repeatedly asked York to come back to the table to negotiate. Each time we have done so, York's response has been to move the goalposts. In virtually every instance, our bargaining team has been told to further modify or pare down our proposals, with no reciprocity on the part of the Employer. Since this strike began, York has refused to engage in substantive negotiations to resolve our outstanding issues.

It is our belief that at this time, York University has failed to make the necessary efforts to resolve the outstanding issue between the parties to justify a move to binding arbitration.

We therefore ask that York University agree to meet our Bargaining Team at the earliest possible time, with a goal of negotiating through all of the outstanding issues between the parties. York University must make a meaningful, good faith effort towards the resolution of the issues that have led to this strike before the Bargaining Team can consider arbitration as an option.

As they have since the strike began, our Bargaining Team is available to meet with your representatives and the Provincially-appointed Mediator. We urge you, for the sake of our students, to join us in making every possible effort to resolve this dispute as quickly as possible.

We await your reply.



Devin Lefebvre, Chairperson
CUPE 3903

:na\cope491

TAB 30

YORK
UNIVERSITÉ
UNIVERSITY

Office of the President

1050 KANEFF TOWER
4700 KEELE ST
TORONTO ON
CANADA M3J 1P3
T 416 736 5200
www.yorku.ca/president

April 11, 2018

Mr. Devin Lefebvre
CUPE 3903 Chairperson
45 Four Winds Dr,
Unit Q-1
North York, ON M3J 1K7

Dear Mr. Lefebvre,

Thank you for your letter today regarding how we might best move forward to end the strike.

It appears that we agree that there are significant differences between us in reaching collective agreement renewals. It has become particularly clear to us that we are far apart on the fundamental principles underlying our respective positions.

We also both agree that interest arbitration is a viable method to resolve this impasse, although you indicate it is a method of "last resort" and suggest now is not that time. You state this even as we are in the sixth week of a strike affecting tens of thousands of students, family, prospective employers, campus workers and our community neighbours.

We are at that point of last resort.

Your explanation for the Union's refusal to move to arbitration at this time is based on your claim that the University has "repeatedly failed to take the steps necessary to bridge the divide between our respective positions" and that the Union precondition before considering binding arbitration is for us to "make a meaningful, good faith effort towards the issues that have led to this strike...."

We have made all possible good faith efforts over the last six months to achieve a negotiated settlement and yet remain at impasse. The time for arbitration is now.

Since we exchanged proposals on October 16th, our teams have met 26 times, well over half of these with the assistance of a conciliator. Through these negotiations, we have reached agreement on over 25 proposals and the University has made significant counter proposals, including monetary and job security proposals, on another 30 of the Union demands. Most importantly, at CUPE 3903's request, we tabled our best offers to avoid a strike on March 1st, which are not only sector leading in themselves but guarantee that the collective agreements continue to lead all other Ontario universities in total compensation and job security programs.

In contrast to these efforts, your bargaining team has not accepted a single one of the eight University proposals, rejecting them outright with no effort at a counterproposal even as we reduced and amended these to try and make them more acceptable.

After the strike had commenced, in a letter of March 15th, you requested that the University return to the table. You held out hope for settlement stating that the differences between us can be bridged and that the "clearest path to a resolution" requires the two sides to "sit down and make their best efforts to reach a negotiated settlement." That is very similar to the language of your letter of today.

Also in that letter of March 15th, in response to the question of interest arbitration, you wrote, "At this time, no, as the parties have not exhausted every possible effort to resolve their outstanding issues through negotiation".

Based upon that letter and in good faith with an earnest desire for a settlement, we met with your bargaining team on March 20, 2018. We proposed enhancements to our March 1st offers, on issues you identified as very important to your members, expecting significant movement from CUPE 3903 on the key outstanding issues to resolve the impasse. We were met with a clear statement that your bargaining team would not stray from their "redline" issues. With those "redline issues" still on the table, the agreements we reached during that day of negotiations brought us no closer to a settlement. They simply made the impasse more stark.

Your positioning at the table was reinforced by a social media post by one of the CUPE 3903 bargaining team members, in which it was noted that the bargaining team had no intention of moving off its redline positions and, in fact, did not have the authority to do so. Further disconcerting was the suggestion in the post that an objective in inviting us back to the table on March 20th was to try to portray us as unwilling to move on our positions.

The parties have exhausted all possible efforts to resolve their outstanding issues through negotiations. We are at the point described in your letter of March 15 and again in your letter today. Our respective actions to date and the gap between us indicate an exhausted impasse. If now is not the point of last resort, then when? We are six weeks into a strike and our students need to complete the academic year.

We have offered since the first day of bargaining to go to interest arbitration to resolve any issues on which we cannot agree at the bargaining table – any outstanding proposals on which agreement has not been reached would proceed to arbitration, subject only to the limitation of the proposal being within the legal scope of collective bargaining.

In the best interests of our students and to save the winter and summer terms, we believe that it is imperative that we agree now to go to arbitration, where an independent third party can decide what is fair and make a binding decision.

We reiterate our offer to refer any proposals on which agreement has not been reached to arbitration, where an independent third party can decide what is fair to both sides. I will also instruct our bargaining team, if the Union agrees to proceed to arbitration, to work with the Union to seek negotiated agreement on any proposals possible before the arbitrator makes a decision.

There is no reason to wait.

I sincerely believe that interest arbitration is the only way forward and sincerely hope you will respond positively in the interest of the entire York University community.

Sincerely,

Rhonda L. Lenton, PhD
President and Vice-Chancellor

rl/if

cc: Mr. Greg Long, Deputy Director (Acting) of Dispute Resolution Services, Ministry of Labour

TAB 31

YORK
UNIVERSITÉ
UNIVERSITY

Office of the President

1050 KANEFF TOWER
4700 KEELE ST
TORONTO ON
CANADA M3J 1P3
T 416 736 5200
www yorku ca/president

April 14, 2018

Mr. Devin Lefebvre
CUPE 3903 Chairperson
45 Four Winds Dr.
Unit Q-1
North York, ON M3J 1K7

Dear Mr. Lefebvre,

We have reviewed the CUPE 3903 release issued following the appointment of arbitrator William Kaplan. We also truly hope meeting with the Commission will support both parties in finding a way out of this impasse.

We would however like to reiterate our offer to CUPE 3903 to arrange a temporary return to work. This is an opportunity for us to collectively work out terms which would allow the winter term to be completed and students to graduate while still allowing the Union's members to resume job action to place pressure on the University's ability to offer summer terms. This is not about summer tuition but, rather, about having students complete the current academic year.

Both parties need to think creatively to avoid compounding the effects of our impasse which is often a natural consequence of a lengthy strike.

Devin, I again wish to put forward the University's offer of electing to go to interest arbitration. Our respective views on what constitutes a reasonable agreement are irreconcilable. To assist in finding a path forward, we request that the Union provide a draft "back to work" protocol which would be acceptable if there was a return to work, whether a temporary return, or upon a negotiated agreement or arbitration. This should obviously address and reflect the work that has to be done to complete the term according to the remediation guidelines while also acknowledging that some of the work that would have been performed is now lost.

The University will attend tomorrow with earnest hope that Mr. Kaplan is able to broker some form of agreement to get your members back to work and to the completion of their academic term along with all of our other students.

Sincerely,

Rhonda L. Lenton, PhD
President and Vice-Chancellor

rl/if

Cc: Mr. Greg Long, Deputy Director (Acting) of Dispute Resolution Services, Ministry of Labour

TAB 32

INTERNATIONAL LABOUR OFFICE

Governing Body
311th Session, Geneva, June 2011

GB.311/4/1

FOURTH ITEM ON THE AGENDA

Reports of the Committee on Freedom of Association

360th Report of the Committee on Freedom of Association

Contents

(c) The Committee notes that the allegations of anti-union discrimination against the SPCTC and its President were mentioned in a letter from the union to the Ministry of Labour and Social Security dated 9 October 2008 and observes that, should the allegations made in the SPCTC's letter prove to be true, they would constitute acts of anti-union discrimination. Noting that, according to the information at its disposal, the letter appears to have elicited no response, the Committee requests the Government to inform it of any action that may have been taken by the authorities in response to the SPCTC's letter. If no such action has been taken, the Committee expects that the Government will refer the SPCTC's allegations to the labour inspection services without delay and that the necessary investigations will be carried out to put an end to any acts of anti-union discrimination that may come to light.

(d) The Committee requests the Government to keep it informed of the outcome of the complaint lodged against the company for unjustified dismissal of the seven members of the SPCTC. Should the anti-union nature of their dismissal prove to be true, the Committee expects the Government to take every necessary measure vis-à-vis the company to ensure that the dismissed trade unionists are reinstated in their jobs with retroactive payment of all salaries due. Should it prove that for objective and compelling reasons their reinstatement should not be possible, the Committee requests that the workers concerned receive an adequate compensation, which would represent sufficiently dissuasive sanction against anti-union dismissals. It requests the Government to keep it informed in this respect.

CASE NO. 2803

DEFINITIVE REPORT

Complaint against the Government of Canada presented by the Canadian Union of Public Employees (CUPE)

Allegations: The complainant organization alleges that the Government has passed legislation ordering the termination of a legal strike initiated by one of the complainant's constituent local unions, thereby interrupting collective bargaining between the parties, referring the dispute over to compulsory and binding arbitration, violating the union's right to strike, and setting a dangerous precedent of premature government intervention in labour disputes that do not involve essential service industries

324. The Canadian Union of Public Employees (CUPE) submitted its complaint in a communication dated 16 June 2010.

325. In a communication dated 21 December 2010, the Federal Government of Canada transmitted the reply of the Government of the Province of Ontario.

326. Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). It has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), nor the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant's allegations

327. In its communication dated 16 June 2010, the CUPE submits a complaint on behalf of its affiliate branch Local 3903 (the Union). CUPE Local 3903 represents about 3,400 contract faculty, teaching assistants, graduate assistants and research assistants at York University in Toronto. Graduate, research and teaching assistants are full-time graduate students at the University. Much of the graduate student funding is delivered through the collective agreement. The complainant explains that the collective agreement reached in 2005 expired on 31 August 2008. The Union served notice to bargain in July 2008 and met with the employer throughout July, August and September of the same year. The Union's key demand was to increase graduate funding, since a large majority of its members earn below the poverty line. Its second key demand was to increase job security for contract faculty members. The complainant states that since its creation, the University has disproportionately relied upon contract faculty. Considering the fact that a number of contract faculty members have been working at the University for multiple decades, it has become increasingly difficult for the employer to label them a contingent workforce, and yet contract faculty members continue to be hired on four- or eight-month contracts with little job security. Finally, the Union demanded improvements to health benefits and child care, as well as an increase in duration of contracts, so as to align with the rest of the sector.

328. CUPE alleges that the employer refused to respond to any of their monetary demands until 16 September 2008, and even then, issued only a "placeholder" response, indicating that a more meaningful offer would be forthcoming at a later stage of negotiations. The same day, the employer requested that the Union agree to binding arbitration to resolve all outstanding issues. In compliance with the Ontario Labour Relations Act, the Union filed for conciliation and held a strike vote in which an overwhelming majority of members voted to go on strike.

329. A strike date was set for 1 November 2008. The complainant organization alleges that by the end of October, the employer had still not responded to their key demands. The Union postponed the strike date to 6 November 2008. The employer finally presented its first response to the Union's demands on 4 November 2008. However it fell short of the membership's needs and the Union went on strike on 6 November 2008. In response to the strike action, the University cancelled all classes, affecting over 50,000 students.

330. CUPE states that although it repeatedly asked the employer for a meeting, hoping for a quick resolution of the labour dispute, the employer met with the Union on only two occasions in the first two months of the strike – for one day in November and a few days in December. Instead, according to the organization, the employer directed its efforts at getting public support and lobbying the Government to adopt back-to-work legislation.

331. The employer met with the Union for four days at the beginning of January 2009 and presented its final offer. The offer was overwhelmingly rejected by Union members attending the general membership meeting. The complainant organization alleges that instead of continuing to negotiate, the employer responded by filing for a supervised vote

on the same offer with the provincial Government. The vote was held on 19 and 20 January 2009, in which the offer was once again rejected.

332. On 21 January 2009, following the supervised vote, the Premier of Ontario announced he was appointing a special mediator. Bargaining resumed on 22 January 2009. However, according to the complainant, the employer refused to make any move. On 24 January 2009, the mediator called the negotiations off, and the Premier of Ontario announced that since the negotiations were in deadlock, the Government would bring a legislated end to the strike. On 29 January 2009, the Government passed the York University Labour Disputes Resolution Act (Bill 145), ordering the termination of the 85-day strike. As a result, collective bargaining was interrupted and the case was then referred to binding arbitration. The arbitrator conducted six days of mediation in March and April of 2009, during which little progress was made. On the sixth day, he tabled a mediator's recommendation, which he suggested would be his likely position in an arbitration hearing. With few options left, both the Union and the employer signed a memorandum of settlement on 7 April 2009 based on the arbitrator's recommendation. Although the Union's bargaining team and executive sent the deal to the membership without a recommendation, the settlement was ratified two weeks later.

333. CUPE alleges that the employer was never serious about reaching a negotiated settlement through collective bargaining and instead relied on the Ontario Government to violate the Union's members' freedom of association and collective bargaining rights enshrined in Conventions Nos 87 and 98. The complainant organization states that Bill 145 sets a dangerous precedent for Ontario. Although members of the Union are essential to the operation of the University, according to the complainant, they do not constitute an essential service.

B. The Government's reply

334. In a communication dated 21 December 2010, the Government of Canada transmits the comments made by the Ontario Government on this case. The latter recalls that while Canada has not ratified Convention No. 98, the Government of Ontario has great respect for the collective bargaining process and that it is not only the responsibility of employers and unions to resolve their differences at the bargaining table, it is also their right under the applicable provincial legislation. To that end, the Government, through the Ministry of Labour (MOL) provides conciliation and mediation support to parties engaged in collective bargaining. Over the past few years, approximately 97 per cent of negotiations have resulted in settlements with no work stoppages.

335. The Government of Ontario recalls that the parties were engaged in collective bargaining for approximately seven months. From October 2008 through January 2009, the Government provided assistance of the MOL conciliation officers and mediators. Notwithstanding the continued efforts of the MOL mediators, the parties remained deadlocked as the Union rejected the employer's last offer. The provincial Government states that contrary to the assertion made by CUPE, collective bargaining was not interrupted by the adoption of Bill 145, as no actual bargaining was taking place, despite the provincial Government's efforts to assist the parties in resolving their differences through negotiation.

336. The Ontario Government states that the education of over 45,000 students had been disrupted, with classes having been cancelled for more than 11 weeks, and that the completion of the academic year was at serious risk. The Government points out that post-secondary education serves a critical public function, and that an extension or loss of an academic year has significant personal, educational, social and financial implications for students and their families, as well as serious organizational and economic impact on the

University and the broader public. Given these serious concerns and the clear deadlocks in negotiations, the Government considers that public interest required an exceptional and temporary solution to address the matters.

337. The Government of Ontario adds that legislation was introduced only after the parties were given every reasonable opportunity to resolve their differences at the bargaining table. While Bill 145 referred the matters in dispute to a mediator–arbitrator, nothing in the legislation prohibited the parties from continuing to negotiate and, in fact, it specifically encouraged them to do so. The Government indicates that the parties agreed on the appointment of the mediator–arbitrator and that they settled their dispute in the course of the mediation phase of the mediation–arbitration. Therefore, according to the provincial Government, the settlement was not imposed by the mediator–arbitrator, but was agreed to by the parties. The settlement, which sets out the terms of a new collective agreement, was subject to a ratification vote by the Union's members. On 27 April 2009, the Union announced that its members had ratified the new collective agreement. In the Government's view, the back-to-work legislation under the circumstances was appropriate and necessary, and effectively facilitated an agreement between the parties.

C. The Committee's conclusions

338. *The Committee notes that this case concerns back-to-work legislation (the York University Labour Disputes Resolution Act, 2009) adopted by the Government of Ontario to bring to an end an 85-day strike at the York University (the relevant provisions of the Act appear in the appendix).*

339. *The Committee notes that the legality of the strike is not disputed and that the complainant and the Government of Ontario appear to agree generally on the events that led to the adoption of the back-to-work legislation. The preamble to the Act summarizes the main reasons for its adoption and reads as follows:*

> ...
>
> *The parties have engaged in collective bargaining for approximately seven months for new collective agreements, including conciliation and mediation with the assistance of Ministry of Labour staff, but have failed to resolve their disputes. A vote of the members of the bargaining units represented by the Union in respect of the University's last offer was conducted. That offer was rejected by all of the bargaining units. Continuing efforts of the Ministry of Labour to assist the parties in resolving their differences through mediation have proved unsuccessful. Negotiations have reached an impasse and the parties are clearly deadlocked.*
>
> *The strike has been ongoing and classes have been cancelled for more than 11 weeks. The education of over 45,000 students has been disrupted and the completion of the academic year is at serious risk. Post-secondary education serves a critical public function. Furthermore, a lengthy extension or loss of an academic year has significant personal, educational, social and financial implications for students and their families as well as serious organizational and economic impacts on the University and the broader public. These negative consequences may be long term in nature and the repercussions could extend beyond the parties, the students and their families. The continuation of these disputes and the resulting disruption in education and its corresponding effects give rise to serious public interest concerns. The interests of students, families and the broader community require that these disputes be resolved. Having regard to these serious circumstances and the clear deadlock in negotiations, the public interest requires an exceptional and temporary solution to address the matters in dispute so that new collective agreements may be concluded through a fair process of mediation–arbitration, staff and students can return to class and the University can resume providing post-secondary education.*

340. *At the outset, the Committee observes that this is the fourth time in the last ten years that it has been called to address the issue of special legislation being adopted to put an end to a lawful strike in the education sector in Canada, Ontario [see Cases Nos 2045, 2145 and 2305 as set out in its 320th, 327th and 335th Reports, respectively]. The Committee notes that in the present case, the Government maintains that the adoption of the back-to-work legislation was justified in order to protect the public interest. While it appreciates the Government of Ontario's concerns set out above, the Committee recalls that the right to strike is one of the legitimate and essential means through which workers and their organizations may defend their economic and social interests [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, paras 521–522]. Furthermore, while the right to strike can be subject to certain limited exceptions, the Committee recalls that the education sector does not fall within these exceptions [see* ***Digest****, op. cit., para. 587]. The Committee recognizes that unfortunate consequences may flow from a strike in a non-essential service, but considers these do not justify a serious limitation of the right to strike unless they become so serious as to endanger the life, personal safety or health of the whole or part of the population. In examining a previous complaint involving the education sector, the Committee stated that the possible long-term consequences of strikes in the teaching sector did not justify their prohibition [Case No. 2145, para. 303, 327th Report, and* ***Digest****, op.cit., para. 590]. In this respect, however, the Committee has considered that in cases of strikes of long duration, minimum services may be established in the education sector, in full consultation with the social partners [see* ***Digest****, op. cit., para. 625].*

341. *The Committee deeply deplores that the Government of Ontario has decided, for the fourth time in about ten years (September 1998, November 2000, June 2003 and January 2009) to adopt ad hoc legislation which brings to an end, in a unilateral manner, a lawful strike in the education sector. The Committee considers that repeated recourse to such legislative restrictions can only in the long term destabilize the labour relations climate, if the legislator frequently intervenes to suspend or terminate the exercise of rights granted to workers and their union by the general legislation.*

342. *In this context, the Committee notes that according to the complainant, although it repeatedly asked the employer for a meeting, hoping for a quick resolution of the labour dispute, the employer met with the Union on only two occasions in the first two months of the strike. According to CUPE, instead of trying to reach a negotiated solution, the employer directed its efforts at getting public support and lobbying the Government to adopt a back-to-work legislation. As regards the allegation of violation of the principle of bargaining in good faith, the Committee notes that the Government indicates that no actual collective bargaining was taking place as the parties were deadlocked due to the Union's rejection of the employers' last offer. As a general rule, the Committee recalls that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties. It further recalls that the principle that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means that any unjustified delay in the holding of negotiations should be avoided [see* ***Digest****, op. cit., paras 935 and 937].*

343. *The Committee further notes that once the offer had been rejected by the Union membership in a vote supervised by the Government on 19 and 20 January 2009, the mediator appointed by the latter on the following day called the negotiations off on 24 January, just three days after assuming his/her duties. The Committee understands (from the publicly available records) that on the very next day, Bill No. 145 was introduced in the Legislative Assembly and given the first reading. On 29 January 2009, the Act providing for a binding mediation–arbitration procedure was adopted. While*

noting the Government of Ontario's statement that nothing in the legislation prohibited the parties from continuing to negotiate and that the legislation rather encouraged them to do so, the Committee recalls as regards the compulsory nature of the mediation–arbitration process, that recourse to these bodies should be on a voluntary basis [see ***Digest****, op. cit., para. 932] and that recourse to compulsory arbitration in cases where the parties do not reach an agreement through collective bargaining is permissible only in essential services in the strict sense of the term [see* ***Digest****, op. cit., para. 994]. The Committee regrets that despite its recommendations in the previous abovementioned cases to consider establishing a voluntary mechanism which could avoid and resolve labour disputes to the satisfaction of the parties concerned, it appears that adoption of a back-to-work legislation continues to be seen by the Government of Ontario as the only means of dealing with a deadlock in a collective bargaining. The Committee emphasizes that the Government should promote free collective bargaining and considers, as it did in previous cases, that it would be more conducive to a harmonious industrial relations climate if the Government of Ontario would establish a voluntary and effective mechanism which could avoid and resolve labour disputes to the satisfaction of the parties concerned. The Committee therefore once again urges the Government to take steps to encourage the Government of Ontario to establish a voluntary and effective dispute prevention and resolution mechanism rather than having recourse to back-to-work legislation.*

The Committee's recommendation

344. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:***

The Committee once again urges the Government to take steps to encourage the Government of Ontario to establish a voluntary and effective dispute prevention and resolution mechanism rather than having recourse to back-to-work legislation.

Appendix

Relevant provisions of the *York University Labour Disputes Resolution Act, 2009*

...

3(1) As soon as this Act receives royal assent, the employer shall use all reasonable efforts to operate and continue to operate its undertakings, including any operations interrupted during any lockout or strike that is in effect immediately before this Act receives royal assent.

(2) As soon as this Act receives royal assent, the employer shall terminate any lockout of employees that is in effect immediately before this Act receives royal assent.

(3) As soon as this Act receives royal assent, the bargaining agent shall terminate any strike by employees that is in effect immediately before this Act receives royal assent.

(4) As soon as this Act receives royal assent, each employee shall terminate any strike that is in effect before this Act receives royal assent and shall, without delay, resume the performance of the duties of his or her employment or shall continue performing them, as the case may be.

4(1) Subject to section 6, no employee shall strike and no person or trade union shall call or authorize or threaten to call or authorize a strike by any employees.

(2) Subject to section 6, no officer, official or agent of a trade union shall counsel, procure, support or encourage a strike by any employees.

...

6. After a new collective agreement with respect to a listed bargaining unit is executed by the parties or comes into force under subsection 19(5), the Labour Relations Act, 1995 governs the right of the employees in that unit to strike and the right of the employer to lock out those employees.

7(1) A person, including the employer, or a trade union who contravenes or fails to comply with section 3, 4 or 5 is guilty of an offence and on conviction is liable:

(a) in the case of an individual, to a fine of not more than $2,000; and

(b) in any other case, to a fine of not more than $25,000.

(2) Each day of a contravention or failure to comply constitutes a separate offence.

8. A strike or lockout in contravention of section 3, 4 or 5 is deemed to be an unlawful strike or lockout for the purposes of the Labour Relations Act, 1995.

...

10. If this Act applies to the employer and the bargaining agent in respect of a listed bargaining unit, the parties are deemed to have referred to a mediator–arbitrator, on the day this Act receives royal assent, all matters remaining in dispute between them with respect to the terms and conditions of employment of the employees in that unit.

11(1) On or before the fifth day after this Act receives royal assent, the parties shall jointly appoint the mediator–arbitrator referred to in section 10 and shall forthwith notify the minister of the name and address of the person appointed.

(2) If the parties fail to notify the minister as subsection (1) requires, the minister shall forthwith appoint the mediator–arbitrator and notify the parties of the name and address of the person appointed.

...

(7) The minister may appoint as a mediator–arbitrator a person who is, in the opinion of the minister, qualified to act.

12(1) The mediator–arbitrator has exclusive jurisdiction to determine all matters that he or she considers necessary to conclude a new collective agreement.

(2) The mediator–arbitrator remains seized of and may deal with all matters within his or her jurisdiction until the new collective agreement is executed by the parties or comes into force under subsection 19(5).

(3) The mediator–arbitrator may try to assist the parties to settle any matter that he or she considers necessary to conclude the new collective agreement.

(4) As soon as possible after a mediator–arbitrator is appointed, but in any event no later than seven days after the appointment, the parties shall give the mediator–arbitrator written notice of the matters on which they reached agreement before the appointment.

(5) The parties may at any time give the mediator–arbitrator written notice of matters on which they reach agreement after the appointment of a mediator–arbitrator.

13(1) The mediator–arbitrator shall begin the mediation–arbitration proceeding within 30 days after being appointed and shall make all awards under this Act within 90 days after being appointed, unless the proceeding is terminated under subsection 18(2).

(2) The parties and the mediator–arbitrator may, by written agreement, extend a time period specified in subsection (1) either before or after it expires.

...

15(1) An award by the mediator–arbitrator under this Act shall address all the matters to be dealt with in the new collective agreement with respect to the parties and a listed bargaining unit.

16. The award of a mediator–arbitrator under this Act is final and binding on the parties and on the employees.

...

18(1) Until an award is made, nothing in sections 10 to 17 prohibits the parties from continuing to negotiate with a view to making a new collective agreement and they are encouraged to do so.

(2) If the parties execute a new collective agreement before an award is made, they shall notify the mediator–arbitrator of the fact and the mediation–arbitration proceeding is thereby terminated.

...

CASE NO. 2770

DEFINITIVE REPORT

Complaint against the Government of Chile presented by the World Federation of Trade Unions (WFTU)

Allegations: The complainant organization objects to section 381 of the Labour Code (which, while prohibiting the hiring of workers to replace strikers, provides for some exceptions), and alleges that Cerámica Espejo Ltda hired workers to replace workers striking in January 2010 over a pay claim and that the Chilean police (Carabineros de Chile) provided protection to the company so that it could illegally remove goods from its plant given that the workers in the transport department were on strike

345. The complaint is contained in a communication from the World Federation of Trade Unions (WFTU) dated 29 March 2010.

346. The Government sent its observations in a communication dated 11 February 2011.

347. Chile has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

348. In its communication of 29 March 2010, the WFTU states that Chilean legislation contains a series of regulations that are contrary to the conventions and principles of freedom of

TAB 33

The Ontario Experience with Interest Arbitration

Problems in Detecting Policy

George W. ADAMS

This paper examines the experience of the Province of Ontario with interest arbitration and focuses more particularly on specific sectors of activity representing critical areas.

The most common substitute for resort to strike or lockout in interest disputes is interest arbitration. This procedure may take various forms: it may be automatic upon the failure of the preliminary conciliation; it may be mandatory upon submission of either party, regardless of the consent of the other parties; it may be confined to first agreement bargaining situations but only when bargaining breaks down; it may be imposed by the Government on its own motion and within its sole discretion, on an ad hoc basis; or it may be on the agreement of the parties. The only constant feature of these procedures is that a third party is ultimately responsible for determining the rules to govern the employee-employer relationship. As a dispute resolution technique, its importance in labour-management relations has tended to parallel the increasing percentage of national output distributed through non-market mechanisms, i.e. "the public sector". The general explanations for its use usually focus on at least three justifications; sovereignty, monopoly, and public harm[1]. All three of these themes underlie any attempt to rationalize Ontario's use of interest arbitration.

In simple terms, "sovereignty" stands for the notion that governments cannot accede to industrial action because to do so would compromise the sovereign authority to govern conferred on the legislative body by the will of the people expressed by the ballot box. While it might be assumed that this notion has become an anachronism in an age when governments have become the largest single employer in the economy and where the labour markets in which governments operate are structured so that no competitive norm exists, it cannot be dismissed so easily in Ontario. Indeed, two general inquiries of Ontario's public sector labour relations legislation conducted at the end of the sixties placed considerable weight on this premise. In the *Report of the Royal Commission Inquiry into Labour Disputes* (1968) Mr. Justice Rand observed:

• ADAMS, G.W., Chairman, Ontario Labour Relations Board.

•• The views expressed in this paper represent the author's personal opinions. The paper was prepared for The Continuing Legal Education Society of British Columbia Conference on Interest Arbitration — A Matter of Public Policy, April 15th & 16th, 1980. Vancouver, B.C.

1 See generally NORTHRUP, *Compulsory Arbitration and Government Intervention in Labour Disputes*, 1966.

The phenomenon in public service that is becoming clearer each day is the commitment of vital public functions to a rapidly increasing number of small minorities and the equally rapid expansion of community dependence on their faithful performance. When individuals or groups voluntarily undertake these responsibilities they enter a field of virtual monopoly; the community cannot secure itself against rejection of these responsibilities by maintaining a standby force which itself would be open to a similar freedom of action. Our society is built within a structure of interwoven trust, credit and obligation; good faith and reliability are essential to its mode of living; and when these obligations are repudiated confusion may be the harbinger of social disintegration[2].

Echoing these thoughts Judge Walter Little also questioned the wisdom of granting the strike right to Ontario's civil servants when he wrote:

Furthermore, our democratic processes provide the methods by which the interests of the community are to be safeguarded. We choose by free elections those who would be entrusted with that responsibility and we have the opportunity at regular intervals of either affirming that trust or transferring it to others. Implicit in the selection of those who will govern us is the duty of those selected to provide, without interruption, those services to which all citizens are entitled by law to avail themselves. Therefore, despite my opposition to the imposition of compulsory arbitration to settle industrial disputes in the private sector, I cannot accept the proposition that anyone who joins the public service, should have the right, in conjunction with others, to withdraw his services with the sole objective of compelling a duly elected government to meet their demands, no matter how meritorious they may be. To admit such proposition, is to imply that our processes of government, and the services which are provided by law for the benefit of all citizens when required, can legally be rendered ineffectual if a critical segment of public servants or crown employees should engage in strike action. The result of such enforced repudiation of its obligations to the community by the government could be, as stated by the late Honourable Mr. Rand, "the harbinger of social disintegration»[3].

Taken to extreme, therefore, the sovereignty viewpoint suggests that every strike by government employees, regardless of the reason, is a political strike. However, in many situations the reality hardly corresponds with this perception. Even assuming that a strike against the government implicitly rejects extreme claims of sovereignty, it does not necessarily follow that strikes by government employees are challenges to the political system. In the majority of instances, they are simply attempts to obtain the same kinds of improved wages, hours, and working conditions as those for which employees strike in the private sector; and, frequently, public service strikes should logically be a cause for much less concern that those in the private sector.

The "monopoly" argument is based on the related notion that most government services are offered on a monopolistic basis causing public sector trade unions to enjoy tremendous (and unfair) bargaining power when they threaten to strike. This view is more a tactical expression of the sovereignty argument put forward by Mr. Justice Rand. If it has merit, however, we should see public employee unions negotiating very favourable contracts and, yet, there is a substantial body of evidence that does not bear this out[4].

2 *Report of the Royal Commission Inquiry into Labour Disputes*, 1968, p. 111.

3 *Collective Bargaining in the Ontario Government Service*, 1969, p. 42.

4 See FEUILLE, Selected Benefits and Costs of Compulsory Arbitration, 1979, 33 *Indus. and Lab. Rel. Rev.*, pp. 64-76 at page 66.

Nevertheless, where the government is the employer it should not be surprising that is has had difficulty minimizing this concern when acting in its role as labour relations policy maker. Indeed, when the expectations of a tax paying public to uninterrupted public services are combined with the spectre of a bargaining imbalance, one can see that policy making in public sector labour relations must be both courageous and altruistic.

Even assuming that the arguments of sovereignty and monopoly can be overcome, a concern that some or all public employee strikes actually harm the innocent public or will after a certain duration remains as a final stumbling block to the mass importation of private sector principles to public sector labour relations. One need only list the thousands of employees providing policing, fire fighting and medical services to the public to throw up the spectre of possible catastrophe arising out of "selfish" differences over money. The "public policy" response takes mere seconds for formulation despite the fact that assertions of catastrophe are usually undocumented. In short, the emotional nature of the issue can mean that policy may be more rooted in editorial opinion and the rhetoric of political anxiety than in any thought-out attempt to harmonize the conflicting public interests of collective bargaining and public safety. All too often one suspects that the public interest in this aspect of labour relations is simply equated with the need for a guarantee against work stoppages. Compulsory interest arbitration, albeit imperfectly, represents this guarantee.

But I think it would be incorrect only to view interest arbitration as a process imposed on unwilling employees by narrow-minded governments on behalf of self-interested tax payers. As more and more experience is gained with compulsory interest arbitration, it is becoming apparent that the institution is more than just an imperfect substitute for free collective bargaining. For example, the Government of Ontario is currently being lobbied by organized labour for the enactment of compulsory arbitration in first agreement bargaining situations. Ontario's public health nurses are lobbying to be brought under *The Hospital Labour Disputes Arbitration Act*[5] and extended the right of compulsory arbitration. Indeed these two instances raise the general policy issue of whether all employees under private sector legislation should be able to choose between strike action or interest arbitration in resolving their differences with employers — and, of course, vice versa. Professional engineers, having formed unions under the provisions of *The Ontario Labour Relations Act*[6], are conducting seminars about the benefits of interest arbitration as a technique to resolve collective bargaining impasses. Access to interest arbitration in the private sector has been specifically provided for by amendments to *The Labour Relations Act* on the agreement of parties to a collective bargaining dispute. A number of teacher-schoolboard collective bargaining disputes have been striking teachers lobbying the Government or negotiating with the employer to end their strike by interest arbitration. One sees no massive campaign by Ontario's public servants, hospital employees, policemen or firemen against the compulsory arbitration that determines their wages and other conditions of employment on an ongoing basis. In short, the process is nowhere near as unacceptable to employees as theory would suggest to be the case.

5 *R.S.O.* 1970, c. 208.

6 *R.S.O.* 1970, c. 232.

INSTITUTIONAL ARGUMENTS AGAINST INTEREST ARBITRATION

Any attempt to explain the patchwork application of interest arbitration in the Province of Ontario requires a brief review of the labour relations debate over the appropriateness of interest arbitration as an effective dispute resolution technique. Any inconclusiveness in the case against interest arbitration leaves room for the operation of the more philosophic or emotional perceptions of the strike right discussed above. This reality cannot be ignored. Moreover, as I review the particular experience of Ontario with compulsory arbitration I want to refer back to the general contours of this debate suggesting which experience supports which argument.

Those who view compulsory interest arbitration as a very weak alternative to free collective bargaining marshal their arguments around the role of conflict in a labour relations system. One of the best statements of this role is found in the report of the *Task Force on Labour Relations* (1968) at para. 392 and following[7]:

> There is a basic characteristic of the collective bargaining system that is seemingly contradictory. Paradoxical as it may appear, collective bargaining is designed to resolve conflict through conflict, or at least through the threat of conflict. It is an adversary system in which two basic issues must be resolved: How available revenue is to be divided, and how the clash between managements drive for productive efficiency and the workers quest for job, income and psychic security are to be reconciled. Other major differences, including personality conflicts, may appear from time to time but normally they prove subsidiary to these two overriding issues.

The Task Force went on to describe the role of economic conflict in functional terms arguing that the strike or lockout serves as a catalyst to agreement and as a catharsis for inevitable interpersonal workplace conflict.

Focussing on the weaknesses of compulsory arbitration as a substitute for economic conflict the Task Force observed:

> One of the worst features of compulsory arbitration is its potentially corrosive effect on the decision-making process both within and between unions and management. It is natural that where both sides expect arbitration at the end of the line, should they fail to agree, there will be a tendency to hold back a little for fear of establishing a new floor or ceiling for the arbitration. There will be an equal reluctance on both sides to concede anything lest it be something the arbitrator might force them to give in his award. Compulsory arbitration need not have these inhibiting effects on collective bargaining, but there is a real risk that it will, especially the longer and more often it is imposed.
>
> Compulsory arbitration may also serve as a crutch for weak leadership in either union or management. When a union leader can force a dispute to arbitration he can avoid some of the compromises within the union and invariably go into a settlement. Instead of making the hard decisions about wage gains as against fringe benefits, across the board absolute as against percentage increases, skilled trade differentials, and other issues that can prove politically embarrassing, he can take all internal conflicts to the arbitrator as demands and let him make the unpopular decisions. Similar evasion of responsibility can take place in management. Once a leader of any king finds an easy way out of some of his dilemmas, he is likely to behave in the same manner in other areas. In the long run the effect would be to undermine both the leadership in question and the collective bargaining process itself[8].

7 *Task Force on Labour Relations*, Ottawa, Privy Council, 1968.

8 *Ibid.*, paragraphs 396, 397, 398.

Of course, the opponents of interest arbitration do not end their attack at the potential corrosive and narcotic effects of the process. They go on to point out the inability of arbitrators to develop meaningful principles by which to adjudicate interest disputes. They argue that such disputes are inherently "polycentric" in nature with the result that arbitrators are unable to satisfy the parties that their interests have really been taken into account[9]. The "parasitic" criteria that tend to be relied upon are said to be inherently unstable and that, in any event, there are real limitations on the ability of an arbitration board to provide meaningful answers to complex labour relations problems. To this is added the risk that arbitration awards may have an adverse economic effect on the economy and the fact that the process does not effectively eliminate work stoppages. Indeed, it may, they suggest, exacerbate mid-term industrial relations conflict.

Increasingly, however, others are arguing that the case against compulsory interest arbitration is more rhetoric than substance[10]. These observers suggest that the data on both the corrosive and narcotic effect of compulsory arbitration is at best arguable or tentative. They point out that the economic impact of compulsory arbitration appears to have been marginal[11]. They also stress that award usage is in the 15 to 25 per cent area and does not seem to be increasing over time. (Although others have discovered a rising incidence of arbitration over 4 rounds of bargaining under the *Public Service Staff Relations Act*.)[12] Indeed, some proponents of interest arbitration point out that an effective system of compulsory arbitration has never been implemented in the sense of establishing proper criteria and research capacity in an impartial agency responsible for the development of very detailed labour market and wage information. It is further argued that many of the imperfections of compulsory arbitration can be eliminated or at least modified by adopting particular forms of compulsory arbitration. For example, final offer selection and "med-arb" are recommended as techniques designed to avoid or soften the so-called corrosive and narcotic impacts of compulsory arbitration[13].

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9 See D.J.M. BROWN, *Interest Arbitration*, Task Force Labour Relations, Study No. 18, Ottawa, Privy Council, 1968.

10 See generally B. DOWNIE, *The Behavioural Economic and Institutional Effects of Compulsory Interest Arbitration*, Economic Council of Canada, 1979, Discussion Paper No. 147. J. Joseph LOWENBERG ed., *Compulsory Arbitration, An International Comparison*, 1976.

11 See COUSINEAU and LACROIX, *Wage Determination in Major Collective Agreements*, Economic Council of Canada 1977. But see AULD, Christofides, SWIDINSKY, Wilton, *The Determinants of Negotiated Wage Settlements In Canada (1966-75): A Microeconometric Analysis*, 1979. This study of 191 public sector wage settlements concluded that arbitral wage settlements bear no resemblance to freely negotiated settlements. The authors also stress that award usage is in the 15 to 25 per cent area and does not appear to be increasing over time.

12 ANDERSON and KOCHAN, "Impasse Procedures in the Canadian Federal Service: Effects on the Bargaining Process", 1976-77, 30 *Indus. & Lab. Rel. Rev.* 283.

13 See STEVENS, "Is Compulsory Arbitration Compatible with Bargaining", 1966, 5 *Indus. Rel.* 38. KAGEL, "Combining Mediation and Arbitration", 1973, 96, *Monthly Lab. Rev.* 62.

Drawing back from the cut and thrust of this debate for a moment, it is apparent that both sides assume one monolithic industrial relations system. Compulsory interest arbitration is either right or wrong. This assumption ignores the fact that Canada is a politically diverse country reflecting regional economic and social characteristics. And within each political jurisdiction labour-management relations consist of a multitude of industrial relations systems[14]. Fortunately, the constitutional allocation of responsibility for labour relations allows our country to accommodate the diverse political and regional interests in its labour relations laws, but within each jurisdiction there tends to be a drive towards the uniform application of laws, be they labour relations oriented or otherwise. This uniform approach, like our debate, ignores the fact that different labour-management relationships react differently to compulsory arbitration schemes. Policemen and firemen are organized along paramilitary lines, and policemen, in particular, do not see their associations as part of the general labour movement[15]. The acceptance of compulsory arbitration by these groups of employees belies many of the arguments just discussed. In fact, the very existence of compulsory interest arbitration in public sector labour relations laws may have attracted many white collar and professional employees to collective bargaining who would otherwise have been repelled from a "right to strike" brand of trade unionism. The growth in these latter occupations has been concentrated in the public sector and their appetite for interest arbitration is well documented and understood[16]. Adding more grey to the debate is the view that "free collective bargaining" in a modern economy is more contrived than real and that the proper management of our economy requires less individual freedom, not more. John Kenneth Galbraith, making the case for permanent wage and price control, has pointed out that the modern large corporation has extensive influence over its prices and over its costs. It supplies much of its capital from its own earnings. It strongly influences the tastes and behaviour of its consumers. He has therefore suggested that in this concentrated sector of the economy trade unions and employers are walking hand in glove and their joint determination of wages and prices may be no more acceptable to employees and very much less consistent with the public interest than if the outcome was imposed by third party determination[17].

The more one looks at industrial relations in today's economy, the less one can distinguish where special public interest ends and normal private interest begins. In fact, there is a continuum of labour-management relations, some imbued with extreme public interest and, at the other end of the spectrum, those with little public significance. It has been observed that "where one begins and the other ends is a political question which, in part, will be determined by individual case and time[18]." As a general matter, however,

14 See generally DUNLOP, *Industrial Relations Systems*, 1958.

15 See H.W. ARTHURS, *Collective Bargaining by Public Employees in Canada: Five Models*, 1971 at 78.

16 See G. ADAMS, "Collective Bargaining by Salaried Professionals", in Slayton and Treblicock eds., *The Professions and Public Policy*, 1976 at 264.

17 See generally J. GALBRAITH, *Economics and The Public Purpose*, 1976 and *Annals of an Abiding Liberal*, 1979.

18 See generally PHILLIPS, "Collective Bargaining Dynamics and the Public Interest Sectors: The Market and Politics", in Gunderson ed., *Collective Bargaining in the Essential and Public Service Sectors*, p. 38.

there are at least seven principal areas which are usually considered to have inordinate public interest in that the disruption of service may threaten one or more of safety or health; necessary government; or the basic links of the economy. These critical areas might be ranked in the following order: police and firemen; hospitals and medical care; utilities; transportation; municipal services; civil servants; teachers and educational authorities.

What is interesting about Ontario is the uneven application of compulsory interest arbitration to these seven categories of employees. Of the seven categories, only three (police and firemen, hospitals, and civil servants) are covered by compulsory arbitration schemes. The other categories enjoy free collective bargaining and in some cases have their own collective bargaining statute tailored to particular needs and bargaining history. On occasion, however, they too experience the imposition of compulsory arbitration by way of *ad hoc* legislation. Ontario therefore ranks neither as the most innovative nor as the least innovative in its utilization of interest arbitration. And like other jurisdictions, the uneven application of the process is as much a reflection of different interest group pressures as it is a discriminating concern for the public's welfare and the theoretical dictates of labour-management relations.

ONTARIO'S USE OF INTEREST ARBITRATION

As of December 1979, 13.5% of employees working under provincial collective agreements were covered by agreements reached under laws requiring compulsory arbitration. The breakdown was as follows: under *The Hospital Labour Disputes Arbitration Act*, 66,700 employees covered in 558 agreements; under *The Crown Employees Collective Bargaining Act*, 56,100 employees in 10 agreements; under *The Police Act*, 14,600 employees in 141 agreements; under *The Fire Departments Act*, 7,700 employees in 78 agreements.

In 1978, 2,848 collective agreements were negotiated affecting 581,438 employees. Only 87 or 3% of these agreements were the result of compulsory arbitration, covering 16,201 or 2.8% of the total employees affected. In 1979, 5% of the total 3,309 agreements negotiated were the product of compulsory arbitration, affecting 8.4% of the total 600,044 employees involved. I also think it important to keep in mind the general incidence of strike activity in Ontario against which should be compared the incidence of arbitration in any particular relationship. In 1975 (the A.I.B. year) 6.1% of all agreements were settled after a strike and these settlements applied to 15.2% of employees subject to settlements that year. In 1978 the figures were 3.7% and 5.5% respectively and in 1979 3.2% and 8.3%[19].

COLLECTIVE BARGAINING BY POLICE AND FIREFIGHTERS

The collective bargaining system for police in Ontario is highly structured, but distinctly different from the private sector system. Police work is

19 Data compiled by the Research Branch, Ontario Ministry of Labour.

concerned with a protection of persons, property and public order and therefore police employment disputes are settled by arbitration without stoppage of work. Members of police forces were specifically excluded from *The Collective Bargaining Act, 1943*[20]. In 1947, however, they were given the right to bargain with municipalities[21]. Excluding the Federal Royal Canadian Mounted Police, there are two types of police forces in Ontario; the Ontario Provincial Police (OPP) and the municipal police forces. The municipal police forces have jurisdiction within organized municipalities, while the OPP serves sparsely populated areas which do not have their own forces. Both the OPP and the municipal forces are regulated by *The Police Act*[22] and the regulations under it. Collective bargaining and arbitration procedures for municipal police are also established by this statute[23], while *The Public Service Act*[24] which governs the Provincial Government's employees also applies to the OPP.

While it is true that police have enjoyed the right of free collective bargaining and compulsory arbitration since 1947[25], Professor Harry Arthurs has observed that it was not until the emergence of strong police associations in Toronto and at the provincial level that these rights gathered real significance[26]. In the early 1960's both groups acquired full-time presidents and expanded staffs. This development went hand in hand with an increased awareness of the advantages of collective action among non-blue collar workers generally in Canada and over the last fifteen years collective bargaining between police associations and their employers has been pockmarked by confrontation and exhibits a heavy reliance on arbitration.

One of the most celebrated cases of recent vintage involved a request by the Metropolitan Toronto Police Association that all uniformed patrol cars be manned by two fully trained and armed police officers while on patrol. While in previous awards arbitrators had adopted the view that this manning decision was a matter of judgment on the part of both commissioners and the heads of forces which should not be interfered with by an arbitra-

20 *S.O.* 1943, c. 4.

21 *The Police Amendment Act*, 1947, S.O. 1947, c. 77, s. 10.

22 *R.S.O.* 1970, c. 351.

23 *The Police Amendment Act*, 1972, S.O. 1972, c. 103 established the Ontario Police Arbitration Commission to oversee the process and provided for a conciliation mechanism and sole arbitrators.

24 *R.S.O.* 1970, c. 386. When *The Crown Employees Collective Bargaining Act* S.O. 1972, c. 67 was enacted, the O.P.P. were excluded from its provisions but an amendment to the Public Service Act recognized the Ontario Provincial Police Association (O.P.P.A.) as the bargaining agent for the members of that force. See *The Public Service Amendment Act*, 1972, S.O. 1972, c. 96, s. 6. The amendment makes a number of specific matters subject to collective bargaining with arbitration to resolve impasses. Arbitration has not, to date, been resorted to. The parties have generally agreed that the Metropolitan Toronto Police Force is a useful comparison.

25 *Op. cit.*, note 21.

26 See H.W. ARTHURS, *op. cit.*, note 15 at p. 90.

tion board, the Association's request was granted in 1974[27]. The issue and subsequent arbitral responses reflect the dramatic impact that compulsory arbitration can have upon public policy and the allocation of public funds. The issue also reveals how collective bargaining, in the context of compulsory arbitration, can become insulated from other policy considerations making claims on scarce public monies. Where employees make claims by way of free collective bargaining, other interest groups in need of public funds can at least indirectly participate through the general budgetary process and lobbying. The employer has to balance these conflicting claims in cushioning his position both at the bargaining table and in the political arena. Employees, therefore, have no absolute right to have their claims met and are confronted with the employer's dilemma of a limited pool of money on which many demands are being made in addition to those of collective bargaining. On the other hand, none of these other interest groups have standing before an interest arbitrator and arbitration awards are usually made, as we will see, without regard for the public employer's ability to pay. The Metropolitan Toronto two-man patrol car case also brings into serious question the appropriateness of policy-making in a relative vacuum of factual information. Adjudication is not a decision-making process best suited to solving highly complex polycentric problems[28]. Indeed, the full complexity of the issue and its suitability to interest arbitration is best seen from the next arbitration award to deal with it[29].

The second arbitrator was advised by the parties that the Commission's case against the two officer car system was the most thorough analysis of the issue ever presented to an arbitrator. A large part of the Commission's evidence comprised of reports of various bodies and persons who had studied the issue in the past culminating in a 1976 study prepared by Robin D. Hale for the Board of Police Commissioners for the Regional Municipality of Waterloo entitled "*Two Man Police Cars: Logic or Emotion.*" The Commission also produced extensive evidence on the exceptionally sophisticated radio communications network which it had commissioned and installed, at least in part to ensure that police officers answering a call where the possibility of danger was great would receive rapid support from other units. Radio calls for police services were analyzed for each patrol district. Current statistics were also reviewed. The Commission also adduc-

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27 See *Metropolitan Toronto Police Association*, unreported, George S. P. FERGUSON, April 19, 1974. This award was upheld as a proper elaboration of the term "working condition" found in section 29(2) of *The Police Act*. See *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association*, 1974, 5 O.R. (2d) 285; affirmed by the Ontario Court of Appeal in *Re Metropolitan Toronto Board of Police and Metropolitan Toronto Police Association*, 1976, 8 O.R. (2d) 65. On March 11, 1975 the Supreme Court of Canada refused leave to appeal.

28 See D.J.M. BROWN, *op. cit.*, note 9 and FULLER, *The Forms and Limits of Adjudication*, 1958. See also BERNSTEIN, *The Arbitration of Wages*, 1954, p. 114.

29 See *Metropolitan Toronto Police Association*, unreported, Kenneth P. SWAN, September 29, 1976. For an equally vivid illustration of this problem; the response of arbitrators to the demand by Ontario nurses for a contract clause dealing with professional responsibility should also be examined. See *Mount Sinai Hospital (Toronto) and the Ontario Nurses Association*, 1977, decided by Arbitrator Burkett.

ed evidence of the considerable dislocation of forces caused by the changeover. Such important services as the York Bureau, the Crime Prevention Bureau, the Community Relations Branch and several others were decimated in the massive reassignment of personnel necessary to meet the requirements of the earlier Ferguson award. A drastic reduction of officers assigned to downtown foot patrol duty was necessary as well. There was also some evidence that a general shortage of personnel had resulted in a significant number of delays in responding to some calls for police service by patrol units. On the other hand, the Association's case was based on the primary issue of safety. It pointed in particular to the murder of a number of police officers in Metropolitan Toronto and indicated that the availability of a backup officer, armed and fully trained, might have saved the life of the victim of some attacks. In attempting to balance all of these considerations the arbitrator wrote (at pages 23 to 27):

> In the event, the task of balancing those two legitimate interests falls, in the absence of a negotiated settlement, to me in nearly the same form as it fell to Judge Ferguson in 1974. The method he used to resolve the problem was and I say with no disrespect a blunt instrument. Unfortunately, the armory of an arbitrator as I have indicated above, contains little else to deal with complex and many faceted problems. The experience of implementation in the 1974 award and the very full evidence available to me makes it possible for me to do some fine tuning, but I am painfully aware that any award I make will be inadequate to meet all of the valid considerations involved. My jurisdiction requires me to determine the present issue, however, and there is no other method of resolution available.
>
> I have therefore determined to confirm the principle of the 1974 award, but to adjust its operation to respond more closely to the period when the combination of heightened criminal activity, movement about the area by citizens and the complicating factor of darkness combined to place the greatest demand on police services and to increase the chances of a police officer being involved in a dangerous situation with no assistance readily available. In addition, I have determined that it would be proper to restrict somewhat the meaning of "patrol cars" in the 1974 award. The evidence is that, although there was originally some doubt, the parties treated that phrase (at the insistence of the Association) as including cars assigned to traffic patrol duty as well. In the view I have taken of the evidence of the safety factor, inclusion of these cars in my award would not be appropriate. There have been no homicidal attacks on traffic officers, and it would seem unlikely that the sort of unpredictable attacks which might occur would be prevented by having two officers in a car. It is true that traffic officers do some patrol duties and that they will be called upon to backup patrol officers, but in these cases the police procedures described above should provide protection as sure as two officer cars would. As their patrol activities would be only supplemental to the duties of the patrol area units, the specific problem of the increased risk during the peak period ought not to affect these officers. There was evidence of the accidental death of a traffic officer left alone at an accident scene. While I agree that there ought to have been another officer present, I cannot see that it would make any difference whether that officer arrived in the same or another car.
>
> I therefore award that:
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> "All uniform patrol cars, except those assigned to traffic duties, shall be manned by two fully trained and armed police officers while on patrol between the hours of 4:00 p.m. one day and 4:00 a.m. the following day, or during such other continuous period of twelve hours per day as shall be designated by the Commission to coincide with the period of peak patrol activity. This change shall be fully implemented within a period of ninety days from the date of this award."

Most arbitral reasoning is based on comparable standards — what is happening elsewhere. In this sense it is an inherently conservative process. By definition, problems of first consideration often lack any comparable standard. In such situations, therefore, is an arbitrator justified and suited to engage in a form of social engineering? Ought he or she to be innovative? What is innovative for one party can be absolutely disastrous for another. Moreover, innovation is often in the eye of the beholder. An innovative solution by a very conservative adjudicator may not be what employee representatives have in mind when they demand greater arbitral courage in this respect. On the other hand, in a "closed" system like police bargaining an adjudicator has no real choice unless prepared to simply say "No".

The first piece of legislation pertaining to firefighters was *The Fire Department Hours of Labour Act*[30] which was passed on June 4th, 1920 and took effect on January 1st, 1921. It was also in 1920 that the Provincial Federation of Ontario Professional Fire Fighters was established. By 1927 there were 27 branches of the Federation representing 90% of the paid fire departments in Ontario. Also in 1927 the first no-strike no-lockout article was inserted in its constitution. *The Fire Department's Act*, as we know it today, was passed in 1947 with the repeal of the earlier legislation[31].

The adjudication of salaries for fire fighters is a classic example of parasitic wage comparisons. Useful private sector comparisons cannot be made because of the unique nature of the work. Over time, however, wage relationships between local police and fire fighting salaries have developed with fire fighters' salaries following police salaries by a relatively constant differential. These types of comparisons, when measurable and constant, do afford workable criteria as their popularity in practice suggests but several factors impede their automatic utilization. Comparisons to others imply that the affected group will never be a wage leader. Further, if the whole industry or area of relevant comparison is subjected to arbitration on that basis, in time the entire adjudicative enterprise may "freeze" unless tied to a workable and external comparison. This is because comparisons depend on a regime of exchange for their vitality and in time such can be displaced by adjudication[32]. The importance of finding a "link" to the private sector for police bargaining is, therefore, crucial to the fire fighter. Unfortunately, the search for a stable and acceptable private sector comparison has not been very successful. While smaller police forces rely upon fair comparisons with the larger police forces of Ontario and larger forces rely upon salary relationships with other police officers across Ontario and across Canada, the circle of internal comparisons simply gets larger till it reaches the last internal comparison. From this point on attempts to "link" police salaries with other identifiable employee groups in the private sector have been fraught with problems. An example of the difficulty is revealed in the 1976 Metropolitan Toronto award of Professor Swan, already quoted above, where at page 60 he wrote:

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30 *S.O.* 1920, c. 88.

31 *S.O.* 1947, c. 37.

32 See D.J.M. BROWN, *op. cit.*, note 9 at p. 25.

Finally, I turned to the question of relativities with other groups of employees in other types of employment. This comparison may be the most difficult of all to make, and the parties set out a number of alternative approaches. The Association suggested, through Mr. Brown, a "link" whereby police salaries would be fixed to a set proportion of some other identifiable employee group and would follow the progress of that group in lock step; the basis of the proposal is the *British Royal Commission on the Police*, 1960 (Cmnd 1222) which proposed a direct link to the skilled trades. "Links" have been popular in Great Britain, where pay research methods have been carefully developed in the context of national bargaining patterns, but they have been very short-lived in Canada, even when successful. The long-standing, but now apparently defunct link between teachers in British Columbia and workers in the forest industry is a good example. Another approach, advanced by Professor Lightman, was a form of qualitative job evaluation where the elements of that technique were used to describe the differences in the work of various comparable occupations without the quantitative data which the technique is normally used to collect. Although I accept the bases of comparison he advances as relevant, I am of the view, as he himself observed, that the analysis is somewhat subjective.

"Reasonable people can reasonably disagree on the criteria selected on the particular comparisons to be made and on the details of these comparisons."

There are any number of policing jobs, and a composite picture of the police officer for the purposes of salary determination ought to be quantitatively based, so that appropriate weight is given to the factors which count highest in a job evaluation program, if a reliable result is to be produced.

Parasitic wage criteria are criteria that derive their sustenance from another bargaining process[33]. In relying on such criteria, care must always be taken not to use parasitic criteria that will in time undermine the very foundations of the adjudicative process. The real problem in police and fire wage determinations generally is their potential for devouring the very basis of adjudication. In Ontario police and fire arbitrations there is increasing evidence that the system is doing just this. All of the critical comparisons are centered on the experience of a few key bargaining situations and they lack stable outside comparisons. The entire system, therefore, rests on a foundation of shifting sand.

AD HOC INTERVENTION

Canadian constitutional law views municipal corporations as the creatures of statute; they possess neither inherent powers nor sovereign status. Accordingly, in the absence of a specific exclusionary provision, municipalities fall within the ambit of a general labour relations statute. By the mid 1960's municipal labour relations had been brought under private sector legislation in almost every Canadian province, including Ontario. There are no prohibitions on the right of Ontario municipal employees to strike, other than the general requirement that the conciliation procedure provided by *The Labour Relations Act* be exhausted. And on several occasions in recent years this right has been exercised, as for example in 1966, 1968 and 1972 when City of Toronto outside workers struck. Although these strikes potentially pose a serious threat to the community, since the employees in-

33 *Ibid.*, at p. 15.

volved include garbage men and operators of the sewage and water supply systems, in fact no danger has ensued. On only one occasion has the Ontario Government actually intervened, by *ad hoc* legislation, to require compulsory arbitration of a threatened strike of municipal hydro-electric employees[34].

The general model followed by the Ontario Legislature in ordering employees back to work on an *ad hoc* basis is to dictate some minimum percentage increase in wages effective immediately on the employees return to work, a technique apparently intended to insure co-operation and instill some confidence in the arbitration process. The arbitrator is then given jurisdiction to award any further or additional increase in compensation he thinks justified in the circumstances.

Despite the wide publicity that was given to strikes by municipal employees in Toronto in 1972 and in Hamilton in 1973 and by municipal transit employees in 1974, work stoppages in Ontario municipal governments have not been that numerous[35]. Of 5,033 strikes that occurred in Ontario between 1958 and 1979, municipal employees were involved in 112 or about 2% accounting for about 2% of the total employees involved and caused 0.8% of the man days lost. In only two cases has arbitration been used to settle the dispute — a Toronto municipal strike in 1972 and the Toronto Transit strike in 1974.

The *ad hoc* approach to compulsory arbitration can gain the confidence of labour and management where permanent machinery may not. The chairman of the arbitration board can be selected on the basis of his particular experience in the area of the dispute — and certain variations in the form of arbitration can be introduced as the situations require. The *ad hoc* choice of key chairman also means that the risk of stultifying precedents is minimized. The aura of uncertainty may also provide its own incentive for settlement[36]. On the other hand, Professor Arthurs has pointed out certain difficulties connected with reliance on special legislation. He writes:

> Ad hoc legislation is a dangerous business: It invites politicization of disputes; it changes the rules in the middle of the game — and is thus liable to be challenged on grounds of basic fairness; and does not afford the parties or the government any long term basis for resolution of difficult, structural problems. Moreover, for a government which generally looks to labour for support, reliance upon ad hoc legislation may simply not be a realistic possibility[37].

It might also be added that the risk of *ad hoc* legislation can cast a long shadow over public interest bargaining which more scapel-like permanent legislation avoids.

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34 See *The Toronto Hydro-Employees' Union Dispute Act*, S.O. 1965, c. 131.

35 Data compiled by the Research Branch, Ontario Ministry of Labour.

36 See MATKIN, *Government Intervention in Labour Disputes in British Columbia*, in Gunderson ed., *op. cit.*, note 18 at p. 98.

37 ARTHURS, H.W., "The Dullest Bill: Reflections on the Labour Code of British Columbia", 1974, 9 *UBCL Rev.* 280-340 at p. 294.

THE HOSPITAL LABOUR DISPUTES ARBITRATION ACT

The principle underlying collective bargaining in the public hospital sector is that each hospital is an autonomous unit responsible for signing and complying with the terms of a collective agreement. Bargaining entered into by a hospital on a group or province-wide basis is entirely voluntary; but, nevertheless, the historical development of bargaining in the hospital industry in Ontario reflects an appetite for wider area and, in some cases, province-wide bargaining. A number of factors have caused this result.

Originally labour-management relations in this sector were covered by *The Labour Relations Act* with the right to strike. And at that time, nurses and paramedical staff were virtually non-union. The only hospital employees organized into unions in any significant degree were service groups comprised of dietary, housekeeping, laundry, maintenance and stationary engineering employees. Indeed, many hospitals had no unions whatsoever. But in 1965 *The Hospital Labour Disputes Arbitration Act*[38] was enacted to protect the community from disruptions in the delivery of health care following the first strike in hospital bargaining at Trenton Memorial Hospital. The legislation applies to both public hospitals and nursing homes and homes for the aged.

While many might view this legislation as very restrictive, it is interesting to note that is also changed the climate for union organization of hospital workers and the financial ability of unions to launch organizing campaigns for new members. Statistics suggest that the newly found funds unions received from compulsory dues conditions awarded by arbitrators (that the hospitals had previously refused to concede), coupled with the elimination of any risk to employees of being called out on strike, led to considerable union success in organizing hospital units. As well, the Registered Nurses Association of Ontario support of nursing groups interested in collective bargaining rapidly led to the certification of many nursing bargaining units across the province[39]. Many technician and technologist groups also organized for collective bargaining and greatly increased the number of separate bargaining groups in the hospital field. The rapid escalation in the number of employees organized and the proliferation of separate bargaining units created, at least from the employers' viewpoint, whipsawing and leapfrogging pressures both within the hospitals and between hospitals. As each agreement was settled, either directly or by arbitration, it created a new plateau or floor for other negotiations related either geographically or by job similarity. In addition to these direct monetary costs, the numerous negotiations caused the collective bargaining expenses of both parties to rise sharply over this period.

This was the state of hospital bargaining in 1974 which led the Johnston Commission[40] to make recommendations for improvement in

38 *S.O.* 1965, c. 48.

39 See generally, *The Report of the Hospital Inquiry Commission*, ("The Johnston Commission") 1974, p. 36 et seq.; GLASBECK, "Compulsory Arbitration in Canada", in Lowenberg ed., *op. cit.*, note 10 at pp. 56-63; *The Impact of the Ontario Hospital Labour Disputes Arbitration Act* 1965: *A Statistical Analysis* 1970.

40 *Ibid.*

negotiation procedures by reducing the bargaining groups to three; service, nursing and paramedical. The Commission also supported province-wide negotiations on central matters with local issues being left for settlement within each hospital. The Commission's view was that the parties should work towards a system of province-wide bargaining on a voluntary basis rather than having the system imposed through legislation and it recommended that the bargaining agents work toward the goal of bargaining by way of a council of trade unions. However, the Commission stated that if the unions could not reach this goal voluntarily then it should be legislated.

Since the publication of the Johnston Report the parties have engaged in wider area bargaining and when impasses have necessitated compulsory arbitration, one or two arbitration awards have set the pattern for the entire industry whether by agreement of the parties at the outset of the arbitration or as a result of *de facto* collective bargaining pressures subsequent to the handing down of the award. Thus, while in 1976 it was reported that only 3% of all the agreements arrived at in hospital bargaining were the product of compulsory arbitration, it must be noted that the other 97% of these settlements designated as non-arbitrated were based almost completely on the few arbitrated agreements during that period. Thus, incidence of arbitration statistics provide a deceptive picture of the real impact of compulsory arbitration in hospital collective bargaining in Ontario[41]. Nevertheless, even when only arbitration incidence statistics are examined one does observe a discernable trend to greater reliance upon direct third party intervention. In 1976 we noted that only 3% of employees were directly subject to a compulsory arbitration award. In 1977 the number of employees increased to 16%. In 1978 Ontario experienced a dramatic increase in compulsory arbitration affecting 69% of all employees subject to collective bargaining that year and in 1979 48% of all hospital employees engaging in collective bargaining were subject to a compulsory arbitration award[42]. These statistics tend to bear out the corrosive and narcotic effect of compulsory arbitration. It is also undisputable that the incidence of compulsory interest arbitration is much greater than the incidence of agreements arising out of work stoppages or strike activity. (See page 16 herein.)

From the very inception of the legislation the extent to which bargaining parties in hospitals reached voluntary agreements has tended to decline. A study published in 1970, looking at the first five years of operation of the legislation, reported that in the two years prior to the legislation, approximately one-half of all settlements were made at the pre-conciliation bargaining stage and one quarter at the conciliation officers stage. Of the remaining 25%, half were settled by conciliation boards and half in post-conciliation bargaining. Only two strikes occurred[43]. When the Act came into effect, the proportion of non-voluntary agreements increased resulting in a greater incidence of arbitration awards than the previous incidence of strikes. Between August 1st, 1965 and July 31st, 1970 the number of ar-

41 For example, I think the DOWNIE study, *supra*, note 10 at page 59 overlooks this reality.

42 Data compiled by the Research Branch, Ontario Ministry of Labour.

43 *The Impact of the Ontario Hospital Labour Disputes Arbitration Act 1965: A Statistical Analysis*, at p. 3.

bitration awards per year grew from 13 to 39. In relative terms the growth in awards was less pronounced going from 15% of all settlements to 25%. However, since arbitration was introduced there appears to have been a general decline in the willingness of the parties to reach voluntary agreement, especially since mid-1969. Indeed, many of the issues presented to hospital arbitrators would never be strike issues in private sector collective bargaining, suggesting an unwillingness to make tough bargaining decisions or a ploy of leaving something for the arbitrator to "split the difference" with.

Compulsory arbitration under the *Hospital Disputes Arbitration Act*[44] has provided the greatest experience with interest arbitration criteria in Ontario. No criteria for the decision-making function of compulsory arbitration boards is outlined in the statute. In the first arbitration in 1965, the arbitrator, Professor H.W. Arthurs, adopted the approach that the arbitration process should try to come as close to producing what free collective bargaining would have produced as possible. Accordingly, he provided the following list of items which he felt might provide adequate guidelines to the adjudicative role he had accorded to hospital arbitrations awards[45].

1) Wages paid in "comparable hospitals", i.e. those of similar type in communities enjoying a similar cost of living and average wage level.
2) Trends in cost of living and average wages in the locality where the hospital is located.
3) Trends in comparable hospitals.

Of lesser weight, but also of importance were:

1) Difficulties encoutered by the hospital in recruiting and holding staff (some evidence of the hospital's failure to pay a level of wages high enough to attract workers on a local labour market).
2) Trends in non-comparable hospitals and in non-hospital occupations.
3) Trends in hospital wages generally.

Professor Arthurs then went on to say that little weight should be given to wage levels in non-comparable hospitals, wages in non-hospital occupations, and abstract appeals to justice. Unfortunately, as compulsory arbitration began to rely on voluntary made bargains that were comparable within the parameters of these criteria and such bargains were in turn based on the results of compulsory arbitration, a circular kind of reasoning began to undermine the integrity of the process. This reality caused boards of arbitration to begin to have regard to negotiations outside hospitals which were truly free of the distorting effects of compulsory arbitration. In the *Peel Memorial Hospital* case[46] Professor Weiler made this point in writing:

> After a time the arbitration decisions themselves become a major factor in determining the kinds of settlements which will be agreed to. With the relative uncertainty of a strike replaced

44 *R.S.O.* 1970, c. 208, s. 4.

45 *Welland County Hospital*, 1965, 16 L.A.C. 1.

46 1969, 20 L.A.C. 31.

by more predictable patterns in arbitration awards, the level of private agreement will tend to reflect the trends in the awards. If this is the case, one completes the vicious circle if the awards are themselves justified by patterns of wages arrived at by settlement. It is no longer possible as it was in the earlier decisions, to extrapolate from the status quo before the Act. Arbitrators must begin to have reference to negotiations outside hospitals which are truly free of the distorting effects of compulsory arbitration.

In an award involving the Toronto Wellesley Hospital in 1976, the arbitrator, Kevin M. Burkett, generalized this approach as it had developed in writing that equity in compulsory arbitration must flow from "community compensation standards"[47]. It was stated that if the tax paying public determines that it requires an uninterrupted service then it must be prepared to pay those who provide the service compensation commensurate with community standards[48]. Such standards were to be determined on the evidence by establishing a relationship between those affected by the adjudication and other jobs which reflected community compensation standards. However, the approach assumes the existence of constant and rational links between the private and public sectors and in many situations this assumption is highly debatable. Community compensation standards or parasitic criteria may be acceptable on one occasion because the result is acceptable. But when conditions change, their acceptability can be put into question. A good example of this lack of stability can be seen on the very next attempt to apply the *Wellesley Hospital* rationale.

The Wellesley Hospital board of arbitration was dealing with the compensation of registered nurses and in choosing a community standard the board chose the surrogate relationship between registered nursing assistants and registered nurses. This internal relationship was chosen because the registered nursing assistants had already settled with the hospitals and there appeared to be a historical relationship between the compensation of R.N.A.'s and R.N.'s during the previous two years of province-wide bargaining. The board reasoned that, first, a registered nursing assistant belonged to the same work group as a registered nurse; second, registered nursing assistants were members of a service unit which included classifications found in the private sector and hence the assumption of an indirect or parasitic relationship for R.N.'s with the private sector; third, registered nursing assistants were covered by a collective agreement extending to March 31st, 1978; and fourth, there was evidence before the board which established the existence of a historical differential of 74% to 75% between the start rates for the registered nursing assistant and registered nurse. In fact, on the basis of weighted average monthly rates, the parties themselves negotiated a differential of just under 75% for the 1975 calendar years.

Unfortunately, however, this approach had the effect of determining the compensation of more highly paid nurses by the compensation paid to lesser qualified and lesser paid registered nursing assistants where the wages of the registered nursing assistants were settled or determined first. In the

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47 *The Wellesley Hospital*, unreported, Kevin M. BURKETT, April 12, 1977, at p. 7.

48 For a more recent example of the same approach taken in the context of a police award see *The Metropolitan Toronto Police Association*, as yet unreported, Kevin M. BURKETT, June 4, 1980.

next round of bargaining for nurses this is exactly what happened and the nurses found the ONA settlement to be totally unacceptable in terms of the result that would be generated for them. With a key interest arbitration for nurses scheduled in June of 1979, the hospitals settled in March with the S.E.I.U. for 43 hospitals — a negotiated settlement affecting 8,100 service workers including the registered nursing assistants. This settlement was somewhere in the order of 5.6% annually and it was the first major settlement of the year in the hospital sector. It was also somewhat out of tune with annual base wage rate increases in Ontario manufacturing which were at about 7.6% and with the rate of inflation. Thus, in the June arbitration dealing with the nurses the employers requested Professor Swan, the arbitrator, to rely exclusively upon the settlement between 8,100 service workers in determining the general wage increase for over 18,000 nurses and relied heavily on the *Wellesley Hospital* award rationale of Arbitrator Burkett. In refusing to do so and thereby rejecting the "historical" 75% relationship between R.N.A.'s and R.N.'s, Professor Swan wrote:

> There are, however, other factors which ought to be taken into consideration in deciding whether this board can accept the S.E.I.U. settlement as an ironclad indicator of the appropriate salary range for registered nurses. First, and most important, the S.E.I.U. agreement covers only the 43 hospitals, whereas our award will, by virtue of the application of the "province-wide reality" to which we have referred above, cover some 133 hospitals. Another S.E.I.U. local in now at arbitration, and another major bargaining agent, the Canadian Union of Public Employees, is still negotiating for the registered nursing assistants which it represents and the rest of the hospitals to which we must have reference. There is no sign that the S.E.I.U. settlement will lead to an immediate replication of the terms of that settlement for R.N.A.'s elsewhere. It seems, therefore, that the circumstances which face the Wellesley Hospital arbitrators, in which most of the bargaining which would provide data for an internal comparisons study was completed are not those which face us at the present time[49].

The rest of the award, however, serves to demonstrate how imprecise criteria can be when arbitrating without the benefit of a key determining settlement and few arbitration awards which have attempted to reach beyond the isolated search for a comparable community standard have fared better[50]. One recent and important attempt to give some order to interest arbitration decision-making was undertaken by arbitrator Shime in *British Columbia Railway Company and Brotherhood of Maintenance of Way Employees, Caribou Lodge, 221 et al.* (1977)[51]. In that case he outlined a complex of additional considerations that any interest dispute adjudicator should take into account. They included:

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49 *Kingston General Hospital*, unreported, Kenneth P. SWAN, June 12, 1979, at pp. 22-23.

50 Also see K.P. SWAN, *Criteria In Interest Arbitration*, 1978.

51 Cited and reviewed in *York Regional Board of Health*, 1978, 18 L.A.C. (2d) 255, at p. 267.

1. Public sector employees should not be required to subsidize the community by accepting sub-standard wages and working conditions.
2. Cost of living.
3. Productivity.
4. Comparisons (a) internal,
   (b) (i) external — in the same industry,
   (ii) external — not in the same industry but similar work.

The most comprehensive attempt to develop a meaningful set of criteria and procedures for compulsory arbitration in Ontario is found in the Johnston Commission Report referred to above. The Commission recommended that the following criteria should be used in the settlement of terms and conditions of employment in collective agreements in public hospitals in Ontario:

> The need to ascertain and preserve appropriate relationships in the conditions of employment (a) as between occupations in public hospitals and (b) as compared to similar occupations outside the public hospitals with due regard for the labour market areas specified in appropriate legislation[52].

These criteria were to be embodied in *The Hospital Labour Disputes Act* and accorded equal weight by arbitrators. For the successful application of the first recommended criterion, the Commission recommended that a comprehensive and dependable job evaluation system be established. To achieve external comparability and to link hospitals with the private sector, the Commission recommended agreement between the parties on a set of benchmark occupations which were easily compared from establishment to establishment, i.e. cleaner, switchboard operator, stationary engineer and electrician. By negotiating compensation for such benchmarks, the parties to hospital bargaining were to be able to obtain settlements which reflected those in the private sector. Having negotiated the changes in benefits for the benchmark occupations, it was then thought to be a simple task to apply these increases to all other occupations in public hospitals in accordance with the relationships established by the proposed job evaluation system. However, the Commission went on to note that if external comparisons were to be meaningfully applied as criteria for setting hospital compensation, it was important to establish explicit labour market boundaries that were broad enough to afford a sufficient number of external comparisons. After examining statistical data by way of a job matching survey, the Commission was satisfied that in any area the size of one of the ten economic regions of Ontario or one of the 14 Ontario Hospital Association districts, an abundance of good external job matches could be found across a broad cross section of industries. In other words, the Commission did not see compulsory arbitration as leading to uniform wage rates across the Province. Finally, the Johnston Commission took the position that a resource centre to provide proper statistical information was necessary for the successful rehabilitation of compulsory arbitration in public hospitals. In the

52 *Op. cit.*, note 39 at p. 28.

Commission's view, if arbitrators were to base awards on the criterion of external comparability they must have access to reliable, independent and up-to-date comparative data on wages and benefits. In the absence of a pay research agency, the Commission was highly skeptical that the proposed legislative criteria would improve the performance of compulsory arbitration. It thought the absence of reliable outside comparisons would simply increase the risk of highly controversial decisions based on inadequate information. However, to date, these recommendations have not been acted upon.

THE PUBLIC SERVICE OF ONTARIO

The Crown Employees Collective Bargaining Act[53], provides for the compulsory arbitration of interest disputes involving civil servants. Section 3(2) of that Act provides that certain "bargaining units designated in the regulations are appropriate units for collective bargaining". Ontario Reg. 577/72, section 11, in effect establishes one large residual bargaining unit which embraces most provincial government employees who are entitled to collective bargaining. The Ontario Public Service Employees Union (O.P.S.E.U.) holds the bargaining rights for approximately 52,000 employees who fall within this massive bargaining unit — a unit which bears no resemblance to any other unit all of which are much smaller and more homogenous[54]. In order to couteract the adverse effects of bargaining size the parties, early on and by agreement, began to bargain separately for each of five broad occupational categories. They also made a distinction between benefits and working conditions and have negotiated each separately. In effect, the parties have thereby maintained uniformity in respect of benefits and other conditions of employment while establishing eight categories or bargaining groups, each of which negotiates separately in respect of salary scales.

Section 6 and 17(1) of the statute authorizes an employee bargaining organization to represent employees on specific terms and conditions of employment while excluding many others. Section 17(1) provides that every collective agreement shall be deemed to provide that it is the exclusive... function of the employer to manage and manage is defined to include:

(a) employment, appointment, complement, organization, assignment, discipline, dismissal, suspension, work methods and procedures, kinds and locations of equipment and classification of positions; and

(b) a merit system, training and development, appraisal and super annuation, the governing principles of which are subject to review by the employer with the bargaining agent.

The provision goes on to specifically provide that such matters will not be the subject of collective bargaining nor will they come within the jurisdiction of a board of arbitration.

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53 *S.O.* 1972, c. 135, s. 9, as amended by *S.O.* 1974, c. 135, s. 4.

54 See ARTHURS, *op. cit.*, note 15 at p. 111.

55 *S.O.* 1972, c. 67.

The Crown Employees Collective Bargaining Act[55], in contrast to the *Hospital Labour Disputes Arbitration Act*, sets out guidelines or criteria that a board of arbitration shall consider relevant in resolving matters in dispute. However, the criteria are extremely general and have provided no greater measure of predictability to the process. These criteria take the following form[56]:

(a) the needs of the crown and its agencies for qualified employees;

(b) the conditions of employment in similar occupations outside the public service, including such geographic, industrial or other variations as the board may consider relevant;

(c) the desirability to maintain appropriate relationships in the conditions of employment as between classifications of employees; and

(d) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered.

Unfortunately, there is no independent pay research body for Ontario public service bargaining to provide detailed and acceptable data. Therefore, the union and Government each have developed different statistical gathering procedures, although when benchmark jobs are negotiated, they normally agree upon a list of specific classifications and the number of employees in those classifications. Professor Arthurs has suggested that the differences in research material used by the parties may contribute to their failure to reach agreements[57]. Related difficulties have arisen from the parties' different interpretations of the same facts and the differences in value placed upon such factors as mobility and security of tenure. Possibly some of these differences could be resolved by the establishment of an independent pay research bureau supported by both parties as exists at the federal level. However, neither party seems particularly interested in seeking an independent bureau, both apparently taking the view that data and information supplied by a neutral agency would be subject to different interpretations in any event.

Statistics on the incidence of interest arbitration indicate a substantial dependence on the process. For example, in 1977 approximately 48% of all employees were subject to an arbitrated settlement and in 1978 some 25% of provincial employees were subject to arbitration. But in 1979 negotiations were very successful and 97% of all employees negotiating during that year were covered by non-arbitrated settlements. Overall, since 1963 when bargaining began, there have been 64 sets of negotiations; 29 have resulted in agreements achieved in direct negotiations; 15 have involved settlement at the mediation stage; and 20 or approximately 30% have gone to compulsory arbitration[58]. There is therefore a substantial reliance upon the interest arbitration process and an examination of some of these awards reveals that by the time the parties get to the arbitrator they are often very far apart.

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56 *S.O.* 1972, c. 67, c. 11(2), as amended by *S.O.* 1974, c. 135, s. 7.

57 See ARTHURS, *op. cit.*, note 15 at p. 117.

58 Date compiled by the Research Branch, Ontario Ministry of Labour.

On the other hand, there does not appear to be any overall discontent with the system. Although the O.P.S.E.U. has recently affiliated with the Ontario Federation of Labour and the most recent brief of the Ontario Federation of Labour to Government recommends that the right to strike be extended to Ontario's public servants, real employee interest in such a right is very debatable. But this is not to say that labour relations in Ontario's public service has always been tranquil. In 1974 an unlawful strike was threatened by the operating categories of civil servants in respect to which the Government responded with an offer of over 21% for one year. This situation and a similar incident involving hospital nurses suggest that in a highly bureaucratized collective bargaining structure real change seems to march hand in hand with crisis and confrontation. In order to achieve this crisis pitch in collective bargaining disputes must be elevated to the level of highly-charged and politicized confrontations. By the same token, in order to get law-abiding public servants to threaten an unlawful strike collective bargaining issues have to be converted into moral principles worthy of such action, a result which is really a negation of the ordinary collective bargaining process.

Neither under *The Hospital Labour Disputes Arbitration Act* nor under *The Crown Employees Collective Bargaining Act* is there a permanent and independent administrative tribunal responsible for interest arbitrations. Rather, boards of arbitration are established on an *ad hoc* basis and are manned by private arbitrators selected by the parties or appointed by the Government. There are advantages and disadvantages with this approach. The major disadvantage is a lack of consistency and expertise in the application of the relevant principles. Some arbitrators are more experienced in interest arbitration matters than others and not all arbitrators give the same weight to the various criteria that are relevant to any decision. This reliance on *ad hoc* boards of arbitration in Ontario may be symptomatic of an overall neglect of the arbitration process as may be the failure to establish independent pay research boards for the various industries or services dependent on compulsory interest arbitration procedures. On the other hand, one of the advantages of *ad hoc* arbitration boards is that arbitrators are not dependent upon interest arbitration cases for their livelihood. This latter feature of Ontario's system may mean then, that those who engage in interest arbitration are more independent and capable of making difficult decisions that a permanent tribunal would be. Similarly, no one group of arbitrators needs absorb the political buffeting and abuse that often comes with making interest arbitration decisions. Fortunately, one of the strengths of industrial relations in Ontario is the relative abundance of experienced independent arbitrators who are able to function in the arbitration process in a fairly sophisticated manner. They may make up for the lack of structural sophistication in Ontario's interest arbitration systems. At least one hopes this is the case.

TEACHER SCHOOL BOARD NEGOTIATIONS IN ONTARIO: AN ALTERNATIVE APPROACH

Until 1975, Ontario was the only province in Canada that lacked legislation governing negotiations between school boards and teachers. But after

more than five years of public discussion and labour relations conflict, Bill 100 was passed by the legislature on July 18th, 1975, and became known as *The School Boards and Teachers Collective Bargaining Act 1975*[59]. On the passage of this Act Ontario assumed a leadership role in public education collective bargaining[60].

The statute maintained, to a great degree, the traditional customs and practices developed in Ontario over the preceding 50 years in teacher-school board bargaining and this is one of the great strengths of the legislation. By not imposing a totally foreign system on the parties, the Province may have avoided the kind of adverse reaction that accompanied Great Britain's importation of Taft-Hartley a few years back. Negotiations continue to be carried on at the local level between the school and the members of the branch affiliates employed by the board. A branch affiliate, the local unit of one of the teacher organizations, includes all the teachers employed by a board who are members of the same provincial affiliate. Either local party, however, may obtain bargaining advice or assistance from outside sources, i.e. their respective provincial representatives. Agreements are for a minimum of one year and all become effective on September 1st and expire on August 31st. The scope of negotiations may cover any term or condition of employment, but no term of an agreement may conflict with existing legislation. Every agreement must include a grievance procedure to resolve disputes that may arise during the life of the agreement. At any time during negotiations, teachers and trustees may ask the Education Relations Commission (E.R.C.) for advice which usually means mediation assistance. A little more will be said about the Commission in a moment.

From an impasse resolution point of view, the most important feature of the Act is the teachers' right to strike. At the request of both teacher and trustee organizations, the Government granted the teachers the right to strike. A strike is defined to include a work-to-rule, mass resignations, and the withdrawal of services. The Act also permits a board to respond to strike action by locking out the teachers and closing the schools. However, before strike action can be taken, the fact-finding process prescribed by the Act must be followed, and the Commission must supervise votes of the branch affiliates both on the last offer received from the board and on whether the members favour strike action. The branch affiliate must also give the board at least five days notice prior to strike action. Finally, the Act specifically provides for the voluntary adoption by the parties of either conventional interest arbitration or final offer selection, which means that at any time during the negotiating process the parties, on mutual agreement, can opt for one of these two other ways provided by statute to resolve their differences.

The Education Relations Commission (E.R.C.) is composed of five persons appointed by the Lieutenant Governor-in-Council. It was established to supervise and co-ordinate the collective bargaining process as well as to provide a buffer between the political and the collective bargaining processes. The E.R.C. functions include:

59 *S.O.* 1975, c. 72.

60 See generally, B. DOWNIE, *Collective Bargaining Conflict Resolution in Education*, 1978.

(a) to maintain an awareness of negotiations between teachers and boards;

(b) to compile statistical information on the supply, distribution, professional activities and salaries of teachers;

(c) to provide such assistance to the parties as may facilitate the making or renewing of agreements;

(d) to select and where necessary to train persons who may act as mediators, fact finders, arbitrators or selectors;

(e) to determine at the request of every party or in the exercise of its discretion whether or not either of the parties is or was negotiating in good faith and making every reasonable effort to make or renew an agreement;

(f) to determine the matter of evaluation and to supervise votes by secret ballot pursuant to the Act; and

(g) to advise the Lieutenant Governor in Council when, in the opinion of the Commission, the continuance of the strike, lockout or closing of a school or schools will place in jeopardy the successful completion of courses of study by the students affected by the strike, lockout or closing of the school or schools.

Since the inception of the Act there have been 997 bargaining situations. In only 29 cases has a strike occurred and in 47 situations the parties have opted for interest arbitration. Thus, arbitration has been mutually resorted to more often than economic action and the overwhelming majority of negotiations have been settled without the need for either terminal event. The results of final offer selection, where adopted, have been closely studied on occasion[61]. The indications are that final offer selection (F.O.S.) works best when it is agreed to as the method of dispute resolution from the outset of bargaining, thereby generating the kind of pressures for reasonableness encouraged by potential economic conflict. It has also been pointed out that while issue-for-issue final offer selection avoids the possibility of an arbitrator having to choose between two unreasonable contract proposals, it does not generate the same kind of pressures that help avoid the need to go to arbitration in the first place. The experience has also been that F.O.S. is less expensive and more expeditious than conventional interest arbitration. I assume this results from the capacity of the parties to telescope their presentations in respect of the justification of a single package configuration. F.O.S. also stresses overall reasonableness as the preeminent criterion for selection and thus encourages parties to keep this factor in mind throughout their collective bargaining relationship. A final important feature of F.O.S. is that it apparently reduces the absolute number of issues that need to be arbitrated in any particular situation.

One of the most significant interest arbitration awards handed down in teacher board bargaining, albeit it was legislated on an *ad hoc* basis, arose out of the Metro Toronto school teachers' strike in 1975. This was the first major strike testing the legislation. After the strike had been in progress for some six weeks, the E.R.C. assigned a three-man mediation team to attempt a resolution but the team's efforts failed. Mr. Justice Dubin of the Ontario Court of Appeal was then appointed to adjudicate the matters remaining in

61 See S.A. BELLAN, "Final Offer Selection: Two Canadian Case Studies and an American Digression", 1975, 13 *Osgoode Hall L.J.* 851-878.

dispute. He took the view that it was not his role to "split" the differences between the parties. He also announced that he would make no effort to mediate the outstanding matters because he thought it was inappropriate to do so in an arbitration and because every possible mediation device had been unsuccessfully inflicted on the parties in any event. Mr. Justice Dubin's resulting award is an important decision in interest arbitration decision-making but it reveals that even a brilliant jurist is unable to overcome the imprecision that afflicts decision-making criteria in this area. Bill 1, the back-to-work legislation, did not provide any criteria[62] and the learned Justice noted that there did not appear to be any uniformity over the criteria that had been used in past arbitrations dealing with employees in the public sector. Accordingly, he constructed his own yardsticks which included the following considerations[63]:

1. The overall compensation presently received by employees involved in the arbitration proceedings including direct wage compensation, vacations, holidays and other excused time, insurance, pension, medical and hospitalization benefits, continuity and stability of employment, and all other benefits received;
2. A comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally, (1) in public employment in the community, and (2) in private employment in the community;
3. A comparison of the wages, hours and conditions of employment for the employees involved in the arbitration proceedings with the wages, hours and conditions of employment with other employees performing similar services within the same municipality and in comparable municipalities;
4. The average consumer price for goods and services commonly known as the cost of living;
5. Changes in any of the foregoing factors during the relevant period of time;
6. The economic climate of the day including consideration of gross national product and of the gross provincial product;
7. The interest and welfare of the public, and the financial ability of those who are called upon to pay the cost of the services being rendered.

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62 *The Metropolitan Toronto Boards of Education and Disputes Act*, 1976, *S.O.* 1976, c. 1.

For similar legislation see also:

The Kirkland Lake Board of Education and Teachers Dispute Act, 1976, *S.O.* 1976, c. 3.
The Central Algoma Board of Education and Teachers Dispute Act, 1976, *S.O.* 1976, c. 25;
The Sault Ste. Marie Board of Education and Teachers Dispute Act, 1976, *S.O.* 1976, c. 26;
The Windsor Board of Education and Teachers Dispute Act, 1976, *S.O.* 1976, c. 78.

63 *The Borough of Education for the Borough of East York et al.*, unreported, Mr. Justice DUBIN, March 3, 1976, at pp. 22-23.

Teacher-school board collective bargaining is significant in Ontario because it demonstrates the capacity of an essential service to function in a right-to-strike context. It also demonstrates a pragmatic style of government in respect to labour relations, tailoring legislative solutions to the needs of particular parties.

CONCLUSION

Against this background it would be rash to attempt to characterize the ethos of compulsory arbitration in Ontario in a word or a phrase. The theoretical debate is not dispositive and more philosophical justifications for compulsory arbitration have had their impact on a "hit-and-miss" basis as interest group pressures have been brought to bear on the political process. Logical explanations are, at times, difficult to come by. It can be seen that weaker groups of employees are becoming increasingly in favour of compulsory arbitration as are various scientific and professional employees. This raises the general policy question of whether interest arbitration ought to be available to any employer or trade union who so elects to go this route. First contract arbitration is an interesting mid-way position.

There also exists a relatively high degree of satisfaction with compulsory interest arbitration by those employees in Ontario who are subject to the process. Indeed, one study examining *THe Hospital Labour Disputes Act*[64] found that sixty-six percent of the people that belonged to unions seemed satisfied with the disposition made by arbitrators and seventy-five percent of their management counterparts indicated satisfaction. In addition, there can be little doubt that compulsory arbitration has had the desired effect of reducing the number of strikes. Against all of this it can be seen that the cases for and against the use of interest arbitration are mixed and essentially depend on timing, context and attitude.

Interest arbitration is, however, a blunt and conservative instrument. Solutions to complex problems are not easily achieved and breakthrough bargaining is unsuited to it. Arbitration also tends to be a labour market leveler sometimes producing wage compression conflict between various groups of employees. The process also insulates collective bargaining in the public sector from the legitimate claims of other interest groups who are excluded from participating in decisions which impact on them. At least in a free collective bargaining regime these interests can try to influence the employer (i.e. Government) who is politically accountable for its action. But none of this is to deny that there is little evidence interest arbitration has had a significant economic impact over and above what free collective bargaining has incurred; that it has reduced the incidence of strike action; and that its presence may actually have encouraged the spread of collective bargaining throughout the ranks of salaried professional, technical and clerical employees. All of which leaves us with the problem we set out to address — that of "detecting (appropriate) policy".

64 *The Impact of the Ontario Labour Disputes Arbitration Act*, 1965, *supra*, footnote 39.

TAB 34

8:620 Interest Arbitration

This section looks at "interest" arbitration, as opposed to "grievance" arbitration. Interest arbitration, sometimes called compulsory arbitration, is designed to replace the strike as the mechanism for resolving bargaining disputes. If the parties cannot agree, work continues and an arbitrator sets the terms that will govern their future relationship, in effect writing their collective agreement for them. In contrast, grievance arbitration, which will be examined in Chapter 9, involves the application of an existing agreement where one party alleges that the other has violated that agreement.

Mediation is often used prior to arbitration, in order to clear away as many issues as possible. In a variant known as "med-arb," the arbitrator first tries to mediate the dispute, then adjudicates those issues that *remain* unresolved.

Allen Ponak & Loren Falkenberg, "Resolution of Interest Disputes" in A. Sethi, ed., *Collective Bargaining in Canada* (Scarborough, Ont.: Nelson, 1989) 260 at 272–86 (references omitted)

The rapid growth of public sector collective bargaining in the late 1960s and throughout the 1970s presented policy makers with a new dilemma. While the right to strike was well entrenched in the private sector, substantial reservations existed about permitting public employees to withdraw their services. The basis for these reservations was essentially twofold: (1) a belief that public sector work stoppages, involving irreplaceable and in some cases essential services, would place an intolerable burden on the public; and (2) a perception that the combination of political and economic pressure generated by public sector strikes would place too much power in the hands of public employee unions.

The dilemma arose in finding substitutes for the right to strike. A number of American states had prohibited public sector work stoppages but had failed to provide mechanisms for the final resolution of impasses. This approach simply resulted in illegal strikes. Most Canadian jurisdictions, on the other hand, opted for some form of compulsory arbitration when the right to strike was removed by statute. By and large, arbitration accomplished the objective of eliminating work stoppages. Illegal strikes have occasionally taken place in the face of arbitration (a well-publicized example is the Montreal police strike in 1969), but such occurrences have constituted rare exceptions. Canadian public employees, albeit with great reluctance in some cases, have accepted the prohibition on strikes where arbitration is available as a substitute.

Unfortunately, compulsory interest arbitration, while alleviating concern about public-sector work stoppages, presents a number of problems of its own. Industrial relations systems in virtually all democratic countries place a high premium on permitting labour and management to negotiate their own collective agreements through the give-and-take of the bargaining process. Almost all available evidence suggests that compulsory arbitration systems reduce the likelihood that the parties will in fact be able to reach an agreement at the bargaining table. . . .

Three major reasons have been advanced to explain why compulsory arbitration reduces the likelihood of negotiated settlements. First, interest arbitration generally produces a lower cost of disagreement than does a strike. Put another way, the fear of going to arbitration is usually less than the fear of a work stoppage. Part of the reason parties settle in negotiations under right-to-strike systems relates to the substantial consequences of not settling. Strikes are usually expensive and painful propositions for the worker, the employer, or both. The same is less likely to be true in an arbitration system where the consequences of actually using an arbitrator may not be particularly onerous. In short, the threat of a strike is a powerful inducement to settle; arbitration systems lack such an inducement.

A second factor that is thought to inhibit negotiated settlements under arbitration systems is the fear that concessions made during bargaining may prove harmful if an arbitrated settlement is eventually required. Whether well-founded or not, a widespread perception exists that arbitrators 'split the difference' between the two parties' positions in arriving at their decisions. Accordingly, negotiators are reluctant to make bargaining concessions that might narrow the differences to their side's detriment; thus, there is a tendency to adopt extreme positions and maintain them. The inhibiting impact of arbitration on compromise activity is frequently referred to as the chilling effect.

The third major reason advanced for the reduced incidence of settlement under arbitration systems is that arbitration is habit forming. It is suggested that negotiators become accustomed to rely on arbitration as an easy way out of making difficult decisions and eventually lose the ability to settle in negotiations. This tendency has been referred to as the narcotic effect, with negotiators becoming 'addicted' to the arbitration process. As time passes, fewer and fewer settlements are achieved at the bargaining table as the temptation to rely on the 'quick fix' of an arbitrated agreement becomes irresistible.

USE OF ARBITRATION IN THE CANADIAN PUBLIC SECTOR

. . . Arbitration is most likely to be obligatory for fire fighters, police, and civil servants. At the other end of the spectrum, it is not mandated in any jurisdiction for general municipal employees (i.e., inside and outside workers, local transit).

The most commonly used form of interest arbitration in Canada is the traditional or conventional form of arbitration. Under conventional arbitration procedures, the arbitration board is free, after receiving submissions from the union and the employer, to fashion its solution to the issues in dispute. The board is permitted to accept the union or the employer position, it can split the difference down the middle, or it can derive its own compromise position on the issues. Subject to very broad constraints of reasonableness, the arbitration board can issue the award it feels is most appropriate under the circumstances and that award becomes the new collective agreement.

Although rarely used in Canada, many jurisdictions in the United States use a form of arbitration called final offer selection (FOS). Final offer selection differs from conventional arbitration in that the arbitrator is required to choose the position submitted by management or by the union, without alteration. In other words, the arbitration board is not free to fashion its own solution by adopting a middle position; it is forced to choose one side's proposal or the other's. Depending on the jurisdiction, a total package format or more flexible issue-by-issue format is used. . . .

A third type of arbitration system, choice of procedures (COP) was pioneered in the 1967 Public Service Staff Relations Act, which granted collective bargaining rights to federal civil servants. It continues to be used in the federal sector as well as British Columbia, Saskatchewan, and some American states. Under a choice-of-procedures system, one of the parties (in Canada, the union) can specify at some point prior to or during negotiations whether an impasse will be resolved through a work stoppage or arbitration. . . . Experience has shown that arbitration is chosen much more frequently than the strike. . . .

SETTLEMENT RATE

There is little disagreement that arbitration systems reduce the incidence of negotiated settlements compared to strike-based systems. The most meaningful comparisons in this regard are among public sector jurisdictions. . . .

The major variable of interest . . . is settlement rate, defined as the proportion of negotiations that are settled by the parties without resort to the final mechanism of dispute resolution. Under arbitration systems, this would be the proportion of negotiations in which no arbitration award was issued; under right-to-strike systems, settlement rate means the percentage of negotiations where settlement was achieved without a work stoppage. . . .

. . . The broadest data set [for public sector systems with the right to strike] is for the province of Ontario and covers over 600 negotiations during a four-year period [1979–82] for teachers, hydro-electric utility workers, and municipal employees (including mass transit). The Ontario data show a settlement rate of 93 percent, a figure that appears to be a reasonable median rate for public sector strike-based systems.

. . . Under conventional arbitration, the ability of labour and management to settle without the help of an arbitrator ranges between 65 and 82 percent. The average settlement rate would appear to be approximately 75 percent. The settlement rate goes up to the 85-percent range under final-offer selection, but still falls short of settlement rates achieved under strike-based systems.

The data, therefore, unequivocally supports the proposition that arbitration systems reduce the likelihood of negotiated settlements compared to strike-based dispute procedures. The gap between the two systems is approximately 18 percent under conventional arbitration and eight percent under final-offer selection procedures.

The data cannot answer the policy question, however, of whether the settlement rate difference between strike and arbitration systems is acceptable or not. . . . After all, even under the least productive arbitration systems, negotiators still manage to settle without arbitration two-thirds of the time. The fact that one out of three negotiations requires an arbitrator's intervention may well be a price that has to be paid for the overall public good. Such tradeoffs might be less palatable, however, in situations where settlement rates are much lower or where the groups involved are arguably less essential.

THE CHILLING AND NARCOTIC EFFECTS

The theoretical underpinnings of the perceived inadequacies of interest arbitration rest on two related concepts, the chilling and narcotic effects. . . . Chilling is assumed to occur

when one or both parties are unwilling to compromise during negotiations in anticipation of an arbitrated settlement; the narcotic effect is an increasing dependence of the parties on arbitration, resulting in a loss of ability to negotiate. . . .

[The authors then discuss several empirical studies on the chilling effect and narcotic effect, and observe that the findings of those studies are generally inconclusive.]

The most common method of assessing the narcotic effect is the proportion of units going to arbitration over time. It is assumed that if arbitration is addictive, more and more units will resort to it with each round of negotiations. . . .

In summary, the empirical research suggests that: (1) a chilling effect may occur with conventional arbitration but is less likely with final offer selection; and (2) while some parties may become dependent on arbitration (narcotic effect), the majority does not repeatedly use the process. These conclusions notwithstanding, there remains considerable confusion among studies in terms of inferences drawn with much of the confusion relating to a lack of clarity over appropriate measures. . . .

James O'Grady, *Arbitration and Its Ills* (Kingston, Ont.: School of Policy Studies, Queen's University, 1994) at 5–35 (bibliography at end of excerpt)

2 WHAT WE BELIEVE WE KNOW ABOUT ARBITRATION IN THE PUBLIC SECTOR

Experience with mandatory arbitration in both Canada and the United States has produced a considerable body of research literature. This literature evaluates the impact of arbitration and examines the criteria that shape arbitrators' awards. This section of the paper endeavours to summarize the principal conclusions and observations that have emerged from the research literature.

1. *Although research findings are not unanimous, the weight of evidence supports the view that arbitration has an upward bias on relative wages in the public sector. . . .*

Surveying the literature in 1983 for the Ontario Economic Council, Gunderson concluded that 'the evidence on the effect of arbitration on settlements is mixed . . . but most [find] a slight positive effect'. . . .

A more recent study supports the Gunderson view. This study, carried out by Currie and McConnell, is the most extensive, empirical review of Canadian experience with compulsory arbitration. Currie and McConnell reviewed the results of collective bargaining in 426 large public sector units, i.e., bargaining units with more than 500 employees. They further confined their survey by the requirement that bargaining units must have negotiated at least four agreements over the period 1964 to 1987. Currie and McConnell conclude that 'on average, wage settlements are highest under compulsory arbitration.' They estimate that 'a switch from right-to-strike to compulsory-arbitration legislation increases wages by between 1 and 2 percent of the wage or by between 6 and 12 cents [per] year of

settlement.' The 'arbitration premium' estimated by Currie and McConnell is higher than that suggested by other studies. . . .

2. *There are significant variances among arbitrators in the weight that they attach to different criteria. . . .*

3. *Productivity, ability-to-pay and labour market disequilibria factors play little role in shaping arbitral decisions.*

This finding is consistent across studies. D.A.L. Auld et al. concluded that arbitrators' awards were determined by factors that were different from those shaping negotiated wage increases. In his review of public sector wage determination for the Anti-Inflation Board, Gunderson found that ability-to-pay, productivity and minimum living standards ranked among the least important factors in determining arbitrated wage increases. Ontario arbitrator Martin Teplitsky stated his position unequivocally in a 1981 award determining the wages for Windsor police officers. In that award, he wrote that 'the ability of the employer to pay in the public sector is irrelevant'. . . .

Arbitrators have not, in general, attached weight in their awards to such disequilibria indicators as 'job queues' or 'quit rates'. . . .

4. *Comparability factors carry, by far, the greatest weight in arbitrators' decisions. Indeed, so great is the weight attached to comparability that it tends to marginalize other criteria.'*

The classic statement of the importance of comparability was set out by Harry Arthurs in an award handed down shortly after the Ontario legislature enacted the *Hospital Labour Disputes Arbitration Act* in 1965. In that decision Arthurs wrote:

> instead of permitting the parties to discover labour market realities by a withdrawal of labour, they are instructed to submit to arbitration. But arbitration is made to substitute for the strike and should therefore likewise be considered an exercise in discovering labour market realities. This being so, it is to relevant wage comparisons that we must look.

Empirical studies confirm the importance of comparability factors. . . . Currie and McConnell . . . conclude that comparability factors are twice as significant in determining wage increases where the right to strike is superseded by arbitration. This finding applies both when wage increases are arbitrated and when they are bargained. In other words, it is the availability of arbitration, not the fact of arbitration, that causes comparability factors to be so important. Swimmer notes that comparability leads most arbitrators to give more weight to wage increases among unionized employers than to economy-wide trends. This biasing of comparability towards unionized employers arises from the predominant view among arbitrators that arbitration's purpose is to replicate a bargained outcome, not an outcome that proceeded from unilateral determination by an employer.

The weight attached to comparability can, however, lead to serious tensions. Harry Arthurs warned of these tensions in his *Welland County Hospital* decision. Arthurs suggested that basing arbitration awards on settlements negotiated at other hospitals would become 'increasingly artificial after all hospital wages have been determined one or more

times by compulsory arbitration.' Paul Weiler echoed this concern in a 1969 decision. He wrote:

> after a time the arbitration decisions themselves become a major factor determining the kinds of settlements which will be agreed to. . . . The level of private agreement [i.e., non-arbitrated settlements] will tend to reflect the trends in the awards. If this is the case, one completes the vicious circle if the awards are themselves justified by patterns of wages arrived at by settlement. . . .

5. *Arbitrators do not appear to attach significant weight to deferred compensation, viz., the costs of providing pension benefits and termination benefits. Nor do arbitrators assign any special importance to implied commitments to annual merit increments or to greater degrees of job security. The costs of pay equity adjustments do not appear to have affected arbitration awards. Directing arbitrators to consider 'total compensation' appears to have comparatively little impact on arbitral practice. . . .*

6. *Arbitration is rarely chosen freely by the parties to a collective agreement. It is especially rare in the private sector.*

The parties to a collective agreement are always free to choose arbitration to resolve an impasse in bargaining. The evidence, however, is that they rarely do so. . . . The federal *Public Service Staff Relations Act* is unique in providing the union with a choice of routes to resolve a bargaining impasse. The evidence from the *PSSRA* is that in the initial years, unions were more inclined to choose arbitration. However, union attraction to arbitration declined over time.

Except when back-to-work legislation is enacted, arbitration in the private sector is exceptionally rare. The important exception is the provision in some labour codes for arbitration of first agreements. These provisions are typically triggered by a union in a weak bargaining position. . . .

To say that both employers and unions in the private sector do not voluntarily choose arbitration is to understate their antipathy to third parties determining the provisions of their collective agreements. Morley Gunderson captured the views of both unions and employers in the private sector:

> The fact that voluntary arbitration is rare in the private sector . . . indicates that labour and management, when not compelled to do otherwise, almost invariably prefer the costs and consequences of a possible strike to the uncertainties of an arbitrated settlement. . . .

. . .

9. *Mandatory arbitration appears to diminish the proportion of settlements achieved through negotiation.*

The evidence for this was discussed in the first part of this paper. It was noted that under compulsory arbitration, voluntary settlement rates fall from approximately 93 percent to 70 percent.

10. Arbitrators tend to award conservatively on non-compensation issues.

While the impact of arbitration on wages has been studied extensively, there has been no systematic examination of arbitral treatment of non-compensation issues. Generally, seniority rules tend to be much weaker in the public sector than in the private sector. As well, classification systems are more likely to be managerially determined. Public sector collective bargaining, therefore, may be judged 'conservative' to the extent that it has not significantly disrupted the pre-collective bargaining *status quo* on these issues.

Arbitrators may be reluctant to alter managerial practice lest their awards lead to unintended effects. Indeed, some adjudicators have criticized both unions and management for putting issues before arbitration boards which a third party is presumptively less capable of understanding than the parties themselves. Arbitration is clearly not a process that exhibits a propensity to be innovative. Indeed, being risk averse, the parties probably do not wish arbitration to be innovative. It seems likely that the disinclination of arbitrators to be innovative, along with the diminished incentive that arbitration gives to the parties to reach voluntary settlement, imparts a degree of conservatism overall to human resource management. . . .

3 COMPULSORY ARBITRATION IN ONTARIO

. . . Paul Weiler commented that 'advocacy of binding arbitration is now de rigueur across a wide spectrum of opinion among politicians and pundits. They consider arbitration not a painful necessity, but a positive virtue.' Ten years later, the pendulum appears to have swung. The desire to escape from the perceived upward bias of wage arbitration may now rank alongside with, or even take precedence over, the concern for stability that led to the legislated imposition of interest arbitration in the first place.

Legitimacy

A system of wage determination that is viewed as 'rigged' against workers will suffer a loss of legitimacy in the eyes both of those workers and others who sympathize with them. The benchmark by which wage determination systems are viewed is free collective bargaining, viz., collective bargaining that is not subject to third-party review or adjudication. Any system of wage determination that departs from the free collective bargaining model is potentially subject to an erosion of legitimacy. This is particularly true of compulsory arbitration and post-settlement reviews of wage agreements. Presumptively such systems risk a loss of legitimacy if they lead to wage increases that are generally below the averages being achieved in the private sector.

When employees view a system of wage determination as 'rigged' against them, a potentially significant instability is introduced. The possibility of defiance becomes real. Ontario had five such episodes between 1974 and 1981.

Legitimacy is an intangible and immeasurable characteristic of a wage determination process. It is not readily susceptible to social science investigation. Legitimacy is nonetheless an important goal of public policy. Proposals that would address a perceived upward bias in wage arbitration at the expense of legitimacy are unlikely to prove durable.

Efficiency

Agreements negotiated by the parties are presumptively more likely to be workable than arrangements imposed by a third party who is often inadequately informed and has only a limited stake in the terms being awarded. Most of the economic analysis of collective bargaining and arbitration dwells on measurable compensation. Collective bargaining, however, addresses significantly more than wages and benefits. In addition to matters involving job security and seniority rights, a collective agreement may also address job duties, occupational health and safety and staffing levels. Paul Weiler has noted a tendency for contentious public sector issues such as classroom size and two-person police cars to wind up in front of an arbitrator. In other situations, arbitrators have been called upon to address such issues as staffing levels in hospital wards or in correctional institutions. Setting aside accountability questions, these are topics that may be ill-suited to determination by a third party. . . .

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An important example of the declining use of interest arbitration in recent years is provided by the Ontario public service. Until 1993, provincial Crown employees in Ontario had no right to strike, and were covered by arbitration. Faced with a very large and growing budget deficit, and believing that arbitration meant higher wages and decreased managerial flexibility, the New Democratic Party government, against the wishes of the Ontario Public Service Employees' Union, passed the *Crown Employees Collective Bargaining Act, 1993*, S.O. 1993, c. 38. That Act ended the system of interest arbitration for most of the public service, replacing it (in section 28) with a right to strike substantially more restricted than the equivalent right under the *Labour Relations Act*. Among the most important of the restrictions on the right to strike is an extensive procedure (sections 30–42) with respect to essential services. That procedure includes a requirement (which in some respects parallels the provisions in the Quebec and British Columbia statutes discussed above, section 8:610,) that the parties attempt to negotiate agree-

ments for the provision of essential services in the event of a strike. This requirem
led to many months of arduous bargaining after the Act was passed.

A Conservative government came into office in Ontario in 1995, in time for the
round of strike-route negotiations. It promptly amended the *Crown Employees Collec*
Bargaining Act, 1993 to impose further restrictions on the right to strike. In 1996 a
ter five-week strike ensued, and the negotiated settlement left the government with c
siderably more flexibility to downsize and otherwise restructure the public services.

For an analysis of current problems facing public sector labour relations, includ
some discussion of the future of interest arbitration, written by an architect of the Cr
Employees Collective Bargaining Act, 1993, see P. Warrian, *Hard Bargain: Transform*
Public Sector Labour-Management Relations (Toronto: McGilligan Books, 1996). On
Ontario Conservative Government's effort to change some aspects of the dynamics
interest arbitration referred to above by O'Grady, by requiring that the arbitrators be ch
sen from a group of retired judges rather than from among the usual candidates, see
Canadian Union of Public Employees v. Ontario (Minister of Labour) 2003 S.C.C. 29.

Chapter 9: The Collective Agreement and Arbitration

9:100 INTRODUCTION

If the collective bargaining process discussed in Chapters 7 and 8 brings a settlement, the terms will be embodied in a collective agreement (sometimes informally called a "contract") between the union and the employer. This chapter deals with the enforcement of such agreements, first at common law and then under modern labour relations legislation.

Disputes over the interpretation and application of collective agreements are commonplace. An employee may claim that the agreement was violated when he or she was disciplined, rejected for promotion, laid off, denied benefits, or subjected to some other unwelcome treatment. A union may challenge a management practice affecting the workforce at large, or affecting the union in its role as bargaining agent. Or, less commonly, an employer may claim that the union has not met its obligations under the collective agreement.

Modern Canadian labour relations legislation does not permit a power contest over disputes of this sort. Strikes and lockouts are banned during the term of a collective agreement, and every agreement must provide a dispute settlement process to resolve disputes over whether the agreement has been complied with. Some statutes specify that this process must take the form of grievance arbitration. However, even where arbitration is not specifically mandated, it is used almost universally because no practical alternative has been found.

Collective agreements almost always provide for an informal grievance procedure through which the parties attempt to resolve their disputes without resorting to arbitration. If a grievance is not resolved in this way, either party may invoke arbitration, as a form of third-party adjudication. Arbitrators make legally binding rulings based upon evidence and argument presented by the parties in an adversarial hearing. The parties to a dispute normally choose the person who will act as arbitrator. Tripartite boards of arbitration (consisting of a nominee of each party and an impartial chairperson) were widely used at one time, but single arbitrators are now more common in most jurisdictions.

Mandatory grievance arbitration is often said to be the *quid pro quo* for the ban on mid-contract work stoppages, in the sense that a union is required to give up the strike as a means of enforcing the collective agreement but gains access to arbitration in exchange. This notional bargain has no parallel in the commercial world, where contracting parties are free to use both economic warfare and legal proceedings. As we will see, the idea of a notional bargain also overlooks issues not addressed by the collective agreement, over which strikes are not permitted and over which arbitrators have no jurisdiction.