

# PUBLIC SECTOR COLLECTIVE BARGAINING: IS IT TIME TO END THE STRIKE?

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When public sector employees exercise their right to strike, the clients for their services suffer more than the direct employers, yet they are powerless to influence the outcome. The rules for private sector labour relations provide a balance of employee-employer powers and vulnerabilities that do not translate well into the public sector. There are alternatives to the disruptions suffered with strikes in the public sector, but they require taking a longer-term view.

Quand les fonctionnaires exercent leur droit de grève, c'est moins leur employeur que les usagers des services publics qui en subissent les conséquences sans pouvoir changer quoi que ce soit à la situation. Dans le secteur privé, les règles en matière de relations de travail créent un équilibre entre les forces et les faiblesses des employés et des employeurs qu'on ne retrouve pas dans le secteur public. Il y a pourtant des solutions aux perturbations causées par les grèves dans ce secteur, mais elles relèvent d'une action à long terme.

In early January 2009 the Ontario government, after previously declaring it would not get involved, scrambled to pass legislation ending a 12-week strike at York University in Toronto. At about the same time, the City of Ottawa saw an end to a strike by bus drivers that had caused significant inconvenience and wasted fuel in a city jammed with traffic. A month later, the nurses' union in Newfoundland and Labrador began taking a strike vote following an escalation in public sparring with the government. These disputes provide an appropriate context to revisit the issue of the right to strike for workers in non-profit agencies and in government.

Labour relations legislation in each province is designed to regulate how unions and management reach collective agreements and how they live with them. The intention is to provide a balance of power to the two sides. If collective bargaining fails to result in an agreement, the union has the power to go on strike, withdrawing labour from the employer. Counterbalancing that power is the right of the employer to lock out the workers until a new collective agreement is signed. That kind of mutual power over the other party makes a certain kind of sense in the private sector. A strike by a union, or a lockout of employees by management, is the ultimate pressure tactic normally taken only after negotiations have failed to reach agreement. Once a strike or lockout is under way in the private (for-profit) sector, there is intense economic pressure on both sides to end the strike.

The strikers hurt because their income is greatly reduced with only "strike pay" from the union's funds and the workers' savings or credit to sustain their basic needs. The company hurts because it cannot make and sell its goods or provide its services. The company is not making money. If the company is publicly owned, share prices may drop. It is this symmetrical economic pain that puts pressure on the parties in the private sector to settle. Usually, there are no third parties being hurt by a strike in the private sector; consumers buy a different brand or seek a different service provider. There is relatively little collateral pain.

In the 1960s (federally) and 1970s (provincially), workers in the public sector were given the right to form unions and to go on strike. The so-called "industrial model" of labour relations was adapted for employees of governments and non-profit agencies. It is arguable that this was a mistake because the balance of power, though enshrined in legislation, does not really exist. Employers in the public sector very rarely use their legislated power to lock out their employees. Why? Because they do not want to disrupt the service that government and non-profit agencies provide to the public. This unwillingness on the part of management to use its lock-out power introduces disequilibrium to the system.

But that is not the only distortion introduced when public sector collective bargaining began.

When there is a strike in the public sector, there is still economic pain on the part of employees but the pressure on

management is mainly political, not economic. During strikes of public sector workers, management is under tremendous pressure from the users of the service (students, transit riders, hospital patients) and often from advocates for these users, including politicians. But the symmetry of the

ity of life declines. People get extremely grumpy and the open-line radio shows heat up. There is a great deal of collateral pain.

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pain is absent and this imbalance can lead to behaviour that is not always helpful in settling the dispute.

In the recent York University strike, 50,000 students were adversely affected but they were not a party to the dispute in the eyes of labour relations law. They could have no direct role in ending the dispute. There were reports of York University students not being able to take needed summer jobs because of the extension of the teaching year. Students in cooperative education programs had their plans shattered. Foreign students, whose higher tuition helps pay the costs for all, had problems with time-limited visas. When other parts of the public sector experience labour disruptions we hear of other problems. When elementary school teachers strike, parents must incur extra, unbudgeted child care expenses. Tourism declines following strikes by ferry workers, affecting hotels, restaurants and car rental agencies.

When teachers, professors, transit drivers or nurses go on strike, the lives of many thousands are directly impacted but, other than complaining to their politicians, there is not much they can do. Meanwhile, the school board or the health system saves money, at least in the short term, the education and health care administrators continue to be paid, but the qual-

employment is government or non-profit. There is too much collateral pain inflicted on those caught in the middle and not enough on those who are in a position to settle the matter.

The answer is not to deny the right to unionize for these classes of employees. But perhaps it is an appropriate time to ask whether other dispute resolution techniques might be more effective than strikes and lockouts.

For certain types of workers, such as firefighters and police, society has deemed that the collateral pain and damage that might ensue if they were allowed to strike is simply too great to allow a massive withdrawal of their

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services. They can still form unions; they still bargain collectively; they still have access to the grievance and arbitration system to settle work-related disputes. Most of the time, these groups reach collective agreements with their employers, just as most of the time workers who do have the right to strike and management with lockout rights reach collective agreements without resorting to their ultimate weapons.

**W**hen groups whose services are too critical to allow them to strike are not able to reach agreement on their own, the dispute is referred to a third-party arbitrator who listens to both sides and decides the matter. Sometimes, instead of allowing the arbitrator a free hand to fashion any final settlement, the parties use "final offer selection." Both the union and management write down what they privately consider to be their final offer and put it in a sealed envelope. Neither side knows what the other's final offer is. Then the arbit-

trator examines the final offer put forward by each party and must select one or the other. This system pressures the parties toward more reasonable final positions so as not to be perceived by the arbitrator as being too extreme and risk having the arbitrator select the other party's position. Often, the final offer given to the arbitrator is more moderate than the last offer put forward at the bargaining table.

Occasionally, we read of unions with the right to strike agreeing with their employers to submit to arbitration issues that they could not resolve in bargaining. Both sides are saved the pain of a strike or lockout.

Some employers are reluctant to use arbitration for salaries and benefits, arguing that imposed settlements cannot necessarily be afforded. Similarly, unions sometimes claim that not being able to strike robs them of their full union rights. Let us examine both these claims.

**G**overnments and the management of non-profit agencies, when bargaining with their unionized employees,

often claim that they cannot settle for more than a certain percentage increase because the budget will not allow more. What governments (federal, provincial or municipal) are really saying is "If we settle for more than that certain percentage, we will have to reduce spending in other areas or we will have to increase taxes." In the case of non-profit agencies such as universities or transit commissions, which cannot levy taxes, they are saying, "If we settle for more than that certain percentage we will have to reduce spending in other areas or increase the fees we charge or seek more subsidies from government." We have heard governments say that they "cannot" submit salary settlements to arbitration because they are the ones elected to control public spending and they cannot delegate any part of that to a third party.

Yet employers in the public sector are often subject to third-party decisions that affect public spending, and not just in the cases of police and firefighters. For example, when a non-unionized employee is fired and sues for wrongful dismissal, the courts can, and sometimes do, decide that the firing was for an improper reason. In such a case, the court awards the dismissed employee a substantial sum of money depending on the length of service, the salary level of the position and other factors. Government must pay that sum regardless of its budgetary situation. Where the employees are unionized, there are sometimes grievances filed by the union on behalf of one or more employees that involve a claim to a substantial amount of money. If the grievance cannot be settled by the parties, the dispute goes to an arbitrator who decides the matter. If the decision favours the union's position, government must pay the sum decided by the arbitrator regardless of the state of the government's finances.

So it is a matter of degree. Whereas grievances and court cases usually involve only a subset of the employees and may result in payments of hundreds of thousands of dollars, the result of arbitrating labour negotiations

affects the entire union membership, and the result can involve millions of dollars. But the same principle applies: a dispute that cannot be settled by the parties is decided by an impartial and independent person (or a three-person panel) selected to be mutually agreeable to both the employer and the union.

When governments say, "We can't submit these matters to arbitration," they really mean "We don't want to."

We should also ask whether it is necessarily a bad thing that taxes or fees increase to reflect the greater cost of a wage increase in the public sector. Too often, the public appears to blindly support striking workers without thinking about where the money will come from to pay an increase in wages. Perhaps the car horn honking to sup-

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port strikers would not be so generous if people directly felt the effect of a salary increase won via the picket line.

We hear unions talking about the right to strike as being a fundamental right of all workers and saying that if they did not have the right to strike, they would be weakened relative to those employees who do have it. The right to strike is not an absolute right and can be set aside by legislation where the public good (or, more often, the threat of the loss of public order) is at stake. As discussed above, society has deemed that it is simply too dangerous to the public good to allow firefighters or police officers to go on strike. In the case of some other categories of workers, even where there is a right to strike,

there is a requirement in the law that they provide "essential services." This is the case with nurses, for example.

An important question is whether public sector workers are seriously disadvantaged where the law prohibits work disruptions. There is no public outcry saying that firefighters or police earn too little or too much. Fire fighters and police in one city do not earn significantly more or less than their counterparts in comparable-sized cities elsewhere in the country, when adjusted for cost of living and when set in the context of the local economy. And they have all the other benefits of unionization. Several universities in Canada, including the University of Toronto and others in Ontario and in western Canada, use time-limited collective bargaining for faculty salaries and benefits, with arbitration being the default if agreement cannot be reached. They seem to function quite well and the students are not held hostage to a dispute. Occasionally, one side or the other feels as though there has been a big injustice as a result of an arbitration decision but *in the long run* things even out.

It is time that we enter into a public debate concerning whether we want the strike/lockout model to continue in the public sector. In that debate, we should insist that what I have termed "collateral pain" — the pain experienced by those not in a position to influence the outcome — be factored into the decision. Collateral pain is not always about mere inconvenience. It also involves additional costs, wasted resources, unnecessary additional anxiety experienced by the most vulnerable and many other negative consequences that could be avoided if we adopted a different model of dispute resolution.

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