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Legal Regulation of Collective Bargaining in the Ontario Public Sector
La structure juridique de la négociation collective en Ontario

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Article abstract

In this paper, the author describes the major features of the legal structure for collective bargaining in the Ontario public sector. The emphasis is mostly placed upon the *Crown Employees Collective Bargaining Act* which applies to a sub-stantial portion of the Ontario public sector labor force. The basic issues dealt with include : disputes settlement, scope of bargaining, determination of bargaining units, representation elections and political activities.

Legal Regulation of Collective Bargaining in the Ontario Public Sector

Donald D. Carter

In this paper, the author describes the major features of the legal structure for collective bargaining in the Ontario public sector. The emphasis is mostly placed upon the Crown Employees Collective Bargaining Act *which applies to a substantial portion of the Ontario public sector labor force. The basic issues dealt with include : disputes settlement, scope of bargaining, determination of bargaining units, representation elections and political activities.*

My starting point is the observation that the role that the government plays as employer is at times bound to conflict with its role as governor. As employer, the government is a party to the setting of terms and conditions of employment for its employees while, as governor, it has ultimate responsibility for, and supreme authority over, the ordering of affairs within its jurisdiction. It would be preferable if these roles were played on completely separate stages, but I seriously doubt whether this ideal can ever be attained. To give an example, government, as governor, often does establish legitimate public policy that will affect the terms and conditions of employment of its employees, such as when a decision is made to devote less public money to a particular government function. In this situation, the employees engaged to perform those services may find that the lower value placed upon these services affects their levels of remuneration. Another example of this conflict could occur where a government determined to curb inflation institutes a policy of wage restraint in bargaining with its employees. Conversely, the determined

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wage demands of government employees may blunt any public policy to cut government spending, either in a particular area, or in general.

The emergence of collective bargaining in the public sector has accentuated this conflict. Public employees, through collective negotiation, have obtained the means by which they can vigorously pursue legitimate employee goals, which may at times conflict with public goals. Government, as a party to a collective bargaining relationship, finds that the wide managerial powers that it formerly enjoyed have been narrowed. The reduction of managerial power means that, even though government is still supreme as governor, it no longer enjoy the same supremacy as employer. The concern, of course, is that collective bargaining by restricting the government's role as employer will spill over and affect the general power of government. Put another way, can the government be a fair and responsive employer and still carry out its primary function of governance ?

Legal structures established to regulate public sector collective bargaining reflect the fundamental tension caused by the conflict of these two roles of government. Ideally, the legislation should attempt to isolate the two roles in order to reduce confusion. The law should make it clear to governments that collective bargaining will impose new responsibilities upon the government as employer, while, on the other hand, the law should make it clear to employees that collective bargaining is not a weapon to be used to achieve political ends. The problem, of course, is that this states the problem too simply. The considerable overlap between the two roles makes it impossible for legislators to completely isolate the two roles. As a result, any legal framework provided for public sector collective bargaining is not likely to provide easy answers to this fundamental problem, and the Ontario legislation is no exception.

THE LEGAL STRUCTURE FOR COLLECTIVE BARGAINING

Employees in the Ontario public sector do not fall under a single legal regime for collective bargaining. It should be added that I use the term « public sector » in its broad sense to cover those employees whose remuneration, either directly or indirectly, is substantially derived from the public funds of the province. Included in this term would be not only provincial public servants, and employees of most Crown agencies, but also employees of public institutions financed by the province, such as hospitals, schools, and universities. Excluded from this definition would be municipal employees whose remuneration is primarily derived from local taxation.

The most extensive legal regime in the Ontario public sector is the *Crown Employees Collective Bargaining Act* [1], covering public servants, employees of the Liquor Control Board, the Liquor Licence Board, the Ontario Housing Corporation, the Niagara Parks Commission, the Workmen's Compensation Board, and employees of the colleges of applied arts and technology. Although this latter group is expressly excluded by the *Crown Employees Collective Bargaining Act* [2], they are brought back into the fold by the *Ministry of Colleges and Universities Amendment Act, 1972* [3]. Members of the Ontario Provincial Police Force are also expressly excluded from the *Crown Employees Collective Bargaining Act,* and they fall under a special legal structure for collective bargaining, established by the *Police Amendment Act, 1972.* [4] Employees of Ontario Hydro and the Ontario Northland Transportation Commission are, by virtue of the *Public Service Act* [5], not considered as Crown employees, and fall under the private sector legal regime provided by the *Labour Relations Act* [6]. Employees of the province's hospitals, schools and universities also fall under the *Labour Relations Act,* [7] with the exception of elementary and secondary school teachers. As is well known, the Ontario government is now in the process of establishing a special legal regime to regulate collective bargaining by elementary and secondary school teachers. The total picture is one of a patch-work quilt of legal structures covering employees in the Ontario public sector, raising the question of whether such a multiplicity of structures is necessary. Any rational justification, of course, would have to be based on the different work situations of these groups of public employees.

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

The most sophisticated legislative attempt to deal with the problems of public sector collective bargaining in Ontario is the *Crown Employees Collective Bargaining Act.* This statute, covering the largest group of public employees in Ontario, establishes a regime for collective bargaining

1 S.O. 1972, c. 67.

2 S. 1 (1) (g) (ii).

3 S.O. 1972, c. 114, s. 2.

4 S.O. 1972, c. 103.

5 R.S.O. 1970, c. 386. Employees of the Workmen's Compensation Board until recently were also excluded by this Act from the Crown employee category. This situation was altered by S.O. 1972, c. 96, s. 1.

6 R.S.O. 1970, c. 232.

7 S. 2 (f) excludes teachers as defined in *The Teaching Profession Act,* R.S.O. 1970, c. 456.

quite different from the regime for the private sector, and from public sector regimes in other jurisdictions. The distinctive approaches contained in the Act appear to be designed to ensure that the function of governance is not impaired by participation of government in the collective bargaining process.

DISPUTE SETTLEMENT MECHANISM AND SCOPE OF BARGAINING

The most outstanding feature of the Act, and probably the most controversial, is the complete prohibition against any form of strike action [8]. The justification for this prohibition is that the withdrawal of the services of public employees would disrupt the function of governance. But, the removal of the right to strike, raises the vexing question of whether collective bargaining can exist in the absence of the economic sanction of the strike. The answer to this question and the justification for prohibiting strikes are bound together. If one accepts the premise that collective bargaining is more than an exercise of economic power but is also an exercise involving appeals to public opinion, then the strike weapon may not be essential. This is especially true in the public sector where the employer is likely to be much more sensitive to the attitudes of the public. Putting the emphasis on public appeals, however, means that bargaining agents must have sufficient resources to finance the sophisticated advocacy required for this exercise. The need for financially viable bargaining agents dictates that the bargaining agents have a wide constituency from which to draw their financial support. At the same time, the large bargaining units required for this type of collective bargaining justify the prohibitions of strike activity, since the withdrawal of services by so large a number of employees at one time would have a substantial impact on the government's role as governor. Thus, the type of collective bargaining established under the Act, with its emphasis on public advocacy, provides the justification for the removal of the right to strike.

In place of strike action, the Act provides for interest dispute arbitration as the method of resolving bargaining impasses [9]. This arbitral structure is given some permanence, since the Act provides for the appointment, for a term of two years, of a permanent chairman to preside over all boards constituted under the Act. The nominees of the employer and the employee organization, however, are appointed on an *ad hoc*

[8] S. 25.
[9] S. 9.

basis. Perhaps the most difficult task facing arbitration boards is to define the scope of collective bargaining under the Act. Section 17, designed to protect the management power of government, sets out a number of matters that may not be the subject of collective bargaining and arbitration. Those matters expressly mentioned are « the right to determine employment, appointment, complement, organization, work methods and procedures, kinds and location of equipment, discipline and termination of employment, assignment, classification, job evaluation, merit system, training and development appraisal, superannuation, and the principles and standards governing promotion, demotion, transfer, lay-off and reappointment. » The difficulty is that there appears to be some overlap between section 17 and section 6, which expressly sets out the matters that are bargainable. The most obvious overlap is between the bargainable matter of « methods of effecting promotions, demotions, transfers, layoffs or reappointments », and the non-bargainable matter of « the principles and standards governing promotion, demotion, transfer, lay-off and reappointment ». Here is a clear example of the tension inherent in a public sector collective bargaining statute. The statute, in attempting to both protect the function of governance and to provide for meaningful collective bargaining appears contradictory.

Who should be the Solomon to resolve such apparent contradictions — the arbitration board with jurisdiction to resolve bargaining impasses, or the Public Service Labour Relations Tribunal with overall authority to administer the statute ? This issue was recently argued before the tribunal by the Civil Service Association of Ontario, representing the community college teachers, and by the Ontario Council of Regents, the employer. The tribunal concluded that the wording of the Act, although not expressly dealing with the problem, indicated that the board and not the tribunal, had primary jurisdiction to determine questions of arbitrability. The tribunal took the approach that, although it was its role to administer the structure for collective bargaining, this role did not extend to adjudicating upon the merits of individual disputes. It was the view of the tribunal that this interpretation of the Act made good collective bargaining sense, since it was desirable that initial bargaining be conducted without the intervention of an adjudicative body.

The impact of this decision is that it allows greater flexibility in initial bargaining. Employee demands may be placed on the bargaining table for discussion without an immediate challenge of their legitimacy under the Act. This approach also avoids the possibility of duplicating the arbitration exercise. It seems likely that the tribunal, in order to de-

termine the legitimacy of employee demands, would have to become substantially involved in the merits of the dispute, since many questions of arbitrability cannot be decided in isolation from the context of bargaining. But, once the legitimacy of employee demands had been determined by the tribunal, the merits of the dispute would then have to be re-argued before the arbitration board. Thus, it is clear that intervention by the tribunal would offer the dual disadvantages of redundancy and delay. The fact is that restricting the scope of bargainable and arbitrable issues does impose strain upon the collective bargaining process, since it is difficult to confine issues to a pre-determined mould. Leaving the determination of arbitrability to the board of arbitration should serve to relieve some of those strains by providing more flexibility at the initial stages and, at the same time, preventing redundancy and delay.

DETERMINATION OF BARGAINING UNITS

The shape of the bargaining units is another distinctive feature of the Act. Not only do most of these units cover the entire province, but they all also cover a number of disparate occupational categories. The pattern is provided by those bargaining units established by regulation [10]. The largest bargaining unit is one comprised of all public servants subject, of course, to the exclusion of those persons not covered by the Act. Another province-wide bargaining unit is established for employees of the Liquor Control Board and Liquor Licence Board. There are two province-wide units covering employees of the Community Colleges, one for support staff and one for academic staff. The anomalies appear to be the two bargaining units established for employees of the Niagara Parks Commission, one for Commission police and one for other employees, and the bargaining unit established for employees of the Ontario Housing Corporation within the Municipality of Metropolitan Toronto.

The tribunal has the jurisdiction to determine the shape of any new bargaining units that might emerge [11]. This jurisdiction has been exercised on only one occasion when the tribunal dealt with an application of Local 767 of the Canadian Union of Public Employees for representation rights in respect of three local bargaining units (at Windsor, Oshawa, and Hamilton) of employees of the Ontario Housing Corporation. The tribunal in a lengthy decision, set out what it considered to be the relevant considerations in determining the shape of bargaining units. The three general

[10] O. Regs. 576/72, 577/72.
[11] S. 3.

considerations taken into account by the board were (1) freedom of association and community of interest; (2) the cost of collective bargaining; and (3) the public interest.

In dealing with the factor of freedom of association and community of interest, the tribunal took the approach that, where the provincial government is employer, the geographical boundaries of community of interest are more likely to be provincial rather than local. The tribunal took notice of the fact that terms and conditions of employment for provincial employees tended to be uniform throughout the province. Moreover, the tribunal also placed weight upon the related factor that management tended to be centralized. In dealing with the cost of collective bargaining, the tribunal expressed concern about the expense of fragmenting the collective bargaining structure by sanctioning a number of local units. In the view of the tribunal, a multiplicity of bargaining units would likely tax the resources of both the employer and the employee organizations, and might result in small groups of employees, because of the cost, never having the opportunity to organize. Finally, the tribunal defined the public interest in terms of a strong, realthy collective bargaining relationship. In the view of the tribunal, since the right to strike was not available, vigorous collective bargaining depended on the employee organization possessing adequate resources to finance the research and advocacy required to meet the employer on equal terms.

The *Ontario Housing Corporation* decision contains a very clear statement by the tribunal favouring large, province-wide bargaining units. This policy recognizes the need for strong bargaining agents, and the need to concentrate collective bargaining. On the other hand, it must be recognized that this policy may put certain strains on the bargaining agent and the bargaining process. The bargaining agent, rather than the employer, is likely to become the focal point of competing demands from groups of employees, requiring it to recognize regional differences and different employee values when formulating bargaining demands. Because collective bargaining has been concentrated, it is likely that a greater number of issues will have to be resolved by the parties at the bargaining table. Skilled negotiation by both parties will be required if the collective bargaining process is to withstand these strains.

MANDATORY REPRESENTATION ELECTION

Another distinctive feature of the *Crown Employees Collective Bargaining Act* is the mandatory requirement of a vote to establish whether

the employee organization enjoys the support of a majority of the bargaining unit. [12] In the context of public sector collective bargaining this requirement makes some sense. First, given the size and composition of the bargaining units, there is some justification for ensuring that the bargaining agent is truly representative of at least a majority of the members of the unit. Moreover, the public position of the government, in favour of public sector collective bargaining makes it unlikely that it will improperly influence employees during the time needed to hold the vote.

POLITICAL ACTIVITIES

The requirement that bargaining agents be politically neutral is another interesting feature of the *Crown Employees Collective Bargaining Act*. The Act establishes political neutrality as a condition of legal status, not recognizing any employee organization that supports any political party, either directly or by receiving money from employees to be used as a contribution to a political party. [13] It would appear that the purpose of this section is to isolate the collective bargaining forum from the political forum, not by completely prohibiting public appeals by bargaining agents, but by requiring that bargaining agents not play party politics in making such appeals.

CONCLUSION

Future developments of collective bargaining in the Ontario public sector are difficult to predict at this stage. There will, of course, soon be a legal structure established for teacher bargaining. Hopefully, such a structure can accommodate the competing requirements of local participation and central accountability. Some modification may be necessary to the legal structure governing hospital bargaining and university bargaining in order to deal with the same type of problem. In other areas of the Ontario public sector, developments are likely to occur at the administrative level, on a case-by-case basis, as the relatively new legal structure receives use. This should be the test of whether the *Crown Employees Collective Bargaining Act* has been successful in providing for workable collective bargaining that does not unduly impede the function of governance.

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[12] S. 4.

[13] S. 1 (1) (h) (i), (ii), (iii), (iv).

La structure juridique de la négociation collective en Ontario

Cet article a pour objet de décrire la structure juridique instituée en Ontario en matière de négociation collective dans le secteur public. Le problème fondamental auquel on fait face est sans contredit la tension créée par le conflit entre le rôle traditionnel du gouvernement en tant qu'autorité souveraine et sa vocation de partie dans une négociation collective.

Le secteur public comprend tous les employés dont la rémunération, directe ou indirecte, provient effectivement des fonds de la Province. Pour la plupart de ces employés, le mécanisme de négociation collective relève du *Crown Employees Collective Bargaining Act,* mais on y trouve certaines exclusions importantes. Pour la Sûreté ontarienne, les modalités de la négociation collective sont insérées dans le *Police Act.* Les employés des hôpitaux, des écoles et des universités de la Province ainsi que ceux de l'Hydro ontarienne et de l'*Ontario Northland Transportation Commission* sont soumis au même régime que les travailleurs du secteur privé et relèvent, par conséquent, du *Labour Relations Act.* Les enseignants des écoles élémentaires et secondaires sont à l'écart de tout régime particulier de négociation collective, mais il semble que le gouvernement soit sur le point d'établir pour ce groupe d'employés un régime de négociation particulier. L'image d'ensemble donne l'impression de ressembler à une espèce de *catalogue* de structures juridiques fort biganée.

Le *Crown Employees Collective Bargaining Act* régit la plus grande partie des employés de la fonction publique. L'interdiction absolue de tout recours à la grève est la caractéristique principale de cette loi. Le pouvoir de négociation, en l'absence de toute sanction économique, doit reposer sur les pressions auprès de l'opinion publique. Les unités de négociation sont vastes de façon à permettre aux agents de négociation d'avoir des ressources financières suffisantes pour appuyer leur cause auprès de la population. L'ampleur de ces unités de négociation justifie en contrepartie l'interdiction du droit de grève.

L'arbitrage exécutoire des différends pourvoit à la solution des impasses. La tâche la plus délicate du conseil d'arbitrage réside dans la détermination du champ de compétence fixé par la loi relativement aux questions sujettes à la négociation, car il semble exister un jeu de chevauchement entre les termes de la loi qui excluent certaines matières de la négociation et de l'arbitrage et les termes de la loi qui déclarent expressément que certaines autres questions sont négociables et *arbitrables.* Récemment, le *Public Service Labour Relations Tribunal,* organisme qui a la responsabilité de l'administration de la Loi, a décrété que le conseil d'arbitrage avait compétence en première instance selon la Loi pour fixer les points sujets à négociation. Cette décision, par conséquent, favorise une flexibilité plus grande au commencement des négociations. Les employés peuvent présenter leurs revendications sans être obligés d'avoir à en justifier la négociabilité devant le tribunal. En outre, étant donné que l'enjeu de la négociabilité et le mérite de l'affaire sont souvent reliés, le refus du tribunal d'établir la légitimité des revendications des employés signifie qu'il n'est pas nécessaire de débattre deux fois le point de vue des parties, une fois devant le tribunal et une autre fois devant le conseil d'arbitrage.

Les unités de négociation établies par règlement au moment de l'entrée en vigueur de la Loi, sont peu nombreuses, s'étendent à la grandeur de la Province et

comprennent un grand nombre de catégories professionnelles disparates. Le tribunal a compétence pour tailler toute unité de négociation nouvelle qui peut s'imposer. Dans une cause récente qui se rapportait au personnel de l'*Ontario Housing Corporation,* le tribunal dégagea clairement, dans une décision relative au caractère approprié de l'unité de négociation, les critères suivants : 1) la liberté d'association et la communauté d'intérêts; 2) le coût de la négociation collective; 3) l'intérêt public. D'une façon plus précise, le tribunal a considéré que, étant donné que le gouvernement est l'employeur, la communauté d'intérêts s'étend à l'ensemble du territoire de la Province et non aux régions et aux localités. Le tribunal s'est aussi inquiété du coût de la négociation collective à la suite de l'établissement d'unités de négociation locales fragmentées. Enfin, étant donné l'interdiction du droit de grève, des unités de négociation étendues si les associations d'employés veulent discuter à force égale avec l'employeur. Il est donc clair que le tribunal a adopté une politique qui favorise des unités de négociation s'étendant à tout le territoire de la Province.

La Loi présente deux autres traits caractéristiques intéressants. En premier lieu, en vertu de la Loi, la tenue d'un vote est obligatoire pour établir le caractère représentatif d'une association d'employés. De plus, la Loi exige la neutralité politique comme condition de l'obtention du statut juridique; elle va jusqu'à exclure les associations d'employés qui appuient des partis politiques. Il semble que l'objet de cette exigence est de séparer le forum de la négociation collective du forum politique, non pas en interdisant d'une façon absolue les pressions auprès du public de la part des agents négociateurs, mais exigeant que ces derniers ne jouent pas la carte politique lors de ces pressions.

L'avenir de la négociation collective dans le secteur public en Ontario est difficile à prévoir. Des changements sont susceptibles de se produire au niveau administratif au fur et à mesure de l'examen des causes, en autant qu'une nouvelle structure juridique pourra être mise en vigueur. Ces modifications devraient permettre de se rendre compte si le *Crown Employees Collective Bargaining Act* a réussi à implanter un régime de convention collective valable qui ne fait pas trop obstacle à la fonction gouvernementale.