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Article abstract

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The Alberta Public Service Employee Relations Act (PSERA) requires collective bargaining disputes to be settled by binding arbitration rather than strike or lockout.[1] Excluded from an arbitration board's jurisdiction are the following issues:[2]

(a) the organization of work, the assignment of duties and the determination of the number of employees of an employer;

(b) the systems of job evaluation and the allocation of individual jobs and positions within the systems;

(c) selection, appointment, promotion, and training or transfer;

(d) pensions.

The parties are free to *bargain* such issues into the collective agreement, but, in the absence of such agreement, the employer can act unilaterally on them.

Other provinces have corresponding legislation. Nova Scotia's model is closest to Alberta's, excluding from arbitration (but not bargaining) roughly similar items.[3] Six other jurisdictions provide that a wide range of items must be excluded from collective agreement

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1 R.S.A. 1980, c. P-33, ss. 49, 93 and 94.

2 *Ibid.*, s. 48(2)

3 *Civil Service Collective Bargaining Act*, R.S.N.S. 1989, c. 71, ss. 23, 32 and Schedule B.

regulation, roughly paralleling the Alberta exclusions from arbitration.[4] While British Columbia public service employees bargain under the special *Public Service Labour Relations Act,* they are subject to fewer bargaining restrictions[5] than the six jurisdictions identified above. Only Saskatchewan and Manitoba allow public servants to bargain under the general labour relations statutes and there are minimal restrictions on bargaining items.[6] Finally, in Newfoundland, where, for designated employees, arbitration is substituted for the right to strike/lockout, there are no restrictions on the scope of bargaining or on matters that can be arbitrated.[7] While our study focuses on Alberta, it will be relevant to researchers in those other jurisdictions that impose significant bargaining and arbitration restrictions on public service employment relations.

The arguments for and against the imposition of bargaining or arbitral restrictions are canvassed elsewhere.[8] We aim to fill two gaps in the literature. Firstly, as a contribution to a theoretical framework for

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4 (a) Federal: *Public Service Staff Relations Act,* R.S.C. 1985, c. P-35, ss. 7, 57(2) and Schedule II. Also the *Public Service Employment Act,* R.S.C. 1985, c. P-33, ss. 69(1), (3) and 87(3); (b) New Brunswick: *Public Service Labour Relations Act,* R.S.N.B. 1973, c. P-25; (c) Ontario: *Crown Employees Collective Bargaining Act,* R.S.O. 1980, c. 108, s. 18(1); (d) Québec: *Civil Service Act,* R.S.Q. 1977, c. F-3.1, s. 116; (e) Prince Edward Island: *Civil Service Act,* R.S.P.E.I. 1974, c.C-9, ss. 150 and 157(3). Bargaining and arbitration in P.E.I. can be expanded in scope by mutual agreement of the parties; (f) Yukon: *Public Service Staff Relations Act,* R.S.Y. 1986, c. 142, ss. 2(1), 46(2) and 58(3).

5 R.S.B.C. 1979, c. 346, s. 13. Excluded are the principle of merit and application in appointment and promotion, pensions, classification, job evaluation and certain training programs.

6 (a) Manitoba: *Labour Relations Act,* R.S.M. 1987, c. L-10, s.3. Restrictions on bargaining of merit and pensions imposed by *Civil Service Act,* R.S.M. 1987, c. C-110, ss. 47, 57.1 and 13(2). See also *Civil Service Superannuation Act,* R.S.M. 1988, c. C-120, ss. 5 and 17; (b) Saskatchewan: *Trade Union Act,* R.S.S. 1978, c. T-17, s. 2(g)(iii). Restrictions on bargaining of pensions imposed by the *Public Service Act,* R.S.S. 1978, c. P-42, ss. 3 and 56.

7 *Public Service (Collective Bargaining) Act,* S. Nfld. 1973, c. 123, s. 41 (as amended).

8 *Proposed Changes to the PSERA,* A.U.P.E. (Sept. 1987) at 9-12, (Submission to Minister of Labour, Hon. Ian Reid); *Presentation to the Alberta Labour Legislation Review Committee,* NUPGE (Dec. 1986) at 16-17; K.P. Swan, "Safety Belt or Straight-Jacket? Restrictions on the Scope of Public Sector Bargaining", in *Essays in Collective Bargaining and Industrial Democracy,* University of Lethbridge (CCH Can. August 1983) at 36-37; *Report on a Study and Information Mission to Canada* (Alberta Case No. 1247) The Governing Body Committee on Freedom of Association, Sir John Wood, C.B.E. (I.L.O.), November 1985, para. 77; Reference *Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* (1987), 38 D.L.R. (4th) 161; J. Finkelman Q.C., *Employer-Employee Relations in the Public Service of Canada,* Part I (Ottawa, Information Canada, 1974), paras. 75, 127, 135, 161; R.D. Higgins, *Making Bargaining Work in the British Columbia Public Service* (Victoria, Queen's Printer, 1972) see e.g. p. 47. No discussion of restricted arbitration or bargaining appears in the *Report of the Task Force on Provincial Public Service Labour Relations* (Edmonton, 1976). Report of government-appointed members published October, 1976 and separate report of union-appointed members published November, 1976.

analysis, we provide several detailed hypotheses as to the possible impact of arbitrability restrictions on bargaining strategy, the negotiation process, the daily conduct of industrial relations during the currency of collective agreements and the organizational interests and power relations of unions and management. Secondly, we test those hypotheses using case studies in the Alberta Civil Service and the Crown hospitals. Our study is valuable because the main critics of arbitrability/bargainability restrictions merely *assume* that they will impair genuine, collective bargaining without specifying exactly how this will occur or whether there is empirical evidence of its occurrence.[9]

IMPACT OF S. 48 ON BARGAINING: SOME HYPOTHESES

Hypothesis 1 *Unions will not place any s. 48 items on the bargaining table, out of a sense of futility.*

The logic of this is that unions will perceive there to be no need for management to make voluntary concessions in the absence of any right to strike or binding arbitration on the relevant issues. We viewed this unlikely as a universal response for reasons embodied in Hypotheses 2 and 3.

Hypothesis 2 *Even though unions believe they will not win concessions on s. 48 items, they will place them on the bargaining table anyway, in response to membership pressure.*

The employment issues excluded by s. 48 include many career-critical interests of crucial importance to employees, such as promotion, performance appraisal, transfer, work loads, technological change, subcontracting, classifications and pensions. It is likely that members would expect their union to win concessions in such areas or, at least, endeavour to do so. We anticipated that, facing such pressure, unions would put s. 48 items on the table for two reasons. Firstly, a union might seek to divert membership dissatisfaction from its own shortcomings on to the "law", using the latter as the scapegoat for its inability to win concessions. Indeed, membership solidarity could even be intensified by identifying the law as the "common enemy". Secondly, unions might seek to link, in negotiations, the most vital s. 48 items with arbitrable matters, offering to trade off compensation demands, for example, for s. 48 concessions.

9 Swan, *ibid.* at 27-33; Dickson C.J.C., *ibid.*, 38 D.L.R. (4th) 161,211.

Hypothesis 3 *Unions will place s. 48 items on the table for the purpose of obtaining information about them even though they do not win, or even expect to win, concessions.*

While s. 48 issues are non-arbitrable, they remain bargainable and, as such, are subject to the duty to bargain in good faith. If the normal "private sector" model of this duty is applied under the PSERA, management would be obliged, on request of the union, to disclose all information that the union needs to make informed and rational bargaining responses and must provide truthful, complete and reasoned explanations for rejecting union proposals.[10] Indeed, the duty extends, in certain circumstances, to proactive divulging of management's plans without formal union request.[11]

However, the duty to bargain in good faith might possibly be formulated differently under the PSERA. The main policy justification for disclosure in bargaining in the "private" sector is the promotion of industrial peace.[12] Arguably, the prohibition of strikes and lockouts under the PSERA disposes of the industrial peace rationale so that the Public Service Employee Relations Board (PSERB) might be persuaded to depart from the "private sector" formulation of the duty to disclose information.

On the other hand, the PSERB may regard "industrial peace" more broadly than organized strikes and lockouts and include "unorganized conflict" such as absenteeism, high turnover, apathy, indiscipline, sabotage and other responses to stress and low morale. Research shows that workers who are informed and involved in management's plans and decisions are less disposed to such "unorganized conflict".[13] Furthermore, the PSERB may recognize that the mere legal prohibition of strikes does not guarantee their non-occurrence.[14]

Another rationale for disclosure in bargaining is the "industrial democracy" notion that workers are entitled to know of management's

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10 See *De Vilbiss (Canada) Ltd.*, [1976] 2 Can. L.R.B.R. 101. See G.W. Adams Q.C., *Canadian Labour Law* (Can. Law Book, 1985) at 583-586.

11 *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep.1411. See B. Langille, "Equal Partnership in Canadian Labour Law" (1983) 21 Osg. Hall L.J. 496.

12 De Vilbiss, *supra*, note 10.

13 See e.g. the "unorganized" conflict caused by employees' stress and the role that employees' participation in decision-making has in reducing occupational stress. For a discussion of research findings see: R.C. Dailey, *Understanding People in Organizations* (West Publishing Co., 1988) and R. Schuler, "A Role and Expectancy Perceptions Model for Participation in Decision Making" (1980) 22 Acad. of Management Jour. at 331-340.

14 Unlawful strikes of Alberta's nurses (1988), corrections officers (1982, 1990) and social workers (1990) are illustrative.

plans because they are an "equal partner" in the enterprise.[15] Although private sector labour boards have usually been cool towards this rationale,[16] it is open to the PSERB to accord it greater weight.

We submit that the PSERB should follow the "private sector" duty as it relates to the disclosure of information. The PSERB has affirmed a policy of equating as closely as possible the rights of public sector employees with those under private sector legislation[17] and this is consistent with applying the private sector duty of disclosure. Accordingly, we anticipated that unions would place s. 48 issues on the table to acquire all the information they can about management's plans and operations.

Hypothesis 4 *The opportunity to exploit uncertain language in s. 48 may encourage unions to bring to the table matters that are ostensibly non-arbitrable.*

There is a penumbra of uncertainty in language[18] and section 48 is no exception. The PSERB has developed the "collateral issues doctrine" whereby a matter is deemed non-arbitral only if it is judged central, and not collateral, to the issues of s. 48.[19] For example, union demands for premium pay for overtime or shift work arguably curtail managerial discretion in such s. 48 matters as the organization of work. Yet, the PSERB has ruled them arbitral as being compensation issues that are merely "collateral" to the organization of work.[20]

Hypothesis 5 *Employers may be willing to make bargaining concessions on s. 48 items.*

This hypothesis is fundamental to the PSERA model, which permits *bargaining* on all issues but prohibits arbitration on some. Evidently, the Legislature contemplated circumstances under which management might make voluntary concessions or even initiate proposals on s. 48 matters. Four main circumstances may influence management in this respect.

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15 See Langille, *supra*, note 11.

16 E.g. *Amoco Fabrics Ltd.*, [1982] 2 Can. L.R.B.R. 305 (O.L.R.B.).

17 *AUPE and the Board of Governors of Medicine Hat College.* Unreported, PSERB Reference 140-065-502 (Fraser) at 8-9.

18 See H.L.A. Hart, *The Concept of Law* (O.U.P., 1961) at 121-150.

19 *Alberta Union of Provincial Employees, Branch 63, and the Board of Governors of Olds College.* Unreported, PSERB Reference 105-095502 (Mason) September, 1979, para. 12. Confirmed by the Supreme Court of Canada in *Re Alberta Union of Provincial Employees et al. and Board of Governors of Olds College.* 136 D.L.R. (3d) 1, 8-9, per Laskin C.J.C.

20 *Ibid.* See also *AUPE* v. *Crown in Right of Alberta (General Service Employees).* Unreported, PSERB (Dec. 1984) 42-44.

(i) Where a PSERA employer competes in the same labour market as a "private sector" employer, the force of "coercive comparisons" may require the former to match any concessions made by the latter on section 48 items.

(ii) Employers may concede s. 48 matters at the table from a commitment to "integrative bargaining". Management may calculate that job satisfaction and productivity may be enhanced by worker protection against managerial arbitrariness in such matters as promotion, appraisal, discipline, discharge and classification. The incentive to pursue "integrative bargaining" is facilitated by management's awareness that a s. 48 concession made in one round of bargaining can be dropped entirely from subsequent collective agreements simply by management's obtaining a ruling from the PSERB that the issue is non-arbitrable.

(iii) Astute managers may have learned that the regulation of s. 48 matters in the collective agreement can assist in the "institutionalization" of workplace conflict and the enhancement of managerial hegemony. As some commentators have noted, the paradox for management is that it must often relinquish some prerogatives through collective bargaining to retain its control over labour over the long haul.[21] Thus, management might concede relatively insipid "window dressing" protections on s. 48 matters, designed to produce the institutionalizing effect and more. Of course, management will be aware that the union must accept them or get nothing. Even if management does not make any concessions, it may calculate that if it is *seen* by the workers to have bargained hard and seriously on section 48 issues, this will increase the acceptability of the outcomes among the workforce.[22]

(iv) Management may make s. 48 concessions to forestall anticipated, unlawful job action by workers. Alberta's nurses, corrections officers and social workers have recently demonstrated their willingness to defy non-strike legislation and this may influence some employers to grant concessions on s. 48 items.

In light of the above, we doubted that s. 48 would remove the designated items from the parties' negotiating agendas. However, we did anticipate a significant impact on how such items are disposed of at the bargaining table.

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21 See M. Burawoy, *Manufacturing Consent* (University of Chicago Press, 1979) and *The Politics of Production* (Verso, 1985), for this forceful argument.

22 See R.B. Freeman and J.L. Medoff, *What Do Unions Do?* (Basic Books, 1984) in which the authors argue that the "exit voice" function of collective bargaining increases efficiency. See also Albert O. Hirschman, *Exit, Voice and Loyalty* (Harvard University Press, 1971) for the "voice" role of grievance and arbitration procedures.

Hypothesis 6 *Assuming the union puts s. 48 matters on the table, s. 48 will "shield" the employer and facilitate resistance to making concessions.*

If s. 48 works as the Legislature apparently intended, management should find it relatively easy to resist union demands in such areas. The union is prohibited from striking. Moreover, the duty to bargain in good faith merely requires the furnishing of relevant information and reasoned explanations; it does not require that management's positions be "reasonable", so long as management can show that they are aimed at improving the efficiency of the organization.[23] If the union attempted to pressure management by terminating negotiations on all other items unless its position on the s. 48 item were accepted first, it would almost certainly violate its duty to bargain in good faith.[24]

We anticipated that this "shield" effect of s. 48 would not have to be continually verbalized by management, but that unions would generally understand the ground rules of their legal power. Of course, management might not utilize the full "shield" effect in all cases for, as observed above,[25] there may be other good reasons for it to negotiate concessions on s. 48 items.

Hypothesis 7 *S. 48 may enhance employer power indirectly in negotiating arbitrable issues.*

Unions may seek concessions on s. 48 items by softening their demands in compensation and other arbitrable matters. Such expenditure of union "bargaining capital" may provide employers with an unexpected windfall in the negotiation of arbitrable issues, and this power is boosted by the ability of an employer to withdraw the s. 48 concession in future rounds of bargaining, with no fear of being bound by an arbitral award on the issue.

Hypothesis 8 *PSERA and non-PSERA employers who share the same labour market, together with their unions, may coordinate, formally or informally, their respective bargaining strategies.*

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23 E.g. *Canada Trustco Mortgage Co.*, [1984] O.L.R.B. Rep. 1356.

24 In *Carpenter's Employer Bargaining Agency*, [1978] 2 Can. L.R.B.R. 5041, (O.L.R.B.), it was held that the pursuit to impasse of demands that are "inconsistent with the scheme of the Act" would violate the duty. Arguably, it would be "inconsistent with the scheme" of the PSERA to refuse to negotiate on arbitrable items in these circumstances.

25 Hypothesis 5.

Where a PSERA employer shares the same labour market as a *Labour Relations Code*[26] (LRC) employer, and the latter has conceded more extensive protections in s. 48 areas than the former, the PSERA employer may be compelled by market forces to match such protections. We anticipated that unions and employers in such circumstances might co-ordinate their respective bargaining strategies. For example, either formally or informally, unions might seek pattern-setting breakthroughs at LRC organizations on s. 48 issues and at PSERA organizations on arbitrable compensation matters, leaving it to the market to "ratchet up" benefits across the board. Employers would be expected to employ a coordinated strategy to minimize benefits across the board.

Hypothesis 9 *Interpretive uncertainties under s. 48 may "chill" consensual problem solving by the parties.*

The usefulness of collective bargaining in solving problems in the workplace may be undermined by the parties' preoccupation with interpreting s. 48. For example, instead of bargaining seriously about the substance of an issue from the outset, the parties may have to clarify its status as a s. 48 matter by referring it to the PSERB. Although further bargaining remains possible following the PSERB's ruling on arbitrability, it is unlikely to occur at the eleventh hour. The item will likely either be dropped or referred directly to arbitration without further attempts at joint resolution. Uncertainties about arbitrability may chill bargaining even on clearly arbitrable issues. In the give and take of bargaining, the parties may be reluctant to make concessions on arbitrable issues until the PSERB rules on the arbitrability of the alleged s. 48 issues, and such rulings are made only after the parties file for arbitration.

Hypothesis 10 *Legal uncertainties in interpretation of s. 48 will induce unions into legalistic hairsplitting to defend their interests.*

Union rhetoric, if not their practice, has traditionally opposed the intrusion of legalism into collective bargaining. Yet the centrality of the interests excluded by s. 48 may induce unions to resort to legal hairsplitting as the only realistic way of protecting themselves.

Hypothesis 11 *Lack of union success in negotiating concessions in s. 48 issues may affect adversely membership support for their union.*

If a union fails consistently to "deliver the goods" in important non-arbitrable issues, membership support for the union may dwindle.

26 S.A. 1988, c. L-1.2.

Dissatisfaction could lead to reduced participation and, therefore, less "democratic" trade unionism; factionalism and increased militancy by breakaway groups; and even formal decertification. Indeed, a hostile management set on eradicating the union might deliberately exploit s. 48 to this end.

Hypothesis 12 *The s. 48 exclusions may steer unions into conduct that diminishes their public image and organizing appeal.*

The ugly face of trade unionism in the public eye is the cash-greedy organization which single-mindedly pursues compensation demands at the expense of less-favoured workers who must ultimately foot the bill through increased costs or taxes. Unions whose demands focus on more principled issues, that is, items typically encompassed by s. 48, such as pay equity or social workers' case loads, are more likely to receive a favourable public reception. This may place unions in a dilemma. By pursuing success in the arbitral compensation issues, unions may lose the support of their more socially-conscious members, and tarnish their image among unorganized workers and the public at large. Moreover, shrewd employers might deliberately engineer bargaining over several years in order to produce this negative image. On the other hand, a union seeking bargaining success in the non-arbitral issues may resort to militant action such as an unlawful strike, a course that risks a divided membership, legal penalties and a tarnished public image.

Hypothesis 13 *Management will make informal concessions on s. 48 issues outside the formal collective bargaining process.*

We anticipated that, while management might resist formal collective agreement provisions on s. 48 items, sometimes it would find it expedient to forge informal arrangements with the union. Management might resist the entrenchment of s. 48 issues in a collective agreement for many reasons, for example, to appease political superiors, to avoid establishing "coercive comparisons" or to avoid the perceived inflexibility of contractual language. Nevertheless, informal concessions may be necessary in order to win employees' cooperation in the labour process.

Such "bargaining" could take various forms. For example, it might consist of the top industrial relations manager reaching understandings with the union business agent or local officers, possibly in a "joint consultation" committee mandated to handle all matters of mutual concern during the life of the collective agreement. Alternatively, negotiation may be conducted through the regular grievance procedure or in *ad hoc* joint meetings, with settlements documented in a memorandum, minuted or merely understood as verbal agreements.

Such arrangements would be absorbed as "custom and practice" and acquire a morally binding status for management and workers. Indeed, they could even acquire a legal force through an adjudicator's interpretation of ambiguous collective agreement language or by virtue of the doctrines of estoppel, laches or waiver.

The union could deploy a variety of "sanctions" and "inducements" to support such informal bargaining. At one extreme is a threatened unlawful strike, defined by the legislation to include such "cut-price" forms of job action as work-to-rule, overtime bans, go-slows, study sessions, etc. Less extreme sanctions might include a general "withdrawal of co-operation" or a flooding of the grievance procedure with spurious complaints. Inducements might include the union's agreeing to management's interpretations of other disputed contract language, dropping outstanding grievances or co-operation with management in the tightening up of work practices, performance standards and discipline.

Hypothesis 14 *Informal "bargaining" may occur on s. 48 issues at the shop floor level to limit managerial discretion.*

Informal "bargaining" might take place on s. 48 items at the level of particular departments, work groups or even individuals within a department, between the employees themselves (perhaps supported by their shop steward) and a foreman or supervisor. These arrangements, too, may crystallize as "custom and practice". Professor Brown has described how lower level managers can allow "custom and practice" to form by acts of "omission" and "commission" in the interest of meeting production schedules.[27] While such understandings are rarely documented, workers expect them to be honoured and managerial non-compliance may result in structured sanctions (e.g., grievances, communal non-cooperation or wildcat strike) or unstructured ones (e.g., quits, absenteeism, indiscipline, sabotage, apathy and reduced productivity). Top management and even union officials may remain unaware of such shop floor arrangements until they "explode" in one or more of the above forms. Even if senior managers do know about them, they may turn a blind eye so long as production runs smoothly. We anticipated that informal "bargaining" of this kind would not be uncommon, given the importance of many s. 48 items in the daily life of the worker and the necessity of management's securing worker cooperation in the production process.[28] Such "bargaining" is more likely in large, compartmentalized bargaining units than in smaller units.

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27 See W. Brown, *Piecework Bargaining* (Heinemann, 1973).

28 On the role of cooperation by employees in the labour process, see P.K. Edwards, *Conflict at Work* (Blackwell, 1986).

Hypothesis 15. *The effect of s. 48 will exclude from public sector collective agreement matters normally reserved as management rights in the private sector.*

One of the Government's stated purposes for the PSERA was to grant to public sector employees rights and benefits that, as far as possible, match those of private sector employees in Alberta.[29] If it operates as designed, section 48 will ensure that public sector collective agreements reserve as management rights only those issues typically retained as management rights in the private sector.

Next, we test the foregoing hypotheses against the evidence of our case studies.

THE IMPACT OF S. 48 ON COLLECTIVE BARGAINING: CASE STUDY EVIDENCE

We tested the foregoing hypotheses by case studies of Provincial Government and Crown hospital employment. These industries were selected because we anticipated that the differences between them in collective bargaining structure, labour market forces, and negotiating traditions, would best disclose the applicability, or non-applicability of our hypotheses. As well, government employment was a natural choice because it represents by far the largest group covered by the Act.[30]

The authors conducted interviews with union and management personnel presently or recently involved in the process of collective bargaining or contract administration for each organization studied. Each individual was interviewed and asked to respond to a common set of questions, as well as advance their comments on their own experiences. We sought, where possible, to interview more than one union and management respondent within each organization and were successful in all but Crown service management, which preferred to provide a single response.[31]

Exigencies of time and resources precluded our interviewing shop stewards, employees and departmental managers at workplace level. Our studies focus, therefore, on the higher echelons of industrial relations in

29 *Supra*, note 17. See also *Legislative Committee Debate on Bill 41*, Alberta Hansard, May 17, 1977, No 55 at 1388-1389.

30 AUPE estimates that it represents around 48,000 Crown employees.

31 Preliminary inquiries with management labour relations personnel indicated that there is some debate among government negotiators over the efficacy of s. 48(2) restrictions from management's point of view. In light of this, we view the "party line" nature of one single managerial response with some reservations.

these organizations. We acknowledge that the impact of s. 48 on the formal structures of collective agreements may diverge significantly from its impact on informal workplace behaviour and practices. Our plan is to expand the scope of our research into the latter.

In addition, we reviewed all current collective agreements in the two sectors, Alberta Labour Summaries of Negotiated Working Conditions in Alberta collective agreements, and all relevant reported and unreported decisions of the Alberta Public Service Employee Relations Board and the courts regarding section 48.

Hospitals

Two bargaining units at Calgary's two largest hospitals –Foothills, within the jurisdiction of PSERA, and Calgary General, within the jurisdiction of L.R.C. – were investigated. We examined the "nursing" bargaining unit encompassing at each hospital registered nurses, certified graduate nurses, and nursing instructors. Second, we examined the "general support services" unit, which includes at both hospitals a broad range of functions such as clerical, janitorial, cooking, laundry, dietary, laboratory testing, gardening, electronics, engineering, plumbing, metalworking, welding, carpentry, library and health technician support. We sought to determine the effect of s. 48 on collective bargaining at the Foothills hospital, which shares the same labour market, has a similar work process and is of roughly equivalent size as the Calgary General, which is covered by the "private sector" legislation, currently the *Labour Relations Code*. Under the "private sector" legislation, hospital workers enjoyed the right to strike until 1984 when the legislation was amended to substitute arbitration as the terminal step in dispute resolution. No items are exempted from the arbitrator's jurisdiction.

The "Nursing" Bargaining Unit

The impact of s. 48 on bargaining at the Foothills hospital can be compared with the Holmesian dog that failed to bark: the section was conspicuous by its almost complete irrelevance to the strategies of management and union negotiators. To understand why, we must review the history of collective bargaining at the two hospitals.

Calgary General presently employs approximately 1260 nurses. It has long formed part of the province-wide bargaining structure which encompasses the vast majority of unionised Albertan hospitals. Provincial bargaining operates as follows. On the employer's side is the Alberta

Hospital Association (AHA), a non-registered employers' organization within the meaning of both public and private labour legislation. Each member hospital, by means of a resolution of its Board, may authorize the Association to bargain, conclude and sign a collective agreement on its behalf. When a collective agreement has been signed, following the ratification procedure specified in the Association by-laws, the authorization expires. Similarly, each individual authorization, once given by a member to AHA, cannot be revoked until a collective agreement has been concluded, either by voluntary recognition or implementation of a compulsory binding arbitration award. The AHA draws planning and negotiating teams from associated hospitals. On the union side, nurses are represented by the United Nurses of Alberta (UNA). A master collective agreement is concluded at the provincial table, which all associated hospitals adopt as the collective agreement for their bargaining unit. Local conditions are negotiated for particular hospitals at the provincial table and are incorporated into the master agreement.

The Foothills hospital nurses' bargaining agent was first certified by the PSERB in 1979. The hospital currently employs approximately 1485 nurses. Initially, the hospital negotiated separately from the provincial structure because, at that time, it was thought that the PSERA precluded the AHA from concluding a collective agreement on behalf of the hospital. Nevertheless, the hospital's position throughout negotiations and in arbitration – the first agreement had to be settled by arbitration – was that the terms of the province wide, "private sector" nursing agreement should apply, with minor modifications. Moreover, the hospital engaged an officer of the AHA as one of its negotiators. The first agreement incorporated the provincial master agreement, with minor differences. At the first opportunity, Foothills joined the provincial bargaining structure and the 1980 collective agreement and all subsequent agreements have been settled at that level. Foothills management decided, after careful analysis, that the potential advantages of having the "shield" effect of s. 48 were outweighed by the advantages of bargaining provincially, namely the bureaucratic and financial efficiencies of having AHA undertake the bargaining; the protection against possible "whipsawing" if the hospital were to bargain alone; and the realization that Foothills shared the same labour market as several LRC Calgary hospitals and would have to match their benefits anyway.

No special arrangements based on its status as a PSERA hospital are made for Foothills in provincial bargaining. The procedure is for one master contract to be negotiated at the same table for both LRC and PSERA organisations within the legal ground rules set by the LRC. There is no separate set of negotiations conducted for Foothills under the rubric of PSERA. Union and management negotiators reported that s. 48 has never been used in planning or table interchange with respect

to Foothills: no special linkages or trade-offs are ever made on the basis of s. 48; the "shield" effect is never employed; and the usual "private sector" formulation of the duty to bargain in good faith is always applied, with full information and explanations on s. 48 items being furnished. In sum, Foothills is treated exactly as if it were a "private sector" hospital. This has meant, for example, that in 1982, Foothills adopted the arbitration award which resulted from special "back to work" legislation ending the lawful strike of "private sector" nurses.[32] That award incorporated items that almost certainly would have been non-arbitrable under PSERA, such as restrictions on the unfettered power of management to determine work scheduling.

Our investigation, therefore, confirms both Hypotheses 5 and 8. Labour market forces have induced Foothills Hospitals management to coordinate strategy with LRC hospitals under the AHA umbrella so that, for Foothills management, s. 48 is irrelevant. Consequently, the collective agreements at Foothills contain several negotiated protections on s. 48 items. While it cannot be known whether such protections would have been conceded by Foothills under a full-blown PSERA regime, two pieces of evidence support the view that the consolidation of PSERA and LRC bargaining under the AHA umbrella has enhanced the union's ability to negotiate s. 48 protections. First, respondents indicated that a number of Crown hospitals other than Foothills have attempted to persuade the LRC hospitals to resist on s. 48 issues, but have failed because of the vastly superior number of LRC hospitals in the bargaining coalition. Second, management of the University of Alberta Hospital, a Crown hospital which bargains outside the AHA umbrella, attempted to use s. 48 to resist the demand of its nurses, represented by the University of Alberta Staff Nurses Association, for a professional responsibility committee (PRC), a feature of the provincial agreement between the AHA and UNA However, the force of "coercive comparisons" eventually induced management to "fall into line" and concede a PRC.[33]

The nurses' experience, therefore, confirms Hypotheses 2, 5 and 8. There is a "tandem" effect, with the PSERA nurses riding the coat-tails of the LRC nurses, and indirectly benefitting from the latter's "bargaining capital", which derives from their right to strike (until 1984), and their surviving "strike culture" since 1984. In this sense, full collective bargaining has been the practice at Foothills, contrary to the underlying assumption of the PSERA and without difficulty in the eyes of Foothills

32 *Health Services Continuation Act,* S.A. 1982, c. 21. The Act expired Dec. 31, 1983.

33 This was incorporated into the collective agreement in April 1986.

management.[34] No loss of efficiency or flexibility is reported, nor any labour relations difficulties. Indeed, the view was expressed that Foothills should be formally incorporated into the LRC for consistency with the rest of the industry. This contradicts the implied assumption of the PSERA that inefficiencies would result at Crown hospitals in the absence of s. 48. Because of the irrelevance of s. 48 at Foothills, therefore, this part of our study discloses no supporting evidence on any of our hypotheses other than numbers 2, 5, and 8.

The "General Support Services" Bargaining Unit

This unit at Foothills comprises approximately 1800 employees, represented by Alberta Union of Provincial Employees (AUPE), Local 55. Collective bargaining takes place at province level, with five "public sector" hospitals, including Foothills, bargaining through the Alberta Hospitals Association on the employers side, and the AUPE on the workers' side. A master agreement is negotiated at this level and adopted by each hospital, with local conditions applicable to particular hospitals being bargained in it.

The equivalent unit at the Calgary General encompasses approximately 1200 employees, represented by Canadian Union of Public Employees, Local 8. Bargaining takes place through the AHA at provincial level for all "private sector" hospitals and Calgary General presently participates in it (although, for several years in the late 1980's, the Local insisted on bargaining its own collective agreements at hospital level).

Bargaining is coordinated informally on management's side between the Calgary General and the Foothills because the organisations share the same labour market and because of the power of "coercive comparisons". This is reflected in the close similarity between the provisions of the two collective agreements, not only in the wage rates for equivalent classifications but in the "management rights" areas encompassed by s. 48. Indeed, in some s. 48 areas, Foothills has greater protections than Calgary General. Moreover, both collective agreements are remarkably similar to the provincial agreement covering the "general support unit" at private sector hospitals which is negotiated

34 The Agreement covering registered nurses at Foothills contains numerous restrictions on management rights in s. 48(2) issues; e.g. art. 14 requires job posting and preference to bargaining unit members in the selection process. Promotion and transfer, etc. are according to seniority if the candidate can do the job. Art. 20 provides leaves as of *right*, art. 13 permits employees to respond to written performance evaluations, art. 34 prevents assignment of employees to work alone on a ward or unit and art. 36 sets up a joint union/management professional responsibility committee for patient-care issues.

under the *Labour Relations Code,* again revealing the strength of "coercive comparisons" in the labour market.

The Industrial Relations Manager at Foothills reported, and union respondents confirmed, that, during the currency of collective agreements, discussions take place constantly with Union officers, including outside business agents and the Local's personnel, on *all* aspects of the labour process, even if they are not regulated by the collective agreement. Moreover, the Industrial Relations Manager emphasised that he regards full, ongoing communication as essential for good employer-employee relations. Accordingly, he informs the Union of all management's plans at the earliest possible opportunity, even though the collective agreement does not require it. Nevertheless, the discussions that take place are more in the nature of "consultation" rather than bargaining *stricto sensu.* Thus, the Union has never threatened unlawful job action in these discussions, nor has it ever offered to drop a grievance, concede on the meaning of disputed contract language, or promise to co-operate in general "tightening-up" in exchange for a management concession on a s. 48 "management right".

Finally, the Industrial Relations Manager had no knowledge of any arrangements being "bargained" by supervisors and work groups below the level of his office, although he stated that he would not rule them out, given the large size of the bargaining unit. In his view, s. 48 has had no effect on the daily operations of Foothills. In particular, he reported that there have been no job dissatisfaction or morale or productivity problems that could discernibly be related to s. 48. He stated that the Foothills policy in negotiations at province level is simply to bargain in the normal way across the entire spectrum of union demands, as if s. 48 did not exist.

Thus, as with the nurses, section 48 is irrelevant for the Foothills "general service" unit, confirming hypotheticals 2, 5, and 8, and providing no support for the other hypotheses.

Crown Service Bargaining

The employees of the Alberta government comprise a single bargaining unit represented by the Alberta Union of Provincial Employees, which negotiates a service-wide master agreement along

with component collective agreements for "local issues" in twelve occupational groupings across the Crown service.[35]

Hypothesis 1 was refuted in part. While union respondents indicated that, out of futility, they do withhold from the bargaining table *low priority s. 48 issues,* such issues are brought to the table when they are of sufficient importance to the membership. The union realizes that it must be seen to make its best effort on high priority issues, even if it fails to win concessions. It realizes, too, that bargaining pressure may extract some concessions on s. 48 issues.

This is illustrated by the case of pensions. For some of the Crown Service locals (e.g. Local 6, Social Workers), pensions have been of relatively low priority and, accordingly, not brought to the table by the union. In contrast, for Local 3 (corrections officers), pensions have come to have increasing importance to the point where, in 1990, the issue was one of the bargaining issues that led to the unlawful province-wide strike of corrections officers.[36] The corrections officers' experience confirms the validity of Hypotheses 2 and 3 that unions will bring to the table s. 48 items that are of great importance to the membership. Nevertheless, there is little evidence of purely "information" bargaining (Hypothesis 3) in s. 48 matters that are not of high priority to the union.

Hypothesis 4 was confirmed and its effect is discussed below along with Hypotheses 9 and 10.

The evidence on Hypothesis 5 was conflicting. The management respondent indicated that bargaining on s. 48 issues is undertaken willingly by management where there is as mutual interest in problem-solving. In contrast, union respondents stated that management is unwilling, as a matter of principle, to make concessions on s. 48 issues or to engage in "integrative" bargaining on such issues.

Regarding hypothetical 6, management and union respondents confirmed that management exploits substantially the "shield" effect of s. 48. Both sides perceived a substantial reduction in union bargaining power in s. 48 items. The weakening of union bargaining power is corroborated, somewhat, by two other pieces of evidence. First, the Crown Service master and component agreements contain significantly fewer restrictions on s. 48 "management rights" than the collective

35 The twelve occupational groups are:(1) Administrative Support Services, (2) Administrative and Program Services, (3) Correctional and Regulatory Services, (4) Trades and Related Services, (5) Natural Resources Conservation, (6) Social Service, (7) Institutional and Patient Support Services, (8) Educational Services, (9) Health and Therapy Support, (10) Medical and Rehabilitative Services, (11) General and Field Support Services, (12) Technical Services.

36 At the time of writing, the parties are still negotiating pensions and the illegal strike is over.

agreements of the Province's unionized sector as a whole.[37] Secondly, in the Saskatchewan Crown Service, for which there are no significant bargaining restrictions, considerably more extensive restrictions on "management rights" have been negotiated. While not conclusive of the "shield" effect of s. 48, this evidence lends some support to it.

Our findings were inconclusive on whether s. 48 may have the effect of indirectly eroding the union's bargaining power on arbitrable items as per Hypothesis 7. While some union respondents speculated their willingness to trade-off arbitrable items in return for s. 48 concessions, others indicated that this would be fruitless in view of management's traditional intransigence on s. 48 items and dangerous if management were to rescind the concession in the next round of bargaining. However, no trading-off across the boundaries of s. 48 has yet occurred.

Regarding Hypothesis 8, the issue of co-ordinated negotiating strategies with private sector employers does not arise with Crown Service bargaining. Nevertheless, management negotiators eye keenly private sector settlements for the purpose of comparisons, as noted above.

As regards the existence of informal "bargaining" on s. 48 items, hypothetical 13 was validated only in so far as management is prepared to *consult* with the union over s. 48 matters during the term of the collective agreement. This consultation usually occurs at *ad hoc* meetings, but sometimes s. 48 issues will also be discussed informally in the regular grievance process, short of adjudication, but again on an informal basis. Mutually agreeable understandings often arise from this consultation, but both sides emphasized that there are no threats, inducements or horse-trading in these discussions as would normally typify a traditional "bargaining" format. For example, although the assignment of social workers' case-loads is a reserved management right under the collective agreement as well as a s. 48 exclusion, the union employees a "joint consultation assistant" to negotiate an individual's case load with management on an *ad hoc* basis, and an informal arrangement has been reached that allows social workers time-off in return for unpaid overload work. This arrangement is understood not to be legally enforceable. The union regards this arrangement as being inferior to collective agreement regulation, but considers it preferable to unfettered managerial discretion. Management regards such arrangements as useful in defusing employees' complaints about work load, while avoiding the perceived inflexibility of collective agreement regulation.

37 Alberta Labour, *Negotiated Working Conditions in Alberta Collective Agreements, 1989* (Planning & Research Branch, Feb. 1989). See tables 13-15, 18-22, 26-27, 115-131.

Hypothesis 14 was neither refuted nor confirmed, with both sides acknowledging the likelihood of workplace level custom and practice existing, but being unable (or unwilling) to pinpoint examples. The authors plan to investigate this possibility further by conducting shop-floor level interviews at a later date.

Hypotheticals 9 and 10, concerning the possible injection of legalism into the negotiation process, were confirmed. Regarding hypothetical 9, both union and management expressed their dissatisfaction with having to expend resources on resolving questions of interpretation under s. 48, and especially with the uncertainty and delays which this creates for negotiators. For example, the PSERB has done a *volte face* on the issue of whether an arbitrator can consider a management rights clause that purports to assert management prerogative in matters excluded by s. 48(2). The union's contention that such a management rights clause would offend s. 48 was first accepted by the PSERB but later ruled arbitral. Meanwhile, the AUPE local at Lethbridge Community College has been waiting three years for a judicial ruling on the arbitrability of such a clause.

Regarding hypothetical 10, we found that unions are induced to play the game of "legal hairsplitting" as one of the few available means of protecting their members' interests in s. 48 areas, despite their professed aversion to legalism. The above mentioned "collateral issues" doctrine has encouraged unions to bring ostensibly s. 48 matters to the table (confirming Hypothesis 4) but with variable success. For example, while a demand to decrease the *length* of the probationary period has been ruled arbitrable, the question of whether or not a probationary period should govern a particular position[38] was ruled non-arbitrable. Moreover, a demand for seniority to govern lay-off and re-call within a particular job classification has been ruled arbitrable, but a demand that the more senior employee laid-off should be entitled to bump junior employees outside a classification or geographic location has been ruled non-arbitrable.[39] As well, a proposal for retraining or redeployment of a current employee whose position is about to be abolished has been held arbitrable, whereas it is non-arbitrable to demand in-service re-training for employees whose positions have already been abolished.[40] Finally, and perhaps most controversially, pay equity proposals have been ruled non-arbitrable.[41] Although it is impossible to measure accurately the extent to

38 *Supra,* note 20.

39 *Supra,* note 17.

40 *Supra,* note 17 at 19-20 contrasting *AUPE* v. *Crown in Right of Alberta.* Unreported, PSERB Reference. 140-001-502, Dec. 1980, article 15.

41 *AUPE* v. *Crown in Right of Alberta.* Unreported, PSERB References 140003-502; 140-015-502; 140-019-502; 140-021-502; 140-023-502 at 18-19. For a critique of this decision see Ian B. McKenna, "Pay Equity and Arbitral Restrictions under the Public Service Employee Relations Act" (1990) 28:3 Alta. Law Rev.

which this climate of sometimes esoteric legalism has eroded a spirit of collaborative problem-solving, the recent illegal strikes of social workers and corrections officers corroborates the union's complaints about the frustration generated among its members by the section as a whole.

As regards the impact of s. 48 on the union's internal affairs, union respondents confirmed Hypothesis 11 that consistent failure to win protection on s. 48 issues has undermined members' confidence in the union.[42] However, the precise measure of this is difficult, if not impossible to assess. The fact that Crown employees comprise a single bargaining unit for certification purposes renders unlikely the prospect of decertification by a disgruntled membership. However, the danger may be more real for AUPE locals outside the Government itself. Management's power under s. 48 to create classifications and organize the work force has led to an explosion of employees classified as casual, temporary and probationary for whom the AUPE has been unable to negotiate protections equal to those enjoyed by regular employees. As these "irregular" employees expand in numbers, they may resent the payment of dues for inferior protection and initiate moves for decertification. However, there was no direct evidence on hypothetical 12 that s. 48 has diminished AUPE's appeal to the non-organized. Yet, it is surely unlikely that employees would want to join a union which cannot negotiate meaningful protections for them.

With respect to Hypothesis 15, s. 48 has plainly had the effect of producing less extensive restrictions on "management rights" items under the Crown master and subsidiary agreements than exist under private sector collective agreements in the province. This belies the government's assertion that one of the goals of the legislation is to achieve greater parity between the public and private sectors.[43]

CONCLUSION

Our primary conclusion is that the effects of s. 48 assumed by Swan and Dickson C.J. are not universal. Power relations, market forces and shared understandings in Crown hospitals have overriden the anticipated effect of the law.[44] In Crown Service bargaining, however, s. 48 has

42 See e.g. social workers' publicly-expressed discontent with AUPE when the union representative signed a tentative agreement which many members believed did not address the issues which provoked the unlawful strike. *Lethbridge Herald* (Monday, June 11, 1990) 1 (C.P. Staff).

43 *Supra,* note 37.

44 This supports O. Kahn-Freund's view in *Labour and the Law* (Stevens, 1972) at 3 that the law plays a relatively minor role in labour relations. See also M. Mellish, L. Dickens and J. Lloyd, *Industrial Relations and the Limits of the Law: The Industrial Relations Effects of the Industrial Relations Act* (Blackwell, 1975).

served to buttress traditional management rights that pre-date the PSERA. Management's defence of such rights, facilitated by s. 48, has contributed to frustrating legalism, strained bargaining relationships within certain Crown locals, and a blunting of union power within the formal bargaining system. Further research is required to determine the nature and effect of informal workplace responses. Finally, the recent unlawful strikes of social workers and corrections officers are evidence of growing pressure for change in the legislation.

Des restrictions à l'arbitrage dans les services publics en Alberta

Nous avons vérifié plusieurs hypothèses se rapportant à l'influence que peut avoir l'article 48 de la *Loi sur les relations de travail dans la fonction publique* en Alberta en regard du processus de négociation collective qui rend non-arbitrable plusieurs sujets traitant des «droits de la direction». L'étude compare les rapports de négociations collectives dans deux unités d'employés d'hôpitaux, les infirmières et le personnel de soutien, à l'hôpital Foothills de Calgary, qui tombent sous la *Loi des relations de travail dans la fonction publique* et dans deux unités à l'hôpital général de la même ville où s'applique le *Code du travail* de l'Alberta qui n'impose aucune restriction sur les matières arbitrables. Nous avons aussi examiné ce qui se produit dans les services gouvernementaux qui sont du ressort de l'article 48 de la première loi.

Voici ce que nous avons constaté. Les syndicats continuent à présenter aux tables de négociation les sujets énumérés à l'article 48, même s'ils ne sont pas susceptibles de faire l'objet d'arbitrage et cela pour plusieurs motifs. Il arrive que les employeurs fassent parfois des concessions sur ces points à cause de la force contraignante des comparaisons avec le marché du travail syndiqué. D'autre part, les employeurs peuvent recourir à l'article 48 en s'en servant comme d'un bouclier pour résister au pouvoir des syndicats. Les incertitudes concernant l'interprétation de cet article ont aussi eu un effet de «gel» sur le règlement consensuel des difficultés. Les syndicats se trouvent ainsi incités à s'engager dans un processus consistant à couper les cheveux en quatre pour protéger leurs intérêts. On note la présence d'ententes informelles entre les syndicats et les employeurs et possiblement, entre les contremaîtres et des groupes de travailleurs à l'intérieur des différents services sur des points se rapportant à l'article 48, même si ceux-ci sont considérés comme des «droits exclusifs de la direction» dans la convention collective, afin d'obtenir la collaboration des employés dans le cours normal du travail.

Bon nombre de nos hypothèses, toutefois, n'ont été ni confirmées ni infirmées par l'investigation, d'où la nécessité d'études ultérieures qui, il faut l'espérer, projetteront davantage de lumière sur ce sujet.