

Compulsory Conciliation in Canada: Do We Need It? **La conciliation obligatoire au Canada : en avons-nous besoin?**

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Article abstract

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Compulsory Conciliation in Canada Do We Need It ?

John D. Misick

This paper tries to find support for the proposition that a free system of conciliation would be (a) more effective and (b) less costly in the long run than a compulsory one.

In no industrialized democracy, with the possible exception of Australia, are labour and management relations so dependent on government intervention as in Canada. Many otherwise negotiable issues, including pensions, vacations, wages, fringe benefits, hours of work, working conditions, grievance and arbitration procedures and the right to strike or lock out are subject to various forms of significant legislative or administrative interference. We Canadians therefore can probably claim the dubious distinction of enacting more pages of legislation and regulation per union member than any other country in the free world. The Canadian legislative syndrome is a creeping disease which alarms a few observers but tends to give most of us a sense of control over our destiny. Far from being a legitimate cause for comfort, its main effects are (1) to systematically and progressively destroy free collective bargaining, (2) to divert the efforts of labour and management into lobbying and other forms of political action, (3) to encourage the multiplication of government bureaucrats, (4) to foster increased defiance of the laws governing labour relations, and (5) to make the labour management field a happy hunting ground for lawyers, politicians, academics, reporters and others with no knowledge of or stake in the process. Generally speaking, the only suggestions these onlookers make for changing whatever at a given moment appears to be wrong with Canadian industrial relations are additions to the legislation already on the books. The basic premise in their thinking is that there is nothing wrong with our laws which cannot be remedied by adding to the existing pile of legislation.

It becomes clearer with each passing year that legislative action has not been successful in giving Canadians a system of labour-

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management relations which is more effective than that which has evolved in countries where there is less government interference. The United States, Germany, and, more particularly, Sweden and the other Scandinavian countries rely on labour and management to solve their own problems, with the government as concerned spectator and, where absolutely necessary, as impartial umpire. Legislation establishes a framework within which the two parties must operate. The form and content of the relationship is left largely to the parties to work out as best they can. While there are significant differences between the U.S. and Scandinavian models, they both differ materially from the Canadian in their reliance on free collective bargaining. Sweden, with the freest system of all, enjoys among western nations the highest degree of labour management harmony, the highest standard of living and a remarkable record for productivity and efficiency.

While it would be irresponsible to propose that the Canadian Industrial relations system should imitate that of any other country, there are useful lessons to be drawn from experience elsewhere. One lesson seems to be that less, rather than more, legislation breeds healthy labour management relations. We would do well to ask ourselves whether the heavy burden of Canadian government intervention has not become a threat to our unions, our industry and the institution of free collective bargaining. It is therefore time we started considering seriously which part of our legislative framework should be retained for its positive value and which should be dismantled because it is senseless, unnecessary, costly, counter-productive or dangerous.

High on the list of unnecessary legislation is that sacred Canadian cow, compulsory conciliation. Compulsory conciliation is a legislative device which proposes that the public interest must be represented in collective bargaining where negotiations have failed. Its justification must rest primarily on its capacity to foster industrial harmony. If it succeeds in this primary task, it should do so at less cost than that of other options which accomplish the primary objective equally well.

The use of compulsory conciliation in Canadian Labour Relations practice dates back to the beginning of this century, having been first enshrined in federal legislation in 1903.¹ Provincial labour legislation, starting at a much later date, followed the federal pattern in

¹ Both the Railway Labour Disputes Act of 1903 and the Industrial Disputes Investigation Act of 1907 made provisions for compulsory conciliation. The latter outlawed strikes or lockouts pending completion of conciliation procedures.

the case of all but one jurisdiction (Saskatchewan) which made no provision for compulsory intervention in negotiations.

The post-war federal model, to which most provinces adhered, called for a two-stage conciliation process, in which the first stage was mandatory in the event of a breakdown in negotiations and the second was semi-automatic but allowed some discretionary powers to the Minister of Labour.² This pattern was generally accepted until the early sixties, by which time it had become apparent to many that the disadvantages of conciliation boards far outweighed whatever benefits they might offer.³ The federal government and most provinces eventually amended their legislation so as to discourage what was viewed as the excessive reliance on boards. No conclusive evidence was or is available to substantiate the arguments for or against this change in legislation. As with so much that is done in the labour relations field, the policy makers followed their hunch.

Further questioning of conciliation policies has occurred in more recent years, with the result that since 1972 several jurisdictions have further modified conciliation provisions to introduce some more or less tentative elements of voluntarism. These have generally taken the form of allowing the minister the authority to waive the first stage of conciliation.⁴ In Manitoba, conciliation has never been an absolute requirement. In British Columbia efforts were made to strengthen conciliation and mediation procedures in 1968, followed in 1973 by the abandonment of virtually all compulsory features. Meantime, Alberta⁵ has moved in the direction of greater compulsion in recent years.

² Canada, Industrial Relations and Disputes Investigation Act, R.S.C. 1952, Vol. III, c. 152.

Alberta, Labour Act, R.S.A. 1970, Vol. III, c. 196.

British Columbia, Industrial Conciliation and Arbitration Act, R.S.B.C. 1948, Vol. II, c. 155.

New Brunswick, Labour Relations Act, R.S.N.B. 1954, Vol. II, c. 124.

Nova Scotia, Trade Union Act, R.S.N.S. 1954, Vol. III, c. 295.

Ontario, The Labour Relations Act, R.S.O. 1960, Vol. II, c. 202.

Quebec, Labour Code, R.S.Q., 1964, c. 141.

³ For a good discussion of this aspect of conciliation practices, see H. D. WOODS, *Labour Policy in Canada*, 2nd ed., Toronto, Macmillan, 1973, chapter 3. pp. 43-99.

⁴ See, for example *Canada Labour Code*, s. 180, New Brunswick Labour Relations Act, s. 91 and Newfoundland Labour Relations Act, s. 19.

⁵ See Alberta Labour Act, 1973, s. 104 and s. 125 and compare with R.S.A. 1970, c. 196, s. 88 and s. 98.

It therefore seems clear that policy makers are less than certain about the degree of voluntarism which best serves Canadian labour-management relations. Those who seek greater freedom and those who are seeking more restrictive systems are unlikely both to be right. It is of course one thing to demonstrate confusion about the effectiveness of conciliation procedures, and quite another to assess the worth of compulsory conciliation. This difficulty may explain why little serious effort has been made to evaluate our conciliation experience.⁶ While it is not at present possible to produce conclusive evidence of the value of compulsory conciliation it is the author's belief that for some time past it has been possible to find tentative answers to the following questions:

- (1) Has compulsory conciliation contributed to labour management harmony in Canada? and
- (2) If it has succeeded in promoting harmony have the results justified the costs?

In an attempt to shed light on these questions, it seemed to make sense to try to find support for the proposition that a free system of conciliation would be (a) more effective and (b) less costly in the long run than one that was compulsory. To test this hypothesis, required that some method be found to compare the results of free and compulsory conciliation systems over as long a period of time as possible.

We chose as our example of a "free" system the Province of Saskatchewan, where access to conciliation was "voluntary" during the period under study. Nova Scotia, on the other hand, has a pure "compulsory" system of first stage conciliation. In many other respects, these two provinces can be paired, and seem to offer opportunities for isolating conciliation experience as a phenomenon which can be compared.

Over the period from 1960 to 1975 the two provinces were not dissimilar in: population, age distribution, size of work force, number of union members and degree of unionization. While Nova Scotia has a larger manufacturing sector, neither province is heavily industrialized, and both depend heavily on resource based industries such as farming, fishing, forestry, and mining. While Saskatchewan's popu-

⁶ An exception to this general rule was the paper by W. B. CUNNINGHAM at the 6th Annual Meeting of C.R.R.R.I. in 1969 entitled «Conciliation: The End of Compulsory Boards».

lation is 25% farmer based, compared with about 3% in Nova Scotia, both provinces are more than 50% urban. Wage levels in Saskatchewan are generally higher than in Nova Scotia, while unemployment averages between one half and one third of Nova Scotia's. Climatic conditions are distinctly different. While, therefore, there are significant differences between these two provinces, the similarities offer some hope that comparison is not meaningless.

As a check on these results, data for the other provinces were developed, one western and one maritime. Alberta and New Brunswick each offered some variants on conciliation practices. Alberta still relies partially on the old two-stage conciliation process while New Brunswick is close to the Nova Scotia Model, even though the New Brunswick Labour Relations Act makes provisions for waiving conciliation at the discretion of the minister. The four provinces studied represent, therefore, a range of reliance on compulsory intervention in negotiations and seem to provide a basis for making useful comparisons.

Several measures of "effectiveness" were tried and discarded. Since conciliation is designed primarily to avoid bargaining breakdowns which lead to work stoppages, it seemed logical to measure the effectiveness of each provincial system by the record of "strike-days per union member". These data were derived from the Federal Department of Labour's annual union membership statistics and reports of man days lost in each province. Slightly different results would have been obtained by using provincial government statistics, but the differences are not material.

A sixteen-year record of strike days per union member (SD/UM) appears in Table #1. A wide search would be unlikely to reveal a more inconclusive set of data and yet, as will be shown, it is this very inconclusiveness which may lend importance to the figures. Saskatchewan's mean SD/UM for the entire period is significantly better than the Nova Scotia record and falls about mid-way between New Brunswick and Alberta. Without the disastrous 1974 figures, Saskatchewan's 16-year average would have been better than that of any of the other provinces. Saskatchewan has, however, enjoyed a much more rapid growth in SD/UM over the period, with mean annual SD/UM for 1971-75 reaching 1.89, compared with Nova Scotia's 1.88, New Brunswick's 1.45 and Alberta's 1.09. Again, these unfavourable Saskatchewan results reflect the high 1974 figures.

Table 1
Strike Days Lost Per Union Member by Province

YEAR	NOVA SCOTIA	SASKATCHEWAN	NEW BRUNSWICK	ALBERTA
1960	.53	.13	.02	.46
1961	1.33	.10	1.25	.29
1962	.39	.07	.30	.35
1963	.30	.21	.45	.37
1964	.19	.12	.58	.10
1965	.41	.44	.20	.09
1966	1.55	.45	.58	.68
1967	1.25	.21	.64	.23
1968	.32	.81	.51	.71
1969	1.46	.65	.28	.73
1970	3.90	1.04	.91	.33
1971	1.68	.04	.57	.72
1972	1.24	1.32	.94	.20
1973	2.59	.58	1.50	1.14
1974	.84	5.34	1.96	1.25
1975	3.03	2.16	2.30	2.14
Average 16 years	1.29	.85	.81	.61

Sources: (1) Economics and Research Branch, Labour Canada, «*Industrial and Geographic Distribution of Union Membership in Canada*» Annual Publication, Table 3, «*Union Membership by Province*».

(2) Economics and Research Branch, Labour Canada *Strikes and Lockouts in Canada, 1960-64*, Table 3, 1965 FF, Table 4.

From these data, it would be difficult to argue the superiority of a free system over one that is compulsory. But, if it is true that the free system has not been proved better than the compulsory, the opposite is equally true. It requires an act of faith to argue that compulsory conciliation in Nova Scotia (or New Brunswick or Alberta) saved a single strike day between 1960 and 1975. This is not to say that compulsory conciliation has never been useful, but simply that on balance the harm it may have done has probably cancelled out the good.

If it was difficult to devise a measure of conciliation effectiveness, it was nearly impossible to find a meaningful measure of cost which was consistent for all four provinces, or even for the two principal provinces studied. No province reports conciliation expense separately in its public accounts. The Nova Scotia Department of Labour kindly extracted figures for conciliation expense for several years, but since comparable figures were not available from any other province, the Nova Scotian data was virtually worthless. It therefore became neces-

sary to rely on what is reported variously as «Labour Relations Expense» or «Industrial Relations Expense» in the Public Accounts of each province. These expense items include the costs of various other services, such as Labour Relations Boards, Industrial Standards, etc., but it appears that in all provinces conciliation expense amounts to about two thirds of the Labour Relations Expense budget item. It was therefore the actual total Labour (or Industrial) Relations expense which, when divided by union membership, yielded the figures for Labour Relations Expense per Union Member (LRE/UM) that appear in Table #2. At best, this can be viewed only as a very rough approximation of a measure of conciliation costs, but despite its shortcomings it provides some basis for comparison.

Table #2 reveals striking differences between LRE/UM in Saskatchewan and the other provinces. Saskatchewan enjoyed substantially lower costs throughout the entire period. Moreover, its costs have increased the least. From the early 1960's to 1971, LRE/UM rose only about 22% in Saskatchewan, while more than doubling in Nova Scotia. In New Brunswick the increase was 26% and in Alberta nearly 37%. It is more difficult to compare the figures since 1971 because of missing data and changes in accounting procedures. It appears, however, that with the exception of Alberta all provinces may have experienced a slight decline in LRE/UM from 1972 to 1975.

Because of the dubious nature of the data used for the cost comparison it is risky to draw firm conclusions. However, even if one were to assume that the Labour Relations Expense budget item in Saskatchewan covered nothing but conciliation expense, while only two thirds of this item was applied to conciliation expense in the other provinces, the Saskatchewan figures would still be impressive.

It would have been encouraging to the anti-legislative bias of the author if it were possible to report that there is strong evidence that the effects of compulsory conciliation have been negative and that the costs are exorbitant. While no such clearcut results emerge from the work which has been done to date, it is significant that there is an equal lack of evidence that compulsory conciliation has generally contributed to labour management harmony. Furthermore, this absence of positive results has been achieved at considerable unnecessary cost to the taxpayer. A widespread, time-consuming and costly habit hardly seems justified on the basis of such a nebulous contribution. In fact, the only real justification for the continuation of compulsory conciliation is that it may be a relatively harmless aberration and is certainly less costly than many other more harmful government programmes.

Table 2
Labour Relation Expense Per Union Member by Province

YEAR	NOVA SCOTIA	SASKATCHEWAN	NEW BRUNSWICK	ALBERTA
1960	1.39	1.25	3.24	5.89
1961	1.39	1.25	3.01	5.67
1962	1.38	1.12	3.29	5.83
1963	1.37	1.31	2.67	5.96
1964	1.06	1.34	3.53	6.73
1965	1.29	1.62	3.20	7.31
1966	1.57	2.05	3.27	7.36
1967	1.60	1.43	2.88	7.56
1968	1.67	1.80	3.07	8.35
1969	2.16	1.96	3.23	8.81
1970	2.71	1.52	3.79	7.68
1971	3.43	1.53	4.09	8.04
1972	3.06	2.38*	2.84	9.34
1973	2.98	1.20*	n.a.	9.32
1974	2.92	1.16*	2.80	9.65*
1975	?	.89*	2.99	7.97
Average 1960-71	1.67	1.52	3.87	7.10

Sources: (1) Economics and Research Branch, Labour Canada, *Industrial and Geographic Distribution of Union Membership in Canada*, Annual Publication, Table 3, «Union Membership by Province».

(2) Public Accounts of Alberta, New Brunswick, Nova Scotia and Saskatchewan.

* Changes in accounting procedures make comparisons with previous years of questionable value.

Further doubts about the value of compulsory conciliation come from other sources. The first of these is the experienced negotiators who treat compulsory conciliation with the derision they feel it deserves. It is not unknown for labour and management to agree mutually to dispose of the «conciliation obstacle» early in the negotiation process before settling down to serious bargaining. To achieve this end, labour and management go through some preliminary skirmishing during which they agree not to agree. They call for conciliation services, and the conciliator, being unable to bring about a settlement, submits his report to the minister. The parties then enter into serious negotiations unfettered by any conciliation or strike restrictions. Examples of such practices are not documented for obvious reasons, but it is widely believed they occur in some major negotiations including those between the UAW and Big Three automakers in Ontario. Where this occurs, compulsory conciliation becomes not only useless but ridiculous.

While such outright defiance of the conciliation process may not be widespread, there is no doubt that compulsory conciliation has other detrimental effects on good faith bargaining. In almost every set of negotiations experienced labour and management negotiators hold back some part of their offers so as to have concessions in reserve which they can surrender when the conciliation officer appears. Thus, recourse to conciliation tends to become semi-automatic even in cases where the parties could have reached a settlement unaided.

If we look beyond the narrow field of conciliation, there are close parallels between compulsory conciliation processes and compulsory interest arbitration, since both entail related kinds of forced third-party interventions. Most of the literature dealing with compulsory arbitration⁸ points to the failures of the process. Where successes have been claimed for compulsory arbitration, the conditions have been so materially different from those surrounding conventional compulsory conciliation as to make comparison largely meaningless.⁹

The weight of the evidence and argument therefore runs against compulsory arbitration, not because arbitration is inherently inappropriate in interest disputes but because it does not generally appear effective when imposed by the state. Some of the arguments against compulsory arbitration are similar to those listed above as interfering with the effectiveness of compulsory conciliation, e.g., that the parties will not bargain in good faith and will develop negotiation strategies which take account of the likelihood of the dispute going before an arbitration tribunal.¹⁰

⁷ See for instance: RAYMOND D. HORTON, «Arbitration, Arbitrators and the Public Interest», *Industrial and Labour Relations Review*, Vol. 28, No. 4, July 1975, pp. 497-507. PETER Z. W. TSONG, «Compulsory Arbitration in British Columbia», *Industrial Relations*, Vol. 11, No. 1, Feb. 1972, pp. 115-117. ROBERT J. HINES, «Mandatory Contract Arbitration: Is it a Viable Process?», *Industrial and Labor Relations Review*, Vol. 25, no. 4, Apr. 72. pp. 533-544. JOHN M. HOWELLS, «Causes and Frequency of Strikes in New Zealand», *Industrial and Labor Relations Review*, Vol. 25, No. 4, July 1972, pp. 524-532.

⁸ See for instance: JOSEPH R. GRODIN, «Arbitration of Public Sector Labor Disputes: The Nevada Experiment», *Industrial and Labor Relations Review*, Vol. 28, No. 1, October, 1974, pp. 89-102. MARK THOMPSON and JAMES CAIRNIE, «Compulsory Arbitration: The Law and British Columbia Teachers», *Industrial and Labor Relations Review*, Vol. 27, No. 1, Oct. 1974, pp. 3-17.

⁹ See: F. WALKER, «Compulsory Arbitration in Australia», in J. Joseph Loewenberg et al., *Compulsory Arbitration*, Toronto, Lexington Books, 1976, p. 37.

¹⁰ E. WALTON, *Interpersonal Peacemaking: Confrontations and Third Party Consultations*, Reading, Mass. Addison-Wesley, 1969.

Systematic research might possibly throw light on the doubts and dilemmas created by these enquiries into the effectiveness of various forms of intervention. Unfortunately, such research has been rare and inconclusive. Moreover, there has been no research directly dealing with compulsory third-party intervention. Walton¹¹ examines the role of the third party in interpersonal conflicts through a series of case studies, but his limited sample, anecdotal approach and subjective analysis cast doubts on the value of the findings for our purposes. Deutsch¹² discusses in some depth the role of third parties in industrial, marital, community and international conflicts, but his analysis also depends on sketchy and largely inconclusive observations bolstered by a single set of laboratory experiments. Fisher¹³ reviews the available literature and discusses the role, identity, objectives and functions of third parties. But nowhere do any of these authors directly address the question of compulsory third party intervention.

Walton¹⁴ does, however, inadvertently provide certain insights which are relevant. His care to win from the conflicting parties the voluntary acceptance of the third party's mediating role, suggests a belief in the importance of a lack of compulsion. Freedom, he implies, is essential to establishing the legitimacy of the intervention and the influence and trustworthiness of the third party. A case cannot, however, be built on such a flimsy foundation, and corroboration is sorely

Both interested policy makers and students of Canadian industrial relations are left in a state of uncertainty and confusion by the available information on compulsory third-party intervention. Much of what we know suggests, however, that such intervention is, at best, of dubious value. Doubts as to its value argue not for abolition of the present system as it exists but for a programme of research and enquiry designed to reveal the true situation. There may be a good case for policy making by hunch when opportunities for systematic evaluation of alternatives are lacking. Where such opportunities are available, however, and the effectiveness of policy is clearly in doubt, there is no excuse for remaining unimformed. What is at issue here, moreover, is something much broader and of more general concern than compulsory

¹¹ MORTON DEUTSCH, *The Resolution of Conflict*, New Haven, Yale University Press, 1973, pp. 382-388.

¹² RONALD J. FISHER, «Third Party Consultation: a Method for the Study and Resolution of Conflict», *Journal of Conflict Resolution*, Vol. 16, No. 1, March 1972, pp. 67-94.

¹³ RICHARD E. WALTON, *op. cit.*, p. 97.

conciliation. It is the Canadian propensity for government intervention in the labour relations field. If it can be shown that compulsory conciliation is counter-productive, might it not be wise to question other aspects of our legislative overburden which seriously interfere with the freedom of collective bargaining relationships? Among those aspects it might be well to question first are sections of provincial and federal statutes calling for mandatory «no-strike, no lock out» provisions in collective agreements, as well as mandatory grievance arbitration provisions. Many of the complexities in the sections of legislation dealing with certification, accreditation and decertification, as well as of Labour Relations Boards generally, are unnecessary or redundant, with perhaps the worst examples of redundancy occurring in the New Brunswick Labour Relations Act. Everywhere one looks our statutes cry out for simplification and for a reduction of the government's role in labour management relations.

This is not to say that governments should have no role in industrial relations, but rather that the role of government should be reduced to that minimum which ensures that the public interest will be guarded effectively. The fact that Canada has exhibited in the early 1970s a strike record worse than that of any industrialized nation except Italy certainly suggests that there may be something wrong with our system. Before we assume that the cure rests in further legislative restraints on free collective bargaining we would be wise to find out whether the existing restraints have contributed more to the problem than to the cure.

La conciliation obligatoire au Canada — En avons-nous besoin ?

L'intervention du législateur en matière de relations professionnelles est plus répandue au Canada que dans la plupart des autres pays industrialisés de l'Ouest. Ce phénomène est de nature à nous intéresser à cause de ses effets négatifs sur les négociations collectives, surtout lorsqu'on tient comme des résultats meilleurs qui ont été obtenus aux États-Unis, en Allemagne et dans les pays scandinaves où l'intervention est moins poussée.

En tête de liste de cette législation inutile, on trouve la vache sacrée de la conciliation obligatoire. L'expérience canadienne de la conciliation obligatoire, qui était destinée à l'origine à protéger l'intérêt public dans les relations de travail, remonte au commencement du XX^e siècle. Les recueils de lois tant fédéral que provinciaux, à l'exception d'une seule province, prévoient la conciliation à une ou à deux étapes des négociations. Au cours des dernières années, les législateurs y ont apporté certaines modifications, mais, dans l'ensemble, le système demeure intact.

Peu d'efforts ont été faits pour révoquer en doute ou contester la valeur du régime de conciliation obligatoire, même s'il semble que, depuis quelque temps, on se rend compte de ses effets négatifs sur les rapports entre syndicats et employeurs et sur le coût de son efficacité.

L'article précédent traite de ce sujet en comparant la conciliation volontaire que l'on trouve dans la législation du travail de la Saskatchewan au système de la conciliation obligatoire qui existe en Nouvelle-Écosse. L'auteur se réfère aussi à l'expérience du Nouveau-Brunswick et de l'Alberta.

Pour étayer cette comparaison, l'auteur a relevé le nombre de jours de grève par membre de syndicat au cours des seize dernières années. Les statistiques ainsi obtenues ne semblent indiquer aucune supériorité d'un régime sur l'autre. Quant à son efficacité en valeur monétaire, il s'appuie sur ce qu'il en coûte par adhérent syndical en matière de négociations collectives. Les statistiques ainsi trouvées montrent clairement que le système de conciliation volontaire l'emporte sur le système de conciliation obligatoire. Toute politique qui aboutit à des résultats aussi discutables demande un réexamen approfondi.

D'autres éléments sont également de nature à faire douter de la valeur du système canadien; des tactiques de négociations qui vont à l'encontre des buts recherchés, des expériences peu fructueuses d'intervention de tiers en qualité de médiateur et certaines études expérimentales portant sur le règlement des conflits. Malheureusement, ce qui en ressort reste imprécis et peu concluant.

Si des recherches ultérieures démontrent que la conciliation obligatoire ne donne pas les résultats qu'on en attend, il faudra se poser des questions touchant tout l'appareil de l'intervention des gouvernements dans le domaine des relations professionnelles et se demander s'il n'y aurait pas intérêt pour eux de mettre au rebut une telle superstructure.

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