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Michael Farrell
Universite du Quebec

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COLLECTIVE BARGAINING IN CANADA

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L.M. FARRELL and G.F. MARCIL

GENERAL OVERVIEW

In Canada collective bargaining is shaped by a tight statutory structure used to regulate almost every aspect of the union-management relationship. Such legislation closely regulates the formation of the collective bargaining relationship, governs the conduct and timing of the bargaining process, places restrictions on economic conflict, and may, in some cases, mandate certain terms of the collective agreement. The legislation confers broad administrative powers on labour relations boards or tribunals, which play a major role in the application of the legislation (Carter 1995). Labour tribunals regulate both management and union activity and may restrain some forms of employer interference with union organizing and bargaining activity as well as the untimely use of economic sanctions by trade unions.

Unlike the United States, the labour relations jurisdiction of the Canadian federal government is much more extensive than that of the state governments. Legislative authority in Canada is divided among eleven different jurisdictions, ten provincial and one federal. As a result of various court interpretations of the Canadian Constitution, the jurisdiction of the federal government has been restricted to undertakings falling within its specific legislative authority and to conduct falling within its criminal law power.

Due to the constitutional division of legislative authority, most private sector employees in Canada fall under the jurisdiction of the labour laws of the province in which they work. Approximately 90% of private sector workers are provincially regulated. In addition to workers employed in manufacturing, mining (excluding uranium), forest products industries, construction, service industries, and local transportation, employees of provincial and local government are covered by provincial jurisdiction.

Although the federal government's labour relations jurisdiction covers a relatively small percentage of private sector employees, these include workers in a number of important areas of the economy including: interprovincial or international air, rail shipping and trucking operations; broadcasting, banks, uranium mines, and

grain elevator operations. All federal public sector employees fall within federal jurisdiction but are covered by a different collective bargaining statute than federal private sector employees.

Early labour laws, in both federal and provincial jurisdictions, were inspired by the passage in the United States of the National Labor Relations Act (usually called the Wagner Act) in 1935. The Act was to be administered by the National Labor Relations Board, rather than the courts which did not, at the time, enjoy a reputation for being favourably disposed toward collective bargaining. The legal structure created by the Wagner Act later became the basic model for the present system of Canadian labour relations law. Although certain provisions of the Wagner Act were borrowed by various jurisdictions in Canada, over the 1937 to 1942 time period, no jurisdiction, either provincial or federal, established a complete code governing union recognition or an administrative agency to apply such a code.

In 1943, a collective bargaining statute modeled on the Wagner Act was enacted in the province of Ontario. In 1944, the province of Saskatchewan was the first government in Canada to recognize the right to collective bargaining, granting collective bargaining rights to both public and private-sectors workers. Also in 1944, a collective bargaining code and administrative tribunal to administer that code were established by the federal government, exercising the powers of the War Measures Act. All of the provinces, with the exception of Quebec and Saskatchewan, suspended their own collective bargaining legislation. Provision was made for the establishment of provincial labour boards, but matters of policy remained the responsibility of the federal board. The imposition of the federal legislation was of primordial importance because it brought all economic activity in Canada within a single comprehensive system of collective bargaining law. By the end of the war, the Wagner model had become firmly established throughout Canada.

In 1948, anticipating the repeal of wartime regulations, the federal government enacted a collective bargaining statute containing the same basic elements as the Wagner Act. After the re-establishment of divided responsibility for labour relations, most provinces enacted legislation substantially similar to the federal legislation and serving as a common beginning for the development of separate provincial legislation.

Up until the 1960s collective bargaining legislation in Canada was directed toward employees in the private sector. An initial resistance to collective bargaining, in both the U.S. and Canadian federal public service, was based on the view that collective bargaining in the public sector was unnecessary, impractical, and illegal. This bias rested largely on the principle of state sovereignty: “the sovereign state cannot be compelled by lesser bodies to do

anything that it chooses not to do, and further it cannot enter into contract arrangements that bind its freedom to exercise its sovereign power in the future” (Cunningham, 1966). Collective bargaining and the right to strike were considered incompatible with the principle of sovereignty and with the essential nature of many government services. A related issue concerned the delegation of power to labour arbitration boards which would be binding on the state.

In retrospect, the sovereignty argument carries little weight in the Canadian context. The original debate over whether public-sector workers should be permitted to organize and bargain has won, and public sector collective bargaining is likely to continue (Craig and Solomon, 1993).

In 1967, the Public Services Staff Relations Act (PSSRA) was passed, creating a new and distinctive collective bargaining structure for employees of the federal government and providing for arbitration or the conciliation/strike route as its final dispute resolution mechanism. The PSSRA granted collective bargaining rights to workers in federal departments, a number of federal agencies for which the Treasury Board is the designated employer, and a number of government agencies or separate employers who administer their own labour relations programs. Since the passage of this legislation all provincial governments have given their public servants the right to collectively bargain, including the right to strike in some jurisdictions and arbitration in others. In Quebec, all workers, private, public and parapublic, come under the Quebec Labour Code. In Manitoba and Prince Edward Island, public servants are granted the right to collective bargaining through their respective civil service statutes. The remaining seven provinces have special public-sector labour relations statutes, which grant the right to collective bargaining. Since the middle of the 1970s, the public sector has become the most highly unionized segment of the Canadian economy.

Collective bargaining has been extended to cover not only workers in the public sector employed by federal, provincial and municipal governments, but workers in the parapublic sector not directly employed by governments, but rather by organizations extensively supported by government funding—this includes teachers, health-care workers, police officers and firefighters. The evolution of the collective bargaining process, which now includes public sector workers in health care, education, government services, has affected not only the way public services are provided but has also contributed to higher levels of taxation and forced the re-definition of the meaning of public services.

The adoption of the Charter of Rights and Freedoms in 1982 radically altered Canadian constitutional law. Canadian courts can now overrule either federal or provincial legislation if it is inconsistent with the guarantees of fundamental rights and freedoms found in the Charter. These guarantees include the freedom of conscience and religion, freedoms of thought, belief, opinion, and expression; freedom of association; due process under law; and equality before and under the law.

The Charter of Rights greatly expanded the role of the judiciary. Before the Charter, federal and provincial legislatures had ultimate authority within their respective jurisdictions. The constitutional role of the courts was only to ensure that the legislative boundaries between the federal and provincial jurisdictions were observed. The Charter enhanced judicial authority over legislative authority, giving the courts the authority to overrule legislation

In spite of a number of important constitutional challenges, the application of the Charter requirement has not fundamentally altered Canadian collective bargaining laws, whether to enhance or curb union activity. The Supreme Court of Canada has considered a number of Charter-based challenges to existing labour legislation, and has found that collective bargaining, strike activity, and even the acquisition of bargaining rights by a trade union are not protected by the Charter's guarantee of freedom of association from legislative encroachment. Picketing activity appears to attract little protection from the Charter. The Supreme Court has also found that the Charter does not apply when an employer seeks to prohibit picketing by an incourt action.

Although the Supreme Court of Canada rejects any notion that union activities are imbued with special constitutional status, trade unions may take some comfort in the fact that the Court has not applied the Charter to erode existing union rights.

The issue arose in a landmark case involving the constitutionality of a union security arrangement found in a collective agreement between a union and community colleges in Ontario [Lavigne v. Ontario Public Service Employees Union (1991), 91 C.L.L.C. para. 14,029]. Under the agreement, all members of the bargaining unit, regardless of whether they were union members or not, had union dues deducted from their pay by the employer and remitted to the union. The Supreme Court of Canada had to decide whether the use of union dues for its political activities was inconsistent with the Charter's guarantees of freedom of association and freedom of expression.

In this case the Court had to deal with three important legal issues: (i) Only government actions are regulated by the Charter. The threshold issue was whether the union security agreement set out in the collective agreement between the union and the community colleges could be characterized as a form of government action.

(ii) The second issue raised the question of whether this arrangement was inconsistent with the Charter's guarantees of freedom of association and expression. (iii) The third issue dealt with the question of whether the arrangement could be considered a justifiable and reasonable limit on these guarantees.

The court held that, even though the union security arrangement was created by the collective agreement, the compulsory collection of union dues by a government agency involved sufficient action to attract the Charter. However, the Court found that the union security arrangement was not inconsistent with the Charter's guarantee of freedom of association and that it could be considered a reasonable limit on the Charter's guarantees. The decision made it clear that union security arrangements would not be eroded by the Charter's guarantees of individual rights.

Charter litigation to date (Carter, 1995) suggests that the judiciary has been reluctant to use the Charter to alter established collective bargaining laws. The Charter has neither enhanced nor reduced trade union power, and collective bargaining laws continue to be shaped by legislative amendment rather than through judicial challenges.

A further constitutional issue concerns the legitimacy of labour relations boards and tribunals. The Canadian Constitution prevents provincial governments from establishing courts or other agencies with the same kinds of powers as those of superior courts appointed by the federal government. Labour relations boards have been given a wide remedial mandate that includes requiring reinstatement and compensation of employees discharged in breach of collective agreement legislation and issuing cease-and-desist orders to restrain strikes and lockouts. Some suggest that provincially appointed boards are acting as superior courts. However, it can be argued that the exercise of power by labour relations boards is qualitatively different from the exercise of somewhat similar powers by superior courts; the former are exercised in the context of their labour relations function and should not be regarded as encroaching on the traditional powers of a superior court.

CHARACTERISTICS OF CANADIAN COLLECTIVE BARGAINING LEGISLATION

In Canada there is a wide variety of statutes governing workers in the public, parapublic and private sectors. In the private sector, eleven statutes regulate the process of collective bargaining. In Quebec, Saskatchewan and possibly British Columbia, one statute governs all employers and all workers; the Quebec Labour Code, The Saskatchewan Trade Union Act, and perhaps the British Columbia Industrial Relations Act, all apply equally to the public, parapublic and private sectors. In every other jurisdiction there are at least two separate statutes, one for private sector workers and one for public-sector workers, and in some cases another statute for the parapublic sector.

While the Canadian statutes maintain much of the structural components of the Wagner Act, each possesses its own distinguishing characteristics which have evolved in response to differing local situations and circumstances with regard to the fundamental components of the collective bargaining process (i.e. the acquisition of collective bargaining rights, the use of economic sanctions, compulsory grievance arbitration,, union security legislation, and the protection of striking workers).

Collective bargaining legislation in Canada provides a relatively simple certification procedure whereby a trade union can acquire collective bargaining rights. A union applies to a labour board; if it establishes that it represents a majority of a particular group of employees, it receives a certificate giving it exclusive bargaining rights for all employees in that bargaining unit. The usual method used to establish the representative character for union certification is through evidence of membership such as the signing of membership cards. Nova Scotia and Alberta require an employee vote. Elsewhere, this is a secondary procedure used by labour boards to establish representativeness if there is some doubt about the reliability of the membership evidence submitted by the union.

Canadian collective bargaining legislation severely curtails the use economic sanctions, such as strikes, during the life of the collective agreement. Strikes for the purpose of gaining recognition are expressly prohibited. In most Canadian jurisdictions the right to strike or the right to lockout is postponed, even if parties are bargaining for a collective agreement, until the various specified dispute settlement procedures (usually conciliation, but sometimes a strike vote as well) have been exhausted. Since these procedures have been established as a precondition to the use of economic sanctions, they are sometimes regarded as indirect restrictions on the right to strike and lockout, and may thus impair their usefulness in resolving conflict.

The complete restriction on strikes and lockouts over the life of the collective agreement has necessitated the establishment of a procedure for a final and binding alternative method for resolving disputes related to the interpretation and administration of the collective agreement. Unlike the legislation in the United States, where such procedures are a matter of negotiation between the parties, Canadian legislation assigns a public element to the process of grievance resolution, whereby the legislature may intervene to alter the basic legislative framework underlying the process. A case in point is the intervention in 1979 by the Government of Ontario, which amended the existing labour relations legislation to impose a new procedure for expedited arbitration. Under the amended legislation, instead of following the existing procedures under the collective agreement for the selection of an

arbitrator, either party to the collective agreement could ask the minister of labour to refer the grievance to a single arbitrator, who must then begin to hear the grievance on an accelerated schedule.

Unlike some “right to work” jurisdictions in the United States where legislation has restricted union security arrangements, Canadian labour legislation permits unions to negotiate operational arrangements such as (i) the closed shop (the requirement that a person be a member of the union before being hired); (ii) the union shop (which requires that a person join the union upon becoming employed); and (iii) the dues shop or Rand formula (which requires that a person pay union dues, but not necessarily join the union, as a condition of employment). Some jurisdictions have made the Rand formula mandatory; others require the employer to collect dues on behalf of the union when so authorized by the employee.

Canadian labour laws include “anti-scab” legislation as well as legislated procedures to permit striking workers to be reinstated in their former jobs once they decide to return to work. Legislation in Quebec (1977), Ontario (1993), and British Columbia (1993), restricts the ability of employers to replace striking workers during a labour dispute. Legislation in Quebec and Ontario prohibits workers from both inside and outside the bargaining unit from working during a strike; British Columbia only prohibits the use of workers from outside the bargaining unit, although the effectiveness of picket lines in that jurisdiction makes it unlikely that members of the same bargaining unit would attempt to work during a strike. In Manitoba the hiring of replacement workers is prohibited by law. In other jurisdictions, even in the absence of such legislative provisions, some Canadian labour boards have regarded the refusal by an employer to displace replacement workers and reinstate striking workers as an unfair labour practice.

THE ADMINISTRATION OF COLLECTIVE BARGAINING IN CANADA

Collective bargaining in Canada is administered by three institutions: (i) the labour relations board or administrative tribunal, a public agency created by statute which has some independence from the executive branch of government, (ii) grievance arbitration, and (iii) the courts.

(i) The labour relations board derives its authority from the enabling legislation, which, not only defines the rights and obligations of both trade unions and employees but also provides the structure and procedure for the expression of these rights.

In each of the eleven Canadian jurisdictions, the basic labour board structure has been modified as necessary to administer each individual set of collective bargaining legislation. Although they generally report to the government through the ministry of labour, labour tribunals are generally thought to have some autonomy from that ministry and act to minimize the possibility of political interference in the collective bargaining process. As a rule, they are composed on three members: a chairman who is independent, a representative of the trade union, and a representative of the employer. Members may be appointed for a fixed term, sometimes established by statute, or at the pleasure of the crown. In larger industrialized jurisdictions, the appointments are usually full time. A support staff of civil servants is employed to manage the administrative functions of the tribunal.

The functions performed by the labour boards are both administrative and adjudicative. Initially established to administer the statutory procedures for the acquisition, transfer, and termination of bargaining rights, their primary function remains the granting or withdrawing of bargaining rights by applying the criteria found in the legislation or developed through the boards' own decision-making process. Questions involving the definition of bargaining units, the certification of bargaining agents (including the eligibility of employees to bargain collectively), the eligibility of unions to represent employees, the appropriateness of the collective bargaining constituency, and the legitimacy of evidence of union membership, constitute the bulk of the board's activities. In each jurisdiction, a comprehensive body of board decisions interpreting the standards established in the legislation has evolved.

In the exercise of the adjudication function, labour boards bear some resemblance to the court. Most statutes list a whole series of unfair labour practices under the law. Administrative tribunals hear and decide complaints regarding activities claimed to violate statute provisions. The chairperson presides over hearings and makes evidential and procedural rules as necessary. Reasons are usually provided for any decision of significance. However, board procedures are in general less formal and more expeditious than those of the court, and there is no requirement that the parties involved must be represented at a hearing by a lawyer. The presence of board members representing both sides of the collective bargaining process also distinguishes labour boards from the courts.

In the public sector, administrative tribunals are extremely important to the collective bargaining process; they perform the equivalent combined functions of labour relations board and minister of labour as found in the private sector. They regulate the relations between the unions and the designated agencies authorized to represent the government employer.

The administrative tribunal may be asked to hear and interpret requests by government departments to designate workers in a specific category. If, for example, the Treasury Board wishes to deny workers the right to strike, this request may be submitted to the Administrative Tribunal.

In the private sector, appointments of conciliation officers, mediators, and conciliation boards are usually made through the minister of labour. In the public sector, such appointments are made by separate administrative tribunals, which also appoint members, either full- or part-time, as adjudicators in contract interpretation disputes.

At the federal level, the entirely independent Public Service Staff Relations Board (PSSRB) administers the provisions of public-sector statutes. Similar administrative tribunals have been set up in most of the provincial jurisdictions to administer the provisions of their public-sector legislation. In some cases, the functions of these tribunals are related to those of the private-sector labour relations boards. In British Columbia, Newfoundland and Saskatchewan, the private-sector labour relations boards or equivalents administer their public-sector statutes. In Prince Edward Island, the administrative tribunal for the public sector is a group composed of three persons: the minister responsible for the Civil Service Act serves as chair and two additional members are appointed by the Lieutenant-Governor-in-Council. In Quebec, the labour relations board no longer exists; the Quebec statute for the public and parapublic sectors is administered by a group of functionaries including certification officers, certification commissioners general, a labour court and an essential services council.

(ii) The grievance arbitration process is a significant factor in the overall union-management relationship. The level and nature of grievance activity has long been recognized as a major indicator of the relative health of the underlying labour climate. There is evidence that unresolved grievances may have a “spillover effect” contributing to lower organizational efficiency and productivity as well as increased workplace conflict (Brett and Goldberg, 1979).

A collective bargaining agreement is an employment contract. A grievance is an allegation, by an employee, the union, or management, of a breach of contract due to misinterpretation or misapplication of a collective bargaining agreement. Rather than pursue an action in the civil court, grievance arbitration has evolved as an equitable, inexpensive, and expeditious method of solving problems arising from contract disputes.

There are two different types of arbitration: interest arbitration, and rights or grievance arbitration. Interest arbitration involves the establishment of the terms and conditions of the collective agreement, especially wages and

other benefits; grievance arbitration involves the interpretation of the existing collective agreement. Interest arbitration is concerned with the initial determination of contract rights when the parties themselves cannot agree to a negotiated settlement. It is usually mandated by legislation as a substitute for the use of strikes or lockouts, often in the public sector (and especially for police and firefighters), when the right to strike is denied or when striking employees have been ordered back to work by ad hoc legislation.

(iii) The collective bargaining process in Canada may also be administered in the courts.

COLLECTIVE BARGAINING IN THE PUBLIC SECTOR

When government grants the right of collective bargaining to its public servants, three major groups of stakeholders are created: (1) the union or unions; (2) those bodies designated to represent the government as employer; and (3) the administrative tribunals that regulate the relations between the first two.

One major issue is the designation of an appropriate government agency vested with the authority to act on behalf of the employer. A number of options exists: (i) the treasury board or equivalent, and (ii) the public service commissions. At the federal level, the authority to act on behalf of the government is vested in the Treasury Board of Canada. In New Brunswick, Newfoundland, and Prince Edward Island, authority to act on behalf of the government is vested in the Treasury Board. In Nova Scotia and Saskatchewan the Public Service Commission is designated as the public employer. In Ontario, the management board of the provincial cabinet is designated as the employer. The Alberta and Manitoba statutes make no specific reference to the government body responsible for negotiations on behalf of public servants. In Quebec, all public-sector negotiations are conducted with the government on one side of the table, and often a common front of public-service unions on the other side.

A major issue in public-sector negotiations is the need for the employer to make very clear to the union and other interested stakeholders that the designated agency has full authority to act for the employer and conclude a collective agreement. Failure to give full authority to the designated agency may encourage the parties of interest to “make an end run around the designated agency,” and appeal directly to politicians to influence the outcome of negotiation.

There are three major types of labour relations disputes with which most public sector statutes are concerned: (i) recognition disputes, the determination of bargaining units, and the certification of bargaining agents;

(ii) contract negotiation, interest disputes and impasse resolution; and (iii) contract interpretation and rights disputes, grievance handling, arbitration procedures, and matters subject to arbitration.

(i) The recognition and determination of the composition of collective bargaining units.

In some jurisdictions, the composition of bargaining units is established by the same legislation granting collective bargaining rights to public sector workers; in others it is determined by the labour relations board or special tribunal. Before the enactment of the PSSRA, literally hundreds of occupational groups existed within the federal public service. Under the new regime, 72 occupational groups were partitioned into five broad categories: Scientific and Professional (comprised of 28 occupational groups), Technical (13), Administrative and Foreign Service (13), Administrative Support (6), and Operational (12). Generally, each occupational group was equivalent to a bargaining unit and consisted of workers, workers plus supervisors, or supervisors only.

The general principles underlying the selection of collective bargaining units in each province/territory resemble those established in the federal PSSRA. The New Brunswick statute contains the same occupational categories as the federal statute and recognizes the distinction between supervisory and non-supervisory bargaining units. In Alberta, workers employed by the Crown constitute a single bargaining unit, but the statute specifies that a number of professionals—doctors, dentists, architects, engineers and lawyers—should not be included in the bargaining unit unless the labour relations board is satisfied that a majority of such professionals wish to be included. The Ontario statute does not name bargaining units as such but refers to groups designated in the Crown Employees Collective Bargaining Act as appropriate for collective bargaining purposes. The following groups are recognized as bargaining units in Ontario: social services, operational services, scientific and technical services, administrative services, general services, law enforcement, and correctional officers. The Quebec Labour Code provides for three types of bargaining units for public sector workers: professional bargaining units, white-collar units, and blue-collar units. The Nova Scotia statute identifies eight different bargaining units, including education and health care. Bargaining units are not defined in the statutes of Manitoba, Saskatchewan, Prince Edward Island or Newfoundland.

In some provinces, the provincial associations or unions that may act as bargaining agents are specified in the statute. Most statutes provide for special tribunals rather than the existing labour relations board to certify unions. Provision is made in the statute for the replacement of the bargaining unit should a majority of the workers

become dissatisfied, and provision is made for the certification of bargaining agents to represent new groups of workers not previously certified. The federal statute requires that, to make application for certification, the prospective bargaining agent must receive the approval of 50% or more of those in the proposed new bargaining unit. Manitoba, New Brunswick, Nova Scotia, and Prince Edward Island do not specify any precise figure relating to the certification process, but their statutes specify the bargaining agents. In three other provinces the statutes require the support of 50% of those voting to support the bargaining agent for certification; the remaining three provinces follow the federal statute and require the support of 50% of total members of the bargaining unit.

(ii) Contract negotiation, interest disputes and impasse resolution.

An examination of the definitions of a public sector collective agreement in most statutes suggests that almost anything is negotiable, except those items requiring the enactment of an amendment to a statute or pension legislation. In comparison with the private sector, the number of items actually negotiated under most statutes governing collective bargaining in the public sector is relatively small.

Under the PSSRA, the following issues are not subject to arbitration: the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees; and any term or condition of employment not negotiated between parties during the period before arbitration was requested in respect thereof. This provision is designed to protect the merit principle in the appointment, promotion, etc., of public-sector workers. Staffing regulations are found in a separate law, the Public Service Employment Act.

The PSSRA provides for two methods of dispute resolution: (a) conciliation with the right to strike, or (b) arbitration. Before a specific round of negotiations begins, the bargaining agent must decide which method to take, conciliation or arbitration; the choice cannot be changed once negotiations have begun. The disadvantage in this approach is the removal of a degree of uncertainty and flexibility often conducive to the give and take process characterizing effective, successful negotiations. Bargaining tends to become inhibited or ritualized when the parties know that they must go through certain predetermined procedures at given stages of the negotiation process.

The New Brunswick statute is similar to the federal law, except in that the bargaining agent must decide between conciliation and arbitration only after an impasse is reached in the negotiation process. This approach maintains a degree of uncertainty about the steps involved in the negotiating process and increases the probability that the two sides may reach an agreement on their own.

(a) The conciliation with right-to-strike option.

At the request of either party, or on the chair's initiative, the chair of the Public Service Staff Relations Board is empowered by the statute to appoint a conciliation officer, who may be appointed when either the conciliation or arbitration route is chosen. If the conciliation officer is unable to bring the parties to an agreement, a conciliation board must be established at the request of either party or the initiative of the chairman of the board.

(b) The arbitration option.

Prior to arbitration the federal act provides for the appointment by the Public Service Staff Relations Board of two panels, each consisting of at least three persons—one representing the interest of the employer the other the interests of the workers. If a dispute reaches the arbitration stage, a three-member arbitration board is appointed by the PSSRB consisting of one PSSRB member and one person from each panel. The New Brunswick arbitration procedure is slightly different from that of the federal government. A maximum period of 45 days is permitted for collective bargaining unless otherwise agreed. Where the parties have bargained in good faith with a view to concluding a collective agreement but have failed to do so, they may, by mutual written agreement, submit their differences to binding arbitration.

Five provinces (Alberta, Ontario, Manitoba, Nova Scotia and Prince Edward Island) provide for conciliation but do not give public servants the right to strike, and require that compulsory arbitration serve as the final step in the dispute resolution procedure. The federal government, British Columbia, Saskatchewan, Quebec, New Brunswick, and Newfoundland allow work stoppages after conciliation or mediation has failed.

Of the six jurisdictions that allow strikes, all but Saskatchewan designate some functions as essential services. The British Columbia statute makes provision for the parties to seal a mediator if they fail to reach a collective agreement on their own. If mediation fails, the parties are asked to submit issues in dispute to arbitration for a final and binding decision. Should either side refuse, the union is free to exercise its strike option. A majority of union members must vote for a work stoppage, and the strike must begin within the three-month period following the taking of the strike vote. The bargaining agent must notify the government negotiators at least three days before any strike begins.

The use of strikes in the public sector is a controversial issue involving trade-offs between the worker's rights to collective bargaining, including the right to strike, and the right of citizens to receive essential public services. According to this argument certain public services, which can only be provided by the state, are so essential that strikes should be prohibited in these sectors and contract negotiations settled by compulsory arbitration.

The federal PSSRA does not cover members of the national police force, the Royal Canadian Mounted Police (RCMP), or the Canadian Armed Forces. Provincial police have collective bargaining with arbitration as the formal mechanism for resolving contract negotiation disputes. This is similar to the way some European countries grant collective bargaining rights to members of the military without the right to strike.

As with the private sector, most statutes governing public-sector workers include a cut-off mark to exclude management workers, who act in a confidential capacity in matters relating to industrial relations and take an active part in policy development and implementation. In general, the cut-off point for management workers is higher in the public sector than in the private sector. In the federal jurisdiction, more managerial exclusions exist than in most provincial jurisdictions.

In 1964, the Government of Quebec revised the *Code du travail* and granted the right to strike to all public- and private-sector workers, with the exception of police and firefighters. Since that time, both the Liberal and *Péquist*e governments have rejected arbitration in preference to retaining control over how their budget is allocated and spent, rather than allow any part of that authority to be shifted or delegated to an arbitrator. In 1982, *le Gouvernement du Québec* passed Bill 72, ensuring the continuance of essential services at all times in the health and social service sectors. Bill 72 applies also to telephone services; subways, buses, and ferries; agencies responsible for the production, transmission, distribution or sale of gas, water and electricity; garbage removal services; ambulance services and the Canadian Red Cross Association; and a number of unspecified government agencies.

An important aspect of the bill is the establishment of the Essential Services Council, composed of eight members: a chair, two persons chosen after consultation with management, two persons chosen after consultation with labour, and three other members. The Council assesses the adequacy of the level of essential services to be provided by the union in the event of a strike. This mechanism is used to determine the level of essential services required during a strike and ensuring that these levels of essential services are provided to the public during a strike. If the Council finds the proposed level of services inadequate it may propose but cannot impose amendments.

(iii) Contract interpretation, rights disputes, grievance handling, arbitration procedures, and matters subject to arbitration.

Federal and provincial statutes covering the collective agreements of public-sector workers contain a provision requiring adjudication of contract interpretation or rights disputes. Section 91(1) of the federal PSSRA provides that a worker who feels aggrieved by the interpretation or application of a provision of a statute, regulation, bylaw, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or a provision of a collective agreement or arbitral award, may carry a complaint thereof through the various steps of the grievance procedure from the level of supervisor up to that of the department's deputy minister. However, a worker is entitled to present a grievance relating to the interpretation or application of a provision of a collective agreement or arbitrable award only with the approval and participation of his or her bargaining agent. The only grievances that may go to adjudication are those relating to the interpretation or application of a provision of a collective agreement or an arbitral award, or those relating to disciplinary action resulting in discharge, suspension, or financial penalty. Otherwise, the final appeal is to the deputy minister.

Unlike the private sector, where the arbitration of rights disputes is in the name of the bargaining unit or unit, in the federal public sector the worker initiates and pursues the grievance in his or her name, through the grievance procedure and to adjudication, although the case may be prepared and presented with the assistance of the bargaining agent.

COLLECTIVE BARGAINING AT THE MUNICIPAL LEVEL IN CANADA

In Canada, there are approximately 200-300 municipal corporations with a population of 10,000 or more. Most of the public-sector workers employed by these municipal governments are covered by a collective bargaining agreement. In addition to police and firefighters, municipal workers are divided into two groups: outside workers and inside workers. Outside workers are employees engaged in maintenance and operational activities related to municipal services and facilities (water and sewage services, roads and street maintenance, refuse collection and disposal, maintenance of parks, recreational facilities, and public buildings). Inside workers are employees engaged in clerical, accounting and stenographic duties, and technical duties relative to engineering, building inspection, property valuation, zoning, and similar areas.

In 1991, the Canadian Union of Public Employees (CUPE), the largest municipal union in Canada, had 2,161 local unions across the country with a total membership of 376,975. Both outside and inside workers are represented by CUPE. In most medium and large cities there are usually two locals of the union. In Quebec, in addition to CUPE, municipal employees are represented by *La federation canadienne des employés de services publics*, affiliated with the CNTU.

A major problem in the practice of the collective bargaining process at the municipal level is the identification of who acts as negotiator with the unions for the municipal corporation. A study of 26 large Canadian cities published in 1977 found that 21 had a labour relations director or city manager responsible for negotiations, three had elected negotiation officials, and two hired labour lawyers as needed (Craig and Solomon, 1993).

Another problem in managing the collective bargaining process is related to the pay capacity of a given municipality. Approximately 60-70% of the annual operating budget of a municipality is used to pay salaries, wages, and worker fringe benefits. Negotiated salary and wage increases have a direct effect on the municipal real property tax rate. Static municipalities or those in decline may be unable to absorb the effects of wage and salary increases as easily as those municipalities with a growing tax base.

THE DEFINITION OF THE PUBLIC SECTOR: THE QUEBEC MODEL

The definition of what constitutes the public sector determines which services fall under public sector legislation and for which there is provision for delivery as an essential service. Although education and health care services are provided and consumed in local areas, within cities and municipalities schools and hospitals are part of the parapublic sector, and receive their capital and operating funds primarily from the provincial and sometimes federal governments. The statutes governing collective bargaining practices in the education and health care sectors are applied generally across provincial or national jurisdictions.

When senior levels of governments find themselves in financial difficulty, these difficulties are reflected in the financial resources they allocate to lower levels of government for health, education and welfare. When the federal government downloaded the cost of carrying a heavy budgetary deficit to the provinces in the 1990s, the provinces downloaded the costs onto the municipalities. The municipalities responded by raising taxes where possible, increasing administration costs, reducing services, and imposing user charges.

In 1978 the Quebec government passed Bill 55, which established a highly centralized form of collective bargaining in education and social affairs. Worker groups (such as local teachers' associations and hospital workers' unions) and management teams are organized into national negotiating committees debating most of the substantive wage and policy issues of the collective bargaining process at the provincial level. In some cases, the national committee may allow clauses negotiated at a lower regional level that reflect specific regional concerns to be inserted into the national contract. Contracts negotiated by national committees are binding on all affiliated worker and management groups. Separate national worker negotiating committees are established for education, health care, and the public sectors. In most years, each committee will negotiate separately; in 1972 and 1982, a common front was formed.

Negotiators acting for the government employer are directly responsible to the ministers of education, health and social welfare. Valid contracts must be signed personally by the minister. The Quebec Treasury Board is responsible for ensuring the orderly progress of negotiations and authorizing the employer-management committees' negotiation positions where these represent a particular concern of the Quebec government.

While the effect of highly centralized negotiations at the local level is unknown, local parties may reasonably be expected to feel some frustration with collective agreements negotiated with little of their own input. Most of North America is dominated by home rule or local community syndrome. However, the culture distinction of Quebec necessitates building a strong and centralized administration; centralized collective bargaining in the health, education, and social welfare sectors is generally thought to be supportive of the cultural situation of French Canadian (Boivin 1975).

The definition of a public service is specified in the Quebec Labour Code, *le Code du travail du Quebec*, and includes more services than does any other political jurisdiction in Canada. Many private-sector services in other jurisdictions, such as the delivery of home heating oil and garbage removal, are included in Quebec's public-sector legislation and fall under the provision for the delivery of essential services.

In Quebec a non-exhaustive list of public services would include:

- (i) a municipal corporation or intermunicipal agency;
- (ii) an establishment or regional council concerned with the provision of health services and social services;
- (iii) a telephone service;
- (iv) a fixed schedule land transport service, i.e. a railway, subway, bus or boat;

- (v) an undertaking engaged in the production, transmission, distribution or sale of gas, water or electricity;
- (vi) a home garbage removal service;
- (vii) an ambulance service or the Canadian Red Cross Association;
- (viii) an agency that is a mandate of the Government, except the *Societe des alcools du Quebec* or an agency or body whose personnel is appointed and remunerated in accordance with the Public Service Act.

COLLECTIVE BARGAINING IN HIGHER EDUCATION IN QUEBEC : AN EXAMPLE

The union agreement (*La Convention Collective*) governing employer-employee relationships between the administration of the *Universite du Quebec a Trois Rivieres* (UQTR) and the professors union (*Le syndicat des professeurs et professeures de l'Universite du Quebec a Trois Rivieres*, SPPUQTR), from June 1997 to September 30, 2000, is composed of twenty four articles, three appendicies, and ten letters of intent (Annex 1).

Articles 1 to 8 are concerned with the basic operational parameters of the employer-employee relationship. Articles 9 to 19 describe the procedures of specific policies concerning individual professors/employees; hiring (*Embauche*, Article 9); job description (*Fonction des professeurs*, Article 10); performance review (*Évaluation*, Article 11); tenure (*Permanance*, Article 12); job security (*Sécurité d'emploi*, Article 13); sabbaticals (*Régime de perfectionnement et sabbatique*, Article 14); leaves of absence (*Congé sans traitement* Article 15); annual vaction (*Vacance annuelles*, Article 16); sick leave (*Congés de maladie*, Article 17), parental leave (*Congés parentaux*, Article 19), and termination (*Congédiement*, Article 18). Articles 20, 21 and 23 cover various group issues including group insurance policies, pension plan, and others. Article 22 describes the salary schedule and the promotion process, and Article 24 describes the grievance process

A grievance, in the context of this union agreement, signifies a dispute arising from an assumed violation or incorrect interpretation or application of the current agreement between the University on the one hand and the union or a professor on the other.

A professor, his agent, or a union representative must submit a signed grievance to the Vice-recteur *a l'enseignement et a la recherche* within 60 days of learning of the event in question, and within six months of the actual act. The written grievance is submitted as an indication of the underlying complaint, and may be amended as necessary. A technical error does not constitute a basis for rejecting the grievance. If the university decides to file a grievance, it must advise the union and follow the same process.

Upon reception of the grievance, the vice-recteur must either accept the grievance or convene a meeting of the grievance committee within two operating days; the committee must meet to within eight days of receiving the notice to meet with the vice-recteur. The grievance committee is composed of two representatives of the union and two representatives of the University and determines the procedural rules of the committee. On mutual consent, the required meeting can be postponed to the next scheduled meeting of the grievance committee.

Within ten days following the meeting of the grievance committee, both sides must decide whether they agree or disagree with regard to the grievance. If both parties agree, a written agreement specifying the corrective measures to be taken is signed. If there is no agreement at the expiration of the ten-day waiting period, the union has a 25-day period to make a formal demand for arbitration to the vice-recteur. The union and the university have twenty days to agree on the choice of an arbitrator (*l'arbitre*); if the parties are unable to agree, an arbitre will be designated by the Minister of Labour according to the *Code du Travail du Quebec*.

The arbitre must, if possible, render his decision within 30 days following the ending of the hearing, but may ask both the university and the union to extend the date. The decision is valid even if rendered after the expiration of the 30-day period. The arbitre's decision is final and without appeal, and must be acted upon as soon as possible or before the waiting period specified in the judgement. If one side contests the decision before another tribunal, the sentence applies as long as it is not decided otherwise. Each side pays its own legal costs; the arbitration fees are shared by both parties. In the absence of a formal agreement, neither party can be held responsible for paying for stenographic transcription.

The authority of the arbitre is bounded by the convention collective, and is required to judge the case in the context of the convention collective and may not modify it in any way. In this context the arbitre can confirm, cancel or mitigate any disciplinary measure imposed by the university. When the grievance includes a request for financial compensation, the arbitre may be asked to establish the right to receive compensation without specifying an amount. If the parties cannot decide on the amount of compensation the arbitre may be called upon to specify an amount.

THE INSTITUTIONAL ENVIRONMENT AND UNION POLITICS AT UQTR

The University of Quebec, was established in 1968 by an act of the *Gouvernement du Quebec* to provide higher educational services to the regions of the province not already served. To date, regional state universities

have been established in Trois Rivieres, Montreal, Outaoais, Rimouski, Chicoutimi, Abitibi-Temisquemingue. The head office is in Quebec and the management of each campus is decentralized.

In a report on the future of the *Universite du Quebec a Trois Rivieres* (UQTR), a committee of four international experts found that while the university had achieved significant development since 1968, it still had not been able to integrate into the larger international intellectual community in North America:

“Il importe enfin que l’UQTR engage et soutienne une politique energetique d’entrée de ses chercheurs dans les reseaux canadiens et americains de recherche ou ils sont beaucoup trop peu presents” (Repenser, Recentrer, Relancer. L’UQTR de la prochaine decennie, 2003).

This failing may be due in part to the institutional environment dominating operations at UQTR. There are approximately 330 full time professeurs distributed across 21 departments, research centers and schools of English, engineering, and the like at the Trois Rivieres campus. Roughly half of the courses are taught by part-time instructors; in some departments, many have little or no graduate training. In recent years, some departments have experienced difficulty recruiting and retaining full-time professorial staff. Inbreeding has been used to fill vacancies; when combined with evaluation, tenure and promotion policies may have contributed to the emergence of an administrative donut effect in university governance at UQTR. Many senior-level administrative positions, which in other universities would be held by seasoned, qualified, and competent professors, are filled at UQTR, *faute de mieux*, by inexperienced junior professors who have little time to develop the research dimension of a university professor. Some of the non-academic administrative positions are held by locals who started at UQTR as clerks in low-level administrative positions. That there is a breathing body in each office may create an illusion of competent management at UQTR; it could also conceal a managerial vacuum at the centre of the institution.

Inbreeding also occurs at the level of union affairs management. In each department many professors are members of both management and the professors union; department heads, section leaders, programme directors, and all their assistants are professors who receive management premiums according to the union agreement and also pay union dues. Some department heads are also the departemental representative on the union council.

The combined effects of managerial and union inbreeding are perhaps most evident in the processes which govern evaluation (Article 11), tenure (Article 12), and the granting of promotions (Article 22) at UQTR. New professors are usually hired on a two-year contract and evaluated during the second year of their first contract. The evaluation process can be very subjective and in the past has been the source of a number of grievances. The stated objective of an evaluation in the union agreement is to encourage the development of excellence by the professor in

the performance of his duties. It is a form of self-criticism for the professor, who submits his *dossier d'évaluation* covering the work accomplished over the time period evaluated. The dossier is evaluated by a committee composed of the director of the department (who serves as president of the committee), two elected department members, a substitute, an outside member, and a technical advisor designated by the vice-recteur. The department, the vice-recteur and any other resource person may contribute information to the *dossier d'évaluation*.

At the end of the first contract, a professor may receive a second two-year contract. If the procedures specified in the union agreement are not followed or if there is evidence of prejudice or discrimination (*parti-pris*), or a lack of substance in the reasons given and the first contract is not renewed, the professor may file a grievance. At the end of the second contract, the professor is evaluated. When the evaluation is positive the professor will receive a third contract and automatically acquires permanence (tenure). Tenured professors are evaluated every six years.

One possible effect of the managerial donut is the creation of a two-tier department in which poorly qualified professors, adept at job politics, navigate the administrative structure to achieve tenure, promotion and administrative position to the detriment of more experienced, better-qualified colleagues and the overall well-being of UQTR. Such management-union inbreeding has created its own problems. For just one case, beginning in 1998 and continuing into 2008, UQTR paid approximately \$1,600,000 in legal and judgement costs. Various university officials and professors appear to have committed perjury, and five lawyers in the employ of the university are under investigation by the *Barreau du Quebec*.

The case involves a new professor, Professeur X, hired in 1998 in the *Département des sciences de la gestion* (DSG). He was not renewed at the end of his first contract and filed a grievance claiming harassment (*parti pris*) by a group of professors led by his section head, who was also president of the professors union. Initially, the union did not provide adequate and timely legal representation; the targeted professor hired his own lawyer and sued the union to recover his costs (*Cour du Quebec, Districte de Trois Rivieres* No 400-32-005658-013). Professor X eventually won the grievance and the university was ordered to reintegrate the professor back into his former position. Instead of returning the professor to his original academic unit/section as ordered by the arbitre, his colleagues refused to accept him and threatened to quit the university; Professor X was sent to another section.

Approximately three months into the next teaching session, the new section head, Professeur Y, filed false criminal charges against Professor X. Professeur Y was encouraged to bring these charges by two UQTR lawyers

(one later became Vice-recteur and the other Director of human resources) who promised to pay any legal fees Professeur Y incurred in the process. Professeur Y was later promoted *directeur du Département des sciences de la gestion*.

In the week before the end of classes, Professeur X was suspended by UQTR for one month without pay and prohibited from meeting his students. Professeur X filed numerous grievances and won them all. He sued the university to recover approximately \$40,000 in legal fees paid to defend the criminal charge filed by Professeur Y and won. On appeal, UQTR claimed, in spite of the secret promise by university officials to pay Professeur Y's legal expenses, that Y was a private citizen who acted independently of the university. The appeal court found that the university was not responsible to pay Professeur Y's legal costs and that X must sue Y to recover his legal costs. On June 12, 2007, the university paid approximately \$385,000 to settle with Professeur X. On June 20 X sued Y in the *cours de Quebec* and was awarded approximately \$41,000. In August 2007, UQTR changed its story and claimed that Y was acting as an agent of the university when he filed false charges against X. The university claimed that X had been paid his \$40,000 within the \$385,000 envelope agreed to on June 12, 2007. In November 2007, this claim was rejected by the court and approximately \$41,000 was paid to X in February 2008. Professeur X has filed yet another grievance to recover his legal fees paid in the civil case.

Management-union inbreeding appears to have undermined the collective bargaining process and enabled management to use the union agreement to deprive members of their rights, including the right to due process. The promotion process is another example of the managerial donut effect, in which an elaborate managerial process is created which fails to protect worker rights. Promotion is defined in Article 22 as the passage from one category to another in the salary schedule. Only the *Conseil d'administration* may grant a promotion from one category to another; the decision is based on the recommendation of the promotion committee which is composed of the *Vice-recteur a l'enseignement et a la recherché* (VRER), who serves as president of the committee, two other members (one an external member designated by the VRER), and three professors designated by the union (one of which is an external member). Each person has the right to vote. The choice of individuals named the promotion committee is made subject to a satisfactory level of competence based on recognized experience in the university milieu.

The promotion criteria are established by the *Commission des études*. A professor who applies for promotion must fill out the prescribed application form on which he/she specifies a percentage weighting to each of the four components of the professors function: teaching, research, community service, and pedagogical

administration. The application is accompanied a *dossier de promotion* which consists of all of the professor's output over the entire period of employment, reflecting the annual ponderations designated by the professor in his annual job performance evaluations.

According to Article 22 of the union agreement, in the evaluation of any *demande de promotion*, the promotion committee must proceed in a just and equitable manner. However, there is no mechanism in the union agreement to assure that the *committee de promotion* has acted in a just and equitable manner. All documents used by the *committee de promotion* are destroyed after the process is finished. Members of the *committe de promotion* are not permitted to discuss the process. In the case of a refusal, the candidate will receive a form letter from the VRER explaining in very general terms the reasons why the promotion was denied.

A grievance cannot be filed over refusal by the university to grant a promotion. A grievance can be filed only if there is reason to believe that the candidate did not receive a fair and equitable evaluation of his/her *dossier de promotion* from the committee of promotion.

Empirical evidence concerning the fairness and honesty of the promotion process at UQTR is limited. One judgement of 27 pages (rendered by the *TRIBUNAL D'ARBITRAGE*, in the matter of Griefs 2004-6 and 2004-7 Promotion, 19 February 2008) found a grave lack of impartiality in the evaluation of the *demande de promotion* of the plaintiff. The arbitre found that the *committee de promotion* lacked the expertise necessary to evaluate the quality of all of the dossiers submitted by some professeurs, and that no provision was made to consult or follow the advice of external experts.

The VRER charged with assuring the fairness and impartiality of the process, showed signs of discrimination and prejudice against the plaintiff. He also attempted to bully other committee members, including his own appointees, to follow his recommendation to deny promotion to the plaintiff. There is reason to suspect that students may have been encouraged to file complaints against the applicant for promotion.

Citing a letter from the VRER to the candidate, in which the VRER informed the candidate that his *demande de promotion* had been refused, the arbitre was surprised to note that the VRER had questioned the quality of the departmental evaluations of the candidate. The departmental evaluations of the candidate were very positive which ran counter to the prejudices of the VRER. The arbitre found that the evidence presented indicated very clearly that, from the beginning of the promotion exercise, the VRER considered that the candidate did not merit a

promotion. Furthermore, as indicated in the *Sentence Arbitrale*, (Article 140), the VRER did not provide relevant information to the *comitee de promotion* which may have influenced the decision.

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ENDNOTES

1. Since 1967, favourable legislation, at both the federal and provincial level of government, has been a major catalyst in the rapid growth of unionization in the federal and provincial public sectors.

2. Unionism at the federal level: seventeen unions represent federal public servants. The Public Service Alliance of Canada (PSAC) membership, approximately 162,770 (1990), is the third largest union in Canada and represents the majority of all public federal civil servants. It was formed in 1967 in a merger of the Civil Service Federation of Canada (CSFC) and the Civil Servive Association of Canada (CSAC), a breakaway from the CSFC. The CSFC, formed in 1909, had an initial membership of 5,223. It grew at an annual compound rate of approximately 6%, to over 80,000 members in 1958. The CSAC had a membership of 33,000 in 1966.

3. The Professional Institute of the Public Service of Canada (PIPS) was initially established to represent professional workers in the federal public sector. Its membership has been reduced due to the establishment of new breakaway unions such as the Economist, Sociologists and Statisticians Association (ESSA).

4. Before the emergence of collective bargaining, worker organizations acted as consultative bodies through the National Joint Council, created in 1944. Employer and worker organizations were represented equally and dealt with various issues, one of which was salaries. In the late 1950s and early 1960s, federal worker organizations and the Public Service Commission often consulted and agreed on salary increases. Such recommendations were frequently ignored by the Federal Treasury Board.

5. At the federal level, union membership increased by 200% between 1966 and 1970 due to the certification of existing unions. From 1970 to 1981 the growth rate declined to approximately 4%, leveling off in 1977.

Recruitment of new members from previously non-unionized groups proved difficult. Clerical and stenographic groups were particularly hard to organize because they consisted largely of young married women whose involvement in the labour force tended to be limited to the years preceding periods of full-time child rearing. At that time, unions appeared low on the scale of needs experienced by members of these groups.

6. Unionism at the provincial level: the history of the organization of provincial workers in Canada is similar to that at the federal level. Worker organizations at the provincial level existed long before the enactment of collective bargaining legislation. Prior to the 1960s most provincial government workers belonged to worker associations concerned primarily with recreational and social activities. In some cases these associations acted as pressure groups to improve the general welfare of workers as well as working conditions. In the 1960s provincial government workers were granted the right to collective bargaining.

7. By 1966, membership in provincial public sector unions was approximately 90,000 and membership continued to increase during the 1970s. By the end of the 1970s there were more union members at the provincial level than at the federal level. To avoid competition for members among provincial and federal public sector unions, an umbrella organization, the National Union of Provincial Government Employees (NUPGE) was formed in 1976. In 1991, NUPGE was the second largest union in Canada with a membership of over 301,200—almost twice that of the PSAC membership of 162,000.