

Some Unresolved Dilemmas **Quelques dilemmes insolubles**

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[See table of contents](#)

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Article abstract

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Collective Bargaining in Canadian Colleges and Universities

Some Unresolved Dilemmas

Donald D. Carter

This paper deals with some of the basic problems created by the adoption of collective bargaining, procedures by faculty at Canadian colleges and universities.

Collective bargaining is now becoming a fact of life for faculty at Canadian colleges and universities. In the colleges, faculty collective bargaining is now the norm, and it appears that in the universities there is a marked movement toward collective bargaining by faculty. In Quebec universities faculty collective bargaining is well established, while in Canadian universities outside of Quebec there has been a rapidly growing interest in collective bargaining by faculty, demonstrated by the adoption of formal collective bargaining procedures at a handful of universities and the encouragement of collective bargaining by national and provincial faculty organizations.

This paper will deal with some of the basic problems created by the adoption of collective bargaining procedures by faculty at Canadian colleges and universities. My failure to deal with support staff should not be construed as a downgrading of the collective bargaining activities of these employees. Collective bargaining by support staff, however, gives rise to a different set of problems, no less important, but not particularly unique to the university context. The fact is that support staff have a much longer tradition of bargaining collectively under labour legislation. There have been pockets of organized support staff within Canadian universities for a number of years and collective bargaining by these groups has not given rise to special problems, except for

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one particular case, widely regarded as an aberration¹. Support staff have generally regarded their relationship with the university as that of employer and employee, and consequently, have seen no problem in treating the university as they would any other employer. Collective bargaining by support staff, moreover, is usually subject to the discipline of an external market, since many support staff are capable of performing their jobs outside of the university. Consequently, support staff face many of the same problems as other organized groups of employees outside of the university.

The adoption of collective bargaining by faculty, however, gives rise to problems of a more novel nature, and these problems have created certain dilemmas for faculty — dilemmas that remain unresolved. These dilemmas reflect a certain ambivalence to collective bargaining on the part of many faculty members. Although faculty have become increasingly aware of the need for collective action, they don't appear to have embraced enthusiastically traditional collective bargaining procedures. This lack of enthusiasm has resulted in a search by some faculty groups for alternatives to collective bargaining procedures. In Ontario, the Ontario Confederation of University Faculty Associations (OCUFA) and Ontario university presidents have been discussing a two-stage provincial salary negotiation system,² the first stage involving the negotiation of an agreed recommendation by OCUFA and the Council of Ontario Universities (COU), the second stage involving the presentation of that agreed recommendation through the existing buffer body, the Ontario Council of University Affairs, to the government. This system of negotiation would embrace only the matters of faculty remuneration and faculty complement, while all other issues would be resolved locally. The search for alternatives has not been confined to Ontario. The faculty association at the University of British Columbia is reported to be engaged in studying the different roles of collective action, only one of these being

¹ *National Union of Public Employees v. Governors of the University of Alberta* (1962), 63 CLLC 1122 (B.I.R.); (1963), 42 W.W.R. 560 (Alta. S.C.), An excellent commentary on this case is found in ADELL, *Collective Bargaining Rights for Faculty at the University of Alberta*, report prepared for Association of the Academic Staff of the University of Alberta, August 12, 1974.

² «Progress Report from Ad Hoc OCUFA/Presidents Working Group,» Toronto, March 19, 1975.

collective bargaining under the *Labour Code*³. What appears to be happening is that faculty, although regarding collective action as being the only way of halting the deterioration of their economic position, at the same time are concerned that their own unique position within the institution and within the community as a whole be maintained. The fundamental dilemma of faculty appears to be this — is it better to protect their economic position at the possible risk of jeopardizing their present status or it is better to preserve the present status at the risk of further deterioration in their economic position? There are, in fact, a number of facets to this fundamental dilemma, and I will now attempt to describe them.

THE CHOICE BETWEEN INDIVIDUALISM AND COLLECTIVE BARGAINING

Faculty generally regard themselves as being more than mere employees of their institution, seeing themselves as « professionals ». Although it is difficult to define the word « professional » when it is used in this wider sense, it can at least be said that it indicates a particular attitude by faculty toward their respective institutions. Most faculty see the relationship as being looser than that of employer-employee. Faculty regard themselves as possessing special skills and knowledge and expect that they will be given a wide latitude in which to apply their special expertise. The faculty member's commitment to his particular discipline may be as great, or greater, as his commitment to the university. There is the expectation that the faculty member's performance will be judged by the results achieved and not by a simple calculation of the hours spent on the job. The faculty member places a heavy emphasis on the recognition of merit, expecting that individual merit will be recognized and rewarded financially by the institution. Not only does the faculty member expect to be recognized by the university, there is also the expectation that recognition and financial reward may come from outside the university, and that these benefits should accrue solely to the benefit of the faculty member. Royalties, lecture fees, consulting fees are all regarded as being the property of the individual faculty member rather than the university.

³ *CAUT Bulletin*, Vol. 23, No. 3, December 1974. I was informed subsequent to the preparation of this paper that the U.B.C. Faculty Association in a close vote has opted for a « special plan, » involving collective action outside of the *Labour Code*.

Underlying this notion of professionalism is a very substantial component of individualism. A dilemma facing faculty is whether collective bargaining is to be bought at the expense of sacrificing some of this individualism. This dilemma is reflected by a number of concerns. One is what I call the « punch-clock bogey » — this is the fear among some groups that collective bargaining will lead to a detailed regulation of the relationship between faculty and the institution, especially in respect to hours of work. Another aspect of this dilemma is the concern that collective bargaining will interfere with merit rewards and market differentials, all faculty being reduced to some monetary lowest common denominator. It should be pointed out, however, that collective bargaining, although obviously based on the principle of collective action, is not necessarily incompatible with individualism, provided that the bargaining parties agree to allow some scope for individualized treatment of faculty. A collective agreement need not provide for detailed regulation of hours of work and the recent Canadian experience seems to indicate that this has not yet happened.

The problem of merit rewards and market differentials is more vexing. On this matter the interests of all faculty are not identical, as in the case of hours of work. Faculty as a collective could bargain to restrict individualized salary increases by reducing the discretionary component of the salary increase. Whether this happens will depend in part on faculty confidence in the assessment of merit. If faculty consider that salary distinctions are based on merit and not favouritism, then it is likely that collective agreements will provide for some part of the salary increase to be paid on a discretionary basis.

Market differentials pose an even more difficult problem, since they cannot be justified by the internal value system of the institution but only by external market forces. The majority of faculty may resent more money being paid to a small group of faculty simply because they are marketable, and may not wish to bargain for market differentials for this minority. On the other hand, the collective bargaining strength of faculty is very largely dependent on the presence in the university of persons for which there is some outside demand. If the small group of marketable faculty were to leave the university for outside opportunities, the collective economic strength of faculty could be seriously impaired. What could happen is that some compromise would be reached whereby market differentials would remain but might not represent what a marketable faculty member could achieve through individual bargaining.

Faculty concern about merit pay and market differentials indicates that there may be some incompatibility between the principles of collective bargaining and long-established faculty attitudes. It is apparent that many faculty still place great value on individualism and, consequently, distrust collective action. Yet, on the other hand, there is a growing realization among faculty that some form of collective action may be necessary in order to maintain their economic position.

THE CHOICE BETWEEN FACULTY EXERCISE OF MANAGERIAL AUTHORITY AND COLLECTIVE BARGAINING

One very important aspect of the relationship between faculty and their respective institution is the desire of faculty to participate in the running of the institution. This desire has been recognized, to a greater or less extent, by most post-secondary institutions. Traditional collective bargaining procedures, on the other hand, are based on the premise that there is a clearcut dichotomy between the interests of employer and the interests of employees. The question is whether there is an incompatibility between collective bargaining and faculty participation in running the institution. Will faculty have to choose between collective bargaining and the exercise of their quasi-managerial role? My colleague, Bernard Adell, has recently made the point that the recent experience in Canadian universities does not indicate any conflict between collective bargaining and faculty participation in governing institutions⁴. In fact, lack of participation at some institutions appears to have caused faculty to turn to collective bargaining in order to assert faculty power. Once faculty power has become established, however, there still remains the question of whether, over the long run, collective bargaining by faculty may undermine the role it plays in the governance of the institution. Can faculty engage in the bluff and pressure tactics of collective bargaining while at the same time engage in the more reasoned and less adversarial deliberations of the governing councils of the institution?⁵

One answer is that the two exercises would be performed by different groups of faculty, but this still raises the possibility of a dichotomy

⁴ ADELL, « The Legal Framework of Faculty Collective Bargaining : Some Short Questions and Some Long Answers, » paper presented to the University and the Law Conference, Dalhousie University, March 1, 1975, at p. 15.

⁵ This question is raised by John CRISPO in « Collective Bargaining by Professionals : advisability, practicability and feasibility, » *CAUT Bulletin*, Vol. 23, No. 6, May 1975.

developing between these two groups of faculty. Another answer is that real bargaining is not likely to take place within the institution but outside with government, and that faculty and administration are allies who should form a common front against the true adversary, government. This appears to be one justification for the two-tier proposal now being considered in Ontario. The difficulty with this answer is that it contemplates a procedure quite different than traditional collective bargaining conducted between an employer and its employees.

A further manifestation of the conflict between collective bargaining and the exercise of managerial authority within the post-secondary institution is the problem of exclusions from the bargaining unit. The difficulty of applying the traditional collective bargaining model to institutions of higher education has been aptly described by the Chairman of the British Columbia Labour Relations Board in the *Vancouver City College* cases⁶, when he pointed out « the uneasy relationship » between the two systems of authority within the university — « the collegial and the bureaucratic ». The fact is that, because of the idea of collegial authority, it is very difficult to determine where traditional managerial authority begins. Nevertheless, the conventional collective bargaining model requires that this type of distinction be made, and a managerial class be identified. This identification may create, or at least encourage, a managerial — employee dichotomy within the academic community. If such a dichotomy does result, it could mean a tightening of the managerial structure and a lessening of the role played by faculty in the running of the institution. In other words, the university structure may have to be altered in order to mesh with the collective bargaining structure.

THE CHOICE BETWEEN JOB SECURITY AND COLLECTIVE BARGAINING

Academic posts at colleges and universities have usually been among the more economically secure positions in this country. Until quite recently, academic freedom has been of greater importance to faculty than economic security, reflecting a situation where faculty dismissals were unlikely to be motivated by financial exigencies. Post-secondary institutions in most parts of the country are now facing severe financial restraints imposed by a shift of governmental spending priorities. Resort to collective bargaining by faculty is, at least in part, a reaction

⁶ [1974] 1 Canadian L.R.B.R. 298.

to this financial situation. The impact of collective bargaining on the traditional job security of faculty, however, remains to be determined.

From the perspective of academic freedom, collective bargaining is likely to enhance the job security of individual faculty. Fair procedures, if not already available, are likely to be the subject of collective bargaining. Faculty bargaining agents, moreover, are likely to be disposed to provide vigorous representation for individual faculty, having an institutional interest in being the champion of faculty rights. From the point of view of the economic trade-offs that will be made at the bargaining table, collective bargaining could very well reduce the traditional job security of faculty. Given the current financial restraints facing post-secondary institutions in some Canadian jurisdictions, a possible trade-off could be, not just more money for more work, but more money for fewer jobs. Certainly financial restraints have had this effect in other collective bargaining situations, both in the private and public sectors. The fact is that the success of the bargaining agent is usually measured in terms of the size of the increase of wages and fringe benefits, not in terms of the number of jobs saved. As long as the majority of the members of the bargaining unit stand to gain financially, there is a tendency to ignore the fact that a small number of fellow workers will have to be laid-off. Although this unpalatable choice is the result of governmental policies of financial restraint, and not collective bargaining, faculty through its bargaining agent might still be forced to make a conscious, and uncomfortable, choice between maintaining salaries and maintaining jobs.

If the choice is improving salaries, as I think it will be, there is the further problem of how to choose those faculty that must go. Most collective bargaining agreements tie job security with seniority, but is this rule-of-thumb appropriate for post-secondary institutions where greater emphasis is placed on merit?⁷ It is quite possible that if the seniority rule were to be applied strictly, our post-secondary institutions would lose much of their vitality, as the flow of junior faculty into these institutions is reversed. The seniority rule, moreover, would interfere with recent hiring policies designed to provide greater female representation

⁷ This question is not meant to suggest that there is any less emphasis on seniority at those universities where collective bargaining procedures do not apply. In fact, present methods of remuneration and appointment are weighted very heavily in favour of the more senior at these institutions.

on faculty. A very important question is whether collective bargaining can deal effectively with the problems posed by the current threat to job security.

THE CHOICE BETWEEN AVOIDANCE OF CONFRONTATION WITH GOVERNMENT AND COLLECTIVE BARGAINING

Perhaps the most serious dilemma faced by faculty is the question of whether the paymaster, the government, should be confronted directly in the collective bargaining process. There are at least two aspects to this problem. The first is a concern that, if the government is the bargaining adversary, the *quid pro quo* of any wage increase will be much closer control of post-secondary institutions by the government. It is quite possible that this concern is exaggerated. Although it is clear that staff entitlement and faculty workload will be considered by government when dealing with faculty demands for higher wages, it is less clear that bargaining over work-load will lead to any greater supervision of institutions and faculty than exists, or is likely to occur anyway.

A more serious concern is the possibility of an impasse developing between faculty and government. Would a public confrontation between government and faculty work to the disadvantage of faculty? Many faculty appear to regard the faculty strike as unworkable, arguing that public opinion would be against faculty, either because a large section of the public would regard faculty as clearly being overpaid, or, even worse, because the public would not care whether faculty withdrew their services. The validity of these arguments can only be tested by a faculty strike, but I have strong doubts as to whether any test will occur. The fact is, that at the present time, faculty appears to have no taste for strike action. If this is the case, then is it possible for faculty collective bargaining to be anything more than an exercise in futility?

Confrontation with government could be avoided, of course, by confining collective bargaining to negotiations between faculty and individual institutions. But without the presence of the paymaster at the bargaining table this might be merely an exercise in shadow bargaining. Direct confrontation with the government might also be avoided by resort to interest arbitration. Although this procedure would probably have some appeal to faculty, governments might be reluctant to delegate a part of their fiscal authority to an arbitrator, especially where they

now can unilaterally determine the market for university faculty.⁸ The fact is that, if collective bargaining procedures are to be effective, it will be necessary for faculty to confront government directly, since it is governments that establish the market for faculty services. There is no doubt that this is an uncomfortable prospect for faculty.

A further possibility is for a two-tier system of negotiations such as is being presently studied by OCUFA and the Ontario university presidents. This system contemplates that internal province-wide negotiations between faculty and the universities would precede negotiations with the government. A common position would be reached and this position would be presented to the government through the buffer body, OCUA. This type of system has been subject to some rather searching criticisms. Leaving aside the problem of the effect of such a system on the autonomy of individual institutions, there is the very basic question of whether it is a collective bargaining system at all. At the first level of negotiation, can it be said that the parties are true bargaining adversaries? There would appear to be little incentive for the universities to resist agreeing upon a common position more favourable to faculty. Negotiations at the second level, moreover, do not appear to correspond to the traditional collective bargaining model. On one side of the table would be a common front of employers and employees, and on the other side of the table would be government. What procedures would be invoked if an impasse were reached? The document setting out the proposal is less than clear on this matter. It is doubtful that the universities as employers would actively encourage a withdrawal of faculty services. If so, then the second level of negotiations appears to be more an exercise in lobbying than in collective bargaining.

This two-tier system of negotiations appears to be a manifestation of the current dilemma of faculty. Faculty realize that collective action is necessary in order to maintain their economic position, but they are concerned that normal collective bargaining may impair their traditional position in society. Proponents of the two-tier system see a system that would allow for greater collective faculty participation in the determination of salary, but which would not constitute traditional collective bargaining. Others see the system as being rather an unhappy compromise between collective bargaining and traditional methods of salary deter-

⁸ This point is made by CRISPO in « Collective Bargaining by Professionals : advisability, practicability and feasibility, » *supra*.

mination. The opponents can be divided into two groups : those that say the system opens the door for collective bargaining and those that say the system is not sufficiently similar to collective bargaining to be workable. This basic dilemma, however, remains unresolved as faculty grapple with the question of whether they should go all the way with collective bargaining.

Le dilemme des professeurs d'université : oui ou non à la négociation collective ?

La négociation collective chez les professeurs des universités et des collègues canadiens est devenue un fait acquis, mais les professeurs demeurent toutefois perplexes à ce sujet. Bien qu'ils soient conscients de la nécessité d'une action collective, ils ne semblent pas s'être engagés avec enthousiasme dans les procédures de la négociation traditionnelle, plus particulièrement en Ontario et en Colombie britannique où l'on a recherché des formules de remplacement. Ce qui arrive, c'est que les professeurs, tout en considérant que l'action collective est le seul moyen de mettre un frein à la dégradation de leur condition économique, se préoccupent en même temps de leur situation particulière tant dans l'institution que dans la société. Le dilemme qui se pose à eux est le suivant : est-il préférable de défendre leur condition économique au risque de mettre en péril leur statut actuel ou vaut-il mieux conserver celui-ci au risque d'une détérioration plus marquée de leur position économique ? Ce dilemme comporte plusieurs facettes.

Les professeurs se considèrent comme des « professionnels » bien plus que comme des employés et s'attendent à jouir de beaucoup de latitude dans l'exécution de leurs tâches. Sous-jacente à cette notion de « professionnalisme », se cache une forte dose d'individualisme. Faut-il s'orienter vers la négociation collective en sacrifiant un peu d'individualisme ? On redoute qu'elle conduise à une réglementation circonstanciée des rapports entre le corps professoral et l'institution, surtout en ce qui a trait aux heures de travail. On craint aussi qu'elle contrecarre la fixation des traitements selon le mérite et en tenant compte des taux du marché du travail extérieur.

Toutefois, la négociation collective n'est pas nécessairement incompatible avec l'esprit d'individualisme à condition que les parties acceptent qu'on permette jusqu'à un certain point l'établissement de traitements fondés sur la valeur de l'individu. Une convention collective n'exige pas obligatoirement non plus une réglementation stricte des heures de travail. Les expériences contraires ne manquent pas. Que la rémunération au mérite se continue, la chose dépend du degré de confiance des professeurs dans l'appréciation du mérite. Si les professeurs se rendent compte que l'appréciation du mérite est équitable, il est concevable que les conventions collectives déterminent qu'une certaine tranche des salaires soit établie d'une façon discrétionnaire.

La question des taux de salaire sur les marchés du travail pose un problème plus difficile, étant donné qu'on ne peut les justifier dans les cadres du système de valeur de l'institution, mais uniquement en faisant intervenir les forces extérieures du marché. Même si la masse des professeurs peut ne pas être désireuse de négocier un traitement spécial pour ceux qui peuvent obtenir davantage sur le marché, la chose peut s'imposer afin d'empêcher le prestige d'une faculté de se dégrader par le départ d'une partie de ses effectifs. On pourrait y arriver par des compromis qui confirmeraient certains écarts.

Un aspect important des rapports entre les professeurs et l'institution réside dans la volonté de ceux-ci de participer à la direction de l'université. Est-ce que le processus ordinaire de négociation collective, fondé sur la prémisse qu'il doit exister une dichotomie bien tranchée entre les intérêts de l'employeur et les intérêts des employés, est incompatible avec la participation du corps professoral à la direction de l'université? D'une part, on peut répondre que la participation à la négociation collective et la participation à la direction de l'institution touchera des groupes différents de professeurs, mais ceci soulève la possibilité de voir se développer une dichotomie entre ces deux groupes de professeurs. D'autre part, cependant, il peut arriver que la véritable négociation ne se fasse pas avec l'université, mais avec le gouvernement. La difficulté serait alors qu'elle supposerait une forme de négociation fort différente de la négociation traditionnelle entre un employeur et ses salariés.

Une autre source de conflit peut se soulever : les exclusions des unités de négociations. À cause de la conception que l'on a de l'autorité à l'université, il est difficile de savoir où commence véritablement l'exercice de l'autorité. La négociation collective traditionnelle exige une identification précise de l'autorité, d'où il peut résulter que la structure de l'université doit être modifiée de façon à l'ajuster à la structure de la négociation collective.

Les institutions d'enseignement secondaire un peu partout au pays font face aujourd'hui à de rigoureuses contraintes financières par suite de changements dans l'ordre des priorités de l'État. L'effet de la négociation collective sur la sécurité d'emploi traditionnelle des professeurs reste donc à mesurer. Du point de vue de la liberté d'enseignement, elle pourrait assurer la sécurité des professeurs pris individuellement parce que les agents négociateurs auront intérêt à se faire les champions des droits des professeurs, mais si l'on considère la question sous l'angle des compromis économiques à la table des négociations, la sécurité d'emploi pourrait être laissée pour compte. Il s'est avéré que le succès d'un agent négociateur se mesure en augmentations de salaire et en avantages sociaux et non par le nombre des emplois qu'il réussit à sauvegarder. Tout comme les agents négociateurs dans les autres secteurs, les agents négociateurs des professeurs d'université préféreront l'amélioration des traitements au maintien des emplois. Ceci soulève le problème du choix des professeurs qui devront partir. N'est-il pas normal, par ailleurs, de relier la sécurité d'emploi à l'ancienneté? Si le critère de l'ancienneté est appliqué rigoureusement, il est possible que les institutions post-secondaires perdent beaucoup de leur valeur. Le critère d'ancienneté contrecarrait en outre les politiques nouvelles d'engagement qui visent à accroître la représentation féminine au sein des corps professoraux.

L'obstacle le plus sérieux peut-être qui se pose aux professeurs, c'est la participation directe du paie-maître, c'est-à-dire du gouvernement, à la négociation. Un des dangers, c'est que le gouvernement, s'il est le vis-à-vis, sera enclin à exercer un contrôle plus strict sur les institutions post-secondaires. Ce danger peut être exagéré, puisqu'il n'est pas clair que la négociation collective aura pour résultat de mener à une surveillance plus marquée des institutions que celle qui existe déjà ou qui adviendra de toute façon.

Plus dangereuse cependant la possibilité d'une impasse entre les professeurs et l'État. Beaucoup de professeurs considèrent la grève impraticable, soit parce qu'une bonne partie de la population estime les professeurs surpayés, soit qu'un débrayage de leur part lui indiffère. À l'heure actuelle, les professeurs n'ont pas tellement le coût de faire la grève. Si telle est la situation, la grève peut-elle être autre chose qu'une action puéride ?

On pourrait éviter une confrontation avec le gouvernement en confinant la négociation collective à l'institution. Mais sans la présence du paie-maître à la table des négociations, celles-ci ne peuvent être qu'un simulacre. La confrontation directe peut encore être écartée par l'arbitrage des conflits d'intérêts. Le gouvernement, cependant, peut avoir de la réticence à déléguer une partie de son autorité de gestionnaire à un arbitre, principalement là où il a la possibilité de fixer unilatéralement les traitements. En fait, pour que la négociation soit vraiment efficace, les professeurs doivent affronter le gouvernement.

Une autre possibilité, c'est le recours au système de négociations à double palier qui est actuellement à l'étude en Ontario. Ce système vise à des négociations provinciales entre les professeurs et les universités au niveau provincial qui précéderaient les négociations avec le gouvernement. On en arriverait à un accord qu'on présenterait ensuite au gouvernement par un organisme-tampon. Question capitale : s'agirait-il là d'une négociation collective ? Au premier palier, il est difficile de considérer les parties comme des opposants, puisqu'ils n'y a guère d'intérêt pour les universités à résister aux positions des professeurs. Au deuxième palier, on aurait un front commun des employeurs et des employés qui négocieraient contre le gouvernement. À quels moyens de solution pourra-t-on recourir si l'on tombe dans une impasse ? Il est fort douteux que les universités en tant qu'elles sont employeurs favorisent la suppression des services. S'il en était ainsi le deuxième palier de négociation équivaudrait plus à une forme de lobby qu'à une véritable négociation collective. Ce système de négociation à double balcon serait-il autre chose que la manifestation au grand jour du dilemme actuel ?

Les professeurs se rendent compte qu'une action collective est nécessaire pour assurer leur situation économique, mais ils sont conscients qu'elle peut compromettre leur position sociale traditionnelle. Ce dilemme demeure sans solution au moment où les professeurs se trouvent aux prises avec la question de savoir s'ils doivent s'engager pour de bon dans la négociation collective traditionnelle.