BRITISH COLUMBIA
PUBLIC SCHOOL
EMPLOYERS' ASSOCIATION
SOLUTIONS AT WORK

Making Reasoned Choices…

Teacher–Public School Employer Bargaining Structure Options and Alternatives Discussion Resource

Hugh Finlayson

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Part 3 of 3

BRITISH COLUMBIA
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EMPLOYERS' ASSOCIATION
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The BC Public School Employers' Association (BCPSEA) supports public education through innovative human resource practices, partnerships, and services. As the multi-employers' association, accredited bargaining agent, and human resource service agency for the province's 60 public boards of education, we provide a full range of human resource services with a focus on the development, coordination, and facilitation of human resources best practices.

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Contents

Introduction

This is the last of a three-part series written to provide background information to inform policy choices concerning teacher–public school employer collective bargaining in BC. Discussions concerning options and alternatives take place against the backdrop of strikes, lockouts, legislative intervention,[1] and inquiries into the bargaining process…and the desire once again to find a *better way* (see Appendix 2 for a historical summary).

Making Reasoned Choices…Teacher–Public School Employer Bargaining Structure Options and Alternatives Discussion Resource also proposes a collective bargaining model. Taking our bargaining experiences, the work of Commissioners Don Wright (2004) and Vince Ready (2007), the process approach that assisted in the June 2012 provincially negotiated agreement and the following five principles the proposed model is provided as a starting point:

1. Respects the right to bargain collectively
2. Encourages voluntary settlements
3. Encourages timely settlements
4. Observes government fiscal and policy imperatives
5. Limits the effect of disruption without undermining 1, 2, and 3 above.

As you read this paper, bear in mind the central question that needs to be answered if the so-called problem is to be solved. Is this a *structure, ability, willingness*, or a *combination of all three* problem? Put another way, is it about structure — the components, processes, and how things are arranged and function in practice; or in bargaining is it a problem of bargaining ability — to discuss, reason, negotiate, and decide on a matter, process or idea; or during the process is it about the matters at issue and willingness — to accept what is proposed/offered?

This paper identifies the *problems* that have been articulated through discussions and provides some structure options for consideration. We emphasize that the structure options must be criterion-based. In our three documents we provide a framework that can be used to consider strutural issues with evaluative criteria. Further, we propose a systematic approach to examining the matters at issue. A four-step framework is provided to assist with inquiry, assessment, and development of alternatives. Our four-step approach seeks to build on the Wright (2004) and Ready (2007) reports, offering another way of looking at the matters at issue using their considered observations as a foundation for the development of options.

- Step One: Build understanding: Context, history, how the current system works, and how other examinations/inquiries inform us
- Step Two: Identify the matters at issue and options: the problem, its origin, components of a bargaining structure, and options to be considered by component

[1] During the local bargaining period there were 15 strikes, 1 lockout (round 1); 17 strikes (round 2); 16 strikes, 2 lockouts (round 3). During the provincial bargaining period 1994 to present there have been three strikes (2001-02; 2004-05; 2010-11 rounds). There have been six occasions of legislative intervention (1993, 1996, 1998, 2002, 2005, and 2012).

- Step Three: Integrate the elements, identify working options: what is bargained where, who has the authority to bargain what, where and how impasses at the bargaining table will be resolved
- Step Four: Align the structure with our criteria (see page 14): does the model meet the criteria we have established for a functional bargaining system? Does this concept answer the question: For what problem is this the solution? or is it just not what we have now? If you accept the proposition that this so called problem is not solely one of structure, how do you propose to address those other issues you have identied?

As noted in our first two papers, *Lessons to Learn and a Course to Chart: Bargaining Structures, Relationships, and Experiences* (June 2012) and *Well, Now That You Asked…Teacher–Public School Employer Bargaining Strucure Discussion Resource* (October 2012), the issue of the appropriate structure used for the determination of teachers' terms and conditions of employment has been the subject of two recent reviews — Wright (2004) and Ready (2007) and two current processes:[2]

- the BC School Trustees Association (BCSTA) Annual General Meeting motion:[3] "That BCSTA establish a task force to examine the collective bargaining structure between the education sector and the BCTF and provide recommendations to the next AGM."
- and the premier's October 17, 2012 announcement of a *review of the teacher bargaining process that will see government engage with the British Columbia Teachers' Federation (BCTF) and other education stakeholders on how best to make systemic improvements prior to the next round of bargaining.*

We suggested in our first two papers that:

> *…it is easy enough to propose solutions, but we must remember that solutions are always based on our assumptions about the problem we're trying to fix. It has become common for observers and others to suggest that the primary problem is the bargaining structure. By this, they are referring to the agreed-upon and legislated processes by which teachers and their employers determine such issues as how much teachers will be compensated for their work, the conditions of their employment (including professional development days, hiring practices, leave provisions, and the organization of the workplace) and all the other provisions that come to form a collective agreement.*
>
> *What is less clear is whether they are also referring to the prevalence and/or duration of strikes, cost of bargaining in terms of resources and/or relationships, authority and roles, or…? While the understanding of "bargaining structure" differs from individual to individual, a common assumption is that the current bargaining structure is the problem, and that if we just had a different structure, a negotiated agreement would quickly follow suit.*

As we noted, the current bargaining structure for teachers and their employers in the K-12 public education sector consists of two bargaining agents: the BCTF, representing the province's public school teachers, and BCPSEA, representing the province's 60 public boards of

[2] Teacher–public school employer bargaining structure has been the subject of five inquiries or policy decisions since the 1980s.
[3] BCPSEA conducted a bargaining post mortem specific to the processes, resources, and results of the round of bargaining that concluded in June 2012.

education as employers. The BCTF and BCPSEA bargain under a two-tier model with some matters bargained at a central provincial table and others bargained by local teacher unions and individual boards of education.

We also reiterated that while another structure can be adopted, it was important to recognize that in practice there are attitudinal, behavioural, and contextual factors that weigh heavily on any structure. Any structure will work if the parties and those who influence the bargaining process are prepared to make it work.

Following the release of our second paper we provided a list of *problems* as a starting point for articulating the matters at, believing that if we have identified the problem(s) and we have concluded that the problem(s) has a structural origin, we can quite properly move to thinking about workable alternatives. See Appendix 1 for a list of the *problems* contained in the two papers.

On October 26, 2012, at a BCPSEA professional development conference (Symposium 2012) with trustees and district staff, we facilitated an informal survey[4] to get a sense of people's thoughts. Participants were asked to take the 12 statements identified in tha paper and indicate the ones that best described the problem. If they had other observations they were asked to include them. At the session 104 participants provided responses. The results were as follows:

- 64% — *When provincial bargaining was adopted in 1994, there were no transition provisions to take the 75 local collective agreements to a form of provincial agreement. The parties have struggled with a system which is neither one model nor the other, it's simply something else.*
- 63% — *Given the parties, their bargaining experiences, and the public nature of public education negotiations, there is no adequate dispute resolution process/system.*
- 62.5% — *A negotiated agreement, history tells us, can't be reached without some form of assistance or intervention.*
- 38% — *In practice, "free collective bargaining" is not evident or structurally not permitted in the sector.*
- 38% — *Unlike K-12 support staff bargaining and other public sector bargaining, the protracted and public nature of teacher bargaining and the effect on the public places pressure on government to respond.*

It is important to note that in both papers we identified two of the problems as:

- ☐ There has not been an enduring *meeting of the minds* on the form and process of provincial bargaining since the original agreement reached by the BC Public School Employers' Association (BCPSEA) and the BC Teachers' Federation (BCTF) in 1994.
- ☐ There is nothing complicated about the *bargaining structure* issue. With the exception of the 1994 agreement and the negotiations that followed that agreement, the BCTF has advocated, pursued, or otherwise pushed for a form of late '80s local bargaining

[4] The survey while not determinative in terms of a basis for policy decisions, taken together with other information gathered through our discussions, is thematically instructive.

These two points appear to be at odds with the current views of the BCTF. In a question and answer session following her plenary presentation to the BCPSEA Symposium, BCTF President Susan Lambert was asked about her comments on bargaining structure in which she appeared to move away from the longstanding BCTF position on the return to local bargaining. Ms. Lambert indicated that it was indeed a change, stating that some items, *relational* in nature, are best dealt with locally, leaving other matters for provincial bargaining. She also questioned whether what we have experienced is a structural problem per se; offering the view that the process has never really been given a chance to work — government intervenion has become a feature. Ms. Lambert's observations warrant exploration.

From the employer's perspective there were observations concerning the development of a bargaining mandate. While BCPSEA has to balance the interests of school boards as employers and government as the maker of public policy to arrive at a mandate the question invariably arises as to what interest takes precedence if a true balance cannot be achieved. In the last round the policy interests and employer interests did align but there were questions concerning emphasis and strategy. Not interests of principle but rather one of approach or tactics.

Taking the informal survey results together with the results of other inquiries and reports, we used our criteria to begin to develop options and alternatives. The criteria were developed a number of years ago when BCPSEA worked with its member employers to develop criteria to assist in establishing a working definition of a *good* collective bargaining system. This framework guided the employers' association's work with the Wright Commission. It is based on the foundational assumption that collective bargaining is the appropriate mechanism to determine teachers' terms and conditions of employment. With this as the foundation, the following six themes emerged from the discussions. The themes serve as an evaluative criterion for assessing collective bargaining structure options.

Bargaining Structure Themes and Criteria

Theme/Criteria	Proposition
Balance The parties are permitted to pursue their goals through collective bargaining, but this pursuit is balanced against the costs of bargaining: ▪ Consequences of industrial conflict ▪ Costs associated with resolving the conflict (dollars, relationship, public confidence) ▪ Out-of-line settlements and the implications for other public sector employers of these settlements.	Bargaining in the public sector context requires that certain interests, often seen as external to the negotiating parties, must be balanced. This recognition leads to certain structural choices related to authority (who bargains what, where), responsibility and accountability. Policy makers react to imbalance, whether perceived or otherwise. These "reactions" have consequences for functional bargaining.

Theme/Criteria	Proposition
Consequences The effects of labour disputes on persons not directly involved in those disputes are minimized.	Collective bargaining in the public sector has implications for the general public. Processes and structures to manage workplace disruption arising out of a labour dispute must be structured to minimize the impact on the public and, as a result, the impetus for government involvement.[5]
Incentive There are incentives and pressures that encourage negotiated settlements. There is sufficient uncertainty about the outcome of bargaining such that the parties are encouraged to negotiate.	The parties will not negotiate if they can predict the outcome both in terms of substance (the deal itself) and process (how the deal will be concluded). Institutionalized uncertainty has the potential of encouraging negotiated agreements.
Time All parties face significant pressure if an agreement is not reached in a reasonable time.	Participants in and observers of the negotiation process will lose faith in it if they perceive it to be protracted and unproductive. These perceptions can lead to intervention by government.
Resolution The process for achieving resolution is found within the bargaining structure. No alternative processes external to the structure exist or can be accessed.	A closed or self-contained bargaining system builds faith in both the parties and the process — the parties believe they can resolve their differences. Alternative processes external to the structure (ad hoc legislative intervention, for example) undermine the structure and erode the bargaining relationship.
Role Recognition Participants understand, and respect as legitimate, the roles of the parties to the bargaining process.	Collective bargaining requires that the parties meet, recognize one another as legitimate representatives of their principals, and engage in informed discussions with the intention of concluding a collective agreement.

A successful negotiated agreement will be defined by whether it lives up to the definition of a *good agreement*: fairness, efficiency, wisdom, stability (see Appendix 3 in our second paper for a detailed description of these concepts).

Other elements need to be in play as well. A bargaining structure works when:

[5] Ad-hoc legislative intervention is an option outside the control of the bargaining parties. It is interesting to note that between 1959 and 1990 there were three public sector and five private sector interventions. Between 1990 and today there was one private sector and 13 public sector interventions, six of which were in the K-12 sector. Legislative intervention has its limitations. It tests the relationship between the parties, faces implementation challenges, and leaves many of the matters at issue unresolved or unsatisfactorily resolved.

- There is acceptance by all parties with an interest in the bargaining process that collective bargaining is the appropriate method to determine the terms and conditions of employment.
- Each of the parties accepts that the other parties have a legitimate role to play and interests to represent.
- There is a degree of trust between the parties as to each other's honesty, reliability, and competence.
- There is a prevailing attitude held by the parties that they will work together to resolve issues or problems identified as a concern to either party and that they will do so within the bargaining structure.
- The structure facilitates negotiated resolutions and does not encourage resolutions through means external to the bargaining process.

Bargaining Structure and Working Relationships

Structure and relationships are inextricably linked. Commissioners Wright and Ready emphasized this reality in their work. In some quarters, however, the discussion of relationships all too often focuses on "do we get along and do individual representatives like each other," rather than "do we respect the legitimate role of the other party and can we work together to resolve matters that are of concern to me, to you, and those that are of concern to both of us."

It is common to see the use of "relationship" as leverage in our sector. Given school districts' desire to foster and maintain a sense of community and collegiality between and among its various employee groups, the union will often use the relationship as a lever to achieve its bargaining goals. This tactic is most often directed not at the district/union organizational level, but at the relationships that exist between teachers, administrators, and the workforce in general.

> Leveraging the relationship: Seeking to compel one party to an act or choice by holding out the possibility of improvement to something that party values and the other party characterizes as at risk; use of the relationship between the parties (or between individuals) and the apparent desire to maintain a productive working relationship as a tactical advantage so as to serve one's own purpose.

For example, the union takes the position that the relationship is poor or in jeopardy unless the employer accedes to its demands — whether in an attempt to secure changes in a negotiation which the employer believes are not in its interest or to resolve a grievance in a certain way.

While one should not underestimate the value of the relationship between the union and the employer, one must question the value of a relationship built on one party abandoning or being compelled to abandon its interests for those of the other under the guise that it will improve the relationship. Positive, productive, and ongoing relationships are best established on a foundation of respect, integrity, maturity, and a high degree of professionalism.

Our sixth theme, role recognition, speaks to this issue. In our discussions, we have advanced the proposition that the challenges facing the negotiating parties today are not just structural but

also attitudinal, behavioural and in turn cultural — how the parties act and react, how they develop their mandates and positions, and how they seek to achieve them. Relationships are not chosen, they emerge. If all those with an interest in public education do not understand the factors that led to the emergence of the current relationships, attempts to create something else will not succeed.

Four factors combine to shape any union–management relationship[6]:

- the acceptance of the legitimacy of the other party and its respective role in the workplace (a central part of theme six, role recognition)
- the degree of trust between the parties
- the degree of friendliness or hostility in the relationship, and
- the degree of competitiveness, individualism, or cooperation between the parties.

All these factors interact with each other to build the foundation of the union–management relationship. The relationship is also a product of various pre-determined factors, including:

- the personalities of the key individuals in the relationship
- the union–management ideologies of the parties
- the economy and the labour supply, and
- union politics.

Events and circumstances experienced by both parties have also affected the nature of the relationship. These include the actions and reactions of the parties to workplace issues, how the parties resolve issues and disputes, and collective bargaining experiences — both what was achieved (the outcomes of bargaining) and how the outcomes were achieved (the process of bargaining). Experiences such as strikes or lockouts, legislatively imposed agreements and the parties' reaction to them, have also contributed to shaping the relationship.

Worth Repeating: Admonitions and Things to Keep in Mind

- From *Lessons to Learn and a Course to Chart: Bargaining Structures, Relationships, and Experiences* (June 2012): "If the capacity, ability or willingness does not exist to make meaningful change, there's the potential that a worse bargaining dynamic will result. The consequences arising out of this dynamic will affect the operation of schools, the delivery of educational programs and, to the degree to which it persists, public education will suffer."
- From Ready (2007): "I have, therefore, concluded that, in the circumstances, it is not the format or process of collective bargaining which will help achieve a collective agreement."
- From Wright (2004): "Even if fully implemented, these recommendations will not significantly improve the state of bargaining unless there is an attitudinal and behavioral change of both sides.

[6] Walton, R.E., and R.B. McKersie, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System*, McGraw-Hill, New York, New York, 1993. Copyright 1993 by McGraw-Hill.

This will require dialogue — a genuine attempt to arrive at mutual understandings — between teachers and the employer group (i.e., government, trustees, and school administrators). The sooner we start on that, the better."

- From Professor John Anderson (1999):[7] "Unfortunately, although policy makers have legislated changes in collective bargaining structure, and labour relations practitioners are painfully aware of the implications of different bargaining structures, very little is actually known about the forces that influence the choice of alternative structures or about the consequences for the relative bargaining power of the parties, the level of industrial conflict, or the functioning of the bargaining process."

Maybe There's Nothing Wrong?

One could take the position that there is really nothing wrong with the structure. As noted by journalist Vaughn Palmer, "My own view with the education sector is in spite of all the experts saying the bargaining system is broken, I don't think it's particularly broken. It's the same bargaining system everybody else has, including school support workers. I just think the problem is that there's no will to settle."[8] Or as BCTF President Susan Lambert recently observed if the process was allowed to proceed without intervention or the threat of intervention maybe, in practice, the system would work.

Whether or not these observers are correct our collective experience tells the story. The teacher–public school employer bargaining cycle, whether done locally or provincially, unfortunately has many of the following features:

- Even though the *Labour Relations Code* provides for bargaining to commence *four months immediately preceeding the expiry of the agreement*, the parties rarely engage in substantive discussions with a view to concluding an agreement prior to its expiry. Little or no substantive bargaining takes place over the summer and the school year starts with an expired agreement, debate, and public commentary.
- The split of issues dominates the preliminary discussions. To date, the BCTF has desired more matters to be designated as local with employers taking the contrary view. While PELRA codifies a form of two tier bargaining, it does leave it to the parties to sort out what is negotiated where. Two tier bargaining models inherently have their limitations.

  Most negotiations involve numerous complex issues, many of which are interrelated. During negotiations, parties can change their positions on one issue in reaction to changes in positions that occur on other issues. In practice, this type of flexibility and process of trade-offs across outcomes makes an agreement possible. The absence of major issues or related issues because one matter is at the provincial table and the other is at local tables confuses the negotiating process, limits meaningful negotiations, and ignores the interrelated nature of provisions in a collective agreement. If there is to be a split of issues, related matters must be bargained in the same forum.

[7] Anderson, John C. *Union-Management Relations In Canada*, Chapter 9, page 209, Addison-Wesley Publishers, 1989.

[8] Vaughn Palmer and Keith Baldrey with Bill Good on CKNW Radio, "Cutting Edge of the Ledge," Friday, October 19, 2012, 10:07 am.

Further, it is an artificial distinction to suggest that you can separate major cost items, such as salary and benefits, from other terms and conditions of employment, all of which have cost implications or consequences to the assignment of resources. Under such a bargaining structure the union has two opportunities to negotiate matters that have cost implications — once at the provincial table and 60 additional times at local tables for other matters which may have cost implications.

- The parties exchange extensive sets of proposals, the compensation mandate is discussed, and the process takes on an increasingly public face.
- A strike vote is achieved and concern sets in. Since 2002 the essential service process — to address the *serious and immediate disruption to the provision of educational programs* resutling from a strike — proceeds. The Labour Relations Board (LRB) of the day worked with the parties to develop an essential service model specific to the K-12 public education sector. In December 2011 the LRB concluded that *the approach the parties have taken has now proven beyond any doubt to be ineffective*, suggesting *that the remedy for that lies in the parties adopting the Board's established approach*. The approach used in the health sector is to identify those matters that are essential as opposed to the work that will not be performed, the unique approach in K-12.
- A strike is intiated using a phased approach.
- With little apparent hope of a timely agreement an intervention is contemplated.
    - In 1993, 1996 (local bargaining period), 1998, 2002, 2005, 2012 (provincial bargaining period) legistative intervention occured. A third party process was included in the 1993, 1996, 2005, 2012 legislation.

For Consideration

The following model is offered as a conclusion to this paper and hopefully as a basis for making reasoned choices. This model is based on bargaining experiences, the work of Wright and Ready, the process approach that resulted in the June 2012 provincially negotiated agreement and the five principles identified earlier.

I. Principles

1. Respects the right to bargain collectively
2. Encourages voluntary settlements
3. Encourages timely settlements
4. Observes government fiscal and policy imperatives
5. Limits the effect of disruption without undermining 1, 2, and 3 above.

II. Issues and Considerations

1. Nature of teacher–public school employer bargaining: Often seen as long, drawn out, protracted and not time sensitive — is there a necessity to have a time-bound system?
2. Split of issues: What issues will be bargained where?

3. The absence of one system or another: Do you specify what matters are provincial and subject to a measure of standardization, and what matters are local? Do you transition to that division now?
4. Authority[9]: With the split of issues, who has the authority to bargain and conclude a collective agreement[10]?
   - Status quo: The BC Teachers' Federation (BCTF) represents all public school teachers and the BC Public School Employers' Association (BCPSEA) represents all public school employers for both local and provincial matters
   - Government/Employer: Government for provincial matters with employer objectives/issues dealt with through consultative processes; BCTF status quo. BCPSEA for local matters through modified delegated authority; BCTF status quo
5. Right to strike/lockout: Is there a necessity for the controlled strike — preserves the right to strike while protecting the public interest (essential service provisions of the *Labour Relations Code*) option specific to the K-12 sector?
6. Impasse resolution: Is the impasse resolution predetermined or subject to policy maker choice in the event an impasse results?

III. Building on Wright and Ready

1. Definitions
   - Collective agreement: There is one collective agreement comprised of the master provincial matters and 60 local sub-agreements
   - Bargaining agents: The BCTF represents all public school teachers and the BCPSEA represents all public boards of education
   - *Public Education Labour Relations Act* (PELRA): Codifies the split of issues and establishes the bargaining framework for the public education sector
2. Split of Issues: What is Bargained Where
   We believe it is necessary to consider the nature and structure of collective bargaining and collective agreements when assessing options for the split of issues. Most negotiations involve numerous complex issues, many of which are interrelated. During negotiations, parties can change their positions on one issue in reaction to changes in positions that occur on other issues. In practice, this type of flexibility and process of trade-offs across outcomes makes an agreement possible. The absence of major issues or related issues because one matter is at the provincial table and the other is at local tables confuses the negotiating process, limits meaningful negotiations, and ignores the interrelated nature of provisions in a collective agreement. If there is to be a split of issues, related matters must be bargained in the same forum.

[9] Individual school board-local teacher association/union bargaining is also an option. It has not been included as there no longer seems to be a constituent group advocating the local bargaining model.
[10] The how and what of ratification would have to be addressed due to the differences in bargaining authority.

Further, it is an artificial distinction to suggest that you can separate major cost items, such as salary and benefits, from other terms and conditions of employment, all of which have cost implications or consequences to the assignment of resources. Under such a bargaining structure the union has two opportunities to negotiate matters that have cost implications — once at the provincial table and 60 additional times at local tables for other matters that may have cost implications.

Given the limitations of two-tier bargaining but recognizing the desire to have meaningful negotiations at both the provincial and local level, we propose the following delineation with respect to where issues should be bargained.

- Provincial Matters
  - Term, recognition, union membership, dispute resolution, collective bargaining procedures
  - Salaries, benefits, paid leaves, and associated compensatory matters
  - Provisions related to the organization of schools: class size, composition, and specialist services.
- Local Matters
  - All other matters not included above[11]
  - Where there is a dispute as to whether a matter is designated a provincial or local matter it shall be considered a provincial matter.

IV. Teacher-Public School Employer Collective Bargaining Model

(For illustrative purposes it is assumed that the agreement expires on June 30)

1. Preparation
   a. The BCTF and BCPSEA establish their bargaining objectives through the policies, processes, and structures which exist within each organization and establish the necessary processes to facilitate local matters bargaining.
   b. The parties develop a common understanding of the data related to all collective bargaining matters, for example:
      - total cost of compensation
      - salary and benefits costs
      - teacher demographics (including, but not limited to, the number and distribution of FTEs and employees)
      - labour market issues (including, but not limited to, teacher supply, demand, and recruitment and retention matters).

[11] Provisions related to teacher currency: evaluation, professional growth and development, mentorship could be considered provincial matters depending on the degree of standardization and general system applicability desired.

2. Establishment of a Facilitator
   a. Eight months prior to the expiry of the collective agreement, a Facilitator be appointed by agreement of the parties; failing agreement, the Chair of the Labour Relations Board shall appoint the Facilitator.

   b. This individual will have authority to continue as Facilitator throughout the collective bargaining process and will begin to meet immediately with the parties. The Facilitator may, from time to time, make recommendations to the parties which the Facilitator deems appropriate to assist the parties in reaching a timely agreement.

3. Bargaining Process: Provincial Matters

   a. Four months immediately preceding the expiry of the collective agreement, the provincial parties will meet and commence collective bargaining. Bargaining proposals are to be exchanged within 30 days of the first meeting.

   b. If no agreement has been achieved by the expiry of the collective agreement, the Facilitator will issue a Bargaining Progress Report outlining:

      - issues at the table
      - matters resolved and unresolved
      - positions of the parties and financial and other implications of those positions
      - the status of local matters bargaining
      - suggested processes and related avenues for continued negotiations and settlement.

   c. With the expiry of the agreement and subject to the provisions of the *Labour Relations Code*, the bargaining agents may exercise their respective rights to strike and lockout.

   d. If no agreement is reached within 30 days of the issuance of the Bargaining Progress Report, the Facilitator is appointed as a Mediator/ Arbitrator.

   e. If, in the judgement of the Mediator/Arbitrator, a timely agreement is not possible the Mediator/Arbitrator will instruct the parties to within one week propose a final offer encompassing all matters at issue that remain outstanding including local matters.

   f. Process for conclusion

      Upon receipt of the parties' submissions, the Mediator/Arbitrator shall establish a process to conclude a collective agreement. At the discretion of the Mediator/Arbitrator, the process may include a combination of arbitration alternatives (interest and/or final offer selection), mediation and facilitation whereby certain issues are subject to varying dispute resolution techniques depending on the nature of the issues (terms of reference can be codified in Regulation).

4. Bargaining Process: Local Matters

    a. Within eight months prior to the expiry of the collective agreement, the BCTF and BCPSEA will meet to review their respective processes for local teacher union-school district bargaining.

    b. Prior to the expiry of the collective agreement the local parties will provide a bargaining status report to their principals. The BCTF and BCPSEA will provide a status report to the Facilitator.

    c. In the event a board of education and a teacher local are unable to conclude an agreement on local matters, the outstanding matters are referred to the provincial bargaining agents for disposition through the provincial process.

    d. A local union cannot strike and a school district cannot lockout on a local matters impasse.

5. Year One Transitional Provisions

    - Amend the *Public Education Labour Relations Act* (PELRA) to codify the split of issues
    - Establish a process to standardize provisions designated as provincial matters.

V. In the Alternative: Teacher–Public School Employer Collective Bargaining Permanent Dispute Resolution Panel

Keep IV. 1 and 2 above, and substitute the following as the process for the balance.

1. A permanent collective bargaining dispute resolution panel shall be established.
2. The members of the panel are:
    - X
    - Y
    - Z
3. The parties may, by mutual agreement, change a panel member.
4. No later than three months before the expiry of their collective agreement, the parties shall exchange bargaining proposals and no later than 15 days thereafter, the parties shall begin collective bargaining.
5. During collective bargaining, the parties may call upon a member of the panel to provide assistance.
6. If the parties reach impasse, the parties shall enter into mediation with one or more members of the panel.
7. If the impasse persists for 14 days after mediation commences, or beyond any other date mutually agreed by the parties, all impasse items shall be submitted to the panel for final and binding arbitration.

8. In reaching its decision, the panel shall take into consideration (the terms of reference can be codified in Regulation):
    - The salaries, benefits and working conditions for employees as compared with public sector employees in relevant comparable employment
    - The economic realities of the marketplace in terms of recruitment and retention of a skilled and qualified workforce
    - Prevailing economic conditions in the Province
    - The interrelationship between government public education policy objectives and terms and conditions of employment
    - The interests of the users of the public education system
    - Historical bargaining patterns
    - Cost of living
    - Such other factors which the panel deems relevant.

Quick Test

Does this model meet the test of the Bargaining Themes and Criteria identified on page 4?

Theme/Criteria	**Comments and Observations**
Balance The parties are permitted to pursue their goals through collective bargaining, but this pursuit must be balanced against the costs of bargaining: ▪ Consequences of industrial conflict ▪ Costs associated with resolving the conflict (dollars, relationship, public confidence) ▪ Out-of-line settlements and the implications for other public sector employers of these settlements.	The model attempts to create a balance such that intervention is not the default option. The parties are held to a timeline and the uncertainty of bargaining assistance further incents bargaining.
Consequences The effects of labour disputes on persons not directly involved in those disputes are minimized.	The right to strike and lockout remain. The timelines and process provide a level of assurance that the process will advance to settlement even if the strike/lockout options are employed.

Theme/Criteria	**Comments and Observations**
Incentive There are incentives and pressures that encourage negotiated settlements. There is sufficient uncertainty about the outcome of bargaining such that the parties are encouraged to negotiate.	Noted above.
Time All parties face significant pressure if an agreement is not reached in a reasonable time.	The facilitator and if necessary the arbitrator can act as *agents of reality* ensuring that time is used appropriately and the process moves forward.
Resolution The process for achieving resolution is found within the bargaining structure. No alternative processes external to the structure exist or can be accessed.	While government has the power to legislate in any round of bargaining there is no default process that relieves the parties of the requirement to bargain under this model.
Role Recognition Participants understand, and respect as legitimate, the roles of the parties to the bargaining process.	Respecting legitimacy is in the hands of the parties….this is not a structure issue but an attitudinal one. As Don Wright noted when commenting on his recommendations: "Even if fully implemented, these recommendations will not significantly improve the state of bargaining unless there is an attitudinal and behavioral change of both sides. This will require dialogue — a genuine attempt to arrive at mutual understandings — between teachers and the employer group (i.e., government, trustees, and school administrators). The sooner we start on that, the better."

Appendix 1:
Is This the Problem We're Trying to Solve?

Is this the problem? If the answer is no, then what is? If the answer is yes or partly yes, how would you further illuminate the description to best capture the problem as you see it? [12]

- ☐ A negotiated agreement, history tells us, can't be reached without some form of assistance or intervention.
- ☐ In practice, "free collective bargaining" is not evident or structurally not permitted in the sector.
- ☐ Given the parties, their bargaining experiences, and the public nature of public education negotiations, there is no adequate dispute resolution process/system.
- ☐ There has not been an enduring *meeting of the minds* on the form and process of provincial bargaining since the original agreement reached by the BC Public School Employers' Association (BCPSEA) and the BC Teachers' Federation (BCTF) in 1994.
- ☐ There is nothing complicated about the *bargaining structure* issue. With the exception of the 1994 agreement and the negotiations that followed that agreement, the BCTF has advocated, pursued, or otherwise pushed for a form of late '80s local bargaining
- ☐ The notion, concept, and structure of provincial bargaining do not enjoy the support of the BCTF.
- ☐ The wrong parties are bargaining.
- ☐ The scope of bargaining — what is bargained, where — is wrong.
- ☐ When provincial bargaining was adopted in 1994, there were no transition provisions to take the 75 local collective agreements to a form of provincial agreement. The parties have struggled with a system which is neither one model nor the other, it's simply something else.
- ☐ While some say the structure is broken, it really isn't. Similar structures seem to work in other parts of the public sector. The problem is that there is no will to settle and the alternatives to making difficult choices are preferable, both strategically and tactically.
- ☐ Outside influences disrupt and distort bargaining, making a negotiated agreement difficult, unlikely, or impossible.
- ☐ Unlike K-12 support staff bargaining and other public sector bargaining, the protracted and public nature of teacher bargaining and the effect on the public places pressure on government to respond.
- ☐ Or, is it something else?

[12] Note that we differentiate the concept of structure, the elements, and how they are organized from process — how the elements are used.

Appendix 2: So How Did We Get Here?

The current bargaining structure has existed since the early 1990s, emerging from two key events:

- In 1987, teachers achieved broad scope bargaining, meaning that they had the legal right to bargain both their compensation and their working conditions with their school district employers; and
- In 1993, the Korbin Commission released a report making recommendations to centralize the public sector bargaining structure, including the highly decentralized K-12 public education sector, which ultimately led to the creation of BCPSEA and its designation as the representative of public school employers. For teachers, individual union certifications were dissolved and the BCTF became the certified bargaining agent for all teachers.

Bargaining at the local level and the emergence of broad scope bargaining

Until 1987, teachers and their employers bargained salaries and bonuses at the local level under a process codified in the *School Act*. If the two parties were unable to reach an agreement by a date specified in the *School Act*, any impasse was referred to arbitration. Working conditions (such as class size or policies over transfers, vacancy filling, supervision, evaluation, and professional development) were not included within the legal bargaining structure, but local teacher associations often pressured boards to negotiate a separate contract for working conditions in return for peacefully settling salary disputes.

Teachers were virtually alone among other public sector employees in their lack of access to collective bargaining, including the right to strike to press for their demands.

However, as described by Osgoode Hall Law School Professor Sara Slinn, even though "teachers had no clear legal right to strike, and compulsory arbitration was prescribed in cases of bargaining impasse, teachers and their locals used mass resignations, strikes, participated in work-to-rule campaigns, and issued "in-dispute" declarations throughout this period as negotiation pressure tactics."[13]

With the coming into force of the *Charter of Rights and Freedoms* in 1982 — and in an attempt to address what the government of the day believed was a constitutional vulnerability — in 1987, the Social Credit provincial government gave teachers a choice. They could choose to organize themselves as trade unions under the labour relations legislation of the day, gaining access to broad scope bargaining but having limited abilities to strike with education designated as an essential service. Or, they could choose to organize as a professional association, with access to binding arbitration to resolve disputes and no option to strike.

Ninety-eight percent of teachers chose the trade union model over the professional association model. With the assistance of the BCTF, union locals were certified as local unions in each district of the province.

[13] Sara Slinn, "Structuring Reality so that the Law Will Follow: British Columbia Teachers' Quest for Collective Bargaining Rights," *Labour/Le Travail* (Fall 2011).

As described by the BCTF in its history of the organization:

> What emerged was a system of coordinated local bargaining. Locals were the bargaining agent charged with the responsibility of negotiating a collective agreement with their school board. The BCTF worked to coordinate all negotiating activities as well as to develop the Collective Bargaining Handbook, with model clause language on every conceivable position that teachers might wish to negotiate. Local bargaining teams were trained by the BCTF and supported by staff assigned to work with locals. Additional staff were hired to assist and new policies and procedures were put in place to support the new bargaining regime including strike pay and assistance. The first round of collective bargaining for teachers in 1988 continued to captivate the excitement and energy of teachers…On November 28, Kitimat teachers began a 10-day strike before successfully concluding an agreement. Eleven other locals struck in the first round and others mobilized to achieve their objectives that became identified in the slogan "Why Not Here?" We did well through coordinated local bargaining.[14]

Between 1987 and 1993, local bargaining resulted in three broad scope collective agreements that enabled teachers to make significant improvements in their salaries as well as gains in their working conditions. During this five-year period, there were also 48 teacher strikes, including 15 strikes and one lockout in round one, 17 strikes in round two, and 16 strikes and two lockouts in round three.

Recently, the senior civil servant responsible for the education file at the time observed:

> On April 1, 1987, the bill was introduced. I've looked back and said, that may have been my worst piece of advice to government ever, because the relationship hasn't worked at all. They've had 11 years of New Democrats; they've had 11 years now of Liberals. It doesn't work.[15]

Bargaining at the provincial level

The early 1990s were a time of considerable change in public education and teacher–employer bargaining. In 1990, government changed education funding and some districts found themselves facing considerable funding constraints as they struggled to meet the rising costs that emerged from the agreements. The province also faced economic pressures and lower revenues.

In 1992, the government established a commission led by arbitrator/mediator Judi Korbin to investigate human resource management in the public sector. K-12 public education was one of the areas of focus. One of the motivating factors in creating the commission was to try and balance the economic realities of limited financial resources with the need to provide public services. As Korbin noted:

> The Commission received numerous submissions concerning the need to establish a method of balancing the power of the parties for collective bargaining purposes…It is believed by many that there are powerful local teachers' associations acting in

[14] "History of the BCTF." Accessed from http://bctf.ca/uploadedFiles/About_Us/HistorySummary.pdf.
[15] Bob Plecas, "Voice of BC," Shaw Cable TV, March 2, 2012.

> concert with the more powerful teachers' federation, whipsawing individual school boards into accepting teachers' bargaining demands because, on a district-by-district basis, they are not able to resist those demands. Consequently, it is perceived that school boards are forced to agree to teachers' settlements beyond the funding ability of a particular district.[16]

Education stakeholders submitted their opinions to the Korbin Commission about the state of labour relations. The BCTF argued for the importance of local bargaining, whereas the employer community recommended centralized bargaining. For example, the BC Principals' and Vice-Principals' Association (BCPVPA) submitted the argument that the local bargaining process was adversarial and did not create an environment for collaborative problem-solving. The BCPVPA also criticized the financial and human resource expense required by the process, stating that mediators and others were benefitting at the expense of students.

The Korbin Commission recommended that there be greater central coordination of bargaining. The government took up this recommendation and restructured public sector bargaining to create several employers' associations in the BC public sector, including the BC Public School Employers' Association as the accredited bargaining agent for public boards of education in the province.

The accompanying legislation introduced provincial bargaining, mandating a single bargaining unit and, by extension, a single collective agreement covering all major issues and cost items. The legislation also defined a process for designating the provincial–local split of issues, with the BCPSEA and BCTF jointly deciding which issues must be bargained provincially and which could be bargained at the local school district level.

The bargaining model as it emerged was fraught with difficulties. First, there were no transitional provisions to take the province from 75 local collective agreements in the 75 public school districts, to a form of master agreement contemplated by the move to a centralized model. Second, few understood the implications of two-tiered bargaining. In its final submission to the 2004 Wright Commission, BCPSEA made the following observation on two-tiered bargaining:

> We believe it is necessary to consider the nature and structure of collective bargaining and collective agreements when assessing options for the split of issues. Most negotiations involve numerous complex issues, many of which are interrelated. During negotiations, parties can change their positions on one issue in reaction to changes in positions that occur on other issues. In practice, this type of flexibility and process of tradeoffs across outcomes makes an agreement possible. The absence of major issues or related issues because one matter is at the provincial table and the other is at local tables confuses the negotiating process, limits meaningful negotiations, and ignores the interrelated nature of provisions in a collective agreement. If there is to be a split of issues, related matters must be bargained in the same forum.
>
> Further, it is an artificial distinction to suggest that you can separate major cost items, such as salary and benefits, from other terms and conditions of employment, all of which have cost implications or consequences to the assignment of resources.

[16] Judi Korbin, *Final Report of the Commission of Inquiry into the Public Service and the Public Sector*, 1993 (Volume 2): F-20.

> Under such a bargaining structure the union has two opportunities to negotiate matters that have cost implications — once at the provincial table and 60 additional times at local tables[17] for other matters which may have cost implications.
>
> Given the limitations of two-tier bargaining but recognizing the desire to have meaningful negotiations at both the provincial and local level, we propose the following model with respect to where issues should be bargained. We submit that the substantive and common issues (monetary and non-monetary) be bargained at a provincial table. We observe that a provincial table provides for an efficient use of resources and expertise while providing a sufficient "balance of bargaining power" between the two bargaining agents and their members.

Looking for alternatives

The experience with the provincial bargaining model in terms of process, outcomes, and relationships has been varied for a variety of reasons. The BCTF and BCPSEA negotiated an agreement for the 1994-1996 period where the parties agreed to new terms, but also continued many of the provisions contained in local collective agreements (referred to as the Transitional Collective Agreement or TCA). The TCA set the stage for the continuation of bargaining in 1997.

In the 1997-1998 round of bargaining, most of the terms of the collective agreement were reached between the parties, although some provisions were reached directly between the BCTF and government (referred to as the Agreement in Committee or AiC), to the exclusion of BCPSEA. The AiC was submitted to the parties for ratification. BCTF members accepted the agreement but BCPSEA members — the province's public boards of education — did not. In July 1998, the terms of the AiC were imposed by the provincial government through legislation.

The provincial parties negotiated an agreement under a bargaining model proposed by Industrial Inquiry Commissioner Vince Ready as part of the resolution to the BCTF illegal strike in 2005. Ready also recommended that the parties adopt this model for future rounds of bargaining, a recommendation the BCTF did not accept.

As we have referenced and discuss further below, given the demonstrated difficulty of reaching negotiated agreements under both the post-1987 local model and the 1994 provincial model, governments have created various inquiries and commissions to propose alternatives to the structure, including:

- in 2003, asking Don Wright to identify options, and
- in 2007, asking mediator/arbitrator Vince Ready for his recommendations.

[17] By the time of the Wright Commission, the number of public school districts in BC had been reduced from 75 to 60 through amalgamation of districts as an initiative of the provincial NDP government.

The Wright report: Mediation and final offer selection

In 2003, Don Wright, a former Deputy Ministry of Education under the NDP government, was appointed as a commissioner to inquire into the bargaining structure and to identify options for improving collective bargaining. At the start of the inquiry he stated that, "My only pre-conceived ideas are …that we are grappling with an incredibly complex bundle of issues and that there is no simple solution." His process was designed to respect this complexity and involved asking education stakeholders to reply to a series of 60 questions, facilitating a session with stakeholders and then issuing a discussion paper.

His report, released in December 2004, noted the unique environment within which collective bargaining occurs in the education sector and the intense pressure it places on government to intervene in any longstanding dispute. He argued that collective bargaining in the public sector must be guided by the state of the provincial economy. Finally, he identified five criteria that are required to be in place if the education sector aspires to a mature collective bargaining relationship:

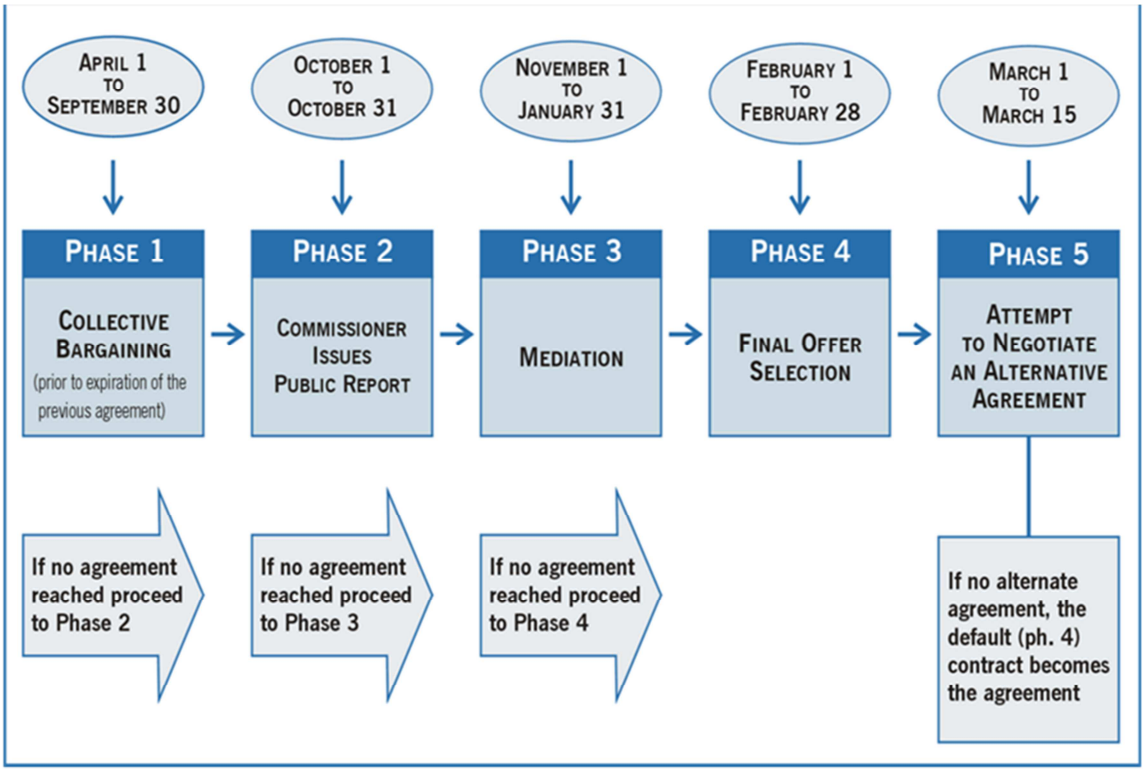
1. Government recognizes that teachers must have an effective voice in determining the terms and conditions under which they teach.
2. Teachers must recognize government's interests in funding the K-12 system.
3. Both parties must bring genuine desire to avoid legislative intervention.
4. Both bargaining agents must be governed effectively so that they can come to the table with the ability to make a deal.
5. The public must be able to hold the appropriate agency accountable for the adequacy of funding, the effectiveness of how that funding is utilized, and the outcome of the collective bargaining process.[18]

Wright recommended maintaining the two-tier bargaining structure, with major cost drivers negotiated provincially and "relational" issues bargained locally. He suggested that the local issues negotiated by local parties not be subject to the approval of either of the provincial bargaining agents (i.e., BCTF and BCPSEA).

He also suggested a mechanism to deal with bargaining impasses, consisting of a multi-phase process that would incorporate various levels of intervention and assistance. For example, the first phase of collective bargaining would be conducted from April 1 through September 30; if an agreement was not reached, a commissioner would investigate the negotiations for the month of October as part of phase two. In phase three, the commissioner would be appointed as a mediator/arbitrator and attempt to mediate an agreement. In phase four, the parties would each propose a final offer, and the mediator would select one as the default contract. A final phase would provide the parties with two weeks to negotiate an alternative agreement.

[18] Don Wright, *Voice, accountability and dialogue: Recommendations for an improved collective bargaining system for teacher contracts in BC*. Commission to Review Teacher Collective Bargaining, 2004.

Although Wright's report was generally accepted by the employers, it was rejected by the BCTF, who felt that it enshrined government intervention and that it failed to return to a system where teachers could negotiate all terms and conditions of employment and withdraw service to resolve disputes. The outright rejection of Wright's recommendations left little chance of future dialogue.



Vince Ready: Provide support to the parties

After the Wright report, veteran mediator/arbitrator Vince Ready was called upon to provide his recommendations giving due consideration to Wright's work. Ready would first have to turn his attention to resolving the illegal teachers' strike of 2005. Ready was able to resolve the strike and proposed a model for the 2006 round of bargaining.

This model, in large part, was credited with the negotiated 2006 deal. Ready would reflect in his report published in 2007, "No collective bargaining system will succeed unless both parties are fully committed to achieving a collective agreement. At the very heart of the labour relations system which governs participants in collective bargaining is the need to compromise, to seek new and creative solutions and to take a pragmatic and disciplined approach to differences which develop in the relationship."[19]

Reflecting on the successful negotiations between the BCPSEA and BCTF that led to their negotiated agreement in June 2006, he stated, "it is not the format or process of collective bargaining which will help achieve a collective agreement. Instead, it is necessary to provide

[19] Vincent L. Ready, *Final Report for Collective Bargaining Options* , February 2, 2007.

support to the parties in their desire to achieve a collective agreement. The presence of a Facilitator/Mediator and the presence of a Government official provided that support."

Ready suggested that eight months prior to the expiry of a collective agreement, various elements should be put in place that would tilt the odds in favour of the two parties being able to negotiate an agreement. These include:

- appointing a facilitator/mediator
- having a government official serve on the BCPSEA bargaining committee to represent government public policy and other interests, and
- getting both parties to develop a common understanding of relevant data on total cost of compensation, benefit costs, teacher demographics, TOCs and labour market issues.

BCPSEA voted to accept Ready's recommendations in their entirety. However, the BCTF said that the report "failed to address any of the concerns raised by teachers over the years."[20]

[20] BCTF E-News 6.7, February 14, 2007. Accessed from https://bctf.ca/publications/BCTFEnews.aspx?id=11422&printPage=true.

Appendix 3: Alternatives for Resolving an Impasse

If the policy imperative is to limit disruption resulting from a strike or lockout there must be a mechanism for resolving collective bargaining impasses. No one model represents a panacea. Each has its advantages and disadvantages:

1. Mediation

- Mediation is a process in which a neutral third party attempts to assist labour and management in reaching a voluntary agreement. The term mediation is often used interchangeably with conciliation.[21]

- The reasons mediation is an attractive method of dispute resolution over other methods include:

  - Helps the parties reach a voluntary settlement
  - Serves as an educational process and promotes the parties' problem-solving abilities
  - More timely and cost-efficient than other methods
  - Uses more informal modes of interaction between the parties against the use of formal hearings and the preparation of transcripts in fact-finding and arbitration.[22]

- Despite the numerous advantages listed above, mediation also has disadvantages and is not suitable for every situation:

  - Mediation does not create pressure for the parties to settle the dispute.
  - A study of the New York impasse procedures done by Kochan et al. indicates that mediation is not effective where the parties lack the motivation to settle, the employer is experiencing problems with their ability to pay, and the parties have unrealistic expectations of the outcome.[23]

2. Interest Arbitration

- Interest arbitration is a form of arbitration used to establish the terms of a collective agreement where the parties are unable to do so through negotiations. This form of arbitration occurs primarily in the public sector where statutes have removed the parties' right to strike.[24]

- Interest arbitration can be an effective dispute resolution mechanism:

  - Interest arbitration protects the public interest by preventing strikes.[25]

[21] Sack and Poskanzer, Labour Law Terms: *A Dictionary of Canadian Labour Law.* Toronto: Lancaster House, 1984, p. 97.
[22] Chauhan. "Managing Public Sector Labour Disputes," in *Handbook of Public Sector Labor Relations.* W. Bartley Hildreth, G. Miller, J. Rabin and T. Vocino, eds. New York: Marcel Dekker, Inc., 1994, p. 197-8.
[23] Ibid.
[24] Sack and Poskanzer. *Labour Law Terms: A Dictionary of Canadian Labour Law.* Toronto: Lancaster House, 1984, p. 27.
[25] Rose, Joseph B. "The Leetch, the Tortoise and the Owl: The World of Interest Arbitration in Ontario," in *Labour Arbitration Yearbook 1994-1995.* Kaplan, Sack and Gunderson, eds. Toronto: Lancaster House, 1995, p. 390.

- Interest arbitration safeguards employee interests by equalizing bargaining power.
- Interest arbitration regulates group conflict.[26]
- From the union's perspective, compulsory arbitration can be beneficial because it results in higher wage settlements.[27]

- However, interest arbitration is not always an ideal solution, and has its own range of disadvantages:

  - The arbitrator usually has little or no understanding of:

    – public finance
    – the long-term effects on the employer's budget of small changes to working conditions
    – substitutability of capital for labour as proposed wage increases make labour more expensive
    – long-range costs of funding pension increases as the composition of the workforce changes
    – many of the issues addressed by the parties.

- Because the arbitrators have little background knowledge or understanding, the following tendencies arise:

  - Decisions are made conservatively, because arbitrators do not want to make any major changes to the agreement.
  - Arbitrators tend to stick to the simple monetary issues where they only need to decide "more or less."
  - Decisions tend to fall in the middle of both parties' initial positions. As evidence of this, interest arbitrators seldom write a decision explaining why they chose one wage rate or benefit over another.

- When interest arbitration becomes the norm, the union does not need to consider what the real needs of its membership are. The union simply makes up a long list of demands and allows the arbitrator to decide. In many provinces, interest arbitration has moved away from being a fail-safe mechanism to replace the strike/lockout threat, towards being a goal of the union.[28] This phenomenon is referred to as the "narcotic" effect, with the parties having undue reliance on interest arbitration as the mechanism to conclude an agreement.

- Interest arbitration allows both parties to elude responsibility for the content and the wording of the collective agreement. As well, it allows both parties to avoid responsibility for selling, defending, and criticizing it. This dispute resolution method allows both sides to escape accountability for the terms and conditions of the new collective agreement and allows them to hide behind the defence that it was the arbitrator who decided the exact terms of the agreement.[29] This has what is referred to as a "chilling" effect on the

[26] Ibid.
[27] Ibid., p. 397.
[28] Crossley, Ronald. "The Pros and Cons of Interest Arbitration: A Management Perspective," in *Labour Arbitration Yearbook 1994-1995.* Kaplan, Sack and Gunderson, eds. Toronto: Lancaster House, 1995, p. 400.
[29] Crossley, p. 405-6.

bargaining process leading to a further undue reliance on interest arbitration as the mechanism to conclude an agreement.

- When parties are aware that they will be going into arbitration, they are often not willing to give any ground. Interest arbitration is not the best alternative because it deters both parties from negotiating.[30]

- The arbitrator is in a position to spend the public's money. If the arbitrator decides to award a very generous wage increase or bonus package to one union, public officials are left to cut spending from some other area. Should an arbitrator — a non-elected neutral — make decisions such as whether to exceed the allocated budget in search of a fair settlement?[31]

  "…third parties not accountable to the electorate to resolve disputes over what should be the terms and conditions of public employment is widely regarded as inconsistent with our system of government."[32] Rights (grievance) arbitrators are seldom trained to do interest arbitration. Rights arbitration and interest arbitration are completely different processes, and therefore require different training.[33]

- Interest arbitration has a chilling effect on the negotiation process.

- Interest arbitration can become very political.[34]

- Interest arbitration can take on average two or three times longer to reach a settlement than the right-to-strike model.[35]

While the above is lengthy list of the many disadvantages of interest arbitration, it is a widely used mechanism for resolving collective bargaining impasses where the parties' right to strike and lock out has been restricted.

3. Mediation-Arbitration (med-arb)

- Med-arb is a process whereby the parties engage in mediation first. Failing resolution of the dispute through mediation, interest arbitration would be invoked.

- This method was developed by recognizing the advantages *and* disadvantages of mediation.

- This model allows the parties to develop and craft their own settlement, while providing for a full and decisive resolution to the bargaining impasse.

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[30] Ibid.
[31] Crossley, 406-7.
Mark Thompson, "Evaluation of Interest Arbitration: The Case of the British Columbia Teachers" in *Interest Arbitration*, ed. Paul Weiler (Toronto: Carswell Company Limited, 1981), p. 79-80.
[32] G. Geisert and M. Lieberman, p. 191.
[33] O. Shime, p. 202.
[34] Ibid.
[35] Joseph B. Rose, "The Leech, the Tortoise and the Owl: The World of Interest Arbitration in Ontario," in *Labour Arbitration Yearbook 1994-1995*, eds. Kaplan, Sack and Gunderson (Toronto: Lancaster House, 1995), p. 397.

4. Final Offer Selection (FOS)

- FOS is a method of dispute resolution that requires the arbitrator to choose between the final offers proposed by the union and the employer. This method is designed to encourage the parties to take reasonable and realistic positions during collective bargaining.

- The goal of FOS is to refashion interest arbitration so it is comparable to a strike. Both parties put their final offers on the table, and if they cannot agree, the arbitrator selects one of the two offers. In this case, the arbitrator is not allowed to put together a new package; one of the two proposals must be selected.

- This method is believed to force both parties to make reasonable demands and to empathize with the needs and demands of the other party. If one party chooses to make unreasonable demands, that party faces the risk of losing it all. This is believed to make the negotiations and the bargaining atmosphere more conducive to reaching a voluntary settlement.

- This method has been tried in numerous American jurisdictions and has been proven to be quite effective. The prospect of FOS improves the prospect of a voluntary settlement, at least compared to conventional arbitration.

- Although FOS increases the likelihood of a settlement, it does not guarantee it. The problem is that the arbitrator is locked into an either/or choice. For whatever reasons, both parties may not be able to put forward a proposal that goes against their principles. Or, one of the parties may attempt to slip something into a contract that may appear moderate in monetary terms or in terms that reduce management rights or union security, but that never would have been agreed to under normal collective bargaining. In arbitration, normally the arbitrator does not make any major changes to the collective agreement, whereas this method allows major changes to be slipped into the agreement. In addition, the parties often cannot agree on issues that are not truly commensurable — that is, when the common denominator is not money.[36]

- Early studies on the success of FOS indicate that it has been quite effective in practice as a dispute resolution method. Studies show that FOS resulted in more frequently negotiated settlements and reduced the “chilling effect” of arbitration on bargaining. The more recent evidence of the effectiveness of FOS is less positive. In fact, more recent empirical evidence leads to the conclusion that the benefits of FOS compared to conventional arbitration are modest.[37]

[36] Weiler, *Reconcilable Differences*, p. 232-4.
[37] Swimmer, Gene. “Final Offer Selection: A Review of the North American Experience,” in *Labour Arbitration Yearbook 1992.* William Kaplan, Jeffery Sack and Morley Gunderson, eds. Toronto: Lancaster House, 1992, p. 215-7.

- Noting the limitations of FOS identified above there are numerous variations on the basic FOS model including:

  Dual Total Package
  Under this procedure, the parties have the option of submitting their final offer plus one alternate final offer.

  By-Issue Selection
  Final offer by item means that the collective agreement results from the selector choosing the best final offer on an issue-by-issue basis, so that the final agreement is a mix of items proposed by two sides. The selector may choose items from either party's package, but cannot change the item selected.

  Tri-Offer Selection
  Under this model, the selector has three offers to choose from for each issue — the union's, the employer's or the recommendations of the fact finder, which have been made known to the parties before arbitration starts. The fact finder's recommendations may endorse one of the two parties' final offers or may be completely different. Similarly, the parties may endorse the recommendations of the fact finder for any issue.

  Repeated-Offer Selection
  This procedure is the same as total package selection, except that in instances where the arbitrator considers both final offers to be grossly unworkable and unfair, the parties may be ordered to submit better final offers. This procedure must be used sparingly in order that it not affect the negotiating incentive that is the strength of the FOS.

  Modified Final-Offer Selection
  This procedure also functions most of the time as regular, total-package FOS. However, in the event the arbitrator receives two unacceptable offers, the arbitrator has the option of writing his/her own settlement. The arbitrator's settlement can only become the agreement by consent of both parties. If one party vetoes the arbitrator's proposal, then one of the original two final offers must be selected. Arbitrator/Mediators Vince Ready and Irene Holden used a modified FOS system to resolve a series of support staff bargaining disputes in 2000. The parties were instructed to prepare their respective final offers. Ready and Holden then modified the process using the offers as the basis for mediated settlements.

  Multiple-Offer Final Selection
  In this procedure each party submits multiple offers to the arbitrator. Three would probably be the ideal number. The arbitrator then considers all six of the offers and chooses the best among them. The arbitrator does not reveal which offer she selected; only which party submitted it. The other party is then left to decide which of the three it wants. The advantages of this system are that each party has an incentive to submit three different and reasonable offers with the hope that one of them will be chosen.

The above-mentioned dispute resolution models have been implemented at different times, in different jurisdictions, with different results. A model that works in one jurisdiction will not necessarily work in another. It is also true that a model that does not work in one jurisdiction will automatically not work in another. It is only through a thorough examination of all the factors relevant to the jurisdiction in question that a person could determine with any certainty the viability of a dispute resolution mechanism.