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Article abstract

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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:

"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:

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

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.