British Columbia
Public School Employers' Association

400 - 1333 West Broadway Vancouver, B.C. V6H 4C1
Telephone: (604) 730-0739 Fax: (604) 730-0787
e-mail: bcpsea.bc.ca http://www.bcpsea.bc.ca

A Question of Alternatives: Avoiding and Resolving Collective Bargaining Impasses

Resource/Discussion Paper

Second Edition
April 2001

British Columbia
Public School Employers'
Association

A Question of Alternatives: Avoiding and Resolving Collective Bargaining Impasses

Resource/Discussion Paper

One of the central tasks of public policy is to allow the two groups to assert their own interests while at the same time providing some mechanism for reconciling these conflicting interests in a way that ensures survival of the relationship. Since no industrial relations system operates without inflicting some social and economic costs on the larger society, the policy must also balance the objective of allowing parties freedom to pursue their goals against the objective of reducing the costs of this overt conflict and the resulting decisions borne by the larger society. Thus, issues such as the right to unionize, the right to strike, and the role of alternative mechanisms of dispute resolution must be viewed as policy choices that affect how far society is willing to go in emphasizing one objective over the other.

— Thomas Kochan (Massachusetts Institute of Technology, 1979)

Source: Chauhan, "Managing Public Labor Disputes," *Handbook of Public Sector Labor Relations*, eds., W. Bartley Hildreth, G. Miller, J. Rabin, and T. Vocino (New York: Marcel Dekker, Inc., 1994) 187.

Second Edition

H.J. Finlayson

Please direct any questions regarding this paper to:

H. J. (Hugh) Finlayson, Executive Director.....(604) 730-4515

Stephanie Tassin, Research Assistant.....(604) 730-4521

Contents

Executive Summary

Collective bargaining in the public sector often results in labour and management reaching an impasse over an issue or interest question. How can the impasse be resolved? It is a question of alternatives.

Labour relations legislation in BC provides the context for the policy alternatives that are available to resolve an impasse. The current legislative structure governing the public sector gives employees, including teachers and support staff in the K-12 sector, the right to strike. However, this right is limited by the government's ability to intervene in a collective bargaining impasse by passing back-to-work legislation, designating certain services as essential, or incorporating no-strike provisions in legislated bargaining structures. Historically, the BC government has opted to control strikes in the K-12 sector in either of two ways:

- designating certain services as essential according to the labour relations legislation in effect at the time of the dispute

- using direct legislative intervention to end the work stoppage or in anticipation of a work stoppage and establish the process for concluding a collective agreement.

No matter which approach is adopted, various alternatives can be employed to assist in resolving an impasse. In some cases, these processes may be initiated by the parties, while in others, they are incorporated in the essential services or back-to-work legislative alternatives. These processes include the following:

- mediation: a neutral third party attempts to assist labour and management in reaching a voluntary agreement

- cooling-off period: neither party can engage in a strike or lockout for a period during which the parties consider their positions and attempt to settle the dispute, often through mediation

- interest arbitration: an arbitrator establishes the terms of a collective agreement where the parties are unable to do so through negotiations

- final offer selection: an arbitrator chooses between the final offers proposed by the union and the employer.

In choosing from these policy options for resolving an impasse, the challenge is to balance two objectives: allow the parties the freedom to pursue their goals while reducing the costs of industrial conflict and the costs resulting from decisions to resolve this conflict.

Part 5 of this paper provides a framework for discussion and poses a series of questions that serve to bring focus to the issue.

If one accepts that proposition that the K-12 education system should be covered by essential service legislation, Part 6 provides a policy option for policy makers considering the incorporation of K-12 public education within essential service provisions of the BC *Labour Relations Code.*

Part One – Introduction

Collective bargaining in the public sector takes place in a highly sensitive political and psychological environment that determines the degree of compromise, hostility, and emotional commitment to the perceived outcome of the bargaining process. In such an environment, labour and management often reach an impasse over an issue or interest question to be resolved.

The occurrence of an impasse creates a deadlock in negotiations between management officials and representatives of the employee organization over the terms and conditions of employment. In reaching that point, either party may determine that no further progress can be made toward an agreement. How can the impasse be resolved?

Bill 7, the *Public Education Support Staff Collective Bargaining Assistance Act* (PESSCBAA), was passed on April 2, 2000, renewing discussion and debate about strikes in the public education (K-12) sector and their resolution, including the designation of K-12 education as an essential service under the *Labour Relations Code*.

Purposes and Contents of this Paper

This resource/discussion paper has a number of purposes:

- In Part Two, set the context for an examination of policy alternatives that balance the objective of allowing parties to pursue their goals against the objective of reducing the effect of conflict, or the potential for conflict, on the public. This involves reviewing the history of BC's labour relations legislation as it relates to job action and to the public sector, as well as examining job action in the sector and the occurrences of legislative intervention.

- Identify legislative options for controlling and avoiding strikes in Part Three, and alternatives for resolving impasses in Part Four.

- In Part Five, provide a foundation for discussions on the alternatives available when policy choices that affect the K-12 sector and its collective bargaining structures are considered.

- In Part Six, a series of policy options are explored with respect to the essential service designation of K-12 education.

The bargaining structure in the K-12 sector (whether provincial, local, regional, or some combination) is not examined for the purpose of illustrating which is the most effective and efficient way to bargain in this sector. Instead, the focus is on public policy alternatives and considerations as they apply to the right to strike (regardless of bargaining structure), and on the role of dispute resolution mechanisms.

It's important to examine the public policy alternatives in the proper sequence. In Part Three, the first set of alternatives deals with structural changes that can be made to control or avoid strikes. In Part Four, the second set of alternatives identifies mechanisms that can be used to resolve the impasse and conclude a collective agreement.

Balancing Objectives

For the purposes of discussion, we suggest that public policy for collective bargaining in the K-12 sector must balance two objectives:

- allowing parties the freedom to pursue their goals
- reducing the costs of industrial conflict, costs resulting from decisions to resolve this conflict and the consequences resulting from out of line settlements

Policy choices such as the right to unionize, the right to strike, and the role of dispute resolution mechanisms illustrate how far policy makers are prepared to go in emphasizing one objective over the other. Many of these choices, such as the right to unionize and the right to strike, have been made and are part of the history and structure of the K-12 sector.

Part Two – The British Columbia Context

Historical Overview: BC Labour Relations Legislation

Under Canada's common law, the process of legal reasoning does not begin with general legal principles but rather stems from the principles of other cases. For this reason, little debate had occurred over the ethical foundations of the right to strike, neither in the public nor the private sector. The right to strike began with the proposition that no laws existed restricting it; therefore, it was not illegal.[1]

In the late 1960s and early 1970s, the majority of Canadian collective bargaining legislation covered the private sector. Around this time, collective bargaining legislation was also passed for the public sector. The *Public Service Staff Relations Act*, which was enacted in 1967, contained important restrictions on federal public servants' right to strike. Federal employees were granted the right to strike, but this right was qualified by a statutory provision ensuring the continued supply of essential services.[2] This led to further essential service designations across the country.

The following is an historical overview of legislation concerning the right to strike/lock out, continuation of services, and impasse resolution in BC:

1968 **Bill 33, the *Mediation Commission Act*, is enacted.** This Act becomes the first compulsory arbitration legislation in Canada. The Commission has jurisdiction over both the public and private sectors and can make binding decisions on labour disputes seen as contrary to the "public interest and welfare."[3]

[1] Donald D. Carter, "Work Stoppages and Essential Services: An Ethical Challenge," in *Greves et les Services Essentiels*, ed. Jean Bernier (Sainte-Foy: Les Presses de L'Universite de Laval, 1994), 87-8.

[2] Carter, D., 88.

[3] Labour Board Proposal, "Essential Service Designation Process: History and Policy Issues," 1.

1972 **The *Mediation Commission Act* is repealed.** Essential services dispute resolution is introduced into the 1973 *Labour Code*. Under Section 73, a *choice of procedures* model is introduced, allowing the firefighters' union, police officers' union, and hospital employees' union to elect to go to arbitration if the collective bargaining process proves unsuccessful. This legislation does not prohibit any one group of employees from going on strike, and does not address what would happen if one of the unions chose to strike.[4]

1974 **Bill 108, the *Essential Services Continuation Act*, is enacted.** In August, firefighters in the Lower Mainland go on strike and refuse to perform any of their firefighting duties. This leads to the enactment of the *Essential Services Continuation Act*, which forces the firefighters back to work and alters their bargaining structure. This legislation becomes the foundation of today's essential services legislation. In addition, it introduces the 21-day cooling-off period: if the parties are unable to reach an agreement, a 21-day period follows during which neither party can engage in a strike or lockout.[5]

1975 **Section 73(7) of the BC *Labour Code* is amended.** The amendments provide the minister with the option of either ordering the cooling-off period or requesting that the Board designate certain facilities as "necessary or essential to prevent the immediate and serious danger to life, health and safety…"[6]

1977 **Bill 92, the *Essential Services Disputes Act*, is enacted.** This Act maintains the right to strike of the members of police, fire, health care, and eight Crown corporations as well as the employees of the provincial government itself. However, it also includes a provision whereby the Lieutenant-Governor in Council can designate certain services as "essential," designate a cooling-off period, or appoint a mediator[7] if the strike is an "immediate and serious danger to the life, health or safety, or an immediate and substantial threat to the economy and welfare of the province and its Citizens."

[4] Ibid., 1.

[5] Ibid., 1-2.

[6] Labour Board Proposal, "Essential Service Designation Process: History and Policy Issues," 2-3.

[7] Ibid., 3-4.

1978 **Essential service legislation is expanded to include educational services.** As a result of the West Kootenay School Districts' strike and the ensuing *West Kootenay Schools Collective Bargaining Assistance Act, S.B.C. 1977, c. 83*, the essential service legislation is expanded to include educational services as necessary and essential to the public.[8]

1987 **The right to strike is not protected under the *Canadian Charter of Rights and Freedoms*.** The inclusion in Canada's constitution of the *Canadian Charter of Rights and Freedoms* provides new grounds for the argument that the right to strike is a constitutional right and should be protected from legislative encroachments. A series of three cases known as the *Labour Trilogy* are put before the Supreme Court of Canada. These cases are of great significance because their outcome will have important implications on public sector bargaining and strike activity, as well as the government's ability to restrict strike activity to maintain essential services.

The outcome of the *Labour Trilogy* clarifies that the right to strike is **not** protected under the *Charter*, and therefore all legislation restricting such activities is and was legitimate. As a result, the maintenance of essential services remains a political issue.[9]

1987 **Teachers are given the right to strike.** Prior to 1987, teachers in BC did not have the right to strike. In 1987, they are granted this right after 50 years of compulsory arbitration.[10] In addition, Bill 20, the *Teaching Profession Act*, contains consequential amendments to the *School Act*, giving teachers the right to join trade unions and engage in collective bargaining with school boards. The essential services provisions are revoked and integrated into Section 137.8(1) of Bill 19, the *Industrial Relations Reform Act*, which deems education to be an essential service:[11]

> (1) Where the minister, after receiving a report of the commissioner

[8] The Board of School Trustees of School District No. 54 (Bulkley Valley) and No. 39 (Vancouver) and Bulkley Valley Teachers' Association, Vancouver Teachers' Federation, BC Teachers' Federation and the Vancouver Municipal and Regional Employees' Union and the 'Intervenors'. May 21, 1993 (Lanyon), BCLRB No. B147/93.

[9] Carter, 89-91.

[10] Mark Thompson and Gene Swimmer, "The Future of Public Sector Industrial Relations," in *Public Sector Collective Bargaining in Canada: Beginning of the End or the End of the Beginning?*, eds. Swimmer and Thompson (Kingston: IRC Press, 1995), 435.

[11] Lanyon, supra.

> respecting a dispute, considers that the dispute poses a threat to the economy of the Province or to the health, safety or welfare of its residents **or to the provision of educational services** in the Province, the minister may do either or both of the following:
>
> (a) order a cooling off period not exceeding 40 days;
>
> (b) direct the council to designate those facilities, productions and services that the council considers necessary or essential to prevent immediate and serious danger to the economy of the Province or to the health, safety or welfare of its residents or to the provision of educational services in the Province.

1993 **Bill 84, the *Labour Relations Code*, is enacted, amending BC's labour legislation.** The provisions of the essential service designation framework that made reference to the economy as well as to educational services are removed. The provision granting the minister the right to designate a cooling-off period is also deleted.[12]

The structure of the public sector changes. On July 9, the *Final Report* of the Commission of Inquiry into the Public Service and Public Sector (Korbin Commission) is released.

On July 27, Bill 78, the *Public Sector Employers Act* (PSEA) is passed, establishing the Public Sector Employers' Council (PSEC) and employers' associations in six sectors of the public sector:

- health
- social services
- education
- colleges and institutes
- universities
- Crown corporations, agencies, and commissions

1994 **The BC K-12 sector changes.** In May, the British Columbia Public School Employers' Association (BCPSEA) is formed.

[12] Labour Board Proposal, "Essential Service Designation Process: History and Policy Issues," 7-8.

On June 7, Bill 52, the *Public Education Labour Relations Act* (PELRA) is passed, establishing BCPSEA as the accredited bargaining agent for all school districts in the province.

In May/August, the BCPSEA *Constitution and Bylaws* are developed in accordance with the *Public Education Labour Relations Act* (PELRA).

Summary: Job Action in the K-12 Sector

The bargaining history between school districts and support staff unions is different than that between school districts and teachers' unions. Support staff have been covered by the labour relations legislation of the day for over 40 years, while teachers did not receive the right to bargain collectively under provincial labour legislation until 1987. Appendix B lists strikes by district since 1987 in the case of teachers, and over the last 10 years in the case of support staff. Table 1 summarizes the number of teacher and support staff disputes since 1987.

Table 1: Summary of Teacher and Support Staff Disputes

School Year	Number of Teacher Disputes	Number of Support Staff Disputes
1986-1987	1	0
1987-1988	2	0
1988-1989	15	0
1989-1990	2	3
1990-1991	16	0
1991-1992	0	0
1992-1993	17	5
1993-1994	0	0
1994-1995	0	0
1995-1996	0	1
1996-1997	0	1
1997-1998	0	0
1998-1999	0	3
1999-2000	0	37

Legislative Intervention in the K-12 Sector

Since 1987, the BC government has deemed it necessary to legislatively intervene in the K-12 sector on four occasions (for the full text of the legislation, see Appendix C):

Bill 31: *Educational Programs Continuation Act*.

Date: May 30, 1993.

Purpose: To end teacher job action and prohibit further job action in School District No. 39 (Vancouver). The legislation arose out of a teachers' strike.

Impasse resolution method: Mediation; failing agreement, interest arbitration.

Bill 21: *Education and Health Collective Bargaining Assistance Act*.

Date: April 28, 1996.

Purpose: To establish a process to ensure that education and health services would not be disrupted during the period covered by the legislation.

Impasse resolution method: Industrial inquiry commissioner or mediator would make binding recommendations in the event of a collective bargaining impasse.

Bill 39: *Public Education Collective Agreement Act*.

Date: July 30, 1998.

Purpose: To legislate the terms of the provincial collective agreement negotiated between the BC Teachers' Federation and representatives of the BC government that were rejected by BCPSEA member school boards.

Bill 7: *Public Education Support Staff Collective Bargaining Assistance Act (PESSCBAA)*.

Date: April 2, 2000.

Purpose: To end support staff strikes in 44 school boards and provide a mechanism for concluding collective agreements in the districts named in the Act.

Impasse resolution method: If after 60 days from the enactment of the PESSCBAA an agreement is not reached, the Industrial Inquiry Commission must make a written decision for settlement.

Part Three – Alternatives for Controlling/Avoiding Strikes

Given the nature of the public sector and the potential for impasse in collective bargaining, some jurisdictions have chosen to incorporate certain structures and processes in legislation. These structures and processes, which are intended to limit the effect of job action on the public while allowing for an agreement, in the first instance, to be reached through negotiations, include the following:

- choice of procedures model
- essential services designation
- back-to-work legislation.

Choice of Procedures Model

The choice of procedures (COP) model provides an option for either a work stoppage to create the impetus for settlement or interest arbitration to resolve an impasse. Under this model, the union must indicate the method of resolving the impasse prior to negotiations. This model was first adopted in the federal *Public Service Staff Relations Act* (PSSRA) in 1967. In 1973, the BC legislature adopted the concept for fire and police services, allowing the union to choose arbitration as an alternative to striking:

> ***Fire and Police Services Collective Bargaining Act (1995)***
> **Section 3: Settlement of Dispute by Arbitration**
>
> (1) If a fire fighters' union or a police officers' union and an employer have bargained collectively and have failed to conclude a collective agreement or a renewal or revision of a collective agreement, the trade union or the employer may apply to the minister for a direction that the dispute be resolved by arbitration.
>
> (2) The minister may direct that the dispute be resolved by arbitration if
>
> (a) a mediation officer has been appointed under section 74 of the Code and has conferred with the parties, and

(b) the associate chair of the mediation division of the board has made a report to the minister

(i) setting out the matters on which the parties have and have not agreed,

(ii) stating whether in the opinion of the associate chair the party seeking arbitration has made every reasonable effort to reach a collective agreement, and

(iii) stating whether in the opinion of the associate chair the dispute or some elements of the dispute should be resolved by applying the dispute resolution method known as final offer selection.

(3) The minister may specify the terms of reference for an arbitration under this Act.

(4) If the minister directs that the dispute be resolved by arbitration, a trade union must not declare or authorize a strike and an employer must not declare or cause a lockout, and if a strike or lockout has commenced the parties must immediately terminate the strike or lockout.

The COP model is used in only a small number of jurisdictions in Canada. As mentioned, the federal legislation requires the union to indicate the method of resolution prior to negotiations, but in BC the choice to go to arbitration or strike can be made at any time during negotiations.

Essential Services Designation

When both parties have made good faith efforts to reach an agreement, but are unsuccessful, what should be done? What processes or mechanisms should be used to facilitate a settlement?

For the private sector, the answer is obvious: strike or lockout. Both sides have an economic incentive to reach an agreement.

For the public sector, the answer is not so obvious. Some argue that strikes in the public sector cause serious harm to the general public, who are deprived of *essential services*. These services can seldom be found elsewhere because in most instances the government is the sole provider. On the whole, public sector services tend to be *essential* in nature primarily because the government's decision to provide a service tends to involve a government monopoly in providing that service. In addition, the public cannot do without, or at least not without absorbing unacceptable harm, many of these services, including police protection and hospital services.[13]

[13] Paul Weiler, *Reconcilable Differences* (Toronto: Carswell Company Limited, 1980), 219.

Debate About Essential Services

What services should be considered *essential* to the health and safety of the public? Should education be deemed an *essential service*?

Two strong and opposing forces emerge in this debate: the union, which wants to protect one of its most powerful bargaining weapons, the right to strike; and the public — the individuals who pay for the service, and their needs. What is more important, or who is more powerful?

Definition of Essential Services

Essential services in the public sector are considered essential because of their importance to the public's safety and health. In some jurisdictions, certain employees may be designated as essential, requiring them to continue to work in the event of a strike. In other jurisdictions, all employees in services considered to be essential may be deprived of the right to strike and subject to compulsory arbitration.

Each jurisdiction defines *essential services* differently. The nature of an essential service depends on a variety of factors, including geographic, technological, environmental, historical, and cultural. This may explain in part the variation in definitions. Some jurisdictions have chosen to adopt a narrow definition, where essential services are "required to safeguard the public's life, health and safety." Other jurisdictions have chosen a more broad definition, where essential services that are suspended "would create inconvenience perceived as undesirable to the public."[14]

[14] Jean Bernier, "La Determination des Services Essentiels dans le Secteur Public et les Services Publics de Certains Pays Industrialises," in *Greves et les Services Essentiels*, ed. Jean Bernier (Sainte-Foy: Les Presses de L'Universite de Laval, 1994), 83.

Rationale for Establishing Essential Services

Goods or services should be deemed *essential* if:

- **No substitutes** are available.
- They are **essential to the health and safety** of the general public.

There are more important values than the right to strike. The public's right to safety outweighs an employee's right to strike.[15]

A philosophical perspective: Some argue that because work can destroy human life and dignity, and can be destructive of humans themselves, strikes can be justified from a moral point of view as a means to protect workers' interests. Others argue that because strikes impose constraints on other peoples' goods, rights, and liberties, they should be regulated. Therefore, the regulatory function of essential services is necessary from a moral point of view to protect other peoples' rights, liberties, and goods. The right to strike must be weighed against the fundamental right to life, health, and safety.[16]

Essential services in the US: In the US, unionized employees in both the public and private sector have the right to strike under the *National Labour Relations Act* (NLRA). However, the government has the authority to intervene in disputes that may create "emergencies"—whereby the dispute may imperil national health and safety. As a result of this legislation, the government has the right to protect essential services in the US.[17]

Collective bargaining in the Canadian public sector: As in the US, the Canadian government in areas of federal jurisdiction and the provincial governments in their respective jurisdictions have the ability to intervene in public sector collective bargaining impasses through back-to-work, essential services, or no-strike legislation. This raises the question of whether "free collective bargaining" occurs in the public sector. Several

[15] Weiler, *Reconcilable Differences*, 236.

[16] Lukas K. Sosoe, "Le Droit de Greve: Un Defi Ethique?," in *Greves et les Services Essentiels*, ed. Jean Bernier (Sainte-Foy: Les Presses de L'Universite de Laval, 1994), 44-45.

[17] Peter Feuille, "Essential for What? Strikes and the Essential Services in the United States," in *Greves et les Services Essentiels*, ed. Jean Bernier (Sainte-Foy: Les Presses de L'Universite de Laval, 1994), 105-26.

aspects of the public sector differentiate it from the private sector and influence the outcome of collective bargaining, including the following:

- The government is often a monopoly-provider of the good or service.
- The public is the owner of the good or service.
- Collective bargaining can be politicized (goal of re-election).

In addition, government-imposed wage controls, settlement guidelines, or mandates on the public sector inhibit the parties' ability to bargain freely. For "free collective bargaining" to take place in the public sector, old habits must be broken: employers must refrain from legislative intervention and unions must understand and accept the economic reality of the time.[18]

The underlying dynamics of collective bargaining and dispute resolution are different in the public and private sectors. In the private sector there is a dimension to decision making and costs of agreement and disagreement that is largely absent in the public sector. Further, it can be argued that a natural or inherent structural limit on bargaining and disputes exists in the private sector. Collective bargaining occurs within the context of the marketplace with competition and the ability of a business's clients to go elsewhere should a business be unable to provide products and services as a result of a strike or lockout. The marketplace structure creates a limit on the terms a union can expect to achieve and the manner it uses to achieve them.

In contrast, the public sector has no such structural limits that are equivalent. Where the government is the monopoly provider of a service there is typically no substitute for that service. No other organization or competitor can take the business over in the event the government cannot provide the service. Arguably, the absence of the marketplace as a limiting structural feature of public sector collective bargaining makes the settlement of agreements quite different and in some cases more difficult than private sector agreements.

[18] Allen Ponak and Mark Thompson, "Public Sector Collective Bargaining," in *Union-Management Relations in Canada*, eds. Morley Gunderson and Allen Ponak (Canada: Addison-Wesley Publishers Limited, 1995), 449.

Why public sector employees *should not* be granted the right to strike:

- Work stoppages are said to inflict excessive damage on members of the general public, who are deprived of essential services that cannot be obtained elsewhere.[19]

- The government typically secures a monopoly when it undertakes an activity; therefore, no substitutes for the activity are available.[20]

- Ordinary citizens are not party to the bargaining and are the main victims of the dispute.[21] "Legalizing teacher strikes…would be inconsistent with a democratic representative government… If an agreement is reached,…parties can simply be seen to have been creating public policies in the middle of the night in a process that excludes other interested parties."[22]

- In the public sector, the strike is used more as a political weapon; in the private sector, the threat of a strike is seen as an economic weapon.[23]

- Public sector employers can agree to an extravagant settlement to relieve public pressure primarily because the repercussions of such a settlement will not be felt immediately. In most instances, a settlement that relieves short-term pressure can be buried in the larger budget and will most likely become the next government's problem.[24]

- Public sector employees are quite well protected from layoffs due to technological change or economic downturn. The union never has to worry about having to trade off workers' jobs for a rich wage settlement as they do in the private sector. "Importing the right to strike from the private sector (for which there is a classic economic rationale) into the public sector exerts a continuing distortion upon the public sector wage determination process."[25]

---

[19] Paul Weiler, *Reconcilable Differences*, 219.

[20] Ibid.

[21] Ibid.

[22] G. Geisert and M. Lieberman, *Teacher Union Bargaining Practice and Policy* (Chicago: Precept Press, 1994), 188.

[23] Ibid., 220.

[24] Ibid.

[25] Ibid.

- In the K-12 sector, teachers do not typically suffer any loss of income as a result of a strike. In most US states and Canadian provinces, students must be in session for a minimum number of days; therefore, strike days are simply rescheduled and employees are paid.[26]

Why public sector employees *should* be granted the right to strike:

- Even though a group/classification of employees in the public sector may perform some duties that are essential to our health and safety (for example, police fight crime), these employees perform other duties that are not essential. The large majority of public sector employees perform duties the public can live without, at least in the short term. For example, police officers protect the public from crimes of violence, but they also issue speeding tickets, testify in court, investigate white-collar crimes, and so on. Though the public's safety would be in peril if the police force were to engage in a total strike, it would not be jeopardized if officers stopped performing duties such as issuing tickets or investigating crimes.[27]

- Some companies in the private sector provide services that are essential to the health and safety of the public but do have the right to strike (for example, natural gas providers in BC). If public safety and lack of available substitutes are reasons to deem a service essential, then restricting the right to strike should also be considered in the private sector.[28]

- The right to strike is the only reasonable catalyst compelling both sides to reach a consensus.[29]

- There are few substitutes for the right to strike. Removing public sector employees' right to strike would require replacing this right with some other form of dispute resolution. While the right to strike may not be a perfect dispute resolution mechanism, it is the best one available.

---

[26] G. Geisert and M. Lieberman, 187.

[27] Weiler, *Reconcilable Differences*, 220-21.

Allen Ponak and Mark Thompson, "Public Sector Collective Bargaining," in *Union-Management Relations in Canada*, eds. Morley Gunderson and Allen Ponak (Canada: Addison-Wesley Publishers Limited, 1995), 432-33.

[28] Weiler, *Reconcilable Differences*, 221.

[29] Stephen B. Blumenfeld, "Canadian Public Sector Collective Bargaining," in *Handbook of Public Sector Labor Relations*, eds. W. Bartley Hildreth, G. Miller, J. Rabin and T. Vocino (New York: Marcel Dekker, Inc., 1994), 361.

Other dispute resolution options include interest arbitration and final offer selection, both of which are believed to weaken the collective bargaining process, lead to excessive third-party intervention, and generally produce inferior collective agreements[30] (see *Interest Arbitration* and *Final Offer Selection* in Part Four of this paper).

- Under a democratic system, it is essential that all employees be granted the right to strike if they feel their wages or working conditions are not good enough.[31]

- Failing to grant teachers the right to strike makes the negotiating process futile. Teacher unions feel that the school board would not negotiate or bargain in good faith unless the union has the right to strike, and that the employer would adopt inflexible positions. This argument was not substantiated by the experiences in US states that prohibited teacher strikes.[32]

Conclusion: Some argue that public sector employees should not be granted the right to strike because of the essential nature of their work. However, most public sector employees clearly provide services that the general public can do without, at least in the short term. Further, private sector employees have enjoyed the right to strike even though the services they provide are considerably more "essential" than those provided by most public sector employees. Private sector bargaining dynamics are different given the natural limits imposed by the marketplace.

Essential Services in Firefighting and Policing

Police officers and firefighters in BC are legislated under the *Fire and Police Services Collective Bargaining Act*. This Act grants the two parties the right to strike, but imposes certain limitations on this right:

- Article 3(4) states that if the minister "directs that a dispute be resolved by arbitration, a trade union must not declare or authorize a strike and an employer must not declare or cause a lockout…"

[30] Ponak and Thompson, 433.

Owen B. Shime, "Interest Arbitration: An Arbitrator Examines the Process" in *Labour Arbitration Yearbook 1992*, eds. William Kaplan, Jeffery Sack and Morley Gunderson (Toronto: Lancaster House, 1992), 201-3.

[31] Shime, 201-3.

[32] G. Geisert and M. Lieberman, 186-9.

- In the event of a strike, the essential service provisions of the *Labour Relations Code* apply.

Though police officers and firefighters have been granted the right to strike in many provinces, they have generally rejected this right. Firefighters have never gone on strike, while police officers have been involved in only a small number of strikes — most notably the 1969 strike by the Montreal police and the eight-week strike in 1980 by the Halifax police.[33]

Tables 2 and 3 summarize the legislation covering the collective bargaining rights of employees in the police and fire services across Canada.

Table 2: Labour Legislation Affecting Police Officers

Province	Right to Bargain Collectively	Mediation/ Conciliation	Right to Affiliate	Right to Strike	Binding Arbitration	Type of Arbitration
British Columbia	Yes	Yes	Yes	Yes[1]	Optional	Single or Panel
Alberta	Yes	Yes	No	No	Yes	Panel
Saskatchewan	Yes	No	Yes	Yes	Yes[2]	Panel
Manitoba	Yes	Yes	Yes	Yes	No	N/A
Ontario	Yes	Yes	No	No	Yes	Single or Panel
Quebec	Yes	Yes	No	No	Yes	Panel
New Brunswick	Yes	Yes	Yes	No	Yes	Single or Panel
Nova Scotia	Yes	Yes	Yes	Yes[3]	No	N/A
Prince Edward Island	Yes	Yes	Yes	No	Yes	Panel
Newfoundland	Yes	No	No	No	Yes	Panel

1 Essential service designations
2 If union constitution has no strike clause
3 Thirty-day cooling-off period
4 Binding on association only

[33]Richard L. Jackson, "Police and Firefighter Labour Relations," in *Public Sector Collective Bargaining in Canada: Beginning of the End or the End of the Beginning?*, eds. Swimmer and Thompson (Kingston: IRC Press, 1995), 317-8.

Table 3: Labour Legislation Affecting Firefighters

Province	Right to Bargain Collectively	Mediation/ Conciliation	Right to Affiliate	Right to Strike	Binding Arbitration	Type of Arbitration
British Columbia	Yes	Yes	Yes	Yes[1]	Yes	Single or Panel
Alberta	Yes	Yes	Yes	No	Yes	Single or Panel
Saskatchewan	Yes	Yes	Yes	Yes/No	Yes[2]	Single or Panel
Manitoba	Yes	Yes	Yes	No	Yes	Panel
Ontario	Yes	No	Yes	No	Yes	Panel
Quebec	Yes	Yes	Yes	No	Yes	Single
New Brunswick	Yes	Yes	Yes	No	Yes	Single or Panel
Nova Scotia	Yes	Yes[3]	Yes	Yes	No	N/A
Prince Edward Island	Yes	Yes	Yes	No	Yes	Single or Panel
Newfoundland (St. John's only)	Yes	No	Yes	No	Yes[4]	Single or Panel
Newfoundland (Others)	Yes	Yes	Yes	Yes	No	N/A

1 Essential service designations
2 If union constitution has no strike clause
3 Binding if both parties agree
4 Limited to certain times

Tables 2 and 3 - Source: R. Jackson, "Police and Firefighter Labour Relations in Canada," in *Public Sector Collective Bargaining in Canada: Beginning of the End or the End of the Beginning?*, eds. G. Swimmer and M. Thompson (Kingston: IRC Press, 1995), 322-3.

Essential Services in Health Care

The regulation of health care and the assurance of essential services vary across the country: in some provinces, health care employees do not have the right to strike, while in others, there is a lack of regulation.[34] Table 4 summarizes the essential service provisions for nurses' unions across Canada.[35]

Table 4: Essential Services Provisions for Nurses' Unions Across Canada

Province	Strikes allowed?	Essential services negotiated by hospital and local union in the first instance?	Third party decides if there is an impasse?	Province-wide strikes by nurses
British Columbia	Yes	Yes	Labour Relations Board	1989, 1991[2]
Alberta	No	N/A	N/A	1988 (illegal)[3]
Saskatchewan	Yes	Yes	No	1988, 1991
Manitoba	Yes	Yes	Independent Third Parties[1]	1990
Ontario	No	N/A	N/A	
Quebec	Yes[4]	Yes	Essential Services Council[6]	1989[7]
New Brunswick	Yes	Yes	Public Services Relations Board	
Nova Scotia	Yes	Yes	No	
PEI	No	N/A	N/A	
Newfoundland	Yes	Yes	Labour Relations Board	
Federal	Yes	Yes[5]	Public Service Staff Relations Board	

1 Union and management can opt out at any time
2 Hospital Employees Union (general service workers)
3 Four previous strikes were legal
4 Can only negotiate above statutory limits
5 Employer gives union list of essential positions and union challenges
6 Law stipulates minimum percents provided in each class of hospital
7 Illegal because untimely

[34] Larry Haivan, "Industrial Relations in Healthcare: Regulation, Conflict and Transition to the 'Wellness Model'," in *Public Sector Collective Bargaining in Canada: Beginning of the End or the End of the Beginning?*, eds. Swimmer and Thompson (Kingston: IRC Press, 1995), 237.

[35] Ibid, 425.

Overview of nursing strikes: In May of 1976, the BC nurses went on strike, forcing the Minister of Labour to direct the Labour Relations Board (LRB) to designate essential services under Section 73(7)(b) of the *Labour Code*. The LRB had to determine which services in the hospital were "essential" and which were not.

Some argued that all services in a hospital should be deemed essential; unions took the position that none of their members should be forced to cross the picket line. Many less-critical surgeries were cancelled and staff members not on strike performed most of the basic labour employees' work (cooking, laundry, and cleaning). This caused a public uproar, because some felt that the health and safety of the public was in peril given the low levels of employees who were deemed "essential."

The nurses in BC also went on strike in 1989. Again, because it was argued that this posed a threat to the public's health and safety as well as to the economy, the Minister of Labour ordered that the Industrial Relations Council designate essential services. This process was seen as very slow and clumsy. Most hospitals were operating with 75 and 80 percent of nurses working, and some were even operating at 110 percent.

Essential Services in Education

Teachers: Prior to 1987, teachers in BC did not have the right to strike, and their wages and working conditions were subject to compulsory arbitration in the event of an impasse. This changed in 1987 with the enactment of Bill 20, the *Teaching Profession Act*, which contained consequential amendments granting BC teachers full collective bargaining rights. In addition, Bill 19, the *Industrial Relations Reform Act* which replaced the Labour Code included an essential services provision that allowed the minister to direct the Industrial Relations Council to designate essential services where there was a "threat to the economy of the province or to the health, safety or welfare of its residents or to the *provision of educational services*…."

Bill 84, the *Labour Relations Code*, was passed in 1993, resulting in further amendments to the essential services legislation. This Bill deleted the words "…provision of educational services…" from the *Industrial Relations Act*, replacing them with the words "…health, safety or welfare of the residents of British Columbia." This had the effect of more narrowly defining those services considered "essential." Article 72(2) states:

> If the minister (a) after receiving a report of the chair respecting a dispute, or (b) on the minister's own initiative considers that a dispute poses a threat to the health, safety or welfare of the residents of British Columbia, the minister may direct the board to designate as essential services those facilities, productions and services that the board considers necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia.

In 1993, the LRB analyzed the past legislation with respect to this issue of essential services in *The Board of School Trustees of School District No. 54 (Bulkley Valley) and the Board of School Trustees of School District No. 39 (Vancouver) and the Bulkley Valley Teachers' Federation and the Vancouver Teachers' Federation and the British Columbia Teachers' Federation (BCLRB No. B147/93)*, and stated the following:

> Given the development of essential service legislation in this province with the inclusion of educational services as a specific subject for essential service orders, we can draw no other conclusion than that the Legislature intended by its removal, to narrow the grounds upon which essential services can be ordered….Therefore an interruption or a disruption in the delivery of educational services is no longer sufficient in and of itself to cause a designation of essential services.

In the *Bulkley Valley and Vancouver School Board* decision (see Appendix F), the LRB ruled that "there were limits on the freedom to engage in Collective Bargaining," and when it was clear, or "demonstrably

obvious," that a dispute would affect the health and safety of the public, the dispute should be brought under control. Likewise, where the LRB has deemed exceptional circumstances to exist, the LRB may rule that education is "essential" within the concept of "welfare." Until now, the only situation that has been considered to fall under this "exceptional circumstance" provision is education to Grade 12 students because of the potential impact that a strike may have on the students' future.

Conclusion: Teachers have the right to strike and this right will not be limited by the provision of "essential services" **unless** "demonstrably obvious" or exceptional circumstances exist.

Support staff: There is little legislative history on the designation of support staff as "essential" under Section 72 of the *Labour Relations Code*. Although the *Bulkley Valley* case addresses teachers, it applies to support staff as well because some support staff members are directly involved in making education available to students. Although disruption of the delivery of services is not enough to warrant designation of essential services, there is cause for an investigation under Section 72(1) when such a disruption affects grade 12 students' ability to graduate or to apply to post-secondary schools.

In the *Bulkley Valley* case, supra, the Chair considered the following factors when making recommendations to the minister under Section 72(1):

- the length of the dispute
- the timing of the dispute
- the amount of instructional time remaining
- the likelihood of an earlier settlement
- the date of provincial examinations
- an assessment of the potential impact on grade 12 students
- the health and safety of the students (that is, whether the school grounds would become very dirty as a result of the strike).

Conclusion: Support staff services will be deemed essential if the withdrawal of these services will seriously affect students' welfare (for example, affecting their ability to apply to or attend post-secondary programs) or health or safety (for example, the school grounds become a risk to their health or safety).

Back to Work Legislation

In the past, the province has used its legislative authority to end work stoppages (see *Legislative Intervention in the K-12 Sector* earlier in Part Two of this paper). Legislation that requires striking employees to return to work or prohibits job action establishes the process for concluding a collective agreement, including processes such as final offer selection and interest arbitration. Back to work legislation can be characterized as an *ad hoc* response to a strike in the public sector and is dependent upon a number of factors, including the nature of the dispute and the political environment.

Part Four – Alternatives for Resolving an Impasse

For collective bargaining to succeed, provisions need to be created to resolve impasses, and these provisions need to recognize the rights, legitimate interests, and power of both labour and management. The most desirable way for both parties to resolve an impasse is to reopen negotiations and bargain until an agreement is reached, or to seek the assistance of a third party to break the impasse. Various third party alternatives are available to assist the parties in achieving their own settlement or concluding an agreement, including the following:

- mediation
- cooling-off period
- interest arbitration
- final offer selection.

The criteria for assessing third party intervention alternatives contained in the *Handbook of Public Sector Labour Relations* are instructive:

1. Vital public services cannot be interrupted.

2. Collective Bargaining cannot be meaningful unless all parties face significant pressure if an agreement is not reached in a reasonable period of time.

3. The bargaining parties themselves should ultimately decide upon all contract provisions. Neutrals may play an important role in unusual circumstances.

4. Any dispute settlement procedure should possess the flexibility for differential application to the disparate types of public employee; e.g., public library workers and policemen.

5. Any dispute settlement procedure must be workable, and it must be palatable to the government employer, public employer and the public (Brookshire and Holly, 1973: 663).

Source: Chauhan, "Managing Public Sector Labor Disputes," in *Handbook of Public Sector Labor Relations*, eds. W. Bartley Hildreth, G. Miller, J. Rabin and T. Vocino (New York: Marcel Dekker, Inc., 1994), 196.

Mediation

Mediation is a process in which a neutral third party attempts to assist labour and management in reaching a voluntary agreement. This process may involve either negotiating a collective agreement or settling a grievance. The term mediation is often used interchangeably with conciliation. Mediation is distinguishable from conciliation in some jurisdictions because it takes place subsequent to the conciliation process and is not compulsory. [36]

Mediation is one of the most widely used third party intervention methods in resolving collective bargaining impasses. Several reasons why 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.[37]

Despite the numerous advantages associated with mediation, this form of dispute resolution also has disadvantages and is not suitable in all situations. The most significant disadvantage is that mediation does not create pressure for settlement. A study of the New York impasse procedures done by Kochan et al. indicates that mediation is not effective where (1) the parties lack the motivation to settle, (2) the employer is experiencing problems with their ability to pay, (3) the parties have unrealistic expectations of the outcome. [38]

[36] Sack and Poskanzer, Labour Law Terms: *A Dictionary of Canadian Labour Law* (Toronto: Lancaster House, 1884), 97.

[37] Chauhan, 197-8.

[38] Ibid.

Cooling-off Period

During a *cooling-off period*, neither side can engage in or authorize a strike or lockout. Parties often engage in mediation during this time. If mediation proves unsuccessful after the cooling-off period, a strike or lockout may occur.

The purpose of the cooling-off period is to prevent the occurrence of a strike by granting both sides some time to consider their positions and attempt, either through mediation or some other form of third party intervention, to settle the dispute.

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 and have made arbitration compulsory. [39]

When parties in the private sector reach an impasse in negotiations, in most cases the union either goes on strike or gets locked out. This is not always the case in the public sector. The nature of the employer and the effects a strike may have on the public mean that public sector employees often go to either voluntary or compulsory interest arbitration.

In an address at Arbitration Day in New York in May 1985, Arbitrator Arnold Zack stated:

> Interest arbitration has strayed from its intended role as a device for resolving those few remaining issues that the parties could not settle, despite their good-faith bargaining. It has become a full-blown substitute for collective bargaining.[40]

[39] Sack and Poskanzer, 27.

[40] Ronald Crossley, "The Pros and Cons of Interest Arbitration: A Management Perspective," in *Labour Arbitration Yearbook 1994-1995*, eds. Kaplan, Sack and Gunderson (Toronto: Lancaster House, 1995), 400.

Clearly, the purpose and use of interest arbitration have evolved quite differently than originally intended. As a result of this evolution, the benefits of interest arbitration as a method of dispute resolution have become much less clear.[41]

Over the last 15 years, BC arbitrators seem to have reached a general consensus that their role as interest arbitrators is to attempt to replicate what the parties might have negotiated in free collective bargaining. It is generally understood that interest arbitration is not an opportunity for arbitrators to impose their "notions of social justice or fairness" in exchange for "market or economic realities."[42] In *Re Board of School Trustees, School District No. 1 (Fernie) and Fernie District Teachers' Association (1982), 8 L.A.C. (3rd) 157 (Dorsey)*, Arbitrator Dorsey set out the following criteria for interest arbitration:

1) The Award must replicate the bargained award.

2) The Award must not be too rigid or static as it will stifle future bargaining by making the outcome of future arbitrations too easily predictable.

3) The Award must not be purely speculative; one must pay close attention to the concerns of the parties.

Why interest arbitration is *not* an effective method of dispute resolution:

- 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

[41] Ibid.

[42] Re Board of School Trustees, School District No. 1 (Fernie) and Fernie School District Teachers' Association (1982) 8 LAC (3rd) 157 (Dorsey).

- Because the arbitrators have little background knowledge or understanding, the following tendencies arise:
  - Decisions are made very 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 and towards being a goal of the union. [43] 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.[44] This has what is referred to as a "chilling" effect on the 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.[45]
- 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

[43] Crossley, 404.

[44] Crossley, 405-6.

[45] Ibid.

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?[46]

- "…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."[47]
- Rights (grievance) arbitrators are seldom trained to do interest arbitration. Rights arbitration and interest arbitration are completely different processes, and therefore require different training.[48]
- Interest arbitration has a chilling effect on the negotiation process.
- Interest arbitration can become very political.[49]
- Interest arbitration can take on average two or three times longer to reach a settlement than the right-to-strike model.[50]

Why interest arbitration *is* an effective method of dispute resolution:

- Interest arbitration protects the public interest by preventing strikes.[51]
- Interest arbitration safeguards employee interests by equalizing bargaining power.
- Interest arbitration regulates interest group conflict.[52]
- From the union's perspective, compulsory arbitration can be beneficial because it results in higher wage settlements.[53]

---

[46] 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), 79-80.

[47] G. Geisert and M. Lieberman, 191.

[48] O. Shime, 202.

[49] Ibid.

[50] 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), 397.

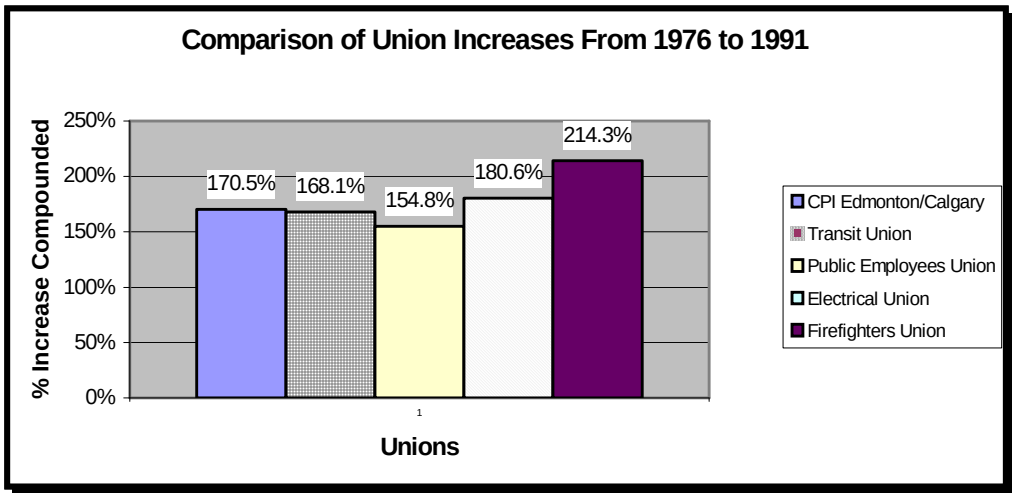
[51] Rose, 390.

[52] Ibid.

- "It balances the relative strength of the parties and places the small union or employer on an equal footing with a larger bargaining counterpart."[54]

From a practical perspective: If interest arbitration was a duplicate of free collective bargaining, then the outcomes of the two methods would be similar. This is clearly not the case in Figure 1, which shows the wage increases of municipal employees in Calgary/Edmonton over the 15-year period from 1976 to 1991.

Figure 1: Comparison of Union Increases from 1976 to 1991



All of the unions in Figure 1 had the right to strike *except* the firefighters' union. This difference in wage increases could be attributed to more experienced or better negotiators at the bargaining table. However, the firefighters have relied on interest arbitration for seven of the last ten years. In every round of negotiations that went to arbitration (except 1983), the firefighters were awarded wage increases superior to the average of those unions who have the right to strike (See Figure 2).

[53] Rose, 397.

[54] Charles Morris, "Interest Arbitration: Panacea's Art or Pandora's Box," in Interest Arbitration, ed. Paul Weiler (Toronto: Carswell Company Limited, 1981), 7.

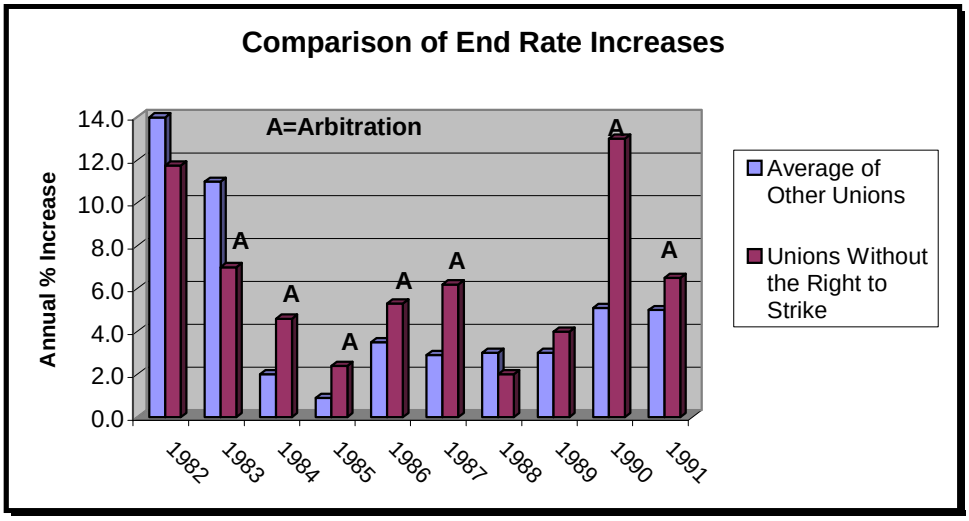


Figure 2: Comparison of End Rate Increases

Source: Ronald Crossley, "The Pros and Cons of Interest Arbitration: A Management Perspective" in *Labour Arbitration Yearbook 1994-95*, eds. William Kaplan, Jeffery Sack and Morley Gunderson (Toronto: Lancaster House, 1995).

Final Offer Selection

Final offer selection (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 FOS Concept

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 their demands not within reason, 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.[55]

> There are numerous variations of Final Offer Arbitration: arbitration where each side submits its final position on specific issues, then the Arbitrator selects the final offer issue by issue; Modified Final Offer Arbitration where the Arbitrator has the option of rejecting both parties' final offers and composing his/her own award; and Repeat Final Offer where the parties' final offers were deemed unacceptable and the Arbitrator requests that the parties resubmit new final positions.[56]

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. [57]

---

[55] Weiler, *Reconcilable Differences*, 232-4.

[56] M. Gunderson and F. Reid, "Public Sector Strikes in Canada," in *Public Sector Collective Bargaining in Canada: Beginning of the End or the End of the Beginning?*, eds. Swimmer and Thompson (Kingston: IRC Press, 1995), 150.

[57] Gene Swimmer, "Final Offer Selection: A Review of the North American Experience," in *Labour Arbitration Yearbook 1992*, eds. William Kaplan, Jeffery Sack and Morley Gunderson (Toronto: Lancaster House, 1992), 215-7

The Canadian Experience

Unlike the US experience, the Canadian experience with FOS as a dispute resolution method has been limited. FOS has been used most extensively in Manitoba, where FOS provisions were in effect from 1988 to 1991. The provincial government at that time implemented FOS in an attempt to strengthen the union's position. Only two pieces of Canadian legislation include FOS as an option for dispute resolution: the Ontario *School Boards and Teachers Collective Negotiations Act* and the Manitoba *Labour Relations Act*.[58] Although the use of FOS in Manitoba was short lived, we can look to the Manitoba experience to better understand the effectiveness of FOS as a dispute resolution method.

Effectiveness of final offer selection in Manitoba: The effectiveness of FOS in Manitoba can be measured by looking at the following:

- Were the final positions of the parties close to each other? Closer results would indicate that the parties had made good faith attempts at the bargaining table to negotiate an agreement. The results are mixed, but the difference between the two parties' final offers on the wage issue was seldom close, and in 8 of the 10 cases, the differential was more than 2 percentage points.[59]

- Overall, whose offer was chosen? The selections were made more or less evenly, with the employer's offer being chosen 6 of 14 times.[60]

Although arbitrators are capable of acting under the restrictions of FOS, they argue that they could have done a better job under the more flexible conventional arbitration method. This was primarily a result of the parties' extreme final positions, which forced the arbitrator to choose between two unpalatable final offers. This situation may have been a result of the actual method of dispute resolution or a result of the parties' inexperience with such a process.

[58] Gene Swimmer, "Final Offer Selection: A Review of the North American Experience," 217-9.

[59] Swimmer, G., 219-226.

[60] Swimmer, G., 219-226.

Final offer selection in BC: On April 2, 2000, the BC legislature passed Bill 7, the *Public Education Support Staff Collective Bargaining Assistance Act*, to resolve collective bargaining impasses in 44 of the province's 60 school districts. The Act established two Industrial Inquiry Commissions (IICs), one to resolve the bargaining impasses (IIC #2) and the other to examine and make recommendations to government on support staff bargaining structures (IIC #3).

The IIC #2 Commissioners were authorized to determine the process and rules to resolve the impasses within the timeframe established by the legislation. The Commissioners directed the parties to attempt to reach an agreement through direct negotiations within a specific time period. Very few agreements were reached during this period, so the commissioners issued an award (Appendix H) detailing the terms of settlement based on the principles followed by interest arbitrators.

For some issues, the IIC #2 award provided principles upon which individual school boards and union locals were to negotiate language for inclusion in their collective agreement. These issues included the following:

- four-hour minimum work day
- secondary seniority — seniority for casual employees for the purposes of bidding on assignments and shift assignment priority
- contracting out
- threshold ability as the criteria for selection on job postings

The parties were to attempt to agree on the specific contract language through negotiating on these issues. If they failed to agree within the time specified by the commissioners, the following procedure would apply:

- The parties have 10 days from the date of referral to FOS to provide the commission with their respective proposals.
- Rebuttal submissions will be made by the parties within 10 days of the initial submission.
- Rebuttal submissions may include any amended proposals the parties wish to make.
- The commissioners will choose one of the submissions as the terms of settlement.

IIC #2 Final Offer Selection: Results and Assessment

The effectiveness of final offer selection can be measured by the closeness of the parties' final offers and the frequency with which each party's offers were chosen. As the Commissioners had issued the first Industrial Inquiry report (May 30, 2000) for the districts in the Vancouver Island Labour Relations Council (VILRC) and the respective unions, the commission established the FOS process for this group (September 26, 2000).

The Commissioners indicated that they intended to follow the same process for the districts and union locals in the rest of the province.

In general, the Commissioners selected the position taken by the employer more often than the position taken by the union. Of the matters referred to FOS, the employer's position was accepted approximately sixty percent of the time. The closeness of the parties' final positions, however, was strongly influenced by the order of the submissions made to the commission. With the exception of the VIRLC, the final positions of the parties were not very close. The commission's original intent was to resolve the support staff disputes through the more traditional FOS; in practice however, they adopted a modified final offer process. This procedure more closely resembled conventional arbitration, as the Commissioners did not select one party's final proposal in its entirety. Clearly, this approach had a chilling effect on the negotiations subsequent to the settlement of the VILRC disputes, as unions and employers adopted the stance they had adopted in the negotiations that led up to the creation of the commission - the parties "taking their chances" with a third party process as opposed to negotiating. Evidence of this can be observed in the difference in the movement of the parties under the first FOS of the VILRC and all the other FOS arbitrations that followed. The movement of final positions towards each other was noticeable under the VILRC final offer submission as they were forced to make good faith efforts in bargaining and to take realistic positions in their final offers. Following the commission's FOS decision for the VILRC, the remaining districts and union locals had little incentive to move significantly from their positions, as there was no longer the same threat of losing it all as there is under traditional FOS.

Part Five – A Basis for Discussion: Labour Relations Policy and the K-12 Sector in BC

The Challenge: Balancing the Objectives

It can be argued that public policy must balance two objectives:

- allowing parties the freedom to pursue their goals
- reducing the costs of industrial conflict and the costs resulting from decisions to resolve this conflict

Policy choices such as the right to unionize, the right to strike, and the role of dispute resolution mechanisms illustrate how far policy makers are prepared to go in emphasizing one objective over the other.

General Public Policy Options

Where the right to bargain collectively, including the right to strike, is incorporated in the industrial relations framework of the public sector, the government generally has four policy alternatives. We have described these alternatives in terms of four generic models:

- **Model One: No special regulations/processes.** Under this model, little or no legislation exists concerning the continuation of public services. In the event of a strike, the parties are responsible for determining how many and which employees (if any) in the bargaining unit will work and what they will do during the strike. K-12 education is not specifically identified as an essential service. There is no special process established to provide for third party intervention.

- **Model Two: Strike prohibition.** There is no right to strike; processes such as interest arbitration are substituted for the right to strike. The primary issue to be resolved is what criteria should be used to determine the settlements.

- **Model Three: Essential service designation.** This model can be referred to as a "controlled strike" model. Strikes are permitted, but in

the event of a strike, there is a provision which designates "essential services." Initially the level of service is decided at some point prior to the impasse. The service levels may be adjusted, however, as the strike continues. The parties negotiate according to the applicable labour legislation.

- **Model Four: Direct legislative intervention.** The government uses legislative authority to intervene in a particular dispute. While Model Four is not a structural option in the same sense models 1-3 are, it does represent a structural option available to government on an *ad hoc* basis.

Models Two and Three are structural responses to the potential for impasse, while Model Four is primarily reactive and depends on a number of environmental and political factors. Note that these generic models have a variety of applications, and the characteristics of one may be combined with the characteristics of others. For example, in some jurisdictions the COP model can be described as essentially a strike prohibition model that uses interest arbitration as the settlement mechanism (see *Choice of Procedures Model* earlier in this paper). The following table provides a general overview of the policy options chosen by each of the provincial jurisdictions in their respective K-12 sectors. Appendix A provides a summary of the legislative structures in each province.

Table Five: Summary—Models Adopted by Each Province

Province	Model One	Model Two	Model Three
British Columbia	**X**		
Alberta	**X**		
Saskatchewan	**X**		
Manitoba		**X**	
Ontario	**X**		
Quebec			**X**
New Brunswick			**X**
Nova Scotia	**X**		
PEI		**X**	
Newfoundland			**X**
NWT	**X**		
Yukon	**X***		

**In the Yukon, teachers have the option of either binding arbitration or conciliation, which allows them the right to strike.*

No matter which model is adopted, the question remains: If negotiations and assistance procedures such as mediation lead to an impasse, which process and mechanism should be used to achieve a settlement? Should the parties be left to choose? Or should interest arbitration, final offer selection, or some combination of the alternatives be used?

The challenge for policy makers is to establish a process that permits meaningful collective bargaining to occur.

Public Policy Choices in BC

As a matter of public policy, unionized employees in the K-12 sector have access to the full scope of collective bargaining and are covered by the prevailing labour legislation. Historically, the government has chosen to minimize the effects of job disruption in the sector through either of two ways:

- adoption of the "controlled strike" model through the designation of certain services as essential according to the labour relations legislation in effect at the time of the dispute. It should be noted, however, that the *Industrial Relations Reform Act* (1987) provisions were never tested and as a result it is not possible to determine the scope and application of the provisions. The current *Labour Relations Code* has been applied only in a very narrow sense as it relates to "welfare" and grade 12 examinations (*School District No. 54 (Bulkley Valley), BCLRB No. B147/93*).

- ad hoc legislative intervention at the time of job action or when job action is contemplated, with a process to conclude the terms of a collective agreement.

No matter which approach the parties choose, the parties have access to impasse resolution mechanisms such as mediation to assist them in achieving a negotiated solution.

Public Education as an Essential Service: Past Experiences and Future Implications

Essential service designations first came into law in a 1975 amendment to Section 73 of the *Labour Code*, which governed disputes involving firefighters, police officers, and hospital employees.

In 1977, most of Section 73 was repealed, leaving the essential service provisions applicable to any dispute that posed "an immediate and serious danger to life or health." These provisions were later moved into a separate statute with the passage of Bill 92, the *Essential Service Disputes Act*.

In 1978, as a result of a dispute involving Selkirk College and four school boards in the West Kootenays, the *Essential Service Disputes Act* was amended. This authorized the LRB to designate essential services to prevent a "substantial disruption in the delivery of educational services."

The *Labour Code* was replaced by the *Industrial Relations Reform Act* in 1987. Section 137.8 of this Act addressed essential services and broadened their scope to disputes that posed a "threat to the economy of the Province or to the health, safety or welfare of its residents or to the provision of educational services in the Province." This provision was in force when teachers were given the right to bargain collectively and the right to strike, also in 1987. It authorized the Board to designate facilities, productions, and services necessary or essential to prevent immediate and serious danger to, among other things, the provision of educational services. This language appeared to cast a broader net by allowing the Board to prevent a strike by teachers or support staff from causing *any* disruption of educational services, rather than *substantial* disruption.

The labour relations board of the day, the Industrial Relations Council (IRC), did not make any essential service decisions under either formulation of the language relating to educational services.

In 1993, the *Industrial Relations Reform Act* was replaced by the *Labour Relations Code*. The Code continued to address essential services, but the reference to educational services was eliminated. What remains as Section 72 of the Code applies where a dispute poses a "threat to the health, safety or welfare of the residents of British Columbia" and authorizes designation of "those facilities, productions and services that the board

considers necessary or essential to prevent immediate and serious danger to the health, safety or welfare" of BC residents.

Case Law

As mentioned above, there were no reported IRC decisions on essential services under the "provision of educational services" language. However, the issue of essential services in school board strikes came before the LRB in 1993 under the current *Labour Relations Code*. This case contains some important insight into the Board's likely approach.

In *School District No. 54 (Bulkley Valley), BCLRB No. B147/93*, the Board ruled that despite the amendments, education falls within the concept of "welfare." The current essential service provision of the Code can therefore apply to some educational services if they are necessary to prevent an immediate or serious danger to the welfare of BC residents.

The case did not proceed beyond that threshold ruling. Its significance in this context lies in the comments the Board made in arriving at its decision. In several passages, the Board acknowledged that the removal of the reference to "educational services" narrowed the applicability of essential service legislation to schools and significantly expanded the teachers' right to strike:

> Therefore, there can be no question that the removal of the phrase "threat" to the "provision of educational services" from the Code narrowed the circumstances in which educational services may be designated…. [A]n interruption or disruption in the delivery of educational services is no longer sufficient in and of itself to cause a designation of essential services.
>
> Therefore, the conclusion is clear: the removal of the words the "provision of educational services" by the Legislature in this *Labour Relations Code* has enhanced the Teachers' right to strike.

The strong implication of these passages confirms a plain reading of the pre-existing language of the *Industrial Relations Reform Act*. If a strike by either teachers or support staff interrupted or disrupted the provision of educational services by a school board, the dispute could be the subject of essential service designations under the Code, which would significantly restrict the scope of the strike.

The Nature of an Essential Service Designation: Applying the Provisions

To some extent, the nature of an essential service designation is speculative due to the lack of any case law or orders under the former legislation. However, we may draw on the general principles expressed by the LRB in essential service cases.

The Board has stated that especially in the public sector, essential service designations should result in a "controlled strike," not in total elimination of a strike. One way of maintaining pressure on the employer is to require management staff to be deployed to the extent possible and to work extended hours to maintain basic services. Striking employees make up the balance of the staffing required to maintain services.

Under some circumstances, certain services must be continued in their entirety, but with reduced staffing and management deployment. The LRB would require non-striking unions to continue working to the extent required to maintain services designated as essential, despite the presence of picket lines. However, non-striking union employees may not be used to perform work normally done by striking employees. For example, an essential service order would therefore not require or permit teachers to perform maintenance work.

Arguably, the LRB would require the continuation of services that are required to ensure that the delivery of educational services is not interrupted. It would require excluded management staff to be re-deployed to perform such work and to be scheduled extended work hours/weeks subject to medical limitations.

In the case of a teacher strike, excluded management who are permitted by law to teach, including principals and vice principals, would have to be deployed in classrooms to minimize the number of teachers designated to work during the strike.

In the case of a support staff strike, excluded management would not replace any teachers, but would be required to be deployed to replace striking support staff employees in performing the services the Labour Relations Board decides are essential to the continuation of educational services.

Services not considered essential would be those that are not essential for this purpose. This would likely include many extracurricular activities,

special events, meetings, the provision of school facilities for public functions and associated maintenance work, and equipment repairs and building maintenance work that can reasonably be postponed without disruption to education. The general level of cleaning and daily maintenance might be reduced. Clerical support might also be reduced but not eliminated.[61]

It can be observed that the general public and as a result the government views K-12 education as a service that is essential. This is evidenced by inclusion specifically of education in essential service provisions of labour relations legislation (*Industrial Relations Reform Act*, 1987) or where not specifically identified the application of the essential service provisions to education (*School District No. 54 (Bulkley Valley), BCLRB No. B147/93*). It is also evidenced by various governments' reactions to K-12 strikes with the enactment of back to work legislation. Essential services in education have recently been an area of political debate. Past legislative initiatives in this area provide perspective on how future legislation might be applied, but questions will remain about the necessity of such provisions, and about their practical effects and operation if enacted.

The challenge for policy makers is to ensure that any legislative structure promotes the resolution of conflicting interests between the parties, as opposed to one where the negotiating parties are able to concentrate their efforts on making strategic decisions not to bargain believing that third party intervention offers them a better alternative to negotiating. Arguably, structures that promote a reliance on third party intervention have consequences, albeit unintended, such as what we have termed the narcotic and/or chilling effect on the process.

[61] Legal Opinion R.A. Francis, Harris and Co. for H.J. Finlayson re: Essential Services, October 4, 2000.

For Consideration: Achieving a Balance

- In making public policy choices concerning collective bargaining in the K-12 sector, what are we trying to achieve?

- Do you agree that the public policy choices should be considered within the framework of "balancing the two objectives" as we have described them?

- Do you accept that the policy decisions to date on the scope of bargaining in the sector are acceptable given the current bargaining context? Do you believe that the alternatives historically used in BC (for example, essential service designation or direct legislative intervention when deemed necessary) and their application should be reviewed?

- What is meant by "essential services" in the K-12 context? In practical terms, what does the expression mean and how is it applied to ensure the continuation of services? What is the rationale for adopting that interpretation?

- Is the concept of "welfare" as it relates to education services and essential services sufficient to address disruption?

- Recent experience instructs us as to how government will respond when faced with a strike in the K-12 sector. It can be argued that there have been structural consequences resulting from ad hoc legislative responses. The bargaining process will follow a predictable path. During bargaining the negotiating parties make strategic decisions concerning the potential of third party intervention. Where it is believed the outcome is potentially better through a third party process the bargaining is pushed to impasse and a strike results. After a short strike, back to work legislation is passed to end the dispute and interest arbitration is used to determine the terms of the collective agreement. The more this cycle is repeated the less true bargaining occurs — a combination of the narcotic effect of third party intervention and the chilling effect on the bargaining process. If education is seen by the public as an essential service, shouldn't legislation reflect that recognition?

- Given the recent experience in the sector, is a "controlled strike" model more appropriate than the current ad hoc legislative approach?

Arguably, under the controlled strike model not all services provided by the public schools would necessarily be considered essential. There would be a LRB regulatory framework mandating certain service levels and a process to determine those levels, allowing the system to operate with the resulting pressure on both the employer and the union to conclude an agreement. In practical terms, can the level of services be determined?

- Are there legislative structures that are more likely to reduce the "chilling effect" and the "narcotic effect" (the unintended consequences of certain structural options) and promote negotiated collective bargaining solutions?

- Should legislative structures currently in operation in other provinces (Appendix A) be explored as legislative options for the K-12 sector in BC?

Part Six – Essential Services in Public Education: A Policy Option

For the purposes of providing a framework for discussion, we have approached this policy option from the perspective that public policy concerning collective bargaining in the K-12 public education sector must balance two objectives:

- Allow parties to pursue their goals

- Reduce the costs of industrial conflict, the costs resulting from decisions to resolve this conflict and the consequences resulting from out of line settlements.

With respect to the right to strike and the designation of certain services as essential, the public policy approaches of the different Canadian jurisdictions illustrate how far policy makers in their respective jurisdictions are prepared to go in emphasising one objective over the other.

In attempting to achieve the balance between the two objectives, historically, policy makers in BC have included education in labour legislation essential service provisions or have had *ad hoc* legislative responses to particular disputes. If one accepts the proposition that the K-12 education system should be covered by essential services legislation in order to reduce the consequences of industrial conflict, the challenge is to ensure that it is done in such a way that meaningful collective bargaining can still occur. The creation of a viable collective bargaining system that allows for certain services to be designated as essential requires, at the outset, an understanding of the principles upon which current essential service legislation is based and the problems that are inherent in past legislative schemes. It is from this foundation that a system or model can be considered.

The Historic Alternatives

The current legislative scheme grants to school board employees full scope collective bargaining and an unrestricted right to strike. In practice, when schools are closed by strikes, the public considers education essential and puts enormous pressure on government to end those strikes. Part of the reason for this public reaction is the interruption in the care and supervision of children during school hours as well as the loss of education time.

The consequence of public pressure is *ad hoc* back to work legislation with the inevitable arbitration of collective agreements.

During the period from 1978 to 1987, the *Essential Service Disputes Act* authorized the Labour Relations Board to designate services essential to prevent a "substantial disruption in the delivery of educational services." In 1987, essential service legislation was moved into the labour relations legislation of the day, the *Industrial Relations Act*. The provisions for education were broadened to give the Industrial Relations Council authority to designate as essential those services that were "necessary or essential to prevent immediate or serious danger to the provision of educational services." Although this language was never tested, the language could be interpreted as eliminating almost all aspects of a strike by teachers and most aspects of a strike by support staff.

Reference to educational services was removed from labour relations legislation when the *Labour Relations Code* replaced the *Industrial Relations Act*. The following is an excerpt from the *Labour Relations Code*, section 72 Essential Services.

(1) If a dispute arises after collective bargaining has commenced, either of the parties to the dispute may apply to the chair to investigate, or the chair on his or her own motion may
  (a) investigate whether or not the dispute poses a threat to the health, safety or welfare of the residents of British Columbia, and
  (b) report the results of the investigation to the minister.

(2) If the minister
  (a) after receiving a report of the chair respecting a dispute, or
  (b) on the minister's own initiative

considers that a dispute poses a threat to the health, safety or welfare of the residents of British Columbia, the minister may direct the board to designate as essential services those facilities, productions and services that the board considers necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia.

An Assessment of the Historic Alternatives

Arguably, the problem with the current model contained in the *Labour Relations Code* (limited application) and that set out in the *Industrial Relations Act* (broad application) is that both models have the potential of undermining collective bargaining as a viable method of settling the terms of a collective agreement.

Ad hoc back to work legislation ends meaningful collective bargaining by making interest arbitration the ultimate method of settlement. As a consequence, the parties then negotiate toward their positions in arbitration. Moreover, where interest arbitration is known to be likely within a short period of a strike, its availability tends to distort collective bargaining dynamics long before a strike begins: what is often described as the narcotic effect of third party reliance and the chilling effect it has on meaningful collective bargaining.

Making all educational services essential would virtually eliminate the incentive for both sides to settle. Most or all operations would continue uninterrupted during a strike, relieving the pressure on school boards, the government and the public. Most or all employees would continue to work and earn their full incomes, reducing the pressure on employees and the union to settle. It is unlikely impasses could be effectively resolved by collective bargaining in these circumstances.

Developing a Working Model: Principles

In developing a working model and assessing policy options it is important to recognize what we have termed as the foundation elements. These elements can be summarized as the recognition that:

- Collective bargaining is the appropriate mechanism to determine the terms and conditions of employment.

- Inherent in the collective bargaining model there must exist an incentive for both sides to settle.

- Where it is deemed necessary as a matter of policy to designate certain public services essential, such designations should result in a "controlled strike," not in the elimination of the right to strike.

- The public school system performs an education function and what we have referred to as a custodial function — the responsibility for the care and safety of children during school hours. Both are viewed as having essential aspects in today's society.

The controlled strike approach recognizes that there must be pressure on both sides to settle, but that some services must be maintained due to the overriding nature of the public interest in those services. The union and its members on one hand, and the school board, government and the public on the other hand, must experience sufficient hardship to ensure there is an incentive to settle on both sides. However, the pressure on the public must be moderated so that legislative intervention and arbitration can be avoided.
In health care, for example, essential service orders are intended to ensure that life and health are not in danger, but that services are sufficiently curtailed to bring some pressure on the public, government and the employers to settle. The reduction of staffing that accompanies reduction of services maintains pressure on the employees and the union.

It is not a simple matter to apply these principles to the K-12 system. Arguably, the orientation or frame of reference of the LRB arises from private sector experiences or essential service matters predominantly in sectors or workplaces where the health and safety of the public is a

concern. In the public education system the LRB is challenged to determine the relative importance of different courses and programs for different students. The impact of an interruption in a course or program may be acceptable for a short period, but damaging beyond that.

Additionally, the importance of the custodial function of the school system has to be considered. If schools in a district close for a day, there simply are not sufficient day care facilities nor trained day care personnel to handle the demand. Working parents would be disproportionately affected.

Developing a Working Model

For policy discussion purposes, three general models or options were presented to assist policy makers during their consideration of amendments to labour legislation to incorporate the concept of K-12 public education as an essential service. The models were based on the following assumptions:

- The legislation applies to all unionized employees in the K-12 public education sector.

- The right to strike is maintained. Provisions are intended to incorporate the concept of a "controlled strike" not the elimination of the right to strike.

- Replacement worker provisions of the *Labour Relations Code* are maintained.

It is important to consider the nature of the K-12 system. The characteristics can be summarized as follows:

- Relatively stable client base during the school year.

- Schools operate on a 10 month cycle (traditionally September through June).

- A variety of school organizations exist within the 10 month school year; select programs operate outside what can be loosely characterized as the normal school year.

- The attainment of educational outcomes is, in part, time based.

- There are 60 school districts with over 1800 worksites. There is one teachers' union, one provincial collective agreement and 69 sub agreements (local collective agreements in place in 1994 with subsequent amendments). There are 15 support staff unions and 77 collective agreements.

Option 1: Include Reference to Educational Programs or Services

Amend Section 72 to refer to the *delivery of educational services (or programs)*.

Considerations for discussion:

1. A legislatively simple solution.

2. Maintains the traditional role of the Minister of Labour and the Labour Relations Board.

3. This option codifies the concept of a controlled strike and limits the right to strike.

4. Through application to the LRB the designation of basic levels of service could increase from time to time as a strike continues.

5. Support staff may be designated as essential under either the educational services (programs) or the health and safety references.

6. No guidance is provided to the Labour Relations Board.

7. From an education perspective, no guidance to employers or employees as to what is considered essential; no guarantee that any particular level of activities directly or indirectly related to education are continued.

8. Guiding principles the LRB could use include:

- Need to balance the public need to maintain essential services against the need to keep pressure on both parties to settle the dispute.
- Assumption that not all educational services, programs, etc., are essential.
- Assumption that services must be sufficiently curtailed in order to bring some pressure on the public, government and employers to settle while having regard for the public interest.
- Managerial personnel to be utilized before bargaining unit employees.

Option 2: Pre 1993 *Industrial Relations Act* Provisions

Amend Section 72 of the *Labour Relations Cod*e with the references contained in BC labour legislation prior to the 1993 amendments:

> …considers that the dispute poses a threat to the economy of the Province or the health, safety or welfare of its residents or to the provision of educational services in the Province, the Minister may do either or both of the following:
> (a) order a cooling off period not exceeding 40 days;
> (b) direct the Board to designate those facilities, productions and services the Board considers necessary or essential to prevent immediate and serious danger to the economy of the Province or to the health, safety or welfare of its residents or to the provision of educational services in the Province.

Considerations for discussion:

1. Includes a cooling off period.
2. Similar to the essential service designation process traditionally used in BC.
3. This option may require similar changes for all essential services.
4. See Considerations for discussion in Option 1.

Option 3: Specific Provision for K-12 Public Education Essential Services

Central to developing this option is the incorporation of the following elements:

- Specific K-12 provisions within Section 72 Essential services of the *Labour Relations Code*. Given that public school disputes present unique considerations, essential services in K-12 education need distinct provisions that include language to the effect that services that may be declared essential in K-12 education must include custodial care as well as educational services.

- An education panel appointed by the Minister of Labour to determine essential services in substitution for the traditional LRB panel.

- Statutory provisions limiting the discretion or providing parameters for the panel when establishing minimum essential service levels. This will allow for a degree of flexibility in application. For example:

> *In the conduct of essential services proceedings before it and in a designation for essential services, the Panel shall ensure that the normal progress of students from one educational level to another will not be impaired by a dispute and in so doing shall consider:*
>
> *(a) educational requirements essential to the attainment of learning outcomes for any student impacted by the dispute;*
> *(b) the length of the dispute and the time of the school year when the dispute occurs;*
> *(c) the impact of the dispute on the preparation for and participation in provincial examinations by students affected by the dispute; and*
> *(d) any health, safety or welfare requirements for students necessarily incidental to the delivery of educational services.*

Considerations for Discussion:

1. Changes what has traditionally been the role of the Minister of Labour and the LRB.

2. This option codifies the concept of a controlled strike and limits the right to strike.

3. Education expertise is useful in separating what is considered essential within the context of essential service designations from those activities considered important and/or necessary but non-essential.

4. Specific criteria would provide direction and guidance.

5. Designation of basic levels of service could increase and change depending on the application of the listed criteria (from time to time as a strike continues).

6. Support staff may be designated as essential under either education services or health and safety.

7. Criteria may be subject to criticism as too vague, too specific, too broad, etc.

8. Given that this option represents a considerable departure from established Ministerial and LRB roles and responsibilities, it may be viewed with limited favour.

9. Given the nature of public education and the purpose of essential service provisions, application of any criteria will be challenging.

Other Options

There are other options that can be identified and in some cases have been implemented in other jurisdictions. These options include:

- Prohibit the right to strike. Codified processes to determine terms and conditions of employment.

- Prohibit the right to strike on certain issues; provide a process for determining non-essential matters that may be the subject of job action.

- Collective bargaining procedures such as the *Fire and Police Services Collective Bargaining Act*; if the parties have bargained and have failed to conclude a collective agreement either party may apply to the Minister to have the dispute settled through arbitration.

- Limit the scope of bargaining, therefore reducing the potential areas of dispute.

In Conclusion: Have We Achieved a Balance?

The designation of educational services as essential will be seen by some as a controversial public policy choice. The options we have identified establish the basis for discussion. At the beginning of this section, we articulated the challenge — if one accepts the proposition that the K-12 public education system should be covered by essential services legislation, how do policy makers create the legislative framework in such a manner that allows meaningful collective bargaining to occur?

In assessing the options we have identified, consider the following questions. Have we achieved what we have set out to achieve? Are these options more likely to reduce the "chilling effect" and the "narcotic effect" (the unintended consequences of certain structural options) and promote negotiated collective bargaining solutions?

References

Bernier, Jean. "La Determination des Services Essentiels dans le Secteur Public et les Services Publics de Certains Pays Industrialises," in *Greves et les Services Essentiels*, ed. Jean Bernier (Sainte-Foy: Les Presses de L'Universite de Laval, 1994).

Blumenfeld, Stephen. "Canadian Public Sector Collective Bargaining," in *Handbook of Public Sector Labor Relations*, eds. W. Bartley Hildreth, G. Miller, J. Rabin and T. Vocino (New York: Marcel Dekker, Inc., 1994).

Carter, Donald. "Work Stoppages and Essential Services: An Ethical Challenge," in *Greves et les Services Essentiels*, ed. Jean Bernier (Sainte-Foy : Les Presses de L'Universite de Laval, 1994).

Chauhan, "Managing Public Sector Labor Disputes," in *Handbook of Public Sector Labor Relations*, eds. W. Bartley Hildreth, G. Miller, J. Rabin and T. Vocino (New York: Marcel Dekker, Inc., 1994).

Crossley, Ronald. "The Pros and Cons of Interest Arbitration: A Management Perspective," in *Labour Arbitration Yearbook 1994-1995*, eds. Kaplan, Sack and Gunderson (Toronto: Lancaster House, 1995).

Feuille, Peter. "Essential for What? Strikes and the Essential Services in the United States," in *Greves et les Services Essentiels*, ed. Jean Bernier (Sainte-Foy: Les Presses de L'Universite de Laval, 1994).

Geisert, G. and Lieberman, M. *Teacher Union Bargaining Practice and Policy* (Chicago: Precept Press, 1994).

Gunderson, M. and Reid, F. "Public Sector Strikes in Canada," in *Public Sector Collective Bargaining in Canada: Beginning of the End or the End of the Beginning?*, eds. Swimmer and Thompson (Kingston: IRC Press, 1995).

Haivan, Larry. "Industrial Relations in Healthcare: Regulation, Conflict and Transition to the 'Wellness Model'," in *Public Sector Collective Bargaining in Canada: Beginning of the End or the End of the Beginning?*, eds. Swimmer and Thompson (Kingston: IRC Press, 1995).

Jackson, Richard. "Police and Firefighter Labour Relations," in *Public Sector Collective Bargaining in Canada: Beginning of the End or the End of the Beginning?*, eds. Swimmer and Thompson (Kingston: IRC Press, 1995).

Lawton S., Bedard, G., MacLellan, D. and X. Li, *Teachers' Unions in Canada*, (Calgary: Detselig Enterprises Ltd., 1999).

Morris, Charles. "Interest Arbitration: Panacea's Art or Pandora's Box," in *Interest Arbitration*, ed. Paul Weiler (Toronto: Carswell Company Limited, 1981).

Ponak, Allen and Thompson, Mark. "Public Sector Collective Bargaining," in *Union-Management Relations in Canada*, eds. Morley Gunderson and Allen Ponak (Canada: Addison-Wesley Publishers Limited, 1995).

Rose, Joseph. "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).

Sack and Poskanzer, Labour Law Terms: *A Dictionary of Canadian Labour Law* (Toronto: Lancaster House, 1984).

Shime, Owen. "Interest Arbitration: An Arbitrator Examines the Process" in *Labour Arbitration Yearbook 1992*, eds. William Kaplan Jeffery Sack and Morley Gunderson (Toronto: Lancaster House, 1992).

Sosoe, Lukas. "Le Droit de Greve: Un Defi Ethique?," in *Greves et les Services Essentiels*, ed. Jean Bernier (Sainte-Foy: Les Presses de L'Universite de Laval, 1994).

Swimmer, Gene. "Final Offer Selection: A Review of the North American Experience," in *Labour Arbitration Yearbook 1992*, eds. William Kaplan, Jeffery Sack and Morley Gunderson (Toronto: Lancaster House, 1992).

Thompson, Mark. "Evaluation of Interest Arbitration: The Case of the British Columbia Teachers" in *Interest Arbitration*, ed. Paul Weiler (Toronto: Carswell Company Limited, 1981), 79-80.

Thompson, Mark and Swimmer, Gene. "The Future of Public Sector Industrial Relations," in *Public Sector Collective Bargaining in Canada: Beginning of the End or the End of the Beginning?*, eds. Swimmer and Thompson (Kingston: IRC Press, 1995).

Weiler, Paul. *Reconcilable Differences* (Toronto: Carswell Company Limited, 1980).

Labour Board Proposal, "*Essential Service Designation Process: History and Policy Issues*."

Cases Cited:

Re Board of School Trustees of School District No. 54 (Bulkley Valley) and No. 39 (Vancouver) and Bulkley Valley Teachers' Association, Vancouver Teachers' Federation, BC Teachers' Federation and the Vancouver Municipal and Regional Employees' Union and the 'Intervenors.' May 21, 1993 (Lanyon), BCLRB No. B147/93.

Re Board of School Trustees, School District No. 1 (Fernie) and Fernie School District Teachers' Association (1982) 8 LAC (3rd) 157 (Dorsey).