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Collective Bargaining in the Public Sector : A Re-Examination
La négociation collective dans le secteur public

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Aller au sommaire du numéro

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Résumé de l'article

Cet article préconise une nouvelle orientation dans l'étude du phénomène de la négociation collective dans le secteur public, en délaissant les qualificatifs de « litige » et de « problème » pour leur substituer un réexamen, à la lumière de l'expérience acquise au cours de la dernière décennie, de la technique elle-même en référant principalement à la justesse des structures de négociation collective dans le secteur public tel qu'on le connaît actuellement. Nous allons nous efforcer d'en identifier et articuler les fondements théoriques dans le secteur public ainsi que leur fonctionnement. Il ne s'agit pas de nous demander : comment peut-on se tirer de l'impasse, mais pourquoi y a-t-il impasse ? Nous allons délaisser la question : par quoi remplacer la grève ? pour nous demander pourquoi y a-t-il grève ? Nous sommes plus intéressés à nous demander si la négociation collective contribue à l'augmentation rapide des coûts dans les services publics qu'à nous demander comment on peut avoir raison de cette augmentation.

Tant en droit qu'en fait, l'infrastructure de la négociation collective dans le secteur public est sensiblement la même que celle qu'on retrouve dans le domaine privé. De plus, alors que notre connaissance des assises théoriques des structures de la négociation collective dans le secteur privé ainsi que de leur fonctionnement est considérable, les assises théoriques et le fonctionnement des structures du secteur public sont à peu près inconnues.

La négociation collective est un processus bâti de telle façon qu'il exige deux parties dont les positions divergent beaucoup à un moment donné et qui sont amenées à un moment ultérieur quelconque à s'accorder sur une position commune. Cette habileté remarquable à réduire et à éliminer leurs divergences grâce au temps qui passe est l'essence, le coeur et la justification de la technique de la négociation collective, et toute application d'une technique doit assurer la préservation et l'intégrité de cette qualité qui consiste à résorber des divergences. La question est la suivante : cette qualité est-elle assez préservée et présente lorsqu'on applique la technique dans le secteur public ? Nous ne le pensons pas. Nous sommes convaincu, en nous fondant sur l'argument mis de l'avant dans la théorie de la négociation collective dans le secteur privé, que la valeur de l'habileté à résorber les divergences repose sur certaines qualités dans la structure de la négociation collective et dans l'impact que chaque partie exerce sur ses rapports avec l'autre. Nous estimons que les structures couramment utilisées pour la négociation collective dans le secteur public ne stimulent pas suffisamment ni d'une façon assez positive les variables qui donnent naissance à cette qualité.

Lorsque la technique de négociation collective, telle qu'elle est conçue pour le secteur privé, est appliquée au secteur public, nous sommes surtout intéressés à réduire si possible la valeur de sa qualité de résorption des divergences qui résultent de (1) l'amplitude des questions négociables (2) de la nature et de la place du pouvoir de décision, (3) de la nature économique et sociale ainsi que du fonctionnement des secteurs public et privé, (4) de la nature des bénéficiaires de la négociation collective, (5) de l'engagement dans des rapports conflictuels et (6) du rôle et de la fonction des sanctions économiques. Nous sommes d'avis que ces caractéristiques inadéquates ont un impact profond sur le pouvoir de la négociation à conduire à des ententes acceptables dans le secteur public. Même si l'on peut endéduire bon nombre de conséquences possibles, il y en a trois qui attirent naturellement l'attention : d'abord, une attitude fort opposée des parties à la négociation collective et à ce qu'elles en attendent comme résultat des divergences qui se manifestent par (I) la nature des bénéficiaires, (II) par l'engagement dans des rapports de force*conflictuels* et (III) par le rôle et la fonction des sanctions économiques : en deuxième lieu, l'absence d'un degré suffisant de maturité en matière de questions financières et de bonne foi du côté de la partie patronale dans le processus de négociation à cause de différences (I) quant à la nature et au niveau de l'autorité décisoire et (II) quant à la nature économique et sociale et au fonctionnement des secteurs public et privé ; troisièmement, par les ambiguïtés qui entourent le rôle de la menace de grève pour favoriser la conclusion d'une convention collective par suite de divergences d'optique quant au rôle et à la fonction des sanctions économiques.

En regard des trois observations que nous venons d'énoncer, nous préconisons les deux propositions suivantes qui, l'une et l'autre, atténueraient de beaucoup les conséquences des caractéristiques structurales inadéquates de la négociation collective dans le secteur public.

En premier lieu, pour que des mesures valables soient prises afin d'atténuer ou d'éliminer l'optique sous lequel les parties conçoivent la négociation collective dans le secteur public et ce qu'elles en attendent, nous proposons que (a) partout où la chose est possible, les structures de négociation dans le secteur public soient exclues de la législation générale en matière de relations du travail et remplacées par des lois distinctes qui s'appliquent à ce secteur, (b) que cette législation et la législation existante dans le secteur public énonce les principes, les concepts et les délais qui serviront à régir les rapports, la raison d'être de l'activité, les responsabilités et les aspirations des parties au sein du secteur public au sujet de l'aboutissement du processus de négociation et (c) que, enfin, les parties à la négociation collective du secteur public songent sérieusement au recours à la médiation continue, c'est-à-dire à la présence d'un médiateur indépendant qui leur soit mutuellement acceptable dès le commencement de la négociation collective et qui serait capable de faciliter l'établissement de rapports sains entre les parties et de demeurer avec elles jusqu'à la solution finale de tous leurs différends. Deuxièmement, nous proposons qu'il soit reconnu une fois pour toutes que le système de prise de décision en matière de dépenses et de revenus dans le service public exige des parties la responsabilité et la bonne foi qui sont nécessaires pour faire naître cette qualité que possède la technique de négociation collective de résoudre les différends. Nous suggérons en conséquence que (a) la question salariale soit rayée du champ de la négociation collective dans le secteur public pour atténuer le degré de maturité financière exigé par le processus de négociation et (b) que, sous réserve d'une solution satisfaisante de tous les autres points rattachés à la négociation, la question salariale soit référée à un arbitrage tripartite obligatoire dont la décision serait finale et exécutoire.

Collective Bargaining in the

in the Public Sector: A Re-Examination

C. Brian Williams

This paper calls for a new direction in the study of public sector collective bargaining away from the « issue » and « problem » approach in favor of a re-examination, in the light of our experience over the past decade, of the physiology of the technique itself with particular reference to the appropriateness of current public sector collective bargaining strctures.

INTRODUCTION

During the past decade one of the major topics before Industrial Relations scholars in Canada has been the extension and development of the collective bargaining technique as the instrument for determining wages, hours, and working conditions in the public sector fields of employment. In turn, the bulk of our efforts have focused on a number of « issues » and « problems » which have emerged as a result of the transplantation of a private sector conceived instrument into the anatomy of our public sector. Some of the more prominent « issues » and « problems » include the : (i) determination of the appropriate bargaining unit, (ii) techniques for impasse resolution and the associated issues of (a) the role and function of a public sector work stoppage, (b) the sovereignty of Parliament, and (c) the determination of an « essential industry, » (iii) inexperience and immaturity in the relationship, (iv) instability in public service cost structures, and (v) ambiguity between the prerequisites of the collective bargaining technique and perceived norms of professional conduct.

There are those who allege with considerable vigor and with some evidence that the introduction of this « foreign technique » has not

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led to the labor relations solution expected of it. Regardless of the merits of such a charge, it is fair to say that we have yet to come up with the appropriate public sector labor relations solution and one must wonder if continued preoccupation with « issues » and « problems » represents the most appropriate direction in our subsequent study and research efforts in this challenging field.

This paper calls for a new direction in the study of public sector collective bargaining away from the « issue » and « problem » approach in favor of a re-examination, in the light of our experience over the past decade, of the physiology of the technique itself with particular reference to the appropriateness of current public sector collective bargaining structures. We seek the identification and articulation of the theoretical foundations of public sector collective bargaining structures and their functioning. We ask not : how can the impasse be resolved ?, but, why the impasse ? We leave the question ; what are the alternatives to the work stoppage ?, in favor of, why the work stoppage ? We are more interested in the question ; does collective bargaining contribute to the sharp rise in public service costs ?, rather than, how can one control this sharp rise in public service costs ?

Although there are exceptions, the structural underpinnings of public sector collective bargaining in law and in practice are basically the same as those employed in the private sector. In addition, while our knowledge of the theoretical foundations of private sector collective bargaining structures and their functioning is considerable, the theoretical foundations and functioning of public sector structures have been largely ignored [1].

As noted by Stieber, this has led :

> Some students of industrial relations (to question) the desirability of transferring, with little or no modification, the legal framework, concepts and institutions, which have become well established in private industry to the public sector. They prefer an approach which would take account of the important differences between public and private employment, both with regard to the unique characteristics of the (government) as employer and the indigenous development of organizations representing public employees. [2]

This observation is certainly not new as it was first expressed almost at the same time as the move to collective bargaining in the public

sector was first introduced. However, at that time and to today, its implications have been largely ignored ; in part because of the momentum which quickly developed in favor of public sector collective bargaining, in part because of the lack of evidence at that time to support the hypothesis that a private sector technique could not function effectively in the public sector, and in part because of the full professorships and consulting fee opportunities which would follow as a result of a firm and deliberate introduction of the technique and a subsequent « issue » and « problem » research focus in an attempt to evaluate its workings and effectiveness. It is here argued that this heretofore meaningful « issue » and « problems » approach has reached the point of rapidly diminishing returns and it is now appropriate and indeed urgent that we go back and examine more closely the still unattended observations which for so long have resided so mutely in the rudely introduced wound we made in public sector anatomy in order to accommodate our beloved collective bargaining technique.

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[1] As presented by Bevars MABRY the literature can be classified as follows : (1) Bargaining power : Neil W. CHAMBERLAIN, *Collective Bargaining,* New York, McGraw-Hill Book Co., 1951, 534 pp., Chapter 10 ; also see his *A General Theory of Economic Process,* New York, Harper & Row, 1955, 370 pp. ; John T. DUNLOP, *Wage Determination Under Trade Unions,* New York, The Macmillan Co., 1928, 230 pp., John R. HICKS, *The Theory of Wages,* New York, The Macmillan Co., 1932, 247 pp., Chapter 7 ; Alfred KUHN, *The Study of Society : A Unified Approach,* Homewood, Ill., Richard D. Irwin, Inc., 1963, 810 pp., Chapters 17-19 ; Charles E. LINDBLOM, « Bargaining Power in Price and Wage Determination, » *Quarterly Journal of Economics,* Cambridge, Vol. 62, May, 1948, pp. 396-417. (II) Bargaining power under uncertainty : G.L.S. SHACKLE, *Expectations in Economics,* London, Cambridge University Press, 1949, 146 pp. ; F. ZEUTHEN, *Problems of Monopoly and Economic Warfare,* London, Routledge & Kegan Paul, Ltd., 1930, 152 pp. (III) Game theory : R. Duncan LUCE and Howard RAIFFA, *Games and Decisions,* New York, John Wiley & Sons, Inc., 1957, 509 pp. ; John NASH, « Two-Person Cooperative Games, » *Econometrica,* Chicago, Vol. 21, No. 1, January, 1953, pp. 128-40 ; T.C. SCHELLING, *The Strategy of Conflict,* Cambridge, Mass., Harvard University Press, 1960, 309 pp. (IV) A general theory of bargaining : J. PEN, *The Wage Rate Under Collective Bargaining,* Cambridge, Mass., Harvard University Press, 1959, 216 pp. ; Carl STEVENS, *Strategy and Collective Bargaining Negotiations,* New York, McGraw-Hill Book Co., 1963, 192 pp. This list is by no means exhaustive.

[2] Jack STIEBER, « Collective Bargaining in the Public Sector, » in *Challenges to Collective Bargaining,* (Lloyd Ulman, Editor), Englewood Cliffs, Prentice-Hall, 1967, 180 pp., p. 77, and J. D. MUIR, *Collective Bargaining by Public School Teachers* (Task Force on Labor Relations, No. 21), Ottawa, Queen's Printer, 1968, 382 pp., p. 315.

THE COLLECTIVE BARGAINING TECHNIQUE ITS DESIGN AND FUNCTIONING

From the words of the Webb's we have the term. From the trade unionists and their outriding intellectuals we have its design and functioning. From the writings of scholars over the subsequent 82 years of its life we have amassed a body of knowledge which at least in terms of weight and careers easily outstrips the record of any other concept in the industrial relations field. We have theories of collective bargaining, models of collective bargaining, agonizing excursions into the definition of collective bargaining, and simulations of collective bargaining. It has been poked and prodded by the institutional economists, bandied about by the behavioralists, and reduced to an absurd oversimplification by the mathematical game theorists and simulators. In the light of all this, what can we say about the structural underpinnings of collective bargaining and the implications of each to the success of the technique in the public employment sector ?

First some general observations. The purpose of the collective bargaining technique is to bring forth an agreement on the terms and conditions which will apply to the persons covered by it. If no agreement is produced short of an actual work stoppage then collective bargaining has failed. Collective bargaining is a classic case of decision-making in the face of uncertainty. Neither party can say for sure what the final settlement position is, but each attempts to reach it at the lowest possible cost and each adopts a bargaining strategy for the purpose of doing just that. It is a process that is designed in a way that will take two parties with widely differing initial positions at one point in time and bring them to an agreement on a commun position at some subsequent time.

This remarkable ability to reduce and eliminate differences through time is the essence, virtue, and justification for the collective bargaining technique and any application of the technique must ensure the preservation and integrity of this difference resolving quality. This quality has been the center of a great deal of study by private sector oriented collective bargaining scholars, particularly those primarily concerned with collective bargaining theory. The two more common issues have been (i) what determines the degree to which this quality is present in a collective relationship ? and (ii) in what way does it influence the timing and terms of settlement ? The question is : are these qualities sufficiently preserved and present when the technique is applied in the public sector fields of employment ? We think not. It is our conviction, based upon the argument

put forth in private sector collective bargaining theory, that the strength of this difference resolving ability depends upon the presence of certain qualities in the collective bargaining structure and in the impact of each on the relationship between the parties. We argue that currently employed public sector collective bargaining structures do not sufficiently positively stimulate the variables which determine this quality.

Although the proof of our position must wait upon the completion of work which is now well underway, it is possible to outline the approach and framework within which we are working.

From the vast literature on collective bargaining in general and its theoretical foundations in particular, we have identified the variables which, it is alleged, determine the strength of the difference resolving quality of collective bargaining.

We examined each variable in the public and private sector contexts in an attempt to identify any variation in the presence or quality of each in either sector.

As a result of this comparative analysis, we have identified some six variables, all of which are structural in character, each of which has a notable difference in presence or quality between the private and public sectors and which to us represent a structural incongruency.

For each of the six structural incongruencies we are presently attempting to establish a causal relationship with three observed qualities in current public sector collective bargaining structures each of which impairs the difference resolving quality of collective bargaining.

We anticipate that the pursuit of this approach will lead not only to the articulation of a cause and effect relationship between the six structural incongruencies and the three observed qualities, but also will set forth some foundations upon which we may build a much needed body of knowledge in public sector collective bargaining theory and the steps we should take to improve public sector bargaining structures and their functioning.

Structural Incongruencies. When the collective bargaining technique, as designed for application in the private sector is applied to the public sector we are particularly concerned about the possible reduction in the magnitude of its difference resolving quality as a result of differences in : (1) the scope of bargaining issues, (2) the nature and locus of

decision-making authority, (3) the economic and social nature and functioning of the public and private sectors of employment, (4) the nature of collective bargaining beneficiaries, (5) commitment to the adversary relationship, and (6) role and function of economic sanctions. Let's examine each of these observed incongruencies a little more closely.

Scope of Bargainable Issues

As conceived, and except for modern day limitations set forth in legislation, the scope of issues to be embraced by collective bargaining was limited only by the power of one party to impose a defined scope on the other party. However, in the public sector many terms and conditions of employment are set forth by alternative techniques such as (i) civil service regulations, (ii) legislation, (iii) professional associations and (iv) codes of practice and ethics.

Nature and Locus of Decision-Making Authority

Collective bargaining, as is implicit in the term « parties » or « labor » or « management » contemplates a tendency for the centralization of decision-making in the hands of those individuals participating in the collective bargaining technique or at least those who are responsible for the success of failure of the enterprise. However, the evidence seems to suggest that collective bargaining decision-making in the public sector is much more diffuse than was ever contemplated. In addition, it appears that this decision-making is shared between those who have managerial responsibility for a given public service activity and those who have political responsibility for the activity. As was pointed out a number of years ago :

> Private employer representatives have broad discretion to negotiate and commit the organization on almost all matters. The negotiators and top management constitute a closely knit « team. » This is not true in the public sector. An agency head may have authority to negotiate on some issues but not on others ... Even the chief executive does not have the final say on the distribution of funds and can only submit recommendations to the legislative body, which has responsibility for the overall budget and levying of taxes to balance income and expenditures. And, if the negotiated items include matters mandated by ... law or civil service provisions, there is still an additional layer of decision makers to go through. This has important implications for determining the appropriate bargaining unit and the appropriate scope of negotiations within the given unit. [3]

[3] STIEBER, *ibid.*, p. 77.

Economic and Social Nature and Functioning of Private and Public Sectors

There is considerable evidence in the history of the development of the collective bargaining technique in the private sector to conclude that the legal framework, procedures, ritual, techniques and consequences were developed as a response to and in recognition of certain economic and social facts of private sector industrial life. These facts of life include : [4] (i) application of the technique in what was and is basically still a competitive market system, (ii) general commitment by all to the pursuit of economic self interest, (iii) little comment in legislation on the bargaining process itself up to the point of the impasse, (iv) fierce resistance by employers to trade unionism and the collective bargaining technique, (v) the helplessness of the individual employee in the face of competitive market forces and the complete unilateral authority of employers to hire and fire, set wages, hours, and other conditions of employment, and (vi) the total and complete commitment of the Canadian trade union movement to the collective bargaining technique. [5] In some cases, these facts of life simply do not apply nor exist in the monopoly flavored public employment field. In others, their presence is notably less than what one observes in a private sector. Some evidence of these very basic differences reside within the development of the labels of « private » as opposed to « public » itself, and the fact that some activities have been designated « public » as opposed to « private. »

Beneficiaries of Collective Bargaining

In general, collective bargaining in the private sector contemplates a major beneficiary cadre composed almost exclusively of craft and industrial occupational classifications. It was conceived and designed by the « working class » and its friends as an instrument to be used for the benefit of the « working class. » However, the concept of « working class » has proven to be a hangup in public sector bargaining, encompassing as it does large groups of individuals which occupy technical, semi-professional, or professional occupational designations and who find their perceived class definition and income levels somewhat in conflict with the beneficiary class connotation implicit in the technique of collective bargaining.

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[4] Based on Stieber, *ibid.*, p. 77-78.

[5] For an excellent review of the principles underlining our collective bargaining system and its evolution and operation see *Canadian Industrial Relations* (the Report of the Task Force on Labor Relations), Ottawa, Queen's Printer, 1968, 250 pp. pp. 9-36 (hereafter referred to as *Task Force Report*).

Commitment to the Adversary Relationship

The implications of the adversary characteristic of the collective bargaining relationship is often overlooked in the discussion of public sector collective bargaining structures. While the functioning of the characteristic is quite compatible with the doctrine of the pursuit of economic self interest, one must question the relevance of the unrestrained deployment of this characteristic and its associated doctrine in the public employment field. The adversary characteristic contemplates the turning of one party against another with the view to opposing or resisting each other in favor of one's position or objective. It breeds the conflict context which is so much a part of the collective bargaining activity. As the Task Force so aptly stated : « 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 management's drive for productive efficiency and the worker's quest for job, income, and psychic security are to be reconciled. » [6]

This conflict or resistance power of one party over another is manifested in the collective bargaining process itself through the tactics and strategy adopted by the parties but its greatest manifestation comes in the form of the impasse and the threatened work stoppage which normally emerges from it. Either the collective bargaining structure provides impasse resolution measures or it is inevitable that the parties will seek to resolve impasse through the work stoppage. In Canada, our long standing commitment to compulsory conciliation and ad hoc mediation are the techniques we use to attempt to resolve the impasse condition short of the actual work stoppage. It is our opinion that current public sector bargaining structures and the adversary quality of it too easily bring the parties to an impasse condition and that we offer too little in a way of alternative impasse resolution measures. In effect we, unintentionally maybe, are relying too heavily on the work stoppage threat as an instrument of impasse resolution. In the public sector structures it is imperative that we dampen the adversary quality of the relationship and the impasse condition that it spawns. We should be concerned not so much with the work stoppage and alternatives to it, but with the reasons for the impasse and its resolution without the resort to a work stoppage.

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[6] *Task Force Report, ibid.*, p. 119.

Role and Function of Economic Sanctions

The role and functions of economic sanctions, normally in the form of a work stoppage, has received the attention of numerous collective bargaining scholars. [7] Suffice it to say here that the work stoppage possibility profoundly influences the relative bargaining power of the parties and as such plays a paramount role in the ability of collective bargaining to lead to the satisfactory resolution of differences between the parties. It is our opinion that the appropriate test for the introduction or retention of the work stoppage possibility must reside in the degree to which the work stoppage possibility either avoids the emergence of an impasse condition or resolves an impasse condition. As Mabry has so cogently expressed it :

> Coercion, defined here as the ability to impose sanctions in order to secure agreement on one's own terms, becomes the significant instrument. It is the instrument that compels one party to retreat from an established position, to consider alternative proposals for settlement, to re-evaluate and to scrutinize more closely the issues pertaining to the negotiations, to explore seriously the consequences of non-settlement. This is true whether the tools of coercion are being envoked or whether their potential existence is simply being revealed.
>
> .....
>
> In union management relations, the principle direct method to impose a loss is through the use of the strike or the lockout, and many of the other elements of the bargaining power more or less indirectly operate to influence the effectiveness of the strike or lockout [8].

It is our position that the anticipated economic coercive nature of the work stoppage threat in the public employment field does not materialize in the public sector structure in part due to the lack of accountability on the part of the structure and in part due to the absence of the private sector economic functioning characteristics of nearly all public sector activities. As a result, what coercive power does flow from the threatened work stoppage is not economic in nature, i.e., the economic consequences of a work stoppage to the activity, but political in nature, i.e., the political consequences flowing from the interruption of the particular public sector activity and the demand that it be restored. Again, according to Mabry :

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[7] For an excellent review see Bevars D. MABRY, *Labor Relations and Collective Bargaining*, New York, Ronald Press, 1966, 475 pp., Chapters 8, 9 and 10, and Neil W. CHAMBERLAIN and James W. KUHN, *Collective Bargaining*, Toronto, McGraw-Hill (second edition), 1965, 451 pp., Chapter 7.

[8] Mabry, *ibid.*, p. 202.

> Since the exercise of coercive power has economic consequences — that is, the ability to coerce applies the ability to reward or punish in monetary terms — some measure of one's own ability to coerce and the ability of his opponent to coerce becomes necessary if a rational economic decision is to be made regarding the terms of the contract to be negotiated. The measure of relative coercive power may be precise or imprecise, and the degree of precision depends on the manner in which the components of power are identified and related, and the precision with which the components themselves are measured[9].

One may ask at this point: Why the preoccupation with the structural underpinnings of collective bargaining? The answer, while very easy to state is not so easy to demonstrate in a conclusive way. Simply stated, the structural underpinnings of collective bargaining and the context in which they were conceived, that is the economic and social nature of the private sector, have come together to establish the relative bargaining power of the parties. It is the free exercise of this bargaining power which brings forth an acceptable collective agreement out of the exercise of the collective bargaining technique. That is, the difference resolving quality of collective bargaining is a function of the relative bargaining power of the parties. The thesis advanced here is that the insertion of the collective bargaining technique, a technique conceived in the economic realities of the private sector and with supporting structural underpinnings complimentary to the realities of the private sector, into the public sector anatomy, has severely disturbed the relative bargaining power positions of the parties and hence the degree to which collective bargaining is able to bring forth its difference resolving quality. This has occurred to such an extent that it is unlikely that collective bargaining is in a position to do the job we have asked of it in the public sector. Further, and assuming that scholars from Commons to Chamberlain are correct, and we argue that they are, the direction to move in public sector collective bargaining is to the re-establishment of more meaningful bargaining relationships through changes in the legislative structural underpinnings of public sector collective bargaining system.

EFFECTS OF STRUCTURAL INCONGRUENCIES ON PUBLIC SECTOR COLLECTIVE BARGAINING

It is our contention that these structural incongruencies noted above have a profound impact on the ability of collective bargaining to bring forth acceptable agreements in the public sector. Although there are a

[9] Mabry, *ibid.*, p. 202.

number of possible consequences that one could cite, there are three that are currently receiving our attention. First, sharply contrasting approaches to and expectations in collective bargaining by the parties as a result of differences in the (i) nature of beneficiaries, (ii) commitment to the adversary relationship, and (iii) role and function of economic sanctions. Second, the absence of a sufficient degree of financial accountability and good faith on the part of the employer participant in the process due to differences in the (i) nature and locus of decision-making authority, and (ii) economic and social nature and functioning of the public and private sectors of employment. Third, ambiguities surrounding the role of the threatened work stoppage in bringing forth a successful conclusion of a collective agreement because of differences in the role and function of economic sanctions.

Contrasting Approaches and Expectations of the Parties

Most, if not all, the unions operating within the public sector :

> ... see little difference between employment in the private and public sectors. They focus upon the individual employee, his economic needs, his job and his fundamental needs as a citizen in a democratic society. Since public employees do not differ from those in private industry in terms of their economic requirements and the desire to have a voice in determining their conditions of employment ; since almost every job in public employment has its counterpart in private industry ; and since management behaves the same way vis-à-vis employees, union leaders see no reason for different laws, procedures and institutions governing labor management relations in the public and private sectors of the economy [10].

In short, the unions enter public service collective bargaining just as they would in the private sector. They assume that (i) the same 'rules' apply, (ii) the other side of the table perceives the process as they do, (iii) their counterparts are as serious and experienced as they are, (iv) the purpose of collective bargaining is to bring forth a collective agreement, (v) they are fully prepared to exercise their right to strike (if they have the right to) and if such action is necessary, and (vi) the scope of issues is itself bargainable and determined by the parties. However, this may not be the case as the incongruencies noted earlier suggest and this is where the issues and problems in public sector collective bargaining start to emerge.

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[10] Stieber, *op. cit.*, p. 77.

Absence of Financial Accountability and Good Faith

The employer is not the private employer and he does not, as the union's expectations call for, either approach the process or behave as a private employer. Nor in the face of the nature of his operations can he do so even if he wanted to. In the usual case we are talking of a non-profit operation. This has profound implications to collective bargaining. First, the bargaining is not over the distribution of future income flows and cost/price relationships and the ability of management to satisfy both (a responsibility they must assume) but simply the determination of subsequent public service costs. [11] It seems reasonable to assume that the charge given the public sector negotiator is to keep these costs down, but it is not his responsibility to generate the required revenues and as such does not face the same consequences of his actions as his private sector counterpart. Indeed, the source of revenues may not even be generated from the activity in question (i.e., hospitals and teachers) but from the tax stream and the political/legislative structure that controls it. [12] Second, those who will be required to provide the revenues may not even be present at the bargaining table and we have elsewhere been warned to guard against this. [13] It is in reality « broker bargaining. » In short, private sector bargaining calls for accountability by the parties and brings to the bargaining table the bargaining power relationship that comes with it. The presently employed public sector bargaining structures do not call forth the required accountability on the part of the employer. We argue that the lack of accountability and the good faith associated with it in public sector structures does not favor successful collective bargaining. [14] It leads to protracted negotiations, lack of good faith in bargaining, increases the likelihood of a failure to reach agreement short of an impasse, encourages, through lack of progress, the introduction and participation of the real revenue source decision-makers, and tends to generate a crisis atmosphere. In bargaining power terms it greatly reduces the power of the employer and equally increases the power of the union.

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11 *Task Force Report, op. cit.*, p. 119.

12 F. ISBESTER and Sandra CASTLE, « Labor Relations in Ontario Hospitals : A Question of Survival, » *Industrial Relations*, Quebec, Vol. 26, No. 2, April 1971, p. 356.

13 *Task Force Report, op. cit.*, pp. 164-65.

14 *Task Force Report, op cit.*, p. 163. We must lament the decision of The Task Force not to put the issue of good faith bargaining in Canada into the « . . . elaborate jurisprudential container . . . » used by our neighbor to the south.

Ambiguities in the Role of a Work Stoppage Threat

The uncertainties surrounding the certainty of an actual work stoppage greatly affects the relative bargaining power of the parties. It is inconceivable to us to talk of a collective bargaining structure which does not have as part of it the uncertainties which flow from the possibility of a work stoppage. This possibility remains the premier device of forcing the parties to resolve their difference. However, when applied in the public sector we are not all that convinced that it in fact plays as important a difference resolving role as it does in the private sector. Or, put another way, that its contribution to difference resolution is significantly less than the pain experienced by parties not part of the bargaining process and who generally are the users of the particular service in question. In such a situation (if it does not contribute pressure to difference resolution) the possibility has been poorly placed and provides to our mind the soundest argument for removing it. As the distinguished members of the Task Force phrased it : « If the system of collective bargaining should be weighed and found wanting because of limitations inherent in the system or because of defects that have too long gone uncorrected, society may reject the system as unsuitable for its purpose. » [15] The fact of the matter is that the work stoppage threat leads to difference resolutions because of its translation by the parties into consequences to the economic viability of the enterprise, that is, in sales, revenues, market losses, and deterioration of competitive position. However, the bulk of the public sector is not encumbered by such mind boggling calculations and as such the influence of the threat is greatly reduced. [16] In short, we fail to see how in traditional terms the work stoppage threat is able to perform its otherwise constructive difference resolving role in the public sector. On the other hand, the political consequences and pressures flowing from the threat may be considerable (a reality that the private sector generally is under little obligation to recognize) and conceivably could lead to further difference resolving efforts at the bargaining table. However, to our mind this possibility is fraught with too great uncertainty to support its retention as an element in the structure, it normally surfaces only after an impasse has occurred, and it still does not get around our position that its contribution to

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[15] *Task Force Report, op. cit.*, p. 38. The interested reader may wish to review their section titled « Collective Bargaining in a Changing World, » pp. 37-40 as it is particularly relevant to the themes of this paper.

[16] Muir, *op. cit.*, pp. 315-16 and Mabry, *op. cit.*, pp. 189-202.

difference resolution is significantly less than the pain experienced by those who are the users of the particular service in question. [17]

PUBLIC SECTOR BARGAINING STRUCTURES — SOME PROPOSALS

It is our opinion that the consequences noted above, all of which follow from the structure incongruencies we noted earlier, seriously impair the ability of collective bargaining to do its job in the public sector. Further, we call upon all of us who make our living off of the collective bargaining activity and the labor-management relationship in general, to redirect our attention to these long standing observations and come to the aid of our gratuitous but deeply troubled benefactor. With respect to the three consequences brought forth in this paper we offer for your consideration the following two proposals, both of which would substantially reduce the consequences that the structural incongruencies have for collective bargaining in the public sector.

1. That steps be taken to reduce or eliminate the contrasting approaches and expectations of the parties in public sector collective bargaining. In part some relief follows from the accumulation of experience with the technique and in part by a wide variety of educational activities which have accompanied the introduction of the collective bargaining system. [18] However, we propose that :

   (a) where applicable, public sector bargaining structures be removed from the « omnibus » private sector legislation and be replaced by separate legislation to cover the activity in question, and that

   (b) this legislation, and existing public sector legislation, set forth the principles, concepts, and time limits that are to govern the relationship, the purpose of the activity, the public sector responsibilities of the parties (or as Muir puts it « . . . the public nature of the employer's business, ») [19] and the expectations concerning the outcome of the collective bargaining process, [20] and,

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18 Isbester and Castle, *op. cit.*, pp. 360-61.

17 Stieber, *op. cit.*, pp. 82-84.

19 Muir, *op. cit.*, p. 315.

20 In this proposal we find support in principle in *Task Force Report* observation : « We favor, then, the general principle of freedom for the bargaining structure to find its own form, subject to the exercise of influence by the state where the public interest is high. »

(c) the parties in public sector collective bargaining give serious and deliberate consideration to the introduction of continuous mediation : that is the attendance of a mutually acceptable independent mediator at the commencement of collective bargaining with the view to facilitating a sound relationship and of staying with the parties through to the final resolution of all differences. [21]

2. That we accept once and for all that our public service expense and revenue decision-making system mitigates against the likelihood of designing into the system the degree of financial accountability and good faith on the part of the parties which is necessary to bring forth the difference resolving quality of the collective bargaining technique. We propose therefore that :

(a) the wage and salary issue be taken out of the scope of public sector collective bargaining and thereby sharply reducing the degree of financial accountability required of the collective bargaining process, and

(b) subject to the satisfactory resolution of all remaining issues within the scope of bargaining, that the wage and salary issue be referred to a tripartite forced choice arbitration board with its decision final and binding. [22]

Our acceptance of the forced choice technique is because of the excellent accountability quality it imposes upon the parties if they are to have any chance of their position being accepted by the board. Also, and we wish to stress, we do not offer it simply because it would avoid the public sector work stoppage (as a stoppage would still be possible) but because of our belief that the collective bargaining technique cannot adequately handle the wage and salary issue and it is unrealistic, indeed presumptious, to continue to ask it to do so. Our support for the removal of the wage and salary issue from the scope of bargaining in favor of the forced choice arbitration technique is offered not as an alternative to the work stoppage in the public sector but as an alternative to handling the issue through the collective bargaining technique.

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21 As suggested by Noel A. HALL, *Vancouver Sun*, Wednesday, May 17, 1972.

22 Carl STEVENS, « Is Compulsory Arbitration Compatible with Bargaining, » *Industrial Relations*, Berkeley, Vol. 5, No. 2, February, 1966, pp. 38-52.

LA NÉGOCIATION COLLECTIVE DANS LE SECTEUR PUBLIC

Cet article préconise une nouvelle orientation dans l'étude du phénomène de la négociation collective dans le secteur public, en délaissant les qualificatifs de « litige » et de « problème » pour leur substituer un réexamen, à la lumière de l'expérience acquise au cours de la dernière décennie, de la technique elle-même en référant principalement à la justesse des structures de négociation collective dans le secteur public tel qu'on le connaît actuellement. Nous allons nous efforcer d'en identifier et articuler les fondements théoriques dans le secteur public ainsi que leur fonctionnement. Il ne s'agit pas de nous demander : comment peut-on se tirer de l'impasse, mais pourquoi y a-t-il impasse ? Nous allons délaisser la question : par quoi remplacer la grève ? pour nous demander pourquoi y a-t-il grève ? Nous sommes plus intéressés à nous demander si la négociation collective contribue à l'augmentation rapide des coûts dans les services publics qu'à nous demander comment on peut avoir raison de cette augmentation.

Tant en droit qu'en fait, l'infrastructure de la négociation collective dans le secteur public est sensiblement la même que celle qu'on retrouve dans le domaine privé. De plus, alors que notre connaissance des assises théoriques des structures de la négociation collective dans le secteur privé ainsi que de leur fonctionnement est considérable, les assises théoriques et le fonctionnement des structures du secteur public sont à peu près inconnues.

La négociation collective est un processus bâti de telle façon qu'il exige deux parties dont les positions divergent beaucoup à un moment donné et qui sont amenées à un moment ultérieur quelconque à s'accorder sur une position commune. Cette habileté remarquable à réduire et à éliminer leurs divergences grâce au temps qui passe est l'essence, le coeur et la justification de la technique de la négociation collective, et toute application d'une technique doit assurer la préservation et l'intégrité de cette qualité qui consiste à résorber des divergences. La question est la suivante : cette qualité est-elle assez préservée et présente lorsqu'on applique la technique dans le secteur public ? Nous ne le pensons pas. Nous sommes convaincu, en nous fondant sur l'argument mis de l'avant dans la théorie de la négociation collective dans le secteur privé, que la valeur de l'habileté à résorber les divergences repose sur certaines qualités dans la structure de la négociation collective et dans l'impact que chaque partie exerce sur ses rapports avec l'autre. Nous estimons que les structures couramment utilisées pour la négociation collective dans le secteur public ne stimulent pas suffisamment ni d'une façon assez positive les variables qui donnent naissance à cette qualité.

Lorsque la technique de négociation collective, telle qu'elle est conçue pour le secteur privé, est appliquée au secteur public, nous sommes surtout intéressés à réduire si possible la valeur de sa qualité de résorption des divergences qui résultent de (1) l'amplitude des questions négociables (2) de la nature et de la place du pouvoir de décision, (3) de la nature économique et sociale ainsi que du fonctionnement des secteurs public et privé, (4) de la nature des bénéficiaires de la négociation collective, (5) de l'engagement dans des rapports conflictuels et (6) du rôle et de la fonction des sanctions économiques. Nous sommes d'avis que ces caractéristiques inadéquates ont un impact profond sur le pouvoir de la négociation à conduire à des ententes acceptables dans le secteur public. Même si l'on peut en

déduire bon nombre de conséquences possibles, il y en a trois qui attirent naturellement l'attention : d'abord, une attitude fort opposée des parties à la négociation collective et à ce qu'elles en attendent comme résultat des divergences qui se manifestent par (I) la nature des bénéficiaires, (II) par l'engagement dans des rapports de force *conflictuels* et (III) par le rôle et la fonction des sanctions économiques : en deuxième lieu, l'absence d'un degré suffisant de maturité en matière de questions financières et de bonne foi du côté de la partie patronale dans le processus de négociation à cause de différences (I) quant à la nature et au niveau de l'autorité décisoire et (II) quant à la nature économique et sociale et au fonctionnement des secteurs public et privé ; troisièmement, par les ambiguités qui entourent le rôle de la menace de grève pour favoriser la conclusion d'une convention collective par suite de divergences d'optique quant au rôle et à la fonction des sanctions économiques.

En regard des trois observations que nous venons d'énoncer, nous préconisons les deux propositions suivantes qui, l'une et l'autre, atténueraient de beaucoup les conséquences des caractéristiques structurales inadéquates de la négociation collective dans le secteur public.

En premier lieu, pour que des mesures valables soient prises afin d'atténuer ou d'éliminer l'optique sous lequel les parties conçoivent la négociation collective dans le secteur public et ce qu'elles en attendent, nous proposons que (a) partout où la chose est possible, les structures de négociation dans le secteur public soient exclues de la législation générale en matière de relations du travail et remplacées par des lois distinctes qui s'appliquent à ce secteur, (b) que cette législation et la législation existante dans le secteur public énonce les principes, les concepts et les délais qui serviront à régir les rapports, la raison d'être de l'activité, les responsabilités et les aspirations des parties au sein du secteur public au sujet de l'aboutissement du processus de négociation et (c) que, enfin, les parties à la négociation collective du secteur public songent sérieusement au recours à la médiation continue, c'est-à-dire à la présence d'un médiateur indépendant qui leur soit mutuellement acceptable dès le commencement de la négociation collective et qui serait capable de faciliter l'établissement de rapports sains entre les parties et de demeurer avec elles jusqu'à la solution finale de tous leurs différends. Deuxièmement, nous proposons qu'il soit reconnu une fois pour toutes que le système de prise de décision en matière de dépenses et de revenus dans le service public exige des parties la responsabilité et la bonne foi qui sont nécessaires pour faire naître cette qualité que possède la technique de négociation collective de résoudre les différends. Nous suggérons en conséquence que (a) la question salariale soit rayée du champ de la négociation collective dans le secteur public pour atténuer le degré de maturité financière exigé par le processus de négociation et (b) que, sous réserve d'une solution satisfaisante de tous les autres points rattachés à la négociation, la question salariale soit référée à un arbitrage tripartite obligatoire dont la décision serait finale et exécutoire.