

Recent Reforms to Public Employee Interest Arbitration in Michigan: Any Lessons for Ontario?

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In 2011, Michigan adjusted its interest arbitration scheme to address concerns that collective bargaining was imposing an unacceptably high price on public employers and taxpayers. The statutory amendments require arbitrators to compare the collective bargaining unit to non-arbitrated groups in the same jurisdiction, potentially resulting in a lower settlement than would otherwise have been awarded to the unit in question. The statute also requires the arbitrator to put more weight on the public employer's ability to pay, thus tilting interest arbitration in favour of employers. The author suggests that, because of these amendments, Michigan provides a relevant case study for Ontario in an era of financial pressure.

1. INTRODUCTION

Over the last half-decade or so, state and local employees in the United States have been under substantial economic pressure. The combination of economic stagnation and a political climate favouring tax reduction has resulted in a decline in local government budgets and local government employment.

Collective bargaining in state and local government in the United States is regulated at the state level. In the aftermath of the Republican success in the 2010 elections, state legislatures and governors moved to limit public-sector bargaining in the states in which it existed. The most publicized example was Wisconsin, where collective bargaining rights of local employees other than police and firefighters were severely limited.¹

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¹ The legislation and events in Wisconsin are summarized in *Wis Educ Ass'n Council v Walker* 824 F Supp 2d 856 (WD Wis 2012). For a detailed analysis of enacted and proposed legislation in other states, see Richard W Hurd & Tamara L Lee, "Can Public Sector Collective Bargaining Survive the Tea Party?"

The efficacy of interest arbitration as a dispute resolution procedure has also been called into question. Those who wish to limit collective bargaining rights see it as enabling the cost-enhancing characteristics of collective bargaining.

Even Michigan, one of the most highly unionized states, has not been immune to these political and budgetary winds. Since 1969, Michigan law has provided for interest arbitration to resolve labour disputes involving uniformed public safety employees, police, firefighters, emergency medical technicians, and emergency personnel who work for police departments (for example, telephone operators). Influential conservative voices and public employers in Michigan have for the past decade been critical of interest arbitration on the grounds that it raises the cost of operating cities and removes spending authority from local elected officials by giving it to unelected arbitrators.²

In 2011, a newly elected Republican governor and legislature amended the Michigan interest arbitration statute. Unlike those in Wisconsin, the Michigan amendments were fairly “surgical.” They left the fundamentals of the interest arbitration system intact, but did tilt the system somewhat toward public employers’ interests.

This paper suggests that the events in Michigan may represent a case study, possibly relevant for Ontario, of how an arbitration system can be designed for an era of budgetary constraints and a political climate that may be sceptical of the efficacy of collective bargaining and its derivative, interest arbitration. Part 2 will briefly discuss broad national economic trends in the United States affecting public-sector collective bargaining. Part 3 will provide a more

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² See e.g. “Binding Act,” Editorial, *The Detroit News* (1 March 2010) A13; “State should help local governments trim costs; Cities, counties rightly ask for changes in state rules,” *The Detroit News* (10 July 2006) 8.

detailed explanation of the 2011 amendments in Michigan. Part 4 will present a summary and final observations.

2. NATIONAL ECONOMIC TRENDS IN THE U.S. AFFECTING COLLECTIVE BARGAINING

The United States has been experiencing a decline in the financial health of local governments. A period of almost two decades of revenue increases at a local level ended in 2009. From 1990 to 2009, total nominal property tax revenues increased from \$158.4 billion to \$471.8 billion, an average annual increase of 6.1%. After that, however, they fell to \$468.06 billion in 2010 and to \$466 billion in 2011.³ Local government employment in the U.S. followed a similar trajectory. It increased in every year from 1990 to 2008, reaching 14.57 million employees in 2008, and then declined over the next three years to 14.165 million in 2011.⁴

These figures demonstrate that local governments in the United States have come under increasing revenue constraints in the last few years. Whether those constraints were due to the economic slowdown, to a preference among voters for tax reductions, or to some combination of both, is less important than the fact that they occurred. It is clear that this revenue trend was associated with declining local government employment.

In addition to reducing employment, this trend of declining revenue can also be expected to put pressure on the institution of collective bargaining in general and on the structures that support public-sector collective bargaining in those states where it exists. Collective bargaining

³ Property tax revenues are given here because they are a uniform source of revenue for local government in the US. Some cities may derive revenues from other sources, such as local income taxes and commuter taxes, but not all of them levy such taxes. United States Census Bureau, "Historical Data for the Quarterly Summary of State & Local Tax Revenue," online: <http://www.census.gov/govs/qtax/historical_data.html>.

⁴ United States Bureau of Labor Statistics, "Employment, Hours, and Earnings from the Current Employment Statistics Survey (National)," online: <<http://www.bls.gov/ces/>>.

is a means of providing employees with representation in determining terms and conditions of employment. Because this representation is expected to result in better terms and conditions than employees would enjoy in its absence, some policy-makers have concluded that collective bargaining increases pressure on already strained local budgets. On this premise, budgetary pressure can be alleviated by placing restraints on the bargaining process.

3. INTEREST ARBITRATION IN MICHIGAN

(a) Economic Context

Michigan actually presaged the national trends in both local revenues and local employment. That state's two local revenue sources are property taxes and revenue sharing. In nominal dollars, property taxes levied in Michigan increased from \$6.7 billion in 1994 to \$14.25 billion in 2007, but declined to \$14.1 billion by 2009.⁵ Total state revenue -sharing to localities in Michigan declined from \$1.55 billion in 2001 to an estimated \$1.045 billion in 2009.⁶ From 1990 to 2003, the number of local government employees in Michigan increased from 403,400 to 459,100. In contrast to the U.S. as a whole, where local government employment did not begin to decrease until 2006, it has steadily decreased in Michigan since 2003, from 459,100 to 388,800 — a decline of 15.3%.⁷

⁵ Michigan Department of Treasury, "Table 14: Local Property Tax Valuation, Levies and Average Rates" in *Annual Report of the State Treasurer: Fiscal Year 2000-2001* (Lansing: 2002) at 28, online: <http://www.michigan.gov/treasury/0,1607,7-121-44402_44404---,00.html>; Michigan Department of Treasury, "Table 13: Local Property Tax Valuation, Levies, and Average Rates" in *Annual Report of the Michigan State Treasure: Fiscal Year 2009-2010* (Lansing: 2011) at 21, online: *ibid*.

⁶ Michigan Department of Treasury, Constitutional Revenue Sharing, "Total Actual and Estimated State Revenue Sharing Payments" (2009) online: <http://www.michigan.gov/treasury/0,4679,7-121-1751_2197_58826_62375---,00.html>.

⁷ United States Bureau of Labor Statistics "Employment, Hours, and Earnings from the Current Employment Statistics Survey (State & Metro Area)," online: <<http://www.bls.gov/sae/>>.

(b) Collective Bargaining and Interest Arbitration in the Michigan Public Sector

The Michigan *Public Employment Relations Act* gives collective bargaining rights to all county and local government employees. However, only uniformed municipal public safety employees — police, firefighters, emergency medical technicians (EMT) and emergency service personnel — are covered by interest arbitration (often called Act 312 Arbitration because the enabling statute was *Public Act 312*⁸). Strikes are illegal throughout the public sector in Michigan, despite the fact that only uniformed public safety employees enjoy binding interest arbitration as a means of resolving impasses.

The result of limiting arbitration coverage to uniformed public safety employees is that county and local jurisdictions in the state have employees under two different dispute resolution regimes: police, firefighters and EMT employees are covered by arbitration, but all other employees are under a collective bargaining regime in which they have neither the right to strike nor the right to arbitrate. While these latter employees may obtain a fact-finder's recommendation, it is not binding.

(c) Interest Arbitration Procedures

Interest arbitration in Michigan is a highly regulated system. Under Act 312, if the parties are unable to agree on the terms of a new collective bargaining agreement, they may inform the Michigan Employment Relations Commission (MERC) and its administrative arm, the Michigan Bureau of Employment Relations (BER). MERC/BER then assigns a mediator to attempt to resolve the dispute. If mediation fails, the mediator informs MERC/BER in writing. Either party may then petition MERC/BER to initiate Act 312 arbitration, by listing the issues in dispute and

⁸ *Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act 312 of 1969*, Pub Acts 2011, No 116, Mich Comp Laws §423.239 [2011 Act 312].

certifying that the parties could not reach an agreement. In consultation with the parties, MERC/BER appoints an arbitrator who chairs an arbitration panel, supported by one union-appointed and one employer-appointed delegate. All decisions of the panel must be by majority vote.

The reason for having a tripartite panel rather than a single arbitrator is to attempt to simulate the bargaining process. Panels operate informally in two different modes, which may be called the judicial mode and the bargaining mode. In the judicial mode, the arbitrator has the authority to make the award, with each delegate concurring or dissenting. In the bargaining mode, the arbitrator and the panel negotiate matters as they arise.

The arbitrator opens the hearing by way of a scheduling conference. This conference may address anything from purely administrative matters, such as the hearing schedule, location and the identity of the parties' delegates, to substantive matters such as issue resolution and the determination of comparables. Ultimately a hearing is held at which the parties present testimonial and documentary evidence. A court reporter is present, since interest arbitration in Michigan is a legal process and the award may be appealed through the judicial system.⁹

(d) Characteristics of the System

Michigan's system of interest arbitration contains elements of final offer selection arbitration (in which the arbitrator must select the entire offer of one of the parties without making any changes to it) and conventional arbitration (in which the arbitrator has the discretion to fashion an award on an issue-by issue basis in response to the evidence presented by the parties). Under the Michigan system, "economic issues" — defined as those that involve the

⁹ *Administration of Compulsory Arbitration Act for Labor Disputes in Municipal Police and Fire Departments*, Mich Admin Code r 423.501-14 (1995).

direct expenditure of funds — are subject to final offer arbitration, but on an issue-by-issue basis. This gives the panel some flexibility, as it may decide certain issues for the union and others for the employer. The panel may also give itself flexibility by how it defines issues: the more narrowly an issue is defined, the more flexibility the panel will have. For example, for a three-year wage adjustment award, the panel may choose to define each annual increase as a separate issue, selecting the final offer of one party for two years and the final offer of the other party for the third year, or to determine the total increase for the three-year period. This flexibility is enhanced by the fact that the panel also has the option of proceeding by way of a majority vote on each issue rather than on the award as a whole.

“Noneconomic issues,” such as seniority bidding for shifts or periods of leave, are subject to conventional arbitration. For noneconomic issues, the panel has the discretion to adopt the offer of one party or to fashion its own award. A dispute over whether an issue is economic or noneconomic is subject to determination by the panel, although such disputes are generally resolved at the scheduling conference.

(e) Factors

The categories of factors that the panel must consider in arbitration, as set out in the 1969 statute and not changed until 2011, are as follows:

- ability to pay
- comparability
- cost of living and consumer prices
- overall level of compensation in the bargaining unit
- lawful authority of the employer

- stipulations of the parties
- changes in circumstances during the proceedings
- other factors traditionally taken into account in bargaining

The important 2011 statutory amendments did not change the factors themselves but did adjust how those factors were defined and weighed, in a way that tilted the arbitration process in the employer’s favour. More specifically, the amendments enacted changed two of the statutory factors: ability to pay and comparability. The 1969 statute defined ability to pay only as “[t]he interests and welfare of the public and the financial ability of the unit of government to meet those costs.”¹⁰ The 2011 statute, however, expanded that definition to include the following:

(a) The financial ability of the unit of government to pay. All of the following shall apply to the arbitration panel’s determination of the ability of the unit of government to pay:

- (i) The financial impact on the community of any award made by the arbitration panel.
- (ii) The interests and welfare of the public.
- (iii) All liabilities, whether or not they appear on the balance sheet of the unit of government.
- (iv) Any law of this state or any directive issued under the Local Government and School District Fiscal Accountability Act . . . that places limitations on a unit of government’s expenditures or revenue collection.¹¹

The 2011 amendments therefore require a far more detailed analysis of a jurisdiction’s financial situation than the 1969 legislation. “Financial impact on the community” presumably means any increase in the tax burden on residents that might result from the award, as well as any increase in costs that the community must bear. Because the “interests and welfare of the public” is considered a financial matter rather than one related to the quality or quantity of the

¹⁰ *Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act 312 of 1969*, Pub Acts 1969, No 312, Mich Comp Laws §9 (prior to amendment by Pub Acts 2011, No 116) [1969 Act 312].

¹¹ 2011 Act 312, *supra* note 8.

public service in question, it might also cover tax increases as well as the diversion of monies from other uses to meet employee compensation costs. Not all future liabilities, including retiree health care, necessarily appear in the annual financial report of the jurisdiction. The fact that an arbitration panel must now take these matters into account in its award is likely to tip the balance further in favour of the employer, who is likely to be the most persuasive source of information on its own financial status.

The second major factor that arbitrators must consider is comparability. In understanding this change, it is important to recall that county and local governments bargain with employees in two different dispute resolution regimes: arbitrated for uniformed public safety employees; and non-arbitrated for all other employees. With respect to the arbitration regime, the 1969 language had clearly limited the comparables to be considered for employees in the county's or local jurisdiction's to other uniformed public safety employees in other county and local jurisdiction, all of whom were also under the arbitration regime, i.e. external comparables. Thus, arbitrated outcomes were used as the basis of comparability determinations in the arbitration regime.

The 2011 amendments added the following wording: "Comparison of the wages, hours, and conditions of employment of other employees of the unit of government outside of the bargaining unit in question."¹² By requiring that the terms and conditions of employment of internal comparables — i.e. other classifications of employees in the unit of government in which the arbitration was occurring — also be considered by the panel, the legislature hoped to create convergence between arbitrated terms and the terms bargained in the non-arbitration regime. It is

¹² Michigan SB 397, *An act to provide for compulsory arbitration of labor disputes in municipal police and fire departments; to define such public departments; to provide for the selection of members of arbitration panels; to prescribe the procedures and authority thereof; and to provide for the enforcement and review of awards thereof*, 2011-2012, Mich, 2011.

assumed that bargained outcomes in the non-arbitrated regime will be less favourable to unions and employees than those in the arbitrated regime.¹³

(f) The Weight of the Factors

The 1969 amendments were silent on the weight to be attributed to each factor in a particular case; this was to be determined by the arbitration panel. The 2011 amendments changed that, with the following language: “The arbitration panel shall give the financial ability of the unit of government to pay the most significance, if the determination is supported by competent, material, and substantial evidence.”¹⁴ This means that arbitration panels must now give the most weight to ability to pay.

4. SUMMARY AND CONCLUSIONS

The 2011 Michigan amendments have tilted the interest arbitration process somewhat toward employer interests. Arbitration panels must now consider (and give the greatest weight to) a public employer’s financial situation. If an award adopts the union’s final offer on any issues in the presence of evidence of financial constraints and other priorities, the award may be subject to a court challenge. In this sense, arbitration panels, and particularly their neutral chairs, must become more knowledgeable about public accounting than they have been.

The 2011 amendments also place a burden on employer advocates to provide evidence of an inability to pay, and a burden on union advocates to refute such evidence. An arbitration

¹³ Under the 1969 amendments, arbitration panels had the authority to consider the internal comparables under “other factors,” but were not required to do so. 1969 Act 312, *supra* note 10. Unions generally argued that units under arbitration were not comparable to units not under arbitration, because of the different dispute resolution mechanisms. This argument was generally accepted by arbitration panels.

¹⁴ 2011 Act 312, *supra* note 8, s 9(2).

system that was oriented toward comparability, with which lawyers are generally comfortable, must now give more attention to financial issues, which they may find harder to deal with.

Public-sector interest arbitration is a creature of the state. It was established to serve the interests of public employers, public employees and the broader public, and it must be seen as serving all three constituencies. In a democratic society, if interest arbitration and arbitrators are perceived as failing to serve all of their constituencies, they will be subject to legislative limitations, whether or not those perceptions are based on fact.

Michigan offers the case of an interest arbitration scheme which has been adjusted to address political decision-makers' concerns that arbitrators were imposing excessive costs on public employers, and ultimately on taxpayers. Act 312 was first passed in 1969, at a time when public employers faced few budgetary constraints, and it was based on fairness and the need to ensure due process for public employees. In the four decades that have passed since then, the political and economic climate has changed considerably. Public revenues have declined, and Michigan voters have become more wary of taxes. The legislated changes in the arbitration system in 2011 reflected those concerns, by requiring arbitrators and advocates to give much more weight to a public employer's ability to pay.

The 2011 amendments also incorporate the assumption that the level of wages and benefits that prevails in the non-arbitration part of the public employee regime in Michigan is closer to the "market" than the level in the arbitration regime. This is a debatable assumption: one could argue that a fair arbitration system is more likely to replicate the wage and benefit level that would prevail in a competitive market than is a system in which employees have neither the right to strike nor the right to interest arbitration.

Because the foundation of interest arbitration has been retained in Michigan, that state will continue to have a healthy public-sector arbitration system. Michigan may represent a useful model for such systems in an era of public resource and taxation constraints. Ontario may wish to look to its neighbour to the southwest as it reflects on the future of its own system of collective bargaining in the public sector.