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GOVERNMENT INTERVENTION IN COLLECTIVE BARGAINING DISPUTES: THE CHANGING LANDSCAPE

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Government Intervention In Collective Bargaining Disputes:
The Changing Landscape

When I was asked to participate on this panel, I was told that the topic would be "The Future of Labour Arbitration in Canada". I replied that I would be pleased to participate, but wanted to focus not on *grievance* or *rights* arbitration, but rather on *interest* arbitration; and more particularly, on the declining use by Canadian governments of high-level third-party intervention in collective bargaining disputes affecting the public interest, and what I perceive to be the declining confidence of at least some Canadian governments in the deployment and outcomes of such intervention.

I first became active in labour relations in 1970. Accordingly, while I don't much like this statistic, I have been a close observer and participant in the field for about 40 years -- the great majority of that time as a neutral in one capacity or another.

For the most part, my work in the labour relations field has been concentrated in western Canada; and much of this paper draws on events in that region of our country. However, there is evidence to suggest that my general thesis is applicable across a range of Canadian jurisdictions.

Throughout the 1970's, 80's and even into the 90's, there was quite heavy reliance by governments on high-level third-party intervention in the resolution of difficult labour disputes in the public sector, and at times in the private sector as well where the public interest was seen to be engaged. By high-level third-party intervention, I mean the appointment of private-practitioners as Special Mediators, Industrial Inquiry Commissioners or Conciliation Commissioners (the terminology varies across jurisdictions), whose role was to seek to bring the parties to a

mediated resolution of the particular dispute, and, if a settlement was not reached by the usual processes of mediation, to prepare written findings and detailed recommendations which would be made public with resulting moral suasion being brought to bear on the parties.

If a settlement was not reached by that means, and if legislation was passed prohibiting or ending a work stoppage, the norm was to put the dispute to some form of arbitration, the preferred model in latter years being mediation-arbitration.

And when *that* was done, the arbitrator or mediator-arbitrator would typically not be provided with any deliberative guidelines. That is to say, the *ad hoc* legislation under which the arbitrator or mediator-arbitrator was appointed would typically not provide any criteria to which the mediator-arbitrator was required to adhere in making the ultimate decision.

Given that legislative vacuum, so to speak, arbitrators created their own doctrinal approaches. Two of the dominant arbitral doctrines that were developed in the 70's and 80's were the "replication theory" and the "ability [or inability] to pay" doctrine.

As you know, the "replication theory" holds that an interest arbitrator should seek to replicate the agreement which the parties themselves would have reached by a process of free collective bargaining, including by the prosecution or continued prosecution of a strike or a lockout, had the Legislature or Parliament not intervened. And as you also know, the "ability to pay doctrine", which applies only to the public sector, holds that a public sector employer should not be permitted to plead an inability to pay normative wage increases, particularly as established by the unionized private and public sectors in the relevant community.

Briefly, the "replication theory" is attractive to arbitrators because it is seen as a proxy for free collective bargaining; that is to say, the theory draws its essence from traditional collective-bargaining values.

Also briefly, the rationale for the "ability to pay doctrine", at least in part, is that governments have an unfettered ability to tax, and should do so to the extent necessary to treat public sector employees fairly in relation to appropriate unionized comparators.

But recently, governments have grown distrustful of the "replication theory" as implemented by labour relations professionals, and regard that theory as being artificial in some of its applications. And governments have also started to resile from the increasing-artificiality of a supposed unlimited taxing power, which is the foundation of the "ability to pay" doctrine.

The fact is that in some of our more sensitive work settings, both in the private and the public sectors, there never has been free collective bargaining according to the true definition of that phrase: which is "collective bargaining, including the right to strike or lock out, with a minimum of third-party intervention; and in particular, a minimum of senior governmental intervention".

Hospitals, public schools, our ferry system in B.C., the national railways, the west coast grain terminals and the west coast longshore industry are all examples of the point just made. In those settings, successive governments, both federal and provincial, have made it clear, by their serial and substantial interventions, that free collective bargaining, as defined above, will not be allowed. So if that's the case, what's to replicate?

But quite apart from doctrinal analysis, today's governments are simply uncomfortable with the idea that unaccountable labour relations professionals, acting as high-profile mediators or as interest arbitrators, should have the power to disregard public policies like wage-restraint programs, or should effectively be given a power of decision over major parts of the government's budget.

One of the early hints that governments were becoming uncomfortable with leaving interest arbitrators to their own devices was the 1995 federal legislation that ended two national railway strikes, one in the public sector (CNR) and one in the private sector (CPR): see *Maintenance of Railway Operations Act,* 1995, S.C. 1995, c. 6.

That legislation ended the strikes by sending the underlying disputes to mediation-arbitration, but unlike in the past, the 1995 legislation prescribed criteria by which the mediator-arbitrators must be guided in the making of an award:

> The [mediator-arbitrator] shall be guided by the need for terms and conditions of employment that are consistent with the economic viability and competitiveness of a coast-to-coast rail system in both the short and the long term, taking into account the importance of good labour-management relations.

I was not involved in the mediation-arbitrations which occurred under that legislation. However, I have looked at the awards and spoken to one of the participants. It seems clear that the awards made certain structural changes to the railway collective agreements that would not likely have occurred in the absence of the statutory criteria.

Two years later, in 1997, there was another piece of federal legislation that did essentially the same thing. It was the *Postal Services Continuation Act*, 1997, S.C. 1997, c. 34. By that legislation, a labour dispute at Canada Post Corporation was brought to an end, with mediation-arbitration being deployed as the ADR model, but with the mediator-arbitrator being constrained as follows:

> The mediator-arbitrator shall be guided by the need for terms and conditions of employment that are consistent with the *Canada Post Corporation Act* and the viability and financial stability of Canada Post, taking into account
>
> (a) that the Canada Post Corporation must, without recourse to undue increases in postal rates,
>
> (i) operate efficiently,
> (ii) improve productivity, and
> (iii) meet acceptable standards of service; and
>
> (b) the importance of good labour-management relations between the Canada Post Corporation and the union.

This legislative shift from the "replication model" to the "adjudicative model" of interest arbitration[1] was picked up in British Columbia in the 2003 legislation ending the strike in B.C.'s coastal forest industry, by putting the issues in dispute to binding mediation-arbitration. Obviously drawing on the above-cited 1995 federal railway legislation, section 7 of the *Coastal Forest Industry Dispute Settlement Act*, SBC 2003, c. 103 required the mediator-arbitrator to consider:

- the need for terms and conditions of employment that are consistent with the viability and competitiveness of the coastal forest industry in both the short and the long term;
- the importance of good labour-management relations in the coastal forest industry; and
- the interests of the employees and their trade unions.

As the mediator-arbitrator under that legislation, I commented as follows on the factors listed in section 7:

> The factors listed in section 7 as requiring consideration recognize both the conflicts of interest and the interdependence which concurrently and inherently exist between employers, on the one hand, and their employees and certified bargaining agents, on the other hand. It is clear that the coastal forest industry is presently in tough financial shape; that the industry faces serous competitive challenges; that the industry's problems cannot be characterized as ordinary cyclical problems which will resolve themselves in due courses. Broadly speaking, a healthy and competitive industry is in the interests of the employees. Steps must be taken toward that end. As the IWA rightly states, a good many of the industry's challenges are external to the collective agreement. But within the frame of the collective agreement, certain flexibilities and cost adjustments must be accepted as inevitable. Some of these will be hard for the employees to accept, but their acceptance is required for the rejuvenation of an industry which, despite its present malaise, remains a predominant (and potentially even more important)

> employment provider and economic engine for coastal British Columbia. At the same time, a healthy and competitive industry requires workplaces where the proper value is placed on good labour-management relations, with a high-morale work force whose interests are genuinely taken into account. The legislation also requires that I consider the institutional interests of the IWA as the workers' representative. I will further comment on the operation of Section 7 of the Act while addressing certain of the revisions I am making to the parties' collective agreement.

I can tell you that the application of the above-quoted statutory criteria or factors resulted in significant structural change to the coastal forest industry collective agreements, which likely would not otherwise have occurred and which endures to this day.

Even more recent examples of legislatively-imposed mediation-arbitration with criteria are two Ontario statutes which, in 2008, ended the Toronto Transit strike (2008) and the CUPE strike at York University (2009): see *Toronto Public Transit Service Resumption Act*, 2008, S.O. 2008, c. 4 (the *TPTSRA*) and *York University Labour Disputes Resolution Act*, 2009, S.O. 2009, c. 1 (the *YULDRA*). Those two statutes, which were identical in this respect, fixed six criteria for the mediator-arbitrator's decision. For present purposes, I will reproduce only three of the criteria (italics added):

- *The employer's* ability to pay in light of *its* fiscal situation;

- the extent to which services may have to be reduced, in light of the award, *if current funding and taxation levels are not increased*; and
- the economic situation in Ontario and the Greater Toronto area. (Note: The TPTSRA said "…in Ontario and the City of Toronto".)

In the *TPTSRA*, the "employer" was defined in s. 1 as meaning "the Toronto Transit Commission", while in the *YULDRA*, the "employer" was defined in s. 1 as meaning "York University". Accordingly, it was not open to a mediator-arbitrator to treat either the City of Toronto (*TPTSRA*) or the Ontario government (YULDRA) as effectively being the employer for purposes of determining "the employer's ability to pay" in the light of "its" fiscal circumstances. And as a general observation, the three above-quoted criteria, particularly the first two, effectively set aside, for purposes of those disputes, the arbitral doctrine regarding "ability to pay". Presumably, this was done because the Ontario government believed that the public interest required it; and put more directly, because the Ontario government was not going to take a chance, so to speak, on mainstream arbitral doctrines.

In British Columbia, where I come from, this modern governmental distrust of high-level third-party involvement in major labour disputes, both public and private, has been evidenced in other ways as well.

As I said near the outset of this paper, there was a time when Industrial Inquiry Commissioners, Special Mediators, Conciliation Commissioners -- whose job is to get the parties to a settlement, including by detailed public recommendations if necessary -- were fairly frequently appointed in major labour disputes by Ministers of Labour in both the public and the private sectors. But that

has dramatically waned. Governments have no difficulty with the idea of what I will call "ordinary mediation" or "ordinary conciliation" in public sector labour disputes -- e.g., where a labour-ministry mediator or conciliator seeks to bring the parties to an agreement, but is not empowered or expected to make public recommendations for settlement where agreement proves elusive. From government's perspective, the problem lies in empowering a higher-level individual to make public recommendations for settlement -- someone whose reputation in the community will add substantial weight to the recommendations -- particularly where the dispute in question is one that directly or indirectly may have a substantial impact on the provincial or federal budget, and particularly where the individual is likely to be steeped in the traditional labour relations doctrines that were developed in past years for the resolution of collective bargaining differences. Very simply, they just don't trust the system.

Let me give you these British Columbia statistics. Between 1975 and 1985 (10 years) there were 41 Industrial Inquiry Commissions appointed under the BC *Labour Relations Code*, R.S.B.C. 1996, c. 244. Between 1986 and 2005 (20 years), there were 17. And since 2005, there has been one, in 2009, upon which I comment below.

I don't have corresponding statistics for the federal jurisdiction, but I believe the trend is the same. I can recall, years back, being appointed a couple times as a federal Conciliation Commissioner in west coast grain disputes; once as a mediator-arbitrator in a west coast longshore dispute; and a couple of times as a Special Mediator and as a Conciliation Commissioner in federally-regulated mining disputes in the North West Territory. I know Vince Ready, Mark Thompson and a few other British Columbians had similar appointments going back some years. But that has decidedly decreased.

I said above that there has been one IIC in BC since 2005. It was in 2009, just last year, in the aftermath of provincial legislation that ended a paramedics' strike against our Emergency Health Services Commission (the provincial ambulance service), by imposing on the parties a one-year extension to their former collective agreement.

Following passage of that legislation, the B.C. Minister of Labour announced the appointment of an IIC, not for the purpose of helping settle the particular labour dispute, which had been resolved by the imposition of the one-year extension to the former collective agreement, but rather with terms of reference that were more forward-looking, calling for a longer-term vision. More particularly, the terms of reference called upon the IIC to prepare:

> …a non-binding report for the Minister of Labour that provides options to the Province for an appropriate collective bargaining structure that supports the efficient and effective delivery of ambulance services through different service delivery and operational models. The collective bargaining structure must support the means for effective resolution of collective bargaining impasses. Possible service delivery and operational models that the [IIC] should consider and evaluate in relation to collective bargaining structure include the following:
>
> - The delivery of ambulance services by way of an independent commission under the Emergency and Health Services Act (status quo);

- The transfer of ambulance services to the Health Sector as either an independent commission or integrated into an existing service delivery structure in accordance with the Health Authorities Act; or

- Service redesign to facilitate greater alignment with Municipal fire services.

The IIC's mandate was also to investigate and submit a report on the following:

- Staff recruitment, training and retention;
- Staff workload and occupational health and safety issues;
- Deployment strategies in comparison with other Canadian ambulance service delivery models;
- The models and rates of total compensation for ambulance paramedics and dispatchers in other jurisdictions in Canada; and
- Any other related matter referred to the [IIC] by mutual agreement of the parties.

But here is the interesting thing. The person appointed by the Minister of Labour as the IIC was Chris Trumpy. Mr. Trumpy had had a distinguished career as a provincial public servant under a number of different governments, including as a highly-regarded Deputy Minister of Finance, which is the position he

occupied immediately prior to his retirement a few years ago. However, as Mr. Trumpy will be the first to say, he had had no prior experience as a labour relations neutral, or really in labour relations at all.

Mr. Trumpy retained Alan Black and Delayne Sartison (well-known labour-side and employer-side lawyers, respectively) to give him confidential labour relations advice. Nevertheless, the ambulance paramedics' union, CUPE Local 873, boycotted the IIC proceeding; and then sought by judicial review to set aside the IIC's report and recommendations to the Minister. In support of the application for judicial review, CUPE filed an affidavit by Professor Joseph Rose, a Professor of Industrial Relations at Queen's University. In the affidavit, Professor Rose gave lengthy opinion evidence about the need, as he saw it, for persons appointed as IIC's to be not only impartial and independent, but also as having a known and recognizable body of experience, and an acknowledged reputation, as senior labour relations neutrals -- all of those attributes being necessary to enhance the probability that the appointment and any resulting recommendations will be acceptable to the affected parties.

That was really an attempt to extend the so-called "retired judges" case (*CUPE v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539) to the IIC setting. (As will be recalled, the Supreme Court of Canada held in "retired judges" that under the Ontario legislation requiring that arbitration be utilized as the means of resolving hospital collective-bargaining disputes, the Minister's appointment of an arbitrator [if such is needed] must be of someone who is not only independent and impartial [as retired judges are presumed to be], but also who possesses appropriate labour relations experience and expertise, sufficient to be recognized by the labour relations community as someone generally acceptable to both labour and management. Appointments by the Minister not satisfying that implied requirement were found to be "patently unreasonable".)

This attempt to extend "retired judges" to the IIC setting was rejected by the Supreme Court of British Columbia: *Ambulance Paramedics of British Columbia v. British Columbia (Attorney General)*, [2010] B.C.J. No. 782. Briefly, the court held that judicial review only lies where there is a decision or order by a statutory body; and that non-binding recommendations by an IIC to government do not comprise a decision or order. This result was unsurprising, given prior B.C. authority holding that relief by way of *certiorari* under the B.C. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 "…is available only in the case of a decision or order, and not in the case of recommendations" (para. 50): see *UTU Locals 1778 & 1923 v. British Columbia Rail Ltd.* (1992) 67 B.C.L.R. (2d) 112 [BCCA].[2]

But that is not really the present point: which is simply that in the most recent appointment of an IIC under the B.C. *Labour Relations Code*, the Minister of Labour appointed someone with no prior labour relations experience. As noted above, the IIC engaged experienced labour-side and management-side lawyers as advisors; but the IIC was himself inexpert and inexperienced at all in labour relations or collective bargaining.

Now, you might think that such a thing is peculiar to the provincial jurisdiction in British Columbia, but not so. There was a similar occurrence in the federal jurisdiction right in the midst of the judicial review proceeding respecting the appointment in B.C. of Mr. Trumpy.

As you know, the normal course in a federal labour dispute that is not resolved is for one of the parties to file a Notice of Dispute with the Minister of Labour, who then has 14 days to appoint either a conciliation officer or a conciliation commissioner or a conciliation board, or to advise that she is taking

none of those steps; and depending on what the Minister does, or says she won't do, the clock starts ticking toward lawful strike or lockout action.

As some of you also will know, collective bargaining in the west coast longshore industry (federal undertaking) is conducted for the employers by the B.C. Maritime Employers Association, and for the affected local unions by the ILWU-Canada, together with the ILWU Local 514 on behalf of longshore foremen.

The most recent collective agreements between the BCMEA, on the one hand, and the ILWU-Canada and Local 514, on the other, were set to expire on March 31, 2010. As that date was approaching, it was clear that the negotiations for renewal collective agreements were not likely to produce early settlements. Those negotiations are closely watched by the federal government because of their potential impact on the Asia Pacific Gateway strategy. And indeed, in mid-March, about 2 weeks prior to the expiry of the collective agreements, the federal Minister of Labour, without any party having filed a Notice of Dispute, reached into section 105 of the Canada Labour Code, which empowers the Minister at any time to appoint a "mediator" (as distinct from a conciliation officer, conciliation commissioner or conciliation board). The Minister appointed two co-mediators in the persons of Ted Hughes and John Rooney. John is a senior member of the federal conciliation service, and has a labour relations background. But not so Ted Hughes, who some of you will know by reputation. Ted was a superior court judge in Saskatchewan back in the 60's and 70's. He went to B.C. in the 70's to serve as the province's Deputy Attorney General, and upon retirement was appointed by the B.C Legislature as the Conflicts Commissioner, a position he occupied with great distinction for some years before retiring once again. That is only a partial resume of someone who is a very distinguished Canadian; but who,

by his own acknowledgement, I'm sure, lacks meaningful experience in labour relations.

So here again we have evidence of a Canadian government looking outside the community of experienced labour relations neutrals when looking for advice and assistance in connection with labour disputes affecting the public interest.

Returning to the British Columbia provincial jurisdiction, there is further and perhaps more dramatic evidence of the government being unwilling to put the fate of public funding into the hands of the community of recognized labour relations neutrals; or for that matter, any arbitrator or mediator-arbitrator at all.

Since 2001, there have been six instances where the B.C. government has ended a public sector bargaining dispute by actually imposing, by legislation, the terms and conditions of the renewal collective agreement:

- *Greater Vancouver Transit Services Settlement Act*, 2001
- *Health Care Services Collective Agreement Act*, 2002
- *Education Services Collective Agreement Act*, 2002
- *Health Sector (Facilities Sub sector) Collective Agreement Act*, 2004
- *Crown Counsel Agreement Continuation Act*, 2005
- *Ambulance Services Collective Agreement Act*, 2009

The *Crown Counsel Agreement Continuation Act*, 2005, is especially noteworthy. The background to that Act was as follows. The *Crown Counsel Act* R.S.B.C. 1996 c. 87, established the Crown Counsel Association (the CCA) as the

bargaining agent for Crown Counsel, authorized to enter into Agreements with the government respecting the salaries, hours of work and other working conditions of Crown Counsel. In the 1998-2003 Agreement between the CCA and the government, it was agreed that for the next following Agreement, if a bargaining impasse was reached, either party could refer the dispute to a three-member Dispute Resolution Panel (the Panel) for recommendations. It was further agreed that the Attorney General, on behalf of the government, could reject the recommendations of the Panel by written notice to the parties within 21 days of the receipt by the parties of the recommendations; but that if the Attorney General did not reject the recommendations of the Panel within the 21-day period, then the recommendations would be binding. Lastly, it was agreed that if the Attorney General *did* reject the recommendations within the 21-day period, he must lay the Panel's recommendations before the Legislative Assembly together with a "written reasoned response" to the recommendations - that is to say, with a reasoned expression of why he was rejecting the recommendations.

There was a bargaining impasse in 2003. The matter was referred by one of the parties to the Panel. The Panel published a report and recommendations which the Attorney General rejected. In due course, the Attorney General laid his "written reasoned response" before the Legislative Assembly.

The CCA filed a grievance under its Agreement with the government alleging that the Attorney General's written response, despite its length, was not a "reasoned response" within the true meaning of the parties' Agreement. In a lengthy award, the duly-appointed arbitrator agreed with the CCA. By way of remedy, the arbitrator set aside the Attorney General's rejection of the Panel's recommendations, and declared that the renewal Agreement between the parties included all of the Panel's recommendations. See *Government of B.C. -and- CCA*,

February 18, 2005 (D.P. Jones, Q.C.). Those recommendations included salary levels that were much higher than the government had proposed to the Panel.

The government's response to that award was the above-cited *Crown Counsel Agreement Continuation Act*, 2005. Among other things, the *Act* set aside the Panel's recommendations, and imposed a salary range of the government's own making.

Against all of that background, let me make this broad observation (which may seem to be unrelated, but really isn't): Over the four decades that I have been a witness to Canadian collective bargaining, I have seen the slow evolution and growth, not without difficulty or exception along the way (and even today), in what might be called dynamic collective bargaining: by which I mean collective bargaining where each side accepts the necessity of coming to grips with the issues that the other side has brought to the table for discussion. I can recall the days, particularly in the 1970's and 1980's, when anything brought to the table by the employer was labeled by the union as a concession, and dismissed on that account; and when employers were putting their issues on the table, not because they thought they would get anywhere with them, but for strategic reasons: the idea being that they would at least have things to drop or abandon as the bargaining wore on, hopefully as an enticement to the union to do the same thing.

But I have seen that situation change. In the private sector, the change has mostly been due to raw economics. In the public sector, the change has likewise been due, in some part, to the recognition of an altered economic environment; but it has been due as well, I think, to governments making it clear that yesteryear's assumptions are no longer current. No longer can public sector unions confidently presume yesteryear's collective-bargaining progression: from direct bargaining to "ordinary" mediation to more "senior" mediation to unbridled interest arbitration.

And after some substantial resistance for awhile, most public sector unions have come to understand the new reality. The result has been an injection of a new discipline into collective bargaining, where hard choices are being made at the bargaining table, rather than being downloaded to third parties.

There is much recent evidence of this new reality in my home province of British Columbia. Many of B.C.'s major public sector collective agreements were due to expire on March 31 of this year. These included the collective agreement between the government and the B.C. Government Employers Union; and the collective agreements between the Health Employers Association of British Columbia and the B.C. Nurses Union and the Hospital Employees Union. All of those unions are large, strong and sophisticated. In every case, new collective agreements were reached prior to the March 31 expiry date, and what is more, on a net-zero basis (except in one instance where a compelling recruitment/retention agreement could be made out), which was the previously-announced government "mandate".

I conclude by returning to the theme of this panel: the future of labour arbitration in Canada -- the focus of this paper being interest arbitration.

Interestingly, as I was reaching this point in the preparation of this paper, I learned of the very recent award (October 5, 2010) by Martin Teplitsky, Q.C. in *University of Toronto -and- Faculty Association*. In that award, the arbitrator declined to accord any relevance to the *Public Sector Compensation Restraint to Protect Public Services Act*, 2010 (which was not strictly applicable to the dispute) or to companion government policies, declaring that he would not be a "minion of government" The arbitrator then adopted the traditional arbitral rejection of ability-to-pay arguments (describing the above-cited legislation as "…a clear case of either requiring or asking public sector employees to subsidize the public

because the public services benefit the public as a whole", opining that a "…more equitable approach would be to spread the 'pain' widely by measures which increase revenues (more taxes or user fees)…"; and he applied the replication model of interest arbitration.

Now, it must be appreciated that the *University of Toronto* arbitration was not under a statute, but rather was under the parties' own very-longstanding private dispute-resolution protocol which, since 1984, has expressly directed the arbitrator to adhere to the replication model of interest arbitration. As well, previous arbitrators under that protocol had specifically rejected ability-to-pay as a pertinent criterion. As Mr. Teplitsky commented, "The parties know that ability to pay has been rejected by interest arbitrators for at least four decades" -- which I take to mean that so long as the parties' longstanding dispute-resolution protocol remains in its present traditional form, the parties can expect the application of traditional arbitral doctrines.

All of that may be correct or at least defensible in legal theory. But I doubt that it will do much to restore or to shore up governmental confidence in unconstrained interest arbitration as traditionally practiced by labour relations professionals.

That lack of governmental confidence presents difficulties. Perhaps stating the obvious, there really are only three ways to fix employees' wages and other working conditions (apart from statutory minima). The first is by unilateral employer determination; the second is by a process of collective bargaining including the potential for strikes and lockouts; and the third is by binding third-party intervention -- i.e, arbitration. Carefully deployed, the third option can be a very useful arrow in the government quiver. But where government grows wary of arbitrators and arbitral doctrines, it can effectively result in the loss of the

arbitration option -- leaving only unilateral employer determination or the strike/lockout option as the means for periodically fixing working conditions. As must be accepted, there are certain truly essential services in which the strike/lockout option cannot be allowed to fully operate. And in those areas, that leaves only the first option: unilateral employer determination -- which is effectively what occurs where public-sector dispute-ending legislation goes so far as to prescribe the terms of the renewal collective agreement.

Unilateral employer determination is not viable in the long run; and it strikes me that governments and the arbitration community should seek to establish a dialogue aimed at the continuing vitality of interest arbitration where necessarily deployed. I do not thereby suggest that arbitrators become "minions of government". But I do think that the future of interest arbitration in essential services or industries will depend on an acceptance of appropriate criteria-for-decision, which will include a shift in thought away from prior arbitral doctrine; and I also think that the arbitration community has a great deal to offer to the dialogue in that direction. Obviously, the criteria-for-decision in a particular instance cannot be so prescriptive as to amount to unilateral employer determination in disguise. However, with that important qualification, I do believe that the future contribution of interest arbitration in the resolution of disputes engaging the public interest will be dependent on the shift in thought to which I have just adverted; and upon a willingness in the arbitration community and the labour relations community generally in that regard.

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[1] In a 1986 award fixing the salaries and benefits for faculty members and librarians at the University of Toronto, I commented as follows on the difference between the "replication" and the "adjudication" models of interest arbitration:

> As we indicated at the outset, Article 6 has recently been amended. In fact, that provision has undergone

amendment more than once. Originally, it called for recommendations by a mediator. Then, in the later part of 1981, the parties agreed to substitute a process of binding arbitration based on the following criteria:

- Changes in the Consumer Price Index in Canada and in Toronto;
- salaries and benefits for faculty members and librarians at other universities and for other professions and groups in society;
- the need to attract faculty members and librarians of the highest quality;
- the overall compensation presently received by faculty members and librarians [at the university]…
- total compensation adjustments made in recent public and private sector collective bargaining settlements;
- the need for the University to operate in a responsible manner.

Thus, the parties agreed that their arbitrator (if resort to arbitration proved necessary) would adopt and follow the "adjudicative model" of interest arbitration: where criteria are enumerated and expressed as objective yardsticks in the expectation that they will be interpreted and applied in a rights-like fashion to the proven facts and circumstances.

There was one arbitration under the provisions of Article 6 as amended in late 1981. The award was published in June, 1982, and was for the 1982-83 academic year. It is referred to by the parties as the Burkett award.

Subsequent to the publication of the Burkett award, the parties engaged in protracted negotiations about the content of Article 6. Eventually, in December, 1984, the parties agreed to a substantial re-wording. Among other things, the criteria for decision were altered. Indeed, they were deleted. Now, the obligation on the part of the panel is to:

> …attempt to reflect the agreement the parties would have reached if they had been able to agree (Article 6(16))…tak[ing] into account the direct or indirect cost or saving

> of any [agreed-upon change] to any salary or benefit (Article 6(19))…

By that formulation, the parties moved away from the adjudicative model of interest arbitration, agreeing instead to the adoption of the so-called "replication model": where the decision-maker is to try to replicate the agreement that the parties themselves would have reached if they had been left to the ordinary devices of collective bargaining -- including economic sanctions. Put simply, at what point would the Association and its membership have settled rather than commence or continue a strike (if the strike option had been available)? At what point would the University have settled rather than commence or continue a lockout (if the lockout option had been available)? In theory, the answers to those two questions are the same. And, the task of the decision-maker, upon a review of the evidence and the submissions of the parties, is to discern the likely point of common ground.

While that may be a difficult task, and one for which an objective measurement of success may be impossible to construct, the modern arbitral consensus is that the replication model does represent the ideal. That is because, of any of the models for third party intervention, it is the least inimical to the accepted norm of free collective bargaining. Accordingly, it helps to maintain the acceptability -- to employers and employees alike -- of interest arbitration as an alternative to strikes and lockouts in public or essential industries.

It is perhaps important to observe that the shift from the adjudicative model to the replication model does not mean that the process of decision-making has become undisciplined. What it does mean is that the role of the decision-maker is no longer simply to identify the criteria -- either contractual or jurisprudential -- around which to pivot a detached and dispassionate award. Rather, the essential function of the decision-maker becomes the identification of the factors which likely would have influenced the negotiating behaviour of the particular parties in the actual circumstances at hand. It is the dynamic mix of those factors which produces the end results.

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[2] Quaere whether that proposition can be so simply and confidently stated in the federal setting -- i.e., under s. 18 of the Federal Court Act, R.S.C., 1985, c. F-7: see, for example, *Canadian Tobacco Manufacturers' Council v. National Farm Products Marketing Council* [1986] 2 F.C. 247.