

Principles for Labour Relations Policy Reform in the Wake of the Drummond Report on Ontario's Public Services

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1. INTRODUCTION

The provincial broader public sector (BPS) in Ontario comprises the full range of government services and Crown corporations, as well as health care and education. The BPS is vital to the Ontario economy as well as to the citizens who use its services; it accounts for about half of the province's gross domestic product. Each of its component parts depends on direct government funding or government transfers, or is at least regulated by the government. The 2008 global financial crisis and its impact on the management of Ontario's public services has brought industrial relations practices and outcomes in the BPS into sharp focus. In 2011, the Ontario government established the *Commission on the Reform of Ontario's Public Services*, chaired by Don Drummond (the Drummond Commission),¹ with a view to enhancing the efficiency of BPS services.²

Ontario's BPS industries are labour intensive and have a high rate of unionization — about 73% in provincial public administration, 70% in education and 46% in health and social services,³ in marked contrast to about 18% in the Ontario private sector (in 2005).⁴ The industrial relations system in those industries had therefore become a subject of concern. Within that

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¹ The Drummond Commission report was released on 15 February 2012: *Commission on the Reform of Ontario's Public Services, Public Services for Ontarians: A Path to Sustainability and Excellence* (Queen's Printer for Ontario, 2012).

² A list of the BPS industries falling within the scope of the Drummond Report is set out in Table 1.

³ Richard P Chaykowski & Robert S Hickey, *Reform of the Conduct and Structure of Labour Relations in the Ontario Broader Public Service: Report to the Commission on the Reform of Ontario's Public Services* (Kingston, Ont: Queen's University School of Policy Studies Industrial Relations Series, 2012) at 22. Approximate union density rates in certain subsectors of the Ontario BPS are set out in Table 1.

⁴ Statistics Canada, "Unionization" (2006) 18:3 Perspectives on Labour and Income 18 at 29-38.

TABLE 1
Union Density Rates –
Ontario BPS and Selected Industries

Industry	Approximate Union Density
Public Sector¹	71.1%
Health Care and Social Assistance¹	47.0%
Hospitals/ Acute Care ²	~75%
Long-Term care ²	~80%
Child Welfare Agencies ²	~87%
Youth Justice Service Agencies ²	~24%
Education¹	71.3%
Provincial Public Administration¹	72.4%

Notes

1 Source: Statistics Canada. CANSIM. Table 282-0078 – Labour force survey estimates (LFS), employees by union coverage, North American Industry Classification System (NAICS), sex and age group, annual (persons).

2 Source: R Chaykowski & R Hickey, *Reform of the Conduct and Structure of Labour Relations in the Ontario Broader Public Service: Report to the Commission on the Reform of Ontario's Public Services* (Kingston, Ont: Queen's University School of Policy Studies Industrial Relations Series, 2012) Chart 1 at 24-25.

system, areas of particular concern identified by the Drummond Commission are the interest arbitration process and the structure of collective bargaining, both of which have attracted considerable public attention and generated a wide variety of views among practitioners on how well they are working. This paper seeks to identify fundamental functional principles that ought to guide policy reform in those two areas.⁵

The contemporary Canadian labour relations policy framework is grounded in core principles of the Wagner model, which originated in the United States before the Second World War. The most significant step in incorporating those principles into the Canadian system was taken by the federal government in 1943, in the form of Order-in-Council PC1003. Some of the main employee rights included in PC 1003 were the right to freely associate and to choose a

⁵ This paper summarizes and extends the analysis in Chaykowski & Hickey, *supra* note 3.

union as the employees' representative for negotiating terms and conditions of employment.⁶ In more recent years, the right to form a union has found protection under section 2(d) of the *Canadian Charter of Rights and Freedoms* as a fundamental constitutional right, as has the right to bargain collectively.⁷

Many other important specific principles have been embodied in labour relations frameworks across Canada, in recognition of the overarching principle that harmonious and effective labour-management relations contribute both to economic efficiency and to industrial justice. Most of our labour relations statutes have been designed with several objectives in mind:⁸ providing for the exclusive representation of employees by a single union; bringing industrial peace during the term of a collective agreement by requiring impartial third-party arbitration of rights disputes; promoting the peaceful resolution of collective bargaining conflicts through active mediation or interest arbitration; and ensuring an active role for government as a neutral third-party “broker” overseeing the labour relations system as a whole.

Performance indicators for industrial relations in the Ontario BPS, and the underlying principles guiding any reform initiatives, need to reflect three distinct concerns: quality of the services provided, enterprise productivity, and workplace industrial justice. The key stakeholder groups — unions, employers, government and the public — have distinct interests. The public interest in the provision of public services can be quite distinct from that of the government, because citizens are more than mere passive consumers of public services. At times the public interest may align with the interests of both employers and unions, as in the improvement of the quality of services. At other times, interests may diverge; for example, reforms aimed at

⁶ See e.g. Morley Gunderson & Daphne Taras, eds, *Canadian Labour and Employment Relations*, 6th ed (Toronto: Pearson Addison Wesley, 2009) (a historical background in Canadian labour relations policy at 1-22); see also Harry C Katz & Thomas A Kochan, *An Introduction to Collective Bargaining and Industrial Relations*, 2d ed (New York: McGraw Hill, 2003) (evolution of labour policy in the US, at 17-72).

⁷ *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016; *Health Services & Support-Facilities Subsector Bargaining Ass'n v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*B.C. Health*]; *Fraser v Ontario (AG)*, 2011 SCC 20, [2011] 2 SCR 3.

⁸ See e.g. HD Woods, Sylvia Ostry & Mahmood A Zaidi, *Labour Policy in Canada*, 2d ed (Toronto: MacMillan, 1973). See also Mark Thompson & Joseph B Rose, “Regional Differences in Canadian Industrial Relations: Is There a ‘Canadian’ System?” in Mark Thompson, Joseph B Rose & Anthony E Smith, eds, *Beyond the National Divide: Regional Dimensions of Industrial Relations* (Montreal: McGill-Queen’s University Press, 2003) (a survey of similarities and differences across Canadian jurisdictions, at 307-324).

increasing productivity may lower costs for the government but increase employee workloads. The shifting alignment of interests highlights the importance of multi-stakeholder engagement in the conduct of BPS labour relations.

The following section of this paper briefly identifies the relationship between the mandate of the Drummond Commission and the main characteristics of Ontario BPS industries that are relevant to industrial relations. The third section summarizes the main issues and concerns with the interest arbitration system and collective bargaining structures in the BPS, and identifies basic principles that should guide reform in these two areas.

2. THE INDUSTRIAL RELATIONS CONTEXT IN THE ONTARIO BPS

The Drummond Commission was given a broad mandate to examine the efficiency of Ontario BPS industries, in the context of very low rates of provincial economic growth, forecasts of continued low growth in the future, sizeable deficits, and sustained increases in provincial government debt.⁹

Because the BPS is highly unionized, it plays a critical role within the overall industrial relations system in the province. In addition, the labour-intensive nature of BPS industries means that labour costs comprise an especially large proportion of total production costs. Therefore, contract settlements, and especially wage increases, have come under increasingly intense scrutiny as the Ontario government attempts to rein in its expenditures. In the long term, ongoing wage increases need to be sustained by productivity increases; the outcomes of the labour relations system are critical in this regard, because they determine labour costs and also affect productivity.

Among the specific aspects of the industrial relations system in Ontario BPS industries which had become the subject of concern were these:

- Successor rights in collective bargaining and representation after the restructuring of operations, because of a perceived need for greater flexibility in such cases.
- Interest arbitration outcomes, because of the concern that inordinately high awards were contributing to labour cost escalation.

⁹ The mandate of the Drummond Commission did not include such matters as taxation levels.

- The structure of collective bargaining, because of concerns that bargaining was inefficient and was leading to higher costs and higher rates of labour disputes.
- The extent of the government’s authority to undertake reforms or impose outcomes on the parties, especially given recent jurisprudence on the meaning of freedom of association under the *Charter*.

In this context, we were tasked by the Drummond Commission to analyze the prospects for reform of various aspects of the industrial relations system in the Ontario BPS. In this paper, we confine our discussion to the principles that should underlie reform in two aspects of that system: interest arbitration and the structure of collective bargaining.¹⁰ In the following section, we identify the main concerns in each of those areas, and the main principles that ought to form the basis for specific reforms.

3. BASIC PRINCIPLES FOR REFORM OF INTEREST ARBITRATION AND BARGAINING STRUCTURE IN THE ONTARIO BPS

(a) Interest Arbitration

Views on the efficacy of the current interest arbitration process in Ontario are quite polarized. Many observers, largely within the arbitration community itself, suggest that the interest arbitration process works very well and ought to be left alone. Others characterize the process as highly dysfunctional, consistently leading to unsuitable outcomes in relation to economic conditions, and call for its overhaul. Our assessment is that the arbitration system is clearly not “broken” but would benefit from a series of reforms that would strengthen it by coming to grips with these four major areas of concern:

- The lack of a standard set of objective mandatory criteria, e.g. for evaluating financial and economic circumstances — criteria that are clearly understood and must be considered in determining monetary outcomes.
- The tendency for arbitration awards to “pattern” after previous awards in the particular subsector.

¹⁰ Chaykowski & Hickey, *supra* note 3. Although our mandate was limited to those main areas, there are other key areas that could be considered as candidates for reform. For example, the issues surrounding essential services are of vital importance to the industrial relations system. Given the complexity of those issues, we recommended that the government address them through a full, separate independent review.

- The risk that the systemic incentives for arbitrators to make their decisions acceptable to the parties, in order to be hired in the future, will result in inefficient and inequitable outcomes.
- The need for increased professionalization of mediators and arbitrators.

Many of the services provided by BPS industries are considered to be in some degree “essential,” in that a significant interruption would affect the health or security of the public. The government has a strong interest in minimizing industrial conflict in those parts of the BPS, and even in precluding work stoppages in some cases. In the Ontario labour relations system, the strike/lockout option is generally seen as an integral part of the broader negotiation process, and one which moves the parties toward voluntary settlements. When governments prohibit work stoppages, they typically provide independent interest arbitration as an alternative, thereby offering an equitable approach to deciding contract outcomes in the event of an impasse. However, in so doing, governments lose the ability to influence those outcomes (including wage levels), and this leads to concerns that arbitrated outcomes may be economically inefficient.

Part of the concern over the efficiency of arbitrated outcomes is based on the view that the interest arbitration process may not take proper account of the criterion of “ability to pay.” This criterion is controversial and has largely been rejected by Ontario arbitrators,¹¹ although in some industries they are explicitly obliged by statute to consider it.¹² The conduct of industrial relations in BPS industries is unique because of two key economic characteristics of public-sector labour markets. First, as public-sector employers typically provide services with a significant “public good” aspect, the government wants those services to be available in sufficient quantity and at an acceptable level of quality, and therefore it funds them itself, either directly or indirectly. This raises doubts about whether public-sector employers are truly bound by the budget constraints that face private sector employers. In other words, what does the criterion of “ability to pay” mean in collective bargaining or interest arbitration if the government, as the funder, can raise additional tax revenues?

Other criteria used by arbitrators are also seen as problematic. One is “replicability,” which means that arbitrators try to replicate what “free” collective bargaining would have

¹¹ The rejection of “ability to pay” is examined in depth in Chaykowski & Hickey, *supra* note 3 at 49-54.

¹² See e.g. *Hospital Labour Disputes Arbitration Act*, RSO 1990, c H.14, s 9(1.1); *Police Services Act*, RSO 1990, c P.15, s 122(5).

yielded. Another is “comparability,” which means that comparable groups of employees in different bargaining units should have similar pay and other terms. The overarching concern of some observers is that a lack of relevant and objective criteria, and a lack of labour market information, have resulted in pay increases that are out of line with productivity or with the ability of governments to pay, or with both.

In addition to the need for better arbitral criteria, other principles that should be looked to in reforming the interest arbitration system include these:

- *Ensuring Independence.* The complete independence of the arbitrator and arbitration process is essential — independence not only from the government, but also from the parties.
- *Accountability and transparency.* The process must be accountable to the parties as well as to the public. First, accountability requires that the rationale for an award must be made clear and explicit, and that the award be made available to the public. Second, the interest arbitration system must support the use of objective criteria, and arbitrators must be held fully accountable for the application of those criteria. Third, the system must be supported by the data needed for conducting fact-based analysis.
- *Professionalism.* Improving interest arbitration would require the government to take the lead in encouraging a culture of continuous improvement in the skills and professional standards of arbitrators.
- *Mindfulness of the Public Interest.* One of the fundamental challenges in reforming any aspect of the labour relations system lies in the fact that although the parties themselves may be satisfied with both the process and the outcomes it produces, the public interest may not be served — for example, if taxes begin to increase faster than household incomes. The fact that the parties are satisfied with a particular industrial relations policy is not a sufficient reason for maintaining that policy as it stands. In BPS industries, an overall guiding principle for reform should be that the interest arbitration process and its outcomes must serve the interests of both the parties and the public.

(b) The Structure of Collective Bargaining in Ontario

Just as the employer’s “ability to pay” is a key challenge facing *interest arbitration* in the BPS, the fact that the provincial government is typically the funder but not the employer is the key challenge facing *collective bargaining structures* in that sector. Scholars have long recognized the challenge posed by the government role as a “ghost at the bargaining table.”¹³ Unions bargain with BPS employers, but recognize that on economic issues the ultimate decision-maker is not at the table but is at the seat of government in the provincial capital. This

¹³ Joseph B Rose, “The Assault on School Teacher Bargaining in Ontario” (2002) 57:1 RI 100.

becomes particularly evident when the government modifies funding structures. For example, when control of funding for primary and secondary education services in Ontario was moved from local school boards to a centralized provincial mechanism, local boards were left with responsibility for bargaining but no authority over funding decisions.¹⁴

This mismatch between funding structure and bargaining practice has led to a variety of suboptimal outcomes. Even when a union and a BPS employer reach what they consider to be an equitable settlement, that employer's inability to pay for it can result in layoffs and cuts in services.¹⁵ In other instances, the government has chosen to bargain directly with a union to settle a labour dispute in the BPS, without informing the particular employer of the terms of the settlement until after the fact.¹⁶

A second challenge in the area of bargaining structures is the threshold problem of coordinating diverse interests on both the union and employer sides. Historically, because unions have sought to take wages out of competition, union organizational structures have emphasized coordination of bargaining strategies and practices between different bargaining units, in order to counter the pressures of competitive labour markets across industry sectors and occupational groups. On the other side, large multi-site employers and employer associations have similarly sought to coordinate bargaining strategies. The capacity for such coordination is a key determinant of each side's bargaining power. Mismatches in the extent of coordination on the two sides of the table may allow one side to engage in whipsawing — i.e., to force concessions by taking advantage of divergences on the opposing side.

Historically, unions and employers have sought bargaining structures which enhance their relative bargaining power and advance their respective bargaining goals.¹⁷ The direct and

¹⁴ Brendan Sweeney, Susan McWilliams & Robert Hickey, "The Centralization of Collective Bargaining in Ontario's Public Education Sector and the Need to Balance Stakeholder Interests" in Sara Slinn & Arthur Sweetman, eds, *Dynamic Negotiations: Teacher Labour Relations in Canadian Elementary Secondary Education* (Kingston: McGill-Queen's University Press, 2012) 247.

¹⁵ See e.g. OPSEU, News Release, "London developmental service workers protest service cuts for most vulnerable" (9 January 2012), online: <<http://www.opseu.org>>.

¹⁶ Interview with a Staff Representative, Canadian Union of Public Employees (6 January 2009), Toronto; interview with the Executive Director of a transfer payment agency (9 December 2008), Ottawa.

¹⁷ For a more detailed discussion of bargaining structure and bargaining power, see Richard Chaykowski, "Collective Bargaining, Structure, Process, and Innovation" in Morley Gunderson

indirect associations between coordination, bargaining structure and relative bargaining power mean that any change to collective bargaining structures will be of tremendous concern to all stakeholders. Therefore, any reforms should be guided by a clear set of principles. Three such principles, set out below, could ground a discussion of potential reforms.

(i) *The Need for Coordination of Stakeholder Interests*

Weak and underdeveloped employer associations pose a particular challenge in some segments of the BPS. So does the existence of conflicts among various stakeholder groups on each side of the table. Reforms that look to stakeholder coordination will require mechanisms to resolve conflicts over provincial leadership and local autonomy. For example, although a significant proportion of employers in some parts of the BPS are not unionized and do not engage in collective bargaining, they will nonetheless have a keen interest in the sector's relationship with government.

(ii) *Free Collective Bargaining*

Negotiated outcomes reached through free collective bargaining — i.e., without legislative or judicial intervention — are generally better than outcomes imposed on the parties. Changes in bargaining structures should not be used as a tool to impose more constraints on the parties, through the designation of essential services or through similar infringements on the principle of free collective bargaining.

(iii) *Flexible Alignment of Collective Bargaining Structures*

There can be no predetermined formula for establishing bargaining structures in the BPS. Among the many factors which ought to influence those structures are funding arrangements and the preferences of the particular parties. The principle of “flexible alignment” suggests that all stakeholders must be involved in the process of shaping bargaining structures. Union groups and employer associations need first to work out their own internal organizational dynamics with respect to local and provincial interests and governance structures. Second, the division between issues to be discussed in a centralized provincial forum and those to be dealt with in local

bargaining would need to be determined. This division would vary by industry and occupation, on the basis of stakeholder preferences, industry characteristics and occupational labour markets.¹⁸ Finally, in any reformed collective bargaining structure, the role of the government would need to be explicitly understood.

4. THE NEED FOR A PROGRESSIVE STEWARDSHIP APPROACH

There has been considerable debate in Ontario on the precise policy options that would be best for labour relations in the BPS. At one end of the spectrum is the “if it isn’t broken, don’t fix it” view, which assumes that the existing framework is close to the best attainable and is relatively stable — that unless there is an identifiable and serious problem, adjustments are unnecessary and may be harmful. At the other end of the spectrum is the idea that successive provincial governments should feel free to rewrite labour relations legislation in accordance with their political preferences. Reforms of that sort may have a short-term democratic mandate, but they become problematic when undertaken without evidence-based analysis of the likely consequences and in the absence of clearly defined principles.¹⁹

In fact, the external environment of collective bargaining in Ontario — most significantly, the economic and legal environment — has changed dramatically over the past several decades. The decline of private-sector unions does not bode well for the public-sector labour movement,²⁰ nor do recent sweeping political shifts in some key American states (including Wisconsin and Ohio), which have weakened public-sector unions.²¹ As for the

¹⁸ Sweeney, McWilliams & Hickey, *supra* note 14. Differences in intra-organizational preferences suggest that flexible approaches would have to be supported by statutory incentives.

¹⁹ For a taste of the early public debate on the Drummond Commission’s recommendations, see Rob Ferguson, “Drummond Report: Ministries, Agencies Urged to ‘Drive Out Inefficiencies,’” *The Toronto Star* (15 February 2012), online: <<http://www.thestar.com/news/canada/politics/article/1131877--drummond-report-ministries-agencies-urged-to-drive-out-inefficiencies>>.

²⁰ See Richard Chaykowski, “Canadian Labour Policy in the Aftermath of *Fraser*” (2012) 16:2 CLELJ 291 at 304-306.

²¹ See *ibid* at 18-19; John Stanford, “Wisconsin’s Disease Crosses the Border,” *The Globe and Mail* (2 July 2012), online: <<http://theglobeandmail.com/commentary/wisconsins-disease-crosses-the-border/article4381590/?service=mobile>>.

internal context of industrial relations in Ontario, it will probably continue to be shaped by the government's fiscal situation and by overall economic growth rates.

A serious danger is that labour relations policy reform may become primarily reactive. This could result in a "ratchet effect," with large disjointed shifts in policy, including swings precipitated by changes in the political party in power. A better option is to encourage more measured ongoing assessment, with incremental changes in the framework and process of labour relations where such changes are deemed necessary. This proactive stewardship approach stands to result in changes that are better matched to changes in the economic and legal contexts.²² Account also has to be taken of the fact that innovations in the industrial relations system in BPS industries may spill over into the private sector.

5. CONCLUSION

Applying the principles discussed in this paper to the current debate on the reform of labour relations in Ontario's BPS leads to three specific conclusions. First, a simple cost containment approach will not work as the sole or predominant guiding principle for reform. While escalating labour costs and financial constraints may be motivating some parties to pursue changes in the system, concerns about the quality of services and about industrial justice are equally legitimate. Second, experimentation and change in the industrial relations system in general, and in the arbitration process and bargaining structures in particular, calls for a comprehensive consultation process. Third, legislative changes should accord with the results of that process across all stakeholder groups, rather than simply being imposed by government. This does not imply that there is no need for legislative reforms, but only that institutional change should follow and support multi-stakeholder engagement.

²² See e.g. Richard Chaykowski, "Industrial Relations Policy: Active or Reactive?" (1995) 16:8 Policy Options 24.