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# Collective Bargaining by Salaried Professionals
# La négociation collective chez les professionnels

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Aller au sommaire du numéro

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Résumé de l'article

Plusieurs innovations législatives récentes des législateurs canadiens reconnaissent que les membres de nombreuses professions libérales doivent affronter les mêmes forces sociales et économiques que la masse des travailleurs salariés. C'est le cas des architectes, des dentistes, des avocats, des médecins et des ingénieurs professionnels. Ces innovations ont accordé aux membres salariés de l'une ou de plusieurs de ces professions l'accès à la négociation collective, et en ce faisant elles décidaient que ces professionnels devaient faire partie d'unités de négociation spéciales.

Parce que les forces qui ont poussé les professionnels salariés à se tourner vers la négociation collective s'accélèrent, d'autres gouvernements devront s'engager dans la même voie et nombre des régimes déjà existants prendre une plus grande extension.

Le nombre de salariés professionnels s'accroit sans cesse sinon d'une façon dramatique, et les grandes institutions bureaucratiques où ils trouvent à s'embaucher ne s'adaptent pas volontiers aux valeurs du professionalisme. De plus, les associations professionnelles n'ont pas été en mesure de trouver des solutions valables aux problèmes qui se posent aux professionnels en tant que titulaires d'emplois n'offrant guère d'autres mesures à substituer au régime de la négociation collective. Donc, alors que, au cours des premières discussions, on se demandait si l'on devait permettre aux professionnels salariés de négocier collectivement, on en est graduellement venu à comprendre qu'ils devaient avoir le droit de le faire pour les mêmes motifs que les autres employés, à vrai dire pour les mêmes motifs que leurs collègues indépendants ont fondé leurs associations professionnelles et ont défendu leur droit d'exercice de leur profession. La négociation collective peut canaliser leurs réclamations en matière de contrôle des emplois, d'établissement d'échelles de salaire « professionnel » et de meilleures conditions de travail. En fait, c'est au moyen de la négociation collective qu'il est possible d'arriver à concilier les cultures souvent en conflit du professionnalisme et de la bureaucratie.

Cependant, de nouvelles questions ont été soulevées. Les intérêts des professionnels salariés à leur travail sont comparables à ceux d'un nombre de plus en plus grand de travailleurs intellectuels. Ce nombre croissant de travailleurs intellectuels ainsi que leur « professionnalisation » remet en question l'à-propos, en fait la justification de mettre à part les membres salariés des professions-type quant à la façon de considérer leur statut spécial de négociation collective. Par exemple, en Ontario et au Nouveau-Brunswick, la législation concernant la négociation collective ne s'applique qu'aux salariés membres de professions données où l'on accrédite des unités de négociation professionnelle, c'est-à-dire des unités de négociation restreintes à une seule profession. Ceci oblige à se demander si l'accréditation par profession est une politique souhaitable et si les législateurs et les commissions de relations de travail n'auront pas à faire face à des réclamations dans le même sens des membres d'autres occupations intellectuelles qui possèdent pour la plupart, sinon toutes, la forte empreinte du professionnalisme.

Il est évident qu'une pareille attitude de la part des travailleurs intellectuels conduisait à une fragmentation inapplicable de la structure des unités de négociation. Mais s'ensuit-il qu'on ne doive accorder aucune considération particulière à une occupation intellectuelle qu'elle appartienne ou non à une profession type comme c'est le cas en Colombie-Britannique et en Saskatchewan? On a fait un effort véritable pour résoudre ces problèmes dans le Code canadien du travail et dans la Loi des relations de travail du Manitoba, qui contiennent, l'un et l'autre, une définition générale de l'employé professionnel, et le Code canadien prévoit une façon vraiment nouvelle de fixer les unités de négociation des professionnels salariés. Toutefois, le critère exclusif de l'existence de droit de pratique et de brevets universitaires ne tient pas compte de la croissance de l'accroissement dramatique d'autres occupations intellectuelles qui ne bénéficient pas de l'un ou de l'autre de ces attributs mais méritent tout autant une désignation professionnelle.

D'autre part, cela ne veut pas dire que toutes les occupations de cols blancs exigeant un certain type de formation post-secondaire devraient être considérées comme des professionnels salariés. Il faut tirer des lignes de démarcation même si elles peuvent être à la limite arbitraires. Mais en le faisant, on devrait apporter une attention sérieuse aux changements qui se produisent dans les types d'emplois. Une fois tirées ces lignes, les commissions des relations du travail devraient avoir le pouvoir de regrouper différents groupes de professionnels salariés qui possèdent une certaine communauté d'intérêts dans une seule unité de négociation. Le National Labour Board aux États-Unis fournit un excellent exemple de cette approche qui tient compte de l'ensemble de ces considérations.

Enfin, quelle que soit l'approche spécifique que l'on choisisse, certaines considérations spéciales s'imposent. Le fait qu'un groupe de travailleurs intellectuels possède une communauté d'intérêts a souvent été une chose ignorée par leurs employeurs, mal comprise par leurs compagnons de travail et négligée par les commissions des relations de travail. Pour ces motifs, l'attention qu'ont portée le gouvernement canadien et celui du Manitoba aux professionnels salariés constitue un progrès bienvenu.

# Collective Bargaining By Salaried Professionals

**George W. Adams**

*This paper examines whether the traditional approach to collective bargaining fits the needs of the salaried professionals or if special treatment is necessary.*

Recent legislative initiatives in many Canadian jurisdictions suggest a growing recognition that the salaried members of many of the prototype[1] or traditional professions are subject to the same social and economic forces confronting other employees. These initiatives have granted salaried members of one or more professions access to collective bargaining and in doing so have generally accorded them special bargaining unit treatment. Because the forces that have caused salaried professionals to turn to collective bargaining are accelerating, other jurisdictions will move in the same direction and many of the current initiatives are likely to be broadened. The number of employed professionals is steadily, in fact, dramatically increasing and many of the large bureacracies in which they tend to be employed do not readily and voluntarily adjust to the culture of professionalism. As a general matter professional associations have not been able to respond to the employment problems experienced by their salaried membership and thus these professionals have had no alternative but to turn to collective bargaining. The first part of this paper surveys the employment problems of salaried professionals that have given rise to these developments.

However these employment problems are not unique to the prototype professions but rather are common to a growing number of intellectual occupations with whom the prototype professionals often work side by side. This increasing number of intellectual workers and their

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[1] By prototype I mean the architectural, dental, legal, medical, and engineering professions.

« professionalization » therefore raises doubts about the appropriateness — in fact fairness — of singling out the salaried members of the prototype professions for special treatment in collective bargaining statutes of general application. For example, in a number of jurisdictions recent amendments apply only to salaried members of particular professions and mandate craft bargaining units for them — bargaining units restricted to these individual professions. What is the justification for giving these particular occupations craft status and is it a desirable policy? How should legislatures and labour boards respond to claims for similar treatment by members of the growing number of intellectual occupations that possess many if not all of the important hallmarks of « professionalism » ? Quite clearly a similar approach with respect to them could lead to an unworkable fragmentation of bargaining units. But does it then follow that no special treatment ought to be accorded to any intellectual occupation whether it is part of a prototype profession or not? In seeking to address this question the paper is critical of most of the approaches adopted in Canada to date but concludes that special treatment along the lines taken in the United States is both necessary and practical.

## SALARIED PROFESSIONALS AND COLLECTIVE BARGAINING: SOME HISTORY

While legislation in Newfoundland, Nova Scotia, Alberta and Prince Edward Island exclude all of the prototype professions from collective bargaining by providing that the definition of « employee » does not include « a member of the medical, dental, architectural, engineering, or legal profession, qualified to practise under the laws of a province and employed in that capacity », the earliest Canadian labour laws did not do so. However after a very short and unsatisfactory experience Parliament decided against their inclusion and most jurisdictions, save for Saskatchewan, followed suit. The principal reasons for exclusion can be briefly summarized. First, because early labour laws made no reference to professionals they were often « swept » into large heterogeneous bargaining units containing other employees to whom they could not relate. For example, in *British Columbia Distillery Co. Ltd. and Local 203 United Office and Professional Workers of America,* Local *203 et al Wartime L.R.B.* [2], the Board ruled:

> The conditions of employment of the office workers and the professional and technical workers employed by the employer are the same. No good

[2] 1947 *CLLC* para. 10, 513 (Wartime Labour Relations Board)

> reason has been shown to warrant subdividing this group of employees into separate units.

A similar response to a particular working relationship that continues as a problem today is revealed in *Quebec Federation of Professional Employees in Applied Science and Research, Unit 4, and Canadian Broadcasting Corporation, Wartime, C.L.R.B.*,[3] in which the Wartime Board stated:

> The Board does not consider that for the purpose of collective bargaining there is any important difference in interest between a professionally qualified engineer and an engineer who has no such professional qualifications, provided both are carrying on work of the same or similar nature and under similar conditions. Academic attainment cannot by itself determine the community of interest.

Secondly, collective bargaining by professionals was thought by many to be unethical or at least undignified. The prototype professions are, generally speaking, service oriented and all have been granted a statutory monopoly over the provision of their services. Therefore because collective bargaining could result in the concerted withholding of these services, abstract ethical and public policy questions were perceived. Moreover, this reticence was compounded by the fact that the professions had attracted persons into their membership who were very individualistic and in whom this individualism was reinforced by a service oriented professional training. From their viewpoint then collective action centering on monetary matters was not only unseemly but in direct conflict with a profession's principal purpose — serving the public. Thirdly, professional associations were dominated by either non-salaried professionals who lacked identification with the problems of their salaried colleagues or by salaried professionals who had either managerial responsibility or ambitions in this regard. Finally, it is likely that governments of the day were affected by a common feeling that professionals are already well served by their status in society. Even today, it is difficult for the general public to identify with the employment problems related to professional occupations because of the obvious advantages enjoyed by the non-salaried faction of the professions.

## FORCES OF CHANGE

As fundamental technological and market forces had their impact on labour market structure and business form, these views began to be

[3] 1946 *CLLC* para. 10, 485 (Wartime Labour Relations Board)

reconsidered. While the increase in white-collar workers in relation to the total labour force was the most salient aspect of the overall occupational shift in the first half of this century, the growth of the «professional» group within this white-collar segment has been the most striking recent change. Between 1951 and 1971 professionals showed the largest percentage increase of any occupational classification, rising in absolute numbers from 385,696 to 848,725, a gain of 120.1% compared to a 114.2% increase in the white-collar work force and only 65.4% in all occupational categories.[4]

Professor Bell believes these changes to be at the heart of what he calls «the post-industrial society». In describing this same occupational distribution in the United States he writes:

> *The pre-eminence of the professional and technical class.*
> The second way of defining a post-industrial society is through the change in occupational distributions; i.e. not only where people work but the kind of work they do. In large measure occupation is the most important determinant of class and stratification in the society.
>
> The onset of industrialization created a new phenomenon, the semi-skilled worker who could be trained within a few weeks to do the simple routine operations required in machine work. Within industrial societies, the semi-skilled worker has been the single largest category in the labour force. The expansion of the service economy, with its emphasis on office work, education and government, has naturally brought about a shift to white-collar occupations. In the United States, by 1956 the number of white-collar workers for the first time in the history of industrial civilization outnumbered the blue-collar workers in the occupational structure. Since then the ratio has been widening steadily; by 1970 the white-collar workers outnumbered the blue-collar by more than five to four.
>
> But the most startling change has been the growth of professional and technical employment — jobs that usually require some college education — at a rate twice that of the average. In 1940 there were 3.9 million such persons in the society; by 1964 the number had risen to 8.6 million and it is estimated that by 1975 there will be 13.2 million professional and technical persons, making it the second largest of the eight occupational divisions in the country, exceeded only by the semi-skilled workers. One further statistical breakdown will round out the picture — the role of the scientists and engineers who form the key group in the post-industrial society. While the growth rate of the professional and technical class as a whole has been twice that of the average labour force, the growth rate of the scientists and engineers has been triple that of the working population. By 1975 the United States may have about 550,000 scientists (natural and social sci-

[4] GOLDENBERG, Shirley B., *Professional Workers and Collective Bargaining*, Task Force on Labour Relations (1968) p. 14 & 15 and *1971 Census of Canada*, Statistics Canada, Catalogue 94-717.

entists) as against 275,000 in 1960, and almost a million and a half engineers compared to 800,000 in 1960.[5]

But it is also important to note another and related feature of «the post-industrial society». Despite the image of individualism traditionally associated with professional work, almost all teachers and nurses are paid employees as are 96% of engineers and architects, 97% of economists, and 93% of accountants and auditors.[6] Even in the most traditionally individualistic professions of law and medicine, approximately 43% are not engaged in private practice.[7] Almost all of the «new professionals», ranging from social workers to systems analysts, work for an employer. And salaried professionals tend to be concentrated in *large* work organizations that may not easily adapt to the culture of professionalism.[8]

Quite clearly these occupational shifts will continue at an even more rapid rate in the decade ahead. The growing emphasis in manpower requirements will be upon relatively high degrees of skill, knowledge and specialized training of various kinds. The shift from an agricultural economy to a predominantly urban industrial society has brought with it the need to concentrate large amounts of capital and numbers of people in order to meet the needs of an interdependent urban economy. The result has been an integrated economy comprised of large industrial, scientific and commercial bureaucracies housing the vast number of specialized white-collar employees needed to coordinate complex production and marketing activities. More recently, there has been a distinct trend towards a service oriented economy which has even accelerated these occupational shifts. As national incomes have risen there has been an increased demand for services and a corresponding occupational shift to trade, finance, transport, health, recreation, research, education and government activities. These area represent the greatest expansion of intellectually based occupations. This occupational shift has also been magnified by the dramatic growth of scientific and technical knowledge and the correlative rise of science based industries (computers, electronics, optics, polymers, health).[9] The

[5] BELL, *The Coming of Post-Industrial Society* (1973) 15.

[6] *1971 Census of Canada,* supra, p. 6.

[7] *ibid.*

[8] For example, by 1962, 54% of all engineers and scientists in the United States worked in establishments employing 1,000 or more employees. (See *Kleingartner, Professional Associations: An Alternative to Unions?* in Woodworth and Peterson, *Collective Bargaining for Public and Professional Employees* (1969) p. 294).

[9] Professor Bell argues that what is distinctive about this stage in our development is the centrality of theoretical knowledge and its exponential growth. BELL, *supra,* p. 20.

end result has been a bureaucratization of the sciences and an increasing specialization of intellectual work. These features of contemporary society challenge the adequacy of our collective bargaining laws as well as any attempt to confine the term «professional» to the prototype professions.

## INTEREST OF SALARIED PROFESSIONALS IN COLLECTIVE BARGAINING

These background forces have contributed to the interest of salaried professional employees in the collective bargaining process because they mean that salaried professional employees are exposed to the same economic and social risks as other wage and salary earners.

The bureaucratization of intellectual work and the explosion of knowledge not only in new fields but within existing fields has led to the specialization of intellectual work into minute parts. For example, after World War II, 54 specializations in the sciences were listed in the United States National Register of Scientific and Technical Personnel. *Twenty* years later there were over 900 distinct scientific and technical specializations listed.[10] As this happens, skills are inevitably broken down, compartmentalized and routinized to the point where salaried professionals may be unable to realize the skills for which they were educated. This problem is often aggravated by the immediate profit-making interests of an enterprise which cause it to employ its labour in the most efficient manner.[11] It may be more efficient to have work which a professional considers to be within his profession's exclusive jurisdiction performed by persons with a lesser but related education or at least to intersperse such persons amongst the professional employees. Similarly it may be more economical to require a salaried professional to perform work which a lesser educated but unavailable person, with training, could perform and thereby avoid immediate recruitment and training costs. Salaried professionals may therefore turn to collective bargaining as a method of perserving or recovering what they believe to be an exclusive work jurisdiction.

Another motivating factor may arise out of a desire to play a more significant or active role in the decision-making processes of the enterprise. An interest in direct participation in the decision-making of a firm is but a corollary of professional expertise. In this sense, claims for greater involvement in decision-making are based upon the premise

[10] See BELL, *supra*, p. 187.

[11] See CHARTIER, *The Management of Professional Employees* (1968)

that those persons who have undertaken protracted studies or acquired experience which give them a special ability to perform a given type of work, have the right to participate in decisions relating to that work and to share this decision-making power only with persons of at least equal competence.[12] However in a bureaucratic setting guided by managerial authority, salaried professionals may have no freedom to choose the direction of work and little or no control over the conditions under which they must work. Indeed, salaried professionals may not be considered as real workers or their contribution may be discounted because their efforts seldom result directly in a physical product and this only aggravates feelings of alienation.[13] The end result is that salaried professionals, having undergone a training that reinforces a strong sense of competence and autonomy, can find themselves distinctly subordinate to, in their perception, an insensitive managerial authority.

But muffled claims for greater job control may not be the central concern. In many instances salaried professionals turn to collective bargaining simply for economic reasons. For example, employed professionals may be paid in accordance with the internal job hierarchy of a bureaucracy which has little or no relationship to professional status, but lack personal mobility to react to these « unacceptable » pay scales because their skills are specific to the enterprise or the similarity in salary scales between firms may make moving pointless.

Financial considerations are very often the primary reason why intellectual workers paid from public funds opt for collective bargaining. In our so-called post-industrial society the government has become the single largest employer of intellectual workers, and indirectly, through public funding, supports the employment of many more. These workers are caught up in one of to-day's most perplexing employment dilemmas — the search for an appropriate mechanism to set the terms and conditions of employment of public employees or employees dependent upon public funds. Winning wage increases from the government is a far different matter than from private industry. The multiplication of government functions creates an unremitting need for new revenues and a concommitant public outcry against rising taxes. Increasingly the end result has been a decision to end or limit existing programs and to hold

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[12] See GROSS, *When Occupations Meet: Professions in Trouble*, p. 45, Minneapolis, University of Minnesota (1967)

[13] See CUVILLIER, *Intellectual Workers and their Work in Social Theory and Practice* (1974) Int'l. Lab. Rev. 291 at 294.

down spending and this has had an adverse effect on wages and salaries. Indeed, one often gets the impression that the public expect intellectual workers who profess a devotion to work and to public service to be indifferent to economic advantages. Buffetted by these political winds, many salaried professionals have simply been driven to collective action with public school teachers, university faculty and hospital employees being good cases in point.

But why turn to collective bargaining? Why didn't salaried professionals turn to their professional associations for assistance? The answer is that most did at first, and these professional associations were unable or unwilling to grapple with employment related problems, leaving no alternative to collective bargaining for the salaried professional. On the whole, professional associations have shied away from direct confrontation with employers. It has been suggested that the associations have a practitioner orientation and cannot identify with the problems confronting salaried members or that the associations are dominated by employer oriented members who are unsympathetic.[14] But whatever the reason professional associations by themselves were unable to respond to the problems of their salaried members and collective bargaining was opted for by many.

## SOME RECENT LEGISLATIVE RESPONSES

In[15] Ontario the Legislature has recently provided professional engineers with access to collective bargaining under *The Ontario Labour Relations Act*.[16] Section 6(3) stipulates that « (a) bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective bargaining. » The Board may include engineers in a bargaining unit with other employees only if a majority of the engineers wish to be included — in short, professional engineers have been given a craft status in Ontario. New Brunswick[17] has taken this craft concept further by providing that the members of the medical, dental, dietetic, architectural, engineering, and legal professions may engage in collective bargaining and each profes-

[14] For example, one study observed that a survey of over 3,000 engineers and scientists showed that 38 per cent of them were desirous of a future in administration, rather than in research or engineering. KLEINGARTNER, *Professionalism and Salaried Worker Organization* (1967) p. 80.

[15] This review is limited to private sector labour legislation.

[16] *R.S.O.* 1970, c. 232 as amended by 1975, c. 76

[17] *Industrial Relations Act*, R.S.N.B. 1973, c. 1-4, s. 1 (5) (b).

sion is entitled to a separate barbaining unit unless the members wish to have other employees included.[18]

Another approach adopted by the Federal Government[19] and Manitoba[20] concentrates less on the prototype professions by defining a professional employee as « an employee who (i) is engaged in the application of specialized knowledge ordinarily acquired by a course of institution and study resulting in graduation from a university or similar institution; and (ii) is or is eligible to be a member of a professional organization that is authorized by statute to establish qualifications for membership in the organization. »

Partnering this somewhat more expansive definition of a professional employee, the Federal Government has selected a more flexible approach to professional bargaining unit structures as well. Section 125(3) of the Code reads:

> Where a trade union applies under section 124 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsection (2)
>
> (a) shall determine that the unit appropriate for collective bargaining is a unit comprised of only professional employees, unless such a unit would not otherwise be appropriate for collective bargaining;
> (b) may determine that professional employees of more than one profession be included in the unit; and
>
> (c) may determine that employees performing the functions but lacking the qualifications of a professional employee be included in the unit.

and subsection 2 of section 125 provides:

> In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union.

Finally, neither the *Labour Code of British Columbia*[21] nor the *Saskatchewan Trade Union Act*[27] mentions the inclusion or exclusion

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[18] Quebec follows this same approach essentially, although many more professions are included (advocates, notaries, physicians and surgeons, inspectors of anatomy, homeopathic physicians, pharmacists and druggists, dental surgeons, engineers, land surveyors, architects, forestry engineers, optometrists and opticians, and dispensing opticians). *Labour Code R.S.Q. c.* 141 as amended s.20.

[19] *Canada Labour Code* R.S. C. 1970 c L-1, Part V, S.C. 1972, c. 18, 5, 107 and s. 125 (3).

[20] *The Labour Relations Act,* C.C.S.M. c L-10 enacted by S.M. 1972, c. 75, s. 1 (t) and s. 28 (3). See also *Organization of Professional Engineers, etc.,* v. Manitoba Labour Relations Board (1976) W.W.R. 723 (Man. C.A.)

[26] *Labour Code of British Columbia* S.B.C. 1973, c. 122

[22] *The Trade Union Act,* 1972, S.S. 1972, c. 137

of professional employees and therefore they are subject to those statutes in the same manner as any other employee. This then represents a third approach.

## CHALLENGE FOR PUBLIC POLICY

All salaried professionals should be able to engage in collective bargaining and this principle is gaining widespread acceptance. They face the same employment problems as others and therefore they ought to have the same rights as others in resolving these concerns. However the challenge for public policy relates to the way in which this result is to be effected. Are the prototype professions to be distinguished from other intellectual workers and provided with craft status as is the case in New Brunswick, or should the unwarranted exclusions simply be removed as in British Columbia and bargaining unit structures determined by reference to the traditional principles underpinning the concept of « appropriateness » ? On the other hand, the *Canada Labour Code* and the *Manitoba Labour Relations Act* adopt positions somewhere in between these two extremes.

### Who is a professional?

What is the rationale for limiting professional employee definitions to the prototype professions? While they can be distinguished from other employees because their non-salaried brethren achieved exclusive authority to regulate « the practising profession », should the existence of licensing, registration and certification statutes be relevant to the granting of a special status to these occupations under modern labour laws. Generally these statutes were enacted to protect an inexpert public from the unqualified or unscrupulous practitioner. However where the consumer is a small number of sophisticated employers of where the occupation does not consult or practise with respect to a broadly based lay clientèle, licensing statutes are less relevant and indeed less likely to exist. For example, Friedson has observed that « licensing is much less likely to occur on behalf of the scholar or the scientist, for they are devoted to exploring intellectual systems primarily for the eyes of their colleagues ».[23] Moreover, today it is not unusual to find « accreditation » privately administered. The occupational qualification of the Ph.D. for a psychologist or university professor or the required eligibility for membership in the vast number of paramedical occupational

[23] See FRIEDSON, *Profession of Medicine* (1970) p. 74.

associations imposed by hospital hiring are illustrative of this phenomenon.[24]

This point takes on even greater significance when regard is given to the fact that the explosion of knowledge in modern society has caused the development of a great number of very sophisticated occupations that meet all the characteristics of « salaried professionalism ». This being so, it appears unfair to grant a special status to only the prototype professions. Many occupations are now based on systematic knowledge or doctrine acquired through long prescribed training and more often than not those performing such work adhere to a set of moral norms where such norms are relevant.[25] Obvious examples include scientists, dietitians, occupational and speech therapists, social workers, psychologists, economists, nurses, mathematicians and professors. Is each group expected to lobby for special treatment and would special treatment along craft lines be practical?

The *Canada Labour Code* and the *Manitoba Labour Relations Act* have attempted to meet this problem by using a more comprehensive professional employee definition, but by limiting the term to those occupations having a professional organization that is authorized by statute to establish the qualifications for membership in the organization they continue to rely upon an unduly restrictive if not irrelevant condition. Another problem is their mutual requirement that a professional employee must apply specialized knowledge acquired by a course of instruction resulting in graduation from a university or similar institution. In a labour relations context, should a university degree be such a crucial factor in separating professional employees from other workers? For example, many technologists in the fields of health, science an communications are graduates of post-secondary institutions other than universities, i.e. community colleges, institutes. Would they come within the phrase « similar institution » and should they be so characterized as a matter of policy? Many of these occupations possess codes of ethics and their associations often play a vital role in developing the curriculum by which members are educated. Moreover, some of these associations are supported or referred to by private and public statutes.[26]

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[24] See HALL, *The Paramedical Occupations in Ontario:* A Study for the Committee on the Healing Arts (1970); *Report of the Committee on the Healing* Arts (1970) v. 2.

[25] These are the two basic criteria of distinction suggested by WILENSKY, *The Professionalization of Everyone* (1964) 60 Am. J. of Soc. 137 at p. 139.

[26] For example, *The Radiological Technicians Act,* R.S.O. 1970, c. 399, and see

It is also important to bear in mind that in an area as dynamic as occupational change, many of these occupations are in an evolutionary state. A community college program today may be the basis of a university degree tomorrow. For example, in the United States, laboratory technologists are trained in universities whereas in Ontario they are educated in community colleges. Indeed it can be asked whether the difference between a community college education and a Bachelors program is any more significant than the educational distance between a B.A. (the dietitian), a M.A. (the social worker), and a Ph.D. (the psychologist). In fact some graduates of community colleges, like nurses, have achieved a substantial degree of « professional » recognition.

Another point to be made is that educational requirements are capable of manipulation by an occupation « on the make » and whether or not an occupation is engaged in such deception, educational requirements may not reflect the actual skill exercised in the workplace. While it is easy to identify different levels of education, as a general matter, it is much more difficult to determine whether the work performed by one occupation is any more difficult or deserving of special treatment than another. Who is to say that a physiotherapist performs a more complex function than a respiratory technologist although their levels of educational attainment are clearly distinct? On the other hand a lack of distinction in job duties may be the very reason why the salaried professional wishes to engage in collective bargaining, i.e. the continued conflict between engineers and engineering technicians.[27]

The most prominent legislative attempt to avoid an overly restrictive definition of professional employee and to accommodate these problems is section 2(12) of *The National Labour Relations Act*[28] in the United States. This section defines professional employee to mean:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the attempt produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced

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generally Elizabeth MACNAB, *A Legal History of Health Professions in Ontario,* a study for *The Committee on the Healing Arts* (1970). See also *Ontario Public Service Employees Union and Stratford General Hospital and Association of Allied Health Professionals* (1976) OLRB Rep. 459.

[27] See *Association of Engineers of Bell Canada and Bell Canada,* Montreal, Quebec (1976) 1 Canadian L.R.B.R. 345 where a lack of distinction in job duties deprived a group of engineers of professional status under the *Canada Labour Code.*

[28] 49 Stat. 449 as amended by 61 Stat. 136 and 73 Stat. 519, 29 U.S.C.A. s. 141 et seg (amended).

> type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes;
>
> (b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a) and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

This definition appears much less restrictive than its Canadian counterparts and provides the National Labour Relations Board with a greater capacity to respond to the claims of all intellectual workers. I might also add that the definition appears most consistent with the dynamics of occupational change.

#### The Appropriateness of Craft Status

The issue of craft status as opposed to some form of broader based bargaining unit structure is a very important one. The principle of craft unionism is maintained when bargaining units are confined to members of a single profession or to specialized categories within a profession. The alternative, sometimes referred to as industrial unionism, combines two or more professional groups or professional and non-professional employees. As we have seen, those jurisdictions that have granted salaried professionals access to collective bargaining laws of general application have not adopted a common formula in this regard.

Ontario and New Brunswick have granted craft status to one or more of the prototype professions while leaving the evolving or « new » professions to the discretion of a labour relations board. (An exception is New Brunswick's treatment of dietitians). As mentioned, the difficulty with this approach is that the prototype professions are thereby treated different from other intellectual workers who cannot be significantly distinguished on the basis of skill, training and responsibility. On the other hand, if all these occupations were granted craft status it would mean an impossible proliferation of bargaining units in many instances. For example, consider the effect on hospital labour relations if pharmacists, physiotherapists, occupational therapists, speech therapists, social workers, psychologists, psychometrists, laboratory technologists, x-ray technologists, respiratory technologists, nuclear medicine technologists, dietitians and medical record librarians were provided with separate bargaining units. Fragmentation on this order would only aggravate counter-productive professional rivalries that already exist (and that tend to veto each other in any event) and meaningful

negotiation would likely be impaired. In fact, it is more than interesting to note that where, as in the construction industry, this fragmented approach was adopted, governments are now gradually moving toward more integrated forms of bargaining and collective agreement administration.[29]

British Columbia, Saskatchewan, and the earlier P.C. 1003 represent a second approach to this problem. This alternative makes no mention of professional exclusions and grants no statutory guarantee of craft status for any intellectual worker. It leaves the treatment of such occupations to the discretion of the labour relations tribunal administering the statute, presumably to be dealt with by reference to general labour law principles that have evolved over the years in defining the «appropriate bargaining unit».[30] Unfortunately, however, professionals did not fare very well at the hands of the Canada Wartime Labour Relations Board and this experience raises questions about the capacity of existing tripartite tribunals to recognize the distinctive interests of intellectual workers. Few, if any, of these tribunals include representation from the occupations with which this essay is concerned and as we have seen it is all too easy to characterize the claims of professionals for separateness as elitist and snobbish. Without their own representation on labour boards, intellectual workers may therefore find bargaining unit determinations unduly preoccupied by fears of work force fragmentation and concerns for the organizational structure of the employer. Accordingly, without building in sufficient institutional sensitivity to the reasons why salaried professionals wish to engage in collective bargaining, this approach may not be very helpful to them.

The provisions found in the *National Labour Relations Act* (NLRA) and the *Canada Labour Code* represent a mid-point between these two alternatives. Section 9 (b) (1) of the NLRA provides that the National Labour Relations Board may not group professional em-

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[29] See Province of Ontario, *Report of the Industrial Inquiry Commission into Bargaining Patterns in the Construction Industry,* May 1976; First Report, *Special Commission of Inquiry into British Columbia Construction,* October 1975. However this is not to deny that the viable protection of craft interests is to a significant extent a function of bargaining unit size and large numbers of salaried professionals employed within a single bureaucracy, as is the case with nurses and teachers, may make it feasible to respect professional distinctions. But unless a special statute is enacted for specific industries or institutions, it is difficult to draft statutory language that can guarantee this right and yet provide the flexibility needed to deal with less monolithic work forces.

[30] These principles are summarized in *Usarco Ltd.* (1967) OLRB Report Sept. p. 526 and *Essex Health Assoc.* (1967) OLRB Report Nov. p. 716.

ployees and non-professionals in a single bargaining unit unless the majority of the professional employees vote for inclusion in such a unit. This section has been interpreted to mean that while the Board is required to differentiate professionals from non-professionals for bargaining unit purposes (remember the NLRA's expansive definition of a professional employee) it is not required to differentiate between professionals. However, applying its general principles of appropriateness, the Board has held that professional bargaining units should be confined to professionals having a community of interests.[31] This approach therefore precludes the Canada Wartime Labour Board type of decision and yet provides a tribunal with the flexibility required to tailor bargaining units to the diverse circumstances under which salaried professionals work.

The *Canada Labour Code* contains much more specific language dealing with two prominent work force situations that have caused difficulties in the salaried professional context — (1) a large number of persons with different professional backgrounds working side by side; and (2) the interdependence often found between salaried professionals and so-called para or non-professionals (i.e. the engineer and the engineering technician). By conditioning the grant of a craft-like bargaining unit by reference to these two situations, the legislative draftsman has tried to create a presumption in favour of craft bargaining and at the same time provide a more limited flexibility than that possessed by the National Labour Relations Board. Whether he has been successful or not still remains to be seen.[32]

## CONCLUSION

The earliest debates on this topic centered on whether salaried professionals should be permitted to engage in collective bargaining. Many argued that it was « unprofessional » to belong to a trade union or that the collective bargaining process, centering on money, would undermine the professional status of those who engaged in it. But for

[31] See for example *Standard Oil* (1954), 107 N.L.R.B. 1524 and *Ryan Aeronautical Company* (1961), 132 N.L.R.B. 1160.

[32] In the recent *Bell Canada* decision (supra) the Board doubted that it could limit the application of section 125 (3) (c) to only those situations where the non-professionals would not outnumber the professionals. And in the *Professional Engineers* case (supra) the Manitoba Board refused to include engineers who were not employed in a professional capacity.

the large part, these arguments have been overcome. It is now generally understood that salaried professionals have turned to collective bargaining for many of the same reasons as other employees, indeed for many of the same reasons their non-salaried colleagues established professional associations and sought licencing statutes.[33] There is therefore nothing «unprofessional» about collective bargaining. In fact, it is through collective bargaining that an accomodation of the often conflicting cultures of professionalism and a bureaucracy may be achieved. Through the collective bargaining process professionals can achieve a greater say in the decision-making processes of the enterprise; working conditions more consistent with professional standards; as well as salary scales that attract and retain highly qualified members of the profession to salaried positions.

Today then the debate centers not so much on whether salaried professionals should be allowed to engage in collective bargaining but rather how should such rights be accommodated and here I suggest the response has been unduly narrow. The overwhelming reliance on such indicators as the existence of licencing statutes and university degrees ignores the dramatic growth of other intellectual occupations that do not enjoy one or both of these attributes and yet merit the designation «professional».

I accept that not all occupations requiring some form of post-secondary training can be considered to be professional occupations. Lines of demarcation must be drawn even though they are somewhat arbitrary at the boundary. But in drawing them regard must be had to the dynamics of occupational change and, once drawn, labour boards ought to be able to group different «professionals» where a broad community of interest exists or where bargaining unit fragmentation would make labour relations chaotic. However sight must never be lost of the fact that intellectual workers who can be considered to be professional employees have, as a group, a community of interest deserving of special treatment and preferably along the lines adopted in the United States in my opinion. Too often their interests have been resented or misunderstood by both their fellow employees and their employers and labour relations boards, without direction, have not always been sufficiently sensitive to their central needs.

[33] Indeed some might suggest that ethics are merely a form of collective bargaining at the professional level.

## La négociation collective chez les professionnels

Plusieurs innovations législatives récentes des législateurs canadiens reconnaissent que les membres de nombreuses professions libérales doivent affronter les mêmes forces sociales et économiques que la masse des travailleurs salariés. C'est le cas des architectes, des dentistes, des avocats, des médecins et des ingénieurs professionnels. Ces innovations ont accordé aux membres salariés de l'une ou de plusieurs de ces professions l'accès à la négociation collective, et en ce faisant elles décidaient que ces professionnels devaient faire partie d'unités de négociation spéciales.

Parce que les forces qui ont poussé les professionnels salariés à se tourner vers la négociation collective s'accélèrent, d'autres gouvernements devront s'engager dans la même voie et nombre des régimes déjà existants prendre une plus grande extension.

Le nombre de salariés professionnels s'accroit sans cesse sinon d'une façon dramatique, et les grandes institutions bureaucratiques où ils trouvent à s'embaucher ne s'adaptent pas volontiers aux valeurs du professionalisme. De plus, les associations professionnelles n'ont pas été en mesure de trouver des solutions valables aux problèmes qui se posent aux professionnels en tant que titulaires d'emplois n'offrant guère d'autres mesures à substituer au régime de la négociation collective. Donc, alors que, au cours des premières discussions, on se demandait si l'on devait permettre aux professionnels salariés de négocier collectivement, on en est graduellement venu à comprendre qu'ils devaient avoir le droit de le faire pour les mêmes motifs que les autres employés, à vrai dire pour les mêmes motifs que leurs collègues indépendants ont fondé leurs associations professionnelles et ont défendu leur droit d'exercice de leur profession. La négociation collective peut canaliser leurs réclamations en matière de contrôle des emplois, d'établissement d'échelles de salaire «professionnel» et de meilleures conditions de travail. En fait, c'est au moyen de la négociation collective qu'il est possible d'arriver à concilier les cultures souvent en conflit du professionnalisme et de la bureaucratie.

Cependant, de nouvelles questions ont été soulevées. Les intérêts des professionnels salariés à leur travail sont comparables à ceux d'un nombre de plus en plus grand de travailleurs intellectuels. Ce nombre croissant de travailleurs intellectuels ainsi que leur «professionnalisation» remet en question l'à-propos, en fait la justification de mettre à part les membres salariés des professions-type quant à la façon de considérer leur statut spécial de négociation collective. Par exemple, en Ontario et au Nouveau-Brunswick, la législation concernant la négociation collective ne s'applique qu'aux salariés membres de professions données où l'on accrédite des unités de négociation professionnelle, c'est-à-dire des unités de négociation restreintes à une seule profession. Ceci oblige à se demander si l'accréditation par profession est une politique souhaitable et si les législateurs et les commissions de relations de travail n'auront pas à faire face à des réclamations dans le même sens des membres d'autres occupations intellectuelles qui possèdent pour la plupart, sinon toutes, la forte empreinte du professionnalisme.

Il est évident qu'une pareille attitude de la part des travailleurs intellectuels conduisait à une fragmentation inapplicable de la structure des unités de négociation. Mais s'ensuit-il qu'on ne doive accorder aucune considération particulière à une occupation intellectuelle qu'elle appartienne ou non à une profession type comme c'est le cas en Colombie-Britannique et en Saskatchewan? On a fait un effort véritable pour résoudre ces problèmes dans le Code canadien du travail et dans la Loi des relations de travail du Manitoba, qui contiennent, l'un et l'autre, une définition générale de l'employé profes-

sionnel, et le Code canadien prévoit une façon vraiment nouvelle de fixer les unités de négociation des professionnels salariés. Toutefois, le critère exclusif de l'existence de droit de pratique et de brevets universitaires ne tient pas compte de la croissance de l'accroissement dramatique d'autres occupations intellectuelles qui ne bénéficient pas de l'un ou de l'autre de ces attributs mais méritent tout autant une désignation professionnelle.

D'autre part, cela ne veut pas dire que toutes les occupations de cols blancs exigeant un certain type de formation post-secondaire devraient être considérées comme des professionnels salariés. Il faut tirer des lignes de démarcation même si elles peuvent être à la limite arbitraires. Mais en le faisant, on devrait apporter une attention sérieuse aux changements qui se produisent dans les types d'emplois. Une fois tirées ces lignes, les commissions des relations du travail devraient avoir le pouvoir de regrouper différents groupes de professionnels salariés qui possèdent une certaine communauté d'intérêts dans une seule unité de négociation. Le National Labour Board aux États-Unis fournit un excellent exemple de cette approche qui tient compte de l'ensemble de ces considérations.

Enfin, quelle que soit l'approche spécifique que l'on choisisse, certaines considérations spéciales s'imposent. Le fait qu'un groupe de travailleurs intellectuels possède une communauté d'intérêts a souvent été une chose ignorée par leurs employeurs, mal comprise par leurs compagnons de travail et négligée par les commissions des relations de travail. Pour ces motifs, l'attention qu'ont portée le gouvernement canadien et celui du Manitoba aux professionnels salariés constitue un progrès bienvenu.