Collective bargaining in the public sector: bargaining rights for civil servants in Nova Scotia

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I. Introduction

A fundamental premise of Canadian labour relations legislation is that all workers have a right to freedom of association, freedom to require their employers to bargain collectively with their chosen bargaining agent, and freedom to strike to persuade their employers to agree to terms and conditions of employment. Yet in all jurisdictions, governments have denied or limited these rights with respect to their own employees. This discrimination reflects a deep-seated conviction among legislators and among many members of the public that government employees pose unique problems requiring special treatment in matters of labour relations.

In this paper I propose to examine both the legislative framework within which this "special" treatment is meted out in Nova Scotia, and the practical accomodations the parties to the public employment relationship have made in order to live within that framework. After discussing some of the more serious problems that have arisen under this regime, I will examine critically the theoretical basis for denying to public employees the collective bargaining rights granted to their counterparts in the private sector to see whether it furnishes adequate justification for withstanding the pressures for change.

II. Legislative Framework Governing Public Employees

What is a public employee? Functionally defined, a public employee is one who performs a public service function and whose wages are paid out of a fund the ultimate source of which is taxation or other government source of revenue. This functional definition

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Collective Bargaining In The Public Sector: Bargaining Rights For Civil Servants In Nova Scotia*

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1. In Saskatchewan civil servants bargain under The Trade Union Act, 1972, S.S.1972, c.137, and have virtually all the rights that private sector employees have. But even in that province there are limitations on what aspects of the employment relationship can be negotiated: see The Public Service Act, R.S.S. 1965, c.9, s.58.
might embrace: (1) employees of government departments, (2) employees of government agencies, (3) employees of government-funded agencies run by non-profit, public service organizations, (4) employees of municipalities, and (5) employees of Crown corporations. But this functional definition bears little relationship to the legal definitions that determine collective bargaining rights in this province. Employees in the last three of these categories, for example, are considered private sector employees, since irrespective of what they do or where the money comes from to pay them, their employer is a legal entity other than the Crown or a Crown agency.

For purposes of this paper I will be focusing primarily on employees of the Crown and of Crown agencies.\(^2\) Even within this narrow compass public sector bargaining in this province is characterized by legal and logical confusion. Employees fall into a bewildering variety of legal categories and under a variety of statutes. I will attempt to survey briefly the various categories, but any survey is necessarily incomplete since the system is capable of creating an infinite number of anomalies.

The Trade Union Act\(^3\) provides that

3(1). Subject to subsection (2) this Act applies to all matters within the legislative jurisdiction of the Province except that it does not apply to Her Majesty in the right of the Province or to the employees of Her Majesty.

(2) This Act applies to any board, commission or similar body that is an agency of Her Majesty in the right of the Province and to the employees of the board, commission or other body, other than those appointed by the Civil Service Commission or the Governor in Council.

"Employees of Her Majesty" basically comprise employees of government departments; they fall outside the Trade Union Act no matter what the source of their appointment. But for employees of Crown agencies the issue is more complicated. If they are appointed by the Civil Service Commission or the Governor in Council, by implication the Trade Union Act does not apply to them. But if they are not appointed by either of those two bodies, the Trade Union Act does apply.

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2. Teachers' bargaining rights are excluded from the scope of this paper because they are governed by a special statute, the Teachers' Collective Bargaining Act, S.N.S. 1974, c.32
3. S.N.S. 1972, c.19
It should be noted that s.3(2) speaks of "any board, commission or similar body that is an agency of Her Majesty . . . ", but makes no reference to boards and commissions that are not agencies. This language creates an anomaly that was revealed in a recent application to the Nova Scotia Labour Relations Board for a cease and desist order. The Trade Union Act provides that

47(2). No police constable or officer, and no employee within the terms of subsection (2) of Section 3 of this Act shall strike or participate in a strike until a period of thirty days has elapsed from the expiry of any time during which a strike is prohibited under Section 45.

The bargaining unit at the Halifax Infirmary represented by the Nurses' Staff Association went on strike before the thirty-day period referred to in s.47(2) had elapsed, and the employer applied for a cease and desist order, arguing that the Infirmary was a Crown agency and therefore fell within s.3(2). The Board's finding was that

. . . [t]he evidence of the relationship between the Government of the Province of Nova Scotia and the Halifax Infirmary and in particular An Act to Incorporate the Halifax Infirmary c. 105, S.N.S. 1960 and the amendment thereto c. 18, S.N.S. 1973, has led the Board to conclude that the Halifax Infirmary is not an agency of Her Majesty in right of the Province. Accordingly employees of the Halifax Infirmary are not employees within the terms of Section 3(2) of the Trade Union Act and are not subject to the constraints of Section 47(2) of the Act.\(^4\)

In light of this finding the Board refused to issue the cease and desist order.

The corollary of this decision is that boards and commissions which do not stand in a strict agency relationship to the Crown are simply private employers for purposes of the Trade Union Act, and their employees have no special limitations on their right to strike. It seems very unlikely that the Legislature contemplated this result in framing s.3(2).\(^5\) The Halifax Infirmary is funded entirely by the

\(^4\) L.R.B. No. 2197, dated June 13, 1975

\(^5\) Compare the provisions of the three relevant acts. (1) Trade Union Act: "any board, commission or similar body that is an agency . . . ") (s.3(2)); (2) Civil Service Act: "any Board, Commission or other agency of the Crown" (s.53); (3) An Act to Incorporate the Nova Scotia Government Employees Association: "boards, agencies and Commissions . . . " (s.2(e)). It is submitted that all these forms of words are intended to refer to the same bodies, and that it was not the intention that they be restricted to just those bodies that meet the technical definition of Crown agency.
province, and its Board of Directors is composed entirely of Cabinet appointees. 6 Provinces which have drafted their legislation more carefully have taken care to see that institutions with these characteristics are governed by public employee collective bargaining legislation. 7

An employee of either the Crown or a Crown agency who is appointed by the Civil Service Commission is a "civil servant"; his labour relations are governed by two provincial statutes, the Civil Service Act, 8 and the Civil Service Joint Council Act. 9 The first of these statutes defines "civil servant" and establishes the Civil Service Commission and its powers. The provisions of the Joint Council Act will be studied in detail in the body of the paper.

The Civil Service Act defines its jurisdiction as follows:

1(a). "Civil Service" means the positions in the public service of the Province to which appointments may be made by the Civil Service Commission and such other positions as may be designated as positions in the Civil Service by the Governor in Council.

"Public service" is undefined. The Act goes on to state that

53. Notwithstanding any other Act the Governor in Council may order that this Act and the regulations, except with respect to tenure of office, shall apply in whole or in part to any employee or class of employees in the public service and to the employees of any Board, Commission or other Agency in the right of Nova Scotia.

56. The Governor in Council may designate any position in the public service of the Province as being a Civil Service position and any person in the public service as being an employee in the Civil Service . . . .

This discretion operates "notwithstanding any other Act", and this clearly includes the Trade Union Act. The legislative scheme is

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7. See for example The Public Service Employee Relations Act, 1977, Bill 41, the new Alberta legislation, which defines "employer" as

(i) the Crown in right of Alberta, or
(ii) a corporation, commission, board, council or other body all or the majority of whose members or directors
(a) are designated by an Act of the legislature, or
(b) can be appointed or designated either by the Lieutenant-Governor in Council or by a Minister of the Crown in right of Alberta . . . .

8. R.S.N.S. 1967, c.34
9. R.S.N.S. 1967, c.35
such that employees of Crown agencies bargaining under the Trade Union Act today could find themselves transformed tomorrow by Order in Council into civil servants excluded from the Trade Union Act.\(^\text{10}\)

There are a significant number of employees of the Crown and Crown agencies who are appointed by Order in Council rather than by the Civil Service Commission. These employees do not fall within the purview of the Joint Council Act, which applies only to civil servants, and they are, of course, entirely excluded from the Trade Union Act. These employees thus have no statutory bargaining rights at all.

The government has in the past used its discretion to transfer employees in and out of the civil service to solve labour relations problems on an *ad hoc* basis. For example, a bargaining unit of employees of the Department of Highways was carved out of the civil service by Order in Council and given bargaining rights similar to those under the Trade Union Act; the government bargains their terms and conditions of employment with CUPE under a voluntary recognition agreement.\(^\text{11}\)

There are thus government employees with full bargaining rights and a right to strike, those with full bargaining rights and a limited right to strike, those with the limited bargaining rights provided under the Joint Council Act, and those with no bargaining rights at all. There are also employees whose bargaining rights continue at the whim of the Governor in Council. The basis for these distinctions often has little or nothing to do with the logic of labour relations. To the extent that the distinctions rest on the legal status of the "employer" they are arbitrary for labour relations purposes and an invitation to employee unrest. This has certainly been the result in Nova Scotia.

III. *Civil Service and Civil Service Joint Council Acts*

A Civil Service Act has been on the statute books of Nova Scotia since 1935,\(^\text{12}\) and with the exception of some expansion in the

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\(^{10}\) This can work the other way too; employees can be removed from the jurisdiction of the Civil Service Commission and thus given bargaining rights under the Trade Union Act. Currently *CBRT & GW* is certified for a bargaining unit of employees in the dietary, household and laundry departments at the Victoria General Hospital, even though the majority of employees there are civil servants.

\(^{11}\) Information from the Economics and Research Division, Nova Scotia Department of Labour.

\(^{12}\) S.N.S. 1935, c.8
powers of the Commission and the addition of a grievance
procedure in 1962,\textsuperscript{13} the present Act is substantially the same. An
analysis of this Act alone would suggest that civil servants have no
bargaining rights at all. Section 9 provides that

The Commission, with the approval of the Governor in Council,
may make regulations relating to employment in the Civil Service
respecting:

(a) terms and conditions of employment;
(b) eligibility and qualifications for appointment;
(c) nature and extent of examination;
(d) classification and reclassification of employees;
(e) transfer and promotion of employees;
(f) compensation and increases in compensation of employees;
(g) termination of employment and what constitutes resignation;
(h) holidays, vacation, sick leave, special leave, and other
absences;
(i) days and hours of work;
(j) hearing and determination of complaints and grievances;
(k) public service award;
(l) the keeping and making of records and reports relating to
employees;

(m) any other matter deemed necessary or advisable for the better
carrying out of the purposes and intent of this Act.

This virtually runs the gamut of terms usually negotiated in a
collective bargaining relationship. If it is not clear enough from
Section 9 alone that the power to determine terms and conditions of
employment rests unilaterally with the Civil Service Commission
and the Governor in Council, the Act goes on to specify particular
powers and duties of the Commission with respect to
classification,\textsuperscript{14} compensation,\textsuperscript{15} appointments,\textsuperscript{16} suspensions,\textsuperscript{17}
exclusions,\textsuperscript{18} and entertainment of grievances.\textsuperscript{19}

The Civil Service Act must, however, be read in conjunction with

\begin{flushleft}
\textsuperscript{13} S.N.S. 1962, c.3 \\
\textsuperscript{14} Supra, note 8, ss. 13-16 \\
\textsuperscript{15} Id., ss. 17-21 \\
\textsuperscript{16} Id., ss.22-47 \\
\textsuperscript{17} Id., ss.48-51 \\
\textsuperscript{18} Id., s.54 \\
\textsuperscript{19} Id., s.58
\end{flushleft}
the Joint Council Act, passed in 1967. This latter Act provides for the establishment of a Joint Council consisting of three "public servants" representing government and appointed by the Governor in Council, three representatives of the "Nova Scotia Civil Service Association", also appointed by the Governor in Council but on recommendation of the Civil Service Association, and an impartial, non-voting chairman likewise appointed by the Governor in Council. This Joint Council "shall consider and negotiate such matters as are put on the agenda". "Any matter concerning the terms of employment of civil servants including, but not so as to limit the generality of the foregoing, working conditions, remuneration, leaves of absence and hours of work" may be put on the agenda. In fact such items must be placed on the agenda by the chairman if a member of Joint Council requests it and follows the proper procedures. The Joint Council must meet at least four times a year. If it cannot reach an agreement on agenda items there is provision in the Act for mediation, and ultimately for compulsory arbitration. The decisions of either Joint Council or the Arbitration Board are binding on the Association. More surprisingly, they are also purportedly binding on the executive branch of government: Sections 8 and 9 of the Act provide that

The Governor in Council, notwithstanding the provisions of the Civil Service Act, is empowered to and subject to Section 9 shall implement any decision of the Joint Council or the Arbitration Board and the Civil Service Commission is empowered to and subject to Section 9 shall implement such a decision in the same manner as it implements a provision of the Civil Service Act or a regulation made thereunder.

21. Supra, note 9, s.2(1)
22. Id., s. 4
23. Id., s.3(d)
24. In the case of NSGEA and Theriault v. The Queen, application for certiorari dismissed, S.H.Nos. 13948A,13949, 13950, unreported, the government argued that only "rights" matters could be placed on the agenda of Joint Council, and that "interest" matters could not be dealt with there (p.10). The Court disagreed with this submission and found that there were no restrictions on matters that could be brought before Joint Council as long as they were sponsored by a member and came within the statutory definition of "terms of employment" (p.15).
25. Supra, note 9, s. 3(b)
26. Id., s.6(1), (2)
27. Id., s. 6(3)
The Governor in Council and the Civil Service Commission are not bound to implement any decision of the Joint Council or the Arbitration Board which would result in any department exceeding its appropriation, provided that the Minister of Finance and Economics will include in the estimates for the next ensuing fiscal year an amount sufficient to implement the decision retroactive to the date on which the decision was to be effective.

While undeniably an improvement over a mere right to petition the Crown, formerly the only recourse against arbitrary treatment open to a civil servant, this is scarcely a collective bargaining statute. First, all members of the Council are appointed, technically at least, by the Governor in Council, one of the parties of interest in the negotiations. On the face of the statute these appointments may be quite arbitrary, and there is no guarantee that the nominal representatives of either side will have a mandate to negotiate. Second, there is no identification of the "Nova Scotia Civil Service Association" which has a right to be represented on Council, nor any indication of what its relationship should be to the civil servants on whose behalf it is presumed to speak. There is no requirement that civil servants be members of the Association or have any input whatsoever into deciding what positions the Association will take at the Joint Council table. Third, the Joint Council Act co-exists with the Civil Service Act, and although some of the provisions of the former Act are specifically designated as operating "notwithstanding the provisions of the Civil Service Act" there are still clashes between the arbitrary powers given to the Civil Service Commission and the intended scope of negotiations under the Joint Council Act. Fourth, no item can be placed on the table of Joint Council unless it has first been processed through an employer-controlled "grievance" procedure. Fifth, the Joint Council Act does not contemplate collective agreements. And sixth, the Act makes no provision for agreements reached by Joint Council or the Arbitration Board to be binding on the employees themselves.

These gaps in the structure of the Act reveal a measure of government control over the proceedings quite inconsistent with collective bargaining as it is usually understood. They are further compounded by a conceptual problem inherent in the whole procedure: how can a union bind government, or more accurately, how can government bind itself? It is a fundamental principle of

28. Id., s.3(d)
Anglo-Canadian constitutional law that no legislature can prevent its successors, or even itself, from changing the law. Certainly no executive can bind the legislature to pass a budget, and significantly Section 9 of the Joint Council Act speaks only of including in estimates for succeeding years amounts sufficient to implement decisions, since there can be no guarantee that the legislature will actually adopt those estimates. This may pose no practical problem, since refusal by the legislature to implement executive recommendations is almost unthinkable under the Cabinet system unless the party in power is so divided that a crisis is imminent in any case. But it is a contradiction in the system of which both parties are acutely aware, and a Cabinet beleaguered by what it considers to be unreasonable contract demands can use the threat of a legislative refusal to implement as an additional bargaining weapon.

An analysis of the Joint Council Act and the uses to which it was actually put during the first few years of its existence suggest that the intention was to provide not a structure for collective bargaining but a structure within which disputes over terms and conditions of employment could be processed on a piecemeal basis in the form of grievances. This conclusion is consistent with the frequency of meetings required of Joint Council, and with the fact that the chairman is prohibited from putting items on the agenda of Joint Council for negotiation

\[ \ldots \text{unless he is satisfied that the appropriate proceedings in respect of the matter have been taken under Section 58 of the Civil Service Act and Regulations 61, 62, and 63 of the Regulations under the Act.} \]

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The provisions referred to outline an internal grievance procedure whereby individual employees may refer individual problems to their department heads or the Civil Service Commission. In other words, the only problems that can be negotiated at Joint Council are those that cannot be resolved on an individual basis between the employer and individual employees. Whatever merits a system like this may have for resolving problems in the administration of the collective agreement, it is antithetical to the philosophy of collective bargaining whereby the individual employee gives up his own right to negotiate in favour of his bargaining agent.

But in spite of the fact that the Joint Council Act makes no reference to collective agreements and fails to provide a structure

29. *Id.*, s.3(d)
hospitable to the negotiation of such agreements, collective agreements have in fact been concluded under its aegis. Prior to 1973 Joint Council had been used simply as a forum for processing grievances arising out of the workings of the Civil Service Act, and for periodic revisions of salary and benefit scales. But in February of that year a unit of technical employees signed a collective agreement and since then all civil servants (with the exception of negotiated managerial exclusions) have followed their lead.

As the bargaining relationship has developed over the years, negotiations do not in fact take place in Joint Council. Negotiators from both sides (not necessarily members of Joint Council and certainly not in that capacity) meet and attempt to reach agreement. The government is presently represented on Joint Council by the Civil Service Commissioner, the Deputy Minister of Finance and the Deputy Minister of Social Services. In actual negotiations, however, it is represented by its Chief Negotiator, currently George Hall. He is technically an employee of the Civil Service Commission but takes his instructions from Cabinet, and in particular a Cabinet committee on labour relations, as regards collective bargaining.

If the parties negotiating outside Joint Council are able to agree, their agreement is then (hopefully) ratified by government and by the Association membership, and then implemented by the Governor in Council in the form of a regulation under Section 9 of the Civil Service Act. Each such "regulation" contains a provision that in the case of conflict between it and any other regulation under the Act, the collective agreement "regulation" shall prevail.

If the negotiators are unable to agree, the dispute is then referred to Joint Council. But in practical terms the sole function of Joint Council in such a case is to be "unable to reach agreement" within the meaning of Section 6(1) of the Joint Council Act so that the compulsory arbitration mechanism can be triggered. There has never yet been a resolution of a contract dispute at the Joint Council level since these procedures were developed.

Joint Council has a role to play, albeit a passive one, in the negotiation of the collective agreement, as a conduit to binding arbitration. Prior to the recent decision of Mr. Justice Hart of the

30. These are personal rather than ex officio appointments.
31. Interview with George Hall, Chief Government Negotiator.
32. Interview with George Hall.
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Nova Scotia Supreme Court in *Nova Scotia Government Employees Association and Gerald Theriault v. The Queen* it was thought to play the same role in the administration of the collective agreement. The typical collective agreement contains the following Article:

The provisions for Arbitration contained in the Civil Service Joint Council Act shall apply to the grievances resulting from this Agreement.34

This article was inserted on the understanding that the only way the parties could, with any statutory authority, invoke binding arbitration for any type of dispute was to go through Joint Council. The procedure followed was that unresolved grievances were placed on the agenda of Joint Council in the same manner as unresolved contract disputes, and if they continued unresolved they were referred to the Civil Service Arbitration Board.

Gerald Theriault’s grievance, along with grievances of two other employees on different issues, proceeded along this route and eventually found themselves before the Arbitration Board. Among other preliminary objections, counsel for the government took the point that

... article 23.01 [identical to the typical provision quoted above] of the collective agreement between the parties substituted a right to arbitration thereunder for whatever right might otherwise exist to proceed to arbitration through the Joint Council mediation procedure provided for in ss.3,4,5 and 6 of the *Civil Service Joint Council Act*.35

In other words, the argument was that not only was reference of grievances to Joint Council not required; it was precluded by the terms of the collective agreement. Astonishingly, the Board agreed with this submission and dismissed the grievances.

The employees’ association applied to the Supreme Court for an order to quash this decision. The Court refused the order on technical grounds, but registered its disagreement with the proposition that the procedure provided by the collective agreement precludes the reference of a dispute to Joint Council. What is interesting for our purposes, however, is the Court’s view that

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33. *Supra*, note 24
35. *Supra*, note 24 at 15
36. The Arbitration award was upheld by an application of the “very question” doctrine (see pp. 22 ff.).
reference to Joint Council, while possible, is not necessary to invoke binding arbitration, and not called for by the collective agreement:

Article 23, in my opinion, incorporated the provisions for arbitration contained in ss.7,8 and 9 of the Civil Service Joint Council Act and were not intended to refer to the matters covered by ss. 3, 4, 5 and 6 of the Act.37

Grievances unresolved by the grievance procedure provided by the collective agreement are to be referred directly to the Civil Service Arbitration Board.

This interpretation is perhaps open to question. It could certainly be argued that the statutory jurisdiction of the Civil Service Arbitration Board is limited to deciding matters referred to it by Joint Council, and that the government and the employees’ association have no more right to call on its services by agreement than has any unrelated third party. But Hart J.’s interpretation has the attraction of short-circuiting the cumbersome mechanism of Joint Council, and the parties may be happy enough to adopt it.

Both parties affect to see this bargaining relationship, with its precarious legal basis, as a creative response to an evolving situation. In fact, at least on the government side, it can be viewed more objectively as a tactic to pacify civil servants by giving them the illusion of bargaining while denying them a stable, rational bargaining structure in which their rights and obligations would be clearly defined.

The truth is that even in 1967 when the Joint Council Act was first passed, Joint Councils had become obsolete as a method of resolving labour disputes in the civil service. Joint Councils are based on the system of Whitely Councils which has been functioning in the British Civil Service since 1919. In Canada, Joint Councils serving a consultative and advisory function were introduced in the federal civil service, and in Ontario, as early as 1944.38 In both these jurisdictions and in others as well it had become clear by 1967 that the Joint Council system, even with the additional features of power to make binding decisions and invoke compulsory arbitration, had serious weaknesses that made it a poor vehicle for the resolution of disputes in the labour relations climate of the 1960s. In 1967 the Ontario government appointed a special

37. Supra, note 24 at 18
advisor to review thoroughly and if necessary to recommend an overhaul of its entire system of bargaining in the civil service. 39 By 1967 the federal government had completed its overhaul of its labour relations system, passing in that year the Public Service Staff Relations Act. 40 That Act provides for collective bargaining with bargaining agents chosen by the employees, and an optional right to strike. The time for Joint Councils was past when Nova Scotia implemented its legislation, and it is not surprising that the result had been, in the words of Premier Gerald Regan himself, "an unmitigated disaster". 41

IV. Nova Scotia Government Employees' Association

(i) Status

The Nova Scotia government is one party to this "unmitigated disaster"; the other party is the Nova Scotia Government Employees' Association (hereinafter "NSGEA"). 42 This Association sits on Joint Council with government and represents civil servants in their negotiations. It is considered by both its members and government to be a statutorily recognized union, with exclusive jurisdiction to represent civil servants. Because of the sloppy legislative framework within which collective bargaining for civil servants takes place, however, its exclusive jurisdiction rests on somewhat shaky legal underpinnings.

The Joint Council Act refers to the "Nova Scotia Civil Service Association" as the body entitled to seats on Joint Council. This was the predecessor of NSGEA; the Association changed its name by constitutional amendment in 1971. It may be that a simple change of name would not necessitate an amendment to the Joint Council Act since the new NSGEA, having followed proper constitutional procedures to effect the change of name, would remain the same body in law. There is in Ontario authority for the proposition that a simple change of name does not affect the

39. This was the Little Inquiry. Judge Little's report was published in 1969, and the results are to be seen in The Crown Employees Collective Bargaining Act, 1972, S.O. 1972, c.67 The Little Report is discussed in Arthurs, Collective Bargaining by Public Employees in Canada: Five Models (Ann Arbor: Institute of Labor and Industrial Relations, University of Michigan, 1971) at 104 ff.
42. Incorporated by S.N.S. 1973, c.136
bargaining rights of a union named in a certification order. But as regards NSGEA more than a simple name change has taken place since the enactment of the Joint Council Act. In 1973 NSGEA incorporated and became unquestionably a different legal entity from either the Nova Scotia Civil Service Association or the unincorporated NSGEA. It is open to question, then, whether the reference in the Joint Council Act to a new extinct Nova Scotia Civil Service Association is sufficient to designate NSGEA, a body corporate, a statutory partner to negotiations.

But assuming that the incorporated NSGEA is in fact the old Nova Scotia Civil Service Association and therefore entitled to seats on Joint Council, it does not follow that NSGEA is the only body with whom government could negotiate concerning terms and conditions of employment for civil servants. The Joint Council Act does not say, as does the Teachers Collective Bargaining Act, for example, that the named union is the only one with which the employer can negotiate, or that all employees must be members of the union. Bearing in mind that effective negotiations take place outside Joint Council and that collective agreements are implemented by government unilaterally as regulations under Section 9 of the Civil Service Act, there appears to be no statutory bar to the government agreeing to go through this process with any trade union or other organization, in effect granting voluntary recognition.

Such an arrangement would not, of course, give much effective bargaining power to employees represented by other unions. They would not have access to the compulsory arbitration procedures laid down in the Joint Council Act unless the government voluntarily agreed to place disagreements on the agenda of Joint Council. It would be extremely unlikely to do so, since by the provisions of the Joint Council Act a decision of Joint Council or an arbitration

43. *Ontario Hydro Employees Union and Hydro Electric Power Commission of Ontario*, 57 CLLC para 18,080. There may be different factors to consider when the union is designated in a statute rather than a certification order.
44. Compare the ambiguous provisions of the Joint Council Act with the clarity of the Teachers' Collective Bargaining Act: s.11(1) "Every teacher as defined by this Act shall be a member of the Nova Scotia Teachers' Union for the purposes of this Act", and s.12(1) "The Union shall be the exclusive bargaining agent for the teachers with the employer".
45. It has, of course, done just that by Order in Council with respect to individual bargaining units, but the argument here is that Orders in Council removing units from the civil service are unnecessary since it could bargain with other unions for employees with the status of civil servants.
board would bind the government, but not a union other than NSGEA, and not the individual employees themselves. Satisfactory terms could only be coerced by employee pressure tactics such as work slowdowns, strikes or threats thereof, and since such action would fall outside the purview of the Trade Union Act, all the common law sanctions against it would be applicable.

For all practical purposes NSGEA enjoys a bargaining monopoly since any other arrangement would depend on voluntary recognition by government, and so far government has been unwilling to deal with any union other than NSGEA as far as civil servants are concerned. Nevertheless it is inaccurate to say that NSGEA has a statutory monopoly on collective bargaining in the same sense as the Teachers' Union does.

(ii) History and Bargaining Philosophy

In order to get a perspective on the effectiveness of NSGEA as a representative of its constituents, it will be useful to examine briefly its genesis, and the historical roots of its approach to collective bargaining. It was born as the Nova Scotia Civil Service Association in 1957 in the manner of many company unions; the government, beginning to feel threatened by moves of the legitimate trade union movement into the public sector, took the initiative in authorizing the formation of a Civil Service Association "the constitution, rules and by-laws of which shall be subject to the approval of the Governor in Council." The civil servants who availed themselves of this permission to organize were generally those of high rank who shared the government's distaste for legitimate trade unionism. The first president of the new Association made clear his approach in his first newsletter to the membership:

We are a civil servants' organization with ideals and purposes neither wholly professional nor yet have they the characteristics of a trade union . . . . The Government is friendly and I feel will benefit greatly from association with our organization in its efforts to improve performance, techniques and communication.

As it was born, so it continued. The partners in the developing bargaining relationship were a government willing to co-opt the

46. Hodgetts, supra, note 38, at 70
47. Order in Council
48. Newsletter, September 1958
leadership in order to prevent civil servants from turning to the legitimate trade union movement for help, and a management-oriented leadership willing to be co-opted. At every juncture change occurred in the structures established only because of external pressure, or the threat of such pressure from organized labour.

Prior to 1972, membership in the Association was open to all civil servants below the rank of Deputy Minister. There were no managerial exclusions whatsoever. Needless to say, the organization was largely controlled by people in managerial classifications and totally failed to provide a forum within which rank and file civil servants could express their views.

Since 1972, for reasons which are too complex to develop in this paper but which have much to do with a general climate of labour unrest in the country, NSGEA had moved closer to the trade union movement and begun to identify more closely with its aims and interests. In 1972, after the demise of the apolitical and ineffectual Canadian Federation of Government Employees' Associations,\textsuperscript{49} it voted to affiliate with the Canadian Labour Congress and made overtures in that direction although these ultimately proved abortive.\textsuperscript{50}

NSGEA's changing perception of its relationship to organized labour is also reflected in recent sporadic forays into organizing outside the civil service proper. NSGEA is currently certified as bargaining agent for a unit of technicians and related classifications at the Halifax Infirmary.\textsuperscript{51} This is the only non-civil service unit for which it bargains directly, but certified associations at the Izaak Walton Killam Hospital in Halifax and the Blanchard-Fraser Memorial Hospital in Kentville are affiliated with NSGEA for bargaining purposes. Likewise affiliated is the College of Cape Breton Faculty Association which bargains under a voluntary recognition agreement.

NSGEA itself attempted to gain certification for the unit now represented by the IWK Technical Employees Association, the technicians at the Killam Hospital. At the time it applied for

\textsuperscript{49} Hodgetts, supra, note 38, at 80

\textsuperscript{50} Interview with John Puchyr, Executive Secretary, NSGEA. The reasons are somewhat obscure.

\textsuperscript{51} Query whether, in light of the LRB finding (supra, note 4) that the Infirmary is not a Crown agency, NSGEA was entitled to be certified to represent these employees at that time. The question is now academic since the NSGEA was amended to give it power to organize in the private sector (S.N.S. 1976, Bill 38)
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certification its bargaining objects as outlined in its Act of Incorporation were:

to bargain collectively with Her Majesty the Queen in the right of Nova Scotia;

— and —

to bargain collectively pursuant to the Trade Union Act with boards, agencies and commissions of Her Majesty the Queen in the right of Nova Scotia from time to time appointed.\(^5\)

The Killam Hospital is a private hospital and not a board, agency or commission of Her Majesty, and therefore NSGEA was not authorized by its Act to bargain with it. The Labour Relations Board dismissed the application for certification, following the lead of the Ontario board\(^5\) in refusing to certify a union for a bargaining unit for whom bargaining would be *ultra vires*.\(^5\)

After this setback NSGEA was successful, over the opposition of a formidable battery of labour groups,\(^5\) in obtaining an amendment to its Act expanding its powers, and it can now

. . . bargain collectively with employers of its members who are employers for whom certification may be granted under the Trade Union Act.\(^5\)

Although it could now organize in the private sector it has not altered its affiliation arrangement with the Killam technicians or its other affiliates.\(^5\) It is presently doing no organizing outside the civil service. The reason given for this is that NSGEA has found it difficult to bargain under two different pieces of legislation and has declared a moratorium on organizing outside the civil service until it achieves its stated goal of persuading government to bring the civil service under the Trade Union Act.\(^5\) If this goal is as distant as government officials suggest it is, organized labour has nothing to fear from NSGEA.

\(^{52}\) Supra, note 42, s. 2(d), (e).
\(^{54}\) This decision is discussed in Hansen *et al.* "Recent Developments in Labour Law in Nova Scotiia" (1976), 2 D.L.J. 791 at 800-801.
\(^{55}\) Including the Nova Scotia Federation of Labour, CUPE, CBRT&GW and the New Democratic Party.
\(^{56}\) S.N.S. 1976, Bill 38, s.1(b)
\(^{57}\) In fact this constitutional amendment predates the certification order for the Blanchard-Fraser employees, although the application for certification was made prior to the amendment.
\(^{58}\) Interview with John Puchyr
(iii) Structure

The present objects of NSGEA are:

(a) to promote the common interests of its members
(b) to foster high standards of service
(c) to maintain good relations with the employers of its members
   (ca) to bargain collectively with employers of its members who
       are employers for whom certification may be granted under
       the Trade Union Act
(d) to bargain collectively with Her Majesty the Queen in the
   right of Nova Scotia; and
(e) to bargain collectively pursuant to the Trade Union Act with
   boards, agencies and commissions of Her Majesty the Queen
   in the right of Nova Scotia from time to time appointed. 59

NSGEA has two organizational structures, one for collective
bargaining purposes and one for local and provincial administration
and policy-making. 60 As far as bargaining structure is concerned, it
is divided into eight bargaining components which serve the same
function as bargaining units under the Trade Union Act. These are:
(1) Professional (PR), (2) Education (ED), (3) Technical (TE), (4)
Services (SE), (5) Clerical (CE), (6) Hospital Services Nursing
(HSA), (7) Hospital Services Technical (HSB), and (8) Mainte-
nance and Operating Services (MOS). Each component contains all
those employees working in that job category across the province.
Members of particular components come together to elect a
Component Representative Council. The chairman of each such
council is on the bargaining committee for that component along
with the president and the executive secretary of NSGEA. For
purposes of general administration and policy-making NSGEA is
divided into eighteen locals or branches on a geographic basis.
Membership in branches cuts across component boundaries. These
branches elect representatives to the Provincial Executive and to the
annual conventions.

(iv) Bargaining Record

The first full-scale collective agreement was negotiated in early
1973, and since early 1974 all components have worked under
collective agreements. But the terms of these agreements, both
monetary and non-monetary, show that the government is still the

59. S.N.S. 1973, c.136, S.2 as am. by S.N.S. 1976, Bill 38, s.1(b)
60. See Nova Scotia Government Employees Association Constitution as amended
May 1976.
dominant partner in this negotiating relationship. The rate of increase for civil service salaries in the key years of 1969-74 was less than the Nova Scotia average. Furthermore, although theoretically "any matter concerning the terms of employment of civil servants "is on the table to be negotiated, NSGEA has made very few inroads into "management's rights". A typical "management's rights" clause reads:

It is the exclusive function of the employer to manage, which function without limiting the generality of the foregoing, includes the right to determine employment, appointment, complement, organization, work methods and procedures, kinds and location of equipment, discipline and termination of employment, assignment, classification, job evaluation system, merit system, training and development, appraisal and the principles and standards governing promotion, demotion, transfer, lay-off and reappointment and that such matters will not be the subject of collective bargaining.

The Association is excluded from such standard union functions as participation in joint job evaluation and classification. The "merit system" is particularly jealously guarded; the standard agreement contains no seniority clause and the job posting clause is weak, requiring the employer to post jobs but imposing no duty on him to consider seniority in allocating jobs.

NSGEA's lack of bargaining success cannot be blamed simply on its own weakness. This is probably an effect as much as a cause. Such collective agreements as these are in fact an inevitable result of structural weaknesses in the whole bargaining system, weaknesses which give NSGEA no effective dispute settlement mechanism and no recourse if the government chooses to bargain in bad faith.

The final dispute settlement mechanism provided by the Joint Council Act is compulsory arbitration before the tripartite Civil

61. See Appendix. This table was prepared by Rollie Thompson, as part of his study, infra, note 69.
62. Quoted from the Educational Component's collective agreement, supra, note 34, Article 6.01.
63. An idea of the vast scope of managements' rights under these collective agreements can be gleaned from the Theriault case, supra, note 24. Theriault's grievance was that he had been unjustly denied a promotion. The board found that this was not a matter that could be considered by Joint Council, and was not arbitrable. A second grievance heard at the same time was based on allocation of leaves of absence with pay in an allegedly discriminatory manner. The board found that this grievance too disclosed no breach of the collective agreement since management was not obliged to apply any standards in determining how it would allocate leaves of absence.
Service Arbitration Board, which deals with problems which have remained unresolved either through bargaining or through mediation. Its neutral chairman sits for a two-year term, whereas the Association and government representatives are appointed on an ad hoc basis. The problems inherent in attempting to resolve interest disputes by the use of compulsory, binding arbitration have been the subject of much comment. It is a mechanism much beloved by governments as an alternative to strikes by their own employees, but in the private sector, both union and management are in general agreement that such arbitration is inimical to the institution of free collective bargaining.

John Crispo, in a recent discussion of interest arbitration, refers to flaws "so many and various that it is difficult to know where to begin." He notes two in particular:

1. the arbitrator or arbitration panel may become too normative in framing awards, thereby losing the confidence of one or both parties and undermining whatever acceptance there may be of the arbitral process,

2. there is a strong inducement on both sides to hold something back from the anticipated trading-off process that almost inevitably occurs in arbitration. Needless to say, this is hardly conducive to effective resolution of disputes through collective bargaining.

This passage might have been written with the Nova Scotia Civil Service experience as a model. With some continuity assured by the fact that the Board chairman sits for a two-year term, arbitration awards have fallen into a normative pattern. Unfortunately, it is a pattern that has caused the employees to distrust arbitration as a route to fair settlement. For example, in the 1973 clerical negotiations the government's final offer for stenographers was $4,200 p.a., and NSGEA's final demand was $4,500 p.a. The arbitration award was $4,237 p.a.. This is a typical result.

64. In practice mediation is rarely used.
65. See Brown, Interest Arbitration (Ottawa; Task Force on Labour Relations, Study No. 18),
67. Id., at 10
68. Joint Council Act, supra, note 9, s. 7(1) (a)
Obviously if the government can count on the Board to make awards not very far above its final offer, it will keep its final offer as low as possible. In fact it has been guilty of the practice of withholding its “true” final offer from the table until it has a commitment that NSGEA will recommend the offer for acceptance and not force arbitration.\textsuperscript{70} NSGEA, knowing from experience that it has little to gain by arbitrating the penultimate offer, may succumb to this “bargaining” tactic.

The system is clearly weighted in favour of the government since the employees are deprived of any effective means of voicing their dissatisfaction or achieving reasonable settlements. But even though the rules are written by and for management, the Nova Scotia government is quite capable of changing those rules in the middle of the game. Governments can, of course, changes the rules of bargaining at any time; this is a constitutional fact of life for unions bargaining with governments. But a government that erects a bargaining structure and then threatens to demolish it if that “bargaining” does not achieve the desired result in an individual case is surely bargaining in bad faith. The Nova Scotia government has been guilty of this on more than one occasion. The most conspicuous example occurred in 1972. In that year the government imposed a 5\% guideline on civil service wage increases. Conscious that such guidelines would not bind an arbitration board, Premier Regan requested that the Association voluntarily comply with the guidelines and not submit higher demands to arbitration. And as further persuasion, he threatened to remove the right to arbitration if the Association was so foolhardy as to refuse his “request”.\textsuperscript{71}

To its great discredit the Association executive knuckled under. This capitulation was consistent with its historic role as supplicant to an omnipotent government, but hardly with the new role it was attempting to assume as equal partner in a collective bargaining relationship. The membership was not so submissive, and the opposition of rank and file members to this executive decision was a key factor in the palace revolution that brought about an almost complete change in leadership in that year. But although the Association won a victory over the guidelines it soon reverted to its former conciliatory stance. This resulted in the estrangement of the

\textsuperscript{70} Id., at 135
\textsuperscript{71} Id., at 64
more militant bargaining components, notably the two Hospital Services components.

(v) Breakdown in the System

Many civil servants have lost confidence in the compulsory arbitration system to the point where they feel it should be avoided at all costs, even to the point of substituting "illegal" forms of pressure on government to obtain fair settlements. Cases in point are the Hospital Services Nursing (HSA) component which resigned en masse in 1973, and the Hospital Services Technical (HSB) component which adopted the same tactic in 1975.

Civil servants in Nova Scotia are not expressly forbidden by their legislation to strike. The only reference to strikes in the relevant statutes is in Section 10 of the Joint Council Act:

The Association shall not sanction, encourage or support, financially or otherwise, a strike by its members or any of them.

The Act itself provides no penalty for breach of this section, although presumably it could be enforced by injunction.\(^{72}\)

An interesting question arises, however, as to the legal status of a strike by civil servants that is not sanctioned, encouraged or supported by the Association: a strike by a break-away component, for example. Would such a strike be equally enjoinable? We must make here a clear distinction between an injunction against picketing and an injunction against the strike itself, or what would be effectively a back-to-work order. Picketing in support of such a strike would, of course, invite an injunction if accompanied by unlawful activity of any kind, the usual pegs on which anti-picketing injunctions are hung being the nominate torts and any breach of statute.\(^{73}\) But as for the strike itself, it is difficult to see how, in cases where the collective agreement has expired, an injunction could issue. There would be no breach of a collective agreement, and strictly speaking no breach of statute either, and therefore the principles developed in the \textit{IBEW v. Winnipeg Builders' Exchange} case\(^{74}\) would not be applicable.

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72. At least to the extent of obtaining an injunction against picketing, and possibly against the strike itself.

73. See Christie, \textit{The Liability of Strikers in the Law of Tort} (Kingston: Industrial Relations Centre, Queen's University, 1967), passim.

74. (1968), 65 D.L.R. (2d)242 (S.C.C.). The case established that a strike itself can be enjoined where it is in breach of a collective agreement and a labour relations statute.
Whether or not such a strike would be illegal, it would be unprotected by the provisions of the Trade Union Act. Such a withdrawal of services would almost certainly be a repudiation of the employment contract entitling the employer to accept the repudiation and refuse to reinstate the strikers. Their only protection would be their own power to negotiate their reinstatement.

The question is at present academic, for when the members of both HSA and HSB resigned en masse they were acting with the sanction if not the encouragement of NSGEA and therefore laying themselves open to an injunction if NSGEA actions violated Section 10. It was for this reason that they chose the route of mass resignations rather than strike. But it is questionable whether mass resignations of this nature are not in fact a strike. The collective agreements themselves, which recite the anti-strike provisions of Section 10, contain a definition of strike imported almost verbatim from the Trade Union Act:

"'strike' means a cessation of work, or a refusal to work or continue to work, by employees, in combination or in concert or in accordance with a common understanding for the purpose of compelling the Employer to agree to terms or conditions of employment. . . ." 76

An industrial action like mass resignations fits squarely within this definition, and although the collective agreement had ceased to be in effect at the time of the mass resignations the Court could not fail to look at it and at its model the Trade Union Act for guidance in interpreting Section 10.

The government did not seek an injunction against HSA, but the Nova Scotia courts had an opportunity to consider the legal status of mass resignations during the walkout of HSB. At that time the government made two applications for interim injunctions. Both applications dealt only with picketing. The first was refused by Mr. Justice Jones, mainly on the ground that the plaintiff had not made out the kind of case necessary to justify an extraordinary remedy like an interim injunction. He says:

The issue as to whether the defendant's conduct constitutes an illegal strike and if so, whether all conduct resulting from such

75. See Education component agreement, supra, note 34, Article 7.01, and Agreement Between the Nova Scotia Government and The Nova Scotia Government Employees Association — Group: Health Services Classification and Pay Plan — HSB, Article 7.01, for example.

76. Quoted from HSB agreement, supra, note 75, Article 1.01(g)
action should be enjoined, will have to be determined at trial.\textsuperscript{77}

He also says, however:

I am not satisfied in the evidence which has been presented before me that the plaintiff has established that there is any illegal activity.\textsuperscript{78}

Although he makes no reference to Section 10 of the Joint Council Act, this comment suggests that he found no breach of that section since it is well settled that breach of statute can constitute sufficient illegal activity to justify the issuance of an injunction against picketing.\textsuperscript{79}

On the second application the injunction did issue. In this case, however, there was clear evidence of inducing breach of contract which is in itself sufficient to support the injunction.\textsuperscript{80} In this decision as well there is no reference to Section 10. As usually happens in these cases there was no hearing on a permanent injunction and therefore no full consideration of the question of whether or not mass resignations constitute a strike. The issue must be said to be still unresolved in this province.

Mass resignation as a dispute settlement mechanism has had mixed results for NSGEA members. In the case of the HSA component action, the dispute was resolved quickly and successfully from the point of view of the employees. However the similar action taken two years later by the HSB component was not so successful. There are a number of reasons why this was so, not the least of which was that the government was determined to make an example of the technicians and teach civil servants that they had nothing to gain by "illegal" tactics. The nurses' settlement in 1973 had had a highly beneficial spin-off effect on collective agreements negotiated by other components in that year. The government was determined not to be so whip-sawed again. When the technicians withdrew their services in February of 1975 the government dug its heels in, quite openly prepared to let them freeze or starve before it would bow to their demands.

The technicians were off work for seven weeks, and returned only because the government took the position that "resigned" technicians had no standing to vote on the contract that had been

\textsuperscript{77} R. v. Meek et al., oral decision of Jones J., S.H.No. 06031 at 6
\textsuperscript{78} Id., at 5
\textsuperscript{79} Gagnon v. Foundation Maritime (1961), 28 D.L.R. (2d) 174 (S.C.C.)
\textsuperscript{80} Oral decision, unreported
negotiated by NSGEA while they were off the job. They voted overwhelmingly to reject the contract, and finally submitted the dispute to arbitration, where the usual "compromise" was reached.

The technicians' walkout, perhaps because it lasted so much longer than the nurses' walkout, finally brought to public attention serious internal differences that had been festering for some time between the executive of NSGEA and the leadership of some of the components. The technicians accused the executive of selling them out by bowing to the government's refusal to negotiate with resigned technicians; of gagging them by refusing to let them talk to the press; of reneging on a promise to call for a province-wide walkout of NSGEA members; and ultimately of entering into a sweetheart deal with government which was so unacceptable that even after seven weeks off the job the component refused to ratify it.

These accusations reflect serious philosophical differences within the Association, differences that may be irreconcilable. The HSB component and to a lesser extent the HSA component are young, militant units, no longer impressed by the twin mystiques of "professionalism" and "civil service". Such groups would inevitably clash with a leadership which, while it is more trade-union oriented than its predecessors, is still in the old civil service tradition, dazzled by the power of government.

Spokespeople for the HSB component have expressed their determination either to "transform the NSGEA into a solid organization" or "leave and seek affiliation with a trade union that is prepared to work with them to improve the wages and working conditions of public employees in Nova Scotia." Under the current legislative framework the latter is not really a viable alternative; it remains to be seen whether or not they can accomplish the former.

V. Why Not Full Collective Bargaining Rights?

Those negotiating on both sides of this relationship recognize the futility of the situation and are anxious for change. But the solutions they are seeking differ, as do their perceptions of the problem. The public position of NSGEA is unequivocal: they want the Joint Council Act repealed and civil servants placed under the Trade

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82. Id., passim
83. Id., at 22
Union Act.\textsuperscript{84} The negotiators for government, on the other hand, are seeking only a rationalization of the current legislation to fit the actual bargaining situation that has evolved, and a clarification of rights and obligations on both sides.

So far government has been totally unwilling to consider the NSGEA proposal. The major bone of contention is, of course, the right to strike; government has rightly or wrongly concluded that the people of Nova Scotia would not be receptive to legislative changes that would legalize strikes in the public sector. Therefore, although the issue will almost certainly rear its head again as it has many times in the past,\textsuperscript{85} it is unlikely that changes in the legislation in the near future will do much more than tidy up some of the more glaring incongruities.

Nova Scotia civil servants have more at stake than simply the right to strike. If they were brought under the Trade Union Act they would also gain the right to chose their own bargaining agent. They would have the right to have their bargaining units determined by the Labour Relations Board on “community of interest” lines rather than by “negotiation”, in this case a synonym for government administrative convenience. They would have protection from unfair labour practices. They could free themselves from the albatross of Joint Council.

What would they stand to lose? NSGEA itself would lose its status, already somewhat ambiguous, as exclusive bargaining agent for civil servants. Its membership would be fair game for other trade unions and almost certainly a significant proportion would defect. But publicly at least NSGEA is quite prepared to make this sacrifice of its own status in exchange for the advantages its members would gain under the Trade Union Act.\textsuperscript{86} More significant than loss of exclusive status, at least in the eyes of the executive and some of the weaker bargaining units, would be the loss of the right to demand binding arbitration in the resolution of interest disputes.\textsuperscript{87} Many NSGEA members feel they would have little to gain by a right to strike. As they perceive the situation, the public and government could readily sustain a temporary loss of their services, and they

\textsuperscript{84} Interview with John Puchyr. There seems to be some doubt about whether the NSGEA membership support this position.
\textsuperscript{85} Vaison and Aucoin, supra, note 20, conclude their article by noting that the matter of full collective bargaining rights for civil servants was then under study by the government (p.580). Their article was published in 1969.
\textsuperscript{86} Interview with John Puchyr
\textsuperscript{87} Interview with John Puchyr
could not hope to force fair settlements in this kind of trial of strength. It is ironic that these feelings are prevalent among civil servants themselves when the government propaganda would have it that all civil servants are so “essential” that the public welfare demands continuity in their services.

The Nova Scotia government, in refusing to confront the question of full or increased bargaining right for its employees, is swimming against the stream in 1977. But its position has an historical basis in certain theoretical and philosophical conceptions about the nature of government and government service that die hard. Some of these conceptions have been seen as obstacles to civil service unionism *per se*; others are relevant only to the right to strike against the state.

Historically, a primary obstacle to collective bargaining in the civil service was the concept of “sovereignty”. Civil servants are employed at the pleasure of the sovereign power, and how can the sovereign be forced to bargain? Would not such bargaining be an abrogation of the duty to govern? But “sovereignty” is an illusory obstacle in a democratic state. Saul Frankel, a noted Canadian commentator on labour relations, laid its ghost for collective bargaining purposes with these oft-quoted words:

Just as the people may decide the rights and privileges of public employees, they may also decide those of private citizens, private corporations and other associations. The people as sovereign may consider themselves unsuable, or they may allow themselves to be sued. They may permit themselves to be bound by contracts with private firms, or they may decide not only to ignore the contract but to confiscate the physical and financial resources of the firm. They may hold their civil servants in virtual bondage — recruit them by conscription and maintain them in monastic isolation; or they may grant them the right of association, provide channels for mutual consultation, and even, if they will, accept as binding the recommendations of a tribunal which owes its existence to the sovereign’s caprice. One can pursue the argument to its logical conclusion, but it becomes a *reductio ad absurdum* in relation to experience. The fact is that the concept of sovereignty can be defined so narrowly or so broadly that almost any kind of practical adjustment is possible. 88

The government as sovereign may refuse to bargain with its employees, but is may also choose to bargain, and the extent to which it chooses to limit its unilateral powers by granting

bargaining rights is a question of policy and not of legal or political theory.

A second argument frequently raised against the concept of free collective bargaining in the public sector is the argument that since the wage fund comes from taxes and other government revenues rather than from profits, collective bargaining is simply an inappropriate instrument for arriving at a just determination of wage levels in the public sector. This argument has been launched from almost every point on the ideological spectrum. The "anti-labour" formulation of the argument is that in the normal bargaining situation rapacious workers limit their wage demands only by what they believe to be their employer's ability to pay. Since the government's ability to pay is limited only by its ability to tax, workers will make "unrealistic" demands. Governments, particularly with the strike weapon held to their throats, will be forced to surrender,\(^8\) thus hopelessly distorting the labour market and putting out of business many of the same taxpayers whose tax dollars provided the money to fuel these extortionate demands. The "pro-labour" formulation of the argument posits a diametric reversal of the relative power positions of the two parties to the employment relationship. In this scenario, the government is seen as consistently backed by tight-fisted taxpayers who lend unanimous support to hard-line positions, back-to-work legislation and other totalitarian measures designed to crush troublesome civil servants. Labour cannot win this kind of contest and must look to other, more "objective" means of reaching wage settlements.\(^9\)

The fact that the same argument can be spun out of such different premises makes its soundness suspect. The single shared premise is that collective bargaining is a tool for solving "economic" disputes, whereas labour disputes in the public sector are "political" disputes.\(^9\) But surely this distinction between economic and political disputes is a false one. Admittedly the costs that must be counted in an unresolved public sector dispute are not always the same as those that determine the resolution of a private

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89. See, for example, Somerville in The National, Vol. 2, No.7, at 4
90. This kind of argument was frequently met by CUPE organizers in their recent abortive attempt to organize the non-academic staff at Dalhousie University. Dalhousie employees do not, of course, work directly for the government but they know where their wages come from.
91. See Proceedings, supra, note 41 at 23, comments by Premier Regan; and Summers' Public Employee Bargaining: A Political Perspective' (1974), 83 Yale L.J. 1156 at 1156.
sector dispute. Certainly civil servants do not have to worry about the government pulling up stakes and moving to Mexico if the cost of labour gets too high in Nova Scotia. Nor does the government have to worry about its competitors enticing away customers if it is forced to suspend operations temporarily. But there are costs of disagreement on both sides that exert these same kinds of pressures. The public welfare and safety is a factor that both sides have to consider since each must attempt to attract public opinion to his side of the dispute. And just as in the private sector, a disagreement that results in a work stoppage means that the employee loses wages and the employer services. Any resolution will depend on who loses most in any given strike. In the public sector as in the private, the balance may fall on either side depending on the facts of the particular situation.

A third argument is one frequently heard from government spokespeople and senior civil servants, although it has not attracted a great deal of public sympathy: that collective bargaining is incompatible with maintenance of the traditional civil service "merit principle". The basic fear is that the trade union principle of promotion from within on the basis of seniority will undermine the tradition of maintaining quality and eliminating political patronage by awarding jobs on the basis of public, competitive examinations. Stated badly, the clash is a real one, but when examined in light of the practicalities of the situation it largely disappears. First of all, to put the merit system on the table for bargaining is not to abandon it. It is a rare union that has the strength or inclination to negotiate seniority as the sole criterion for promotion, and this almost never happens where jobs require different skills, knowledge and experience. Furthermore, the government has already modified the strict merit principle to recognize entrenched rights in those already employed. Section 24 of the Civil Service Act provides that

Vacancies shall be filled by promotion or transfer insofar as it is consistent with the best interests of the Civil Service.

This is just good management practice; obviously civil servants will perform better if they believe they have some kind of job security and chance for advancement.

A fourth argument focuses specifically on the right to strike in the

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92. Interview with George Hall. Even those provinces whose attitude to public employee collective bargaining is most progressive are careful to frame their legislation so that the merit principle is non-negotiable.
The argument is basically that services provided by government are *ipso facto* essential to the public welfare. Since they are essential, it is intolerable that the public should be deprived of them simply because there is a labour dispute between the government and its employees. This argument, particularly as formulated by American commentators, is often couched in terms that can only be described as demagogic. One writer says: "To the extent that any community permits public employees to strike, whatever the rationale and whatever the group, that community is taking the first step to anarchy." Another speaks of the public sector strike as "a weapon with which to bludgeon the entire community into submission." Closer to home, a former president of the Canadian Bar Association says "... the general citizenry is held to ransom because the service or activity that has been immobilized constitutes a vital segment of the national life."

But there is in fact no solid data to substantiate these dire prognostications. Harry Arthurs, in discussing the more general topic of strikes in essential industries, concludes:

The experience, as far as a random survey shows, has been the same in the various essential industry disputes over the past 20 years. While there has been inconvenience, there has seldom been danger. As to economic losses, these have no doubt occurred; both parties and non-belligerents have suffered. But how much the loss is off-set by pre- and post-strike economic gains is almost impossible to assess. The only thing that can be said with certainty is that the estimates of loss always exceed the actual losses.

Arthurs surveyed hospital strikes, public utility strikes and strikes in war industries, among others, in arriving at these conclusions.

In this province it is difficult to believe that the "essential services" argument is being put forward in good faith. Because of the conceptual and legal chaos governing the bargaining relationships of public employees most of the workers performing services traditionally regarded as essential are not in fact civil servants. Fire protection, garbage collection and police services are usually municipal functions; employees performing these functions bargain...
under the Trade Union Act, although police officers come under the strike postponement provisions of Section 47(2). "Public" utilities are generally provided by municipalities, Crown corporations or private enterprise, and are therefore legally part of the private sector.

Hospital services present some of the greatest anomalies. All hospitals under provincial jurisdiction provide similar services, and all are wholly or largely funded by the Health Services and Insurance Commission, a Crown agency that takes its instructions on budgetary restraints from the Cabinet. Yet they do not all have the same bargaining rights. Hospitals whose employees are appointed by the Civil Service Commission, like those at the Victoria General, bargain under the Joint Council Act and their employees have no right to strike. Hospitals that are run by Crown-appointed boards and agencies bargain under the Trade Union Act, with or without the strike postponement provisions of Section 47(2). Hospitals that are run by municipalities or charitable organizations bargain under the Trade Union Act like any private employer.

The result is that most employees performing what are usually regarded as essential services escape the strike ban, and the bulk of government employees caught by it are those performing administrative, clerical and maintenance jobs for government departments. Can it be seriously argued that the public welfare cannot withstand a strike by these people in a province that tolerates police and hospital strikes?

In any case it is only realistic to recognize that however intolerable the public may find the public sector strike, keeping such strikes illegal will not prevent them. The Nova Scotia experience itself has shown that when employees are sufficiently disaffected they will strike whether it is legal or illegal. To quote a distinguished Canadian commentator whose views on labour relations in the public sector would probably be described as "moderate":

To state the obvious, no method that can be devised to terminate disputes guarantees peace and it is a fact that outright prohibition of strikes by public servants has not prevented such strikes from taking place. Indeed the view is held in some quarters that the prohibition of strikes may lull management into a false sense of security and, by egging labour on to defy the law, and thereby prove its determination, actually causes strikes. 97

97. Finkelman, Employer-Employee Relations in the Public Service of Canada, Part I (Ottawa, 1974) at 123.
I would not argue that laws should be repealed simply because they are not being obeyed. But surely the only justification for discriminating against public employees by making it unlawful for them to strike is that it is desirable to prevent such strikes. If in fact the law does not prevent the strike, the law is merely punitive.

IV. Conclusion

None of these theoretical, philosophical or practical arguments has sufficient force to justify the continued denial to civil servants of bargaining rights which employees in the private sector have enjoyed for years. In the Nova Scotia context these arguments lack even the virtue of consistency, since most of them would apply with equal force to large numbers of public sector employees who presently bargain under the Trade Union Act without permanent harm to the body politic. But the notion that civil servants are somehow unique persists and continues to shape public policy. The crux of policy-making in public employment labour relations is always the issue of dispute resolution: should civil servants have the right to strike?

Canadian jurisdictions have come up with a variety of answers to this question. In Saskatchewan and British Columbia, civil servants have the same right to strike as other employees. In Newfoundland there is also a right to strike, subject to an exception in favour of "essential" employees and emergency situations. In the federal civil service employees have a choice of method of dispute resolution; each bargaining unit can opt for either binding arbitration or conciliation/strike. New Brunswick civil servants have a similar choice, but in addition their legislation prohibits picketing. Quebec legislation prohibits strikes by peace officers, but allows other civil servants to strike as long as "essential" services are provided for. In Ontario the recently passed Crown Employees Collective Bargaining Act, 1972 unequivocally prohibits strikes in the civil service, opting instead for binding...
arbitration. Alberta’s new legislation\(^\text{104}\) contains a similar prohibition. Prince Edward Island and Manitoba, like Nova Scotia, are still encumbered with the Joint Council system, but their legislation is silent on the right to strike.\(^\text{105}\) It is arguable that silence gives consent in this context, but this was almost certainly not the legislative intent.

It is submitted that Saskatchewan and British Columbia have the best answer. Binding arbitration of interest disputes is, for reasons already discussed, an unacceptable solution. It might be acceptable if the alternative dispute settlement mechanisms imposed costs too great to be borne, but there is no evidence that this is the case. The system in which employees have a choice of dispute settlement mechanisms has great superficial attractions; it creates the illusion of providing the best of both worlds. But in both jurisdictions\(^\text{106}\) that have adopted it, there are strong disincentives to choosing the strike route. Certain employees in each bargaining unit that has chosen the strike route are designated as “essential”, and these employees must work even if their fellow employees strike. This greatly weakens any strike; in certain kinds of units the majority of employees may find themselves designated “essential”.\(^\text{107}\) Because of this damper on free choice, and because of the feeling among civil servants already discussed in the Nova Scotia context that strikes would damage them more than the employer because of the nature of the services they perform, binding arbitration has been the choice of the overwhelming majority of units, at least in the federal jurisdiction.\(^\text{108}\) The result is that in these “choice” jurisdictions as well as in those where binding arbitration is the sole method of dispute resolution real collective bargaining is subverted.

In conclusion it is submitted that for all purposes which ought to be considered in making policy decisions on collective bargaining rights, there are no relevant differences between private and public sector employees. Civil servants in Nova Scotia belong under the Trade Union Act. Full collective bargaining rights for them are long overdue.

106. Canada and New Brunswick.
107. “Designation” seriously impaired the effectiveness of the 1975 nurses’ strike at the Camp Hill Hospital, a federal hospital in Halifax.
APPENDIX
PERCENTAGE INCREASES IN EARNINGS
N.S.G.E.A. AND PRIVATE SECTOR, 1969-74

<table>
<thead>
<tr>
<th></th>
<th>N.S.G.E.A.</th>
<th>AVG. WEEKLY</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ALL COMPONENTS¹</td>
<td>EARNINGS</td>
</tr>
<tr>
<td>1969</td>
<td>7.8%</td>
<td>7.2%</td>
</tr>
<tr>
<td>1970</td>
<td>9.2</td>
<td>10.3</td>
</tr>
<tr>
<td>1971</td>
<td>6.5</td>
<td>8.3</td>
</tr>
<tr>
<td>1972</td>
<td>6.4</td>
<td>9.2</td>
</tr>
<tr>
<td>1973</td>
<td>8.7</td>
<td>9.1</td>
</tr>
<tr>
<td>1974</td>
<td>8.6</td>
<td>11.9</td>
</tr>
<tr>
<td>1969-74</td>
<td>56.4%</td>
<td>70.5%</td>
</tr>
<tr>
<td>Avg. Annual Rate³</td>
<td>7.78%</td>
<td>9.3%</td>
</tr>
</tbody>
</table>

1. Weighted average of all components. Mid-term lump-sum payments have been split between the two contract years.
2. Nova Scotia Industrial composite for all workers in establishments employing 20 or more, excluding primary sector employment, e.g. agriculture and fishing and non-commercial services, e.g. public administration, education and health services.
3. Compound annual average.

SOURCE: Research Division, Civil Service Commission and S.C. 72-002.