Update

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JULY 1999

STRIKES IN THE PUBLIC SECTOR IN THE SECOND MILLENNIUM - EMPLOYEE RIGHT OR GOVERNMENT POLICY?

THE CAMBRIDGE LECTURES 1999
Canadian Institute for Advanced Legal Studies

Queen's College,
University of Cambridge

July 16, 1999

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I. INTRODUCTION

The right to strike in the public sector has been a longstanding controversial issue in Canadian labour law. As public sector compensation attracts more attention from government, this issue will continue to vex labour relations practitioners and academics. The conventional wisdom of today is that limited government is better and that government expenditures should be restrained. No doubt, this direction has had a direct impact upon public sector employment and compensation. The method by which public sector bargaining disputes are resolved will become a more important government policy.

Indeed, recently Canada has been experiencing a number of public sector strikes as governments gain more access to revenues because of generally improving economic conditions. This is particularly so in the health and education sectors in which nurses and teachers have received little or no economic increases since the early 1990's. Whether these strikes are lawful or not, they are symptomatic of the recurring need to focus upon the appropriate method to resolve bargaining impasses in the public sector.

Although the right to strike of public servants is in question, the right to bargain collectively has been well established in Canada. It is unlikely that there will be any inroads on the rights of public servants in this regard. This article shall focus for the most part on the jurisdictions of Canada and Ontario. In both of these jurisdictions the right to bargain collectively has been enjoyed by public servants for about three decades.

The question of whether public servants or broader public servants should have the right to strike unfortunately raises an ongoing philosophical debate which is based on limited empirical evidence as to the impact of public service strikes. Most frequently the answer to this question is based on political biases rather than economic or labour relations realities. The public perception is that most governments prefer a system whereby the right to strike is replaced with the right to arbitrate. For the most part, the public assumes that the right to strike has been conferred upon public servants at their urging and to the dismay of governments. My thesis is that governments in fact prefer public servants to have the right to strike for a number of reasons which ultimately advantage the government's position as employer and regulator of the economy.

II. BACKGROUND OF COLLECTIVE BARGAINING AND THE RIGHT TO STRIKE IN THE PUBLIC SECTOR

In general, there are five legal regimes providing for the determination of terms and conditions of employment for public servants. First, there is the regime under which there are no bargaining rights at all. In these jurisdictions, working conditions are dictated by regulation or legislation. Secondly, there are some jurisdictions which provide for some limited bargaining rights. However, any bargaining impasses will be determined by the government. Thirdly, there are jurisdictions in which most public servants are treated as any other employees in the private sector with full rights to strike. Fourth, there are some jurisdictions which provide public servants with the choice of dispute settlement mechanisms, whether it be the right to strike or the right to arbitrate. Finally, there are those jurisdictions which prohibit employees from striking but substitute in its stead the right to compulsory arbitration. Both Canada and Ontario have variations of the last three alternatives.

Historically in Canada and Ontario, there have been separate collective bargaining statutes for the public service. Frequently, the broader public service fell under the general labour relations legislation. The broader public service encompasses those employees who are employed by government institutions or agencies apart from the federal or provincial governments such as municipalities, school boards, universities and so on. However, in Ontario, fire, police, health workers and teachers were covered by separate legislation in some or all aspects of their labour relations. Because of the various labour relations regimes applying to these different categories of employees, labour relations anomalies were created. For example, whether an employee had the right to strike normally depended upon the identity of his or her employer, rather than the nature of the job function. Prior to 1994, the Ontario public service was prohibited from striking. At the same time, many broader public servants fell under the general labour relations statute and maintained the right to strike. This led to absurd anomalies whereby essential public transit workers who could cripple a city like Toronto with a strike had the right to strike, but chauffeur drivers for politicians and senior bureaucrats did not. Similarly, liquor store employees could not strike while employees in beer stores did have the right to strike. The janitorial staff at city hall could strike but the same staff at Queen's Park could not. The anomalies were endless.

This situation ultimately led to recent legislative changes so that most public servants now have the right to strike in Ontario. Moreover, in the last few years, the Ontario government is bringing in more and more public sector and broader public sector employees under the general labour relations statutes. The changes being made clearly indicate a government preference for the right to strike as the appropriate dispute settlement mechanism to resolve bargaining impasses in the public sector.

III. ATTITUDES TOWARDS COMPULSORY ARBITRATION AND THE RIGHT TO STRIKE

As we approach the new millennium, many Canadians view the right to strike as an outmoded method of resolving bargaining disputes. This is particularly true in respect of public servants. There are concerns as to whether the traditional rules of collective bargaining apply in the government sector. It is argued that government provides monopoly services and when these are interrupted by a strike, the union is in effect "holding the public hostage".

In this regard it is useful to refer to the recent strike of nurses in Quebec in the summer of 1999 in that it is a concrete example to test public perceptions and government attitudes to the right to strike and the right to arbitrate. It shows how a public sector strike is a political action in which both sides fight for public support which will usually determine the outcome of the strike. The public relations strategy of the nurses was effective in gaining public sympathy. At the same time it was discovered that the government was encouraging its supporters to contact the media to complain that the nurses were "holding sick people hostage" by their withdrawal of services. Interestingly, the Quebec situation was exceptional in that the public supported the strike even though their public services had been interrupted and the strike was illegal. It was exceptional because the public does not normally support public sector strikes. The reasons for the success of the Quebec employees is that nurses are probably the most sympathetic group of public servants. As well, they were very effective in persuading the public of the justness of their cause.

The other relevant feature of the Quebec situation was the government's response to the strike. Although the nurses offered to terminate the strike and refer the dispute to arbitration, the government adamantly refused. The Quebec government's attitude proves my thesis that governments today will tolerate public sector strikes in order to avoid arbitration at all costs unless the government is prepared to "rig" the arbitration process. I will return to this point later.

Returning to the public concerns with public sector collective bargaining, it is sometimes argued that the government is not a business operating with a view to making a profit. As a result, the normal incentives and disincentives to settlement which apply to a business are not necessarily applicable to government. Finally, many people view bargaining and the right to strike as an interference with the sovereignty of government. According to this view, an elected government should not be forced into policy choices by the concerted withdrawal of services of a "special interest group". Public sector terms and conditions of employment should be determined by the government after taking into account all of the public interest because such issues are important matters of public policy.

Where employees are denied the right to strike, interest arbitration is normally the method by which new collective agreements are decided. Arbitration is a form of adjudication which takes on some of the trappings of a court but which is a qualitatively different forum because of the nature of the issues raised. For the most part the determination of public sector terms and conditions of employment is an important political decision based on public finance and administration considerations. The question of whether a government can afford a particular public sector employee settlement is a matter of public policy. The affordability of the settlement will depend on fiscal considerations such as government spending and taxation. The reduction of government services in another area, or an increase in taxes, or a combination of both can finance any increases in compensation resulting from an arbitrated settlement.

The process of interest arbitration raises two fundamental questions which are beyond the scope of this article but which underlie much of the ongoing debate. The first fundamental question is one of political accountability. Who should be making these government budgetary decisions: the politician who is elected and therefore accountable to the public or the arbitrator who is only accountable to the two parties before him or her?

The academic debate in respect of this question is interesting because it is quite similar to the ongoing debate on the application of the *Charter of Rights and Freedoms* by judges. More and more, we are hearing questions raised as to the appropriateness of judges resolving important public policy issues inevitably raised in *Charter* cases because judges are not accountable to the public.

The second fundamental question is whether adjudication is the appropriate form of decision making to make these kinds of decisions. Professor Lon Fuller of Harvard Law School wrote of the "limits of adjudication" to address polycentric issues which raise problems not well suited to the adjudicative process and which affect interests far beyond the litigants. Interest arbitration is a good example of what Professor Fuller was referring to.

I would now like to turn from public perceptions to how the stakeholders view the interest arbitration process. In "Attitudes Towards Collective Bargaining and Compulsory Arbitration", Rose and Manuel undertake a systematic analysis of stakeholder perceptions of the interest arbitration process.[1] Some important perceptions among stakeholders are the following:

- The union will likely do no worse at arbitration and will likely achieve an award better than the employer's final offer.

- Employers recognize that a gap exists between the arbitral criteria they consider important and arbitrator preferences.

- Unions like arbitration because of lower costs and congruence between union and arbitral preferences.

- Settlement behaviour is affected by the predictability of arbitration outcomes.

- The search for appropriate and mutually acceptable criteria for decision-making is difficult in the best of times and has been complicated by government fiscal woes and the overriding goal of cost containment.

In the next part I shall examine the extent to which available empirical evidence on the impact of the right to strike as opposed to compulsory arbitration is consistent with any of these attitudes and perceptions. However, in the debate over the competing merits of arbitration and the right to strike, perceptions often matter more than reality.

IV. EMPIRICAL EVIDENCE CONCERNING COMPULSORY ARBITRATION AND THE RIGHT TO STRIKE

The "Wagner model" provides the fundamental underpinnings of Canadian labour relations regimes. This model is based upon regulating industrial peace in a relationship between two

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[1] J.B. Rose & C. Manuel, "Attitudes Toward Collective Bargaining and Compulsory Arbitration" (1996) 23(4) *Journal of Collective Bargaining Negotiations in the Public Sector* 287 at 306-308.

parties - union and employer - understood to be adverse in interest to one another. Collective agreement negotiation is seen as a power struggle in which the economic weapons - strike by the union or lock-out by the employer - can be resorted to. Of course, the purpose of these sanctions is to inflict harm upon the other party.

Many Canadian academics question the appropriateness of the highly adversarial Wagner model in the public sector of the late 1990's. Although the question of viable alternatives to the Wagner model has been the subject of some debate, there certainly is no consensus to date on such alternatives. Furthermore, there is a critical need for reliable empirical data about the comparative impact on wages and "industrial peace" in the public sector of the right to strike system versus a system of mandatory arbitration. Unfortunately, such data is hard to come by and even the results of the most reliable data are controversial.[2] Since the problem involves political, economic and labour relations considerations, it is therefore highly interdisciplinary in nature. The literature suggests that it is extraordinarily difficult to isolate the variables at play.[3]

In the absence of reliable empirical data, the policy responses are based largely on political interests rather than economic and labour relations factors. Having said that, it is important to identify what we do know about the interplay of different legally instituted resolution mechanisms and public sector economics. A recent analysis by Morley Gunderson[4] provides an excellent review of "what we know" in this area. The main points identified in this analysis are the following:

- Government employees do appear to be paid more than comparable non-government employees with the gap being around 5 to 10 percent.

- The pay advantage is higher for low-wage employees and lower (and likely even negative) for high-wage employees. It is also higher for females than males.

- The pay advantage is dissipating over time, likely reflecting the stronger constraining forces that are being placed on governments. (In my view, this gap has been narrowed or eliminated by the government restraint on spending since the early part of this decade.) This highlights the importance of taking a reasonably long-run view and not over-reacting to short-run signals.

- Although more information is needed on this, the government wage advantage seems to be highest in the broader public sectors of education and health and welfare.

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[2] J. Currie and S. McConnell, "Collective Bargaining in the Public Sector: The Effect of Legal Structure on Dispute Costs and Wages" (1991) 81(4) *The American Economic Review* 693;

[3] See: Currie and S. McConnell,1991, *infra* note 2; Currie and S. McConnell, "Collective Bargaining in the Public Sector: Reply" (1996) 86(1) *The American Economic Review 327*; and Gunderson, Hebdon, Hyatt, 1996 "Collective Bargaining in the Public Sector: Reply" (1996) 86(1) *The American Economic Review* 315.

[4]. See: Gunderson, M. Government Compensation: Issues and Options, Human Resources in Government Project Series, Discussion Paper No. W/03, Canadian Policy Research Networks Inc, 1998, at 26.

- Limited evidence suggests that fringe benefits are higher in the government sector than in the non-government sector so that the total compensation advantage is likely to be larger than the wage advantage.

- Most of the studies are based on data from the 1970's and early 1980's, with little evidence on the current situation or on changes that have occurred over a long period of time.

- The union wage impact is smaller in the public sector than the private sector, although given the high degree of unionization in the public sector, it is extremely difficult to disentangle a union wage effect from a public sector wage effect.

- Wage settlements under arbitration tend to be slightly higher than when the right to strike prevails in the public sector.[5]

- There is no evidence of spillover effects from arbitrated settlements in the public sector to freely negotiated settlements in the private sector. Indeed, there is no strong evidence that public sector settlements, as a whole, influence private sector settlements.

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

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

This review is particularly telling because it clearly demonstrates that there are major gaps in our knowledge. These gaps which will likely remain for the foreseeable future. A few things are clear - the evidence suggests that public sector wages are higher but that this advantage is dissipating over time. As well, pay settlements are higher under an arbitration system than a strike system. However, in assessing what system is preferable there is a need to consider other policy issues beyond the pressure to keep public sector wages in check and to preserve essential services at all times. Employee morale, and the ability to attract skilled workers to the public sector are emerging as paramount policy concerns.[6] In addition, there is evidence to suggest that under a no-strike system employees will redirect industrial conflict towards the grievance arbitration system despite the weaknesses of this system. On this point, Hedbon and Stern conclude:

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[5] On this point, Gunderson refers to the following Canadian studies and reviews: Anderson, J. "The Impact of Arbitration: A Methodological Assessment" *Industrial Relations* (1981) 20 at 129-148; Currie and McConnell, (1991) *supra* note 2; Downie, B. *The Behavioral, Economic and Institutional Effects of Compulsory Interest Arbitration*, (1979) Ottawa: Economic Council of Canada; Gunderson, Hebdon, Hyatt, (1996) *supra* note 3; O'Grady, J. *Arbitration and its Ills*, (1992) Kingston: Institute for Policy Analysis Program on Government and Competitiveness; Ponak, A and Falkenberg, L. "Resolution of Interest Disputes" in *Collective Bargaining in Canada*, edited by A. Sethi, Scarborough: Nelson Canada, at 260-90; and Saunders, G. "The Impact of Interest Arbitration on Canadian Public-Private Sector Earnings Differences, 1970-1980" (1986) *Industrial Relations* 25, at 320-27..

[6] P. Warrian, *Hard Bargain* (1996, Toronto, McGilligan Books).

> "The inter-connectedness of the various forms of industrial conflict is also an issue that policymakers need to consider before they draw practical conclusions about the costs and benefits of bargaining laws. For example, when legislators are contemplating a no-strike ban, they need to consider how conflict will be expressed when the strike alternative is no longer available. We are suggesting that the tradeoff of various forms of conflict has policy relevance, particularly where the elimination of strikes is not the primary policy goal."[7]

High rates of grievance arbitration are a costly and cumbersome way to resolve employee/employer conflicts, especially when the underlying causes are systemic, and could be addressed more effectively at the bargaining table. The correlation between compulsory arbitration and high rates of grievance arbitration suggests that worker morale is probably lower where there is no right to strike.

In my view, the most serious flaw of a "no-strike compulsory arbitration" system is what has been referred to as the chilling effect of arbitration on voluntarily agreed upon settlements. This is one phenomenon which can be empirically established and is observable to most labour relations practitioners. . If your impasse can or will likely result in arbitration, there is limited incentive to put all your bargaining cards on the table prior to that process. As a result, voluntary settlements are discouraged. Moveover, arbitration provides a convenient mechanism to avoid making hard political decisions. Whether it be the union politician or the government politician, it is sometimes easier to have the decisions made for you by the arbitrator. This transfer of political responsibility and accountability is a serious concern in any free collective bargaining system in particular, and in any democratic system in general. Once again, there is an interesting parallel to the *Charter of Rights and Freedoms* in that politicians will sometimes avoid making hard political choices thereby leaving the problem to the courts to resolve. With either an interest arbitration award or a *Charter* decision, the politician has a "devil made me to it" cover.

Similarly, interest arbitration has what has been referred to as a narcotic effect. Using the process rather than making settlements becomes a political crutch in many situations. The more you use arbitration the more addicted you become to the process.

The final policy consideration is that a "no-strike" system is certainly no guarantee of industrial peace. In many cases where employee morale and anxiety reach intolerable levels, strikes will occur regardless of legal prohibition. Recently, we have experienced a number of illegal strikes of nurses across the country who feel that their profession has borne the brunt of the cash cutting and restraint in the health sector. Jurisdictions, such as Australia, which mandate arbitration to resolve bargaining disputes experience numerous unlawful strikes.

V. ARBITRAL CRITERIA AND JURISPRUDENCE

A key challenge for any arbitration system is to establish the criteria by which arbitrators should be guided in determining the terms and conditions of employment. In the past, legislators have attempted to do this in various ways. Some statutes set out general criteria which enable the

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[7]. See Hebdon, R. and Robert Stern, "Tradeoffs Among Expressions of Industrial Conflict: Public Sector Strike Bans and Grievance Arbitrations" 51(2*) Industrial and Labor Relations Review* (January 1998), Cornell University, at 218.

arbitrator to consider any factor he or she believes is relevant to making a fair and reasonable determination. Other statutes specifically delineate the express criteria which must be taken into account by the arbitrator.

In this article I shall consider general principles and some specific criteria which has given rise to a great deal of recent controversy.

1. Guiding Principles

There are two primary guiding principles for interest arbitrators. The first is the principle of "replication" and the second is the question of what is fair and reasonable in the circumstances of the bargaining parties. These principles have been described by one arbitrator in the following words:

> "The first general principle that emerges from these cases, and, indeed, from the arbitral jurisprudence in Canada, is the replication principle. This principle requires an interest arbitration board to replicate, as closely as possible, the collective bargaining result that the parties would have reached themselves, had they successfully concluded their own negotiations.
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> ....
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> An arbitration board making such choices, also considers what is fair and reasonable. Arbitration boards are unwilling to impose terms and conditions at one end of the spectrum, notwithstanding, one particular party's ability to achieve such a term or condition. This is why comparables are important."[8]

In another case, an arbitration board determining terms of a collective agreement between a school board and teachers concluded that the appropriate question before it was as follows:

> "If one were to take two seasoned and objective negotiators, one representing the School Board and one the Teachers, give each of them all of the information and data presented to this Board, allow each to assume that the other's client is prepared, if necessary, to call or take a strike as the case may be, and instruct each to negotiate a settlement of these outstanding issues on the understanding that a strike is totally unacceptable to his client, what settlement would result?"[9]

The principle of replication dictates that the arbitrator should attempt to replicate as nearly as possible the result which would have occurred if the collective agreement negotiations process had not been interrupted by the arbitration process. The purpose of the arbitration is to simulate as

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[8] *Electrical Contractors Association of Alberta and I.B.E.W., Local 254 and 424* (November 24, 1997, S.Lanyon at 9. See also: *Yarrow Ltd et al and Hospital Employees' Union et al* (1993), 21 C.L.R.B.R. (2d) 1 (B.C.L.R.B.).

[9] *Leeds and Grenville County Board of Education and Ontario secondary School Teachers' Federation, District #37* (August 17, 1976, S.R. Ellis).

nearly as possible the agreement which could have been reached by the parties themselves under sanction of strike or lock-out.[10]

In applying the principle of replication, arbitrators will consider the following factors:

- the parties' positions in negotiations
- settlements reached by other parties
- the significance of the matters at issue, and
- likely trade-offs that would have been made during negotiations.[11]

However, this principle of "replication" must be informed by an analysis of objective criteria in the proceeding and not by subjective or speculative considerations:

> "Interest arbitrators appear unanimous in their view that a board of arbitration should attempt to replicate the result which would have occurred if the collective bargaining process had not been interrupted by arbitration...
> ...
>
> ...it is essential to realize that a board of arbitration is not expected to embark upon a subjective or speculative process for divining what might have happened if collective bargaining had run its full course. Arbitrator are expected to achieve replication through an analysis of objective data from which conclusions are drawn with respect to the terms and conditions of employment prevailing in the relevant labour market for work similar to the work in issue.
> ...
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> ...When arbitrators speak of replicating the result of collective e bargaining, that is the context in which they speak. That reasoning was summarized by Professor J.M. Weiler in *Grandview Private Hospital* on p.168 as follows:
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> Interest-arbitration under section 73 of the *Labour Code*...is intended to provide a procedural substitute for strike within a process of free collective bargaining. An arbitrator must look at labour market realities, ie. the relative economic and bargaining position of the parties, *in attempting to simulate the agreement which could have been reached by the parties under the sanction of a strike or lockout*. The best evidence of this hypothetical

[10] This principle has been applied in the education context, for example, in the following cases: *Re Board of School Trustees, School District No. 29 and Lillooet Teachers' Association* 19 C.L.A.S. 489 (B.C.) (S.Kelleher); *Re White Horse Plains School Division No.20 and White Horse Plains Teachers Association of the Manitoba Teachers Society* 14 C.L.A.S.

[11] *Re Electrical Contractors Association of Alberta, supra.*

agreement is the pattern of development in other comparable hospitals in the community, especially those collective agreements voluntarily concluded."[12]

Implicit in the replication principle of interest arbitration is the importance of the factor of comparability drawn from similar labour markets where similar work is performed.

"Comparables are simply a rational matching of the terms and conditions of other collective agreements to the actual terms and conditions of employment before an arbitration board. This results in interest arbitration being primarily a conservative exercise. It is generally not the role of an interest arbitration board to award new or breakthrough clauses; any such terms and conditions as these should be the result of the parties' own negotiations.
....
In the majority's view, replication and comparability work toward the same end under this current statutory scheme [a hybrid of free collective bargaining and compulsory arbitration]. The terms and conditions of employment reached by the other trade unions involved in the same negotiations, in the same industry, represent the comparables which ought to be replicated. These terms and conditions, which represent the "pattern settlement," were reached under the conditions of each party's right to strike or lock out; under the conditions, therefore, of free collective bargaining."[13]

2. Ability to Pay

The criterion of "ability to pay" has created a great deal of controversy in Canada. When public sector compulsory arbitration was introduced in the mid-sixties arbitrators followed the lead of Professor Harry Arthurs who, in 1966 defined the essential limitation on pay raises as the "employers' ability to pay". This decision created a real restraint to the upward movement of employees' wages in the broader public sector.

However, in the 1970's many interest arbitrators ruled that ability to pay was an improper criterion of decision for public sector employees. In this regard, Judge Emmett M. Hall of the Supreme Court of Canada in his report to the Railway Arbitration in 1973 stated:

"I recognize all of these factors and in particular the essential national character of the railways, and that their services are essential for the nation's well-being. The continuous efficient operation of the rail transportation as an instrument in equalizing regional disparities is a policy to which the nation has long been committed and the Calgary declaration was in harmony with that policy and with section 3 above quoted. However, this use of railways as an instrument of national policy requires that it should be the nation as

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[12] *Re Beacon Hill Lodges of Canada and Hospital Employees Union* (1985), 19 L.A.C. (3d) 288 (Hope) at 303 to 305.

[13] *Electrical Contractors Association of Alberta*, *supra* pp.9-10. See also: *White Horse Plains School Division No. 20*, *supra* (re teacher salaries); *Algoma District Mental Retardation Service and C.U.P.E. Local 1880* (September 13, 1990, P. Haefling).

> a whole, not the employees of the railway, which must absorb any deficit that may occur in the carrying out of the national policy.
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> I cannot accept the Calgary declaration as an obstacle to granting increases or benefits otherwise justly due to the employees. The employees cannot be asked to subsidize the carrying out of a commitment made in the national interest. To the extent that the railways are locked into the situation of subsidizing the national purpose, as I think they are there, they should be recompensed from the public treasury."

In a similar vein, Ontario Arbitrator Owen Shime in an arbitration award involving the British Columbia Railway Company in 1976 made a similar comment on ability to pay:

> "The operation of the industry at a loss does not justify employees receiving substandard wages. On balance, the total community which requires the service should shoulder the financial loss and not expect the employees of the industry to bear an unfair burden by accepting wages and working conditions which are substandard; that is not to say that the public sector employer ought to be the best employer in the community - it need not. Rather, it should be a good employer and also be seen as a fair employer."

One arbitrator went as far as to describe this criterion as being irrelevant. Arbitrator Kenneth Swan in the 1979 *Kingston Hospital* case stated:

> "The ability of the employer to pay in a public sector dispute is irrelevant. It is not that I fail to recognize the difficulties facing the employer, when inflation is running at 8-1/2% per annum and provincial grants are only 4-1/2% in continuing the high level of service which our society has become accustomed to. However, these employees cannot be expected to subsidize a higher level of care than we as a society can afford or are prepared to pay for by receiving less than appropriate wages."

It is fair to say that by the 1980's interest arbitrators in the Canadian public sector had universally rejected the legitimacy of the ability to pay argument. Apart from the consideration of public servants being required to subsidize public services through substandard wages, there were other factors which contributed to arbitrators rejecting this criterion. In particular, arbitrators viewed this criterion to be an attack upon their independence and, thus, as discrediting the arbitration process. If arbitrators were required to apply the ability to pay criterion, they felt that they became enforcers of government fiscal policy. The ability to pay a fair wage by the government is completely within its control. The payment of wages and fair working conditions, like other government policies, is a question of priority. If the payment of a fair wage required an increase in taxes or a decrease in expenditures in other areas, arbitrators viewed this to be a fair result. Arbitrators should not be forced to make the kinds of political decisions which the governments expected with the ability to pay criterion. This is particularly so in respect of public servants who are deprived of the cherished right to strike. The credibility, impartiality and fairness of the process required the rejection of this criterion.

3. The Ontario government's response to this arbitral consensus.

In 1995, the people of Ontario elected a new conservative government which was elected on a platform of tax cuts, decreased government expenditures and limited government. Early in its mandate the government amended a number of statutes providing for compulsory arbitration. In the *Savings and Restructuring Act*, *1996* (the "*Omnibus Bill*") the government provided for the following legislated criteria:

> "In making a decision, the board of arbitration shall take into consideration all factors the board considers relevant, including the following criteria:
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> 1. The employer's ability to pay in light of its fiscal situation.
>
> 2. The extent to which services may have to be reduced, in light of the decision, if current funding and taxation levels are not increased.
>
> 3. The economic situation in Ontario and in the [relevant employer].
>
> 4. A comparison, as between the [the employee group subject to arbitration] and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
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> 5. The employer's ability to attract and retain qualified [the employee group subject to arbitration]."

Upon its enactment, this legislation caused a great deal of criticism by trade unionists and interest arbitrators. However, with the passage of time, it became clear that arbitrators only viewed these fiscal criteria as considerations amongst many others that would be relevant in the making of the decision. As to which relevant factors had priority over others, this would be left to the arbitrator's discretion. As a result, it was argued that the majority of the arbitrators placed little priority on these fiscal considerations.

With this experience, the government decided that any further legislated criteria would have to be far more express. Moreover, giving effect to these criteria would have to be mandatory. In the fall of 1998, the government of Ontario had the opportunity to address its concerns. In terminating a number of strikes and lockouts in elementary and secondary schools, the government enacted the *Back to School Act, 1998*. The strikes and lockouts were legal in that teachers and school boards had the lawful right to exercise these economic sanctions. In terminating these sanctions, the government imposed mediation/arbitration. The powers of the mediator/arbitrator were defined in section 17 of the *Act* which provided:

> "17. (1) The mediator-arbitrator shall make an award that:
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> (a) is consistent with the *Education Act* and the regulations made under it; and
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> (b) permits the scheduled board to comply with the *Education Act* and the regulations made under it.

17. (3) The scheduling of pupils' instruction, the length of instructional programs provided to pupils on school days and the length of pupils' instructional periods are education matters for boards to determine under the *Education Act* and the mediator-arbitrator shall not make an award that would interfere with such determinations.

17. (4) The mediator-arbitrator shall make an award that he or she considers, having regard to relevant education funding regulations and Ministry of Education and Training policies, can be implemented in a reasonable manner without causing the scheduled board to incur a deficit.

17. (5) Subsection (6) applies if implementation of the award would result in an increase in either the scheduled board's total or the scheduled board's average-per-teacher compensation costs for members of the scheduled bargaining unit, for either the first or the second year of the term of the agreement.

17. (6) The mediator-arbitrator shall include in the award a written statement explaining how, in his or her opinion, the scheduled board can meet the costs resulting from the award without incurring a deficit and, for he purposes of the statement, the mediator-arbitrator shall have regard to relevant education funding regulations and Ministry of Education and Training policies."

(emphasis added)

Since school boards in Ontario are now totally funded by a provincial funding formula, the provincial government in effect predetermined the result at arbitration. Since the arbitration award could not result in a deficit, the provincial government mandated that the school board would have to operate with the funds it had provided. The arbitrator could not circumvent this result without violating the law. Moreover, the legislation withdrew from the arbitrator's consideration several working conditions which had been subject to collective bargaining for over twenty years. Indeed, these working conditions which were removed from the collective bargaining process were the very working conditions which gave rise to the strikes and lock outs which were terminated by the back to work legislation. In the result, the arbitration process provided for contained the most draconian measures which labour relations practitioners in Ontario had ever seen. Ultimately the arbitrators rendered decisions which were totally in favour of the school boards. As stated above, the government predetermined the result. The negative impact on the credibility, impartiality and fairness of the system was immeasurable.

4. The implications of government interference in the arbitration process.

The fairness of the process and the effect on employee morale are long term implications which will have to be assessed. The 1990s have seen a growing degree of labour unrest among public and broader public sector employees in Canada. The conduct of government, as employer, in this situation may well raise questions for judicial consideration at some point. One such question is whether there are restrictions in law on the government's legislative authority to control public sector interest arbitration. In previous decades, and earlier in this decade, governments imposed fiscal policies and decisions directly by means of wage-restraint legislation. Such

decisions were not popular with unions. Nevertheless, the method of direct control by legislative action made the government accountable to the public for its policy choices.

The Ontario government's recent interference with the conduct of the interest arbitration process represents a fundamental shift in approach. This government still wished to dictate the result, but it wished to do so in a manner for which it hoped not to be held publicly accountable. This form of government action gives rise to concerns about the independence of the interest arbitration process, a process in which the government has a direct and compelling interest. It is interesting to note that concerns relating to the independence of interest arbitration are coming into focus at the same time as recent litigation over the manner in which provincial court judges' salaries and working conditions are determined. The Supreme Court of Canada has stated that in order to protect the judicial independence of provincial court judges, our Constitution requires that a fair, impartial and independent dispute settlement mechanism be established to resolve issues relating to judicial compensation. [14] It seems clear that the recent restrictions imposed by the Ontario government on the arbitration process in the education sector would not pass constitutional muster in the judicial sector. As a result, it seems likely that the courts may be asked whether the government has gone too far in its interference with the independence of the arbitration process for public sector and broader public sector employees. It is clear that such government interference contravenes international law. International labour conventions binding on Canada and Ontario require that any state imposed arbitration be fair, impartial and effective. Unfortunately, the Canadian record before international labour tribunals has been abysmal.

As a footnote, it might be added that not surprisingly there is an obvious relationship between the extent of governmental interference in the arbitration process and the settlement awarded to the public servants. With the extensive interference referred to in October 1998, Ontario teachers gained little or no increase in compensation from the arbitration awards referred to above even though they had not received any meaningful increase since 1992. At the same time, their working conditions were severely eroded. On the other hand, a recent award by a panel awarding increases to provincial court judges compensation gave the judges a 30% increase over three years because they had not received an increase since 1992 and the Ontario economy was buoyant. Same provincial government: same provincial economy. The difference, of course, is that in respect of judges, the government could not constitutionally interfere in the process and shape or indeed dictate the result. Unfortunately for teachers, the equality guarantee of the Charter of Rights and Freedoms does not yet protect against discrimination resulting from different professions or occupations. However a complaint has been filed with the International Labour Organization which will likely declare once again that Ontario is in violation of international labour law standards.

VII. CONCLUSION - GOVERNMENT PREFERENCE FOR THE RIGHT TO STRIKE

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[14] Reference re: *Public Sector Pay Reduction Act* (P.E.I.) (1997), 150 D.L.R. (4th) 577 (S.C.C.)

As I stated above, empirical evidence does not provide a conclusive basis for governments to prefer the right to strike over compulsory arbitration or vice versa. Whether there is a government inclination to confer a right to strike on public servants will depend upon a balance of the short term political consequences of a disruption in public services versus the long term political objectives of the government. In regard to the former, any government will be sensitive to the political fallout of a public service strike. The inconvenience caused by such a strike will usually cause the public to demand a "quick fix". The effect of this political pressure will frequently encourage politicians to quickly settle the dispute usually at a price not favourable to the government.

On the other hand, the long term political objectives of the government may render a more favourable view of the right to strike. The weaknesses of the arbitration system range - from the "chilling effect" on bargaining a settlement to the "grievance fever" effect - are apparent. However, from a conservative government's perspective there are more ideological reasons for opting for the right to strike for its employees. The focus on deficits, tax cuts and expenditure reductions leave a government with little appetite for increasing compensation levels. Restructuring, privatization and deregulation are policies which will be resisted by trade unions and public servants in bargaining. As these policies are important long term objectives of the government, it is unlikely that a government will want these issues to be put before an arbitrator who could impede these policy directions by awarding working conditions which would protect employees if such policies were pursued. It is clear that many governments are very wary of an arbitration process which they cannot control. Control has been attempted through legislated criteria of decision. However, these attempts have often proved futile. Moreover, a conservative government does not want to permit an arbitrator to interfere with its attempt "to reinvent itself". As a result, the right to strike is becoming a far more attractive dispute settlement mechanism.

Governments are also discovering from experience that the costs of inconvenience and disruption caused by a public service strike are far outweighed by the benefits to be gained by the strike route. In short, governments have learned that they will frequently "win" a public service strike. During the strike, the government will save millions of dollars in unpaid wages. On the other hand, unions will experience huge losses in strike pay and employees will suffer from the loss of wages. Furthermore, if the government is "losing" the strike it can always pass back to work laws terminating the strike and imposing a very restricted form of arbitration as the Ontario government did in October 1998 with the *Back to School Act, 1998*. Moreover, the threat of back to work legislation enhances the government's bargaining power at the expense of the employees. The government is in the unique position of being employer and law maker at the same time. Unfortunately, this is a power which is exercised quite often by the Canadian and provincial governments.

There are some qualifications to this trend. There are certain public servants such as police, firefighters and health workers who are so essential that society should not experience any disruption. In these instances, a reformed form of arbitration will prevail. However, these essential services will be kept to a minimum. The other qualification is the "controlled strike" under which certain positions in the bargaining unit are designated as essential and there is a strike ban for these employees. The political problems within the union of only some employees having the right to strike are clear. Moreover, the removal of these essential employees from the strike weakens the bargaining power of the union. The strike is a blunt weapon to impose damage on the

employer. Inevitably, the impact of the strike is lessened with the designation of these persons who could inflict the most harm on the employer by their withdrawal of services.

With these kinds of odds it is little wonder that the right to strike is gaining favour with many governments. It is a “win-win” for the government. It will either win the strike, or if it is losing the strike it will eventually win by legislating a termination of the strike. Today, a government is like any other employer and will respond only when it can be persuaded that it has recruitment or retention problems. These problems will become apparent through the invisible hand of the market when the demand for workers is greater than their supply. Labour has become another commodity of production. Ideology has triumphed in that the right to strike leads to the least government interference with “free collective bargaining”. The market has the last word. Forget allusions to legal principle or freedom of association as expounded by constitutional or international law. Today, the right to strike is better characterized as a government preferred method to resolve bargaining disputes with its employees. It has become the policy choice of governments which want more control over the working conditions of their employees. The irony is that governments are now more willing to confer this cherished right on their employees regardless of whether the employees want it or not. Governments can always restrict the right to make it ineffective; and if the right does become effective, back to work laws can be passed to extinguish the right. The strike has become a preferred policy of government rather than the exercise of a cherished right. Is the public sector strike outmoded as we approach the second millennium? - most governments would say no.! Many unions and employees are now taking that question under advisement.

Last amendment July 8/99