Bargaining in the Public Sector: Some Canadian Experiments

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STUDENTS OF INDUSTRIAL RELATIONS often view Canada as the fifty-first state of the United States and assume that US practices prevail above the forty-ninth parallel. In many respects this generalisation is accurate, particularly as it applies to the private sector. Although there are some notable differences between the two countries in that sector, the similarities far outweigh the differences. Most of the organised workers in Canada belong to US-based international unions. In mining and manufacturing, many of the employing firms are branch plants of US multinational corporations. Labour legislation in Canada is closely modelled on the US Wagner and Taft-Hartley Acts. Canadian collective bargaining legislation is administered by boards that decide on the certification of an exclusive bargaining agent in the appropriate unit after ascertaining the view of the majority of workers involved. The parties are enjoined to bargain in good faith and permitted to strike or order a lockout if agreements cannot be reached. Written agreements are signed and binding. Disputes over interpretation are resolved by arbitration.

Many municipal employees in both countries are subject to arrangements similar to those applicable to the private sector. The similarity of approach does not, however, extend to public servants at the higher levels of government. Here Canada has recently followed an independent course and experimented with a number of procedures which are unique.

I. Canadian federalism

Like the United States, Canada is a federal country with three levels of government. In addition to the national Government centred in Ottawa, there are ten Provinces, two Territories and a multitude of municipalities.

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Municipalities have functions similar to those prevalent in many countries. Most municipal employees are governed by the labour legislation applicable to the private sector. In some Provinces even policemen, teachers and hospital employees have the right to strike. In others, most employees are permitted to strike, but certain groups of municipal civil servants must submit to binding arbitration because society will not tolerate a withdrawal of their services. The provincial governments have jurisdiction over the legislation governing municipal employees in their respective Provinces.

The other two levels of government have spheres of power allocated by the British North America Act, the written portion of the Canadian Constitution. The two levels of government share jurisdiction over labour relations, with the balance of responsibility much more decentralised than in the United States. As one would expect, each of the 11 governments has exclusive jurisdiction over labour legislation governing its own civil servants and employees of Crown corporations, agencies or boards created by the government concerned.

This article will describe and evaluate the industrial relations systems employed at the national level and in a few Provinces that have experimented with new approaches. It will not treat municipal labour relations at any length, since, as already indicated, the private sector model tends to apply to most of these employees.

II. The Federal Government's approach

Employees in most of the nationalised corporations (Crown corporations) are treated in the same way as employees in the private sector who are subject to the jurisdiction of the Federal Government. This includes employees of a large railway, the largest broadcasting network in Canada, the Polymer Corporation and the major airline, among others. All of these employees come under the Industrial Relations Disputes Investigation Act (IRDIA).[1] They belong to unions of their choice, and in most cases are in unions that include workers in the private sector as well. These employees are free to strike and have on occasion engaged in strike action. In a few cases involving strikes on the railways (including the privately owned one), special ad hoc legislation was passed when the strikes were already under way, ending the stoppages and imposing binding arbitration. In most instances, disputes have been resolved in much the same manner as they would be in the private sector.

For most civil servants and for the employees of a small number of boards and commissions, a separate Act, the Public Service Staff Relations Act (PSSRA), governs the relationship between the State as employer and its organised employees. This Act was promulgated in 1967

[1] This Act, which was promulgated in 1948, is now incorporated in the Canadian Labour Code as Part V—" Industrial relations ".

and applies to all employees of the federal service except those in agencies coming under the IRDIA and members of the Armed Forces and the Royal Canadian Mounted Police. The latter two groups have no collective bargaining rights.

The PSSRA applies to over 200,000 employees, most of whom are civil servants under the jurisdiction of the Treasury Board, acting as the employer; it also covers, separately, workers in the following agencies: the Atomic Energy Control Board, the Centennial Commission, the Defense Research Board, the Economic Council of Canada, the Fisheries Research Board, the National Film Board, the National Research Council and the Northern Canada Power Commission. Workers covered by the PSSRA are scattered among 75 departments and agencies across Canada, and some of them even serve overseas. They represent a wide range of occupations, from unskilled labourers to highly skilled research scientists, lawyers, physicians, and so on. The bargaining units are unusual in that they include a very large group of professionals (doctors, lawyers, dentists, engineers). In fact, almost all eligible employees have elected to engage in collective bargaining and have joined together in certified bargaining units.

In addition to the groups indicated earlier, confidential and managerial employees are also excluded from the legislation. The definition of " confidential and managerial " in the federal legislation is quite narrow. Indeed, many supervisory employees and workers who under legislation covering the private sector might be considered as managerial are in fact permitted to organise and engage in collective bargaining. They are even permitted to belong to the same union—and in some cases can be included in the same bargaining unit—as the persons they manage. Only about 3 per cent of federal civil servants have been excluded from bargaining owing to the managerial or confidential nature of their positions.

The legislation is administered by the Public Service Staff Relations Board, which has been established specifically to deal with the collective bargaining arrangements in the federal civil service. The Board is tripartite in nature and has many of the functions found in labour relations boards covering employees in the private sector: for example, it will decide on the appropriate bargaining unit, conduct certification proceedings, certify the bargaining unit, investigate allegations of unfair labour practices, and so forth. As will be seen later, the Board also has other functions not normally carried out by labour relations boards catering for private employees. The chairman of the Board is a permanent appointee of the Government who must be acceptable to all concerned. In addition to the chairman, there is a list nominated by the various major unions engaged in bargaining with the Government, and another list of employer nominees. All cases which go before the Board are heard by a tripartite panel including equal numbers of employer and employee representatives.

The Government has also established other machinery to assist in applying the labour legislation. The Pay Research Bureau operates under the Public Service Staff Relations Board and is therefore independent of the government departments. Its function is to gather statistical data on wage developments outside the federal public service, as an aid to all parties in collective bargaining as well as to the arbitration tribunals discussed below. The Pay Research Bureau operates with advice from both the unions and the employer concerned.

There is also a tripartite arbitration tribunal established to hear interest disputes.[1] The tribunal has several permanent chairmen, who must be acceptable to all parties. In addition it has a list of employer nominees and a list of employee nominees. Each arbitration case is heard by a three-man panel consisting of the chairman plus a nominee from each of the lists. The decisions of the tribunal, however, are those of the chairman.

The final piece of machinery established by the Government in this field is the appointment of an adjudicator to handle grievance disputes under the collective agreements. There is a chief adjudicator who must be acceptable to all parties, and who is assisted by other adjudicators. The grievance machinery is open not only to those who are eligible to engage in collective bargaining and choose to do so, but to other employees who either choose not to bargain or are ineligible for collective bargaining.

Scope of bargaining

The legislation differs significantly from that applying in the private sector in its definition of the scope of collective bargaining. Certain matters are specifically excluded therefrom, including in particular: (1) anything which requires action by Parliament, except for the granting of money to carry out the terms of the collective agreements; and (2) matters covered by the following legislation: the Government Employees Compensation Act, the Government Vessels Discipline Act, the Public Service Employment Act and the Public Service Superannuation Act.

These pieces of legislation are designed primarily to protect the merit principle in matters of appointment, transfer and promotion which are excluded from collective bargaining. In addition they cover matters such as superannuation, death benefits and accident compensation, which are also outside the scope of bargaining. All of these issues are open for discussion by the parties through the National Joint Council, composed of most of the major associations engaged in bargaining with the Government, and representatives of the Government. The discussions,

[1] For a recent definition of the distinction between " interest " disputes and " rights " or " grievance " disputes, see Johannes Schregle: " Labour relations in Western Europe: some topical issues ", in *International Labour Review*, Jan. 1974, pp. 1-22.

however, are consultative only and their results cannot bind the Government, which also exercises unilateral control over the classification system and job assignments.

Choice of route for dispute settlement

Under the federal legislation, the bargaining agent is given the option of choosing between two possible routes for resolving disputes which cannot be settled by negotiation. The first is to submit the dispute to a conciliation board, and should the board fail to resolve the dispute, the bargaining agent is then free to engage in a strike. The second alternative is to submit the dispute to arbitration, with conciliation by a conciliation officer as a possibility prior to arbitration.

It should be noted that the choice lies entirely with the bargaining agent, whose decision the Government is bound by law to accept. This provides a bargaining agent with a very powerful weapon in collective bargaining. Groups which are unwilling or unable to engage in effective strike action can compel the Government to submit disputes to compulsory arbitration. Other groups which may find the strike an effective weapon can in fact engage in work stoppages. The bargaining agent is free to alter its choice of route from one set of contract negotiations to the other. It must, however, designate the route to be followed before bargaining begins on a given contract.

As of 31 March 1973, there were 108 bargaining units in operation covering almost 198,000 employees subject to the PSSRA. Of these, 89 units with 130,484 members had opted for arbitration and only 19 units with 67,376 employees had selected the strike option. There had only been five legal strikes up to that time. Among the factors influencing a bargaining unit's choice of route is the question of " designated " employees.

DESIGNATED EMPLOYEES

In order to cope with the problem of emergency services, which are defined under the federal legislation as services whose non-performance would threaten the " safety and security of the public ", there is provision for designating employees who are not permitted to engage in strikes. Before selecting its bargaining route, the bargaining agent is entitled to information on the number of employees likely to be so designated. It can ask the employer to submit a list of employees whom the employer wishes to designate should a strike occur, and the employer is required to submit this list very soon after the request is received. The bargaining agent may choose to accept the designation of some or all of the listed employees. Should it decide to challenge a portion of the list, the case is decided by the Public Service Staff Relations Board. Once the number of designated employees is known, the bargaining agent then proceeds to select the

appropriate route. On average thus far, in all cases in which the bargaining agent has requested a list of designated employees, about 13.6 per cent of the employees in these bargaining units have been designated, but of course the proportions vary greatly between bargaining units.

THE CONCILIATION-STRIKE ROUTE

The following employees are prohibited from striking: those designated as indicated above; those not in a certified bargaining unit; those in a bargaining unit that has opted for the arbitration route; those in a bargaining unit covered by a collective agreement which is still in force; and those in a bargaining unit that has opted for the strike route but has not yet exhausted the conciliation procedure.

Employees who have opted for the strike route include postal workers (approximately 25,000), ship repair workers (approximately 2,300), printing workers (approximately 1,200), air traffic controllers (1,000), and technicians employed on electronic work at air terminals. It should be noted that non-supervisory postal workers have not been considered as designated employees.

There is great interest in the question of strikes in the federal service, after the recent experience with public service strikes in many other countries. In Canada, at the time of writing, there have already been three postal strikes. The first of these was illegal. The others were legal, because they came after the enactment of the PSSRA. All three strikes lasted for some time, and the public suffered considerable inconvenience. In two other strikes air traffic was severely disrupted for some time. However, in all cases a settlement was ultimately reached, and the nation managed to survive without these services.

THE ARBITRATION ROUTE

Disputes that may be submitted to arbitration are subject to a variety of restrictions, of which the most important appear to be the following:

(1) No matter may be brought before the arbitration tribunal that has not been raised earlier in collective bargaining. Matters excluded by law from bargaining are of course not subject to arbitration.

(2) In addition, there are certain issues that are negotiable but are not subject to arbitration. Arbitration is limited under section 70 of the PSSRA to " rates of pay, hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto ". Under section 56, arbitration tribunals cannot deal with matters which require action by Parliament, except for the expenditure of funds. Under section 70, arbitration specifically cannot deal with the merit principle of appointment, assignment, lay-off or release, nor can it deal with matters involving workers not in the bargaining unit. For

example, while the parties are free to negotiate on a matter such as union security (meaning the obligation under the collective agreement for workers to join or at least contribute to the certified bargaining unit), under section 70 the arbitration tribunal cannot deal with this question should the parties fail to resolve it by the process of bargaining.

Problems of the PSSRA

The most significant problems experienced under the federal legislation appear to be the following:

(1) *Fragmentation of the bargaining units.* The certification procedures followed under the Act have resulted in the existence of a very large number of bargaining units in the federal public service. Although some fragmentation was necessary and desirable, given the sheer size and diversity of employment in that service, it seems to have been carried too far. This means that many of the bargaining units are too small and weak to find the strike option a really effective one; strikes could occur in many of them for considerable periods of time, with little resulting pressure on the employer for any kind of settlement. It can also lead to the " whipsawing " or " leap-frogging " of demands presented by different bargaining agents.

Too many separate negotiating sessions are in progress at any one time. The employer is bargaining simultaneously with various bargaining agents; some of the larger associations negotiate on behalf of a sizeable number of bargaining units, and they too are constantly engaged in collective bargaining with the same employer. In each of these sessions the same issues come up again and again, particularly in relation to fringe benefits and working conditions.

The parties all too often are bargaining with an eye to what precedents may be set for other groups. This attitude creates all sorts of problems in collective bargaining and also for the arbitration process, since the arbitrators must be conscious of the implications of their decision in a given case for other groups of employees. If arbitrators pay excessive heed to this consideration, they may refuse to innovate in the area of fringe benefits and working conditions for fear of the possible repercussions.

(2) *Limitations on the scope of arbitration.* Since the subjects open to arbitration are much more restricted than those which can be dealt with by collective bargaining, bargaining agents often find that the employer can use the possibility of arbitration as a weapon in order to put pressure on them. Thus the employer may indicate his willingness to make concessions on certain matters not subject to arbitration only if the bargaining agent forgoes arbitration; if he does not, the employer may refuse to concede these matters, whereupon the bargaining agent will find that the arbitration tribunal is precluded from discussing them.

III. The Provinces

The Provinces have tended to copy the Federal Government in legislation applicable to labour relations in the private sector. However, only one Province has thus far adopted the federal model in the public sector.

This section will concentrate on a few Provinces where significant experiments are under way.

New Brunswick

New Brunswick is the sole Province to have adopted the federal model thus far. However, the New Brunswick approach deviates from the federal legislation in a number of ways as regards the choice between the strike and arbitration. In the first place, the parties can alter their preference during the course of bargaining. And secondly, either party is free to propose arbitration as an alternative to the strike, whereas in the federal model this prerogative is solely that of the union, but both parties have to agree. If either party rejects arbitration, a stoppage is the only available alternative.

Before a strike may be called, the union must secure the support of a majority of those participating in a strike vote. If a stoppage occurs, the union may not picket and the government in return agrees not to attempt to operate the facilities until the dispute is resolved.

New Brunswick's legislation applies not only to its civil servants and employees in Crown agencies, but also to school-teachers and hospital employees, who in most other Provinces come under special legislation.

Ontario

In Ontario, with the exception of workers in liquor stores, the provincial police and a few other groups, the civil service employees are all organised in a single large association, the Civil Service Association of Ontario (CSAO), which bargains on behalf of some 43,000 employees. While strikes are illegal in public employment, the parties have agreed to submit unresolved interest disputes to a tripartite arbitration tribunal. The arbitration tribunal's awards are final and binding, in so far as the provincial government has always agreed to implement them, and there is no reason to expect that the Province will deviate from past practice.

The pattern of bargaining is built around the fact that there is a single union for all the employees involved. Unlike the practice in the federal system and the private sector, wages are decided separately from fringe benefits and working conditions. Whereas the latter are decided for the entire service in separate negotiations, wages are dealt with in negotiations involving smaller groups of employees in groups of related occupations.

Saskatchewan

Saskatchewan was the first jurisdiction in Canada to sanction civil service strikes, by legislation enacted in 1944. Public employees in this Province are covered by the same legislation as employees in the private sector. This is also true of hospital employees and policemen, but not of teachers and fire-fighters, who are subject to compulsory arbitration in the event of failure to reach agreement.

Quebec

The approach in Quebec is to model bargaining in the public sector on the private sector. The government rejects arbitration as inappropriate on the grounds that it places undue power to determine the level of public expenditures in the hands of non-elected arbitrators. All employees, including hospital employees and teachers as well as civil servants and Crown agency workers, may strike if agreement cannot be reached in negotiations. Only policemen, other law enforcement officers and firemen are subject to compulsory arbitration.

To protect the public interest, however, the government has copied the US Taft-Hartley Act and provided for injunctions prohibiting for 80 days strikes that endanger " public health and safety ". Once this period has elapsed, no further delay can be imposed on strike activity. Furthermore, civil servants cannot strike until the parties agree on the definition of essential services and methods of maintaining them during a stoppage. If no agreement can be reached, these issues are decided by the Labour Court.

In 1972, civil servants, school-teachers and hospital workers all struck in a united front after failing to negotiate an agreement with the government. The legislative provisions concerning the maintenance of essential services were ignored and an injunction issued by the Courts also failed to end the strikes. A special ad hoc law, with strong penalties for violation, finally forced the workers to return to their jobs while bargaining was resumed.

IV. Some conclusions

One hesitates to draw any firm conclusions on the basis of the limited Canadian experience with collective bargaining for public servants. Only the Saskatchewan Act has been in force for a period long enough for trends to be discerned clearly. The other enactments described here have all operated for less than a decade. Before 1967, the prevailing practice was unilateral determination by the employer, with, at the most, prior representations from organised groups of employees.

None the less, some inferences can be drawn, albeit with varying degrees of confidence.

Management

In every jurisdiction, bargaining policy is closely controlled by the cabinet, usually through the treasury board. Departments of Labour play no role other than in the provision of conciliation services. In the federal system, even the conciliation function is handled by a special independent board.

Those conducting collective bargaining on behalf of the government are often recruited from the private sector. Government employment has grown so rapidly that there was no choice but to bring in persons with experience from outside the public service.

Labour

Freedom of association is present throughout Canada. However, the form of permissible association and the relationship of employee organisations with the authorities varies greatly between jurisdictions.

In some Provinces, the government has severely restricted the number of organisations that it will recognise and deal with. In Ontario, for example, only one union is recognised for all civil servants and the employer refuses to bargain with separate organisations representing various dissident groups of employees. In other instances, provision is made for certification and recognition of bargaining agents covering distinct sub-groups of public servants, such as engineers, lighthouse-keepers, and so on. The federal system, with over 100 separate bargaining units, is an example of this.

Most organised civil servants belong to unions composed primarily of public servants, although there are examples of groups affiliated with predominantly private sector unions. This is true at all three levels of government, and also of Crown agency employees. Thus in the railways and airlines, most workers in government-owned enterprises are in unions organising large numbers of private sector workers as well. On the other hand, workers in many utilities (electricity, water, etc.) belong to organisations that are predominantly composed of public service workers.

It should be noted that a number of public service unions are affiliated with union federations at the provincial and national levels comprising both public and private sector unions.

In the future some of the blue-collar workers in public employment may join powerful private sector unions active in their occupations. There is evidence in Ontario that some highway and hospital employees would prefer affiliation with unions such as the Teamsters.

Similarly, public service unions may extend their interest to other groups. In Ontario again, the CSAO has moved to organise workers in the community colleges and universities. Some of the professional unions may also decide to extend their activities to the private sector, which remains largely unorganised in their fields.

Collective bargaining

Much has already been said here about collective bargaining and little more need be added. Employees in municipal service and in government-owned enterprises have long enjoyed collective bargaining rights. Civil servants, however, were denied them and had at most consultation arrangements until very recently, though since the mid-1960s the higher levels of government have become more receptive to collective bargaining. Canada has gone much further than the United States in accepting arbitration and even strikes as the ultimate method of resolving disputes in the public service.

Experience with arbitration

Thus far, in those areas which are subject to compulsory arbitration, the parties appear to be reasonably content with the process and its results. There are, of course, exceptions to this generalisation, with periodic complaints from one party or the other. The most vociferous opponents of the system are hospital employees, who remain among the lowest-paid employees and blame arbitration for their plight.

The greatest weakness in the process lies in its limitations in coping with working conditions. In the federal system, with a proliferation of bargaining units, arbitrators are reluctant to innovate in this area for fear of setting precedents which could spread to other groups, with unforeseeable consequences. Furthermore, the arbitrators change from one dispute to another, and often neither are aware of nor have time to learn what is at stake in a request to alter a working rule.

The Ontario system avoids these problems by grouping all public service employees in a single bargaining unit and by placing the arbitration tribunal under a permanent chairman who has acquired expertise in the subject. These gains are obtained at the cost of an inability to effect a trade-off between wage increases, altered working conditions and fringe benefits, since these three areas are covered in separate negotiations. Furthermore, the compulsion to organise in a single bargaining unit has left some disaffected groups of civil servants with no option but to remain in a union that they do not support. Finally, with negotiations on working conditions covering the entire public sector labour force, only changes that are desirable throughout the bargaining unit tend to be considered seriously, while demands that are meaningful only to small groups are likely to be ignored.

Experience with strikes

Canadian experience with strikes as a legally sanctioned option has been limited. However, some things are now obvious. Each of the governments concerned is bound to arrange matters so that no strike

which brings it, or any significant part of it, to a halt will have to be tolerated for long. In the federal system, both the fragmentation of bargaining units and the prohibition of strikes by " designated " employees have been provided for in the legislation in order to ensure that strikes are socially and politically tolerable. The Quebec government will undoubtedly act to ensure that there is no repetition of the 1972 strikes.

Where strikes of public servants are permitted, since they cause no economic harm to the State, the union can only impose its will by winning over public support. Low-paid postal workers successfully used this weapon, whereas the more highly paid air traffic controllers merely annoyed the public and might well have achieved more by arbitration.

In the federal system, where strikes and arbitration are alternatives, at least for some groups, the Government seems to be determined to induce unions to opt for arbitration. In order to achieve this, its policy consists in resisting settlements for strikers that appear more generous than those that comparable groups are obtaining through arbitration. This policy appears to be working, as is evidenced by the small number of bargaining units that have opted for the strike and by the very low incidence of strikes in the public sector.

Wage guidelines and collective bargaining

Once governments engage in bargaining, they soon find themselves, as principal employers of many categories of labour, in the position of pattern-setters. Governments become pattern-setters because they are not only large but also very visible employers. Press coverage of settlements in the public sector is usually very thorough. This puts governments under considerable pressure from the private sector to resist demands for major innovations or improvements which could spread to the private sector.

In recent years, with their strong inflationary pressures, the Canadian Government has on occasion proclaimed guidelines for permissible wage settlements.[1] This has tended to focus attention on settlements in the public sector, where leadership in restraint was to be expected. The Government was thus compelled to adopt a rigid stance in collective bargaining and refused to exceed its own guidelines. Although the arbitration process produced some settlements in excess of the guidelines, arbitrators soon appeared to adopt the latter as a major criterion in their decisions. Unions in the public sector, indeed, showed concern that they were being compelled to behave in a " socially acceptable " manner, whereas in the private sector settlements continued to exceed the guidelines.

[1] See George V. Haythorne: " Prices and incomes policy: the Canadian experience, 1969-1972 ", in *International Labour Review*, Dec. 1973, pp. 485-503.

While governments do not have to face the cost restraints operating in the private sector, they do act, under pressure, to restrain tax increases and to set an example for all in the battle against inflation. Our experience indicates that these pressures can be as strong as competitive market forces in stiffening employer opposition to union demands.

Extent of the public sector

There is no doubt that the size and range of activities of the public sector are constantly expanding. The potential for growth is particularly strong at the provincial level. Education and health services are now financed largely by the Provinces, and concern with the cost of these services is mounting. We have seen that some Provinces have already assumed direct responsibility for bargaining with their employees in these sectors. Other jurisdictions are likely to be pushed in the same direction. This will introduce collective bargaining for groups formerly hostile to unions, such as doctors, dentists, pharmacists and university teachers. Working out arrangements suitable for these groups may well prove difficult. Concern with the environment and similar problems involving regional planning create pressures for a shift of functions from local governments to the Provinces. This often results in a change in unions and in bargaining procedures.

The Provinces are likely to be the first level of government to find themselves equipped with a collective bargaining system, but with no acceptable alternatives for resolving disputes. It may be expected that if unions are permitted to strike, they will seek ways of conducting effective strikes which governments are unlikely to tolerate. On the other hand, it is a moot point how long governments will be prepared to permit arbitrators to determine major issues of economic policy, such as the cost of public services and the pattern of wage settlements.