Steven M. Barrett
Direct Line: 416.979.6422
Fax: 416.591.7333
sbarrett@goldblattpartners.com
Our File No. 18-609

January 6, 2023

Via E-mail (registrar@lrb.bc.ca)

British Columbia Labour Relations Board
Suite 600 - Oceanic Plaza
1066 West Hastings Street
Vancouver BC V6E 3X1

Att'n: Rene-John Nicolas, Vice Chair

Dear Sirs/Mesdames:

Re: His Majesty the King in right of the Province of British Columbia (the "Province")
-and- BC Government Lawyers Association
("Association")
(Application for Certification under Section 18(1) - Case No. 2022-001618R) (the "Application")

We are counsel for the British Columbia Government Lawyers Association ("BCGLA") and are authorized and instructed to file this submission, attached as Schedule "A" to this letter, on its behalf.

We confirm that we have served these submissions on His Majesty the King in right of the Province of British Columbia, the Attorney General of British Columbia, the Professional Employees' Association, and the B.C. General Employees' Union today.

Yours very truly,
GOLDBLATT PARTNERS LLP

Steven M. Barrett
SMB:ta

Attachment
c.c.
Harris & Company LLP Barristers & Solicitors (*via E-mail djordan@harrisco.com*)

Moore Edgar Lyster Lawyers (*via E-mail rle@unionlawyers.com / danielmcbain@unionlawyers.com*)
Goldblatt Partners LLP (*via E-mail kmercer@goldblattpartners.com / manderson@goldblattpartners.com)*
B.C. General Employees' Union (*via E-mail gall.levit@bcgeu.ca*)
Black Gropper Labour & Employment Lawyers (*via E-mail jgauthier@blackgropper.com*)
BCGLA (*via email jgarethmorley@gmail.com*)

SCHEDULE "A"

SUBMISSIONS OF THE BRITISH COLUMBIA GOVERNMENT LAWYERS ASSOCIATION

Table of Contents

Summary of the Application

1. The BCGLA brings this application under ss. 18(1) and 23 of the *Labour Relations Code*[1] to be certified as the bargaining agent for a bargaining unit of all persons employed by His Majesty the King, in right of the Province of British Columbia (the "Province" or "Employer"), as Legal Counsel, other than Crown Counsel and employees otherwise excluded under s. 1(1)(a) and (b) of the *Code* ("Legal Counsel").

[1] RSBC 1996, c 244 [*Code*].

2. Under section 23 of the *Code,* once the Board is satisfied that on the date it receives a certification application at least 55% of the employees in a proposed unit are members in good standing of the trade union, and the proposed unit is appropriate for collective bargaining, the Board must certify the trade union as the bargaining agent for the employees in the unit. The Board has already determined, without objection, that the BCGLA is a trade union. There should be no dispute that nothing in the *Code* excludes Legal Counsel as employees within the meaning of the *Code,* or that well over 55% of Legal Counsel have signed cards stating that they are members of the BCGLA and want it to represent them as a bargaining agent. Therefore, as long as Legal Counsel as defined is an "approriate unit" and no constitutionally-valid law interferes with certification, the application must be granted.

3. Under the Board's ordinary tests to determine whether a proposed unit is appropriate, this is an easy case. Legal Counsel clearly have a community of interest. The bargaining unit, as defined, fits within the Employer's own categories. Legal Counsel have different duties and employment conditions than any other public servants. In every Canadian jurisdiction in which government lawyers' collective bargaining rights have been recognized, civil government lawyers either bargain on their own or in conjunction with Crown prosecutors. Most importantly, if Legal Counsel are not defined as an appropriate bargaining unit, this group of employees will be denied their ability to bargain collectively altogether. No other trade union seeks to or legally could represent them.

4. The *Public Service Labour Relations Act*[2] provides no reason to deny this application. To the extent past decisions suggest otherwise, they should not be followed, especially in light of the Employer's concession that excluding Legal Counsel from collective bargaining legislation creates an unconstitutional situation. Alternatively, if the conflict provision in s. 23 of the *PSLRA* is read as interfering with the rights of Legal Counsel under s. 23 of the *Code,* it is inconsistent with the s. 2(d) rights of Legal Counsel under the *Charter*, and this Board should exercise its authority to give it no force or effect to the extent of this inconsistency.

[2] RSBC 1996, c 388 [*PSLRA*].

FACTS

LEGAL COUNSEL

5. Bargaining unit members are full- and part-time lawyers in non-supervisory positions with the job classification "Legal Counsel"[3] working for the Province. Legal Counsel are appointed as employees under the *Public Service Act*.[4]

6. To work as Legal Counsel, an individual must be a practicing member of the Law Society of British Columbia. With the exception of private firms retained on an *ad hoc* basis and Crown Counsel, only lawyers in the Legal Counsel classification engage in the practice of law with the Province as their client.

7. There are approximately 348 Legal Counsel employed by the Province in non-supervisory positions. Legal Counsel are disproportionately women: approximately two-thirds of Legal Counsel are women and one-third are men, whereas approximately 49% of Crown Counsel are women and 51% are men.

8. Legal Counsel work in the Legal Services and the Justice Services branches of the Ministry of the Attorney General, the Public Guardian and Trustee, the Risk Management Branch of the Ministry of Finance, and for administrative tribunals. The overwhelming majority of Legal Counsel work for the Legal Services Branch ("LSB"), which is located in Vancouver and Victoria. Legal Counsel are also a majority of the employees of the LSB.

9. The LSB, Justice Services Branch and Criminal Justice Branch are unique in government because they are headed by an "Assistant Deputy Attorney General" under the Ministry of the Attorney General, as opposed to an Assistant Deputy Minister. For the LSB, being organized under the Ministry of the Attorney General separately from the ministries it advises is an important recognition of the importance of independence of legal advice to the rule of law. It also promotes the principle that the Attorney General "speaks with one voice" to government.

---

[3] The Legal Counsel Classification Series was created by Treasury Board Order No. 258/1992. Prior to April 1, 2019, the Legal Counsel designation included Crown Counsel, but that was altered in 2020 (with retroactive effect) by Treasury Board Order 2020-603. Effective April 1, 2019, they have been two separate designations. This application is brought to certify a bargaining unit of lawyers who fit within the current definition of Legal Counsel; i.e. not Crown Counsel.

[4] RSBC 1996, c 385, s 8.

10. The primary functions of Legal Counsel in the LSB are to:

a) represent the government in court or tribunal hearings, further to the Attorney General's "regulation and conduct of all litigation for or against the government or a ministry in respect of any subjects within the authority or jurisdiction of the legislature";

b) provide legal advice to Cabinet and government ministries; and

c) draft statutes and regulations and advise on the authority of regulations.[5]

11. The Justice Services Branch employs 12 Legal Counsel in support of its mandate. All Justice Service Branch Legal counsel are located in Victoria in a building shared with LSB. The Policy and Legislation Division of the Justice Services Branch is responsible for legislation, related policy, and law reform in private civil law (including succession law, torts, enforcement of judgments, contract law, trusts and private international law), family law, and the criminal justice system, and promotes dispute resolution within the justice system.

12. The Public Guardian and Trustee employs 11 Legal Counsel, all located in Vancouver. The Public Guardian and Trustee protects the legal and financial interests of children under 19 years, the legal, financial, personal and health care interests of adults who require assistance in decision making, and administers the estates of deceased and missing persons. The general powers, duties and functions of the Public Guardian and Trustee are set out in legislation.[6]

13. The Risk Management Branch is the part of the Ministry of Finance that provides risk management and insurance services to the provincial public sector. It is the only ministry outside the Ministry of the Attorney General that employs Legal Counsel. Legal Counsel in the Risk Management Branch work in Victoria.

---

[5] *Attorney General Act*, RSBC 1996, c 22, s. 2; *Regulations Act (Office of Legislative Counsel)*, s. 2.

[6] *Public Guardian and Trustee Act*, RSBC 1996, c 383, ss. 5-7 and 17(1), as well as: the *Adult Guardianship Act*, RSBC 1996, c 6, the *Community Care and Assisted Living Act*, SBC 2002, c 75, the *Employment Standards Act*, RSBC 1996, c 113, the *Estates of Missing Persons Act*, RSBC 1996, c 123, the *Family Law Act*, SBC 2011, c 25, the *Infants Act*, RSBC 1996, c 223, the *Limitation Act*, RSBC 1996, c 266, the *Patients Property Act*, RSBC 1996, c 349, the *Representation Agreement Act*, RSBC 1996, c 405, the *Trust and Settlement Variation Act*, RSBC 1996, c 463, the *Wills, Estates and Succession Act*, SBC 2009, c 13, the *Estates Administration Act*, RSBC 1996, c 122, and the *Will Variation Act*, RSBC 1996, c 490.

14. A number of administrative tribunals, including the Labour Relations Board, obtain legal services from Legal Counsel. Legal Counsel for administrative tribunals must provide those legal services independently of government. The Province is their employer.

15. Lawyers employed by the Province have a unique combination of professional and ethical duties that are distinct from any other government employee. As with other government employees, all Legal Counsel share a commitment to the principle that government must act within the law and a focus on loyally furthering government policy within that constraint. However, unlike other government employees, Legal Counsel's role is to advise government regarding the legality of the government's preferred or chosen path.

16. As chief law officer, the Attorney General provides independent legal advice to the government. The Attorney General has a special role to play in advising Cabinet to ensure the rule of law is maintained and that government actions are legally and constitutionally valid. Legal Counsel, in turn, have a similar role in developing and articulating that advice and direction to shape government action.

17. This essential, constitutionally-significant function makes Legal Counsel vulnerable to employment-related pressure. In particular:

a) All advice that Legal Counsel provide is confidential, unless waived by government;

b) An opinion from Legal Counsel that government action is authorized may be a defence to civil liability, even if a court ultimately disagrees with the advice;

c) Opinions that proposed government action may not be legally authorized can be unwelcome to government officials; and

d) As excluded employees, Legal Counsel can be dismissed without cause – and when they are, no explanation is given.

18. Further, and unlike Crown Counsel, as part of their job duties Legal Counsel at times must take or consider positions contrary to the interests of other public servants, including other professionals in the public service. This is most obvious when giving advice or representing the government on labour or employment issues, but can spill into other areas as well (for example, advising that a public servant, including a professional employee, has acted negligently, has engaged in wilful misconduct, has exceeded legislative or constitutional authority, or should be represented separately from the Province).

19. Legal Counsel give advice and represent the government in relation to its compliance with the *Charter*, the constitutional division of powers, the independence of the judiciary, Aboriginal and Treaty rights and commitments, procedural fairness and reasonableness in the making of statutory decisions, compliance with statutory, regulatory and contractual commitments, including authorizations for spending and taxes, and respect for the common law and statutory rights of British Columbians, including to property, against discrimination under the *Human Rights Code*, protection from tortious conduct by government, and many other areas.

20. Litigators (also referred to as barristers) represent government in civil actions, constitutional challenges, and tribunal proceedings. They represent government statutory decision makers in judicial review applications. Specific practice areas also include civil forfeiture and representation of the Director of Child Welfare.

21. Legislative Legal Counsel draft government bills and provide confidential advice on the effectiveness of statutory language to obtain the public policy objectives of Cabinet. They draft and examine proposed regulations to determine whether they are authorized by the enactment under which they are made, are an unusual or unexpected use of that authority, trespass unduly on existing rights and freedoms, are consistent with the *Charter*, and are drafted in accordance with standards established by the Chief Legislative Counsel.

22. Many of the terms and conditions of employment for Legal Counsel are distinct from any other government employee. For example:

a) The Legal Counsel series sets out a schedule of salaries unique in government. Prior to April 1, 2019, it was shared only with Crown Counsel. Since that date, it is unique to Legal Counsel.

b) Since at least April 1, 1992, the terms and conditions of Legal Counsel have been set out in a Treasury Board Order that applies to no other public servants, other than articled students.

c) Between April 1, 1992 and March 31, 2019, the relevant Treasury Board orders provided, and the practice was, that the terms and conditions of Legal Counsel were set by the collective agreement in force between the Province and the BC Crown Counsel Association ("BCCCA"), except for terms relating to union security, job security and the grievance procedure. In these areas the Terms and Conditions for Excluded Employees applied.

d) Since April 1, 2019, the relevant Treasury Board orders provided, and the practice has been, that the terms and conditions of Legal Counsel are set by the collective agreement in force between the Province and the BCCCA, except for terms relating to salary, union security, job security and the grievance procedure. Salary is set uniquely by Treasury Board order.

e) The terms and conditions of employment that apply to all public servants are further modified by the professional obligations of Legal Counsel as lawyers, which prevail in the case of any inconsistency with the terms and conditions of employment of public servants.

23. In the case of Crown Counsel, the distinct nature of their role as lawyers is reflected in the bargaining structure under the *Crown Counsel Act*[7] and the recognition of the BCCCA as their bargaining agent. While the terms and conditions for Legal Counsel were similar to Crown Counsel in the past, Legal Counsel and Crown Counsel are represented by different organizations and the conditions of employment for Legal Counsel have not continued to track those of Crown Counsel since they were granted the ability to bargain collectively through the BCCCA.

THE BCGLA

24. Before 1991, many lawyers who were *de facto* employees of the government, either as prosecutors or civil lawyers, were ostensibly contractors with various rates of remuneration. In 1991, the BCCCA was created to develop a collective bargaining relationship between Crown Counsel and the government.

25. In December 1992, the Legal Services Branch Lawyers Association ("LSBLA") was formed to represent Legal Counsel in employment matters. It originally had 55 members.

26. The LSBLA was renamed the BCGLA by special resolution dated November 6, 2017. For simplicity, we refer to the organization as BCGLA in these submissions.

27. There is no mandatory dues check off for BCGLA members. Members voluntarily pay 0.5% of their salaries in dues. The employer facilitates the deduction of these dues from members' paycheques.

28. The BCGLA exists to bargain collectively with the Employer on behalf of Legal Counsel employed by the Province, and to represent Legal Counsel with respect to remuneration, benefits, and other terms and conditions of their employment. For example, as further explained below, when Legal Counsel's compensation was tied to that negotiated by the BCCCA for Crown Counsel, the BCGLA provided representations to the employer on behalf of Legal Counsel.

29. BCGLA also seeks to create, promote, and encourage better understanding, unity and cooperation among its members, and to represent its members in matters of professional interest relating to employment. For example, and as further explained below, the BCGLA has made collective

[7] RSBC 1996, c 87, s 4.1.

representations to the employer on behalf of Legal Counsel with respect to billing targets, occupational health and safety concerns, and spending of professional development funds.

30. One of BCGLA's key interests has been to ensure that Legal Counsel are protected from any disadvantage or perception of disadvantage arising from their having fearlessly followed their professional obligations – including the duty to state their legal opinion when it may conflict with government's preferences.

GOVERNMENT LAWYERS EXCLUDED FROM *PSLRA*

31. The *PSLRA* was first enacted in 1973. It was the result of a campaign by the British Columbia Government Employees Association ("BCGEA") (the predecessor to the British Columbia General Employees Union ("BCGEU")) for recognition as a bargaining agent. The BCGEA had been set up shortly after the First World War as a voluntary organization to advocate for public servants. Lawyers were never members of the BCGEA. Until the enactment of the *PSLRA*, the Province did not recognize the right of most government employees to collectively bargain, with some exception for craft unions.

32. Prior to the *PSLRA,* the Crown in British Columbia held a prerogative immunity from statute, which it could waive.[8] It had waived this immunity for production employees working for the Queen's Printer, but had otherwise asserted it. When the first New Democratic Party government (the Barrett government) was elected in 1972, it promised to remedy this and appointed the Higgins Commission, with BCGEA representation, to consider how to do so. The 1972 Higgins Report entitled "Making Bargaining Work in British Columbia's Public Service" (the "Higgins Report") is attached at **Tab "A".**

33. In 1972, there were very few lawyers working in the public service, and most of them were in management roles. Ministries often obtained legal services on an *ad hoc* basis from the private bar. It was only under the Barrett government that the LSB was created as an "in-house" law firm for the Province.

34. There is no evidence of any consultation with lawyers in the course of drafting the Higgins Report, or that the Higgins Commission ever considered their circumstances. Certainly, the Higgins Report does not address the question of whether or how lawyers working for the government could organize

[8] *Bombay (Province) v Bombay (City),* [1947] AC 58 (JCPC). See discussion in Horsman & Morley, *Government Liability: Law and Practice,* s. 1:15 (Crown Immunity From Statute).

collectively. In any event, the circumstances were radically different from those which exist today, where almost 400 employees work as Legal Counsel for the Province.

35. The Higgins Report considered the possibility of providing for the ordinary rules of certification in the public service, but rejected this because of a concern that the Labour Relations Board would not appear sufficiently independent from government and because the BCGEA already existed. Instead, the Higgins Report recommended separate legislation to apply to public servants.

36. The government then introduced the *PSLRA*, which had the effect of voluntarily recognizing the BCGEA/BCGEU as the bargaining agent for its members. Nurses working for government had already been separately organized and this was recognized as well. The Printer Union was grandfathered in through an exclusion of those employees from the definition of employee under the *PSLRA*.

37. Section 4 of the *PSLRA* sets out the bargaining units every "employee" covered by the *PSLRA* "must" be a member of. However, the definition of "employee" in the *PSLRA* excludes "a practicing lawyer or articled student as defined in section 1(1) of the *Legal Profession Act*, who is engaged in the practice of law", "a person employed in the Office of Legislative Counsel", and "a person employed in the Legal Services Branch of the Ministry of Attorney General".[9]

38. The exclusion of practicing lawyers from collective bargaining legislation is traced to the 1948 federal *Industrial Relations and Disputes Investigation Act* ("*IRDIA*"),[10] but the legislative rationale for the exclusion at that time was simply that it had been requested by the Canadian Bar Association. No substantive public policy or other rationale has ever been provided by government.[11] Provincial post-war industrial relations regimes, including that in BC, adopted the *IRDIA* as a model and provincial collective bargaining legislation across the country adopted the lawyer exclusion (except Saskatchewan, which has never excluded professionals from collective bargaining), similarly without any public policy or other rationale.[12]

---

[9] *PSLRA*, s. 1(1)(b), (t), and (u).
[10] SC 1948, c 54.
[11] As is discussed in more detail at paras 129 and following, BCGLA commissioned research by Dr. David Doorey with regard to the legislative and policy history of the exclusion of government lawyers from collective bargaining in Canada (the "Doorey Report"). The Doorey Report is attached as **Tab "B"** to these Submissions, and his discussion of the lack of public policy rationale for the lawyer exclusion from collective bargaining is found at paras 18-32 and para 162 of the Doorey Report.
[12] Doorey Report at para 41.

39. The Higgins Report did recommend a bargaining unit for professionals. The largest groups of professionals in the Province at the time were foresters and engineers. These occupational categories are the core of what became the Professional Employees Association ("PEA"), which was certified as the bargaining agent for the professional employees unit in the *PSLRA*.

40. In June 1993, a further report – the Report of the Commission of Inquiry into the Public Service and Public Sector, often referred to as the Korbin Report (attached at **Tab "C"**) – reviewed the *PSLRA* and recommended leaving it in place. The Korbin Report did not comment on the exclusion of lawyers let alone address the rationale for it.

41. The only group of government lawyers in BC who have been able to collectively bargain with the Province are Crown Counsel. The government recognized the BCCCA as a bargaining agent for all Crown Counsel outside of the *Code* or the *PSLRA*. Instead, the status of the BCCCA as bargaining agent was established through its own statutory regime in the *Crown Counsel Act*. BCCCA and the Province entered into their first Collective Agreement on December 4, 1992, with a term of 2 years beginning April 1, 1992. The parties have continued to reach new collective agreements until March 31, 2019. Since April 1, 2019, no new collective agreement has been reached between the BCCCA and the Province.

BCGLA REPRESENTATION OF LEGAL COUNSEL

42. Despite not being recognized by the government as a bargaining agent, the BCGLA has a long history of representing Legal Counsel through representations to the employer regarding salaries, joint association-management committee meetings, grievances, and other associational activities.

Salary representations

43. BCGLA's initial goal was to have the terms and conditions of employment for Legal Counsel match those of Crown Counsel.

44. On December 29, 1992, the Deputy Attorney General, Bob Edwards, confirmed that the relevant terms of the agreement between BCCCA and the Province would apply to all practicing lawyers in the LSB. This was formalized through Treasury Board Order 258 dated February 26, 1993, which applied retroactively to April 1, 1992. A copy of TB Order 258 is attached at **Tab "D".**

45. The extension of compensation terms from the Crown Counsel agreement to Legal Counsel continued for many years. This was confirmed in various documents, including a memo dated March 21,

1997 to all lawyers in the LSB from Gillian Wallace, the Assistant Deputy Attorney General (attached at **Tab "E"**) and Treasury Board Order 329 (attached at **Tab "F"**).

46. As such, from April 1, 1992 to March 31, 2019, the salary and other compensation terms of the applicable collective agreements between the BCCCA and the Province applied to Legal Counsel.

47. The Province also solicited BCGLA's perspective on the terms and conditions of employment prior to preparing its positions for bargaining with the BCCCA, and sought BCGLA's input on what terms would apply after any agreement was made. This is confirmed, for example, in a letter dated December 1, 2006 from Paul Straszak, Assistant Deputy Minister in the Employee Relations Division of the BC Public Services Agency (the "PSA"), which is attached at **Tab "G"**. ADM Straszak noted the employer's "willingness to recognize the distinct nature of the needs of LSB lawyers."

48. However, as these documents also show, significant terms and conditions of the Crown Counsel agreements did not apply to the BCGLA, even when the compensation terms did. Those other terms and conditions include: (1) recognition as a bargaining agent and a Rand formula union security clause; (2) the right not to be disciplined or discharged without cause; and (3) access to an independent grievance and arbitration procedure.

49. Also unlike Crown Counsel, the Province has excluded Legal Counsel from the *PSLRA* without providing any specific alternate mechanism (such as that provided under s. 4.1 of the *Crown Council Act*) for Legal Counsel to select a bargaining agent to represent them in meaningful collective bargaining.

Joint Committee Meetings

50. Following requests from the BCGLA, on January 22, 1993, the Assistant Deputy Attorney General for LSB, Brian Neal, agreed to meet with the executive members of BCGLA "to have a preliminary discussion on the objectives of the Association and to establish a working relationship with Branch Management". Attached at **Tab "H"** is a memorandum dated January 21, 1993 from ADAG Neal to the lawyers of LSB which sets out this approach.

51. The January 22, 1993 meeting between ADAG Neal and the BCGLA executive represented the start of regular meetings between the BCGLA and the ADAG responsible for LSB, other managerial employees of LSB, and representatives of the PSA, which are called "Joint Committee" meetings.

52. Joint Committee meetings have consistently been held approximately monthly or bimonthly. Minutes are taken at the meetings. While Joint Committee does not have decision-making authority, agenda items include all matters relating to the employment of Legal Counsel.

53. While the BCGLA has sought to have similar Joint Committees developed with the Justice Services Branch and the Public Guardian and Trustee, the employer has not yet agreed to do so.

54. The BCGLA has also participated in other joint education and professional development committees with management.

Grievances

55. To the best of its ability given the absence of a collective agreement and the lack of a dispute resolution framework with the requisite employee protections, the BCGLA represents members in situations that would generally be subject to the grievance process under a collective agreement.

56. The BCGLA has participated in both internal disciplinary meetings within the Ministry and investigations by the PSA. Although there is no formal agreement in place between the employer and the BCGLA with respect to representing members in these matters, in practice the BCGLA is unaware of any Legal Counsel who requested the BCGLA's participation in a disciplinary process who was denied that opportunity.

57. The existing internal dispute resolution procedures available to BCGLA and its members are inadequate. The final decision maker is not an independent arbitrator, but rather the Deputy Minister – i.e. a member of management. This mechanism is inferior to that which would be provided under a collective agreement entered into pursuant to section 84 of the *Code*.

58. However, the BCGLA has consistently invoked the processes available to it to advocate for its members. For example, in November 2014, BCGLA raised a concern on behalf of its members in the Legal Services Branch's Civil Litigation Group regarding discriminatory file assignment by the Supervising Counsel in that Group. The Supervising Counsel had a practice of not assigning female Legal Counsel to roles on files involving organized crime. BCGLA attempted to address this issue informally with the Supervising Counsel and with the Assistant Deputy Attorney General, but – even though Supervising Counsel admitted to this discriminatory practice – the ADAG determined no formal action was required.

59. On November 21, 2014, the BCGLA filed a formal complaint to the ADAG regarding Supervising Counsel's discriminatory practice.

60. Despite the serious nature of the discriminatory conduct, management did not launch an independent investigation. By letter dated December 11, 2014, the ADAG said the complaint lacked "particulars" to determine whether a formal investigation was warranted. He offered to have further discussions "about proceeding with a joint LSBLA, management/PSA fact finding inquiry into the process of how files are assigned in Civil Litigation", following which he would be "prepared to discuss with the LSBLA potential recommendations that may be warranted (including the prospect of an independent investigation if appropriate)."

61. Although the BCGLA was concerned about management's woefully inadequate process for resolving this serious complaint of discrimination, BCGLA agreed to meet to discuss the fact finding inquiry. BCGLA agreed to put the formal complaint process on hold and work with ADAG and Supervising Counsel first to attempt to establish a non-discriminatory assignment of work process. Despite concerted efforts by BCGLA, the complaint was ignored and stalled by LSB management and the Deputy Attorney General.

62. Ultimately, the complaint was not resolved until 2018 when then-President of BCGLA raised the issue directly with then-Attorney General David Eby. This intervention resulted in an investigation and the resignation or early retirement of the Supervising Counsel and Deputy Supervising Counsel for the Civil Litigation Group.

Other representational activities

63. BCGLA has also advocated with management and obtained important changes for its members with regards to:

a) Ensuring that mandatory Billing Targets (introduced in 2011) are applied in a way that is consistent with leaves of absence provided under the Crown Counsel Agreement and the employer's obligation to provide a non-discriminatory and safe workplace by not threatening mental health and not discriminating based on family status or disability;

b) A fair and transparent process for Merit appointments;

c) Allowing Legal Counsel to use their Professional Requirement Allowance on membership in the Canadian Bar Association;

d) Privacy protections for Legal Counsel in the conduct of their duties;

e) A fairer and more transparent process for discipline and for responding to bullying and sexual harassment complaints, despite not having a collective agreement that protects members against discipline or termination without cause;

f) The assignment and allociation of office space;

g) The right of Legal Counsel to respect the picket lines of other unions and associations;

h) Occupational health and safety protections, with a particular emphasis on the mental health and workload management associated with their legal practice; and

i) Appropriate workplace protections and protocols in the context of the COVID-19 pandemic, including public health measures and return to work/hybrid workplace protocols.

64. Since 2009, BCGLA has also been a member of the Canadian Association of Crown Counsel, a national organization of associations and unions representing criminal and civil lawyers working for federal and provincial governments. Through this Association, members of the BCGLA executive meet regularly with representatives of government lawyer unions or associations throughout the country.

65. As described above, the BCGLA has a long history of assisting and representing its members in a manner similar to the role played by a recognized bargaining agent. Moreover, the BCGLA is the only organization that has ever represented, or sought to represent, Legal Counsel. In particular, the PEA, BCGEU, and BCCCA have never represented, nor sought to represent, Legal Counsel.

GOVERNMENT REFUSAL TO RECOGNIZE BCGLA AS A BARGAINING UNIT

2012-2013 card campaign

66. In 2012, BCGLA (then the LSBLA) conducted a card campaign to gauge members' support for the Association seeking recognition as their bargaining agent. Legal Counsel indicated their support by signing a card which stated: "I want the Legal Services Branch Lawyers Association to seek bargaining agent status in order to act as my exclusive bargaining agent and to represent me in collective bargaining."

67. By early 2013, over 55% of eligible lawyers in the LSB were members of BCGLA, and those lawyers provided a mandate for BCGLA to seek bargaining agent status. This was communicated to the PSA in a letter dated February 15, 2013from then-President of the BCGLA to Bert Phipps, Assistant Deputy Minister for Employee Relations. A copy of this letter is attached at **Tab "I"**.

Government refusal to recognize BCGLA

68. On February 18, 2013, the BCGLA executive met with ADM Phipps and Rebecca Sober of the PSA and the Assistant Deputy Attorney General, Kurt Sandstrom.

69. Following the provincial election on May 14, 2013, ADM Phipps retired in June 2013 and was replaced by John Davison as the PSA's Assistant Deputy Minister for Employee Relations.

70. On September 5, 2013, the BCGLA wrote a letter to ADM Davison setting out its position and mandate and requesting a meeting to discuss the Association's status as a recognized bargaining agent. A copy of this letter is attached at **Tab "J"**. BCGLA indicated that it hoped to have a recognition agreement in place by March 2015, when the existing Crown Counsel agreement was set to re-open on certain items, so that Legal Counsel could negotiate their first collective agreement at that time.

71. On September 27, 2013, the BCGLA followed up with an email, enclosing a draft voluntary recognition agreement for the Province's consideration. A copy of the email and its attachment is attached at **Tab "K"**.

72. At a meeting on September 29, 2014, ADM Davison read a prepared statement outlining the government's position at the time, a copy of which is attached at **Tab "L"**. As part of that statement he said: "LSB lawyers … act for Government. Many of them provide confidential legal advice to Government on highly sensitive matters. In our view, that is why it is appropriate that LSB lawyers are excluded from collective bargaining under the *Public Service Labour Relations Act*."

73. ADM Davidson's September 29, 2014 statement went on to propose a process whereby BCGLA would be able to make representations as to terms and conditions of employment, but the final decision would be with the employer. This was not meaningful collective bargaining and was thus unacceptable to the BCGLA and its members.

74. In the meantime, as described above, the BCGLA continued to represent its members to the best of its ability despite the employer's ongoing refusal to recognize the BCGLA as a bargaining agent and the lack of protections afforded to members by a collective agreement.

The BCGLA's continued attempts to gain recognition

75. The BCGLA held meetings in January 2015 where members made it clear they wanted to take action to assert their right to collective bargaining, as the BCCCA had done before being recognized.

76. On February 6, 2015, BCGLA wrote to ADM Davison, referring to the Supreme Court of Canada's ("Supreme Court" or "SCC") recent decision in *Mounted Police Association of Ontario v Canada (Attorney General)*[13] ("*MPAO*"), asserting that the Province's position with respect to BCGLA members' collective bargaining rights was unconstitutional, and implying that BCGLA would proceed to legal action if the Province did not respond before March 16, 2015. A copy of this letter is attached at **Tab "M"**.

77. On May 14, 2015, ADM Davison spoke to the then-President of BCGLA Sandra Wilkinson, advising that in light of *MPAO* there would be a "course correction" in the government's response to the BCGLA and the Association would no longer receive a "pound sand" response. ADM Davison promised to get back to Ms. Wilkinson by June 22, 2015.

78. The BCGLA finally met with ADM Davison on August 4, 2015. A copy of ADM Davison's speaking notes from that meeting are attached at **Tab "N"**. As indicated in the speaking notes, ADM Davison recognized that the Supreme Court had declared that employees are entitled to a meaningful collective bargaining process that provides for a dispute resolution mechanism, implicitly accepting that Legal Counsel did not currently have access to such a process or mechanism. He said the Province considered creating an independent bargaining unit of Legal Counsel represented by BCGLA to be a viable option, but that the Province was also considering including Legal Counsel in the unit with Crown Counsel represented by the BCCCA or the broader professional bargaining unit with other professionals working for the government represented by the PEA. ADM Davison said the Province would consult with each organization as "an important step in assisting [the government] in coming up with the most appropriate and informed decision."

79. The BCGLA told the PSA that Legal Counsel wanted a bargaining unit for Legal Counsel working for the Province, and that this unit could either exclude or include Crown Counsel. BCGLA stated it supported a bargaining council approach with the BCCCA.

---

[13] 2015 SCC 1.

80. In the course of the government's consultations with the PEA, the PEA made clear that it agreed with BCGLA's position that lawyers should not be forced into the professional employees bargaining unit. In the context of this proceeding, the PEA has again articulated its support for the right of BCGLA members to choose their representative as bargaining agent.

81. The BCCCA opposed having its members placed in a common bargaining unit with Legal Counsel and asserted that Crown Counsel had to be in a bargaining unit on their own given their unique role under the *Crown Counsel Act*. Aside from this, BCCCA stated that the decision regarding which other option was appropriate should be left to Legal Counsel.

Change of government

82. On July 29, 2016, BCGLA met with ADM Davison again. ADM Davison told the Association that no decision about recognition could be made until after the next provincial election (on May 9, 2017) because, in the government's view, legislation would be required and they would not introduce such legislation in the final year of the existing government's mandate. He assured BCGLA that this would be a priority under the new government and that, in the meantime, Legal Counsel would retain parity with the applicable terms and conditions applied to Crown Counsel. A copy of ADM Davison's speaking notes from the July 29, 2016 meeting are attached at **Tab "O"**.

83. No party obtained a majority in the May 2017 election. The BC New Democratic Party and the BC Green Party reached a confidence and supply agreement in June 2017 and John Horgan, the leader of the BC New Democratic Party, became Premier on June 18, 2017.

84. On August 10, 2017, the BCGLA met with then-Attorney General David Eby and the Assistant Deputy Attorney General for the LSB James Harvey. Minister Eby indicated his general support for union recognition and asked about a merger with the BCCCA. BCGLA representatives indicated that they were friendly with BCCCA and would support a common bargaining framework, but preferred to be recognized as a standalone bargaining unit. BCGLA noted that the current Crown Counsel agreement expired on March 31, 2019 and expressed the importance of having a bargaining relationship in place before then. Minister Eby and ADAG Harvey said they would take up the issue with others in government and the head of the public service. There was no mention at that time of any statutory requirement or government preference for Legal Counsel to be part of the larger professional employees' bargaining unit represented by the PEA.

Government asserts that the PEA is the only option for Legal Counsel representation

85. Finally, after months of delay, the PSA scheduled a meeting with the executive of the BCGLA on February 9, 2018. ADM Davison and Rebecca Sober attended from the PSA and ADAG Harvey participated. ADM Davison apologized for the delays and then read directly from a letter, a copy of which is attached at **Tab "P"**. Although the letter is dated February 7, 2018 BCGLA did not receive a copy nor was the Association informed of its contents until the meeting on February 9, 2018.

86. As was set out in the letter, ADM Davison said that government (by which he meant Treasury Board as the instructing body to the PSA) had decided that the only available option for Legal Counsel to collectively bargain would be as part of the PEA. ADM Davison also confirmed that government had no intention of unilaterally placing BCGLA members into the PEA.

87. The government representatives at the meeting did not provide any further explanation for why the government made this decision, instead saying that the PEA was "the only option."

88. In fact, the reason that the PSA recommended to Treasury Board that the only option would be for BCGLA members to join the PEA was that the PSA was aware that this was not acceptable to Legal Counsel as a group and would thus avoid the prospect of unionization altogether. Neither the PSA nor Treasury Board engaged in a *bona fide* consideration of the effects of alternative arrangements or other policy options on employee choice, industrial stability, or labour relations principles and policy.

89. Alternatively, the reason PSA opposed a separate bargaining unit or joint bargaining with Crown Counsel was a collateral one, namely in order to make it less likely that Legal Counsel would be able to maintain a salary link with Crown Counsel. This was a budgetary consideration that should not have played a role in determining appropriate bargaining units.

90. These considerations would normally be set out in a submission to Cabinet or the Cabinet committee delegated the responsibility.

91. PSA has denied that it drafted a submission to Treasury Board or any other Cabinet committee. If it did not draft a submission, it was because it was aware that the basis for the decision was inappropriate.

92. The BCGLA made it clear in the February 9, 2018 meeting that this response was disappointing and unacceptable to BCGLA.

93. ADM Davison was visibly uncomfortable when delivering the letter. Some members of the BCGLA executive attempted to engage him on the reasons for the decision and alternative approaches that would ensure efficiency of bargaining while respecting employee choice and *Charter* rights. ADM Davision refused to engage in the discussion, saying the decision was final. It became clear that the decision was not made for *bona fide* labour policy reasons.

94. The meeting attendees discussed whether the BCGLA would put the PEA option to its members. One member of the BCGLA executive asked the government representatives, "Will you be open-minded about receiving feedback from our members?" ADM Davison said "no" and that this was "the government's decision." Another member of the BCGLA executive commented that it was clear that the government and the BCGLA were at an "impasse."

The BCGLA attempts to change government's mind

95. The BCGLA held an Extraordinary General Meeting on June 22, 2018 to confirm a mandate with respect to the options presented by the employer following the February 9, 2018 meeting with government. The executive put forward a special resolution reflecting three different possibilities:

a) Option A: the BCGLA would reject the government's position and the members would approve legal action.

b) Option B: the BCGLA would continue as it was without bargaining status.

c) Option C: the BCGLA would inform the government that it accepts the government's amendment of the *PSLRA* to include lawyers in the professional employees unit.

96. No members voted for Option C. Two members voted for Option B. All other members who voted chose Option A, once again reflecting the near-unanimous will of the Association's members to be represented by the BCGLA as their bargaining agent.

97. The BCGLA wrote to ADM Davison on July 6, 2018 to advise him of the membership's clear direction as expressed by the Extraordinary General Meeting and to try once more to meet with PSA. A copy of this letter is attached at **Tab "Q"**.

98. The BCGLA executive met with ADM Davison on October 10, 2018. At that meeting, the BCGLA told him the government had an obligation to respect the employees' choice of bargaining agent and not to impose an unwanted bargaining structure upon them. The BCGLA proposed either statutory

recognition through an amendment to the *Attorney General Act* (similar to the structure for Crown Counsel) or a voluntary framework agreement (similar to what exists between the Government of Ontario and the Association of Law Officers of the Crown). The BCGLA was clear that whatever structure was created had to include a third-party grievance arbitration process and a process to resolve collective bargaining impasses, through either a right to strike or binding interest arbitration. The BCGLA denied the Province's claim that it would be a burden to recognize the BCGLA because the Province has recognized BCGLA as Legal Counsel's representative since 1992. The BCGLA noted it had a mandate to bring a legal challenge, and was prepared to do so, but preferred to work things out.

99. ADM Davison said the government's position in February was that the "PEA option" was "constitutionally viable" and he assumed the government's view had not changed, but he would confirm.

100. ADM Davison consulted with the Minister of Finance, Carole James. In that meeting, they did not discuss labour policy, but only the (presumed) fiscal impact if Legal Counsel were to maintain a link to Crown Counsel and Crown Counsel were to maintain a link to provincial court judges. They did not consider any factors related to the appropriateness of bargaining units; they only considered the Province's fiscal interest. The Minister of Labour was not consulted and was instead instructed not to be involved in the decision.

101. On January 25, 2019, ADM Davison wrote to BCGLA to advise that the government would not change its position as a result of the October 10th meeting. He said: "[W]e stand by our original decision that was communicated to you in a letter dated February 7, 2018. We are prepared to take legislative actions necessary to extend collective bargaining rights to your members, provided we receive confirmation they want to be included within the existing PEA bargaining unit." A copy of this letter is attached at **Tab "R"**.

102. Since BCGLA members had overwhelmingly rejected being included in the PEA bargaining unit, the BCGLA was unable to – and did not – provide that confirmation. This was communicated to ADM Davison shortly after January 25, 2019.

LEGAL CHALLENGES COMMENCED

103. BCGLA filed a Notice of Civil Claim on August 9, 2019 challenging the constitutionality of the exclusion of Legal Counsel under the *PSLRA* and the Province's actions in unilaterally dictating the bargaining agent and bargaining unit through which Legal Counsel could exercise their *Charter*-protected collective bargaining rights (the "BCGLA *Charter* Challenge").

104. The summary trial of the BCGLA *Charter* Challenge was set for February 2023. As a result of this Application for Certification, and following an agreement by counsel regarding the best way to proceed in light of the two related proceedings, the summary trial was adjourned on consent for this Application for Certification to be adjudicated by the Board.

105. In the spring of 2022, the government took steps to enable increased access to collective bargaining under the *Code* through the introduction of card-based certification. The *Labour Relations Code Amendment Act, 2022*, created a statutory recognition mechanism whereby a bargaining agent would be certified for an appropriate bargaining unit of "employees" if 55% of them sign a card with prescribed wording. This legislation was given royal assent on June 2, 2022.

106. At the time that this legislation was passed, Minister of Labour Harry Bains asserted that "[u]nder the *Charter of Rights and Freedoms*, workers who wish to collectively organize must not be impeded in any way." In introducing this legislation, the government acknowledged that "[t]he new single-step certification process will enable workers to join a union when a clear majority of employees indicate they want to…". Minister Bains also said: "Workers want to be valued and they want to have a say. This is about giving workers the choice to speak with a collective voice for fair working conditions." A copy of the news release is attached at **Tab "S"**.

107. Following these legislative amendments, and given the government's professed commitment to employees' right to be represented by their freely- and democratically-chosen bargaining agent, the BCGLA decided to apply for Certification pursuant to s. 23 of the *Code* and initiated a card campaign using the prescribed language and rules under the *Code*.

108. After the card campaign was launched, and following a discussion at the Joint Committee about how the BCGLA would be engaging with its membership, the employer forbade the BCGLA from using the employer's email systems to contact Legal Counsel and posting material in common areas. Attached at **Tab "T"** is an email from Barbara Carmichael, Assistant Deputy Attorney General, to the President of the BCGLA stating "further use of the government e-mail system and Branch distribution lists is not allowed". This is a significant obstacle in a workplace where most communication is online and a substantial portion of the workforce works at home.

109. Nevertheless, by November 29, 2022, an overwhelming majority of the 348 Legal Counsel within the bargaining unit had signed cards, well over the 55% threshold for mandatory certification under the *Code*.

110. Given these numbers, the BCGLA decided to proceed with this Application under the *Code*. The hearing dates for the BCGLA *Charter* Challenge have been adjourned as that challenge may become moot if the BCGLA is certified through this Application.

PROVINCE CHANGES TERMS AND CONDITIONS OF EMPLOYMENT

111. After the BCGLA *Charter* Challenge commenced, and despite the prior practice of consulting with the BCGLA about issues pertaining to the terms and conditions of employment of Legal Counsel, the employer fundamentally changed those terms and conditions without prior negotiation, consultation, or notice.

112. After the previous Crown Counsel agreement expired on April 1, 2019, the BCCCA and the Province were unable to agree to a new collective agreement and the matter went to interest arbitration. On December 19, 2019, Arbitrator Hall ruled that increases given to provincial court judges would apply to Crown Counsel until a new collective agreement was reached.

113. Under Treasury Board Orders 258 and 329, the fiscal terms of the Crown Counsel agreement applied to Legal Counsel and, when arbitrators had decided on an interpretation of the Crown Counsel agreement in the past, Legal Counsel had received the corresponding increases and retroactive payments.

114. However, this time Legal Counsel did not receive those corresponding increases and retroactive payments.

115. On January 6, 2020, the BCGLA wrote to Richard Fyfe, the Deputy Attorney General, to state its position that these increases should be extended to Legal Counsel as well, consistent with the practice established during prior rounds of negotiation. Despite following up on numerous occasions and asking about this issue at Joint Committee meetings, the BCGLA did not receive a substantive response for several months.

116. On June 5, 2020, DAG Fyfe wrote to the BCGLA attaching Treasury Board Order No. 2020-0603, which purported to separate the Legal Counsel classification series from the Crown Counsel classification series. A copy of the letter and Treasury Board Order is attached at **Tab "U"**.

117. On July 15, 2020, BCGLA wrote to DAG Fyfe to express its opposition to this unilateral change in the terms and conditions of Legal Counsel without prior negotiation or even consultation.

118. On October 21, 2021, BCGLA wrote to the Minister of Finance and the Attorney General putting the Province on notice of its objection to the change in terms and conditions of employment of Legal Counsel without notice or consultation, reminding them that the Treasury Board Order governing those terms and conditions of employment would expire on March 31, 2022, and serving notice to bargain. A copy of that letter is attached **Tab "V"**.

119. In the Fall of 2020 and Spring of 2021, BCGLA represented a member facing discipline. At first it appeared that the issue had been resolved through a letter of expectation on the employee's file. However, shortly after the meeting at which BCGLA understood a mutually acceptable resolution had been reached, the employee was terminated without cause. Before that incident, no BCGLA member had ever been terminated without cause when BCGLA had provided representation and support during a discipline process.

120. When BCGLA wrote to ADM Alyson Blackstock (former-ADM Davison's replacement as the PSA's ADM for Employee Relations) and ADAG Barbara Carmichael about this issue, ADM Blackstock responded: "we intend to continue our practice of permitting employees to have a support person of their choosing in attendance at disciplinary meetings." In practice, if the person is a BCGLA member, this "support person" is usually a BCGLA representative. However, ADM Blackstock said the employer was unwilling to consider any mechanism whereby Legal Counsel would be protected from dismissal without cause.

121. On November 10, 2021, ADM Blackstock responded to reiterate the government's position and said: "we would happy to consider any written suggested changes [BCGLA] provide[s] for Legal Counsel terms and conditions of employment to the BC Public Service Agency." A copy of that letter is attached at **Tab "W"**.

122. At the BCGLA Annual General Meeting on November 24, 2021, members approved the BCGLA sending the employer a list of proposals for terms and conditions of employment for Legal Counsel that included voluntary recognition of BCGLA as bargaining agent for Legal Counsel. The other proposals included: re-establishing compensation parity with Crown Counsel (ongoing and retroactively), job security provisions, continuing Joint Committee meetings with the LSB and establishing same with Justice Services

Branch and Public Guardian and Trustee, mandatory dues check off, and other protections for Legal Counsel. These proposals were communicated to the Province by letter addressed to ADM Blackstock on November 29, 2021, a copy of which is attached at **Tab "X"**.

123. On March 28, 2022, Ms. Blackstock wrote to BCGLA to advise that "due consideration" had been given to BCGLA's letter and that Treasury Board Order No. 2022-0401-02 was approved and would come into effect on April 1, 2022. A copy of the letter, Treasury Board Order No. 2022-0401-02, and an "FAQ" for Legal Counsel dated March 24, 2022 are all attached **Tab "Y"**.

124. Treasury Board Order No. 2022-0401-02 ties salary adjustments for Legal Counsel to the adjustment for managers excluded from bargaining units ("Excluded Managers"), rather than the historic pattern of tying salary adjustments to those under the Crown Counsel agreement.

125. No response was provided to the Association's proposals regarding job security, dismissal and discipline with cause, union recognition, dues checkoff or third party arbitration.

126. All other terms and conditions of the Crown Counsel agreement that applied to Legal Counsel as of April 1, 2019 continue to apply to Legal Counsel.

127. The BCGLA has continued to represent its members to the best of its ability despite the Province's ongoing delays, changing requirements, and refusal to recognize the democratically-expressed wishes of Legal Counsel to have BCGLA recognized as a bargaining agent, as described above.

REPRESENTATION OF GOVERNMENT LAWYERS IN OTHER JURISDICTIONS IN CANADA

128. As demonstrated by the pattern of collective bargaining in other jurisdictions, the proposed bargaining unit of Legal Counsel is an appropriate bargaining unit. While there are a number of jurisdictions in which civil lawyers working for government bargain on their own or in conjunction with Crown prosecutors, there are no jurisdictions in which they are in a combined unit with non-lawyer public servants. The practical effect of any such requirement has been to preclude collective bargaining for lawyer employees of the government.

The Doorey Report

129. In an effort to understand and situate Legal Counsel's campaign for recognition of the BCGLA within the appropriate historical and rational context, the BCGLA commissioned Dr. David Doorey, Ph.

D., to write a report examining the origins and history of, and professed rationale for, the treatment of lawyers under collective bargaining legislation in Canada, with a particular focus on the treatment of government lawyers (the "Doorey Report", already attached at **Tab "B"**). Dr. Doorey is an expert on labour law and labour law principles, including collective bargaining structures.

130. Among other things, the Doorey Report canvasses the treatment of government lawyers under various collective bargaining regimes across Canada, both through statutory recognition frameworks and voluntary recognition regimes. The Doorey Report speaks to the practice and history of collective bargaining of government lawyers in Canada.

131. Dr. Doorey was asked whether placing lawyers into a broader "all professionals" bargaining unit is consistent with the pattern and practice of lawyer representation and collective bargaining across Canada. Dr. Doorey opined:

> I have found no example of legislation in Canada that conditions access to collective bargaining for lawyers upon the lawyers joining or being placed in an "all professionals" bargaining unit. Therefore, a legislative scheme that required government lawyers to join an "all professionals" bargaining unit against their wishes would be unique in Canadian collective bargaining history.[14]

132. More specifically, in every Canadian jurisdiction in which bargaining occurs between a government and its lawyers, the bargaining units are comprised entirely of lawyers. In fact, as set out in Table 2 of the Doorey Report,[15] collective bargaining for government lawyers occurs as follows:

[14] Doorey Report at p 56.
[15] Doorey Report at pp 28-29.

Jurisdiction	**Legislative Treatment of Government Lawyers**	**Collective Bargaining Practice**
Federal	Board must have regard to employer's classification of positions, including occupational groups established by the employer. Board must establish units that are co-extensive with the occupational groups established by the employer unless doing so would not permit satisfactory representation of the employee. Federal *Public Sector Labour Relation Act*, s. 57	Association of Justice Counsel represents approximately 2600 government lawyers in the Law Practitioner Group.
Alberta	The *Public Service Employees Relations Act* excludes practicing government lawyers, but s. 13 of that Act permits the Board to include lawyers in a statutorily mandated "all employee" unit represented by the AUPE if a majority of lawyers (and persons training to become lawyers) wish to be included in the bargaining unit.	The Alberta Crown Attorneys' Association represents crown attorneys, but the government does not negotiate collective agreements with that Association. Civil lawyers have an association called Alberta Justice Civil Lawyers' Association, but that Association does not engage in collective bargaining.
British Columbia	The *Public Service Labour Relations Act* excludes practicing government lawyers.	The BC Crown Attorneys' Association is recognized by the government as the exclusive representative of crown attorneys. The parties negotiate agreements that set working conditions for approximately 450 crown counsel. Civil lawyers employed by the provincial government are represented by the BC Government Lawyers' Association. The government does not engage in collective bargaining with BCGLA.
Manitoba	The *Labour Relations Act* does not exclude lawyers. The LRA (s. 39(3)) prohibits the Board from including practicing professionals in a unit with employees who are not members of that profession unless a majority of the professional employees wish to be included in the unit.	Manitoba Association of Crown Attorneys was certified in 1976 and represents both crown prosecutors and civil lawyers employed by the provincial government in a lawyer only bargaining unit.

New Brunswick	The *Public Service Labour Relations Act* does not exclude lawyers. The Act (s. 30(3)) prohibits the Board from including employees in a bargaining unit 'from more than one occupational group'.	The NB Crown Counsel Association was certified in 2010 as the exclusive bargaining agent for the Crown Counsel Group. The NB Crown Prosecutors Association was certified in 2010 as the exclusive bargaining agent for the Crown Prosecutors Group.
Newfoundland and Labrador	The *Public Service Collective Bargaining Act* excludes practicing government lawyers.	The Newfoundland and Labrador Crown Attorneys Association represents crown attorneys, but the government does not engage in collective bargaining with this organization.
Nova Scotia	The *Civil Service Collective Bargaining Act* excludes practicing government lawyers.	Crown attorneys are represented by the NS Crown Attorney's Association. Following a strike in 2000, the government agreed to recognize the NSCAA and to bargain "framework agreements". Civil lawyers in Nova Scotia are not represented by an association and do not engage in collective bargaining.
Ontario	The *Crown Employees Collective Bargaining Act* excludes practicing government lawyers.	Crown attorneys are represented by Ontario Crown Attorney's Association (OCAA) and civil lawyers employed by the government are represented by the Association of Law Officers of the Crown (ALOC). The associations bargain with the government as a council. Since 1989, the government has bargained a series of Framework Agreements with OCAA and ALOC.
PEI	The *Labour Act* excludes practicing lawyers.	The PEI Crown Attorneys' Association represents crown attorneys, but that organization does not engage in collective bargaining with the government.
Quebec	Crown attorneys are excluded from the *Labour Code* but are afforded a statutory right to bargain collectively under the *Prosecutors' Act*. The *Public Service Act* permits the government to certify a bargaining unit that includes multiple professions only with consent of a majority of employees in the profession. (s. 67)	Prosecutors are represented by Association of Attorney-General's Prosecutors of Quebec (ASPGQ), which bargains over working conditions with the government. Civil lawyers employed by the government are represented by Les avocats et notaires de l'État Québécois (LANEQ).

Saskatchewan	The *Saskatchewan Employment Act* does not exclude practicing lawyers.	Crown attorneys are represented by the Saskatchewan Crown Attorneys Association (SCAA). SCAA is not certified but the government recognizes it as the bargaining agent for prosecutors. Civil government lawyers are represented by the Saskatchewan Crown Counsel Association (SCCA), which also is not certified. In 2008, the government agreed to bargain a Memorandum of Understanding with SCAA and SCCA that includes processes for establishing compensation for government lawyers.

Crown counsel in Alberta

133. In Alberta, the *Public Service Employee Relations Act* (*PSERA*) makes collective bargaining for government lawyers conditional upon them joining an existing, broader "all employee" bargaining unit represented by the Alberta Union of Public Employees ("AUPE"), if a majority of lawyers elect to do so. To date, Alberta government lawyers have never elected to join the "all employee" unit.

134. Crown counsel in Alberta are represented by the Alberta Crown Counsel Association (the "ACCA"). In 2019, the ACCA filed an application with the Alberta Labour Relations Board for certification as the bargaining agent for Crown prosecutors. In that application, the ACCA challenged the sections of the *PSERA* that purport to restrict their members' access to collective bargaining through a general "all employees" bargaining unit. Although the Board found that the Alberta government had failed to meaningfully bargain with the Association, it denied the *Charter* challenge and thus the application.

135. The ACCA sought judicial review of that decision before the Court of Queen's Bench (as it then was), which application was denied. That decision has been appealed to the Alberta Court of Appeal and remains before the Court.

136. In the interim, the ACCA and its members did not seek to exercise their *Charter* rights by joining the "all employees" bargaining unit under the *PSERA*. Rather, the ACCA and its members persisted as the bargaining agent for Alberta's Crown prosecutors. Ultimately, and notwithstanding the ongoing litigation, the ACCA was successful in obtaining recognition by the Alberta government and negotiated an agreement on a first contract for Crown prosecutors in Alberta. On October 21, 2022, that agreement was ratified by members of the ACCA.

137. The first contract, in effect until March 2024, allows for market-based pay raises, mental health supports, and lays out a framework for how the parties will resolve disputes and address occupational health and safety concerns. A copy of the Government of Alberta news release announcing the ratification of the first contract with the ACCA is attached at **Tab "Z"**.

138. This example demonstrates the appropriateness of a lawyer-only bargaining unit, and inappropriateness of a more general bargaining unit, for government lawyers: Crown prosecutors in Alberta so strongly prefer representation by their own association in their own unit that they rejected the option of statutory bargaining protections through inclusion in an "all employee" unit.

SUBMISSIONS

139. BCGLA should be certified pursuant to s. 23 of the *Code* as the bargaining agent for all persons employed by the Province as Legal Counsel (as defined herein).

BCGLA MEETS THE REQUIREMENTS TO BE CERTIFIED UNDER SECTION 23 OF THE *CODE*

140. Under s. 23 of the *Code*, if the Board is satisfied that on the date it receives an application under Part 3 at least 55% of the employees in a unit are members in good standing of a trade union and the unit is "appropriate for collective bargaining", the Board must certify the trade union as the bargaining agent for the employees in the unit.

141. There is no dispute that, on the date of the BCGLA's Application, at least 55% of the proposed bargaining unit were members in good standing of the BCGLA. Moreover, the Board has already issued its decision that the BCGLA meets the definition of trade union under the *Code*.[16]

142. An appropriate bargaining unit is one that includes employees around which a rational and defensible line can be drawn and where the employees share a community of interest.[17] Especially when a previously-unorganized group of employees are seeking certification, the issue is not whether the bargaining unit is perfect, but whether it is "appropriate". At all stages of the analysis the dominant

[16] Letter from Vice-Chair Nicolas dated December 13, 2022 following December 12, 2022 case management meeting.
[17] *Island Medical Laboratories Ltd.*, BCLRB B308/93 (Reconsideration of IRC. No. C217/92 and BCLRB No. B49/93) (Q.L.) [*Island Medical*] and *Re Aramark Canada Facility Services Ltd.*, BCLRB No. 243/2004.

consideration is freedom of association of the employees. Industrial stability is the secondary consideration.

143. In this case, it is clear that a rational and defensible line can be drawn around a bargaining unit of all persons employed by the Province as Legal Counsel. "Legal Counsel" is the employer's own classification, and BCGLA brings this application to represent all employees within that classification who are not excluded from the definition of "employee" in the *Code*.[18] BCGLA has been representing employees that meet this definition for nearly 30 years without any confusion regarding who is and is not included.

144. The leading case on the question of how the Board will assess a community of interest is the its decision in *Island Medical*, wherein the Board sets out six factors used to define community of interest in an application for certification:

a) Similarity in skills, interests, duties, and working conditions;

b) The physical and administrative structure of the employer;

c) Functional integration;

d) Geography;

e) The practice and history of the current collective bargaining scheme; and

f) The practice and history of collective bargaining in the industry or sector.[19]

145. Each of these factors point to Legal Counsel being an appropriate, stand-alone bargaining unit.

146. As the Board explained in *Island Medical*, the determination of a community of interest rarely turns on (a) through (c):

> the issues of similarity in skills, interests, duties and working conditions are fairly self-evident with regard to any measure of community of interest. Those who perform similar work under similar terms and conditions of employment will have a community of interest which can be neatly set within the framework of a single collective agreement.[20]

---

[18] See definition of "employee" at *Code* s. 1.
[19] *Island Medical* at 24.
[20] *Island Medical* at 25-27.

147. The existence of a community of interest among Legal Counsel is self-evident in respect of the first three factors. Legal Counsel perform similar work under similar terms and conditions of employment, and share common and unique ethical and legal duties. Legal Counsel play a unique and constitutionally-significant role, and their terms and conditions of employment differ from those of other public servants, for example, their salaries are set by a Treasury Board Order that applies to no other public servants (except Articling Students), the other terms and conditions of their employment are based on the collective agreement between the Province and the BCCCA (except salary, union security, job security, and grievance procedure), and other terms and conditions of employment that apply to all public servants are modified where necessary because their duties as lawyers must prevail where there is a conflict or inconsistency. The very fact of Legal Counsel's collective exclusion from the *PSLRA* is also demonstrative of their shared working conditions and community of interest.[21] There is functional integration between and amongst Legal Counsel in their roles, which is not present between Legal Counsel and non-lawyers in the public service. These factors demonstrate the appropriateness of this proposed bargaining unit.

148. The BCGLA does not anticipate the employer will argue that geographic separation of Legal Counsel is an issue with respect to the appropriateness of the bargaining unit given the public service's all-employee bargaining units and the Crown Counsel bargaining unit include employees across the Province. In contrast to those units, Legal Counsel are more geographically cohesive in that they all work in one of two cities: Vancouver or Victoria.

149. The BCGLA's long history of representing its members in matters pertaining to their employment (detailed above) establishes a practice and history of the current collective bargaining scheme and further demonstrates the appropriateness of the proposed bargaining unit. Since the BCGLA was formed in the early 1990s, the Employer has recognized its role as a representative for civil lawyers in the public service. While the Employer has refused to engage in collective bargaining with the BCGLA, the Employer has nevertheless acknowledged the BCGLA's role as representative for Legal Counsel through, *inter alia*, arranging Joint Committee meetings with the BCGLA, allowing BCGLA representatives to join individuals during disciplinary meetings, and consulting with BCGLA before entering negotiations with the BCCCA that impact Legal Counsel. Throughout this time period, other professionals in the public service have

[21] *Public Service Commission and Graphic Arts International Union, Local No. 210 et al*, [1975] BCLRBD No 47 [*Queen's Printer*] at pp 4-5.

been represented by the PEA; however, neither the Employer nor the PEA has recognized the PEA as a representative for Legal Counsel.

150. Finally, the practice and history of collective bargaining in the sector demonstrates the appropriateness of the bargaining unit. As the Doorey Report explains, in all jurisdictions in Canada where government lawyers bargain collectively with the government as employer (including in BC with respect to Crown Counsel), government lawyers are in their own bargaining unit separate from other public servants.

151. As such, by any review of the facts in this case, the proposed bargaining unit is appropriate.

152. Well over 55% of employees in the proposed bargaining unit signed signed cards compliant with the requirements of s. 23 of the *Code*, expressing their membership in and support for the Association. As such, more than 55% of the employees in the proposed unit are (and were on the Application date) members in good standing of the BCGLA, and therefore, pursuant to s. 23 of the *Code*, the Board must certify BCGLA as the bargaining agent for the employees in the unit.

THE *PSLRA* IS IRRELEVANT TO WHETHER BCGLA SHOULD BE CERTIFIED UNDER THE *CODE*

153. As the BCGLA understands it, the Province's primary basis for its position that this Application should be dismissed relates to the effect of the *PSLRA*, a separate legislative enactment. Section 4 of the *PSLRA* states that every "employee" covered by the *PSLRA* must be included in one of three bargaining units set out in that section: (a) a bargaining unit of all nurses; (b) a bargaining unit of all licensed professionals; or (c) a general bargaining unit for all other employees.

154. However, in the BCGLA's submission, the *PSLRA* is irrelevant to the proceeding before this Board.

155. Although the *PSLRA* requires "employees" within its meaning to be members of one of the bargaining units set out in s. 4, it does not require and, in fact, does not allow persons excluded from that definition to be members of those bargaining units. The bargaining units set out in s. 4 of the *PSLRA* therefore *cannot* be appropriate bargaining units for public servants who are excluded from the definition of "employee" under the *PSLRA*.

156. Legal Counsel are excluded from the *PSLRA* by operation of the statute's definition of "employee", which states:

> "employee" means an employee as defined in the *Public Service Act*, or a person employed by or holding office at the pleasure of the government, but does not include any of the following:
>
> … (b) a practising lawyer or articled student as defined in section 1 (1) of the *Legal Profession Act*, who is engaged in the practice of law;
>
> … (t) a person employed in the Office of Legislative Counsel;
>
> (u) a person employed in the Legal Services Branch of the Ministry of Attorney General…

157. While Legal Counsel are "employees" within the meaning of the *Public Service Act*, they are excluded from the definition of "employee" in the *PSLRA* as they are practising lawyers (and also, where relevant, employed in the Office of the Legislative Counsel or the Legal Services Branch of the Ministry of the Attorney General). Therefore, s. 4 of the *PSLRA* does not apply to Legal Counsel.

158. In this Application before this Board, the BCGLA seeks certification under the *Code*. Unlike the *PSLRA*, there is no exclusion of Legal Counsel from the definition of "employee" under the *Code*. The definition in the *Code* is:

> "employee" means a person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board's opinion,
>
> (a) performs the functions of a manager or superintendent, or
>
> (b) is employed in a confidential capacity in matters relating to labour relations or personnel;

159. Legal Counsel plainly fit within this definition of employee. It is undeniable that Legal Counsel are employed by the Province as the employer, and are not excluded under subparagraphs (a) or (b).

160. The mere fact that the same term ("employee") is defined differently in the *PSLRA* and the *Code* is not unusual. Terms are often defined differently in different statutes so that it is understood what that term means within the confines of that Act. The statutory definition applies only to the statute it falls within, or where it is explicitly stated to apply to other statutes. The *Public Service Act* definition only applies

to that statute,[22] the *PSLRA* definition uses the *Public Services Act* definition with exemptions that only apply to the *PSLRA*,[23] and the *Code* definition only applies to the *Code*.[24] Legal Counsel can be "employees" for the purposes of the *Public Service Act* and the *Code*, and yet not for the purposes of the *PSLRA*.

161. Therefore, on its face, if Legal Counsel, as defined, are an appropriate bargaining unit, and if the BCGLA has obtained cards from more than 55% of Legal Counsel so defined, then the *Code* requires the BCGLA "must" be certified under the regime established by the *Code*.

162. While the statutes themselves are clear, past decisions of the Board have cast doubt on this plain and obvious reading. In the BCGLA's submission, these decisions were wrongly decided as a matter of statutory interpretation. In the alternative, a decision excluding Legal Counsel from certification under the *Code* in the present Application would violate the *Charter*.

Historic decisions from the Board

163. Before considering the prior decisions of the Board and its predecessors, it is important to note that the Board is not bound by *stare decisis*. However, due to the desirability of uniform and consistent decision making, there must be a persuasive reason to depart from past decisions, particularly decisions made following reconsideration.[25] While the BCGLA recognizes this desirability, in this situation there are "persuasive reasons", namely:

a) The Board's own decisions have not been consistent. The earliest decision (and therefore the one closest in time to the labour policy behind the *PSLRA*) takes the position that respects the texts of the statute *and* the purpose of promoting collective bargaining for groups of employees who desire it.

b) Later decisions recognize that the "ordinary and grammatical" sense of the statutes allows individuals who are "employees" under the *Code* but not the *PSLRA* to form a bargaining unit and certify a bargaining agent of their choice under the *Code*, and that such an interpretation promotes the underlying purpose of the *Code*. However, they ultimately depart from the ordinary textual meaning for reasons that are, on examination, not persuasive.

c) All decisions of administrative tribunals, including decisions relating to statutory interpretation, must take into account the values underlying the *Charter*. In the context of labour relations, a particularly important "*Charter* value" is "freedom of association" as defined in s. 2(d) of the *Charter*. The Board decisions holding that persons excluded from the definition of "employee"

[22] S. 1 begins with: "In this Act:…"
[23] S. 1(1) begins with: "In this Act:…"
[24] S. 1(1) begins with: "In this Code:…"
[25] *British Columbia Automobile Association*, BCLRB No. B94/99 at para 42.

> under the *PSLRA* could not be certified under the *Code* turned on a less robust and more limited understanding of freedom of association, which was expanded by the Supreme Court of Canada in 2015.

Queen's Printer

164. The Board first considered the question whether government employees were excluded under the *Code* in its 1975 decision addressing the status of five employees of the BC Printing Bureau ("Queen's Printer").[26]

165. Before getting into the specifics of this case, it is critical to understand how and whether the statutes at play in this proceeding apply to the Province. The *Labour Relations Act* in place at the time of the Higgins Report (1972), which precipitated the enacting of the *PSLRA* (1973), did not apply to the Crown. This was not due to anything written explicitly in the *LRA*, but rather because of the *Interpretation Act* then in place, which provided that legislation did not apply to the Crown unless stated explicitly.[27] This was true at the time of the Higgins Report (1972) and when the *PSLRA* was enacted (1973).

166. On June 27, 1974, the same government (the Barrett government) and Legislature that introduced and enacted the *PSLRA* enacted a new *Interpretation Act* removing and reversing this exemption; the new *Interpretation Act* provided that the Crown was and continues to be bound by an Act unless it specifically provides otherwise.[28] As a result, after June 27, 1974, the *Labour Relations Code* applied, for the first time, to the Provincial Crown as an employer.

167. In the *Queen's Printer* case, certain specified employees of the Queen's Printer were excluded from the definition of "employee" in the *PSLRA* (as is the case with Legal Counsel). Specifically, "employee" in the *PSLRA* did not include "a person employed by, or in the service of, … the Queen's Printer under the Public Printing Act, other than clerical or administrative employees."[29] The employees in question were copy-typists and "stockmen." They were appointed to their positions by the Public Service Commission and classified by the Commission as "clerical". However, unlike other members of the public service at the Queen's Printer, they worked in the "shop area" and were immediately and directly engaged with the physical process of printing, binding, and shipping alongside the other excluded employees.

---

[26] *Queen's Printer*, *supra*.
[27] *Interpretation Act*, RSBC 1960, c 199, s 35.
[28] *Interpretation Act*, SBC 1974, c 42, s 13. This provision is now reflected in: *Interpretation Act*, RSBC 1996, c 238, s 14(1).
[29] *Queen's Printer* at p 3.

168. The BCGEU argued that they were employees within the meaning of the *PSLRA* and ought to be in the all-employee bargaining unit for which BCGEU was certified under the *PSLRA*. The printing unions, which had been certified as bargaining agents for all other employees in the shop area of the Queen's Printer, argued the five employees were excluded from the *PSLRA* and therefore within the bargaining unit for which the printing unions were certified under the *Code*.

169. The Board found the individuals' job functions were not 'clerical or administrative' and therefore they were excluded from the *PSLRA* and fell within the printing unions' bargaining unit. This determination was upheld on reconsideration.

170. On reconsideration, the Province raised for the first time the possibility that if the employees were not clerical, it did not necessarily follow that they were in the *Code*-based bargaining units because they were appointed by the Public Service Commission and were employees of the public service (unlike the other employees in the printing unions' units).

171. The reconsideration board found:

> It should be obvious from a consideration of s. 1(1) of the Public Service Labour Relations Act that public servants may not fall within the compass of that statute and that that was the effect of [the Board's original] ruling in the present case. Since this is so, **it would be within the power of the Board to include these employees within a bargaining unit certified under the private sector provisions of the Labour Code.** Similarly the Board could even now vary the Certificate of March 27th, should it conclude that the wording of the Certificate is too narrow to encompass the five individuals whose status is presently in issue. However, the Board need not make any determination as to whether such a variance is now necessary. This is because the Commission stated at the hearing that, should it be unsuccessful in its appeal, the five individuals would be "terminated" as public servants but continue to work as employees of the Queen's Printer. When that occurs there will be no doubt but that the employees fall within the Certificate of March 27th Hence, the Board need not determine the neat issue of whether a public servant holding office at the pleasure of the Crown and appointed by the Commission in contradistinction to the other "printing staff" who are employed directly by the Queen's Printer, - may nevertheless be an employee of the B.C. Printing Bureau. Suffice it to say that even if the Board had answered that question in the negative it would have been prepared to vary the Certificate of March 27th to include these persons.[30]

172. This decision shows the Board's initial willingness – just two years after the *PSLRA* was enacted – to include individuals employed by the government who are excluded from the *PSLRA* in bargaining

[30] *Queen's Printer* at p 8 (emphasis added).

units certified under the *Code*. Moreover, this decision was the closest in time to the labour policy behind the *PSLRA*. It is also consistent with the then-recent change to the *Interpretation Act* which followed shortly behind the introduction of the *PSLRA* by the same government and legislature, and which provided that legislation (which would include the *Labour Code*) is binding on the Crown (which would include the Crown as employer).

Internal Auditors

173. The next decision in this line of cases was rendered in 1989 when the BCGEU brought a certification application under the *Industrial Relations Act* (which replaced the earlier *Labour Relations Code*), on behalf of the internal auditors in the Liquor Distribution Branch of the government.[31] As with Legal Counsel in the present Application, internal auditors are excluded from the definition of "employee" under the *PSLRA*, which the Province argued meant they could not be certified under the *IRA*. The Industrial Relations Council ("Council") in that case appears to have departed from its prior reasoning and come to the opposite conclusion than the reconsideration board reached in *Queen's Printer*. The BCGLA submits that it did so without "persuasive reason" and is therefore not entitled to deference.

174. The Council acknowledged that there was no explicit exclusion of public servants – including the internal auditors – from the *IRA*, and accepted that the plain, grammatical and ordinary meaning of the words used in the *IRA* would mean that it applied to the internal auditors excluded from the *PSLRA*. It also recognized that there was "no specific provision in the IRA stating that it does not apply to Government employees…" However, the Council then reasoned that this plain, ordinary and grammatical meaning could not be countenanced, since it would mean that all employees or persons covered by the *PSLRA*, even though they are included in one of the three bargaining units under s. 4 of the *PSLRA*, could also elect to unionize under the *IRA*. In the Council's view, if employees covered by the *PSLRA* also have rights under the *IRA*, "this would render the *PSLRA* entirely redundant", which the Council called "absurd".[32] On the basis of this supposed "absurdity" both the original Vice-Chair and the

---

[31] *British Columbia (Re)*, [1989] BCLRBD No 224 (C225/89) [*Internal Auditors*]; aff'd [1990] BCLRBD No 52 (C55/90) [*Internal Auditors* Reconsideration].

[32] *Internal Auditors* at p 6. As described below, this is not an absurdity because s. 23 of the *PSLRA* (which was s. 26 in 1989) provides that "if this Act is contrary to, in conflict with or inconsistent with that or any other Act, this Act prevails." Therefore, all individuals who <u>are</u> included in the definition of "employee" in the *PSLRA* and therefore in one of the three bargaining units defined at s. 4 of the *PSLRA* cannot also have representative rights under the *Code*.

reconsideration panel decided the *Code* did not apply to persons excluded from the *PSLRA*'s definition of 'employee".

175. In the BCGLA's submission, the concern with redundancy which underlies the *Internal Auditors* decision is entirely misplaced. The *PSLRA* would not be rendered redundant if the *Code* applied to employees excluded from the *PSLRA*; rather, it would continue to apply to all persons defined as employees under the *PSLRA*. Moreover, the certification provisions of the *Code* would not apply to those persons who *are* employees under the *PSLRA*, because s. 4 of the *PSLRA* provides that such persons must be members of one of the enumerated bargaining units and s. 23 of the *PSLRA* provides that where the *PSLRA* is contrary to, in conflict with, or inconsistent with the *Code*, the *PSLRA* prevails. So, when it comes to government employees *covered* by the *PSLRA*, the *PSLRA* prevails, and this is hardly redundant. It was and continues to be a *non sequitur* to say that the same would be true of government employees *excluded* from the *PSLRA*.

176. At the same time, it would hardly be an absurd result – and it is indeeed one compelled by the plain, ordinary and grammatical meaning of the legislation (as well as its underlying purposes and the values and requirements of s. 2(d) of the *Charter*, as set out more fully below) – for the *Code* to apply to government employees including lawyers who are excluded from the *PSLRA*.

177. In the *Internal Auditors* decision, the Vice-Chair supported his interpretation by looking to the common law at the time the *PSLRA* was enacted, and the analysis of this common law immunity upon which the Higgins Report was premised, apparently without awareness that this common law had been changed by the Legislature in 1974. While the Vice-Chair accepted the union's submission that what is now s. 23 of the *PSLRA* "only applies to those inconsistencies between the *IRA* and the *PSLRA* which arise by virtue of the application of the *IRA* to employees who are, in fact, included in collective bargaining under the *PSLRA*, sections 4(a), (b), and (c) [the three bargaining units of *PSLRA* covered employees]", nonetheless he dismissed this as irrelevant based on his assumption that the *IRA* did not apply to any government employees as a result of this purported common law principle.[33]

178. Again, in the BCGLA's submission, this conclusion was fundamentally flawed because it relied on a common law principle the Legislature had expressly altered.[34] There is no doubt that at the time the

---

[33] *Internal Auditors* at pp 9-11.

[34] *Canada (Attorney General) v. Thouin,* 2017 SCC 46 at para. 19.

PSLRA was enacted and at the time of the Higgins Report, the common law excluded the Province from the application of the *Code* based on Crown immunity. However, this entirely fails to recognize that Crown immunity from statute was abolished in British Columbia *after* the Higgins Report, and *after* the introduction of the *PSLRA*, as a result of the introduction of the new *Interpretation Act*. From that point forward, government was bound by the *IRA* (now the *Code*). This is because nothing in the *IRA* or *Code* provides that it does not apply to the Crown, and the *Interpretation Act* requires that legislation be interpreted as applying to the Crown unless that legislation specifically provides otherwise, which the *Code* does not.

179. Therefore, the underlying rationale of the original decision in *Internal Auditors* – that the *IRA* did not apply to the Province at all in light of Crown immunity – was simply mistaken. The Council relied on the Higgins Report and common law Crown immunity cases without considering that these all either predated the 1974 abolition of Crown immunity from statute in British Columbia, or referred to jurisdicitons in which this never occurred. Without this fundamental error, the Vice-Chair presumably would have been compelled to give effect to what he conceded was the plain, textual meaning of the statutes, which would in turn also have furthered the fundamental purposes of the *IRA* of promoting collective bargaining.

180. The BCGLA also notes that the Vice-Chair in *Internal Auditors* made an additional error in seeking to distinguish the *Queen's Printer* case on the basis that the Province was not the employer in that case. In fact, an agency of the government only has a legal personality (is "corporate") distinct from the Crown *if* its authorizing statute so provides, whether expressly or by necessary implication.[35] The Queen's Printer Bureau was not an independent corporate body, as can be seen from the undisputed fact that its clerical employees were within the public service unit. Furthermore, even if a body is corporate, if it is a Crown agent, it will have the benefit of Crown prerogative immunity from statute within the scope of its agency.[36] This is why the Baigent panel in the *Queen's Printer* case said it would not matter whether the Bureau was part of the Crown or not.

181. Turning to the internal auditors reconsideration decision, the Council accepted that "there is nothing explicit in either piece of legislation [the *PSLRA* and *IRA*] to address the status of *PSLRA* excluded employees under the *IRA*." However, it accepted the original panel's view that this approach

---

[35] *Westlake v Ontario* (1971), 21 DLR (3d) 129 (HCJ), aff'd [1972] 2 OR 605 (CA), aff'd [1979] SCR vii; *Whalley v Royal Canadian Mounted Police (Public Complaints Commission)* (2009) 314 DLR (4th) 498 (NSCA) at para 15.
[36] *R v Eldorado-Nuclear Ltd.,* [1983] 2 SCR 551 at pp 565-566.

would render the *PSLRA* redundant, based on the Council's view that "if persons excluded form the definition of "employee" in the *PSLRA* have collective bargaining privileges under the *IRA*, there was no reason for the Legislature to have passed the *PSLRA* in the first place since all employees in the Province would fall under the umbrella of the *IRA*".[37] Again, in the BCGLA's submission, this reasoning is, with respect, fundamentally flawed. The *PSLRA* is not redundant – it applies to all employees within its ambit and, by virtue of s. 23 of the *PSLRA*, those employees are not covered by the *IRA*/*Code*. However, there is no compelling logic to or basis for, and certainly no redundancy or absurdity which requires, finding that the *Code* applies to lawyers excluded by the *PSLRA* and not falling with its ambit.

182. As a result, when it comes to employees covered by the *PSLRA*, its bargaining unit structure and all of its other specific requirements and limitations apply. However, there is no basis for applying the *PSLRA* to employees who are specifically excluded from its scope and application, and no legal basis whatsoever for this Board refusing to apply the *Code* to lawyers who are excluded from the *PSLRA*'s structure and specific requriements and limitations. If the legislature wished those provsions to apply to lawyers, it has a remedy; but there is no warrant for assuming or accepting that the legislature so wishes in the absence of the enactment of such legislation. Nor is there any legal basis for depriving government lawyers of the right to apply for certification under the *Code*.

183. In its reasons, the reconsideration Council also referered to the Higgins Report and also observed, as had the original panel, that public servants employed by the government as employer had been excluded under the predecessor to the *IRA*, and that their exclusion from the *PSLRA* did not create rights under the *IRA*. In the Council's view, it would "strain the language of the enactment" to "now find that the mere act of exclusion form the *PSLRA* automatically creates rights under the *IRA*," with the Council concluding that had "the Legislature intended such a drastic change in the state of the law, surely it would have said so in explicit terms".[38] Again, this entirely fails to recognize the fundamental change to the law in 1974, *after* the Higgins Report was published, and fails to appreciate that the statutory changes relevant to Crown immunity occurred in a different statute (the *Interpretation Act*), introduced by the same government as the *PSLRA*. Moreover, it is not the BCGLA's submission that "the mere act of exclusion from the *PSLRA*" creates rights under the *Code*; rather, the rights under the *Code* come from the specific language of the *Code* including its definition of employee, and from the application of the *Code* to government as employer as a

[37] *Internal Auditors* at p 4.
[38] *Internal Auditors* Reconsideration at p 6.

result of the explicit language of the *Interpretation Act* and the absence of any specific language to the contrary in the *Code*. In other words, what strains the language of the *Code* is an interpretation which would exclude Legal Counsel from its application and protections.

Judicial Administrative Assistants

184. The last decision in this line of cases was released in 2014 and was made with respect to an application by the Association of Judicial Administrative Assistants (JAAs) for certification under the *Code*.[39] In its decision, the Board relied heavily on the *Internal Auditors* decision. As with Legal Counsel, s. 1(1) excluded all JAAs within the proposed bargaining unit as persons "employed to provide administrative or clerical support services to a judge of a court in British Columbia".[40]

185. In its reasons, the Board turned to s. 23 of the *PSLRA*, which, as noted above, provides that if the *PSLRA* is contrary to, in conflict with, or inconsistent with the *Code*, the *PSLRA* prevails. The Board found that the definitions of employee in the *PSLRA* and the *Code* were in conflict and inconsistent, in that the former excludes JAAs and the latter includes them. In the Board's view, this supposed "conflict" or "inconsistency" was sufficient to engage s. 23, such that the *PSLRA* definition prevailed with respect to both statutes, and therefore that a constitutional challenge was required "to overturn the language of the legislation."[41]

186. However, in BCGLA's submission, this approach to s. 23 is fundamentally mistaken. Defining "employee" differently in different statutes does not and cannot create a conflict: rather it just requires that the provisions of *each* statute be read with the definition in *that* statute in mind.

187. The Board also determined that a "purposive reading" of the *PSLRA* and the *Code* suggests "the legislative intent was not to allow Government employees, excluded from the statutory bargaining regime established under the *PSLRA*, to apply for bargaining rights under the *Code*" and that such an interpretation would "produce results contrary to the intent of the legislature".[42]

---

[39] *The Government of the Province of British Columbia v Association of Judicial Administrative Assistants*, BCLRB No. B97/2014, 2014 CanLII 21539 [*Judicial Administrative Assistants*].
[40] *Judicial Administrative Assistants* at para 6.
[41] *Judicial Administrative Assistants* at para 38.
[42] *Judicial Administrative Assistants* at para 47.

188. With respect, the Board in *Judicial Administrative Assistants* misunderstood what a "purposive reading" of an enactment is. The "purpose" of a statute is the mischief that it is designed to correct.[43] There can be no serious dispute that the fundamental purpose of the *Code* is to provide groups of employees not excluded from its ambit with the democratic right to decide whether they wish to be collectively represented in order to equalize their bargaining power with their employer. The fundamental purpose of the *PSLRA* was to provide unions in the public service with the right to represent employees covered by its ambit within one of three bargaining units. Indeeed, as the Board itself stated, "the purpose of the *PSLRA* was to grant access to a particular statutory collective bargaining regime to certain government employees, but not to others."[44]

189. In the BCGLA's submission, the purpose of neither enactment is advanced by refusing to permit Legal Counsel to apply for certification under the *Code*. Certainly, the purpose of the *Code* is not promoted by straining its language to exclude groups of employees, and in this case Legal Counsel, from collective bargaining altogether. When it comes to the *PSLRA*, its purpose (to grant access to that specific bargaining regime to certain employees and not to others) is not subverted by recognizing the right of Legal Counsel to seek certification under the *Code*. Those government employees covered by the *PSLRA* regime continue to be covered by it, and those who are not, including Legal Counsel, are not covered by it. But the fact that they are nonetheless covered by the *Code* hardly subverts the application of the *PSLRA* and its specific structure and requirements to those who are covered by it.

190. Before countenancing a contrary result, the Board should expect to see *clear* language to that effect in the relevant statutes – particularly since the Province, unlike any other employer, can propose government bills in the Legislature and make its purpose clear. But in *Judicial Administrative Assistants,* as in *Internal Auditors,* the panel ignored what it recognized to be the "grammatical and ordinary" reading of the texts. While the Board concluded that it was "bound by the legislative intent expressed in the *PSLRA* and the *Code*,"[45] any such purported "intent" to exclude employees from collective bargaining altogether, where they were excluded from the bargaining units defined by s. 4 of the *PSLRA*, is not expressed in either the *PSLRA* or the *Code*. If the legislature had wanted to say that the purpose and intent of the *PSLRA* was to preclude access to the *Code* altogether, it would have and could have done so. What the statutes actually

---

[43] *Interpretation Act*, RSBC 1996, c 238, s 8.
[44] *Judicial Administrative Assistants* at para 14.
[45] *Judicial Administrative Assistants* at para 53

say is that the *PSLRA* only assumes priority in the event of a conflict. There is no such conflict, and absent any such conflict, the *Code* and the *PSLRA* coexist and can and should be interpreted that way.

191. The Board also pointed to the existence of the *Crown Counsel Act* as further evidence that the exclusion of practicing lawyers from the definition of employee under the *PSLRA* demonstrated a legislative intention that lawyers do not have access to collective bargaining under the *Code*. According to the Board "[a]s long as a category of Government employees is excluded from the definition of employee under the *PSLRA*, and no other statutory collective bargaining regime has been established for them, the legislative intent is that they not have access to collective bargaining under the *Code*."[46] This reasoning is misguided because there is no basis for assuming that the Legislature's reason for enacting the *Crown Counsel Act* had anything to to do with denying *other* employees, including lawyers, their ordinary right to access to collective bargaining under the *Code*, or for that matter for assuming that mere exclusion from the *PSLRA* reflected an intent to deprive Legal Counsel altogether of the right to apply for certification under the *Code* from which they are in no way excluded.

192. Finally, the Board rejected the Association's arguments relating to *Charter* values, which were based on the then-recent decisions in *Health Services* and *Fraser*. The Board observed that *Fraser* only affirmed a right to a "process of engagement" in which employees can collectively make representations to their employer which must be considered in good faith by their employer in discussions with employees, but did not go so far as to hold that exclusion from a collective bargaining scheme could infringe s. 2(d).[47] As will be discussed below, the understanding of freedom of association in *Fraser* has subsequently been overtaken by later authority from the Supreme Court of Canada. While this of course could not have been considered by the panel in *Judicial Administrative Assistants,* it is a "persuasive reason" to revisit the issue from first principles. Moreover, not only has the scope of s. 2(d) protection expanded since the *Judicial Administrative Assistants* decision (so that the *Charter* values to be considered in interpreting the *Code* in this case are different than were considered by the Board in the *JAA* case), but there was also no direct alternative *Charter* challenge brought in that case in the event that the *Code* was interpreted as somehow excluding JAAs.

193. As a result, the BCGLA asserts that the Board adopted an incorrect approach to statutory interpretation in *Internal Auditors* and *Judicial Administrative Assistants* that resulted in a reading of the *Code*

---

[46] *Judicial Administrative Assistants* at para 51.
[47] *Judicial Administrative Assistants* at para 52.

that the text cannot support. As set out more fully below, the correct approach to statutory interpretation reveals that the *Code* can and does apply to Legal Counsel because: (1) the plain and ordinary meaning of the text does not give rise to a conflict between the *PSLRA* and the *Code*, (2) using the proper purposive analysis, the only interpretation the text can support is that put forward by the BCGLA, and (3) if the Board determines it is necessary to consider the *PSLRA*, the *Code* must be interpreted to allow Legal Counsel access to collective bargaining in light of the values underlying s. 2(d) of the *Charter*.

There is no conflict between the PSLRA and Code

194. It is trite law that statutes are to be interpreted according to the modern approach, whereby: "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[48] Importantly, "the starting point is the text of the provisions in their grammatical and ordinary sense."[49] Ordinary meaning has been described as referring to "the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context" and "the natural meaning which appears when the provision is simply read through".[50]

195. Despite the Board in *Internal Auditors* and *Judicial Administrative Assistants* finding that the ordinary meaing of the statute supported the unions' positions in those cases, the Board ignored this vital finding. If the Board had given due weight to its own finding regarding the plain and ordinary meaning of the words that the legislature chose, it would be clear that there is no statutory barrier to individuals such as Legal Counsel who are excluded from the definition of employee in the *PSLRA* (and therefore the statutorily-mandated bargaining units in the *PSLRA*), but are not excluded from the definition of employee in the *Code* and, therefore, from bargaining collectively pursuant to the *Code*.

196. The definition of employee under section 1(1) of *Code* is:

> a person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board's opinion,
>
> (a)performs the functions of a manager or superintendent, or

[48] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21.
[49] *R v Conception*, 2014 SCC 60 at para 14.
[50] *Pharmascience Inc. v Binet*, 2006 SCC 48 at para 30.

> (b)is employed in a confidential capacity in matters relating to labour relations or personnel

197. Legal Counsel clearly fall within this definition as persons "employed by an employer". This application is for certification of a bargaining unit of Legal Counsel *except* those excluded by the *Code* under s. 1(1)(a) and (b). Therefore, the members of the proposed bargaining unit are employees under the *Code*.

198. On the other hand, Legal Counsel are excluded from the *PSLRA* definition of "employee" in s. 1(1)(b) (and, where relevant, (t) and (u)), and are therefore not included in any of the designated bargaining units under s. 4. There is no provision of the *PSLRA* which states that Legal Counsel (or other individuals excluded from the *PSLRA* definition of employees) are not entitled to collectively bargain under other legislative regimes. While the Board in the two cases reviewed above previously assumed that this was the legislature's intent, the legislation did not – yet could have (subject of course to *Charter* requirements) – expressly restricted access to the *Code* for *PSLRA*-excluded employees.

199. The lack of policy rationale for this conclusion is shown by the fact that other public servants excluded from the defiiniton of "employee" under the *PSLRA* do bargain under the *Code*[51] or other statutory regimes.[52] There is no basis for the suggestion that this supports an inference that the legislature could not have intended bargaining under the *Code* for employees not excluded from its scope, and not otherwise covered by other labour relations legislation.

200. The definitions in the *PSLRA* are explicitly limited to the meaning of those terms for the purpose of applying and interpreting "this Act," i.e. the *PSLRA*.[53] The definition of "employee" in the *Code* is completely separate. Legal Counsel, like other public servants excluded from the definition of "employee" in the *PSLRA,* who do not perform the functions of a manager or superintendent and who are not employed in a confidential capacity in matters related to labour relations or personnel, are "employees" for the purposes of the *Code*.

---

[51] See, e.g., *Queen's Printer*.
[52] *Crown Counsel Act*, RSBC 1996, c 87, s 4.1.
[53] *PSLRA*, s. 1(1)

201. There is no legal conflict between the *PSLRA* and certification of the BCGLA under the *Code*. The fact that Legal Counsel are not employees under the *PSLRA* does not imply or mean that Legal Counsel are not employees under the *Code*.

202. In this context, reference to s. 23 of *PSLRA* does not assist the Employer. Section 23 states: "Unless otherwise provided in this Act, the *Labour Relations Code* applies, but if this Act is contrary to, in conflict with or inconsistent with that or any other Act, this Act prevails." This provision only provides a priority rule *in the event of a conflict*. It does not create a conflict where one does not exist.

203. It is simply not a conflict for different statutes to interpret the same word in different ways since the stipulated definition only applies within the statute itself. This is particularly so where the definition serves to render the relevant group outside of the scope of the statute (as is the case with Legal Counsel under the *PSLRA* definition of employee). Many statutes in BC define employee differently than the way it is defined in both the *Code* and the *PSLRA* – including the *Public Service Act*, on which the definition in the *PSLRA* is based.[54] That does not mean that those statutes are all in conflict.

204. To summarize:

a) Legal Counsel are included within the definition of "employee" under the *Code*;

b) There is no other provision of the *Code* which would exclude Legal Counsel from the ambit of the regime created under the *Code*, and in particular there is no provision that denies access to the *Code* for employees of the government;

c) Legal Counsel are excluded from the definition of "employee" under the *PSLRA*, and therefore from the statutory bargaining units created by *PSLRA* s. 4;

d) There is no provision in the *PSLRA* which states that individuals exempted from the definition of employee in that statute are not entitled to collectively bargain pursuant to other legislation (including the *Code*) (and, in fact there are examples of such individuals collectively bargaining under the *Code* and other statutory bargaining regimes).

205. Therefore, the provisions in their grammatical and ordinary sense provide for Legal Counsel to collectively bargain with the Employer pursuant to the *Code*. In fact, the plain and ordinary meaning of the words cannot offer any other interpretation. There is no need to or basis for looking further.

---

[54] See, e.g., *Public Service Act*, RSBC 1996, c 385, s 1; *Public Service Benefit Plan Act*, RSBC 1996, c 386, s 9; *Income Tax Act*, RSBC 1996, c 215, s 124.

The Board did not apply a proper purposive analysis

206. While the modern approach to statutory interpretation involves a purposive analysis, it does not focus on the legislators' intent where the text itself cannot support that meaning.[55] As LeBel J explained: "Although statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament."[56] In other words, while looking to legislative intent is a component of statutory interpretation, ultimately the interpretation the Board arrives at must be one that the words of the text can reasonably bear.[57]

207. This is at the heart of the incorrect approach adopted by the Board in *Internal Auditors* and *Judicial Administrative Assistants*. In those decisions, the Board arrives at an interpretation that the words cannot bear by reading into the *Code* and the *PSLRA* text that is not there, under the guise that this is part of a "purposive approach" to statutory interpretation.

208. However, even if the text of the *Code* did permit such an interpretation (which it cannot), the purposive analysis undertaken by the previous Boards was incomplete. With respect to remedial legislation such as the *Code*, a purposive analysis dictates a broad and liberal interpretation of the legislation to allow the pursuit of its underlying remedial purposes.[58]

209. The purpose of the *Code* is to provide employees with access to collective bargaining. This is expressed, for instance, in s. 2(c) of the *Code*, which requires the Board to exercise powers and perform duties under the *Code* in a manner that "encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees".[59]

210. The purpose of the *PSLRA* is to extend that access to particular government employees who were not previously provided with such access through the predecessor to the *Code*. Even if the legislature initially enacted the *PSLRA* and the *Code* with the intention that only the *PSLRA* would apply to government employees, this intention has been overtaken by subsequent legislative changes (see the discussion of the *Interpretation Act* amendments set out above). Moreover, providing government

---

[55] Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) at 9.01[3].
[56] *Re: Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38 at para 33. See also *University of British Columbia v Berg*, [1993] 2 SCR 353 at 371.
[57] Known as the "plausible meaning rule": Sullivan, *The Construction of Statutes*, at 7.02[1].
[58] *Interpretation Act*, RSBC 1996, c 238, s 8.
[59] *Code*, s. 2(c).

employees excluded from the *PSLRA* with access to collective bargaining through the *Code* (where they are not otherwise excluded from doing so under the *Code*) is not incompatible with – and is in fact consistent with – the overarching purpose of the *Code*.

211. The only interpretation of the *Code* which reconciles the grammatical and ordinary sense of the words of the text with these purposes is one which allows Legal Counsel access to collective bargaining pursuant to the *Code*, because otherwise – contrary to the purpose and intent of the *Code* – Legal Counsel would not have access to collective bargaining.

212. As described above, in *Internal Auditors*, the Board found that the BCGEU's argument would lead to an "absurdity" in that it would mean employees covered by the *PSLRA* also have rights under the *Code*, rendering the *PSLRA* redundant. As explained above in the discussion of that decision, there is no such redundancy or absurdity.

213. Moreover, "the clearer the language of the text, the greater the absurdity required to justify departure from its apparent meaning."[60] For the reasons set out above, there is no ambiguity in the text in this case. Therefore, there must be a significant absurdity to establish a basis on which the Board could find an alternate interpretation applicable. There is also nothing absurd in finding that public servants, including Legal Counsel, who are not included in the *PSLRA* or its three bargaining units, have the right to seek to become certified under the *Code*. Indeed, it would be absurd to hold otherwise in the face of the purposes of the *Code* and the freedom of association values it reflects.

214. The *Code* is a statute of general application that sets out a comprehensive scheme by which employees may access collective bargaining; the *PSLRA* sets up a statutory regime regulating bargaining between the government as an employer and certain government employees as defined in the Act. Even if excluded individuals gain access to collectively bargain under the *Code*, the *PSLRA* continues to apply unchanged to all those individuals it was intended to regulate.

215. Finally, as noted above, while the government relied on Crown immunity to set wages and working conditions and to refuse to recognize the right of government employees to collectively bargain before the *PSLRA* was introduced, that Crown immunity was stripped away by legislation introduced by the same government shortly after it introduced the *PSLRA*. Evolving Supreme Court of Canada jurisprudence (as

[60] Sullivan, *The Construction of Statutes*, at 10.02[6]

discussed more fully below) has also confirmed that the *Charter* right to freedom of association includes the right to a process of meaningful collective bargaining, which even the government must recognize with respect to its own employees. In light of section 14(1) of the *Interpretation Act* and this evolving *Charter* jurisprudence, it is no longer an absurdity (if it ever was) for the *Code* to apply to government employees who are excluded from the *PSLRA*.

216. In fact, in light of our current understanding of the constitutional rights protected under s. 2(d) (as reviewed below), and in light of the Board's statutory mandate to interpret its powers in a manner that encourages collective bargaining between employers and the freely chosen representatives of employees, it would be an absurdity to leave any group of otherwise-eligible employees beyond the reach of statutory collective bargaining.

217. At very minimum, there is a heavy burden on the Province to demonstrate what the absurd consequence would be if Legal Counsel were to be able to be represented by a union certified as their bargaining agent under the *Code*.

Cannot rely on PSLRA exclusion because it is inconsistent with Charter values

218. As set out above, the BCGLA's primary position does not engage the *Charter*. BCGLA submits that Legal Counsel have access to collective bargaining under the *Code* and that the *PSLRA* is no barrier to this; in fact, the only barrier to Legal Counsel exercising their *Charter*-protected rights is the Board's previous and, in the BCGLA's respectful submission, wrongly-decided jurisprudence.

219. Underlying the modern approach to statutory interpretation is the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the *Charter*, and thus must be interpreted in a constitutionally-compliant manner, where possible.[61]

220. To the extent the Board considers the exclusion of Legal Counsel under the *PSLRA* somehow relevant to the interpretation of "employee" under the *Code*, it would be inconsistent with *Charter* values to allow the exclusion of Legal Counsel under the *PSLRA* to support reading an exclusion of Legal Counsel into the *Code*.

[61] See, e.g., *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at para 35.

221. It is important to note at the outset that, for the purpose of this Application, the Crown has conceded that the statutory exclusion of Legal Counsel from access to collective bargaining is unconstitutional. In this context, there is no legal basis for permitting the Crown to rely on what it concedes to be an unconstitutional exclusion in support of its proposed interpretation of the *Code* as excluding Legal Counsel.

222. Indeed, there are important *Charter* values surrounding the freedom of association protections afforded by s. 2(d) of the *Charter* that arise in this case, as reflected in the Crown's concession.

223. Section 2(d) of the *Charter* guarantees employees the right to a meaningful process of collective bargaining, including the "indispensable" right to strike grounded in the principles of workplace democracy.[62] As explained by the SCC, "[n]either the text of s. 2(*d*) nor general principles of *Charter* interpretation support a narrow reading of freedom of association".[63] Significantly, the constitutional right to collective bargaining is grounded in Canadian labour history, international law, and the underlying values of the *Charter* as a whole, including equality, democracy, self-determination, dignity and liberty.[64]

224. The purpose of s 2(d) is "to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power," a purpose that is "nowhere...more pertinent than in labour relations," given that "individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers." As the SCC has held, it is "only by banding together, thus strengthening their bargaining power with their employer, [that employees] can meaningfully pursue their workplace goals."[65] The guarantee in s. 2(d) cannot be indifferent to power imbalances between workers and their employer in the labour relations context as that would ignore these historical origins.[66]

---

[62] *MPAO* at para 67; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 [*SFL*] at paras 1, 28; *Meredith v Canada (Attorney General)*, 2015 SCC 2 at para 24; *Ontario (Attorney General) v Fraser*, 2011 SCC 20 [*Fraser*] at para 97; *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 [*Health Services*] at paras 19, 87; *British Columbia Teachers' Federation v British Columbia*, 2016 SCC 49.

[63] *MPAO* at para 47

[64] *MPAO* at para 50; *Fraser* at paras 89-97; *Health Services* at paras 38-86, *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 365-369 per Dickson CJ in dissent, but adopted by the majority in *SFL* and *MPAO*; *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 at paras 30-34.

[65] *MPAO* at paras 55, 58, 62, 70-72, 80.

[66] *MPAO* at paras 70, 80

225. Therefore, the *Charter* values at issue in this case include access to a meaningful process of collective bargaining, together with the right of employees to democratically select and choose their own independent bargaining agent. A labour relations process that substantially interferes with the possibility of having meaningful collective negotiations on workplace matters impairs freedom of association and thus is inconsistent with *Charter* values.[67]

226. There can be no dispute that Legal Counsel have been denied access to any meaningful collective bargaining regime, and cannot meaningfully engage in collective bargaining if thery are excluded from any and all collective bargaining regimes. While the Employer has recognized the BCGLA as a representative for Legal Counsel on an *ad hoc* and at-will basis, the Employer has steadfastly refused to voluntarily recognize the BCGLA as the official bargaining agent for Legal Counsel and directly negotiate with the BCGLA with respect to Legal Counsel's terms and conditions of employment. Further, Legal Counsel currently have no protected process to collectively address disputes with the employer, including protections for work stoppage (or alternative dispute resolution mechanisms) or a grievance process that can be referred to an independent grievance arbitrator. There is, however, one available avenue for meaningful collective bargaining to be extended to Legal Counsel, and that is through the granting of BCGLA's certification application under the *Code*. Therefore, to the extent that there is any ambiguity in the language of the text (which is denied), consistent with the Board's constitutional obligation, the *Code* ought to be interpreted in a way that gives effect to Legal Counsel's right to a process of meaningful collective bargaining in light of the *Charter* values underlying the right to freedom of association.

227. This is also consistent with the Board's statutory obligation, under s. 2 of the *Code*, to interpret the *Code* in a manner that encourages collective bargaining between employers and employees' freely chosen representative. In any event, the *PSLRA* cannot be relied upon to prevent Legal Counsel from democratically selecting their own bargaining agent and having that bargaining agent duly certified under the scheme enacted in the *Code*, particularly given the Crown's concession as set out above.

228. In the circumstances, BCGLA has met the requirements under the *Code* for certification as a bargaining agent for Legal Counsel and, as such, ought to be certified.

---

[67] *MPAO* at para 68

EXCLUSION OF LEGAL COUNSEL FROM THE *CODE* WOULD CONSTITUTE AN UNJUSTIFIED INFRINGEMENT OF SECTION 2(D) OF THE *CHARTER*

229. In the alternative, in the event that the Board interprets the *Code* as excluding Legal Counsel, then that exclusion under the *Code* itself would be contrary to s. 2(d) of the *Charter*. The Board would then have to consider the appropriate remedy under either s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982* to cure the constitutional defect.

230. Before turning to this issue, it is critical to recognize that the BCGLA has applied for certification of Legal Counsel under the *Code*, not under the *PSLRA*. For the purpose of being certified as bargaining agent for Legal Counsel under the *Code*, the BCGLA does not challenge the constitutionality of the *PSLRA* as it is written. No one is asking the Board to include Legal Counsel within one of those bargaining units and it is not within the Board's jurisdiction to do so.

Board jurisdiction to determine constitutional questions

231. The Supreme Court describes the power of administrative tribunals to grant remedies under ss. 24(1) and 52 as follows:

> administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And … they must act consistently with the *Charter* and its values when exercising their statutory functions.[68]

232. The legislature has granted this Board the power to decide questions of law that arise in any matter before it, "including constitutional questions".[69] This means the Board is both a "court of competent jurisdiction" under s. 24(1) and has the jurisdiction to apply s. 52 (within limits as described below), as long as the constitutional questions that arise relate to matters that are properly before the Board. The Board, therefore, has the authority and obligation to read its home statute in a constitutionally-compliant manner, and to refuse to give effect to the undisputedly-unconstitutional exclusion.[70]

233. The issue before this Board is whether to certify the BCGLA as bargaining agent for a bargaining unit of Legal Counsel. As a specialized tribunal, this is well within the Board's expertise and jurisdiction to

---

[68] *R v Conway*, 2010 SCC 22 at para 78. See also paras 79-82

[69] *Administrative Tribunals Act*, SBC 2004, c 45, s 43(1), made applicable to the Board by s. 115.1(e) of the *Code*.

[70] *Cuddy Chicks*, [1991] 2 SCR 5 at pp 14-15; *Conway* at para 78.

decide, given that it has jurisdiction to determine whether Legal Counsel are employees under the *Code*, whether the unit applied for is appropriate, and whether a sufficient number of employees are members in good standing of the BCGLA such that the Board must certify BCGLA under the *Code*.[71] Thefore, if any legislation is raised as a bar to such certification, the Board has the authority to consider its constitutionality and decline to give effect to an unconstitutional provision.

Breach of rights under section 2(d) of the Charter

234. In assessing whether the right to collectively bargain under s. 2(d) has been infringed, the central issue is whether the legislation at issue substantially interferes with the right to a meaningful process of collective bargaining.[72] The determination is contextual and fact-specific,[73] involving two inquires:

a) does the legislation or government action interfere with a term or condition of employment that is important to employees in the collective bargaining process, and

b) to what extent does that legislation or government action preserve the right to a process of collective bargaining. This includes the right to strike (or arbitration for essential workers) as an indispensable component of any good faith and meaningful collective bargaining process. The focus is on the impact of the legislation, and whether it preserves or undermines a meaningful collective bargaining process.

235. The right to a meaningful bargaining process is negated where legislation or government action reduces employees' negotiating power or disrupts the balance between employees and their employer.[74] This includes, among other things, laws and regulations that ban recourse to collective action by employees without adequate countervailing protections,[75] or a legislative scheme that strips employees of adequate protections in their interactions with management so as to substantially interfere with their ability to meaningfully engage in collective negotiations.[76] In articulating the test in *MPAO* and *SFL,* the SCC clearly rejected the notion that collective bargaining is a "derivative" right that only exists where the guarantee under s. 2(d) is otherwise frustrated. The SCC also rejected the "impossibility" threshold for finding a s. 2(d) breach.[77]

---

[71] *Code*, ss. 23, 139.
[72] *MPAO* at para 80.
[73] *Health Services* at para 92.
[74] *MPAO* at paras 71-72.
[75] *MPAO* at para 72.
[76] *MPAO* at para 80.
[77] See *MPAO* at paras 73-80 and *SFL* at paras 77-78.

236. In *SFL*, the SCC ruled that s. 2(d) protects the right to strike as an "indispensable component" of meaningful good faith bargaining and the "powerhouse" of collective bargaining, since it is "the possibility of a strike which enables workers to negotiate with their employers on terms of approximate equality."[78]

237. In this case, the following demonstrates how the exclusion of Legal Counsel under the *Code* (based on the Employer's admission relating to the effect of the exclusion in the *PSLRA*) would substantially interfere with their right to meaningful collective bargaining:

a) Legal Counsel do not have recourse to collective bargaining through any other legislative mechanism: without access to collective bargaining under the *Code*, Legal Counsel will not be able to bargain collectively with the Employer;

b) While the Employer does recognize BCGLA as a representative for Legal Counsel, the Employer refuses to negotiate with BCGLA as bargaining agent for Legal Counsel;

c) Legal Counsel do not have basic protections that equalize power between employees and employers, including union security clauses, the right not to be discipline or discharged without cause, and access to a grievance and independent arbitration process;

d) The employer's willingness to consult with BCGLA does not equate to collective bargaining and the Employer ultimately decides what to do (often contrary to BCGLA's expressed wishes, such as the unilateral decision to tie salary to excluded managers rather than the Crown Counsel agreement); and

e) Legal Counsel do not have the right to strike or, alternatively interest arbitration.

238. The Province has repeatedly refused to recognize Legal Counsel's right to a process of meaningful collective bargaining through its own democratically-chosen bargaining agents described in detail above.[79]

239. The circumstances for Legal Counsel in this case are akin to those of the RCMP in *MPAO*. In that case, the SCC found that the purpose of the definition of "employee" under the federal *Public Service Labour Relations Act* violated s. 2(d) of the *Charter*, explaining:

> [80] To recap, s. 2(d) protects against substantial interference with the right to a meaningful process of collective bargaining. Historically, workers have associated in order

[78] *SFL* at paras 3, 55.

[79] For example, the government responded to the BCGLA's first card campaign in 2013 that in its view Legal Counsel did not have a right to collectively bargain, and that final decisions on terms and conditions of their employment would rest with the employer. Again in 2015, post-*MPAO*, again the Province failed to recognize Legal Counsel's right to a process of meaningful collective bargaining through the bargaining agent of their choice, taking several years to consult different associations – all of whom supported a separate bargaining unit for Legal Counsel represented by the BCGLA – and then ultimately in 2018 refusing to effect this option, which the government itself put forward in consultations.

> "to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict", namely, their employers: *Alberta Reference*, at p. 366. The guarantee entrenched in s. 2(d) of the *Charter* cannot be indifferent to power imbalances in the labour relations context. To sanction such indifference would be to ignore "the historical origins of the concepts enshrined" in s. 2(d): *Big M Drug Mart*, at p. 344. It follows that the right to a meaningful process of collective bargaining will not be satisfied by a legislative scheme that strips employees of adequate protections in their interactions with management so as to substantially interfere with their ability to meaningfully engage in collective negotiations.
>
> …
>
> [131] … The *PSSRA* and, later, the *PSLRA* established the general framework for labour relations and collective bargaining in the federal public sector. A class of employees, the members of the RCMP, has, since the initial enactment of this regime, been excluded from its application in order to prevent them from exercising their associational rights under s. 2(d). Thus the issue to be addressed is whether the purpose of excluding a specific class of employees from the labour relations regime impermissibly breaches the constitutional rights of the affected employees. The issue is not whether Parliament must impose a new statutory labour relations regime in the presence of a legislative void.[80]
>
> …
>
> [135] The *PSSRA*'s successor, the *PSLRA*, reduced the categories of excluded public servants. RCMP members, however, continued to be excluded in identical terms as under the *PSSRA*, and no other statute permitted RCMP members to engage in a process of collective bargaining… The *PSLRA* exclusion is but a part of a constitutionally defective regime of labour relations, designed to prevent the exercise of the s. 2(d) rights of RCMP members. We therefore conclude that the purpose of the *PSLRA* exclusion infringes s. 2(d) of the *Charter*.

240. Similarly, the Quebec Court of Appeal recently ruled that the exclusion under the labour relations regime of first-level managers working at a casino was unconstitutional.[81] The Court confirmed the appropriate test was whether the impugned legislative scheme deprives employees of adequate protections in their interactions with the employer in such a way as to create a substantial interference with their ability to meaningfully engage in collective bargaining or, alternatively, whether the contested law or act of the

---

[80] *MPAO* at paras 131, 135.

[81] *Association des cadres de la Société des casinos du Québec c Société des casinos du Québec*, 2022 QCCA 180. This decision is currently on appeal to the Supreme Court of Canada.

State has the effect of substantially impeding the activity of collective bargaining, thereby discouraging the collective pursuit of common objectives.[82]

241. Similarly, the exclusion of Legal Counsel from any collective bargaining regime would result in a constitutionally-defective regime of labour relations designed to prevent, and having the effect of preventing, Legal Counsel from exercising their s. 2(d) rights. Indeed, as noted above, the Province has effectively conceded as much.

Remedy under section 24(1) of the Charter

242. Under s. 24(1) of the *Charter*, the Board has the authority to grant "such remedy as the [Board] considers appropriate and just in the circumstances."

243. As explained above, any exclusion of Legal Counsel from a process of meaningful collective bargaining under the *Code* would be unconstitutional.

244. Indeed, the Province has conceded that Legal Counsel's freedom of association, as guaranteed by s.2(d) of the *Charter*, is infringed to the extent that their exclusion from the definition of 'employee' in the *PSLRA* means they cannot access meaningful collective bargaining. In these circumstances, there is no principled basis for this Board to rely on the statutory exclusion of Legal Counsel under the *PSLRA* to support what would equally amount to an admittedly unconstitutional interpretation of the *Code*, and deny certification of the BCGLA as bargaining agent under the *Code* as an appropriate and just remedy.

245. Therefore, the appropriate and just remedy in the circumstances is for this Board to certify the BCGLA as bargaining agent for the proposed unit of Legal Counsel. This Board can do so pursuant to s. 24(1) of the *Charter*.

Remedy under section 52 of the Constitution Act

246. If the Board concludes – contrary to the BCGLA's submission – that s. 23 of the *PSLRA* means that the definition of "employee" in the *Code* cannot include persons excluded from the definition of "employee" under the *PSLRA,* then the BCGLA asserts that the Board ought to exercise its authority under s. 52 of the *Constitution Act* to disregard s. 23 of the *PSLRA* to this extent.

---

[82] *Association des cadres de la Société des casinos du Québec c Société des casinos du Québec*, 2022 QCCA 180 at para 137.

247. Although the Board does not have the authority to make a formal declaration of constitutional invalidity or strike down the impugned legislation,[83] the Board does have jurisdiction to consider constitutional questions and disregard an impugned provision if the Board finds it violates rights guaranteed under the *Charter*.[84]

248. The applicant in *Judicial Administrative Assistants* did not bring a constitutional challenge to seek a remedy under s. 52 of the *Constitution Act*. Instead, the applicant only raised the issue of the constitutionality of the exclusion of JAAs from the *PSLRA* and the *Code* as a guide to statutory interpretation based on "*Charter* values". The Board therefore declined to decide the issue of whether its reading of s. 23 of the *PSLRA* was consistent with the *Constitution Act*, asserting that the constitutional challenge to overturn the language of the *PSLRA* was required.[85] This was on the basis of the Board's interpretation that JAAs were "covered by the *PSLRA* and ... specifically excluded from the definition of employee" because the definition of "employee" in the *PSLRA* was in conflict with the definition of "employee" in the *Code*, and that the conflict was resolved by reference to s. 23 of the *PSLRA*.[86]

249. In this case, in the alternative to the *Code* interpretation submissions set out above, the BCGLA *does* challenge the constitutionality of the exclusion from the *PSLRA*. The BCGLA asserts that any exclusion of Legal Counsel from the *Code* by the purported operation of the priority provisions of the *PSLRA* is unconstitutional. If the Board finds, as the BCGLA submits, that any such exclusion of Legal Counsel from the *Code* is unconstitutional, the Board may disregard the offending provision(s) on constitutional grounds and rule on the claim as if the impugned provision(s) were not in force.[87]

250. As a result, insofar as the application of the *Code* is concerned, to the extent the *Code* is interpreted as excluding Legal Counsel due to the exclusion of Legal Counsel under the *PSLRA* and the operation of s. 23 of that Act, the Board must refuse to give effect to any such exclusion, as in both purpose and effect, the exclusion operates to preclude Legal Counsel from engaging in a process of meaningful collective bargaining, contrary to s. 2(d) of the *Charter*.

---

[83] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 at para 31; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16 at paras 44-45, *Cuddy Chicks* at p 17.
[84] *Administrative Tribunals Act*, SBC 2004, c 45, s 43, made applicable to the Board by s. 115.1 (e) of the *Code*; *Cuddy Chicks* at p 17.
[85] *Judicial Administrative Assistants* at para 53.
[86] *Judicial Administrative Assistants* at para 38.
[87] *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16 at para 45.

251. To the extent the Board determines that it must consider the priority provision in s. 23 of the *PSLRA,* then it must find that s. 23 of the *PSLRA* is unconstitutional as applied in the context of this certification application and cannot be given force or effect. As a result, the definitions of "employee" in the *PSLRA* and *Code* have equal relevance and applicability within their own statute. Legal Counsel, then, would be rightly understood as employees under the *Code* but not under the *PSLRA*.

252. Given that the BCGLA certification application otherwise meets the requirements for certification as set out in s. 23 of the *Code*, the BCGLA submits that the Board must certify BCGLA as bargaining agent for Legal Counsel.

Remedy Sought

253. An order certifying the BCGLA as bargaining agents for all persons employed by the Province as Legal Counsel, other than Crown Counsel and employees otherwise excluded under s. 1(1)(a) and (b) of the *Code*.

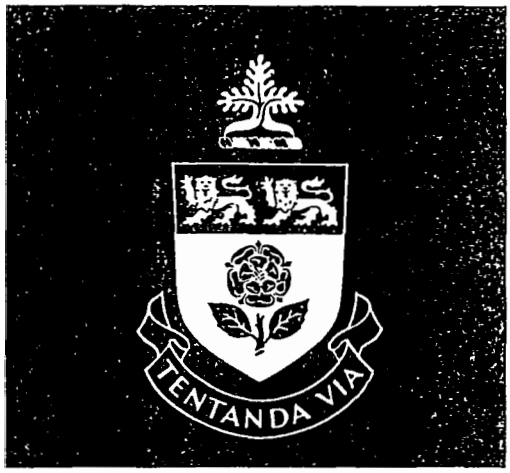
ATTACHED DOCUMENTS

TABLE OF CONTENTS

W.	Letter from ADM Blackstock to Gareth Morley (BCGLA) dated November 10, 2021
X.	Letter from Gareth Morley (BCGLA) to ADM Blackstock dated November 29, 2021
Y.	Letter from ADM Blackstock to Gareth Morley (BCGLA) dated March 28, 2022 Treasury Board Order No. 2022-0401-02 dated March 18, 2022 Legal Counsel Salary Update Contact Centre FAQs dated March 24, 2022
Z.	News Release entitled "Agreement ratified with Alberta Crown prosecutors" dated October 27, 2022

TAB A

TAB A



LAW LIBRARY

YORK
UNIVERSITY

TAB A

TAB A

48
3/6145

MAKING

BARGAINING WORK

IN

BRITISH COLUMBIA'S

PUBLIC SERVICE

Report and Recommendations
of the Commission of Inquiry
into Employer-Employee Relations
in the Public Service of British Columbia

December 1972

D 2 4 9

TAB A

TAB A

December 1972

His Honour the Lieutenant-Governor in Council
Victoria, British Columbia

Sir:

In accordance with Order-in-Council 3786 dated October 19th, 1972, it is our pleasure to present the Report and Recommendations of the Commission of Inquiry into Employer-Employee Relations in the Public Service of British Columbia.

Our terms of reference were to make inquiry into and concerning employer-employee relations in the public service in the Province of British Columbia and to report our findings and recommendations.

It is our hope that our report will assist your Government in drawing up a model legislative framework to govern employer-employee relations in the public service of the province. We are confident that the recommendations contained in this report can serve this purpose.

In addition, we believe the report, when published, will lead to a better understanding of employer-employee relations in the public service of British columbia.

Respectfully submitted,

R. D. Higgins, Chairman

J. L. Fryer

N. J. Ruff

G. L. Tomalty

N. T. Richards

TAB A

PREFACE

The Commission of Inquiry on Employer-Employee Relations in the Public Service of British Columbia was appointed on October 19th, 1972. In presenting its Report, the Commission has prepared a brief introduction for the purpose of setting a tone and of describing the way in which the Commission went about its study. This is followed by an issue-by-issue discussion of the matters considered by the Commission, together with its findings and recommendations. The arguments for and against the various options open to the Commission are presented so that its position, particularly on the more contentious issues, can be clearly understood. For the convenience of the reader, the principal recommendations are summarized at the end of the Report. The conclusion stresses the underlying theme of the Report - Making Collective Bargaining Work. It draws attention to the need for an attitudinal change by both managerial persons and employees and for an understanding that their relationships will be different under collective bargaining.

The Commission is appreciative of the interest shown in the inquiry and of the co-operation extended from both within and without the public service of British Columbia. Some eighty-three submissions were made by employee groups, individual employees, management personnel, organized labour, representatives of employers in the private sector and community organizations.

TAB A

The Commission held public hearings at five major centres throughout the province and, in addition, held discussions with representatives of both employer and employee sides of other provincial jurisdictions and in the public service of Canada. All of this was valuable in the formulation of the Report. It was not possible for the Report to include the details of every submission received. It is hoped, however, that those who made submissions will recognize, in their reading of the Report, the Commission's attempt to take full account of their views.

The Commission is indebted to its research assistants, Laraine C. Singler and John A. Mochrie, who collected and organized much of the required data. The Commission also extends its thanks to Mrs. Eileen G. Anton for the capable way in which she handled the heavy secretarial and stenographic duties and to Mrs. Sharon E. Clifford and Mrs. Heather D. Jones who provided the typing and clerical assistance.

TAB A

v

C O N T E N T S

TAB A

INTRODUCTION

Under the terms of Order-in-Council 3786 dated October 19th, 1972 five Commissioners were appointed " . . . to make inquiry into and concerning employer-employee relations in the Public Service in the Province and to report their findings and recommendations to the Lieutenant-Governor in Council".

The Commission of Inquiry into Employer-Employee Relations in the Public Service of British Columbia promptly conducted its investigations and prepared a report containing its recommendations. The title of that report is Making Bargaining Work in British Columbia's Public Service. This title was carefully chosen and is intended to reveal, from the outset, the unanimous conviction of the Commission that free collective bargaining is the appropriate method for determining wages, salaries and other conditions of employment within the public service of British Columbia.

The Commission did not consider it necessary to argue strongly the case in favour of collective bargaining. This was done with both eloquence and obvious sincerity by the many groups of employees and their representatives appearing before us. The Commission wishes to note, in this regard, that during the entire course of its investigations, including public hearings, written submissions and visits to officials in other provincial jurisdictions and the federal service, not a single presentation was received in opposition to collective bargaining for provincial government employees.

The Commission saw as its main task the consideration of how the collective bargaining system could best be introduced into

the public service of British Columbia. A system should be devised, the Commission believed, that would permit maximum employee participation in the bargaining process while, at the same time, minimizing both public inconvenience and government involvement and intervention in the actual bargaining process.

In conducting its inquiry, the Commission had the advantage of being able to examine the various methods of collective bargaining presently in effect in all other provincial jurisdictions as well as the federal government. This was so because the province of British Columbia has the rather dubious distinction of being the last public jurisdiction in Canada to consider granting collective bargaining rights to its employees.

Collective bargaining is a complex process and has been developing in the private sector over a considerable period of time. However, the Commission is of the view that there are differences between employer-employee relations in the public and private sectors. These differences, which are reflected in many parts of the report, need to be taken into account and they caution against adopting, unchanged, the private sector bargaining practices in order to cope with the peculiar problems associated with government employment. Nor is it appropriate to just transplant into the British Columbia public service a system of collective bargaining designed to suit the needs of another public jurisdiction. Rather, the Commission has attempted from the outset to devise a collective bargaining framework specifically devised to meet the needs of the public service in this province.

The Current Scene

Wages, salaries and working conditions in the public service of British Columbia are determined unilaterally by the Lieutenant-Governor in Council. Such decisions are usually made following the receipt of recommendations from the Civil Service

Commission which has the statutory responsibility under the Civil Service Act and Order-in-Council 2204/67 to review employee representations on " . . . matters affecting the general welfare and conditions of employment".

In keeping with the provision of Order-in-Council 2204/67, a form of joint consultation exists whereby employee groups make submissions. Section 73 (1) of the Civil Service Act makes provision for the recognition of an "association" in which a majority of employees are members in good standing to be recognized as the spokesman for all employees in matters of general welfare and conditions of employment. At present, the organization representing the majority of employees is the B. C. Government Employees' Union. Order-in-Council 2204/67 makes additional provisions for the recognition of groups of employees. The B. C. Government Employees' Union, as well as some smaller groups, makes annual representations to the Civil Service Commission on wages and other working conditions. Over the past two or three years, the development has been towards genuine consultation on these occasions and, where a particularly strong or determined group of employees is involved, the process has taken on some of the trappings of a bargaining session--with formal demands and counter proposals. However, in no cases do the discussions result in a written collective agreement.

It is obvious to the Commission that as far as the vast majority of government employees is concerned the present system is a very poor substitute indeed for real collective bargaining. The present system has been most aptly described by the former chairman of the Civil Service Commission as "legal paternalism".

During its investigations, the Commission of Inquiry was shocked by the lack of confidence in the Civil Service Commission expressed by both employees and management. Many employees expressed the view that the Civil Service Commission has failed in

its responsibility to ensure that its own personnel policies are fairly and consistently implemented and regularly policed throughout the service. There is an alarming lack of knowledge at all levels, including senior supervisors, of the personnel policies of the Civil Service Commission and far too many employees are unaware of their rights--or unwilling, due to the fear of reprisals--to insist upon them. It is the sincere hope of the Commission of Inquiry that the introduction of collective bargaining will go a long way to correct these weaknesses of the present system.

Questions to be Decided

Given the assumption that collective bargaining is the most appropriate method of determining working conditions, the Commission of Inquiry addressed itself to the task of developing recommendations which, if adopted, would ensure the orderly and efficient introduction of the bargaining process. We sought to develop a framework within which issues could be examined and recommendations made. Easy answers were not available to many of the questions tackled by the Commission, and we did not avoid making recommendations on what we knew to be contentious issues.

Our investigation was necessarily wide in scope because of the many difficult questions before us:

- Should there be a special statute to govern collective bargaining and if so what should it cover? If a separate statute is recommended, how should existing statutes be amended and/or revised to reflect the new legislation?
- Who is to negotiate with whom? Just what is the public service? How should bargaining units be defined and bargaining agents certified? Who will negotiate for the government?

- What should be the scope of bargaining? What negotiating procedures will be needed? Where do professionals fit into the picture? And is there a need for a statutory grievance procedure?
- How does one deal with the public interest question? How can the peaceful resolution of disputes be encouraged while, at the same time, permitting bargaining to work by putting pressure upon the parties to reach agreement?
- And finally, what ongoing programmes will be needed to ensure that when bargaining is introduced the necessary training and competence to cope with it will be developed within the public service?

The purpose of this report, then, is to outline the questions dealt with by the Commission of Inquiry and to set forth recommendations for a system of collective bargaining in the public service of British Columbia.

TAB A

COLLECTIVE BARGAINING CONCEPTS

One of the most significant developments in labour relations in recent years has been a changing attitude toward collective bargaining by employees and employers alike in the public sector. As a result, collective bargaining has gained general acceptance as the proper method for determining salaries and working conditions of public service employees. Some form of bargaining presently exists for employees in the public services of all other provinces and the federal government. Only in British Columbia does no machinery exist to provide for genuine give and take negotiations between the government and its employees. Almost all decisions affecting wages, salaries and working conditions are determined unilaterally at one level or other of government.

In view of the present state of affairs in this province, it therefore becomes noteworthy that of the more than eighty submissions received by the Commission, both in writing and at public hearings, not a single one was opposed in any way to the implementation of collective bargaining in the British Columbia public service.

La Reine ne négocie pas (The Queen does not negotiate) is the classic statement of the principle of sovereignty. It was from this principle that those who opposed collective bargaining in the public service drew theoretical sustenance. They relied upon the orthodox position on sovereignty that maintains that

government has the sole authority to govern and that this authority cannot be given to, taken by, or shared with anyone.

The orthodox position on sovereignty permitted only the government to establish terms and conditions of employment. Clearly, genuine collective bargaining is incompatible with such a position. Indeed, rigid adherence to the sovereignty principle and its use as the rationale for denying collective bargaining led to the development of a "double standard" as far as labour relations was concerned. On the one hand, the government established, through the Department of Labour, elaborate administrative and regulatory machinery whose function was to ensure that the rights of employees were protected and maintained--rights to union organization and recognition and to collective bargaining up to and including the legal right to withdraw services. But on the other hand, the government categorically denied these very same rights to its own employees.

During the course of its investigations, the Commission found that this denial of basic rights to provincial government employees had led to deleterious side effects. Relationships between the government and the major organizations representing provincial employees were not as constructive or as meaningful as they should have been. Furthermore, there was quite clearly a degree of hostility felt by a number of major employee groups towards their employer that could in no way be considered in the best interests of the people of the province. Virtually all of this discontent and ill will could be traced directly to the annoyance on the part of the employees and their organizations that they were being denied fundamental rights enjoyed by all other workers in the province.

The sovereignty argument as a reason for denying public service employees their basic rights no longer has any currency in Canada. The Commission consequently believes that the "double standard" described above should be eliminated immediately.

As the best method of achieving this goal:

The Commission recommends that full collective bargaining should be the method used to determine salaries, wages and working conditions in the public service of British Columbia.

The Commission also recommends that the necessary legal and administrative machinery to implement collective bargaining be established with definite criteria in mind;

(a) it should be sensitive to the particular characteristics of public service employment especially as they may differ from the private sector;

(b) it should pay special regard to the role of the Crown as the employer and thus to the concept of the public interest inherent in this relationship; and

(c) it should seek to permit the parties to act as freely as possible in their efforts to reach an agreement.

The Commission cannot stress too strongly what it considers to be the critical difference between an employee or employee group having the right to request something of government, but leaving the final determination in the hands of government, and the situation whereby both parties sit down at the negotiating table as equals to seek to resolve a problem. It is not negotiation when one of the parties can make a decision that the other party must ultimately accept as final.

Collective bargaining involves, first of all, two legally defined parties, each representing an interest--an employer interest and an employee interest, the latter a collective one expressed by representative spokesmen.

Collective bargaining presumes some parity between the parties in that each is free (at least theoretically) to take certain action, or threaten such action, should there be no meeting of the minds.

It means the exchange of proposals and counter proposals and the reaching of an agreement by compromises mutually accepted.

It implies some formal, agreed-upon machinery for the exercise of this process whether at stated intervals or otherwise.

It implies the reduction of any agreement to writing, in terms that are again mutually accepted, and includes, as part of such terms, machinery for the settlement of disputes arising out of alleged breaches of the agreement or because of differences as to its application or interpretation.

It also requires "good faith". Difficult to define, but essential to the process, good faith involves the willingness of the parties to engage in collective bargaining with the honest intention of trying to reach an agreement. But perhaps above all, in the public service of British Columbia, the introduction of collective bargaining means an end to the employees and their
9 representatives approaching the government as supplicants.

In this regard:

> *The Commission recommends an end to the use of the term "civil servant" and suggests in its place the term "public service employee" wherever it appears in statutes, regulations, circulars, press releases or any other documents emanating from the provincial government, its departments and agencies.*

In concluding this section, the Commission wishes to make it quite clear that it does not consider collective bargaining to be a panacea. Its introduction will not cure all the myriad of

personnel problems that are found in the provincial public service. We do believe, however, that in a free society there is no acceptable alternative to collective bargaining as the method of determining salaries and other conditions of employment for employees.

With this in mind:

The Commission recommends that the legislation designed to implement collective bargaining in the public service of British Columbia should contain a preamble outlining the government's commitment to the collective bargaining system as the most appropriate method of determining wages and working conditions in the public service.

DEFINING THE PUBLIC SERVICE

At the outset of its deliberations, the Commission of Inquriy had to determine the meaning intended by the term "public service" in its terms of reference. The Commission concluded that collective bargaining existed in the major Crown agencies of the British Columbia Hydro and Power Authority and the British Columbia Railway and, as such, these jurisdictions should be excluded from its inquiry. Clearly, then, the Commission's main concern was with the approximately 31,000 employees holding appointments under the Civil Service Act who are engaged in a variety of tasks within the departmental structure of government and who do not have the right to bargain collectively. Therefore, the major recommendations in this report are intended to apply to what has been referred to in the past as the "civil service", which term the Commission considers should be replaced by the term "public service".

There are a number of other groups of employees who do not qualify within the Commission's definition of public service, but about whom the Commission considers itself bound to make observations and recommendations. These are as follows:

Employees of the Workmen's Compensation Board

The Workmen's Compensation Board operates as an agency separate from government and is funded by employer contributions. Its employees do not have the right to bargain collectively and the Commission considers that such right should be made available to them.

The Commission recommends that employees of the Workmen's Compensation Board be granted the right to collective bargaining through an amendment to the Workmen's Compensation Act to provide coverage under the proposed Public Service Labour Relations Act or under the Labour Relations Act.

Employees of the Queen's Printer

The Queen's Printer is a branch of the Department of the Provincial Secretary, but it operates relatively independently and on a profit and loss basis. While appointments to its small clerical and allied staff are made under the Civil Service Act, appointments to its plant staff are not. The plant staff has had some semblance of bargaining over the years in that there has been an arrangement that employees would be paid whatever rates were negotiated by printing trades unions in the Victoria area.

The Commission considers that the role and function of the Queen's Printer are such that it should be established as a separate agency. From this thinking follows the view that its employees should be granted bargaining rights on the same basis as employees in the private sector.

The Commission recommends that:

(a) the Queen's Printer be established as a separate government agency; and

(b) employees of the Queen's Printer be granted the right to collective bargaining under the Labour Relations Act.

Employees of Manning Park Lodge

Manning Park Lodge is an enterprise operated by the Department of Recreation and Conservation. There are approximately thirty employees, none of whom are appointees under the Civil Service Act, engaged in the operation of a motel, coffee shop, service station, and grocery store complex.

TAB A

As the operation is in practice a separate agency, the Commission considers the employees should be afforded the same bargaining rights that are available in the private sector.

> *The Commission recommends that employees of Manning Park Lodge be granted the right to collective bargaining under the Labour Relations Act.*

Employees of Lion's Gate Tourist Court

The Lion's Gate Tourist Court is an enterprise operated by the Department of Public Works. The situation with regard to the approximately seven employees of the tourist court is similar to that surrounding the employees at Manning Park Lodge.

> *The Commission recommends that the employees of Lion's Gate Tourist Court be granted the right to collective bargaining under the Labour Relations Act.*

In addition, investigations by the Commission's staff revealed that it is the practice in some departments, particularly in Mental Health Services, to hire and appoint staff independent of the Civil Service Commission but using Civil Service Commission classifications and salaries.

Insofar as the Commission has been able to determine, this practice has come about due to the need for flexibility in experimenting with certain types of programmes. However, the Commission finds it difficult to appreciate why the same flexibility could not have been provided had the employees been hired by the Civil Service Commission and granted temporary appointments under the Civil Service Act. The present practice would appear to be strictly contrary to both Civil Service Commission and Treasury Board policy. Some of the employees have no status and, if the present situation is allowed to continue, will have no access to the bargaining process.

The Commission recommends that the matter be immediately referred to the Civil Service Commission for detailed investigation with the view to bringing the employees concerned under the Civil Service Act by means of temporary appointments.

Another matter on which the Commission must observe is the situation in regional colleges where some employees are hired and paid by the college and other employees of the same type are hired and paid under the provisions of the Civil Service Act. Real difficulties could arise, as the former would have access to collective bargaining under the Labour Relations Act and the latter could have access to the collective bargaining under the legislation recommended in this report. In other words, there could very well be two bargaining agents, under two different statutes, dealing with the same type of employees.

As the government is reviewing policy with regard to regional colleges, the Commission considers it should be made aware of the situation described above.

STATUTORY PROVISIONS

There are three possible ways of making the necessary statutory provisions for the establishment of collective bargaining in the public service of British Columbia:

(a) by amendment or addition to the Labour Relations Act;
(b) by amendment and addition to the Civil Service Act; or
(c) by a new statute specifically devised for the provincial public service.

In examining these options the Commission considers neither the Labour Relations Act nor the Civil Service Act to be appropriate vehicles for the new regulation of labour relations in the provincial public service.

Collective bargaining might be readily extended to the public service by the specific inclusion of the Province, i.e., Her Majesty in right of British Columbia, in the definition of employer under the Labour Relations Act. To do so without any further amendment or additions to this statute would provide an explicit recognition of the rights of provincial public service employees to participate in the determination of their pay and other terms and conditions of employment in precisely the same manner as that accorded employees in the private sector.

Under the Labour Relations Act, provincial public service employees could engage in collective bargaining after the determination of appropriate bargaining units and the certification

TAB A

of bargaining agents by the Labour Relations Board. To follow this course would, however, ignore inherent differences in the nature of labour relations in the public and private sectors. In the latter, the Province is a third party and is able to impartially regulate the procedures it establishes for the conduct of collective bargaining. Thus, while the Labour Relations Act establishes an independent Labour Relations Board, the Minister of Labour is also charged with the administration of the Act. Similarly, under the Mediation Services Act, the Minister is able to play an impartial role in the encouragement of the settlement of labour disputes through the appointment of mediation officers and industrial inquiry commissions. In the public sector, the Province is in a different position as here it is the employer and a direct party to the bargaining process. In such circumstances, a provincial Minister of the Crown cannot be regarded as an independent impartial third party and it would be incongruous to place the operation of the collective bargaining process under the day-to-day administration of the employer.

Special provision must therefore be made for the establishment of a separate independent agency with responsibility for the administration of collective bargaining procedures in the provincial public service. The public interest is directly involved in the services provided by the provincial government and, therefore, the Commission wishes to recommend that certain procedures be followed which, while preserving the principles of free collective bargaining, recognize the particular character of the British Columbia public service. All of these considerations would appear to make new legislation the more appropriate route.

As the Civil Service Act currently includes provision for employee representation in matters affecting their general welfare

and conditions of employment, it might also at first appear to be a possible vehicle for collective bargaining. As in other jurisdictions, the primary purpose of the Civil Service Act was to provide for the establishment of a Civil Service Commission to ensure an adherence to the application of the merit principle in the selection, appointment and promotion of public service employees. Other functions have also been assigned to it and the current Civil Service Act and regulations govern a wide range of personnel policy.

The proposed system of collective bargaining will replace the limited form of consultation that has taken place between the Civil Service Commission and representatives of public service employees. As is detailed elsewhere in this report, it would be an entirely unsatisfactory arrangement to make the Civil Service Commission a party to actual negotiations concerning rates of pay and other terms and conditions of employment. The introduction of a system of collective bargaining will necessitate a significant change in the current role of the Civil Service Commission, and its future jurisdiction in personnel administration will be less extensive than at present.

Redefinition of the responsibilities of the Civil Service Commission will also entail a thorough revision of the Civil Service Act which will end any application of that Act to matters made the subject of collective agreements between the Province and its employees. While clarifying the role of the Civil Service Commission in this way, it would appear misplaced to then encumber the Act with the procedural mechanisms of collective bargaining.

As a result of the foregoing considerations, the Commission finds it appropriate that collective bargaining be introduced in the

provincial public service through the enactment of new legislation specifically devised for that purpose. This legislation should establish procedures governing such matters as the certification of bargaining agents, the settlement of disputes arising out of negotiations, employer-employee rights and obligations and the resolution of grievances.

> *The Commission recommends that legislation to govern employer-employee relations in the provincial public service take the form of a Public Service Labour Relations Act.*

EMPLOYER BARGAINING AGENT

Collective bargaining requires the employer to be represented during negotiations by an authoritative agent. Without this, effective negotiating cannot take place. In the public service, this means that the representation of the Province as an employer at the bargaining table must rest with a single government agency which possesses the primary responsibility for policy decisions concerning pay and other terms and conditions of employment. Those who actually take part in negotiations must work closely with the political executive which has the principal authority in matters of government finance.

Under the existing system of employer-employee consultation established under section 73 of the Civil Service Act, and Order-in-Council 2204/67, there is provision for representatives of the British Columbia Government Employees' Union and other employee groups to make representations to the Civil Service Commission. After hearing their submissions, the Civil Service Commission makes recommendations to the Treasury Board within narrowly defined policy guidelines established by the Board and the amounts provided in the annual Estimates of Government Expenditure. The Board's decisions are in turn subject to approval by the Executive Council. Should the employees represented by the Union or the groups object to the rates of pay and other working conditions established in this manner provision is made for an appeal to the Civil Service Commission which reports to the Provincial Secretary on the area of disagreement. Under the terms of the Order-in-Council, the Lieutenant-Governor

in Council may confirm the Civil Service Commission's recommendations; refer them back for further consideration; hear the "Association" or group concerned; establish a Fact Finding Committee; or refer the matter to a Board of Reference established under section 75 of the Civil Service Act. In practice on the occasions where an appeal has been made it has usually been referred to the Civil Service Commission for further consultation with those making the appeal and the matter again brought to the Treasury Board which may in turn submit any further revisions to the Lieutenant-Governor in Council.

As described above, the Civil Service Commission has in the past played a role in the determination of personnel policies with respect to pay and working conditions. The Commission of Inquiry, however, considers it both improper and illogical to assign to the Civil Service Commission the task of acting as the employer's bargaining agent. The essential function of a Civil Service Commission is to act as an independent body which ensures the maintenance of certain standards in personnel administration within the public service. Foremost in this is the Civil Service Commission's role in the application of the principle of recruitment to the public service by merit. If the Civil Service Commission were also to act as an agent of the employer at the bargaining table it would completely forfeit the status of an impartial commission whose autonomy ensured that recruitment to the public service was free of political and personal consideration or any other forms of patronage.

In its investigations the Commission of Inquiry found a surprising lack of confidence in the Civil Service Commission due to its current role as an intermediary between the Treasury Board

and the representatives of public service employees. While the Civil Service Commission is not at present representing the Province as an employer in the negotiation of a collective agreement, in the consultations that take place with the various employee groups it has been placed in the invidious position of appearing to be not only a spokesman of the employer but also one which did not possess the full competence to discharge this responsibility. To contemplate an extension of the current functions of the Civil Service Commission in this regard to the role of the employer bargaining agent would only serve to further exacerbate such tensions.

In examining the structure of decision making within the provincial government, the Commission of Inquiry is of the opinion that only the Treasury Board possesses sufficient authority to act as the single agent of the Province in its capacity as an employer. The Treasury Board is a committee of the Executive Council established under the Audit Act and is composed of three cabinet ministers and the Minister of Finance who is also chairman of the Treasury Board. The Deputy Minister of Finance acts *ex officio* as Secretary to the Board. Its powers extend to all matters relating to finance, revenue, expenditure, or Public Accounts referred to the Board by the Executive Council.

By virtue of a similar area of responsibility, the Treasury Board has developed in other jurisdictions into the central management agency for the public service with its own staff to assist in the discharge of its functions. This has not taken place in British Columbia and the machinery for efficient financial planning and the co-ordination of programmes has remained in a rudimentary state despite a level of expenditure which exceeded $1,400,000,000 in the last fiscal year. With appropriate staffing the Treasury Board is clearly the only agency with the required degree of competence to negotiate with public service employees. The Commission is therefore of the view that the

interest of both sound management and effective collective bargaining would be served by extending the role of the employer bargaining agent to the Treasury Board.

The jurisdiction of the Treasury Board as the agent of the employer should extend to all segments of the public service subject to the direct control of the Provincial Government.

The Commission recommends that the Treasury Board be named the representative of the Province as the employer under the Public Service Labour Relations Act.

In assuming this function the Treasury Board will require a special staff Personnel Policy Secretariat. This should be a separate agency directly responsible to the Board and charged with the actual conduct of negotiations with representatives of public service employees together with the performance of the necessary related administrative, research and advisory functions. In recognition of the importance of this function the Director of the proposed Secretariat should be given the rank of a senior public service employee.

The matter of financial management lies outside the terms of reference of this Commission. However, in the event the Treasury Board follows the pattern elsewhere and extends its support staff to a full secretariat, under the direction of its own minister and outside of the Department of Finance, then the Personnel Policy Secretariat should become a division of the larger secretariat.

The Commission recommends the establishment of a Personnel Policy Secretariat directly responsible to the Treasury Board and under a director with the rank of deputy minister. Such a provision should be made by an amendment to the Audit Act and the Act be appropriately renamed the Financial Administration Act.

EMPLOYEE REPRESENTATION

The determination of appropriate bargaining units is central to the collective bargaining process in the public service of British Columbia. Before negotiations can commence, appropriate units for collective bargaining must be defined and procedures for certifying the representative bargaining agents must be implemented.

The size and composition of the bargaining units profoundly affect:

- the likelihood of all groups within the public service being organized for bargaining purposes;
- the range of subjects that can be negotiated meaningfully;
- the probability of jurisdictional disputes arising between competing employee organizations; and
- the chances of disputes occurring during negotiations being resolved peacefully.

Indeed, the manner in which the bargaining unit question is handled can ultimately determine the success or failure of the whole idea of collective bargaining in the public service.

It is therefore not surprising that the definition of appropriate bargaining units within the public service was one of the most difficult questions confronting the members of the Commission. Much time was spent on this issue because the Commission realized, from the outset, that the determination of

appropriate bargaining units is essentially a discretionary exercise. Such discretion, the Commission felt, should only be invoked after a thorough examination of all available information.

Many will no doubt disagree with the manner in which the Commission has dealt with this subject and with our recommendations regarding it. It should therefore be stated that, in developing the recommendations on the bargaining unit question, the Commission applied precisely the same criteria that were applied in dealing with all the issues before us.

In the first place, the Commission's recommendations are designed to ensure that collective bargaining, when introduced into the public service of British Columbia, will work smoothly. Secondly, it is our belief that collective bargaining should be available to as many employees of the provincial government as possible. Thirdly, we consider that the scope of subject matters for collective bargaining should be as broad as possible. But above all, the Commission believed that it had an obligation to consider all parties involved in the bargaining process when making its recommendations. Decisions should not be made, the Commission felt, without due regard to their impact not only on the government as employer and the employees, but also upon the public of the province at large.

Two Basic Approaches

The experience in other government jurisdictions reveals a wide diversity in the comprehensiveness of bargaining units. On the one hand, there is the federal system with nearly

TAB A

one hundred bargaining units. At the other extreme, we find the Manitoba provincial scene where the Manitoba Government Employees' Association is recognized by statute as the bargaining representative for all provincial government employees. While neither approach would appear suitable for British Columbia, an examination of the situation in other jurisdictions does serve to illustrate that there are fundamentally different approaches to the question of bargaining unit determination.

One of the briefs submitted to the Commission raised the issue in the following terms:

> The determination of an appropriate unit for collective bargaining in the public service will be one of the most difficult questions facing the provincial government in devising this new legislation.
>
> There are essentially two possibilities in this respect: 1) The Public Service Labour Relations Act could allow for only one bargaining unit for all provincial government employees, or 2) it could allow for a multiplicity of bargaining units within the British Columbia civil service.

Those who argue in favour of the multiple bargaining unit approach emphasize the importance of the criteria of "community of interest" in determining appropriate bargaining units. On this basis, it is suggested that groups of employees having a like profession, craft or classification should each be determined as an appropriate unit for collective bargaining purposes. Such groups of employees should not be included in bargaining units with other classifications of employees. One of the arguments in support of this position is that such employees could be in the minority within a larger unit and, thus, their special interests and needs might be subordinated to the wishes of the larger unit's majority. Furthermore, the point is made that particularly for certain professional groups their licens-

ing association has available to it information, experience and resources that would enable better representation of the group involved and thus better results at the bargaining table. Finally, the advocates of multiple bargaining units point to the fact that the only way to ensure strict adherence to the principle of "freedom of choice" is to permit all government employees to pick the bargaining agent of their individual choice.

At the same time, there are many arguments against the multiple bargaining unit approach. There are some 1482 classifications within the provincial government service. Rigid adherence to the "community of interest" concept could theoretically lead to the establishment of a similar number of bargaining units. Obviously, such a situation would make bargaining administratively unwieldy, if not impossible.

It is highly probable that the creation of multiple bargaining units would lead to jurisdictional disputes within the government service. In addition, government employees could easily end up in organizations whose memberships were composed mainly of employees from the private sector. As a minority group, the provincial government employees would be bound by policies determined by a majority who had no connection with, and little understanding of, the special conditions prevailing within the public service.

Serious morale problems would inevitably arise, if employees working side by side within the same department of government, but being members of different bargaining units, found themselves subject to significantly different conditions of employment. As well, the operation of a service-wide promotional policy would be inhibited by the existence of differing sets of basic working conditions.

Under a system of multiple bargaining units, any real hope of maintaining standard service-wide conditions of employment would disappear as the various employee organizations engaged in tactical manoeuvres against each other as part of their bargaining strategy. Similarly, management would be free to whipsaw one employee group against another. The likelihood of costly and damaging disputes is obviously greater under such circumstances. Although it is possible for these problems to be avoided by all the employee organizations agreeing upon a common bargaining strategy, there is little evidence to support the position that such a common front is probable.

The employer's bargaining workload, under a multiple unit system, would be exceedingly heavy. This situation would most likely lead to delays in negotiations which only tend to undermine the effectiveness of the collective bargaining process.

For all these reasons, the Commission found the multiple unit approach to be impractical. The Commission is further convinced that while the fragmentary approach might serve the wishes of several special interest groups in the short run, nevertheless, it will soon prove unworkable and could well jeopardize the whole bargaining process within the public service of British Columbia.

The case in favour of separate bargaining units was pressed most strongly before the Commission by certain professional groups of employees, particularly the engineers, foresters and nurses. Submissions of a similar nature were also received from the doctors, chartered accountants and the physiotherapists and related occupations. In all cases, the groups involved represented employees whose professional association has statutory authority to license persons to practise that profession.

During questioning, it became apparent that there was a genuine worry on the part of the members of the groups concerned that their inclusion in a large bargaining unit could lead to a situation whereby their ethical and professional responsibilities would, in their view, be at odds with the requirements of that bargaining unit. These dual loyalties could result in disciplinary action and, in extreme cases, the loss of accreditation might be involved. Such potential conflicts could be avoided provided: (1) the professional groups were not grouped into a bargaining unit with non-professionals; (2) membership in the bargaining agent were not compulsory; and (3) a method of dispute settlement, other than strike, were open to these professional groups.

The Commission was not initially convinced that the need to treat these professional groups separately was sufficiently great to warrant adopting a fragmentary approach to bargaining unit determination. One alternative open to the Commission was to exclude professional groups from the collective bargaining process altogether, as is the case in many private sector jurisdictions. Another option was to emulate other provincial jurisdictions which permit professionals to opt out of collective bargaining. However, neither alternative was acceptable, since the Commission believes that as many employees as possible should have the collective bargaining process available to them.

After much deliberation, we were able to devise a formula that had the two-fold advantage of extending collective bargaining to the professional groups involved while, at the same time, avoiding the conflict of interest about which these groups seemed so concerned.

The Commission recommends that all employees (other than managerial and confidential exclusions) in professional classifications whose association has statutory authority to license persons to practise that profession be placed by statute within a single bargaining unit to be known in the Public Service Labour Relations Act as the "licensed professional bargaining unit".

Considerable support was voiced during the public hearings in favour of determining the widest possible bargaining unit within the public service of British Columbia. This was the position expressed by both the British Columbia Federation of Labour and the Canadian Labour Congress on behalf of the trade union movement in the province. The major employee organization, the British Columbia Government Employees' Union, took a similar approach, and its stand was backed by a variety of professional and non-professional groups within the public service including architects, laboratory scientists, social workers and ships' masters and chief engineers.

The all encompassing approach to bargaining unit determination in the public service has many advantages.

- It recognizes that employees in the provincial public service all work for a "single" employer (the provincial government). The salaries and other benefits of all employees within the provincial public service come from a single central source, namely the Consolidated Revenue Fund.
- It takes account of a historical tendency within the public service to seek to standardize basic working conditions. With a service-wide bargaining unit, the advantages derived from having service-wide conditions of employment could be maintained under a system of collective bargaining. Any alternative approach could only serve to exacerbate the problems associated with inter-group tensions between different staff interests.

- It serves to encourage stability within the collective bargaining process. This is extremely important in the public sector. It is very doubtful that an approach to bargaining unit determination that will invite jurisdictional disputes, inter-union rivalry and whipsawing at the bargaining table can be considered to be in the public interest.

- It recognizes that weaker groups within the public service will tend to be protected within a larger bargaining unit, and the situation whereby groups with considerable bargaining power make gains at the expense of the groups who have less negotiating strength will be avoided.

- It appreciates the likelihood that within a large bargaining unit greater bargaining expertise and more comprehensive backup resources will be available to the negotiators. This, in turn, will tend to avoid lengthy delays in the bargaining process.

In short, an all encompassing bargaining unit would avoid the many disadvantages associated with a proliferation of bargaining units, as outlined earlier in this section.

There is, however, a major weakness to the all encompassing approach to bargaining unit determination. For while it is true that employees working for a single employer will have many problems in common, they will also have many that are quite different. These concerns, insofar as they are common to a group of employees, can be neglected within a broadly based bargaining unit. In order to overcome this weakness, it is imperative that special bargaining procedures be developed to permit the effective handling of specialized group problems. The Commission believes that this can be accomplished and has made

detailed recommendations which are designed to facilitate the implementation of such procedures under the section entitled, "Bargaining Scope and Procedures".

As previously stated, the Commission examined the bargaining unit question very carefully. However, it was obvious that no approach to the question of unit determination could satisfy all who appeared before us. This is so because we were urged to recommend the establishment of bargaining units based upon a variety of conflicting criteria.

The Commission is convinced, as a result of its investigations, that the advantages to be derived from the establishment of the widest possible bargaining unit far outweigh the disadvantages inherent in such an approach. This is especially so since it is possible to devise bargaining procedures which effectively accommodate the "loss of identity" criticism. We are further convinced that it is in the best interests of all parties concerned not to fragment the public service of British Columbia by introducing a multiplicity of bargaining units.

In summary the all encompassing approach means that the employees will be represented by a single effective organization, able to negotiate standard conditions of employment throughout the provincial public service. The employer derives the not inconsiderable administrative advantage of negotiating service-wide conditions of employment with a single authoritative spokesman of the employees. The public is assured of a system of employer-employee relations in the public service of the province that will minimize the likelihood of important government services being disrupted.

The Commission recommends that, except where otherwise specifically excluded by statute, the public service of British Columbia comprise a single unit for collective bargaining purposes.

The Commission also recommends that, in order to facilitate the orderly introduction of collective bargaining into the public service, the bargaining unit recommended above be described in the Public Service Labour Relations Act.

It is further recommended that this bargaining unit be known as the "public service bargaining unit".

Choosing the Bargaining Agent

Once the bargaining unit is defined in the legislation, procedures must be available to permit the employees within the unit to choose a bargaining agent to represent them. In some provincial jurisdictions, the majority employee organization is granted statutory recognition as the exclusive bargaining agent for all the employees covered by the legislation. Despite these precedents, the Commission is completely opposed to such statutory recognition. It is the Commission's view that such recognition denies the employees affected the freedom to choose or to change their bargaining representative in the normally accepted manner of a majority decision without the approval of the legislature.

The Commission recommends that the employees within the bargaining units must be free to select the bargaining agent of their choice.

In order to ensure that this freedom of choice is exercised in an impartial and orderly fashion, certification procedures will need to be included in the Public Service Labour Relations Act.

It is recommended that the following certification provisions be included in the Public Service Labour Relations Act:

> *Where a union applies to be certified as the bargaining agent for the employees in the "public service bargaining unit" or for the employees in the "licensed professional bargaining unit",*

(a) if the Public Service Adjudication Board is satisfied that, upon examination of records and other inquiries as it deems necessary, including the holding of such hearings as it deems expedient to determine the merits of any application for certification, more than fifty (50) per cent of the employees in the bargaining unit were members in good standing of the applicant union on the date of filing the application, then the Board shall certify the union;

(b) if the Board is in doubt as to whether or not more than fifty (50) per cent of the employees in the unit were members in good standing of the applicant union on the date of filing the application, the Board may order a vote to be taken to determine the wishes of the majority of the employees in the unit as to the selection of a bargaining agent;

(c) if the Board is satisfied that, at the date of filing the application, thirty-five (35) per cent or more, but not more than fifty (50) per cent, of the employees in the unit were members in good standing of the applicant union, the Board shall order a vote to be taken to determine the wishes of the majority of the employees in the unit as to the selection of a bargaining agent; and

(d) if the Board is satisfied that, at the date of filing the application, less than thirty-five (35) per cent of the employees in the unit were members in good standing of the applicant union, the Board shall dismiss the application and refuse to certify the union.

For certification purposes, the "public service bargaining unit" shall comprise all employees, except those specifically excluded by statute or regulation, in the public service on either the first day of April or the first day of October, whichever immediately precedes the date on which the application is filed.

Even after a bargaining agent has been democratically chosen by the majority of the employees in the bargaining unit, it is necessary to ensure that provisions are made to enable the employees to change the bargaining agent, if they so desire, at some future date.

TAB A

The Commission recommends that the provisions used to certify a bargaining agent also be used to permit the employees in the bargaining unit to change their bargaining agent, subject to the following conditions:

An application to the Public Service Adjudication Board to change the bargaining agent for the public service bargaining unit or the licensed professional bargaining unit may be made under the following conditions:

(a) where no collective agreement is in force and twelve months have elapsed since the certification of a bargaining agent for the unit; or

(b) where a collective agreement is in force, the application may be made only during the last two months in each year of its term of any renewal or continuation thereof, except with the consent of the Board.

EXCLUSIONS

It is the view of the Commission that when determining exclusions from the collective bargaining process the criterion to be used is that of a genuine "conflict of interest" arising from membership in the bargaining unit being incompatible with the nature of the dutes being performed. At the same time, the Commission believes that since to be excluded is to be denied access to the collective bargaining process, the number of exclusions should be kept to a minimum. Thus, it is the position of the Commission that when determining exclusions in the public service great care must be taken to ensure that only those persons having a definite responsibility for management of employees, as well as those persons engaged in a truly confidential capacity, are excluded.

The Commission does not favour the approach of certain other public jurisdictions where legislation specifies the exclusion of persons involved in managerial and/or confidential responsibilites in considerable detail. It is the Commission's view that such an approach would do nothing but encourage management to strive for the maximum number of exclusions.

The Commission considers that the Public Service Labour Relations Act should refer to those to be excluded from collective bargaining in broad terms, and that the employer's bargaining agent and the employees' representative should get together as soon as possible after certification of the latter for the purpose of reaching

agreement as to the actual positions to be excluded. In cases where the two parties cannot reach agreement within a period of ninety days, the area of disagreement should be placed before the Public Service Adjudication Board for a ruling. The same procedure would apply at the end of a contract period should either side proposed any change to the list of exclusions.

The Commission recommends that:

(a) the Public Service Labour Relations Act provide that those persons performing managerial or confidential roles are not considered employees for the purposes of the Act:

(b) the designation of positions as managerial or confidential be left to the two parties; and

(c) if the two sides cannot agree within a period of ninety days after the matter has been raised at the bargaining table, the area of disagreement be placed before the Public Service Adjudication Board for a ruling. (See section entitled "An Independent Staff Relations Board" for recommendation concerning purpose and duties of Public Service Adjudication Board.)

TAB A

UNION SECURITY

A basic ingredient of any collective bargaining system is that an employee organization receives the legal recognition as the spokesman for the employees in a defined bargaining unit. Hand in hand with that legal recognition goes the obligation to represent all the employees in the bargaining unit in the collective negotiation, and subsequent implementation, of agreed upon terms and conditions of employment. The fact that the bargaining agent is required to represent all members in the bargaining unit gives the agent a claim to support from the entire unit membership.

This relationship between the bargaining agent and the degree of support required of it by the membership in the unit is commonly known as "union security".

In the private sector of the economy, the matter of union security is usually left for the parties to decide at the bargaining table. The Commission could have easily followed this example and made a similar recommendation in the case of the public service of British Columbia, but it chose not to.

In the first place, the Commission was of the opinion that the subject of union security in the public service was clearly within its terms of reference and must therefore be carefully examined. Secondly, it became evident from the briefs presented at the public hearings that the question of union security was of concern to nearly all groups appearing before the Commission. And finally,

the Commission was inclined to the view that there is a difference --albeit a subtle and ill-defined one--between the application of union security in the public, as distinct from the private, sector.

During the course of the inquiry, the Commission requested its research staff to investigate and report upon the manner in which the other provincial jurisdictions and the federal government dealt with the union security question. The results of that research showed that the British Columbia public service had by far the weakest form of security in Canada. Membership in employee organizations within the public service of this province was found to be entirely voluntary, and such membership is revocable at a moment's notice. Dues check-off privileges are presently afforded only to the major employee organization but this privilege is by no means guaranteed, having been cancelled from October 1960 to July 1697 inclusive.

In the other provinces, the form of union security ranges from what is basically a union shop in the Alberta civil service to a modified union shop in Newfoundland and Saskatchewan, with the Rand formula being the practice in Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island.

In the private sector, the most usual type of union security provision is the union shop wherein an employee must, after a specified probationary period, become and remain a member in good standing of the certified bargaining agent. Another form of union security in the private sector is the closed shop wherein an employee, prior to receiving employment, is required to be a member in good standing of the union certified as the bargaining agent.

It is the view of the Commission of Inquiry that these more stringent forms of union security are inappropriate in the

public service, unless their implementation were to be paralleled by the introduction of legislative safeguards that would provide for the public review of the internal affairs of any bargaining agent enjoying the protection of either a union or closed shop clause. Intervention of this type would be required in order to ensure the uninterrupted right of all citizens to serve the state. Such procedures, it could be argued, would add unnecessarily to the workload of the proposed Public Service Labour Relations Board and, at the same time, would likely involve a degree of public scrutiny over the internal affairs of employee organizations that is neither practical nor desirable.

Rather, the Commission came to the conclusion that the most appropriate form of union security for the public service of British Columbia is that which combines the individual's freedom of association with the obvious obligation owed by members of a bargaining unit to the certified bargaining agent. The form of union security commonly referred to as the "Rand formula" most appropriately meets these criteria.

Under the Rand formula type of union security, all members of a bargaining unit are required to pay the regular and reasonable dues of the bargaining agent whether or not they decide to become members of that bargaining agent. The payment of dues is thus in the form of a fee for services rendered and legal responsibilities assumed by the appropriate employee organization in the collective bargaining process.

The Commission recommends that the matter of bargaining agent security should be dealt with in the proposed Public Service Labour Relations Act.

The Commission further recommends that the Act should provide that each collective agreement entered into between the government and a certified bargaining agent of its employees shall contain a clause requiring the employer:

(a) to deduct from the monthly pay of each employee in the bargaining unit affected by the collective agreement, whether or not the employee is a member of the bargaining agent, the amount of the regular monthly membership dues payable by a member of the bargaining agent;

(b) to remit the amounts deducted under clause (a) to the bargaining agent monthly; and

(c) to inform the bargaining agent, monthly or as may be provided in the collective agreement, of the names of the employees from whose monthly pay, deductions have been made under clause (a) and the amounts so deducted from each employee's monthly pay.

During the public hearings the Commission received four submissions, each requesting it to consider the position taken by those who, because of religious convictions or beliefs, object to joining a union and object to paying dues to a union. The Commission was inclined to respect the views of such persons where a union or closed shop provision might be made part of their conditions of employment. In this instance, however, the Commission considers the use of the Rand formula sufficient protection of an individual's freedom of conscience.

The Commission also believes that recommendations concerning the check-off privilege presently enjoyed by the major employee organization are required. An indefinite extension of this privilege would clearly tend to conflict with the provisions for bargaining agent security proposed above. However, an abrupt termination of the check-off privilege would be unfair to the organization concerned.

Consequently, with regard to the matter of check-off privileges:

The Commission recommends that the existing check-off privilege be continued until such time as a collective agreement is entered into with the employee organization in question or until such time as the employee organization fails to obtain certification as the bargaining agent, whichever date occurs first.

The Commission further recommends that no additional check-off privileges be granted unless and until they are contained in collective agreement(s) entered into following the introduction of collective bargaining.

BARGAINING SCOPE AND PROCEDURES

The Scope of Bargaining

During its investigations, the Commission found that the practice in many other public jurisdictions is to exclude by statute many items from the collective bargaining process. However, it is the Commission's view that in order to make collective bargaining a meaningful process the subject matters for negotiation must cover virtually all issues that are of concern to the employees. Placing a long list of items "out of bounds" can only inhibit the effectiveness and relevance of the whole negotiating process.

Consequently:

> *the Commission recommends that the scope of bargainable issues be as broad as possible.*

In defining the wide scope recommended, there are two possible approaches. One way is to list the items that should be subject to bargaining; the other is to spell out the items that are excluded from bargaining, the rest being, by implication, negotiable. The Commission chose the latter approach as being the more practical.

It is generally accepted today that recuitment and promotion within the public service should be on the basis of merit rather than political or other favourtism. Consequently:

> *The Commission recommends that the merit system in the public service of British Columbia be excluded from collective bargaining.*

Superannuation in the public service is governed at present by the Civil Service Superannuation Act. During the course of public hearings and in written submissions, it was suggested to the Commission that superannuation should be placed upon the bargaining table. In favour of such a position are the arguments that pensions are bargainable in much of the private sector together with the correct assertion that superannuation is an important working condition.

However, pension plans in the private sector are not regulated by their own statute. Furthermore, the present superannuation plan is an exceedingly complex one, so much so that serious efforts to renegotiate its provisions would almost certainly impede the reaching of an orderly and prompt agreement. In addition, because of the statutory requirements, any amendments reached at the negotiating table would have no force and effect until approved by the legislature. Yet presumably, management representatives would insist on charging the cost of anticipated pension improvements to the "package" at the time of negotiations.

After much discussion on the issue of superannuation and its appropriateness as a bargainable item:

> *The Commission recommends the subject of superannuation be excluded from the collective bargaining process. This situation should be reviewed after a reasonable period of time.*
>
> *It is further recommended that the Civil Service Superannuation Act be amended to provide for the establishment of a seven-member joint committee composed of three representatives from the employee organizations and three representatives appointed by the employer. A neutral chairman should be selected by the two parties concerned.*

The proposed joint committee should be responsible for making recommendations to government on needed amendments to the superannuation plan. At the same time, the committee should have the responsibility for overseeing the investment of the very large sums of money in the superannuation fund, with a view to ensuring optimum returns to the fund.

For the sake of consistency, it is also recommended that the Civil Service Superannuation Act be renamed as the Public Service Superannuation Act.

Apart from the aforementioned exclusions, all other matters would be negotiable. Included in this list of negotiable items would be the job evaluation system upon which classification within the public service is based.

It is the recommendation of the Commission that the criteria upon which classification is based is a proper subject for negotiation. While not a negotiable item, the application of the classification system should be subject to the grievance procedure.

With the introduction of bargaining, conditions of employment in the public service would no longer be determined by statute or regulations. Consequently, the existing Civil Service Act will need to be thoroughly revised to reflect the introduction of collective bargaining.

Bargaining Procedures

Elsewhere in this report we have recommended the establishment of the widest possible bargaining units within the public service of British Columbia. It was also recommended, earlier in this section, that the scope of bargainable issues be as broad as possible. To accommodate such an approach, special bargaining procedures will have to be devised. The Commission has several distinct suggestions to make in this regard.

In making our recommendations with respect to bargaining units, considerable emphasis has been placed on the need to maintain standard conditions of employment throughout the service. At the same time the Commission recognizes that special concerns and special interests exist amongst particular occupational groups. Clearly, the bargaining procedures to be devised must accommodate both considerations. They will have to be unique procedures, tailor-made to the needs of collective bargaining in the public service of this province.

The Commission recommends that a two-tier system of negotiations be implemented in the public service of British Columbia.

To this end, we recommend that a "master agreement" be negotiated covering those conditions of employment that are common to all members of the bargaining unit.

We further recommend that "component" agreements also be negotiated covering wages, salaries and those conditions of employment peculiar to an occupational group.

The "master agreement" concept goes hand in hand with the recommendation that bargaining units should be service-wide in scope. We believe that the successful negotiation of a service-wide master agreement is clearly in the best interests of the public service. This is so because among other things:

- it will provide a vehicle for including in the collective agreement much that is now a matter of regulations;
- it will serve to facilitate the desirable service-wide promotional policy;
- it will serve to eliminate intergroup tensions, so destructive to morale, that inevitably arise when employees working side by side for the same department receive different

benefits in areas such as vacations, sick leave, statutory holidays and overtime. (Similar tensions also arise when employees doing the same job for different departments are not afforded equal treatment);

- it means that the weaker groups within the public service can benefit from the efforts of the stronger groups; and
- it means an end to the unfair situation whereby special arrangements are made for "privileged" groups of employees.

By the same token, the negotiation of separate agreements on an occupational basis clearly permits major groups within the public service to retain their identity and to exercise their full bargaining potential in the areas of wages, salaries and any condition of employment peculiar to the group concerned.

The Commission does not believe that the various occupational groups within the service should be spelled out in any statute.

The Commission recommends that as far as possible the definition of these groups should be left to the parties themselves.

It is further recommended that the process of defining the appropriate occupational groups for component bargaining purposes should commence immediately after certification is granted. If the parties cannot agree upon the appropriate definition of a group within a period of ninety days following certification, then the area of disagreement should be placed before the Public Service Adjudication Board for a ruling.

The Commission believes that the introduction of the "two-tier" approach to bargaining in the public service of British Columbia will work. Its chances of success, however, will be enhanced immeasurably if it is given a fair trial by those groups who would have preferred their own completely separate status.

The proposed approach has the great advantage of being flexible, since new occupational groups can be created or existing ones consolidated by mutual agreement. This flexibility also extends to the fact that subjects initially covered in the master agreement can be moved to the individual component agreements and *vice versa*.

Flexibility is, in our view, essential when introducing a new system of employer-employee relations. In the several other jurisdictions examined by the Commission, it was felt that the lack of such flexibility has led to a number of otherwise avoidable problems.

Throughout its deliberations, the Commission sought to devise and subsequently recommend procedures designed to make collective bargaining work smoothly in the public service. We have tried in all areas to minimize conflict and to ensure that rights can be enjoyed by government employees without undue inconvenience to the public. It is for this reason that we believe negotiations on the many items to be included in the master agreement should not be restricted to the "crisis" period immediately preceding the expiry of the agreement. Some form of continuing negotiations is called for.

> *The Commission recommends that the legislation should permit continuing discussions during the life of the agreement of those items contained in the master agreement.*
>
> *It is further recommended that, although such discussions may be initiated by either side, any solutions arrived at during these continuing negotiations should not be implemented until the expiry of the existing master agreement, i.e., the resolutions arrived at during the term of the expiring agreement would be appropriate matters for inclusion in the renewed master agreement.*

In order to ensure that bargaining gets underway as

soon as possible after certification has been granted, it is necessary to establish time limits within which negotiations must commence. Similarly, to facilitate the renewal of a collective agreement, negotiations should be encouraged to commence well before the expiry date. In order to deal with this matter of the notice required to bargain,

The Commission recommends that the Public Service Labour Relations Act provide as follows:

(a) where a bargaining agent has been certified for the employees in a bargaining unit and no collective agreement is in force,

(i) the bargaining agent may, by notice, require the employer to commence collective bargaining no later than thirty (30) days following certification; or

(ii) the employer may, by notice, require the bargaining agent to commence collective bargaining no later than thirty (30) days following certification;

with a view to concluding a collective agreement in respect of the employees in the unit.

(b) where a collective agreement is already in force, then not more than ninety (90) days and not less than thirty (30) days preceding the expiry of the collective agreement, a party thereto may by notice require the other party thereto to commence collective bargaining with a view to the renewal or revision of the collective agreement.

DISPUTE SETTLEMENT

The procedures and structures proposed in this report are primarily designed to enable and to encourage employer and employees to bargain effectively and achieve mutually acceptable collective agreements. The Commission's recommendations with respect to the employer bargaining agent, employee representation, and bargaining procedures are all carefully devised so as to achieve this end. There can be no adequate substitute for the negotiation and application of an agreement which the parties have freely agreed upon. An agreement which is a product of bargaining in good faith and is jointly determined by the employer and employee representatives is one in which both share the responsibility for the fulfillment of its terms. The conduct of free collective bargaining thus represents a stabilizing factor in the conduct of employer-employee relations.

Assistance in Negotiations

There may be occasions when the two parties acting alone are unable to resolve points of disagreement at the bargaining table. At times, the services of a skilled third party can make a contribution to the settlement of disputes arising during the initial negotiation or renewal of a collective agreement. In the private sector, for example, where bargaining has continued for at least ten days, services of a mediation officer may be requested by either party to assist in the resolution of a dispute. A mediation officer may also be appointed where the Minister of Labour considers the public interest is or may be affected.

Whenever appropriate, mediation services should also be available in collective bargaining within the provincial public service. This step will facilitate further negotiations beyond any impasse reached by the two parties. The status of the Province as the employer will require such services to be provided through the office of the Chairman of the proposed Public Service Adjudication Board rather than the Minister of Labour.

While the services of provincial mediation officers might be utilized with some measure of neutrality ensured through their exclusion from an actual bargaining unit, it should be recognized that their position would still not be entirely the same as the one they occupy in disputes in the private sector. It may therefore be necessary in certain cases for the Board, in consultation with both parties, to appoint other skilled and experienced persons as mediators.

In making provision for mediation services, the Commission is conscious of the possible dilatory effects of the appointment of a mediator should it become a routine and automatic part of the bargaining process. It is further emphasized that in order to maintain the pressure to continue bargaining in good faith and to reach a mutual agreement, a specific time should be established for the receipt of the mediator's report by the Chairman of the Board.

The Commission recommends that in the event that the employer's representative and an employee bargaining agent are unable to agree on any item to be included in a collective agreement, the Public Service Labour Relations Act contain provisions that, on the written request of both parties, the Chairman of the Public Service Adjudication Board shall appoint a mediator to confer with and assist the parties in reaching an agreement. The mediator should be required to submit a confidential report, setting out the matters which have and have not been agreed upon,

within ten days of his appointment or such longer period as is agreed to by both parties and the Chairman of the Board.

The persistence of any dispute despite continued negotiations and the assistance of a mediator may be seen as a failure of the collective bargaining process. This situation may develop to the point where employees temporarily withdraw their services in a strike in order to assert the claims they place upon the employer. Alternatively, the employer may choose to lock out the employees to assert his own position.

The consequences of any failure to achieve an agreement inthe course of negotiations between the Province and the representatives of its employees have been most carefully considered by the Commission. It has recognized the existence of a considerable public interest in this particular issue and devoted much time in exploring possible procedures and courses of action to be taken to achieve a final settlement of any dispute. In approaching this question, the Commission places an emphasis on the need to consider the realities of a situation in which a deadlock occurs. It is not concerned with the assertion of any abstract right or conjecture as to unthinkable mishaps which might occur should a strike or lock out ever take place within the public service. The primary focus should rather be upon a practical rational exploration of actual experience in this field.

It may be argued that the possibility of any disruption of essential public services through a strike or lock out and the hardships anddangers which might attend such action necessitate the legal prohibition of strikes and lock outs in the public sector. The final step in any dispute would be compulsory binding arbitration. Experience in the province in both the public and private sectors and the weight of other evidence available to the Commission has led it to the conclusion that compulsion could not prevent strikes or the threat of strikes.

Nor would it be conducive to the effective conduct of collective bargaining and the maintenance of stable employer-employee relations. If the value of a system using compulsory binding arbitration is weighed against that of a collective bargaining system free of such a constraint, there is growing evidence that the latter does more to encourage responsibility and stability.

The certainty of the imposition of a binding agreement upon both parties through compulsory arbitration reduces pressures on both sides to reach a joint agreement. There is little necessity for them to assume realistic positions or achieve an understanding with one another. It makes limited demands on the parties' sense of responsibility either in negotiations or in the subsequent application of the settlement. Although the consequences of a strike or lock out are quite different in the public sector, in seeking to remove the risk of such action it also removes the critical element of uncertainty and pressure from the bargaining table. Thus, while appearing to be a device for the effective solution of disputes arising from collective bargaining, compulsory arbitration in fact leads to a negation of the whole bargaining process.

The Commission has examined a number of proposed variations in the forms that arbitration may take, including the so called "final offer selection" or "last offer arbitration". This procedure attempts to simulate the pressures of full collective bargaining by requiring the arbitrator to select the most reasonable offer of either party item by item. In the opinion of the Commission there is at present no evidence to suggest that it should modify its view that compulsory arbitration, in any form, seriously undermines the inducement to both parties to successfully conclude the joint determination of a collective agreement.

2

The Commission believes that the right to strike is an essential element in making the collective bargaining process work. However, as in all statements concerning rights in our society, to assert such a right is to say that good reasons must be given before it is qualified or limited. This determination should not however be performed in the abstract but in an immediate situation when one is better able to make an assessment of the actual consequences. To argue that all or some public services are essential and should not be disrupted so as to protect the public health, safety or welfare is to proceed from a consideration of a possible outcome, to an assertion of a necessary outcome, for all times and in all circumstances. It is the view of the Commission that no service performed in the public sector can be deemed inherently and absolutely more essential than one performed in the private sector. However, we can envisage that at certain times and under certain conditions and at certain locations the public interest could demand continual maintenance of a particular service.

The absence of a standing prohibition of any form of strike action, lock out, or the definition of essential services would not mean in any way an abdication of responsibility for the public interest. The Legislative Assembly always possesses the competence to intervene to protect the interests of the general community. In the opinion of the Commission the public interest is best served if intervention is based upon a specific demonstrated need.

Rather than wishing to dwell upon a gloomy negative approach to collective bargaining, the Commission is concerned that positive steps be taken to maximize the probability that responsible negotiations will take place. The Commission is convinced that this goal will be achieved, and stable relationships encouraged, if there is a minimum of outside interference

and both parties are forced to assume the full responsibility for their actions, including the consequences of being unable to peaceably settle their disputes. Too great an elaboration of sophisticated standing procedures to govern the final settlement of disputes may impede, rather than improve, the bargaining process.

Where negotiations reach an impasse and a mediator is unable to assist theparties in reaching an agreement, both sides should be encouraged to seek a peaceful resolution of their dispute. The ability of public service employees to withdraw their services should in no way be construed as necessarily entailing that strikes will take place in the public sector. It should be open to all parties at all times to voluntarily agree to jointly submit their differences to a third party.

The Commission considers it desirable that at the request of both parties the Public Service Adjudication Board shall establish an *ad hoc* dispute settlement board to arbitrate the dispute and render a final and binding settlement. A request for such a board should only be made once a deadlock has occurred in negotiations. The Commission of Inquiry considers this point to be the most appropriate time to require theparties to indicate this choice since it maintains the element of uncertainty as to the consequences of any deadlock throughout the negotiations.

Where there is no agreement to voluntarily submit the dispute to a third party for final settlement it should be open to the employees' bargaining agent to proceed with a strike vote by secret ballot among its membership. Where a majority of those who vote support a strike, the employees' bargaining agent should give the employer ten (10) days notice before a strike may take place. This period is designed to

provide time for any final attempts to resolve the dispute before the actual work stoppage takes place. The Provincial Legislature could be summoned during this period to consider special emergency measures. Thus while maintaining the pressures resulting from the possession of the right to strike, there would also remain sufficient protection of the public interest.

It should be noted that the 1972 fall amendments to the Mediation Commission Act, now known as the Mediation Services Act, removed the prohibition on strikes by provincial public service employees. Under section 6 (3) of the Constitution Act, however, passed following the 1959 strike of provincial employees, picketing of provincial government premises was prohibited. Since picketing is recognized as a legitimate activity during a legal strike this section should be repealed.

The Commission recommends that provision be made under the Public Service Labour Relations Act for the appointment of ad hoc dispute settlement boards upon the joint request of both the employer's and employees' representatives. Such dispute settlement boards should be made up of one nominee from each of the two parties and a chairman jointly agreed upon by the two members or failing this directly appointed by the chairman of the Public Service Adjudication Board.

Where the chairman of the Public Service Adjudication Board is notified of a deadlock in negotiations he should immediately require each party to advise him as to their willingness to submit the dispute to final and binding arbitration by an ad hoc dispute settlement board.

Where either party refuses to submit the dispute to arbitration the Commission recommends that the employees' bargaining agent be permitted to conduct a vote by secret ballot among members of the particular unit

as to whether or not to strike. Where a majority of employees who have voted support a strike, the employees' bargaining agent should be required to give ten (10) days written notice of any intention to strike but no strike should be permitted pending receipt of the report of any mediator appointed under the Act. A similar time limit should apply with any intention by the employer to lock out.

The Commission further recommends that the general restriction on picketing by public service employees be repealed by an amendment to the Constitution Act.

Regardless how extensive and complex it may be, no collective agreement can possibly take into account all the problems that will arise during the life of the agreement.

A formal grievance procedure should be established that will provide assurance to the employee that he will not suffer from arbitrary management and, at the same time, provide management with the assurance that employee claims will not be supported by coercive pressures. Such a procedure should be common and applicable to all employees in the public service.

Under the present grievance procedure established by Order-in-Council 2204/67, pursuant to section 75 of the Civil Service Act, there is a four-step system by which an employee may seek to resolve a grievance. This is as follows:

1. Any employee, or any two or more employees, may either by himself (themselves) or by his (their) duly authorized representative request a review in respect to any decision affecting him (them) arising out of the application of the Civil Service Act and/or its regulations or general rulings of the Civil Service Commission first to his (their) immediate supervisor. The immediate supervisor shall investigate the grievance and advise the employee(s) in writing of his decision within seven (7) days.

2. Where the immediate supervisor does not forward his decision within seven (7) days or where the employee(s) desire to

appeal the decision of the immediate supervisor, representations in writing should be forwarded to the immediate supervisor, who shall forward the representation promptly, together with related correspondence, to the Deputy Minister or other official having general supervision over any department or branch of the Civil Service. The Deputy Minister or other official having general supervision over the department or branch of the Civil Service, may review the request, or designate an official to review the request, and report his findings. The Deputy Minister or person designated by him, shall, within fourteen (14) days of his receipt of the request, set out in writing his decision in regard to the matter. Copies of his decision shall be forwarded to the employee(s) and to the Civil Service Commission.

3. Failing resolution of the request at the departmental level, it shall be placed before the Chief Personnel Officer or person(s) appointed for the purpose by the Civil Service Commission, who shall endeavour to mediate the matter as between the employee(s) and the Deputy Minister or other official having general supervision over any department or branch of the Civil Service.

4. Failing a satisfactory mediation of the matter the employee(s) or his (their) representative may apply in writing to the Civil Service Commission, who shall arrange to hear the evidence in respect to the matter. The Civil Service Commission's review may take the form of a hearing where:

   (a) evidence may be taken on oath, and

   (b) cross-examination will be permitted in accordance with the principles observed in a Court of Law, and

(c) testimony will be recorded in shorthand or other manner. The employee, group of employees, or committee, is entitled to receive from the Commission upon request either a transcript of the proceedings recorded at the hearing, or a written summary of the submission. Subject to section 72 of the Civil Service Act, the decision of the Commission shall be final binding upon the employee(s) and upon the departmental officials, who shall, forthwith, carry out the decisions of the Commission.

This grievance procedure has been criticized by both employees and management because the Civil Service Commission, in many cases, rules on its own decisions and, furthermore, the rulings rendered are too often compromises rather than decisions based on the merits of the case.

In addition, the procedure does not apply to all public service employees as a 1971 regulation made under the 1970 Corrections Act established a Code of Conduct for employees in correctional centres. This code of conduct set out a separate procedure for handling grievances and, in so doing, excluded such employees from the grievance procedure established by Order-in-Council 2204/67. The adjudicator under the Code of Conduct grievance procedure is the Attorney-General rather than the Civil Service Commission. This is unfair in that it leaves the determination of employee grievance solely in the hands of the department and, therefore, is open to bias.

The Commission of Inquiry recommends:

1) *that the regulation establishing the Code of Conduct pursuant to the Corrections Act be rescinded.*

2) *that the Public Service Labour Relations Act provide for the following grievance procedure for those not covered by a collective agreement:*

(a) Any employee or his duly authorized representative may present a grievance to the designated local official who shall give his decision in writing within fourteen (14) days.

(b) If the employee is not satisfied with the decision or receives no decision within the 14-day period, he may appeal to his Deputy Minister or the official designated by the Deputy Minister to handle grievances. The Deputy Minister or his designate must give his decision in writing within thirty (30) days.

(c) If the employee is not satisfied with the decision of the Deputy Minister or his designate he may place his grievance before the Public Service Adjudication Board. The decision of the Board shall be final and binding on all parties.

While the procedure outlined above should be available to all employees not covered by collective agreements, undoubtedly, each collective agreement will deal with the grievance procedure in more specific terms.

The Commission of Inquiry also recommends that the Public Service Employment Act provide for appeals on matters within the purview of the Public Service Employment Commission. Such appeals shall be direct to the Commission. Failing resolution of the grievance at the Commission level, it may then be placed before the Public Service Adjudication Board for a final and binding decsion.

AN INDEPENDENT STAFF RELATIONS BOARD

Earlier in this report the Commission recommended that a separate statute be enacted to implement collective bargaining in the public service of British Columbia. It thus follows logically that a separate agency be created, charged with the responsibility of administering the system of collective bargaining we are proposing be introduced in the public service. The reasons to support such a course of action are many.

In the private sector, the administration of the collective bargaining system is normally handled by a labour relations board that reports directly to the Minister of Labour. In the public sector, however, such a situation would clearly be open to question since the government is the employer and the Minister of Labour is a member of that government. Furthermore, regardless of the debate as to the degree of difference, it does appear that the industrial relations system in the public sector cannot be identical to that found in the private sector. The creation of a separate agency recognizes that this difference exists and provides assurance that concepts found workable in the private sector will be examined carefully and even modified somewhat before their adoption in the public sector.

The introduction of the collective bargaining process to the public service of British Columbia will be new to the employees and their organizations as well as to the employer. Consequently, it is quite likely that their ability to cope with it will be

enhanced if they have confidence that the agency established to administer the system has an understanding of the unique problems of public employment.

Finally, it is of the utmost importance that the administering agency deal quickly with all matters placed before it. The likelihood of this occurring would clearly not be guaranteed if we were merely to suggest adding greatly to the workload of existing boards that already find themselves hard pressed to provide prompt and adequate service.

The Commission recommends that a separate independent agency be established, responsible for the administration of the proposed Public Service Labour Relations Act.

It is also recommended that this agency be known as the Public Service Adjudication Board and that it be comprised of a chairman and two other members, one to be representative of the employee interests and the other to be representative of employer interests. It is important that in appointing the chairman every effort be made by the employee organizations and the employer to agree upon a selection, but if such efforts fail then the chairman should be appointed by the Chief Justice of British Columbia. All members of the Public Service Adjudication Board should be appointed by the Lieutenant-Governor in Council for a fixed period of no less than seven years and all should have secure tenure.

It is further recommended that the Board be guaranteed a sufficient budget and staff to ensure speedy handling of all matters placed before it.

It is typical to have in law the right of review, as distinct from the right of appeal on the merits, over the decisions of administrative tribunals.

The Commission recommends that there be no right of appeal in law against the decisions of the Board but that

there should be access to the courts for the purpose of ensuring that the Board stays within its statutory jurisdiction and that it acts with procedural fairness.

We have stressed the need for the Public Service Adjudication Board to be thoroughly independent in the conduct of its affairs. Basically, its duties will be similar in scope to those performed by the Labour Relations Board in the private sector, except that additional duties and responsibilities are called for under the Public Service Labour Relations Act.

The duties of the Public Service Adjudication Board should include the following:

(a) certification of employee bargaining agents including the conduct of certification and decertification votes;

(b) resolution of disputes amongst the parties concerning the appropriateness of occupational groups for bargaining purposes;

(c) supervision of dispute settlement procedures;

(d) ruling on contested managerial and other exclusions;

(e) acting as a final court of appeal on grievances or disputes arising out of both the application and interpretation of collective agreements as well as those arising out of matters not covered by the agreement (i.e., promotions); and

(f) imposing penalties on public service employees and their unions when they engage in illegal work stoppages and on public officials who violate the law. The Board should have access to the courts for enforcement of its ruling when it deems necessary.

The Commission wishes to observe at this point, however, that the Public Service Adjudication Board should not, under any circumstances, be required to arbitrate or rule upon any disagreements or impasses that arise during the course of actual negotiations. The Public Service Adjudication Board should not serve as a permanent arbitration board, and to impose such a role upon it would only serve to undermine the stature of the Board that is central to the success of collective bargaining.

And finally, because the functions allocated to the Public Service Adjudication Board are central to the orderly introduction of collective bargaining in the public service of British Columbia:

> *It is recommended that the Board be constituted immediately following the passage of the Public Service Labour Relations Act.*

In the government today there is a scarcity of personnel with experience in dealing with unions and administering labour agreements. The employee side is better prepared for collective bargaining as union leaders have received on-the-job training in a variety of situations within the union movement which has had a long history of negotiating. Management must adjust itself to bargaining with equals in contrast to the sovereign relationship of the past. Past relationships with employees and their organizations will have to be carefully reviewed.

Once an agreement is signed, the day-to-day administration of the agreement provides an opportunity to assess the strengths and weaknesses of clauses in the agreement that can be most useful in the preparation for negotiations of the next contract.

The management negotiator's task is a most difficult one. He must possess a thorough understanding of personnel administration as well as being knowledgeable in the various approaches to collective bargaining.

The management representative at the bargaining table must be able to speak with authority as the employee representative must know that the negotiator has the power to make a decision that will be supported by the government.

An extensive communications network must be developed between the negotiating agency and the operating departments so that the negotiator has access to pertinent information in relation to bargainable items.

Operating management must adjust, reconciling itself to a role in which its freedom of action is limited by what takes place at the bargaining table. Management must realize that they no longer deal directly with individuals without considering the presence of a collective agreement and the involvement of the bargaining agent. Management's development of competence in this new era requires both flexibility and innovative ability.

All levels of management must understand the need of adhering to the terms of the collective agreement. It is, therefore, the responsibility of senior officials to instruct and educate their subordinate officials and supervisors on their duties in adhering to agreement terms. Education of administrative officials and supervisors is a continuing process.

> *The Commission recommends an in-Service training programme be established immediately for senior management officials in government in the field of collective bargaining.*

The personnel officer is of utmost importance, as he is the obvious management person to take on the added role of advisor to the government negotiator on matters concerning his department. In this role, he will provide the technical information and expertise upon which negotiating positions can be based leading to final settlement on wages and other conditions of employemnt. He also will be involved in the grievance procedure when the terms of the contract must be invoked in disciplinary and other matters affecting employees.

With the implementation of collective bargaining, additional responsibilities are placed on the personnel officer function to ensure that all aspects of the agreement are adhered to. At present the large departments of government have an average of of two personnel officers, with many departments having no trained personnel officers at all. Indeed, the average ratio of personnel officers to staff in

other jurisdictions throughout Canada, excluding British Columbia, is one for each 220 employees, while in British Columbia the ratio is one for each 947 employees. There would, therefore, appear to be a need to increase the number of personnel officers in the public service.

> *The Commission recommends that the necessary staff be recruited to increase the standard of service of personnel administration in the public service of British Columbia.*

The introduction of collective bargaining in the provincial public service entails a significant adjustment in the present role of the Civil Service Commission. As was argued earlier in our discussion of the Employer Bargaining Agent, it would be both improper and illogical to involve the Civil Service Commission as a representative of the employer at the bargaining table. As a consequence of this, some of the responsibilities currently held by the Civil Service Commission should be transferred to the Treasury Board in order to permit the Board to fully discharge its role as the employer bargaining agent.

The responsibilities to be assumed by the Treasury Board should include all matters of personnel policy which are in any way related to the determination of rates of pay and other terms and conditions of employment made subject to a collective agreement. In concrete terms, this means that the responsibility for transfers, suspensions and dismissals for misconduct or negligence together with the entire function of the Classification and Wage Division should be relinquished by the Civil Service Commission and assumed by the proposed Personnel Policy Secretariat of the Treasury Board. The evaluation and classification of positions, the definition of position classifications, and pay and fringe-benefit research all logically belong with the employer bargaining agent. It also follows that the area of organization and staff utilization studies, establishment control, and other aspects of manpower needs should be located with

the Treasury Board. Indeed, given the current responsibilities of the Treasury Board, it may be argued that this would have been a more appropriate location in the interests of sound management even in the absence of collective bargaining. In keeping with our other proposals the Civil Service Commission should also be renamed the Public Service Employment Commission.

While this necessary transfer of responsibilities appears to relieve the Civil Service Commission of a major element in its current range of duties, its remaining responsibilities should by no means be considered merely residual ones. In the opinion of the Commission of Inquiry, its proposals will enable the Civil Service Commission to more effectively discharge what has been intended as the primary essence of its position within the organization of the provincial government. This role envisages an impartial, independent body established to ensure the maintenance of appropriate standards in personnel administration and in particular the protection of the principle that recruitment and appointment to the public service should be solely on merit. The Public Service Employment Commission will also be placed in a position to make a major contribution to the promotion of efficiency and individual advancement in the provincial public service through the provision of a wider range of in-Service training and development programmes.

In proposing the above changes, the Commission of Inquiry also considers it appropriate that additional steps be taken to ensure the maintenance of the independence of the Public Service Employment Commission and the application of the merit system throughout the provincial public service. The Civil Service Commission has grown from the early Public Service Act of 1908 and the

appointment of three grading commissioners to a three-member commission appointed by the Lieutenant-Governor in Council, composed of a chairman and two other senior public servants with executive experience and ten years of public service employment. Also under the provisions of the current Civil Service Act which first came into effect in 1945, the Provincial Secretary is charged with the administration of the Act.

While the Commission of Inquiry in no way wishes to suggest maladministration or bias on the part of the Chairman and Deputy Ministers who have served on the Civil Service Commission, protection of the merit system makes it desirable that appropriate efforts be made to maximize the independence of the Civil Service Commission from the political executive and departments of government. With this in mind, the Commission of Inquiry suggests that the independence and impartiality of the new Public Service Employment Commission would best be secured if its membership was composed of a chairman plus two full-time members drawn from the community and enjoying security of office for an established period of time subject to removal by the Lieutenant-Governor in Council on an address of the Provincial Legislative Assembly. The administration of a new Public Service Employment Act should be placed entirely with the Public Service Employment Commission which should report annually to the Legislative Assembly.

In making appointments to the Public Service Employment Commission, there would be an opportunity to make that body representative of the general community. This will provide for a broad perspective to be brought to its work and not that of particular segments or interests. The appointment of a woman to the Public Service Employment Commission should not, for example, be seen as an absolute guarantee of the active representation of women's interests in

appointments to the public service. Such an appointment would, however, be a move toward ending the current conspicuous absence of women at this level of responsibility in government who comprise approximately 40 per cent of public service employees.

In addition to the question of the composition of the Public Service Employment Commission, the Commission of Inquiry also wishes to direct attention to the present scope of the merit system within the provincial public service. Under the Statute Law Amendment Act and separate amendments to the Game, Probation and Sheriff's Acts assented to March 26th, 1965, a significant number of "outside services" were brought under the provisions of the Civil Service Act. Positions affected included appointments to the British Columbia Ferry Authority, Civil Defence Staff, the Liquor Control Board, Corrections Branch, University Endowment Lands, the Fish and Game Branch, Probation Branch and sheriffs' offices together with daily rate and seasonal monthly employees. At the same time, the Civil Service Commission also received powers to delegate its duties by regulation and under Order-in-Council 965/65, delegated its personnel administrative functions with respect to the above staffs to the departments or agencies concerned. Thus, while the scope of the Civil Service Act was broadened to achieve consistency in personnel and salary administration, it was also held that to avoid the disadvantages of too much centralization the administrative powers and duties were to be then delegated back. Although the Civil Service Commission technically remained responsible for the general supervision and inspection of the exercise and performance of these functions, in practice the procedures remained essentially as before. Introduction of the proposed system of collective bargaining for all public service employees and the uniform application of the merit

system would appear to dictate that this delegation of powers be revoked.

The Commission is disturbed by the long established trend toward the increasing number of employees hired under Schedule Four of the Civil Service Classification Schedules whose temporary appointments are generally made outside the scrutiny of the Civil Service Commission. Here, again, the interests of efficient administration and the application of the principle of recruitment by merit point to the need for a reassertion of the merit principle and an end to this circumvention of the intent of the Civil Service Act.

The abuse of the provisions for temporary appointments leads not only to appointments which in many instances cannot be termed appointment by merit, it also leads to the exploitation of individual employees who earnestly seek a career in the provincial public service but are retained on a temporary basis and made subject to lay-off at any time.

So as to clarify the standards to be applied in the application of the merit principle, the Commission also considers it desirable that they be defined under the Public Service Employment Act. The Commission recognizes that for certain public service positions, years of continuous service are a justifiable component of merit and should, therefore, be included in its definition, together with education, skills, knowledge, and experience. In addition, in order to maximize the opportunities for advancement within the public service, statutory provision should be made to ensure that all competitions are Service-wide in nature and that they be initially open only to in-Service applicants. Furthermore, an employee bargaining agent should be given the right to appoint an observer to the

selection panel for all competitions save where no applications are received from provincial public service employees.

The Commission of Inquiry recommends the transfer of the responsibility for suspensions, transfers and dismissals for misconduct or negligence together with the functions of the Classification and Wage Division (and of organization and staff utilization studies plus establishment control), from the Civil Service Commission, to the proposed Personnel Policy Secretariat of the Treasury Board.

The Commission recommends that the Civil Service Commission be renamed the Public Service Employment Commission and charged with the general administration of the revised Civil Service Act to be titled, the Public Service Employment Act.

It is also recommended that the Public Service Employment Commission be composed of three members appointed by the Lieutenant-Governor in Council. The Chairman should continue to be of the rank of Deputy Minister charged with the executive direction of the Act. The two other commissioners should be full-time appointees from the community for a period of seven years during good behaviour, subject to removal only by the Lieutenant-Governor in Council on an address by the Legislative Assembly. On appointment to the Public Service Employment Commission, a Commissioner should relinquish any other employment, whether within or outside the public service.

The Commission of Inquiry recommends that the current delegation of powers by the Civil Service Commission with respect to personnel administration be revoked and that careful attention be paid by the Public Service Employment Commission and the Treasury Board to any continuing abuse of temporary appointments to the provincial public service.

The Commission of Inquiry further recommends that the Public Service Employment Act include the following definition of the components of merit:

(a) Education

(b) Skills

(c) Knowledge

(d) Experience

(e) Years of continuous employment in the Public Service of British Columbia

(f) Any other matters that, in the opinion of the Public Service Employment Commission, are necessary or desirable having regard to the nature of the duties to be performed and consistent with any prescribed classification standard.

All competitions for appointments to the provincial public service should be service-wide competitions and initially open only to in-Service applicants.

The Public Service Employment Act should also provide a certified employee bargaining agent the right to appoint an observer to the selection panel for all competitions save where no applications are received from provincial public service employees.

TAB A

IN-SERVICE TRAINING AND DEVELOPMENT

Employer-employee relationships are not only matters of pay, hours of work, vacations and other basic conditions of employment. Both employer and employee also have a vital interest in the opportunities afforded individuals to develop to their full potential and to advance within the provincial public service to positions of higher responsibility. To neglect this aspect of personnel policy is to risk low morale, poor performance, and inefficiency in administration.

Changes in specialized technology, administrative methods, and the nature of government programmes further require that training and development be regarded as a continuing process. No matter how well prepared, for example, they may have been for the performance of a particular task on entry to the public service, employees will become a wasted resource if there are no further opportunities to improve their skills and they remain unexposed to changing methods and outlooks. In the Commission's view, the provision of training and development programmes by the provincial government for its employees is a critical element both in making employment in the British Columbia public service a rewarding career and in ensuring the maintenance of a high quality of public services throughout the province.

A number of inter-departmental in-Service training and development programmes have been established by the Staff Training Division of the Civil Service Commission. A three-year Executive

Development Training Programme is offered in collaboration with the University of Victoria for employees at the level of Clerk 5 and above with at least three years' employment in the provincial public service. A seven-month correspondence course in Basic Public Administration is available to employees at the level of Clerk 4 and above with at least two years' employment. A short Supervisory Training Course in Staff Management is conducted for public service supervisors. Special courses, seminars, and workshops have also been sponsored for particular departments.

In addition to the above, a number of departments themselves provide in-Service training for their employees in specialized skills. These have included, for example, social work, psychiatric nursing, and technical forestry. In its investigations the Commission also noted with considerable interest the steps now being taken at the University of Victoria to establish a School of Public Administration. This would provide useful programmes both for pre-entry training and to broaden the opportunities for further education in the field of public administration by public service employees beyond those directly sponsored by their employer.

Evidence submitted to the Commission of Inquiry suggests that the present number and scope of in-Service training and development programmes and provisions for external training do not meet the contemporary needs and demands of the public service and that the programmes should be improved and expanded on an interdepartmental and departmental basis.

Particular concern has also been expressed as to the importance of the availability of such programmes to female employees. They have a particular need for further training and for more opportunities and encouragement than presently exist in order to move out of

the routine low level job classifications into which women now tend to be segregated.

Existing training programmes also tend to be primarily oriented towards professional, administrative and clerical employees. Special efforts are thus urgently required to develop and then implement in-Service training programmes for the substantial group of employees working for the government in what are popularly known as "blue-collar"occupations.

The reorganization of functions proposed in this report will enable the new Public Service Employment Commission to give special attention to the formulation and expansion of appropriate training programmes for all provincial public service employees. Such efforts might include general orientation seminars and other programmes directly related to job performance, administrative competence, training for indivdual advancement, and opportunities for professional development. These should be developed in close collaboration with departmental officials.

The Commission recommends that the Public Service Employment Commission give priority to the expansion of training and development programmes and that an Advisory Committee on Training composed of Commission, departmental, and Treasury Board officials be established to assist in and encourage the provision of a wide range of interdepartmental and departmental in-Service training.

The report of the Commission of Inquiry calls for the early introduction of collective bargaining into the public service of British Columbia.

Our recommendations have, as their overriding objective, the development of a system of bargaining that will work. For this reason the proposed framework for negotiations has been especially designed to meet the requirements of the public service of this province.

For the guidance of the parties, we have recommended that the collective bargaining system be described in detail in a proposed Public Service Labour Relations Act. But at the same time, we are acutely conscious that any law has its limitations. While it can establish the procedural framework for bargaining, in the final analysis, only the parties at the bargaining table can make the system a success.

It is the view of the Commission that the indications are hopeful in this regard. The employees have obviously wanted the introduction of collective bargaining for a long time and it is clearly in their best interests to make every effort to ensure that this long-sought goal is responsibly exercised. On the employer's side, there are many who, with the necessary familiarization with the practice and techniques of collective bargaining, will be well able to represent the government at the bargaining table. Above all, it is absolutely vital for all concerned throughout the public service of this province, to come to grips with the unalterable fact that collective bargaining is fundamentally different from the present procedure.

We sincerely believe that such a change in attitudes is possible. With it, collective bargaining is sure to work and a relationship will develop between the parties based on mutual respect. Such a relationship, we are convinced, can only be of great benefit to the government, its employees, and to the public of the province that they both serve.

The era of unilateralism should be brought to an end. In its place we envisage an era of joint determination of wages and working conditions where both parties sit together at the negotiating table as equals.

TAB A

SUMMARY OF RECOMMENDATIONS

This report puts forward a plan for the introduction of an orderly and efficient system of collective bargaining into the public service of British Columbia. Consideration has been given to procedures which will give public service employees the same rights enjoyed by their counterparts in the private sector while,at the same time, recognizing the peculiarities which exist in bargaining with the Crown as an employer. The Commission's recommendations are summarized as follows:

Collective Bargaining Concepts

1. Full collective bargaining should be the method used to determine salaries, wages, and working conditions in the public service of British Columbia.

2. The necessary legal and administrative machinery to implement collective bargaining be established with definite criteria in mind:

   (a) it should be sensitive to the particular characteristics of public service employment, especially as they may differ from the private sector;

   (b) it should pay special regard to the role of the Crown as the employer and thus to the concept of the public interest inherent in this relationship; and

   (c) it should seek to permit the parties to act as freely as possible in their efforts to reach an agreement.

3. The use of the term "civil servant" be discontinued and in its place the term "public service employee" be used wherever it appears in statutes, regulations, circulars, press releases or any other documents emanating from the provincial government, its departments and agencies.

4. The legislation designed to implement collective bargaining in the public service of British Columbia should contain a preamble outlining the government's commitment to the collective bargaining system as the most appropriate method of determining wages and working conditions in the public service.

Defining the Public Service

1. The employees of the Workmen's Compensation Board be granted the right to collective bargaining through an amendment to the Workmen's Compensation Act to provide coverage under the proposed Public Service Labour Relations Act or under the Labour Relations Act.

2. The Queen's Printer be established as a separate agency and the employees be granted the right to collective bargaining under the Labour Relations Act.

3. The employees of Manning Park Lodge be granted the right to collective bargaining under the Labour Relations Act.

4. The employees of the Lion's Gate Tourist Court be granted the right to collective bargaining under the Labour Relations Act.

5. The matter of some departments hiring and appointing staff independent of the Civil Service Commission, but using Civil Service classifications and salaries, be immediately referred

to the Civil Service Commission for detailed investigation with the view of bringing the employees concerned under the Civil Service Act by means of temporary appointments.

Statutory Provisions

The legislation to govern employer-employee relations in the provincial public service take the form of a Public Service Labour Relations Act.

Employer Bargaining Agent

1. The Treasury Board be named the representative of the province as the employer under the Public Service Labour Relations Act.

2. The establishment of a Personnel Policy Secretariat directly responsible to the Treasury Board and under a director with the rank of deputy minister. Such a provision be made by an amendment to the Audit Act and the Act to be appropriately renamed the Financial Administration Act.

Employee Representation

1. Except where otherwise specifically excluded by statute, the public service of British Columbia comprise a single unit for collective bargaining purposes.

2. In order to facilitate the orderly introduction of collective bargaining into the public service, the bargaining unit recommended above be discribed in the Public Service Labour Relations Act, and be known as the "public service bargaining unit".

3. All employees (other than managerial and confidential exclusions) in professional classifications whose association has statutory authority to licence persons to practice that profession be

placed by statute within a single bargaining unit to be known in the Public Service Labour Relations Act as the "licenced professional bargaining unit".

4. Employees within the bargaining units must be free to select the bargaining agent of their choice.

5. The following certification provisions be included in the Public Service Labour Relations Act:

Where a union applies to be certified as the bargaining agent for the employees in the "public service bargaining unit" or for the employees in the "licenced professional bargaining unit",

(a) if the Public Service Adjudication Board is satisfied that, upon examination of records and other inquiries as it deems necessary, including the holding of such hearings as it deems expedient to determine the merits of any application for certification, more than fifty (50) per cent of the employees in the bargaining unit were members in good standing of the applicant union on the date of filing the application, then the Board shall certify the union;

(b) if the Board is in doubt as to whether or not more than fifty (50) per cent of the employees in the unit were members in good standing of the applicant union on the date of filing the application, the Board may order a vote to be taken to determine the wishes of the majority of the employees in the unit as to the selection of a bargaining agent;

(c) if the Board is satisfied that, at the date of filing the application, thirty-five (35) per cent or more, but not more than fifty (50) per cent, of the employees in the unit were members in good standing of the applicant union, the Board shall order a vote to be taken to determine the wishes of the majority of the employees in the unit as to the selection of a bargaining agent; and

(d) if the Board is satisfied that, at the date of filing the application, less than thirty-five (35) per cent of the employees in the unit were members in good standing of the applicant union, the Board shall dismiss the application and refuse to certify the union.

6. For certification purposes, the "public service bargaining unit" shall comprise all employees, except those specifically excluded by statute or regulation, in the public service on either the first day of April or the first day of October, whichever immediately precedes the date on which the application is filed.

7. The provisions used to certify a bargaining agent also be used to permit the employees in the bargaining unit to change their bargaining agent, subject to the following provisions:

An application to the Public Service Adjudication Board to change the bargaining agent for the "public service bargaining unit" or the "licenced professional bargaining unit" may be made under the following conditions:

(a) where no collective agreement is in force and twelve (12) months have elapsed since the certification of a bargaining agent for the unit; or

(b) where a collective agreement is in force the application may be made only during the last two months in each year of its term of any renewal or continuation thereof, except with the consent of the Board.

Exclusions

1. The Public Service Labour Relations Act provides that those persons performing managerial or confidential roles are not considered employees for the purposes of the Act.

2. The designation of positions as managerial or confidential be left to the two parties.

3. If the two sides cannot agree within a period of ninety (90) days after the matter has been raised at the bargaining table, the area of disagreement to be placed before the Public Service Adjudication Board for a ruling.

Union Security

1. The matter of bargaining agent security be dealt with in the proposed Public Service Labour Relations Act.

2. The Public Service Labour Relations Act provide that each collective agreement entered into between the government and a certified bargaining agent of its employees shall contain a clause requiring the employer:

(a) to deduct from the monthly pay of each employee in the bargaining unit affected by the collective agreement, whether or not the employee is a member of the bargaining agent, the amount of the regular monthly membership dues payable by a member of the bargaining agent;

(b) to remit the amounts deducted under clause (a) to the bargaining agent monthly; and

(c) to inform the bargaining agent, monthly or as may be provided in the collective agreement, of the names of the employees from whose monthly pay, deductions have been made under clause (a) and the amounts so deducted from each employee's monthly pay.

3. The existing check-off privilege be continued until such time as a collective agreement is entered into with the employee organization in question or until such time as the employee organization fails to obtain certification as the bargaining agent, whichever date occurs first.

4. No additional check-off privileges be granted unless and until they are contained in collective agreement(s) entered into following the introduction of collective bargaining.

Bargaining Scope and Procedures

1. The scope of barganable issues to be as broad as possible.

2. The merit system in the public service of British Columbia be excluded from collective bargaining.

3. The subject of superannuation be excluded from the collective bargaining process. This situation should be reviewed after a reasonable period of time.

4. The Civil Service Superannuation Act be amended to provide for the establishment of a seven-member joint committee composed of three representatives from the employee organizations and three representatives appointed by the employer. A neutral chairman should be selected by the two parties concerned.

5. The proposed joint committee should be responsible for making recommendations to government on needed amendments to the superannuation plan. At the same time, the committee should have the responsibility for overseeing the investment of the very large sums of money in the superannuation fund, with a view to ensuring optimum returns to the fund.

6. The Civil Service Superannuation Act be renamed as the Public Service Superannuation Act.

7. The criteria upon which classification is based be a proper subject for negotiation. While not a negotiable item, the application of the classification system should be subject to the grievance procedure.

8. A two-tier system of negotiations be implemented in the public service of British Columbia consisting of a "master agreement" covering those conditions of employment that are common to all members of the bargaining unit, and "component" agreements covering wages, salaries, and those conditions of employment peculiar to an occupational group.

9. The definition of the appropriate occupational groups for component bargaining purposes within the bargaining unit be left to the two parties.

10. The process of defining the appropriate occupational groups for component bargaining purposes should commence immediately after certification is granted. If the parties cannot agree upon the appropriate definition of a group within a period of ninety (90) days following certification, then the area of disagreement should be placed before the Public Service Adjudication Board for a ruling.

11. The legislation should permit continuing discussions during the life of the agreement of those items entered in the master agreement.

12. Solutions arrived at during these continuing negotiations, which may be initiated by either side, should not be implemented until the expiry of the existing master agreement, i.e., the matters could be included in a renewed master agreement.

13. The Public Service Labour Relations Act provide that:

(a) where a bargaining agent has been certified for the employees in a bargaining unit and no collective agreement is in force

(i) the bargaining agent may, by notice, require the employer to commence collective bargaining no later than thirty (30) days following certification; or

(ii) the employer may, by notice, require the bargaining agent to commence bargaining no later than thirty (30) days following certification;

with a view to concluding a collective agreement in respect of the employees in the unit;

(b) where a collective agreement is already in force, then not more than ninety (90) days and not less than thirty (30) days preceding the expiry of the collective agreement, a party thereto may by notice require the other party thereto to commence collective bargaining with a view to the renewal or revision of the collective agreement.

Dispute Settlement

1. The Public Service Labour Relations Act contain provisions that, in the event that the employer's representative and an employees' bargaining agent are unable to agree on any item to be included in a collective agreement, the Chairman of the Public Service Adjudication Board shall, on the written request of both parties, appoint a mediator to confer with, and assist the parties in reaching an agreement. The mediator should be required to submit a confidential report, setting out the matters which have or have not been agreed upon, within ten (10) of his appointment or such longer period as is agreed to by both parties and the Chairman of the Board.

2. Provision be made under the Public Service Labour Relations Act for the appointment of *ad hoc* dispute settlement boards upon the joint request of both the employer's and employees' representatives. Such dispute settlement boards should be made up of one nominee from each of the two parties and a chairman jointly agreed upon by the two members or failing this, directly appointed by the Chairman of the Public Service Adjudication Board.

3. Where the Chairman of the Public Service Adjudication Board is notified of a deadlock in negotiations he should immediately require each party to advise him as to their willingness to submit the dispute to final and binding arbitration by an *ad hoc* dispute settlement board.

4. Where either party refuses to submit the dispute to arbitration, the employees' bargaining agent be permitted to conduct a

vote by secret ballot among members of the particular unit as to whether or not to strike. Where a majority of employees who have voted, support a strike, the employees' bargaining agent should be required to give ten (10) days' written notice of any intention to strike but no strike should be permitted pending receipt of the report of any mediator appointed under the Act. A similar time limit should apply with any intention by the employer to lockout.

5. The general restriction or picketing by public service employees be repealed by an amendment to the Constitution Act.

Grievance Procedure

1. The regulation establishing the Code of Conduct pursuant to the Corrections Act be rescinded.

2. The Public Service Labour Relations Act provide for the following grievance procedure for those not covered by a collective agreement:

   (a) Any employee or his duly authorized representative may present a grievance to the designated local official who shall give his decision in writing within fourteen (14) days.

   (b) If the employee is not satisfied with the decision or receives no decision within the 14-day period, he may appeal to his deputy minister or the official designated by the deputy minister to handle grievances. The deputy minister or his designate must give his decision in writing within thirty (30) days.

(c) If the employee is not satisfied with the decision of the deputy minister or his designate, he may place his grievance before the Public Service Adjudication Board. The decision of the Board shall be final and binding on all parties.

3. The Public Service Employment Act provide for appeals on matters within the purview of the Public Service Employment Commission. Such appeals shall be direct to the Commission. Failing resolution of the grievance at the Commission level, it may then be placed before the Public Service Adjudication Board for a final and binding decision.

Independent Staff Relations Board

1. A separate independent agency be established, responsible for the administration of the proposed Public Service Labour Relations Act.

2. The agency be known as the Public Service Adjudication Board and be comprised of a chairman and two other members, one to be representative of the employee interests and the other to be representative of employer interests. It is important that in appointing the chairman every effort be made by the employee organizations and the employer to agree upon a selection, but if such efforts fail then the chairman should be appointed by the Chief Justice of British Columbia. All members of the Public Service Adjudication Board should be appointed by the Lieutenant-Governor in Council for a fixed period of no less than seven (7) years and all should have secure tenure.

3. The Board be guaranteed a sufficient budget and staff to ensure speedy handling of all matters placed before it.

4. There be no right of appeal in law against the decision of the Board but there should be access to the courts for the purpose of ensuring that the Board stays within its statutory jurisdiction and that it acts with procedural fairness.

5. The Board be constituted immediately following the passage of the Public Service Labour Relations Act.

Developing Competence in Public Service Bargaining

1. An in-Service training programme be established immediately for senior management officials in government in the field of collective bargaining.

2. The necessary staff be recruited to increase the standard of service of personnel administration in the public service of British Columbia.

Public Service Employment Commission

1. The responsibility for suspensions, transfers and dismissals for misconduct or negligence together with the functions of the Classification and Wage Division (and of organization and staff utilization studies plus establishment control) be transferred from the Civil Service Commission to the proposed Personnel Policy Secretariat of the Treasury Board.

2. The Civil Service Commission be renamed the Public Service Employment Commission and charged with the general administration of the revised Civil Service Act to be titled the Public Service Employment Act.

3. The Public Service Employment Commission be composed of three members appointed by the Lieutenant-Governor in Council. The Chairman should continue to be of the rank of deputy minister charged with the executive direction of the Act. The two other

commissioners should be full-time appointees from the community for a period of seven years during good behaviour, subject to removal only by the Lieutenant-Governor in Council on an address by the Legislative Assembly. On appointment to the Public Service Employment Commission, a commissioner should relinquish any other employment, whether within or outside the public service.

4. The current delegation of powers by the Civil Service Commission with respect to personnel administration be revoked and that careful attention be paid by the Public Service Employment Commission and the Treasury Board to any continuing abuse of temporary appointments to the provincial public service.

5. The Public Service Employment Act include the following definition of the components of merit:
   (a) Education
   (b) Skills
   (c) Knowledge
   (d) Experience
   (e) Years of continuous employment in the Public Service of British Columbia
   (f) Any other matters that, in the opinion of the Public Service Employment Commission, are necessary or desirable having regard to the nature of the duties to be performed and consistent with any prescribed classification standard.

6. All competitions for appointments to the provincial public service should be service-wide competitions and initially open only to in-Service applicants.

7. The Public Service Employment Act should also provide a certified employee bargaining agent the right to appoint an observer to the selection panel for all competitions save where no applications are received from provincial public service employees.

In-Service Training and Development

The Public Service Employment Commission give priority to the expansion of training and development programmes and that an advisory committee on training composed of Commission, Departmental, and Treasury Board officials be established to assist in, and encourage, the provision of a wide range of inter-departmental and departmental in-Service training.

TAB A

A P P E N D I C E S

TAB A

APPENDIX A

ORDER-IN-COUNCIL 3786

THAT section 3 of the Public Inquiries Act empowers the Lieutenant-Governor in Council to cause inquiry to be made into and concerning any matter connected with the good government of the Province and by commission intituled in the matter of that Act and issued under the Great Seal, appoint Commissioners to inquire in such matter:

AND THAT section 12 of this Act empowers the Lieutenant-Governor in Council to make rules governing all such Acts, matters, and things as may be necessary to enable complete effect to be given to every provision of that Act:

AND TO RECOMMEND THAT, pursuant to the Public Inquiries Act and all other powers thereunto enabling, Commissioners be appointed to make inquiry into and concerning employer - employee relations in the Public Service in the Province and report their findings and recommendations to the Lieutenant-Governor in Council in accordance with the Act:

AND THAT each Commissioner be paid the usual living and travelling expenses for each day during which he is engaged in the performance of the powers and duties of the Commissioners together with an honorarium to be fixed by the Lieutenant-Governor in Council:

AND THAT the remuneration for witness fees and allowances to witnesses in respect of mileage and maintenance be on the same scale as provided in the Supreme Court of British Columbia, and that the Commissioners be authorized to employ such counsel and consultants, advisers and research assistants, and such clerks and stenographers as are considered necessary for the purpose of conducting the inquiry:

AND THAT the Commissioners, for the purpose of making the inquiry, be authorized to arrange and hold hearings as they may deem appropriate:

AND THAT the following persons be appointed under the Great Seal as Commissioners for this inquiry:

R.D. Higgins (Chairman)
J.L. Fryer
N.T. Richards
N.J. Ruff
G.L. Tomalty

DATED this 19 day of Oct A.D. 1972

"E. Hall"

Provincial Secretary.

APPROVED this 19 day of Oct A.D. 1972

"D. Barrett"

Presiding Member of the Executive Council.

TAB A

APPENDIX B

INVESTIGATION OF OTHER GOVERNMENT JURISDICTIONS

(1) General

The Commission considered it extremely important to obtain firsthand knowledge of the bargaining structures and experiences gained in the public services of other provinces and the federal government. It was felt that visiting the other government jurisdictions would not only supplement our extensive review of the variety of collective bargaining systems in existence and their respective legislation, but also it would assist the members of the Commission in determining the relevance of these systems to the public service of British Columbia. In addition, it was considered such visits would enable the Commission to benefit from the practical experiences gained elsewhere, as well as the problems and pitfalls encountered, before making any recommendations as to the best method of introducing collective bargaining in the public service of this province.

In view of the deadline for submitting our report, it was apparent that time would be put to best advantage by concentrating on the different types of bargaining systems, rather than by making a cursory investigation of all the jurisdictions and consequently examining structures which are similar in nature. The Commission, therefore, selected those jurisdictions which were considered to represent a good cross section of the variety of approaches to public service collective bargaining.

Saskatchewan is the sole jurisdiction where public service bargaining is covered by the same legislation as that governing the private sector, while Manitoba's public service operates under separate legislation which gives a single employee organization statutory recognition as the bargaining agent for all provincial government employees. In contrast, provincial public employees in Ontario are soon to be governed by legislation which will remove the statutory recognition presently enjoyed by the existing employee organization. The federal government jurisdiction offers an excellent example of the multi-unit approach to bargaining in the public service.

The Commission took a very strong position that, in order to obtain a clear understanding of the bargaining relationships existing in other jurisdictions, it was vital that its investigations took into account the experiences of both parties to the collective bargaining process. Thus, it deliberately sought the views of both the employer and the employee representatives in the jurisdictions visited.

To further ensure that the time was well spent, the members of the Commission prepared, in advance, a fairly comprehensive list of questions and points to be investigated during these visits. This proved to be a very useful guide in the discussions with the various employer and employee organization officials.

TAB A

(2) Schedule of Visits

Ottawa December 4, 1972	*Canada, Public Service Staff Relations Board* J. Finkelman, Chairman G.E. Gauthier, Vice-Chairman K. Scobie and H. Saunders, Assistant Directors, Pay Research Bureau
Ottawa December 5, 1972	*Canada, Treasury Board* R. Steward, Director of Staff Relations
	The Professional Institute of the Public Service of Canada L.W.C.S. Barnes, Executive Director
	The Public Service Alliance of Canada R.G. DesLauriers, Director, Collective Bargaining Branch
Toronto December 6, 1972	*The Civil Service Association of Ontario (Inc.)* G. Gemmell, President H. Bowen, General Manager
	Ontario, Civil Service Commission J.R. Scott, Director, Staff Relations Branch
Winnipeg December 7, 1972	*The Manitoba Government Employees' Association* E.G. Metcalfe, Executive Director
	Manitoba, Management Committee of Cabinet L.A. Giffin, Director of Staff Relations
Regina December 8, 1972	*The Saskatchewan Government Employees' Association* P. Martens, President W. Leonard, Executive Secretary
	Saskatchewan, Public Service Commission W. Fyles, Chairman

TAB A

APPENDIX C

EVIDENCE SUBMITTED

(1) General

Interested groups and individuals were invited to make submissions to the Commission of Inquiry. This invitation was extended through display advertisements which were placed in seven daily newspapers in the five cities of the province where the public hearings were conducted. Two separate advertisements were placed in these publications--one calling for submissions and the other giving the times and places of public hearings.

As it was considered that the majority of interested parties would wish to speak to their briefs at a public hearing, November 16th, 1972 was set as a deadline for the receipt of written submissions. This was necessary in order to give the members of the Commission sufficient opportunity to familiarize themselves with the contents of written submissions before their presentation at a hearing, and it proved to be of considerable value in conducting meaningful and informative discussions with the parties involved. It should be known, however, that all written submissions received after the November 16th deadline were accepted and given full consideration by the Commission during its deliberations.

Evidence was submitted to the Commission in the form of written briefs and oral presentations. Most parties chose to present their views both orally and in writing. The remainder either appeared before the Commission at a public hearing and made no written submission or simply submitted a brief without appearing at the hearings.

Eighty-three organizations and individuals submitted evidence to the Commission; they are listed below. Those who appeared at one of the public hearings (whether or not they also made a written submission) are listed in their order of appearance. The parties who made written submissions only are listed alphabetically, following the list of those appearing before the Commission at a public hearing.

The Commission studied each of the briefs received and made note of all suggestions and recommendations. In those cases where the parties spoke to their briefs at the public hearings, the written submissions served as a basis for exchange with the parties concerned, particularly in those instances where the Commission considered points raised in the briefs needed further amplification. As well, the Commission recorded the proceedings of the public hearings for its own purposes and made use of these recordings during its subsequent deliberations.

A number of individual written submissions dealt exclusively with personal grievances and/or salary matters. As the Commission did not consider such subject matters to fall within its terms of reference, these submissions were not accepted on that basis and, consequently, the submitters involved are not listed.

Documentation relating to the submission of briefs and public hearings includes a copy of the advertisement soliciting briefs, a copy of the advertisement giving notice of public hearings, and a list of the newspapers in which these advertisements appeared. This information is reproduced following the list of written submissions.

In addition to the evidence submitted, both orally and in writing, copies of a number of reports relating to similar inquiries into employer-employee relations were secured by the Commission. These documents were studied and their relevant suggestions and recommendations were taken into accout in preparing this report on collective bargaining in the public service of British Columbia.

(2) Public Hearings

This list includes all organizations and individuals who appeared before the Commission at one of the public hearings, whether or not they made a written submission in addition to their oral presentation.

in order of appearance

City and Date	Organization or Individual
Prince George, B.C. November 20, 1972	The Association of Professional Engineers of British Columbia
	British Columbia Government Group of Professional Foresters (Prince George Section)
	British Columbia Federation of Labour
	The Association of Professional Engineers of British Columbia (Northern Branch)
Kamloops, B.C. November 22, 1972	Management staff, The Tranquille School
	The Association of Professional Engineers of British Columbia (Central Branch)
	British Columbia Government Group of Professional Foresters (Kamloops Section)

TAB A

City and Date	Organization or Individual
Nelson, B.C. November 24, 1972	Messrs. P. Barnacle and P. Mackie on behalf of ten employees of the Department of Recreation and Conservation, Parks Branch (Kokanee Region).
	British Columbia Government Group of Professional Foresters (Nelson Section)
	The Association of Professional Engineers of British Columbia (East Kootenay Branch)
	B.C. Society of Highway Maintenance Supervisors
	Mr. B.J.H. Riley, Cranbrook, B.C.
	Mr. T.P. McKinnon, Kaslo, B.C.
	Mr. F. Heddle, Nelson, B.C.
Victoria, B.C. November 29, 1972	Association of British Columbia Professional Foresters
	British Columbia Administrative Officers Association
	British Columbia Government Group of Professional Foresters
	Council of Graphic Arts Unions of the B.C. Printing Bureau
	Mr. A.N. Fraser, Victoria, B.C.
	Masters and Chief Engineers Association of the British Columbia Ferries
	Miss H.A.J. Marshall, Victoria, B.C.
	Psychiatric Nurses Association of British Columbia
	Mr. L. Stellingwerff, Victoria, B.C.
	British Columbia Government Group of Professional Engineers
	Mr. R.B. Vickery, Victoria, B.C.
	Victoria Labour Council

TAB A

City and Date	Organization or Individual
Victoria, B.C. November 29, 1972	The Association of Professional Engineers of British Columbia (Victoria Branch)
	The Association of Professional Engineers of British Columbia (Mid-Island Branch)
	The Provincial Government Lawyers' Association
	Status of Women Action Group of Greater Victoria
	Mr. H. Graham
Vancouver, B.C. December 1, 1972	British Columbia Association of Social Workers
	British Columbia Institute of Technology Staff Society
	British Columbia Government Employees' Union
	Group of Professional Engineers of British Columbia Hydro and Power Authority
	International Power and Engineering Consultants Ltd. Group of Professional Engineers
	Registered Nurses' Association of British Columbia
	Mr. D.M. Rushworth on behalf of physio-therapists, occupational therapists and dietitians employed in the Department of Health Services and Hospital Insurance
	Mmes. H. Forster and R. Berthiaume on behalf of four employees of the Riverview Hospital
	Mr. A.J. Price, Vancouver, B.C.
	Health Sciences Association of British Columbia
	Employers' Council of British Columbia

TAB A

City and Date	Organization or Individual
Vancouver, B.C. December 1, 1972	Vancouver Board of Trade
	The Association of Professional Engineers of British Columbia (Vancouver Branch)
	Status of Women Council
	Messrs. D.H. Goard and R.S. Carey on behalf of the Senior Administrative Staff of the British Columbia Institute of Technology
	The Workmen's Compensation Board Employees' Association
	Mr. J. Soukoreff, Vancouver, B.C.

(3) Written Submissions

This list includes all organizations and individuals who made written submissions, but excludes those who appeared before the Commission at one of the public hearings and, therefore, are listed above.

in alphabetical order

Mr. R.D. Ally, Burnaby, B.C.

The Association of Professional Engineers of British Columbia, Salaried Engineers' Division

The Association of Remedial Gymnasts of British Columbia

Mr. W. Belzer *et al*; forty-eight employees of the Department of Lands, Forests and Water Resources (Chemistry Laboratory, Water Resources Service)

British Columbia Government Group of Architects

TAB A

British Columbia Government Group of Professional Foresters (Vancouver Section)

British Columbia Medical Association and the Salaried Physicians Section of the British Columbia Medical Association on behalf of the 130 salaried physicians employed in the public service of British Columbia

British Columbia Society of Medical Technologists

British Columbia Society of Occupational Therapists

Mr. R. Brock, Nelson, B.C.

Canadian Labour Congress

Canadian Merchant Service Guild

Canadian Society of Hospital Pharmacists (British Columbia Branch)

Canadian Society of Radiological Technicians (British Columbia Division)

Mr. J. Conway, Victoria, B.C.

Messrs. H.A. Crawford and F. Snihur on behalf of the officers employed at the University Endowment Lands Fire Department

Mr. G.B. Frame, Victoria, B.C.

Fredin Gas Engineering Services Ltd.

Mr. W.R. Henderson on behalf of twenty-four personnel officers employed in the public service of British Columbia

Mr. T.R. Ingram, Victoria, B.C.

The Institute of Chartered Accountants of British Columbia

International Union of Operating Engineers, Local 882 (Stationary Engineers)

Mr. R.J. Kuhn, Burnaby, B.C.

Mr. E.A. Lund, Victoria, B.C.

Capt. J. Maclean, Fulford Harbour, B.C.

Mr. C.H. Mills, Victoria, B.C.

Mr. J.A. Moisey, Kelowna, B.C.
Dr. H.M. Morrison, Lac La Hache, B.C.
Mr. J.H. Palmer, Victoria, B.C.
Mr. J. Peereboom, Victoria, B.C.
Mr. C. Shergold, Sidney, B.C.
Miss K.D. Thomson, Victoria, B.C.
Ms. V. Thomson, Victoria, B.C.
Mr. J.F. Tomczak, Victoria, B.C.
Mr. J.W. Webber, Victoria, B.C.

(4) Advertisement for Submission of Briefs

(2" x 5" display advertisement inserted for 3 consecutive issues)

COMMISSION OF INQUIRY INTO
EMPLOYER-EMPLOYEE RELATIONS
IN THE PUBLIC SERVICE OF BRITISH COLUMBIA

INVITATION FOR SUBMISSIONS AND
NOTICE OF HEARINGS

NOTICE is given that all persons and interested groups wishing to make submissions to the Commission appointed under the Public Inquiries Act to make inquiry into and concerning employer-employee relations in the Public Service in the Province should make a copy of their submission available to the Commission at the address shown below not later than NOVEMBER 16, 1972.

PUBLIC HEARINGS will be held by the Commission at the following locations:

Prince George	Monday, November 20th
Kamloops	Wednesday, November 22nd
Nelson	Friday, November 24th
Victoria	Wednesday, November 29th
Vancouver	Friday, December 1st

TAB A

Those who wish to appear in person before the Commission at any of these locations should notify the Chairman of their intentions not later than NOVEMBER 10, 1972.

R.D. Higgins, CHAIRMAN
Commission of Inquiry into
Employer-Employee Relations in the
Public Service of British Columbia.
Parliament Buildings
Victoria, B.C.

(5) Advertisement for Notice of Public Hearings

(2" x 6" display advertisement inserted for 2 consecutive issues)

COMMISSION OF INQUIRY INTO
EMPLOYER-EMPLOYEE RELATIONS
IN THE PUBLIC SERVICE OF BRITISH COLUMBIA

NOTICE OF HEARINGS

FURTHER to a previous notice with regard to the making of submissions to the Commission appointed under the Public Inquiries Act to inquire into and concerning employer-employee relations in the Public Service in the Province, details of the places of public hearings are as follows:

PRINCE GEORGE	Monday, November 20th, 1972 at Court Room "B" Provincial Government Building 1600 - 3rd Avenue
KAMLOOPS	Wednesday, November 22nd, 1972 at Mental Health Centre Conference Room 519 Columbia Street
NELSON	Friday, November 24th, 1972 at the Court House 320 Ward Street

VICTORIA	Wednesday, November 29th, 1972 at Newcombe Auditorium Provincial Museum Building Parliament Buildings
VANCOUVER	Friday, December 1st, 1972 at Stanley Room Bayshore Inn 1601 West Georgia Street

ALL HEARINGS will commence at 9:00 a.m.

R.D. Higgins, CHAIRMAN
Commission of Inquiry into
Employer-Employee Relations in the
Public Service of British Columbia.
Victoria, B.C.
Phone: 382-6111 - Local 3604

(6) Daily Newspapers in Which Submissions Were Solicited and Notice of Public Hearings Was Given

Kamloops - Sentinel

Nelson - Daily News

Prince George - Citizen

Vancouver - Province

Vancouver - Sun

Victoria - Colonist

Victoria - Times

TAB A

APPENDIX D

STATISTICAL TABLES

TAB A

TABLE 1: NUMBER OF EMPLOYEES IN THE PUBLIC SERVICE BY DEPARTMENT OR AGENCY, OCTOBER 31, 1972

Legislative Assembly	16
Premier's Office	10
Agriculture	494
Attorney-General	2,804
Commercial Transport	130
Education	1,341
Finance	797
Public Health	1,704
Mental Health	4,841
Hospital Insurance	148
Highways	5,531
Industrial Development	173
Labour	201
Lands	392
Forest Service	2,904
Water Resources	469
Mines & Petroleum Resources	162
Municipal Affairs	43
Provincial Secretary	684
Civil Service Commission	49
Superannuation Commission	56
Public Utilities Commission	61
Public Works	1,723
Recreation & Conservation	953
Travel Industry	113
Rehabilitation & Social Improvement	937
Minister without Portfolio	4
Sub Total	26,740
B. C. Ferries Division	2,457
Liquor Control Board	2,041
Total Public Service	31,238
Note: Workmen's Compensation Board	872

TAB A

TABLE 2: NUMBER OF PUBLIC SERVICE EMPLOYEES BY CLASSIFICATION GROUP AND CLASS, OCTOBER 31, 1972

	PERMANENT	LIMITED	TEMPORARY	TOTAL
DEPARTMENTAL SERVICES				
Special	243	-	45	288
Executive	23	-	-	23
Administrative	362	3	16	381
Clerical				
-01 - General	1,824	101	569	2,494
-02 - Business Machine Operation	215	9	128	352
-03 - Stenographic	1,319	107	466	1,892
-04 Stockkeeping	84	22	119	225
Total Clerical	3,442	239	1,282	4,963
Operational				
-01 - Farms	66	3	5	74
-02 - Building Services	597	72	300	969
-03 - Culinary	355	60	264	679
-04 - Equipment Operation	98	1	28	127
-05 - Housekeeping	81	1	14	96
-06 - Maintenance	280	14	148	442
-07 - Personal Services	21	-	2	23
Total Operational	1,498	151	761	2,410
Technical				
-01 - Accounting	198	-	-	198
-02 - Agriculture	1	-	-	1
-03 - Draughting	225	7	134	366
-04 - Engineering	729	15	253	997
-05 - Instructional	80	12	14	106
-06 - Investigational	791	11	128	930
-07 - Laboratory	102	5	12	119
-08 - Marine	128	85	113	326
-09 - Medical - Nursing	1,769	267	591	2,627
-10 - Occupational Therapy	3	-	-	3
-11 - Computer Programming	48	-	4	52
-12 - Recreation - Cultural	7	-	9	16
Total Technical	4,081	402	1,258	5,741
Professional				
-01 - Accounting	12	-	-	12
-02 - Agricultural	168	-	8	176
-03 - Economics - Statistics	17	-	-	17
-04 - Education	176	4	15	195
-05 - Engineering	513	6	201	720
-06 - Laboratory	72	3	2	77
-07 - Legal	32	-	3	35
-08 - Library	43	3	1	47
-09 - Medical	88	3	63	154
-10 - Nursing	462	18	269	749
-11 - Nutrition	19	-	3	22
-12 - Sociological	771	12	162	945
-13 - Survey	18	-	-	18
-14 - Research	93	5	22	120
-15 - Hospital Administration	15	-	-	15
-16 - Systems Analysts	20	-	-	20
-17 - Physiotherapy	29	-	12	41
Total Professional	2,548	54	761	3,363
Gaol Service (Schedule 2)	927	1	123	1,051
Vocational Schools (Schedule 3)				
-01 - Headquarters	-	13	8	21
-10 - Vocational Schools	-	30	297	327
-20 - B.C.I.T.	-	22	348	370
Total Vocational Schools	-	65	653	718
Departmental (Schedule 4)				
-01 - Incremental	-	13	2,559	2,572
-02 - Single Rate	-	107	4,909	5,016
-10 - University Students	-	1	2	3
-12 - Internes	-	3	-	3
-14 - Psychiatric Nurses	-	-	117	117
Total Departmental	-	124	7,587	7,711
Queens Printer			90	90
SUB TOTAL: Departmental Service	13,124	1,039	12,577	26,740
B. C. FERRIES:				
Administrative				
-01 - Senior Positions	23	-	-	23
-02 - General	72	1	33	106
Total Administrative	95	1	33	129
Shore				
-03 - Maintenance	88	-	50	138
-04 - Terminal	103	-	140	243
Total Shore	191	-	190	381
Vessels				
-06 - Deck Department	272	-	213	485
-07 - Engine Department	178	-	146	324
-08 - Catering Department	390	-	747	1,137
Total Vessels	840	-	1,106	1,946
SUB TOTAL: B. C. Ferries	1,127	1	1,329	2,457
LIQUOR CONTROL BOARD	1,167	-	874	2,041
TOTAL: Public Service	15,418	1,040	14,780	31,238
NOTE: Workmen's Compensation Board	853	-	19	872

TAB A

TAB B

The Treatment of Practicing Lawyers in Canadian Collective Bargaining Legislation
Expert Report of David J. Doorey, Ph.D

November 2022

Introduction

1. My name is David Doorey. I reside at 176 Evelyn Avenue in the City of Toronto.

2. I am aware that under Subrule 11-2(1) of the Rules of Court, I have a duty to assist the court and not be an advocate for any party. I have prepared this report in conformity with my duty to the court as articulated in Subrule 11-2(1) of the Rules of Court. If I am called upon to give oral or written testimony in relation to this matter, I will give that testimony in conformity with my duty.

Qualifications

3. I am an Associate Professor of Labour and Employment Law at York University. I am a senior faculty member in the School of Human Resource Management in the Faculty of Liberal Arts and Professional Studies and a member of the Graduate Faculty of Osgoode Hall Law School. I served as Director of the School of HRM between 2016-2019 and I was Academic Director of Osgoode Hall Law School's specialist LL.M program in Labour and Employment Law from 2010-2022.

4. In 2019-2020, I was a Visiting Research Fellow at Harvard Law School's Labor and Worklife Program, where I am also a Senior Research Associate. In 2012-13, I was a Visiting Professor at the University of Toronto, Faculty of Law and the Centre for Industrial Relations and Human Resource Management.

5. I have taught courses in Labour Law, Industrial Conflict Law, Employment Law, Industrial Relations, Globalization and International Labour Law, and Labour and Global Supply Chains in Undergraduate, Masters, and Ph.D. level courses at Osgoode Hall Law School, York University, Queens University, the University of Toronto, and Toronto Metropolitan University.

6. I received my Bachelor of Arts in Industrial Relations in 1990 and my Masters' degree in Industrial Relations (M.I.R.) in 1992, both from the University of Toronto. I received my Bachelor of Laws (LL.B.) degree in 1995 and my Doctor of Philosophy (Ph.D) in 2009, both from Osgoode Hall Law School. My Ph.D dissertation was supervised by Professors Harry Arthurs, Mary Condon, and Cynthia Williams. I received my Masters' of Law in Labour Law (LLM Labour Law) from the London School of Economics and Politics Science in 2002, where I studied comparative, British, international, and European labour law under Professors Keith Ewing, Paul Davies, and Hugh Collins, all noted international experts in the subject matter.

7. I was called the Bars of Ontario and British Columbia in 1997 and I practiced labour and employment law in both provinces before returning to academia, appearing as legal counsel before the Ontario Labour Relations Board, the British Columbia Labour Relations Board, the British Columbia Court of Appeal, and various other administrative tribunals as well as before superior courts in both provinces.

8. I am the author of the books *The Law of Work* (2nd ed, Emond 2020), and with co-author Professor Alison Braley-Rattai, *Canadian Labour Relations: Law, Policy, and Practice* (2nd ed, Emond 2020), which are used in undergraduate, law, and graduate level courses in universities and colleges across Canada. I have written many peer-reviewed academic articles which have been published in leading Canadian and foreign law journals as well as chapters in books exploring labour and employment law and other related subject matter. I am a member of the editorial board and joint author of *Labour Law: Cases, Materials and Commentary* (9th ed.), a national labour law casebook. I have served as Articles Review Editor of the Canadian Labour and Employment Law Journal since 2009. I also sit on the editorial board of the Journal of Industrial Relations. I am the founder and editor of the *Law of Work Blog*, which has been recognized as the top law blog in Canada on multiple occasions in the Canadian Law Blog Awards. My articles on collective bargaining law and employment law have been cited by the Supreme Court of Canada.

9. I am the recipient of two awards for outstanding contributions to Canadian labour relations and labour law, including the H.D. Woods Prize (Canadian Industrial Relations Association) and the Morley Gunderson Award (University of Toronto, Centre for Industrial Relations and HRM).

10. I have written and spoken in Canada and abroad on a wide variety of issues relating to Canadian and international collective bargaining law, and I am the recipient of competitive scholarly research grants amounting to over $100,000 to study issues in labour and employment law, corporate social responsibility, and legal theory.

11. My expertise includes labour law and labour law principles, including collective bargaining structures and the history and rationale for the exclusion of lawyers from collective bargaining legislation in Canada as well as contemporary practices for lawyers who engage in collective bargaining across Canada. This opinion is relevant to the issues of whether the exclusion of practicing, employed lawyers from collective bargaining legislation is a breach of Section 2(d) of the Charter, if so, whether that exclusion is saved by Section 1 of the Charter, and if not, what the appropriate remedy may be.

12. A copy of my *curriculum vitae* is attached as **Schedule A.**

Expert Report Sought and Summary of Findings

13. I was retained by the law firm Goldblatt Partners to consider and respond to the following 6 questions:

    1) What are the origins, history, and rationale for the lawyers' exclusion from collective bargaining legislation, in Canada in general, and in BC in particular?

    2) What is the present treatment, practice, and status of collective bargaining by employed lawyers across Canada in both the private and public sectors, both under legislation and outside of a legislative framework, and including lawyers being in their own bargaining unit or included in bargaining units with other non-lawyer employees?

3) Assess whether there is a present public policy rationale for the continued exclusion, including a review of the treatment of the lawyer exclusion from law reform reports and in academia.

4) Examine the extent to which access to collective bargaining for lawyers, whether under collective bargaining statues or otherwise (and including in their own bargaining units and with the right to be represented by their own democratically selected bargaining agent) has given rise to adverse labour relations or other public policy difficulties.

5) Assess the representational and bargaining effects of preventing lawyers from being represented by their own democratically selected bargaining agent in their own separate bargaining unit?

6) Consider the extent to which placing lawyers into a broader "all professionals" bargaining unit consistent with the pattern of lawyer representation and collective bargaining across Canada?

14. This report includes an extensive historical record of the origins and evolution of the professional/lawyer exclusion in Canadian collective bargaining legislation. Narratively, I have recorded that history at both the federal and provincial levels in roughly a chronological order rather than organize the report according to the 6 questions posed. At the end of the report, I provide my specific responses to each of the questions based on facts included in the report.

15. In this report, I have cited historical legislative documents and Hansard records as well as case law that is publicly available. When I have cited other external authorities, including law reform reports and academic literature, I have attached the relevant passages as Appendices. When I have attached an authority, I believe it is reliable and credible.

16. For ease of reference, I provide the following index to this report:

TAB B

I. HISTORY OF THE LAWYER EXCLUSION IN THE FEDERAL JURISDICTION

17. In this Part, I describe at length debates leading to the initial exclusion of practicing lawyers in federal legislation in 1948. I have done so because the contemporary lawyer exclusions that remain in Canada today have their roots in these 1948 debates. Indeed, after the federal government introduced the lawyer exemption into federal collective bargaining legislation in 1948, all provinces except Saskatchewan simply adopted the exclusion into their own province legislation without further legislative debate or discussion.

18. By way of summary, the following review of the debates preceding the adoption of the practicing lawyer exclusion at the federal level in 1948 demonstrate that, against expressions of concern voiced by some MPs that there was no principled rationale to single out a few professions for exclusion from collective bargaining legislation, the exclusion for practicing lawyers was nevertheless introduced because the Canadian Bar Association (CBA) requested the exclusion and no labour organization objected to it. In 1948, the CBA was an organization representing a mostly homogeneous profession of male sole practitioners and small law firms; very few lawyers were "employees" who would have been covered by the new collective bargaining legislation in any event.

A. *The Industrial Relations Disputes Investigation Act and the History of the Exclusion of Practicing Lawyers in the Federal Jurisdiction (1948-1972)*

19. Prior to 1948, federal legislation regulating collective bargaining activities, including the 1907 Industrial Disputes Investigation Act and the 1944 Wartime Labour Relations Regulation, Order in Council PC 1003 ("PC 1003"), did not expressly exclude lawyers or other professionals.

20. In June 1947, the federal government introduced *Bill 338, An Act to Provide for the Investigation, Conciliation and Settlement of Industrial Disputes* to replace both the 1907 *Industrial Disputes Investigation Act* and P.C. 1003. The federal government anticipated that Bill 338, once enacted, would serve as a template for provincial collective bargaining legislation to create a de facto national labour code despite labour relations falling primarily under provincial jurisdiction.[1] This desire for consistency in federal and provincial labour law was widely shared by the provinces at the time. Bill 338 defined "employee" as excluding "a member of the medical, dental, architectural, or legal profession qualified to practice under the laws of a province and employed in that capacity."[2]

21. Bill 338 lapsed, but its substantive terms were re-introduced in the fourth session in 1948 as Bill 195, *An Act to Provide for the Investigation, Conciliation and Settlement of Industrial Disputes*. Bill 195 introduced new legislation that would be known as the *Industrial Relations and Disputes Investigation Act, 1948* ("IRDIA"). Bill 195 added "engineers" to the list of excluded professions that had originally appeared in Bill 338. This change was made at the request of the National Association of Professional Engineers and the Engineering Institute of Canada, which had filed a submission arguing that engineers should be treated in the same manner as the other four listed professions.[3]

---

[1] See comments of federal Minister of Labour Humphrey Mitchell: See House of Commons Committees, 20th Parliament, 3rd Session, House of Commons Debates (June 17, 1947), at 4230-4231.
[2] Bill 338, *An Act to Provide for the Investigation, Conciliation, and Settlement of Industrial Disputes,* s. 2(1)(i).
[3] See House of Commons Committees, 20th Parliament, 4th Session, House of Commons Debates (April 22 1948), at 3208.

22. This issue of whether engineers should be excluded attracted considerable debate in the legislature and before the Standing Committee on Industrial Relations (IR Committee) in the Bill 195 deliberations. Under PC 1003, which did not exclude professionals, some 1100 engineers in Ontario and Quebec had joined the Employee Professional Engineers and Assistants Union (EPEAU). The EPEAU had been certified and had bargained several collective agreements with more still in negotiations. The EPEAU argued in submissions to the IR Committee that engineers should be covered by the legislation as they had been under PC 1003.

23. The EPEAU was the only union to oppose the professional exclusion clause found in Bill 195, and their argument related only to engineers. The fact that lawyers, doctors, dentists, and architects were also excluded from the definition of "employee" in the Bill was not a concern of the Canadian labour movement. The Canadian Congress of Labour submitted a draft National Labour Code to the IR Committee for consideration in February 1948 that included the same definition of "employee" found in Bill 195 that excluded the listed professions.[4] The Trades and Labor Congress of Canada argued for the government "to expedite the passage of Bill 195 as quickly as possible."[5] Therefore, in 1948, when the statutory exclusion of practicing lawyers was first proposed and debated, neither of the two umbrella labour movement organizations objected to the exclusion and, as I will explain below, the association claiming to represent lawyers, the Canadian Bar Association, supported the exclusion.

24. Some members of Parliament serving on the IR Committee in 1948 argued that engineers were unlike the other excluded professions because many more engineers were "employed" in large organizations and therefore functioned more like regular employees. This argument is captured in the following passage from MP MacInnes:

> Where workers are engaged in an industry as employees, whether they are doing pick and shovel work or whether they are doing draughting or something of that kind, they are exactly in the same position so far as their relationship to their employer is concerned, unless they are in a confidential capacity or managerial capacity. They are selling their labour power to the employer and because they are selling their labour power to the employer, as they increase in numbers they will organize and make a collective agreement. It is only by making collective agreements that they can deal with their employers satisfactorily.[6]

25. In the context of extended debate over the exclusion of engineers, many MPs argued in favour of removing the exclusion of all the listed professionals, including lawyers. A motion was put to debate and vote before the IR Committee that called for the deletion of the part of the "employee" definition that excluded professionals. After some debate, that motion was defeated, and the professional exclusion remained in the enacted version of the IRDIA.[7]

---

[4] See House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (April 27 1948), at 41.
[5] See House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (April 27 1948), at 13.
[6] House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (May 18 1948), at 228.
[7] House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (May 13 1948), at 214.

26. The central argument of those calling for the removal of the professional exclusion was that the IRDIA did not impose unionization or collective bargaining and that the government should leave the decision about whether to pursue collective bargaining under a statutory model to employees, whether they are professionals or not. A secondary concern was that the list of professions excluded appeared to be random and that other professions had already come forward asking to be excluded as well and more would do so later. This would create confusion and inconsistency and therefore the law should cover the professionals like other employees. These sentiments are expressed in the following selection of quotations from members of the IR Committee:

> [Example 1] Mr. Johnston: Personally, I would have no objection to doctors obtaining collective agreements if they desired to. I would not have any objection to allowing lawyers to enter into a collective agreement if they themselves desire it.[8]
>
> [Example 2] Mr. Archibald: I should like to ask the Minister if it would not be practical to drop all of [the professional exclusion subsection]? You have mentioned certain professionals there, skilled and unskilled. If you are going to mention any professions why do you not include preachers, chartered accountants and politicians? Why single these people out and give them status of being above and beyond the ordinary hoi polloi? I would suggest the removal of that. Then, as the Minister has already pointed out, it would fall back to themselves for labour relations, and they have good sense and all the rest of it. Leave it out. Then there would be no fight over who was a professional man.[9]
>
> [Example 3] Mr. Skey: I should like to ask the Minister again if we are not already getting into a position whereby people like chemists and geologists, and so on, are asking for inclusion in their professional status, and if we would not have any number of other groups coming before the government or before the labour relations board asking in many other ways. We would have many other groups of employees and their professional associations. Would the deletion of the clause not save the government a tremendous amount of trouble in the future and place the whole onus on the board for deciding their status?[10]
>
> [Example 4] Mr. MacInnis: If you delete this [professional exclusion clause] altogether you are not compelling doctors, lawyers, or engineers, to come under this Act, but you are doing the same thing with them as you are doing with the plumbers, conductors, street railway men, miners and others. You are leaving them free to make use of this Act or not make use of the Act. I do not think it is democratic procedure to say that a certain class of people cannot take advantage of legislation on our statute book to better their own condition, particularly when their own profession has failed to do that.[11]
>
> [Example 5] Mr. Gillis: I would point out that there is nothing compulsory in the bill. If it applied to doctors, lawyers, engineers and what have you, the first thing they would have to do would be to conform with the mechanics of the bill, form a trade union, get certification and all the rest of it. If they did not want to do that, there is nothing in the bill that compels them to.

---

[8] House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations, at 204.
[9] House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations, at 205.
[10] House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations, at 207.
[11] House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations, at 209.

27. There was considerable debate at the IR Committee about amending the Bill to permit professionals to organize and be certified in their own bargaining unit to guard against them being swept into a larger "all employee" unit that included manual or clerical labourers.[12] The American Taft-Hartley Act, enacted a year earlier in June 1947, had amended the *National Labor Relations Act* to ensure that "professional employees" (including lawyers) would not be swept into a bargaining unit with non-professional employees unless a majority of the professionals voted to join that broader unit. The concern about professionals being included in larger non-professional units included both a practical labour relations element related to a lack of community of interest, and a classist or elitist element expressed as a concern that professionals are not forced to become "trade unionists."

28. This idea that professionals should be able to associate and engage in collective bargaining but that they should not be compelled to join "trade unions" appears at various points in the federal debates. The following are examples:

> [Example 1]: Mr. Dickey: The attitude of the Engineering Institutes across Canada…is that they want their members to deal with their employers as professional groups and not under the same circumstances as trade unions. Now, there is nothing high hat about that. It is simply that the conditions of professional employees are very different from the conditions pertaining to the members of a trade union. The idea of the national association in excluding them is to try to help their membership on a professional basis; that is the whole thing.[13]
>
> [Example 2]: Mr. MacInnes: [Removing the professional exclusion provision] does not make trade unionists of engineers. I want to ease the minds of these professional people on that point. It does not degrade them. This Act does not compel bargaining as trade unions.[14]
>
> [Example 3]: Mr. Adamson: I agree with the minister that the one thing we are trying to prevent is to have professional men as a trade union…. My intention certainly was to keep the profession as a profession and keep them separate and outside a trade union."[15]

29. Some MPs argued that the exclusion of lawyers was unnecessary because lawyers and other professionals were not interested in collective bargaining, and that their professional associations represented their interests in any event. For example, MP Knowles, and MP Croll, both of whom opposed the exclusion of professionals, stated the following at that IR Committee hearings:

> [Example 1]: Mr. Knowles: [S]upposing [the professional exclusion clause] had not been inserted into this bill at all. I do not think either the lawyers or the Bar Association would have

---

[12] See e.g. House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (May 13 1948, at 203; House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (May 18 1948), at 236.
[13] House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (May 18 1948), at 228.
[14] House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (May 13 1948), at 228.
[15] House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (May 18 1948), at 235.

made a clamour to have themselves excluded from the bill. Lawyers are not interested in collective bargaining. It is not an issue for them and the same is true of doctors.[16]

[Example 2]: Mr. Croll: The lawyers are not likely to be asking for a collective bargaining agreement. They have got a better union themselves than the government can ever provide them.

30. The primary argument presented by Minister of Labour Humphrey Mitchell, which ultimately won the day and preserved the professional exclusion, was one of deference to the professional associations that requested to be excluded from the legislation. Mitchell asserted that he felt "obliged" to exclude lawyers because the Canadian Bar Association (CBA) requested the exclusion. This explanation is presented at a variety of points in the debates within the IR Committee and in the legislature. The following is a sample:

[Example 1] Hon. Mr. Mitchell: I might give a review of my position. We spent a good deal of time on the drafting of this legislation. What we did was we forwarded imperfect ideas to all of the national organizations in the country, labour organizations, professional organizations…and employer's organizations. What is going to be the yardstick? We took this as the yardstick, that the expression of the national organization speaking for their constituent members was the majority voice of the profession. That is why that is there. When you come to the medical profession and they pass a resolution and say, "We want to be excluded from certain legislation," then on a fundamental question like that I think you have got to give some respect to the viewpoint expressed by that organization. The same thing applies to lawyers, dentists, architects and now we have got to the engineers. As I said before there is nothing to prevent those people from forming an organization, and I expressed my own opinion that if they did so and they asked for the conciliation services of my department they would certainly get them.

That is the position we are in. What are you going to do? Are you going to listen to the majority opinion of the organizations, or are you not? Whatever you may do about the engineers I think we are certainly obliged to have the lawyers, doctors, architects, and the dentists in the bill. The only reason this discussion has come up is because there is a group inside a profession who feel that particular word 'engineer' should be excluded from the bill.[17] [emphasis added]

[Example 2] Hon. Mr. Mitchell: I have always taken the view that you should listen to the representations made by the parent organizations…. In my judgment due weight had to be given to their representations. It may be proved to these organizations and their membership in the light of experience that their judgement was unsound. If so, then will be the time to amend the section. With labour you listen in the main to representatives from the national organizations and similarly with representations form the employers. The representations we

[16] House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (May 13 1948), at 210.

[17] House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (May 13 1948), at 208. See also House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (May 18 1948), at 236.

> received from the organizations and from professional groups which obtained their status as professional men from provincial legislatures were very powerful.[18]
>
> [Example 3] Mr. Timmins: Speaking for myself as a lawyer and having regard to the representations made to the minister and his department in drawing this clause, the legal profession has said it desired to have lawyers excluded from this Act. I think we should be guided by that.[19]

31. Notwithstanding Minister of Labour Mitchell's claim that the legislature should defer to the opinion of the national professional associations, not all profession associations that requested to be excluded received their wish. For example, the government received requests to be excluded from organizations representing dieticians, land surveyors, chemists, and physicists but none of these professions were excluded. There was little explanation provided by government officials as to why some, but not other professions were excluded. In rejecting the dieticians' request, Mitchell stated simply that dieticians, "do not stand in the same class as the professions of engineering, architecture, dentistry, medicine and the like."[20]

32. The IRDIA passed in June 1948 and included the exclusion of practicing lawyers. That exclusion remained in federal collective bargaining legislation until it was removed in 1973 with the enactment of Bill C-183, An Act to Amend the Canada Labour Code, which I discuss below.

B. The Woods Task Force and Removal of the Exclusion in the Federal Jurisdiction (1972)

33. In 1968, the Federal Task Force on Labour Relations (the "Woods Task Force") released its final report and recommendations for reform of the Canada Labour Code (CLC). The report, entitled Canadian Industrial Relations: Report of the Federal Task Force on Labour Relations, has been described by the Supreme Court of Canada as "Canada's leading Task Force in Labour Relations."[21] The report advocated for an inclusive approach to legislative protections for collective bargaining. The expanded list of exemptions in Canadian labour relations legislation was identified as a problem requiring "corrective action".[22] The Task Force was also critical of the practice of carving out occupations from the dominant collective bargaining legislation and creating special legislation to regulate collective bargaining for those occupations. "This disparity leads to a more fragmented approach to industrial relations than is either necessary or desirable, given the goal of consistency of policy."[23]

34. The Task Force report called the complete exclusion of entire occupations, including law, from protection under collective bargaining legislation "disturbing":

> More disturbing are exemptions which apply to certain groups, such as the traditional professions of law and medicine, and agricultural and domestic workers, where no alternative

---

[18] Hansard, House of Commons Debates, 20th Parliament, 4th Session, v. 6 (June 17 1948), at 5368.
[19] House of Commons Committees, 20th Parliament, 4th Session, Standing Committee on Industrial Relations (May 13 1948), at 210.
[20] Hansard, House of Commons Debates, 20th Parliament, 4th Session, v. 6 (June 17 1948), at 5365.
[21] *Dunmore v. Ontario (Attorney General),* 2001 SCC 94, para. 41.
[22] Woods Task Force, para. 250. (**Appendix A**)
[23] Woods Task Force, para. 252. (**Appendix A**)

> legislative framework is provided. In some cases, as in many of the professions, this deprivation works no hardship on the group itself because it is strong enough to look after its interests without collective bargaining legislation; although not usually without statutory authority to administer an exclusive licencing arrangement. More often than not, the danger in these instances is to the public, since these groups are seldom subject to the same series of checks and balances as unions operating under the labour relations acts and, unlike unions, often confront no opposing force in the form of an organized employers of their services. [24]
>
> [Relevant excerpts from the Woods Task Force are attached as **Appendix A**]

35. The Woods Task Force was supported by independent research studies. One study, written in 1968 by Professor Shirley Goldenberg considered collective bargaining by professional workers.[25] Professor Goldenberg made several recommendations to the Task Force, which are summarized as follows:

    - Statutory collective bargaining protection should be extended to professionals.
    - Collective bargaining is compatible with professional ethics.[26]
    - In extending protective collective bargaining to professionals, and while "recognizing the right to strike as an essential ingredient of the bargaining process", some restrictions are indicated in "exceptional cases" where "a vital public interest" would be jeopardized.[27]
    - It is incumbent on the government that restricts a right to strike by professionals in order to protect a vital public interest to ensure that workers receive a "fair deal."[28]
    - The associations that represent professional workers in collective bargaining must not be the licencing bodies of those professions, because (1) the licensing body has the power to restrict numbers in the profession and thereby drive up the costs to the public which is contrary to the public interest and (2) members of the licensing body will find themselves on opposite sides of the bargaining table which could create a conflict of interest.[29]

      Relevant portions of Professor Goldenberg's book are attached as **Appendix B.**

36. The Woods Task Force ultimately recommended that collective bargaining coverage be extended to professionals and, accepting the recommendation of Professor Goldenberg, recommended that the licencing body for the professional not be the collective bargaining representative for professional employees:

---

[24] Woods Task Force, para. 253. (**Appendix A**)
[25] S. Goldenberg, *Professional Workers and Collective Bargaining* (Ottawa: Task Force on Labour Relations, 1968) (Appendix A)
[26] Ibid. at 96. (**Appendix A**)
[27] Ibid. at 97, 98. (**Appendix A**)
[28] Ibid. at 97-98. (**Appendix A**)
[29] Ibid. at 70-71, 98-99 (**Appendix A**)

> We recommend that the coverage of collective bargaining legislation be extended to employees who are members of licenced professionals, provided the bargaining agent be a separate organization form the licencing body.[30]

37. On March 23, 1972, the federal government ratified ILO Convention 87, Concerning Freedom of Association and the Protection of the Right to Organize, 1948. Convention 87 requires that states give effect to the protected right of all employees "without distinction whatsoever" to join a union or association of the employees' choosing, to engage in collective bargaining, and to strike.[31]

38. The following week, on March 29, 1972, the government introduced Bill C-183, An Act to Amend the Canada Labour Code, which removed the professional exclusion from the CLC, as recommended by the Woods' Task Force. In his introductory speech at first reading, Minister of Labour Martin O'Connell opened his remarks by referencing the recent ratification of Convention 87:

> An essential ingredient of free collective bargaining is freedom of association and protection of the right to organize. In this respect, Mr. Speaker, it is my pleasure to inform the House that Canada has ratified International Labour Organization Convention No 87 which was deposited with the ILO on March 23 by the Canadian Ambassador. Reference to this convention dealing with the right to organize and to be represented by the union of one's choice is made in the preamble of the bill.
>
> Let me know turn, Mr. Speaker, to some of the provisions of the new bill which I believe are consistent with the overall goal of labour legislation which I indicated earlier. First I would like to deal with the extension of bargaining rights. The bill would extend bargaining rights to professional employees who until now have not been entitled to bargain collectively. We believe that these people have tended in recent years to be put into a kind of no man's land between management on the one side and the organized worker on the other, without the right to be certified. We propose to rectify this. But in doing so we recognize that professional employees have specialized knowledge and training and that they may choose to have their own bargaining unit.[32] [emphasis added]

39. I could locate no debate in parliament or in Committee leading to the enactment of Bill C-183 about the removal of the lawyer exclusion in 1972. The Bill extended coverage under the CLC to professionals in the federal jurisdiction, including practicing lawyers, and introduced a definition of "professional employee" (s. 107(1)) and new rules relating to bargaining unit description when professionals were involved (s. 125(3)). In particular, the Board was directed that a unit comprised of only professionals was appropriate unless such a unit would otherwise not be appropriate, that a unit comprised of more than one professional may be appropriate, and that a person performing the functions of a professional but lacking the formal qualification could be included in a unit with the professionals. Today, the same basic model appears in section 27 of the *Canada Labour Code*.

---

[30] Woods Task Force, para. 441 (**Appendix A**)
[31] Convention 87, Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), art. 2. Article 9 provides an exception for the armed forces and police.
[32] Hansard, House of Commons Debates, 28th Parliament, 4th Session, v. 2 (March 29, 1972), at 1271

40. The *Public Service Staff Relations Act* of 1967, which extended collective bargaining rights to federal public sector employees, excluded lawyers employed in the Department of Justice. That exclusion was removed by the *Public Service Labour Relations Act*, S.C. 2003, which came into effect on April 1, 2005. In April 2006, the Association of Justice Counsel (AJC) was certified to represent lawyers of the federal public service.[33] Today, the AJC represents approximately 2600 lawyers employed by the government of Canada. The bargaining unit is comprised solely of lawyers employed in the Law Practitioner Group.[34] The AJC and the Treasury Board have concluded four collective agreements since the AJC was certified. The AJC and Treasury Board have agreed to refer collective bargaining disputes to binding determination under section 182 of the PSLRA.[35]

II. THE TREATMENT OF LAWYERS IN PRIMARY COLLECTIVE BARGAINING LEGISLATION AT THE PROVINCIAL LEVEL: PRIVATE SECTOR

41. The IRDIA served as the template for collective bargaining legislation at the provincial level. By 1955, every province except Saskatchewan had enacted collective bargaining legislation modeled after the IRDIA that included the professional exclusion in language either identical to or closely modeled after that found in the IRDIA, including: Nova Scotia (introduced in 1947), Ontario (1948), Manitoba (1948), New Brunswick (1949), Alberta (1950), Newfoundland & Labrador (1950), British Columbia (1954). Prince Edward Island followed in 1962.

42. Following the federal government's ratification of ILO Convention 87 and the repeal of the professional exclusion in the Canada Labour Code in 1972, most Canadian provinces amended their primary collective bargaining legislation to follow suit, including: Manitoba in 1972, British Columbia (1975), and Newfoundland & Labrador (1977). New Brunswick (in 1971) and Quebec (1964) had repealed the lawyer exclusion earlier. The only provinces to retain the lawyer exclusion in the primary collective bargaining legislation beyond the 1970s were Ontario, Alberta, Nova Scotia, and PEI. These are the only four provinces that retain the exclusion today. Table 1 summarizes these changes as they related to practicing lawyers.

---

[33] *Federal Law Officers of the Crown v. Treasury Board of Canada* (2006) PSLRB 45 (CanLII)

[34] https://www.ajc-ajj.ca/sites/default/files/2019/12/2019_lp_collective_agreement_-en_0.pdf

[35] See e.g. Treasury Board and Association of Justice Counsel, Determination of outstanding issues tied to the renewing the 2014-2018 collective agreement: https://www.ajc-ajj.ca/sites/default/files/2019/12/2018_arbitral_award.pdf

TAB B

Table 1: History of Adoption and Repeal (where applicable) of the Lawyer Exemption in the Principle Collective Bargaining Statutes

Jurisdiction	First Excluded Lawyers from Collective Bargaining Legislation	Removed Exclusion in Private Sector Collective Bargaining Legislation
Canada	1948	1973
Alberta	1950	N/A
British Columbia	1954	1975
Manitoba	1948	1972
New Brunswick	1949	1971
Newfoundland & Labrador	1950	1977
Nova Scotia	1947	N/A
Ontario	1948 Re-introduced in 1995	1992-1995
P.E.I.	1962	N/A
Quebec	1944 (lawyers could organize under Professionals Syndicate Act)	1964
Saskatchewan	N/A	N/A

43. What follows is a summary of the treatment of practicing lawyers under provincial collective bargaining legislation followed by a more detailed summary of the treatment of practicing lawyers employed directly by provincial governments.

A. Alberta

44. Alberta did not initially exclude lawyers or other professionals from the *Labour Act, 1947*. The exclusion was introduced in 1950 adopting the same language found in the IRDIA.[36] A search of the Alberta Legislative Library Scrapbook Hansard for that session of parliament found no references or discussion of the addition of the professional exclusion. Today the exclusion appears in section 1(l)(ii) of the Alberta *Labour Relations Code*.

45. A small number of practicing lawyers employed in Alberta are covered by collective agreements, notwithstanding that practicing lawyers are excluded. These lawyers work for unions that have voluntarily agreed to include the lawyers in a broader bargaining unit. This is the case for example at the Health Services Association of Alberta. However, it is rare for lawyers in the private sector to be unionized in Alberta.

B. British Columbia

46. British Columbia introduced a professional exclusion that mirrored that found in the IRDIA in 1954, including practicing lawyers.[37] That exclusion was removed from the *Labour Relations Code* in 1975 and has not been reinstated.[38]

47. Today, many practicing lawyers employed in BC are unionized and covered by collective agreements. For example, lawyers employed by the BC Teachers' Federation, the Hospital Employees' Union, BC Nurses Union, the BC Government Employees Union, the Public Service Alliance of Canada, Service Employees International Union, and Health Sciences Association of BC are all unionized and covered by collective agreements.

48. The Professional Employees' Association (PEA) was certified to represent lawyers employed by the province's Legal Services Society (LSS) in 1981. In December 2019, the legal aid lawyers engaged in a work to rule strike in support of collective bargaining proposals for higher wages. PEA's Collective Agreement with LSS includes the following clause dealing with "professional responsibilities" (Art. 24):

> The Employer recognizes that an employee must work in a manner consistent with the Professional Conduct Handbook, the Law Society Rules and the codes of ethics established by the Law Society. The Employer recognizes that an employee must be able to act independently in the representation of clients.
>
> No employee will be disciplined for refusal to comply with an Employer-instructed course of action which, in the employee's opinion, conflicts with the aforesaid standards of the Bar, provided that in such a case the employee shall, upon request, be required to provide the

[36] *An Act to Amend the Alberta Labour Act,* 1950, Ch. 34, s. 18.
[37] B.C. *Labour Relations Act, 1954*, c. 17, s. 2(1).
[38] *Labour Code of British Columbia Amendment Act, 1975,* ch. 33, s. 1(b).

violation of the relevant professional standard or code and the Employer shall have the right to seek alternative advice from the Law Society.[39]

49. PEA was certified in 1995 to represent lawyers employed by the provincial Family Maintenance Agency. The collective agreement between these parties also includes provisions governing "professional conduct", including in Art. 26:

> 26.4 Professional Responsibilities
>
> The Employer recognizes that counsel must work in a manner consistent with the Professional Conduct Handbook, the Law Society Rules and the codes of ethics established by the Law Society.
>
> No counsel will be disciplined for refusal to comply with an Employer-instructed course of action which, in the counsel's opinion, conflicts with the aforesaid standards of the Bar, provided that in such a case counsel shall, upon request, be required to provide the violation of the relevant professional standard or code and the Employer shall have the right to seek alternative advice from the Law Society.[40]

50. The PEA also represents lawyers employed by the Law Society of BC after obtaining a certification from the BCLRB in 2006. The collective agreement between the PEA and the LSBC includes a dedicated clause about "Professional Conduct" which reads as follows:

> 1.4 Professional Conduct
>
> a) Nothing contained in this Agreement alters the effect of the Legal Profession Act, the Rules, and the Code of Professional Conduct for BC.
> b) It is understood that the rights and obligations of the employees under this Agreement are subject to their professional obligations under the Legal Profession Act, the Rules and the Code of Professional Conduct for BC.
> c) The Parties agree to work together to attempt to ensure that the rights and obligations of employees under this Agreement do not conflict with their professional obligations under the Legal Profession Act, the Rules and the Code of Professional Conduct for BC.[41]

C. Manitoba

51. Manitoba's *Labour Relations Act* of 1948 excluded professionals including practicing lawyers using the same language found in the IRDIA.[42] However, the professional exclusion was removed in the 1972 *Labour Relations Act*, which also introduced a new definition of "professional employee" and specified that employees who are members of a profession shall not be included in a unit with other employees who are not members of that profession unless a majority of those professional

---

[39] Collective Agreement between BC Legal Services Society and PEA: https://pea.org/system/files/Legal_Services_Society_Collective_Agreement_Oct_1_2014_to_Sept_30_2019.pdf

[40] See Collective Agreement THEMIS Program Management and PEA: https://pea.org/system/files/FMEP-Eighth-Collective-Agreement-FINAL.pdf

[41] See Collective Agreement between LSBC and PEA: https://pea.org/system/files/LSL_CA_2019_JAN_01_TO_2021_DEC_31.pdf

[42] Manitoba *Labour Relations Act, 1948*. c. 27, s. 2(1)(i)

employees wish to be included.[43] Today, these provisions appear at ss. 1 and 39(3) of the *Labour Relations Act*:

> 39(3) The board shall not include professional employees practising a profession in a unit with employees who are not professional employees practising that profession unless it is satisfied that a majority of the professional employees practising that profession wish to be included in the unit; and the board may take such steps as it deems appropriate to determine whether the professional employees wish to be included in the unit.[44]

52. Lawyers employed by several unions in Manitoba are unionized and covered by collective agreements, including the Manitoba Government and General Employees Union, the Manitoba Nurses Union, and the United Food and Commercial Workers. Unionized lawyers employed by unions are typically placed in a bargaining unit with other labour relations officers/staff representatives. The Manitoba Legal Aid Lawyers' Association was certified to represent lawyers employed by Legal Aid Services Society of Manitoba in 1975.[45]

D. New Brunswick

53. New Brunswick's collective bargaining legislation in 1945 did not exclude lawyers, but the *Labour Relations Act, 1949* enacted in April 1949 adopted the definition of employee found in the IRDIA which excluded lawyers.[46] In 1971, the professional exclusion was removed and a new section deeming a bargaining unit comprised of "legal professions" (and other identified professions) to be appropriate, but also permitting professionals to be included in a unit with other employees if a majority of them so wished.[47] The same bargaining unit language today appears in section 1(5)(b) of the *Industrial Relations Act,* which reads as follows:

> 1(5) For the purposes of this Act, …
>
> (b) a unit, consisting solely of members of the medical, or dental, or dietetic, or architectural, or engineering or legal profession qualified to practise under the laws of the Province and employed in that capacity, shall be deemed by the Board to be a unit of employees appropriate for collective bargaining, but the Board may include such members in a bargaining unit with other employees if the Board is satisfied that a majority of such members wish to be included in such bargaining unit.[48]

54. Lawyers employed by several unions in NB are unionized and covered by collective agreements, including at the NB Nurses Union and the NB Union of Public Employees.

---

[43] Manitoba *Labour Relations Act,* 1972, c. 75, s. 1(t), s. 29(3)
[44] *Labour Relations Act,* CCSM, c L 10, s. 39(3)
[45] *Legal Aid Lawyers Association - and - Legal Aid Services Society of Manitoba - and - The Government of Manitoba* , [1975] MLBD No 2
[46] N.B. *Labour Relations Act, 1949* , s. 1(i).
[47] N.B. *Industrial Relations Act, 1971*, c. 9, s. 2(5).
[48] *Industrial Relations Act,* RSNB 1973, c. 1-4, 1(5)(b)

E. Newfoundland and Labrador (NFLD)

55. NFLD's *Labour Relations Act, 1950* excluded professionals including practicing lawyers using the same language found in the IRDIA.[49] However, the professional exclusion was removed in the 1977 *Labour Relations Act*, which also introduced a new definition of "professional employee" and permitted the labour board to find a unit to be appropriate that includes one or more professionals and workers who perform work "closely related" to the work of the professional employees or to recognize a unit comprised of only one profession if the professionals so request.[50] Today, that language appears at section 40 of the *Labour Relations Act*:

> 40. (1) The board may find appropriate a unit of professional employees of 1 or more professions and may include in the unit employees who do work that in the opinion of the board is closely related to the work of the professional employees in the unit.
>
> (2) Where the board considers it desirable to do so, professional employees may, on the request of the majority of them, be formed into a unit restricted to members of 1 profession and employees who do work closely related to the work of those professional employees.

56. Some lawyers employed in the private sector in NFLD are in certified bargaining units. For example, lawyers employed by the Newfoundland Association of Public Employees are represented by the United Food and Commercial Workers in a staff representative bargaining unit, and NAPE represents lawyers employed by the Registered Nurses of NFLD.

F. Nova Scotia

57. Nova Scotia is one of four Canadian jurisdictions that excludes lawyers from coverage under collective bargaining legislation. The province introduced the exclusion of professionals, including practicing lawyers, in the 1947 *Trade Union Act*, using the same language that appeared in the IRDIA.[51] That exclusion is today found in section 2(2) of the *Trade Union Act*, RSNS, c. 475.

G. Ontario

58. Ontario is the only province that has experienced four phases in the treatment of lawyers under collective bargaining legislation: (1) inclusion of lawyers until 1948; (2) exclusion from 1948 to 1992; (3) inclusion from 1992 to 1995; and (4) exclusion again from 1995 to the present. This section reviews this complicated history.

1. The Early Inclusionary Period (1943-1948)

59. Canada's first full-fledged collective bargaining statute modeled after the U.S. Wagner Act, the Ontario *Collective Bargaining Act*, S.O. 1943, c. 4, did not exclude lawyers. The *Collective Bargaining Act, 1943* excluded "domestic servants", police, "the industry of farming", the Hydro-Electric

---

[49] *Labour Relations Act, 1950*, S.N. 1950, No. 15, s. 2(i)

[50] *Labour Relations Act, 1950*, S.N. 1950, No. 15, s. 2(u), s. 39

[51] *Labour Relations Act, 1950*, S.N. 1950, No. 15, s. 2(i). Nova Scotia introduced the exclusion prior to the passage of the *IRDIA,* modeled after the language that had been included in the original Bill 338 adopted by the federal government in 1947. As noted earlier, Bill 338 lapsed and Bill 195 was introduced in 1948 and enacted as the *IRDIA* later that year.

Power Commission of Ontario, and certain municipal corporations and school boards (s. 24) ("Original Exclusions"). In relation to the farming workers exclusion in that legislation, the SCC commented as follows in *Dunmore v. Ontario (Attorney-General)*:

> The enactment of the Collective Bargaining Act, 1943 reflected the legislature's awareness of employer unfair labour practices and its concomitant recognition that legislation was necessary to enable workers' freedom of association. The Collective Bargaining Act, 1943 was enacted against a background of staunch resistance to the labour movement; in large part, it was intended to prevent discrimination against union members. In this context, the exclusion of an entire category of workers from the LRA can only be viewed as a foreseeable infringement of their Charter rights.[52]

60. The *Collective Bargaining Act, 1943* was repealed and replaced in April 1944 by *The Labour Relations Board Act*, 1944, S.O. 1944, c.29, which created the Ontario Labour Relations Board and authorized the application of the Wartime Labour Relations Regulations made under the War Measures Act, including PC 1003 which was adopted in February 1944, to employees and employers governed by provincial jurisdiction. The *Labour Relations Board Act, 1944* carried over (in s. 10) the Original Exclusions found in the *Collective Bargaining Act, 1943* and did not exclude lawyers or other professionals.

61. Between 1944 and 1948, P.C. 1003 was effectively adopted as Ontario collective bargaining law through a series of Regulations.[53] P.C. 1003 applied to federal undertakings and organizations falling within provincial jurisdiction designated as essential to the war effort. It protected a right of "employees" to organize unions without employer reprisals, among other collective bargaining related rights, and defined "employees" as excluding only persons employed in confidential capacity or having the authority to employ or discharge employees and persons "employed in domestic service, agriculture, horticulture, hunting or trapping" (s. 2(f)). P.C. 1003 did not exclude lawyers or other professional employees.

2. Adoption of the Lawyer Exclusion Modeled After the Federal IRDIA: 1948-1992

62. The *Labour Relations Board Act, 1944* was repealed and replaced by *The Labour Relations Act*, *1948,* S.O. 1948, c. 51, which carried over the Original Exclusions initially found in the *Collective Bargaining Act, 1943* and added firefighters to that list of exclusions (s. 9). The *Labour Relations Act, 1948* included few substantive collective bargaining rules, but rather empowered the Lieutenant-Governor in Council to enact Regulations that mirrored federal collective bargaining legislation which had not yet been enacted.

63. This model implemented the promise the government had made in the Speech from the Throne on March 3, 1948 to, "recommend that the labour code which is now before Dominion parliament (Bill 195) be considered for adoption as the labour code for all industry in this province." The Throne speech also noted that discussions had already taken place between the federal and provincial departments of labour.[54] As noted earlier, in the 1940s and 1950s, there was a strong

---

[52] *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, para. 47.
[53] O. Reg. 47/47 *Regulations Made Under the Labour Relations Board Act, 1944 and the Labour Relations Board Act, 1947.*
[54] Ontario Hansard, March 3, 1948 at 8.

push by most provinces and the federal government to develop a de facto national labour code by having the provinces adopt the core elements of the federal legislation through provincial legislation.

64. The Ontario *Labour Relations Act, 1948* became law in April 1948 and the province then waited for the federal government to enact the IRDIA, which occurred in June of that year. In December 1948, the Ontario government filed Ontario Regulation 279/48 which adopted the terms of the IRDIA, including the professional exclusion which read as follows:

> 1(1)(h) Employee means a person employed to do skilled or unskilled manual, clerical, or technical work, but does not include …
>
> (ii) a member of the medical, dental, architectural, engineering or legal profession qualified to practice under the laws of Ontario and in Ontario and employed that capacity.

65. I have reviewed the Ontario Hansard for 1948. There was no debate in the Ontario legislature in the period leading up to the passage of either *The Labour Relations Act, 1948* or Regulation 279/48 of the practicing lawyer and professional employee exclusion.

66. The *Labour Relations Act, 1948* and Regulation 279/48 were later repealed and replaced by *The Labour Relations Act, 1950,* S.O. 1950, c. 34. The 1950 legislation incorporated much of the substance of the IRDIA and Regulation 279/48, including the professional exclusion, which now appeared as Section 3(a):

> (3) For the purposes of this Act, no person shall be deemed to be an employee,
>
> (a) Who is member of the architectural, dental, engineering, legal or medical professional entitled to practice in Ontario and employed in a professional capacity;

67. I reviewed the Hansard and Committee meetings preceding the passage of *The Labour Relations Act, 1950*. There was little discussion or debate about the professional exclusion prior to the passage of the legislation. At the Committee of the Whole held on April 5, 1950, MPP Joe Salsberg of the Labour-Progressive Party questioned the exclusion of lawyers and other professionals found in the draft bill:

> I suggest this is wrong in principle, and that this Legislature should not incorporate in the labour act any such restriction. I know it can be argued that architects, engineers, and other such professional groups are members of professional associations and therefore should not belong to a trade union, but I suggest that it is not our business to prevent them from being considered an employee and be governed by this Bill if they so desire. What I am suggesting is that we leave it to the professional groups, to the individuals, to decide whether or not they want to be part of a trade union, and for the purpose of this Act, to be considered as employees.[55]

[55] Ontario Hansard, 1950, April 5 at C-1, p. 495-496.

A vote was taken on a proposal by MPP Salsberg to delete the professional exclusion (s. 3(a)) of the Bill, which was rejected.[56] There is no other record in the Hansard reports of debates regarding the decision of the Ontario government to exclude lawyers and other professionals and *The Labour Relations Act, 1950* was enacted. No elected official defended or provided a rationale the exclusions.

68. In 1962, the legislation was amended to add "land surveyors" to the list of professional exclusions.[57] In 1975, the exclusion of "engineers" was removed from the list of the professional exclusions and a new provision designating a unit comprised solely of engineers to be appropriate for collective bargaining was added.[58]

69. To conclude, when the practicing lawyer exemption was first introduced into Ontario labour legislation in 1948 there was no rationale provided by Ontario legislators. The exemption was simply included without explanation as part of a wholesale adoption of the federal model of collective bargaining law found in the IRDIA. This followed the general pattern across the country by which provinces simply adopted the exclusions found in the IRDIA with little or no debate or defence of the exclusions.

3. Removal of the Lawyer Exclusion in Ontario from 1992-1995

70. On June 4, 1992, the Ontario government introduced Bill 40, Labour Relations and Employment Statute Amendment Act, which eliminated the professional exclusion, bringing lawyers under collective bargaining legislation for the first time since 1948. Bill 40 deleted section 1(3)(a) (the professional exclusion section), and added a new section dealing with bargaining units for professionals which read as follows:

> 6(4) Subsections (4.1) and (4.2) apply with respect to employees who are entitled to practice one of the following professions in Ontario and who are employed in their professional capacity:
>
> 1. Architecture.
> 2. Dentistry.
> 3. Engineering.
> 4. Land Surveying.
> 5. Law.
>
> (4.1) A bargaining unit consisting solely of employees who are members of the same profession shall be deemed by the Board to be a unit of employees appropriate for collective bargaining.
>
> (4.2) Despite subsection (4.1), the Board may include the employees described in subsection (4.1) in a bargaining unit with other employees if the Board is satisfied that a majority of the employees described in subsection (4.1) wish to be included in the bargaining unit.

[56] Ontario Hansard, 1950, April 5 at C-4, p. 501.
[57] *An Act to Amend the Labour Relations Act*, c. 68, April 18, 1962.
[58] R.S.O. 1970, c. 232, as amended by 1975, c. 76. Today this language is found in s. 9(4) of the Ontario *Labour Relations Act*.

71. There was little discussion in the legislative debates leading to the enactment of Bill 40 on November 5, 1992, about the extension of collective bargaining to professionals. The elimination of the professional exclusion was raised several times in the meetings of the Standing Committee on Resources Development (Standing Committee). On August 4, 1992, Deputy Minister of Labour Jim Thomas commented that one area of reform targeted by Bill 40 was enhancing the ability to organize. In that vein, he observed: "Professional employees and domestics, formerly excluded from the right to organize under the act, are not permitted to organize under the act, are now permitted to organize, just as in most other jurisdictions."[59]

72. There was no discussion at the Standing Committee of the clause in Bill 40 removing the professional exclusion.[60] On October 8, 1992, opposition Progressive Conservative Labour Critic Elizabeth Witmer argued in favour of retaining the professional exclusion when the clause-by-clause discussion of Bill 40 reached section 7(2), the new clause that defined a unit of professionals as appropriate for collective bargaining. MPP Witmer referred to the concerns raised by some employer groups in relation to the difficulties that could arise in the event of a strike by lawyers and psychologists, and asserted the following in relation to the reasons for the professional exclusion:

> The reason for the original exclusion was the perceived inconsistency between a professional's obligation to his or her clients and the right to strike. It was also thought that the right to bargain collectively is not critical to those individuals, because they are governed by their own specific professional regulatory bodies. I would say at this time that the rationale for the original exclusion continues and is very important in our deliberations. I'm concerned that if we go ahead as the government has proposed under Bill 40, professionals would be potentially in a conflict-of-interest situation between their professional responsibilities and the responsibilities and accountabilities that could be demanded by them by virtue of belonging to a trade union.[61]

73. The clause in Bill 40 removing the professional exclusion was approved without further debate and discussion by the Committee of the Whole on October 28, 1992.[62] Bill 40 received Royal Assent on November 5, 1992. As discussed below, in the brief period during which lawyers were covered by the *Labour Relations Act*, lawyers at a variety of workplaces obtained access to coverage under collective agreements.

4. Re-Introduction of the Lawyer Exclusion (1995 to Present)

74. On October 4, 1995, the Ontario government introduced Bill 7, *An Act to Restore Balance and Stability to Labour Relations and to Promote Economic Prosperity* (Bill 7). This followed a campaign

---

[59] Standing Committee on Resources Development, August 4, 1992 at 1440: https://www.ola.org/en/legislative-business/committees/resources-development/parliament-35/transcript/committee-transcript-1992-aug-04

[60] Standing Committee on Resources Development, September 30, 1992 at 1730: https://www.ola.org/en/legislative-business/committees/resources-development/parliament-35/transcript/committee-transcript-1992-sep-30 (the relevant clause was s. 2(2), which attracted no discussion and no amendments in the clause by clause discussion at Committee)

[61] Standing Committee on Resources Development, October 8, 1992 at 1700: https://www.ola.org/en/legislative-business/committees/resources-development/parliament-35/transcript/committee-transcript-1992-oct-08

[62] Ontario Hansard, 35th Parliament, session 2: https://www.ola.org/en/legislative-business/house-documents/parliament-35/session-2/1992-10-28/hansard-1

promise by the Progressive Party of Ontario to repeal the provisions introduced through Bill 40 in their entirety.

75. Bill 7 repealed the *Labour Relations Act* and replaced it with the *Labour Relations Act, 1995,* S.O. 1995, c. 1, Schedule A (Labour Relations Act, 1995). Section 7 of Bill 7 removed practicing lawyers, architects, dentists, land surveyors, and medical doctors from coverage under any collective agreement effective 90 days after the section comes into force and legislatively stripped any such employees from coverage under collective agreements. Section 7 read as follows:

> 7. (1) This section applies with respect to bargaining units that include, on the day this section comes into force, persons who are entitled to practice one of the following professions in Ontario and who are employed in their professional capacity:
>
> 1. Architecture.
> 2. Dentistry.
> 3. Land Surveying.
> 4. Law.
> 5. Medicine.
>
> (2) A trade union that is the bargaining agent for employees in a bargaining unit that includes persons described in subsection (1) ceases to represent the persons described in subsection (1) 90 days after this section comes into force.
>
> (3) A collective agreement that applies with respect to persons described in subsection (1) ceases to apply to them on the earlier of,
>
> (a) the day on which the collective agreement expires; and
> (b) 90 days after this section comes into force.

76. In debates and in Committee leading to the enactment of Bill 7 in November 1995, no explanation or rationale was provided by the government in the legislature or Committee for removing lawyers from coverage under the Labour Relations Act, 1995 and stripping already unionized lawyers from collective agreement coverage beyond the observation that repealing Bill 40 in its entirety had been part of the Progressive Conservative's election platform. The only specific reference to lawyers in the debates appears in the Hansard on October 19, 1995 when David Johnson, Chair of the Management Board of Cabinet, stated in regards to the parallel re-introduction of the lawyer exemption in the *Crown Employees Collective Bargaining Act* (discussed below) that, "the government is willing to establish a framework agreement for limited bargaining for lawyers employed in the public service."[63]

5. Lawyer Collective Bargaining in Ontario Private Sector

77. The temporary removal of the lawyer exclusion in 1992 initiated a brief wave of organizing of lawyers in Ontario. Between 1992-1995, a variety of unions representing bargaining units comprised partially or exclusively of lawyers were either certified by the OLRB or voluntarily recognized by employers. Some examples include:

---

[63] Hansard Reports, Ontario Parliament 36, Session 1 (October 19, 1995) at 1620: https://www.ola.org/en/legislative-business/house-documents/parliament-36/session-1/1995-10-19/hansard#P318_75699

- The Association of Law Offices of the Crown (ALOC) was certified to represent lawyers employed by Workers' Compensation Board.[64]

- The Office and Professional Employees International Union (OPEIU) was certified to represent a unit of employees that included lawyers and articling students employed by Ombudsman Ontario.[65]

- The Brewery, General, and Professional Workers Union (BGPWU) was certified to represent units of lawyers employed by Neighbourhood Legal Services (London & Middlesex) and Brant County Community Legal Clinic.[66]

- The Canadian Association of University Teachers (CAUT) voluntarily recognized a bargaining unit comprised of lawyers in 1993.

78. Several small legal clinics in Ontario have voluntarily recognized OPSEU as the bargaining agent for lawyers employed at the clinics. In some of these cases, the clinics initially took the position that lawyers were excluded from the *Labour Relations Act* and therefore that they could not unionize. However, these clinics dropped that position and agreed to recognize OPSEU after OPSEU threatened to file a Charter challenge against the lawyer exclusion.[67]

79. In 2012 and 2013, more than 80 percent of staff lawyers employed by Legal Aid Ontario (LAO) joined the Society of Energy Professionals (the Society) and the Society asked LAO to begin bargaining towards a framework collective bargaining model.[68] When LAO refused, the Society launched a Charter challenge in 2015 asserting that LAO's refusal to recognize and bargain collectively with the lawyers' chosen bargaining representative violated Section 2(d). The Charter challenge was scheduled to be argued in December 2016.[69]

80. However, in August 2016, with the Charter application looming, LAO agreed to negotiate with the Society on behalf of LAO lawyers towards a Framework Agreement for collective bargaining. In October 2016, a secret ballot vote was conducted, and LAO staff lawyers voted overwhelmingly in favour of unionization. Thereafter, LAO voluntarily recognized the Society as the bargaining representative for a unit described as "all lawyers employed by the LAO in the province of Ontario engaged in the practice of law, save and except lawyers employed in the General Counsel Office, lawyers in labour relations and human resources department, the Senior Advisor Clinics, Special

---

[64] *Workers' Compensation Board*, [1995] OLRD No 875

[65] *Ombudsman Ontario*, [1993] O.L.R.D. No. 466

[66] *Neighbourhood Legal Services (London & Middlesex) Inc.,* [1993] O.L.R.D. No. 1039; Brant County Community Legal Clinic, [1994] OLRD No 529

[67] See for example the voluntary recognition agreement, OPSEU and Advocacy Centre for Tenants Ontario, dated February 20, 2018, paragraph 6. **Attached as Appendix C**

[68] Legal Aid Ontario Lawyers, "Submissions to the Changing Workplaces Review" (September 11 2015): https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/ontario_workplace_review/Legal%20Aid%20Ontario%20Lawyers%20Campaign%20-%20LWS%20Submissions.pdf

[69] Jacques Gallant, "Legal aid lawyers locked in legal battle with province over unionization" Toronto Star (August 13 2016): https://www.thestar.com/news/gta/2016/08/13/legal-aid-lawyers-locked-in-legal-battle-with-province-over-unionization.html

Advisors, Investigators, Supervisory Duty Counsel, Managers and any other person above the rank of Manager." The Charter challenge was withdrawn.

81. Negotiations between LAO and the Society towards a Framework Agreement resulted in a mediation and interest arbitration before William Kaplan in April 2017. Before Mr. Kaplan, LAO argued that bargaining disputes should be resolved by means of "the traditional dispute resolution model for collective bargaining", meaning strike/lockout. The Society argued that interest arbitration should be used. Mr. Kaplan imposed interest arbitration, finding that a work stoppage by LAO lawyers would jeopardize the vital public interest in ensuring people can obtain and afford legal counsel.[70] Today, the Society (now known as the Society of United Professionals) represents approximately 350 staff lawyers employed at LAO.

82. To summarize, notwithstanding the exclusion of practicing lawyers in the OLRA, lawyers employed at a variety of unions and other public interest-based organizations are covered by collective agreements. In some cases, that arrangement dates from the brief window in which the Ontario government removed the lawyer exemption, while in other cases the employers agreed to voluntarily recognize a unit including lawyers after unions filed or threatened to file a Charter application.[71]

83. To the extent that practicing lawyers are included in bargaining units in Ontario today, their status as bargaining unit employees depends entirely on the employer's willingness to permit this. As excluded workers, practicing lawyers have no statutorily protected right to strike similar to other employees represented by a certified union and who may be in the same bargaining unit as the lawyer.

H. Prince Edward Island

84. Prince Edward Island is one of four Canadian jurisdictions that excludes all lawyers from coverage under collective bargaining legislation. PEI did not exclude lawyers or professionals from coverage under the *Trade Union Act* of 1945. However, the 1962 *Industrial Relations Act,* Ch. 18, s. 1(i) excluded professionals, including practicing lawyers, using the same language used in the IRDIA, and added to the list of excluded professions "registered nurses and teachers". There is no PEI Hansard for the period in which the professional exclusion was introduced. Today the professional exclusion appears in section 7(2)(a) of the *Labour Act*, RSPEI 1988, c L-1.

I. Quebec

85. Quebec's *Labour Relations Act* of 1944 excluded lawyers.[72] However, Quebec's *Professional Syndicates Act,* R.S. 1925, c. 255, s. 1 of 1924 recognized and protected rights of professionals to organize associations and unions and to bargain enforceable collective agreements that did not include majoritarianism and exclusivity.

---

[70] *Legal Aid Ontario v The Society of Energy Professionals, IFPTE Local 160*, 2017 CanLII 26673 (ON LA)

[71] Submission of the Society of Energy Professionals to the Changing Workplaces Review, at 24-25: https://d3n8a8pro7vhmx.cloudfront.net/thesociety/pages/3941/attachments/original/1595258280/Changing_Workplaces_Review_Society_Submission.pdf?1595258280

[72] *Labour Relations Act,* RSQ, 1944 c. 30, s. 2(a)

86. The 1964 *Quebec Labour Code* removed the professional exclusion and mandated that professionals "shall necessarily, together with persons admitted to the study of such profession, constitute a separate group" for the purposes of the *Labour Code*.[73] In 1977, the *Labour Code* was again amended to remove the requirement that professionals, including lawyers, be certified into separate bargaining units.[74] Today, the *Labour Code* does not exclude private sector practicing lawyers.

J. Saskatchewan

87. Saskatchewan has never excluded lawyers from its collective bargaining legislation. Lawyers employed by a variety of public and private employers are unionized and covered by collective agreements. For example, lawyers employed by the Human Rights Commission and by some unions, including the Saskatchewan Nurses Union, are in bargaining units that also include non-lawyers.

88. Legal aid lawyers in Saskatchewan are represented by CUPE, Local 1949. The union was certified in 1984 and the bargaining unit now comprises approximately 130 members, including lawyers and other staff, working in legal aid offices across the province. In the last round of bargaining, the unionized legal aid employees voted to strike before a negotiated agreement was reached with the aid of a government mediator.[75] The current collective agreement between CUPE Local 1949 and the Saskatchewan Legal Aid Commission expires in September 2021.[76]

III. Treatment in Provincial Collective Bargaining Legislation of Practicing Lawyers Employed Directly by Provincial Governments

89. The legal treatment of collective bargaining by lawyers employed by Canadian governments can be grouped into three categories:

    1. Jurisdictions which do not exclude government lawyers from collective bargaining legislation and where government lawyers are unionized and bargain with the government over working conditions in *lawyers-only* bargaining units [Federal, Manitoba, New Brunswick, Quebec, and Saskatchewan)

    2. Jurisdictions that exclude government lawyers from collective bargaining legislation, but some government lawyers nevertheless have organized and are covered by some sort of collective agreement or "framework agreement" that governs some conditions of employment for government lawyers. [Ontario (both crown attorneys and civil lawyers), Nova Scotia (crown attorneys only), BC (crown attorneys only)]

    3. Jurisdictions that exclude government lawyers from collective bargaining legislation and there is no collective bargaining that occurs that covers government lawyers. [Newfoundland and Labrador, Alberta, PEI]

---

[73] *Labour Code,* RSQ, 1964, c. 141, s. 20

[74] *An Act to amend the Labour Code and the Labour and Manpower Department Act,* 1977, c. 41, s. 11.

[75] See CUPE Press Release, June 14 2019: https://thestarphoenix.com/news/local-news/legal-aid-union-at-impasse-over-sick-leave-hours-of-work

[76] https://online.flowpaper.com/77b90736/CBASaskLegalAid/

90. Here is a quick summary of the facts that are described in detail in this section:

1. Insofar as practicing civil lawyers and crown attorneys employed by Canadian governments engage in collective bargaining at all, either pursuant to collective bargaining legislature or through voluntary, extra-statutory bargaining with willing governments, they do so in bargaining units comprised solely of lawyers.

2. In Alberta, the only province in which access to statutory collective bargaining coverage is made conditional upon government lawyers joining an existing, broader "all employee" bargaining unit represented by a union they did not select (AUPE), the government lawyers do not engage in collective bargaining, despite being represented by employee associations.

3. Canadian governments have recognized that government lawyers enjoy a distinct community of interest that warrants placing them in their own bargaining unit. This recognition is manifest in legislative provisions that prohibit labour boards from placing government lawyers in a bargaining unit that includes non-lawyers, sometimes with the exception that the lawyers may be included in a larger bargaining unit if a majority of them vote for this arrangement. For example:

   - Federal *Public Sector Labour Relations Act,* s. 57: Board is required to establish bargaining units that align with the government's designated occupational groups, unless doing so would not permit satisfactory representation of employees. The Public Service Labour Relations Board certified the Association of Justice Counsel as the exclusive bargaining agent for all lawyers employed by the Treasury Board in the Law Practitioner occupational group.[77]

   - Manitoba *Labour Relations Act,* s. 39(3): Board is prohibited from placing practicing lawyers in a bargaining unit with non-lawyers, unless a majority of lawyers wish to be included in that broader bargaining unit. The Board certified the Manitoba Association of Crown Attorneys in 1976 to represent both crown prosecutors and civil lawyers employed by the provincial government.

   - New Brunswick *Public Service Labour Relations Act,* s. 30(3): Board is prohibited from including employees from more than one occupational category in a single bargaining unit. In 2010, the Labour Board certified the NB Crown Prosecutors Association as the bargaining agent for the Crown Prosecutors' Group and the NB Crown Counsel Association as bargaining agent for the Crown Counsel Group.

   - Quebec *Public Service Act,* s. 67: Tribunal can only certify an association that represents more than one profession with the consent of a majority of employees who are members of that profession. Prosecutors in Quebec are represented by Association of Attorney-General's Prosecutors of Quebec (ASPGQ), and Civil

[77] *Federal Law Officers of the Crown v. Treasury Board of Canada* (2006) PSLRB 45 (CanLII)

lawyers and notaries employed are represented by Les avocats et notaires de l'État Québécois (LANEQ).

- Between 1993-1995, the lawyer exclusion was removed from the Ontario *Labour Relations Act* and *Crown Employees Collective Bargaining Act,* and the *OLRA* mandated that a bargaining unit comprised solely of employees of a single profession "shall be deemed by the Board to be a unit of employees appropriate for collective bargaining".[78] In 1995, the lawyer exclusion was re-introduced in Ontario.

4. In every Canadian jurisdiction where government lawyers are represented by an association/union, those associations/unions represent only the government lawyers. The pattern across Canada is that government lawyers create and form their own associations/unions rather than join existing unions that also represent non-lawyers.

91. Table 2 provides a brief overview of the law and practice of collective bargaining involving government lawyers across Canada. The remaining paragraphs in this section summarize in greater detail the treatment of government lawyer collective bargaining in Canada's provinces.

Table 2: Summary of Collective Bargaining Treatment of Government Lawyers in Canada

Jurisdiction	Legislative Treatment of Government Lawyers	Collective Bargaining Practice
Federal	Board must have regard to employer's classification of positions, including occupational groups established by the employer. Board must establish units that are co-extensive with the occupational groups established by the employer unless doing so would not permit satisfactory representation of the employee. Federal *Public Sector Labour Relation Act*, s. 57	Association of Justice Counsel represents approximately 2600 government lawyers in the Law Practitioner Group.
Alberta	The *Public Service Employees Relations Act* excludes practicing government lawyers, but s. 13 of that Act permits the Board to include lawyers in a statutorily mandated "all employee" unit represented by the AUPE if a majority of lawyers (and persons	The Alberta Crown Attorneys' Association represents crown attorneys, but the government does not negotiate collective agreements with that Association.

[78] *Act to Amend Certain Acts concerning Collective Bargaining and Employment*, 1992 S.O. 363, s. 7(2)(4.1)

	training to become lawyers) wish to be included in the bargaining unit.	Civil lawyers have an association called Alberta Justice Civil Lawyers' Association, but that Association does not engage in collective bargaining.
British Columbia	The *Public Service Labour Relations Act* excludes practicing government lawyers.	The BC Crown Attorneys' Association is recognized by the government as the exclusive representative of crown attorneys. The parties negotiate agreements that set working conditions for approximately 450 crown counsel. Civil lawyers employed by the provincial government are represented by the BC Government Lawyers' Association. The government does not engage in collective bargaining with BCGLA.
Manitoba	The *Labour Relations Act* does not exclude lawyers. The LRA (s. 39(3)) prohibits the Board from including practicing professionals in a unit with employees who are not members of that profession unless a majority of the professional employees wish to be included in the unit.	Manitoba Association of Crown Attorneys was certified in 1976 and represents both crown prosecutors and civil lawyers employed by the provincial government in a lawyer only bargaining unit.
New Brunswick	The *Public Service Labour Relations Act* does not exclude lawyers. The Act (s. 30(3)) prohibits the Board from including employees in a bargaining unit 'from more than one occupational group'.	The NB Crown Counsel Association was certified in 2010 as the exclusive bargaining agent for the Crown Counsel Group. The NB Crown Prosecutors Association was certified in 2010 as the exclusive bargaining agent for the Crown Prosecutors Group.
Newfoundland and Labrador	The *Public Service Collective Bargaining Act* excludes practicing government lawyers.	The Newfoundland and Labrador Crown Attorneys Association represents crown attorneys, but the government does not engage in collective bargaining with this organization.

TAB B

Nova Scotia	The *Civil Service Collective Bargaining Act* excludes practicing government lawyers.	Crown attorneys are represented by the NS Crown Attorney's Association. Following a strike in 2000, the government agreed to recognize the NSCAA and to bargain "framework agreements". Civil lawyers in Nova Scotia are not represented by an association and do not engage in collective bargaining.
Ontario	The *Crown Employees Collective Bargaining Act* excludes practicing government lawyers.	Crown attorneys are represented by Ontario Crown Attorney's Association (OCAA) and civil lawyers employed by the government are represented by the Association of Law Officers of the Crown (ALOC). The associations bargain with the government as a council. Since 1989, the government has bargained a series of Framework Agreements with OCAA and ALOC.
PEI	The *Labour Act* excludes practicing lawyers.	The PEI Crown Attorneys' Association represents crown attorneys, but that organization does not engage in collective bargaining with the government.
Quebec	Crown attorneys are excluded from the *Labour Code* but are afforded a statutory right to bargain collectively under the *Prosecutors' Act*. The *Public Service Act* permits the government to certify a bargaining unit that includes multiple professions only with consent of a majority of employees in the profession. (s. 67)	Prosecutors are represented by Association of Attorney-General's Prosecutors of Quebec (ASPGQ), which bargains over working conditions with the government. Civil lawyers employed by the government are represented by Les avocats et notaires de l'État Québécois (LANEQ).

Saskatchewan	The *Saskatchewan Employment Act* does not exclude practicing lawyers.	Crown attorneys are represented by the Saskatchewan Crown Attorneys Association (SCAA). SCAA is not certified but the government recognizes it as the bargaining agent for prosecutors. Civil government lawyers are represented by the Saskatchewan Crown Counsel Association (SCCA), which also is not certified. In 2008, the government agreed to bargain a Memorandum of Understanding with SCAA and SCCA that includes processes for establishing compensation for government lawyers.

A. Alberta

92. The *Public Service Employees Relations Act* excludes practicing lawyers (s. 1(l)) but also includes a provision (s. 13) that permits the Board to nevertheless include lawyers in a statutorily mandated "all employee" bargaining unit represented by the Alberta Union of Public Employees if it is satisfied that the majority of lawyers and persons training to become lawyers employed by the government wish to be included in that unit.

93. In his 1988 report for the Ontario government, *The Professional in Government* (Weiler Report), Paul Weiler wrote this about the Alberta model:

> While in form Alberta does permit professional government employees to elect to bargain through the single provincial employee bargaining agent, in practice none of these professional groups wants to be included in that all-employee unit, and thus none of them now have collective bargaining.[79]
>
> Excerpts from the "Weiler Report" are attached as **Appendix D.**

This description remains accurate in 2022. The Alberta Crown Attorneys' Association represents crown attorneys, however the government does not bargain collectively with the ACAA.[80] Civil lawyers have an association called Alberta Justice Civil Lawyers' Association, but that Association also does not engage in collective bargaining.

94. In 2019, the Alberta Labour Relations Board dismissed a Charter challenge filed by ACAA asserting that the requirement in the *PSERA* that crown attorneys join the existing "all employee"

[79] P. Weiler, *The Professional in Government* (Ontario: 1988), at 5. **Appendix D.**
[80] The history of bargaining attempts by the ACAA is recounted at length in *Alberta Crown Attorneys' Association,* (2019) CanLII 113205 (AB LRB).

provincial unit if they want to engage in collective bargaining violated Section 2(d). That decision was upheld by the Court of Queens Bench in 2021.[81] That decision was appealed and the Alberta Court of Appeal is presently scheduled to hear the appeal in March 2023.

B. British Columbia

95. The 1972 *Report and Recommendations of the Commission of Inquiry into Employer-Employee Relations in the Public Service of British Columbia,* entitled "Making Bargaining Work in British Columbia's Public Service" (the "Higgins Report") recommended the extension of statutory collective bargaining to public sector workers in BC.[82]

96. The Higgins Report recommended that the government introduce a new public sector collective bargaining statute, and that public sector employees be placed into one of two bargaining units defined by the statute:

(1) a unit of licenced professionals (the "licenced professional bargaining unit"); and

(2) a single unit comprised of all other public service employees ("public service bargaining unit").

Excerpts from the Higgins Report are attached as **Appendix E.**

97. In response to the Higgins Report, the BC government enacted the *Public Service Labour Relations Act,* 1973 S.B.C. 303. Although the Higgins Report did not single out practicing lawyers for special exemption in its recommendation for the extension of collective bargaining to government employed professionals, section 1(1) of the 1973 legislation excluded from the definition of an "employee", "a person qualified under the *Legal Professions Act*, or an enrolled student under such Act, who is engaged and working in the practice of such profession." The exclusion of government lawyers remains in Section 1 of the *PSLRA* today.

98. I have reviewed the 1973 Hansard debates for Bill 75, *Public Service Labour Relations Act.* I could find no discussion or debate explaining the government's decision to exclude licenced government lawyers in the *Public Service Labour Relations Act* of 1973.

99. Crown attorneys are represented by the BC Crown Counsel Association which was recognized in 2000 as the exclusive bargaining agent pursuant to the *Crown Counsel Act,* RSBC 1996, c. 87. Civil lawyers employed by the BC government are represented by the BC Government Lawyers' Association. The BC government does not engage in collective bargaining with the BCGLA.

C. Manitoba

100. Section 39(3) of the *Labour Relations Act* prohibits the Board from including practicing lawyers in a bargaining unit with non-lawyers unless a majority of lawyers wish to be included in that broader unit.

---

[81] *Alberta Crown Attorneys' Association,* (2019) CanLII 113205 (AB LRB), application for judicial review dismissed, *Alberta Crow Attorneys' Association v Alberta (Justice and Solicitor General)*, 2021 ABQB 949.

[82] "Making Bargaining Work in British Columbia's Public Service", *Report and Recommendations of the Commission of Inquiry into Employer-Employee Relations in the Public Service of British Columbia* (December 1972), H.D. Higgins, Chair.

101. The Manitoba Association of Crown Attorneys (MACA) was created in 1974 and was certified to represent crown attorneys in 1976. Today, the MACA represents over 160 civil lawyers and Crown Attorneys employed by the government, and bargains collective agreements with the Province of Manitoba. The bargaining unit description reads as follows:

> The terms of this Agreement shall apply to persons employed in positions within the bargaining unit of the Manitoba Association of Crown Attorneys as set forth below: Crown Attorneys employed in the Legal Services Branch; Crown Attorneys employed in the Manitoba Prosecution Service; Crown Attorneys employed in the Legislative Counsel Office; Legal Counsel employed by the Public Trustee.

The collective agreement includes a detailed procedure for renewing collective agreements that includes binding interest arbitration in the event of a bargaining impasse. [83]

D. New Brunswick

102. Until 2009, the NB *Public Service Labour Relations Act* defined lawyers employed as legal officers under the Attorney General as "persons employed in a managerial or confidential capacity" and therefore lawyers were excluded from collective bargaining under the legislation. That Act also excluded other employees, including "casual" employees. In a decision dated June 17, 2009, the Court of Queen's Bench struck down the exclusion of casual employees as a contravention of Section 2(d) of the Charter. The government did not attempt to defend the contravention as justified under s. 1 and the Court suspended declaration of invalidity for 12 months.[84] The exclusion of casuals was repealed in April 2010.[85]

103. On May 22, 2009, the government introduced Bill 80, *An Act to Amend the Public Service Labour Relations Act* which removed legal officers employed by the Crown from the "managerial and confidential capacity" definition with the result that government lawyers would became eligible to participate in collective bargaining under the legislation.[86] When he introduced Bill 80, Minister of Human Resources Rick Brewer explained that the change was due to the Supreme Court of Canada's recent decisions recognizing "the right to join a union":

> The Public Service Labour Relations Act governs labour relations and collective bargaining for New Brunswick's public service. The Act defines which employees can belong to a union and bargain collectively. At this time, legal officers under the jurisdiction of the Attorney General are prohibited from doing so. Today, we are proposing an amendment that will allow these Crown lawyers to be represented by a bargaining agent, to seek certification as a bargaining unit, and to negotiate collective agreements with their employer. The Supreme Court of Canada has ruled in other jurisdictions that the right to join a union is protected under the Canadian Charter of Rights and Freedoms. With this amendment, we are

---

[83] See https://www.gov.mb.ca/csc/labour/pubs/pdf/agreements/mb_asso_attorney.pdf at 57.
[84] *CUPE v. PNB*, 2009 NBQB 164 (CanLII).
[85] *An Act to Amend the Public Service Labour Relations Act,* SNB 2010, c. 20
[86] *Bill 80*, *An Act to Amend the Public Service Labour Relations Act,* SNB 2009, c. 39

demonstrating the commitment of the province of New Brunswick to respect the Supreme Court's ruling.[87]

NB Journal of Debates, excerpts attached as **Appendix F.**

104. This same message was repeated by Mr. Brewer at second reading on June 16, 2009, at which time he also referenced that the impetus was the SCC decision in *BC Health Services:*

> In essence, the amendment will allow Crown lawyers to be treated like all other unionized employees. The Supreme Court of Canada has ruled that similar provisions in other jurisdictions are unconstitutional under the Charter of Rights and Freedoms. The court has ruled that the right to join a union and to bargain for the terms and conditions of employment is protected under the freedom of association provisions of the Charter.
>
> As a government, we are proactively making this change to meet the Supreme Court's expectations. Approximately 90 people will be affected by this amendment. They include drafters of legislation, Crown prosecutors, and legal counsel serving with the Office of the Attorney General. We do not anticipate any change in service to the public as a result of this amendment. The Public Service Labour Relations Act provides for essential services in the event of any labour dispute. This would apply to lawyers, as well as to other unionized groups in the public service. We would expect a high level of lawyers to be designated essential, given the importance of the service they provide. The designations will be determined by the Labour and Employment Board.[88] …
>
> This group of employees had been considered to be unable to bargain. Due to a Supreme Court ruling, they do have that right, so we are being proactive about putting this amendment in place now.[89]

105. Bill 80 received assent on June 19, 2009. Section 24(5) of the *Public Sector Labour Relations Act* now requires the Labour Board to recognize as an appropriate bargaining unit a unit comprised of "all of the employees in an occupational group", with the possibility of exclusions for employees who supervise employees in the occupational group. Section 30(3) specifies that when determining if a group of employees constitutes an appropriate bargaining unit, that the Board "shall not include employees from more than one occupational category".

106. On January 8, 2010, the NB Crown Counsel Association was certified to represent a bargaining unit comprised of the Crown Counsel Group and the NB Crown Prosecutors Association was certified to represent the Crown Prosecutors Group. The employer in both certifications was the Board of Management. Section 43.1 of the NB PSLRA requires an essential services agreement be concluded that would restrict the right to strike of some practicing lawyers.[90]

107. In 2014, the Professional Institute of the Public Service of Canada (PIPSC) was certified as the bargaining agent for a unit comprised of lawyers employed by the NB Legal Aid Services

---

[87] NB Journal of Debates (Hansard), May 22 2009, at 22. **Attached as Appendix F.**
[88] NB Journal of Debates (Hansard), June 16 2009, at 36. **Attached as Appendix F.**
[89] NB Journal of Debates (Hansard), June 16 2009, at 44. **Attached as Appendix F.**
[90] See *New Brunswick Crown Prosecutors Association,* (2012) CanLII 25296 (NBLEB)

Commission in the Legal Aid Lawyer Group within the Scientific and Professional Occupational Category.[91]

E. Newfoundland and Labrador

108. The NFLD *Public Service Collective Bargaining Act* excludes lawyers employed in the Department of Justice and as legislative counsel.[92] Crown Attorneys are represented by the Newfoundland and Labrador Crown Attorneys Association (NLCAA), which has been recognized by the government as the representative of crown attorneys, but the parties do not engage in collective bargaining. Civil lawyers employed by the NFLD government are not represented by any employee association.

F. Nova Scotia

109. The *Civil Service Collective Bargaining Act,* RSNS 1989, c 71, excludes from coverage any employees who are "employed in a managerial or confidential capacity" and then at s. 11(2)(g) defines that category as including any person who is a member of the legal profession "qualified to practice and employed in that capacity."

110. The NS Crown Attorneys Association (NSCAA) was registered under the NS *Societies Act* in 1992. The NSCAA represents the interests of crown attorneys in employment related matters, and the crown attorneys have occasionally engaged in strikes to advance their interests, including in 1998 and again in 2019. Over 90 percent of crown attorneys participated in the 1998 strike over compensation and other working conditions. This strike led the province in 2000 to recognize the NSCAA as the exclusive representative of crown attorneys in NS and to enter into a Framework Agreement that establishes a system of collective bargaining that included access to conciliation and interest arbitration to resolve bargaining disputes.[93] The parties have resorted to interest arbitration to resolve bargaining disputes on multiple occasions since 2000.

111. Pursuant to the Framework Agreement, the parties negotiate Employment Agreements that set out terms and conditions of employment for crown attorneys. The Employment Agreement includes detailed provisions relating to working conditions and a no strike or lockout clause.[94] Although the province initially resisted the inclusion of a grievance and arbitration process to resolve rights disputes, after the SCC decision in *BC Health Services* in 2007, the province agreed to NSCAA's long-standing efforts to obtain such a process.[95]

---

[91] See Collective Agreement between PIPSC and NB Legal Aid Services Commission, https://pipsc.ca/groups/nb-la

[92] *Public Service Collective Bargaining Act*, RSNL 1990, c P-42, s. 2(1(i)(ix)

[93] Shelagh Campbell, "Continental Drift in the Legal Profession: The Struggle for Collective Bargaining by Nova Scotia's Crown Prosecutors" PhD Dissertation, St. Mary's University, 2010, at 193: http://library2.smu.ca/xmlui/handle/01/23268#.X490dC8ZOqc

[94] See Employment Agreement, April 2015 to March 2019: https://novascotia.ca/psc/pdf/employeeCentre/collectiveAgreements/NS_Crown_Attorneys_Agreement_April_1_2015_-_March_31_2019.pdf

[95] Shelagh Campbell, "Continental Drift in the Legal Profession: The Struggle for Collective Bargaining by Nova Scotia's Crown Prosecutors" PhD Dissertation, St. Mary's University, 2010, at 196: http://library2.smu.ca/xmlui/handle/01/23268#.X490dC8ZOqc

112. The province and the NSCAA entered into a renewed Framework Agreement with a term running from 2012 to 2022. During bargaining towards a renewal Employment Agreement in December 2015, the province introduced Bill 148, *Public Services Sustainability (2015) Act,* SNS 2015, c 34, which would impose wage freezes on all public sector employees (including crown attorneys) for two years and then mandate small raises for another two years. Bill 148 was not proclaimed until August 2017. However, in June 2016, NSCAA agreed to those wages in a renewed Employment Agreement with the province with an expiration date in March 2019. In exchange, the province agreed to a renewal Framework Agreement with a term from 2012 to 2046. The new Framework Agreement again included the right of access to binding interest arbitration if bargaining for a renewal Employment Agreement reached an impasse.

113. In October 2019, during the conciliation process to renew the Employment Agreement, the province introduced Bill 203, *Crown Attorneys Labour Relations Act,* SNS 2019, c 23. That Bill would have amended the Employment Agreement and the Framework Agreement to remove access to interest arbitration and replace it with a "right to strike" governed by the *Trade Union Act* but subject to an essential services agreement or order. NSCAA claimed that virtually every crown attorney would fall within the definition of an "essential service" under this new legislation and, on October 23, the crown attorneys commenced a withdrawal of services in protest except for sufficient workers to continue matters involving serious offences.[96] The province then filed an action and motion seeking an injunction ordering an end to the strike and arguing, *inter alia,* that the strike constituted a violation of the Employment Agreement and Framework Agreement 'no strike' clauses.[97] See Notice of Action attached as **Appendix G**. Ultimately that action was withdrawn after the parties reached a settlement on a renewed Employment Agreement and in March 2020 the province rescinded the *Crown Attorneys Labour Relations Act.*

114. Civil lawyers employed by the Nova Scotia government are not represented by an association.

G. Ontario

115. The *Crown Employees Collective Bargaining Act*, 1972 S.O. Ch 67, introduced in 1972, included the same professional exclusions as the *Labour Relations Act*, including practicing lawyers (s. 1(1)(iv)).

1. History of the Government Lawyer Exclusion in Ontario and Lawyer Bargaining in Practice

116. Ontario Crown attorneys formed an association, the Ontario Crown Attorney's Association (OCAA), in the 1940s to organize social events and various professional activities. By the 1980s, OCAA was engaging in more formal negotiations with the government over salaries and other terms of employment. In December 1987, the Association of Law Officers of the Crown (ALOC) was formed to represent the interests of civil lawyers employed by the province in a government commissioned study of working conditions of professionals in the government chaired by

[96] Taryn Grant, "Nova Scotia Crown attorneys are not backing down in labour dispute with province" Toronto Star, October 23 2019: https://www.thestar.com/halifax/2019/10/23/nova-scotia-crown-attorneys-are-not-backing-down-in-labour-dispute-with-province.html

[97] Notice of Action, Attorney General of Nova Scotia and Nova Scotia Crown Attorneys' Association, October 23, 2019. **Attached as Appendix G.**

Professor Paul Weiler ("the Weiler Report", attached as **Appendix D**).[98] As discussed in Part IV below, the Weiler Report recommended collective bargaining for professionals and binding interest arbitration in the event of disputes about compensation. Under Weiler's proposed model, government lawyers would have had the option of joining an existing OPSEU bargaining unit that covered non-lawyers or dealing with the government through their own lawyers-only unit represented by an association of their own choosing.

117. In July 1989, following the release of the Weiler Report but before any legislative reform, the government and OCAA and ALOC signed a First Framework Agreement on Collective Bargaining that described a process of voluntary recognition and collective bargaining that included binding arbitration in the event of bargaining impasse. In the years that followed, a series of collective agreements were negotiated, the first covering 1989-1990, and then subsequent one-year agreements for the years 1991, 1992, and 1993.[99]

118. In 1993, the Ontario government amended the *Labour Relations Act* and CECBA to remove the professional exclusion, extending the statutory collective bargaining model to government lawyers, including a right to strike subject to an agreement or order on essential services.[100] At the same time, the government terminated, effective at the end of 1994, the First Framework Agreement that the Ontario government had entered into with OCAA and ALOC.[101] The amended *Labour Relations Act* deemed that a bargaining unit comprised solely of employees of a single profession was appropriate for collective bargaining.[102]

119. When these amendments to the CECBA were being introduced in 1993, there was little debate in the legislature about whether lawyers should have a statutorily protected right to collective bargaining. Insofar as the removal of the lawyer exclusion from the CECBA was debated at all, the focus was on the question of whether government lawyers should have a right to strike or access to interest arbitration if bargaining reached an impasse. The Law Society of Upper Canada's secretary treasurer sent a letter to the government expressing concern about the extending a right to strike to Crown lawyers that provided as follows:

> The Law Society of Upper Canada makes no submission with respect to the extension of rights to organize and bargain collectively to qualified lawyers employed in a professional capacity who are crown employees. It is assumed, however, that the extension of such rights would be governed by legislation similar to that applicable to other crown employees and that the right to strike would be prohibited. The Law Society of Upper Canada submits that crown attorneys in criminal proceedings or civil attorneys who represent the government in other matters should not be given the right to strike, and they do not want the right to strike.[103]

---

[98] T. Hadwen, et al, *Ontario Public Service Employment and Labour Law* (Toronto: Irwin, 2005), at 288; Paul Kaufman, "ALOC at 25 Years" (July 2013): http://www.oba.org/en/pdf/sec_news_pub_jul13_kau_alo.pdf

[99] T. Hadwen, et al, *Ontario Public Service Employment and Labour Law* (Toronto: Irwin, 2005), at 288.

[100] *An Act to revise the Crown Employees Collective Bargaining Act, to amend the Labour Relations Act and to make related amendments to other Acts*, S.O. 1993, Ch. 38 (Bill 117)

[101] *An Act to revise the Crown Employees Collective Bargaining Act, to amend the Labour Relations Act and to make related amendments to other Acts*, S.O. 1993, Ch. 38 (Bill 117), s. 61.

[102] *Act to Amend Certain Acts concerning Collective Bargaining and Employment,* 1992 S.O. 363, s. 7(2)(4.1)

[103] Ontario Hansard, December 13, 1993, at 2040: http://hansardindex.ontla.on.ca/hansardeissue/35-3/l097b.htm

ALOC and OCAA also supported interest arbitration over the strike/lockout route.[104]

120. Bill 117 was enacted in December 1993. The Bill terminated the voluntary Framework Agreement and Collective Agreement effective December 31, 1994. In response, both ALOC and OCAA applied to be certified in early 1995, however the government agreed to bargain a Second Framework Agreement outside of the *Labour Relations Act* and the parties entered into a new Framework on March 3, 1995 that included binding interest arbitration.[105] However, in November 1995, the CECBA was once again amended by Bill 7: the professional exclusions were re-introduced and the Second Framework Agreement dated March 3, 1995 was terminated.[106] The lawyer exclusion has remained to this day, now found in section 1.1(3) of the CECBA.

121. Notwithstanding the exclusion of lawyers in the CECBA, the Ontario government continued to voluntarily recognize OCAA and ALOC as a council and to engage in collective bargaining over working conditions. The parties entered into a new Third Framework Agreement in 1998 that include a binding interest arbitration process to resolve bargaining disputes. By that time, the parties had been without a collective agreement since 1992. Collective bargaining towards a new collective agreement began in 1999 and reached an impasse on the issue of salaries and the dispute was referred to a board of arbitration chaired by Arbitrator William Kaplan, which ordered a 30 percent salary increase over two years ("Kaplan Award").[107] The Third Framework Agreement in effect at the time of the Kaplan Award expired in December 2001 after which the parties commenced bargaining towards a new Fourth Framework Agreement.

122. The Fourth Framework Agreement covered the period 2002 to 2013 (later extended to 2018). That Agreement replaced the binding arbitration mechanism found in the earlier Framework Agreements with a final offer selection process that was not binding on the government. The government could decline to accept the arbitrator's award. ALOC and OCAA later argued in an interest arbitration hearing that the Fourth Framework Agreement was negotiated "with a gun to our head" because without a Framework Agreement the associations would have no legal relationship with the employer that would protect a right to bargain.[108] The parties bargained several new collective agreements under the Fourth Framework Agreement.

123. In July 2010, OCAA and ALOC gave notice to the government that they intended to file a Charter challenge under s. 2(d) of the Charter regarding the constitutionality of the lawyer exclusion in the CECBA, the Fourth Framework Agreement itself, and the government's conduct under that Framework Agreement. In agreement reached in August 2010, OCAA and ALOC agreed not to proceed with that Charter application as part of a settlement that led to a Fifth Framework Agreement that would operate until 2057 and that included a zero percent wage increase and a revised bargaining dispute resolution process.[109]

---

[104] Ontario Hansard, December 13, 1993, at 2040: http://hansardindex.ontla.on.ca/hansardeissue/35-3/l097b.htm

[105] T. Hadwen, et al, *Ontario Public Service Employment and Labour Law* (Toronto: Irwin, 2005), at 289.

[106] Bill 7, *An Act to Restore Balance and Stability to Labour Relations and to Promote Economic Prosperity,* (1995) S.O. 1 (1995), Part II, s. 13(3), s. 67(7)

[107] *In the matter of an interest arbitration between ALOC and OCAA and the Crown in the Right of Ontario (Management Board of Cabinet),* October 26 2000 (Kaplan, Paliare, Dissent: Gray)

[108] *The Association of Law Officers of the Crown (ALOC) v Ontario (Management Board of Cabinet),* 2014 CanLII 87074 (ON LA), http://canlii.ca/t/ghg0j

[109] See settlement preceding the Fifth Framework Agreement between OCAA, ALOC, and the government (attached as **Appendix H**), at paragraph D(2): "The Employer and ALOC/OCAA agree that these amendments to the Framework

See Fifth Framework Agreement between OCAA, ALOC, and the government, attached as **Appendix H**.

124. The Collective Agreement between the government and ALOC and OCAA includes the following recognition clause:

> 1.1 This Agreement applies to all lawyers represented by the Association of Law Officers of the Crown (hereinafter referred to as "ALOC") and the Ontario Crown Attorneys' Association (hereinafter referred to as "OCAA") pursuant to the 2002-2057 Framework Agreement.
>
> 1.2 The Government of Ontario as the Employer recognizes a council comprised of OCAA and ALOC as the exclusive bargaining agent representing lawyers employed in their professional capacity to negotiate the terms and conditions of employment pursuant to the 2002-2057 Framework Agreement, which Framework Agreement remains in full force and effect in accordance with its terms, including provision for enforcement of the Framework Agreement.
>
> 1.3 For greater certainty, OCAA represents lawyers employed in their professional capacity in the Criminal Law Division including fee-for-service lawyers who are either employees or dependent contractors as defined by the Labour Relations Act.
>
> 1.4 For greater certainty, ALOC represents all other lawyers employed by the Government of Ontario including lawyers employed in Commission Public Bodies prescribed under the Public Service of Ontario Act, 2006 and any fee-for-service lawyers who are either employees or dependent contractors as defined by the Labour Relations Act. ALOC also represents all articling students, including in both the criminal and non-criminal law divisions.
>
> A copy of the Collective Agreement between ALOC, OCAA and the Ontario government is attached as **Appendix I.**

125. In 1995, during the period in which lawyers were not excluded from the OLRA, the OLRB found ALOC to be a "trade union" for the purposes of the OLRA and certified the union to represent a bargaining unit comprised of lawyers employed by the Workers' Compensation Board.[110] However, after the 1995 amendments to the CECBA that re-introduced the lawyer exemption, the OLRB ruled that ALOC was no longer an "organization of employees" and therefore was not a "trade union" for the purposes of the OLRA.[111]

Agreement resolve any and all disputes regarding the constitutionality of the exclusion from the Crown Employees Collective Bargaining Act, 1993 pursuant to s. 1.1(3) paragraph 5, the content of the Framework Agreement and the conduct of the parties under the Framework Agreement."

[110] *Workers Compensation Board,* [1995] OLRD No. 875

[111] *Crown in the Right of Ontario,* [1999] OLRB Rep. May/June 383

126. Today, ALOC represents approximately 750 lawyers employed by the Ontario government outside of the Criminal Law Division.[112] The OCAA represents over 1000 assistant crown attorneys and crown counsel.[113]

2. Decision of the ILO's Committee on Freedom of Association in Complaint Challenging Statutory Exclusion of Government Lawyers (1997)

127. In 1996, the Canadian Labour Congress (CLC) submitted a complaint to the International Labour Organization's Expert Committee on Freedom of Association (CFA) that challenged the exclusion of lawyers and other professionals from coverage under the Ontario *Labour Relations Act* in Bill 7 (1995). The complaint referenced the removal of bargaining rights from government lawyers.[114] The CLC argued, *inter alia*, that by removing professionals from statutory collective bargaining protections against reprisals and that support collective bargaining and the right to strike, the Ontario government had contravened fundamental ILO Conventions, including the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98),* as well as the *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).* Canada ratified C87 in 1972 and C98 in 2017. [115]

128. In its Reply to the Complaint, the Ontario government argued with regard to the professional exclusions, including the lawyer exclusion, "that labour laws originally enacted with industrial settings in mind are not always suitable for non-industrial workplaces, such as private homes and professional offices, where occupational duties and professional obligations may not be compatible with the highly formalized terms and conditions of employment and at least somewhat adversarial nature of relationships typical of a unionized environment."[116]

129. The CFA concluded that the exclusion of lawyers from collective bargaining legislation was inconsistent with Convention 87, as was the law decertifying lawyer bargaining units and the absence of protections for the right of lawyers to strike in Ontario law. The CFA noted that governments are required to ensure that statutory protections are in effect "accompanied by civil remedies and sufficiently dissuasive sanctions" that protect all employees, including lawyers, "protection against acts of anti-union discrimination at the hands of the employer."

130. The CFA's conclusions on these points are reproduced below:

> 182. The Committee would first recall that Article 2 of Convention No. 87 (ratified by Canada) is designed to give expression to the principle of non-discrimination in trade union matters, and the words "without distinction whatsoever" used in this Article mean that freedom of association should be guaranteed without discrimination of any kind based on occupation, etc. (See Digest, op. cit., para. 205.) Furthermore, by virtue of the principles of freedom of

---

[112] http://www.aloc.ca/About-ALOC.aspx
[113] https://www.ocaa.ca/about-us/
[114] CFA Report No 308, 1997 (Canada) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2904114, para. 153.
[115] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098
[116] CFA Report No 308, 1997 (Canada) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2904114, paragraph 172

association, all workers - with the sole exception of members of the armed forces and police - should have the right to establish and to join organizations of their own choosing. As concerns domestic workers, the Committee recalls the Committee of Experts' position that, since these workers are not excluded from the application of Convention No. 87, they should be governed by the guarantees it affords and should have the right to establish and join occupational organizations (General Survey on freedom of association and collective bargaining, 1994, para. 59).

183. Furthermore, noting that the exclusion of agricultural and domestic workers and certain categories of professional employees also means that these workers are not covered by the provisions of the LRA granting and protecting strike action, the Committee recalls that it has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests (see Digest, op. cit., para. 474). However, the right to strike may be restricted or prohibited only: (1) with respect to public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of whole or part of the population) (see Digest, para. 526). The Committee has always been of the view that agricultural activities do not constitute an essential service (see Digest, para. 545). As regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services and the public service, restrictions should be accompanied by adequate impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented (see Digest, op. cit., para. 547).

184. In light of the above principles, the Committee, referring also to the comments addressed to the Government by the Committee of Experts on the Application of Conventions and Recommendations, calls upon the Government to take the necessary measures to ensure that agricultural and horticultural workers, domestic workers, architects, dentists, land surveyors, lawyers and doctors all enjoy the protection necessary, either through the LRA or by means of occupationally specific regulations, to establish and join organizations of their own choosing. It also requests the Government to take the necessary measures to ensure that the right to strike is not denied to agricultural and horticultural workers, domestic workers, architects, land surveyors and lawyers and to ensure adequate compensatory guarantees where this right may be restricted in respect of the medical profession.

185. As concerns the exclusion of these workers from the collective bargaining machinery established by virtue of the LRA, the Committee notes the complainant's contention that the employers concerned are no longer under any legal obligation to bargain with unions representing the affected workers or to engage in any bargaining whatsoever regarding the terms and conditions of employment. Furthermore, the complainant alleges that these workers are denied the protection against anti-union discrimination and employer interference afforded in the LRA.

186. While not neglecting the importance it places on the voluntary nature of collective bargaining, the Committee recalls that measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements (see

Digest, op. cit., para. 781). Furthermore, the preliminary work for the adoption of Convention No. 87 clearly indicates that "one of the main objects of the guarantee of freedom of association is to enable employers and workers to form organizations independent of the public authorities and capable of determining wages and other conditions of work by means of freely concluded collective agreements". (See Digest, op. cit., para. 799.) As concerns protection against anti-union discrimination, the Committee notes that section 81(1) of Bill 7 only protects agricultural workers from discrimination in employment on the grounds that the person was a member of a trade union or had exercised or attempted to exercise any rights under the ALRA which was subsequently repealed by the 1995 Act. Thus, it appears that any union activity carried out by agricultural workers after the entry into force of Bill 7 would not be statutorily protected, nor would such activities carried out by the other groups of workers not covered by the protective provisions of the LRA. The Committee would recall in this respect the need to ensure by specific provisions, accompanied by civil remedies and sufficiently dissuasive sanctions, the protection of workers against acts of anti-union discrimination at the hands of the employer.

187. The Committee therefore considers that the absence of any statutory machinery for the promotion of collective bargaining and the lack of specific protective measures against anti-union discrimination and employer interference in trade union activities constitutes an impediment to one of the principle objectives of the guarantee of freedom of association, that is the forming of independent organizations capable of concluding collective agreements. It requests the Government to take the necessary measures so that agricultural and horticultural workers, domestic workers, architects, dentists, land surveyors, lawyers and doctors have access to machinery and procedures which facilitate collective bargaining and to ensure that these workers enjoy effective protection from anti-union discrimination and employer interference.

188. Noting further the complainant's allegation that the organizations which had already been created and recognized as bargaining agents in the agricultural sector and among professional employees (following the amendments which extended the application of the LRA to these workers) were decertified by virtue of sections 7(2) and 80(3) of Bill 7, the Committee requests the Government to take the necessary measures to ensure their re-certification and to keep the Committee informed of the progress made in this regard.

189. Finally, noting that the collective agreements pertaining to agricultural workers and professional employees which had been entered into by virtue of the pre-1995 version of the LRA were annulled under sections 7(3) and 80(2) of Bill 7, the Committee would recall that the suspension or derogation by decree - without the agreement of the parties - of collective agreements freely entered into by the parties violates the principle of free and voluntary collective bargaining (see Digest, op. cit., para. 876). The Committee therefore requests the Government to revalidate the collective agreements in question and to keep it informed of the progress made in this regard. [117]

[117] CFA Report No 308, 1997 (Canada) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2904114

H. Prince Edward Island

131. Government lawyers are excluded from the *Labour Act* (s. 7(2)(a) and the *Public Service Act* (s. 43(2)). An organization known as the PEI Crown Attorneys' Association has existed in the past, but I have been unable to confirm whether that Association is still active. In any event, no association representing government lawyers has ever engaged in collective bargaining with the government.

I. Quebec

132. Crown prosecutors in Quebec are excluded from the *Labour Code.*[118] However, prosecutors are afforded a statutory right to associate and to bargain collectively in the *Act Respecting the Process for Determining the Remuneration of Criminal and Penal Prosecuting Attorneys and Respecting their Collective Bargaining Plan* (Prosecutors' Act).[119] The prosecutors are represented by the Association of Attorney-General's Prosecutors of Quebec (ASPGQ), which bargains over working conditions with the government. The ASPGQ and its members engaged in strikes in 1986 and 2002, before a legal right to strike was recognized for prosecutors in Quebec.[120] In 2004, the Quebec government granted prosecutors a legally protected right to strike, which was exercised for the first time in 2011 (as explained below).[121]

133. Civil lawyers and notaries employed by the Quebec government are represented by an association recognized under the Professional Syndicates Act known today as Les avocats et notaires de l'État Québécois (LANEQ). LANEQ, which was previously known as the Association of State Jurists, was accredited under the Public Service Act in 1996. Section 66 of the Public Service Act states that the government can certify an association that represents professionals, including lawyers, and section 67 provides that "with the consent of a majority of the employees who are members or admitted to the study of a profession" (including law), "certification may be granted to an association representing more than one of such groups".[122] LANEQ members have a statutory right to strike subject to certain rules requiring essential service designations to be agreed or imposed by the Administrative Labor Tribunal (Essential Services Division).[123]

134. LANEQ bargained a first collective agreement with the Government of Quebec that commenced in March 2000 and ended in June 2002. In negotiations to renew that first agreement, LANEQ members engaged in a two-day strike in 2004 before a renewal collective agreement was reached.[124]

135. In February 2011, some 450 Quebec crown attorneys represented by ASPGQ joined over 1000 lawyers and notaries represented by LANEQ (still known then as the Association of State

---

[118] *Labour Code,* CQLR, c C-27, s. 1(l)(4).
[119] *Act Respecting the Process for Determining the Remuneration of Criminal and Penal Prosecuting Attorneys and Respecting their Collective Bargaining Plan,* 2005, Ch. P-27.1
[120] https://globalnews.ca/news/108696/quebec-prosecutors-government-lawyers-on-strike-3/
[121] *An Act to Amend the Act Respecting Attorney General's Prosecutors and the Labour Code,* 2004, c. 22
[122] *Public Service Act,* CQLJ c F-3,1.1., s. 66
[123] *Public Service Act,* CQLJ c F-3,1.1, s. 69. For a Tribunal decision considering essential services designation in relation to LANEQ members, see: *Quebec (Government of) (Department of Professional Relations, Treasury Board) and Lawyers and Notaries of the Quebec State*, 2016 QCTAT 6023 (CanLII)
[124] *Lawyers and Notaries of the Quebec State c. Attorney General of Quebec,* 2019 QCCS 3897 (CanLII), para. 14-15

Jurists) in a strike over pay and working conditions.[125] That strike was ended by back to work legislation enacted in February that extended the collective agreements between the government and ASPGQ and LANEQ until March 2015 (Bill 135).[126] Later in 2011, ASPGQ entered into an agreement with the government that introduced a new procedure for establishing remuneration for prosecutors that involved non-binding arbitration recommendations and the elimination of a right to strike for prosecutors, which was legislated in December 2011.[127]

136. Negotiations throughout 2015 and 2016 to renew the collective agreement between LANEQ and the government were unsuccessful. On October 24 2016, LANEQ members once again went on strike. This strike lasted 4 months, ending when the government again legislated the lawyers back to work in February 2017 (Bill 127).[128] Bill 127 ended the strike, introduced certain fines and a time-limited period of further mediation after which, if no deal was reached, the government could legislate a new collective agreement.

137. In October 2019, the Quebec Superior Court ruled that the back to work legislation which terminated the lawyers' right to strike and imposed contract terms contravened section 2(d) of the Charter and was not saved by section 1.[129] The court ruled that prohibition on the right of the lawyers to strike amounted to a substantial interference in the exercise of their freedom of association. The court also ruled that Bill 127 violated the Quebec Charter of Human Rights and Freedoms.

J. Saskatchewan

138. Lawyers employed by the provincial government in Saskatchewan are not excluded from *The Saskatchewan Employment Act*. In the 1988 "Weiler Report", Professor Paul Weiler provided historical context to explain why professionals, including lawyers, were not included in a provincial government employee bargaining unit in Saskatchewan:

> [By] agreement of the Saskatchewan government and its Government Employees Association, doctors, lawyers, engineers and dentists are excluded from the single provincial government employee unit.[130]

139. Today, Saskatchewan crown attorneys are represented by the Saskatchewan Crown Attorneys Association (SCAA). SCAA was formed in 2001 and although it has not applied to be certified by the Labour Board, the government has recognized the SCAA as the exclusive bargaining agent for prosecutors in the province. Non-prosecutorial (civil) lawyers employed by the Saskatchewan

---

[125] Andrew Chung, "Crown Lawyers Go On Strike in Quebec" Toronto Star, February 9, 2011: https://www.thestar.com/news/canada/2011/02/08/crown_lawyers_go_on_strike_in_quebec.html

[126] *Act to Ensure the Continuity of the Provision of Legal Services Within the Government and Certain Public Bodies,* 2011, Ch. 2.

[127] *Act respecting the process for determining the remuneration of criminal and penal prosecuting attorneys and respecting their collective bargaining plan*, 2011, Ch. 31

[128] *An Act to ensure the continuity of the provision of legal services within the Government and to allow continued negotiation and the renewal of the collective agreement of the employees who provide those legal services*, SQ 2017, c 2. See also: CBC News, "Quebec legislates striking government lawyers, notaries back to work" (February 28 2017): https://www.cbc.ca/news/canada/montreal/quebec-lawyers-notaries-strike-law-1.4002336

[129] Les avocats et notaires de l'État québécois c. Procureure générale du Québec, 2019 QCCS 3897 (CanLII), <http://canlii.ca/t/j2hbt>

[130] P. Weiler, "The Professional Employee in Government: Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario, January 1988, **Appendix F,** at 6.

government are represented by the Saskatchewan Crown Counsel Association (SCCA). Neither SCAA nor SCCA have formally applied for certification. However, in 2008, the government agreed to a Memorandum of Understanding with SCAA and SCCA that recognizes the associations as the representatives of Crown attorneys and civil Crown lawyers and that includes a detailed process for establishing compensation for the lawyers.

IV. TREATMENT OF THE LAWYER EXCLUSION IN LAW REFORM REPORTS AND ACADEMIC LITERATURE

140. Every Canadian law reform report since 1968 that has considered the question of whether practicing lawyers should be covered by collective bargaining legislation has recommended that they be so. I have already examined the 1968 report of the Woods Task Force above in Part I, which recommended that the professional exclusion be removed from the *Canada Labour Code*, finding no justification for it.

141. As noted above in Part III(G), Professor Paul Weiler recommended in a report to the Ontario government in 1988 that statutory collective bargaining protections be extended to government lawyers (the Weiler Report, **Appendix D**). Weiler noted that early collective bargaining legislation excluded lawyers and several other professions based on a "feeling at the time that [collective bargaining] was unnecessary and inappropriate" for professionals: "That legal exclusion rested on the simple fact that the employee in question was practicing one of the designated professions. No further consideration was given to the particular sensitivity of the job being performed or the nature and needs of the employer involved."[131]

142. In his earlier 1980 book, *Reconcilable Differences: New Directions for Labour Law*, Weiler had described the decision in most Canadian jurisdictions to extend collective bargaining protection to public servants and to professions in the private sector:

> Historically, many types of workers have been excluded entirely from the legislation which establishes a right to trade union representation. One estimate made in 1951—fifteen years after the National Labor Relations Act was passed—was that fully one-half of the U.S. workforce was denied access to that legislation. The scope of Canadian law at that time was essentially the same. Since then there is no doubt about the direction of Canadian labour policy. Professional employees now enjoy trade union representation, finding no conflict between their professional obligation to the client and their desire to have a meaningful voice in huge organizations for which they may work… Probably the most significant breakthrough concerns public servants who work for the most powerful employers of all—the federal and provincial governments their agencies and instrumentalities. The basic principle has now been conceded all across Canada that government employees should enjoy the right of collective bargaining with their sovereign employer.[132]
>
> Excerpts from Weiler, *Reconcilable Differences*, are Attached as **Appendix J.**

[131] P. Weiler, "The Professional Employee in Government: Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario, January 1988, at 29.
[132] P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at 35. [**Appendix J**]

143. In the Weiler Report of 1988, Weiler noted that by the 1980s, many professionals stood in the same position as other employees vis-à-vis their employers: "the immediate reason why Ontario government and doctors and lawyers want to organize is essentially the same as motivated non-professional employees, public or private. They believe that their salaries are too low, that their relative position is worsening rather than improving, and they want to take steps to alter that situation."[133]

144. Weiler concluded: (1) that professionals, including lawyers, have significant concerns about the employment conditions "which can only be effectively addressed through some kind of group organization and dealings with their government employer", and (2) "that there is no inherent incompatibility between such employee organization and their professional obligations." Therefore, he recommended that "the same basic right as is now enjoyed by just about everyone else employed in this province and across the country" be extended to professionals.[134] This included extending unfair labour practice provisions to professionals and a statutory model of collective bargaining.[135]

145. Weiler identified two models to extend collective bargaining to professionals, including lawyers, employed by the province. One was to simply repeal the exclusion of the professionals then found in the CECBA. This approach might have effectively swept government lawyers into an existing all employee unit already represented by OPSEU. Weiler believed that the lawyers should have a choice whether to join the existing OSPEU unit or to bargain separately in a lawyers-only unit:

> However, simple repeal of the professional exclusion from CEBCA coverage could automatically sweep all these prototype professionals into the broad, all-employee unit designated under this Act and represented by OPSEU. Neither these professional employees nor the government nor OPSEU believe that this would be an appropriate result. Having been statutorily excluded from this system of provincial government-union bargaining during the crucial formative years of its life, these professional employees deserve a choice about whether they do now want to cast their lot with the rest of the government employees.[136]

Weiler proposed that the CEBCA be amended to permit lawyers (and other previously excluded professionals), by majority vote, to opt into the broader OPSEU unit and also to later opt out of that unit if they decided it was not the right choice. Otherwise, Weiler wrote, "the fear of being locked forever into this format would likely be an insuperable obstacle to any of these people initially electing to join OPSEU to see whether that organization might actually be suitable to their needs as employee professionals."[137]

---

[133] P. Weiler, "The Professional Employee in Government: Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario, January 1988, at 33

[134] P. Weiler "The Professional Employee in Government: Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario, January 1988, at 71

[135] P. Weiler, "The Professional Employee in Government: Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario, January 1988, at 60

[136] P. Weiler, "The Professional Employee in Government: Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario, January 1988, at 61.

[137] P. Weiler, "The Professional Employee in Government: Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario, January 1988, at 61.

146. The second option, if the lawyers elected not to join the OPSEU unit, was to permit the lawyers to choose their own bargaining agent and to then bargain with the government under a two-stream process. The first stream would involve creating joint committees of government and representatives of professional associations that would discuss and consult over a variety of work-related conditions. The second stream would involve a system of binding arbitration to resolve compensation related disputes when negotiations fail to reach a settlement.[138] As noted above, Weiler's recommendations led to the first Framework Agreement being reached between the government and Ontario Crown Attorneys Association and the Association of Law Officers of the Crown in 1990.

147. The point noted by Weiler, that the nature of legal practice has changed fundamentally since the Canadian Bar Association lobbied the federal government to exclude lawyers from 1940's labour legislation, has been explored in other academic literature. For example, Professors Stager and Arthurs studied the changing composition of Canadian lawyers over time. In 1941, 90.5 percent of lawyers were self-employed in private practice. In 1951, 83 percent of practicing lawyers were self-employed.[139] Most Canadian lawyers in the 1940s worked as self-employed practitioners in law firms with one or two lawyers.[140] In the late 1940s, only about 5 percent of practicing lawyers were employed in private industry, usually in the capacity as in-house general counsel (and who therefore would likely have been excluded from collective bargaining legislation under the managerial or confidential employee exclusions in any event). Only about 5-6 percent of practicing lawyers were employed in public administration in the late 1940s.[141] Prior to the 1970s, lawyers employed by community organizations, unions, or advocacy organizations "were almost nonexistent", according to Professors Arthurs, Weisman, and Zemans.[142]

Excerpts from Stager & Arthurs, *Lawyers in Canada,* is attached as **Appendix K.**

Excerpts from Arthurs, Weisman, & Zemans, "The Canadian Legal Profession" is attached as **Appendix L.**

148. The composition of legal practice today is considerably different from the situation in the 1940s and 1950s. By 1986, the percentage of Canadian lawyers who were self-employed had dropped to 61 percent, compared to over 90 percent in 1941.[143] In 2017, the Law Society of Ontario reported that only 39 percent of lawyers in the province were engaged as either sole practitioners or partners in a law firm. The remaining 61 percent of lawyers were employed by law firms, government, businesses, legal clinics, or in education.[144] Today, over 600 lawyers are

---

[138] P. Weiler, "The Professional Employee in Government: Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario, January 1988, at 60-61, 71-74.
[139] D. A. Stager & H.W. Arthurs, *Lawyers in Canada* (U. of Toronto Press, 1990), at 179
[140] D. A. Stager & H.W. Arthurs, *Lawyers in Canada* (U. of Toronto Press, 1990), at 176-177: "Prior to the 1950s, law firms were characterized by one or two lawyers working in a modest office, with the assistance of a typist-bookkeeper and occasionally a law clerk or student. Large firms of 25-30 lawyers were non-existent…."
[141] D. A. Stager & H.W. Arthurs, *Lawyers in Canada* (U. of Toronto Press, 1990), at 271.
[142] H.W. Arthurs, R. Weisman, & F. Zemans, "The Canadian Legal Profession" (1986), 11 American Bar Foundation Research Journal 447 at 460
[143] D. A. Stager & H.W. Arthurs, *Lawyers in Canada* (U. of Toronto Press, 1990), at 271
[144] Law Society of Ontario, Annual Report Data, 2017, Membership Statistics: http://annualreport.lso.ca/2017/en/annual-report-data.html#MemStatLawyersAgeGender

employed by the Ontario Ministry of the Attorney General, compared to only 6 in 1945.[145] According to Professor Fred Zemans, in 1976, only 18 lawyers in Ontario were employed as legal clinic lawyers.[146] Today there are nearly 400 staff lawyers and articling students practicing as employees in the legal clinic system in Ontario.

Excerpts from Zemans, "Community Legal Clinics" is attached as **Appendix M.**

149. In summary, the academic literature describes a dramatically different legal environment today compared to the 1940s, when the legal exclusion from collective bargaining legislation was first introduced. Today, a substantially larger proportion of practicing lawyers are engaged as "employees" by organizations, law firms, and government.

150. Like the Woods Task Force and the Weiler Report, the 2017 Ontario Changing Workplaces Review Final Report recommended the removal of the professional exclusion from the Ontario *Labour Relations Act*.[147] The Final Report noted that historically the exclusion has been justified on the basis that "professionals were seen as having adequate protection through their self-regulated professional bodies" and a concern that conflicts could arise between "a professional's continuing duty and obligation to his or her patients or clients and the right to strike". However, the Special Advisors concluded that those concerns could not justify the exclusion.

151. The Final Report of the CWR noted that there are 46 regulated professions in Ontario and that employees belonging to 41 of these professions are covered by collective bargaining legislation. It is only lawyers, doctors, architects, land surveyors, and dentists who are singled out for exclusion. This observation reflects back to the concerns expressed (described above in Part I) during debates surrounding the 1948 IRDIA that the selection of professions being excluded was random and without justification. The Final Report concluded that the exclusion of professionals was inconsistent with recent Supreme Court of Canada jurisprudence regarding Section 2(d) of the Charter:

> This prohibition directed at professionals employed in a professional capacity is inconsistent with, and contrary to, the constitutional guarantee of freedom of association. The Court's purposive approach to section 2(d) was most recently summarized by Chief Justice McLachlin and Justice LeBel in Mounted Police Association, where they said:
>
> > The jurisprudence on freedom of association under section 2(d) of the Charter…falls into two broad periods. The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purposive approach to the guarantee.
> >
> > …after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to

---

[145] H.W. Arthurs, R. Weisman, & F. Zemans, "The Canadian Legal Profession" (1986), 11 American Bar Foundation Research Journal 447 at 460.

[146] F. Zemans, "Community Legal Clinics in Ontario: 1980 A Data Survey (1981), 1 Windsor Yearbook of Access to Justice 230 at 237. Attached as **Appendix M**.

[147] *Changing Workplaces Review, Final Report,* 2017, at 10.7 and Recommendations 139-142: https://www.ontario.ca/document/changing-workplaces-review-final-report/chapter-10-scope-and-coverage-labour-relations-act-1995#section-6

> affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by the historical origins of the concepts enshrined in s. 2(d)

There is no suggestion in any of the recent jurisprudence that professionals employed in a professional capacity should be denied the constitutional right of freedom of association. Quite the contrary, the broad and purposive interpretation of section 2(d) of The Constitution Act, 1982 mandates the removal of this exclusion and extending LRA coverage to this group of employees.[148]

152. The Final Report of the Ontario Changing Workplaces Review concluded that there are legal mechanisms to deal with real concerns about strikes by professionals who perform true "essential services", including the establishment of a fair and effective dispute resolution process that includes mediation and interest arbitration.[149] The Ontario government did not implement the recommendation to remove the professional exclusion from the *Labour Relations Act.*

153. Considering that the lawyer exclusion has survived in some Canadian jurisdictions since the 1940s, the complete absence of advocacy justifying the exclusion in political debates or academic and policy literature is striking. The general pattern in the small literature that considers the lawyer exclusion is to identify presumptive historical justifications for the exclusion in the early post-war period when very few lawyers were "employed", and to then proclaim that those early justifications no longer apply because attitudes about professional workers and collective bargaining have evolved and the labour market for lawyers has changed dramatically such that a large segment of professionals are now "employed" and therefore share the same employment-related concerns as other employees.

154. The historical justifications cited in the academic literature for the lawyer exclusion can be summarized into three general categories:

(1) normative judgments about how lawyers *ought to behave* as professionals and about the role and purpose of collective bargaining and "trade unions";

(2) arguments that lawyers *do not need collective bargaining* because they are well paid, are mostly self-employed anyways, and already have representation by their professional associations; and

(3) arguments that practical labour relations problems and potential conflicts of interest would result if statutory collective bargaining were extended to lawyers, particularly relating the *potential of strikes and conflicts of interest.*

---

[148] *Changing Workplaces Review, Final Report,* at 10.7 and Recommendations 139-142: https://www.ontario.ca/document/changing-workplaces-review-final-report/chapter-10-scope-and-coverage-labour-relations-act-1995#section-6

[149] *Changing Workplaces Review, Final Report,* at 10.7 and Recommendations 139-142: https://www.ontario.ca/document/changing-workplaces-review-final-report/chapter-10-scope-and-coverage-labour-relations-act-1995#section-6

155. Over time, the first two arguments came to be seen within the academy as outdated and elitist, particularly as the proportion of practicing lawyers who are "employees" of organizations expanded rapidly through the latter half of the 20th century and union representation expanded into the public sector, white collar, and professional ranks. The argument that lawyers are already represented by lawyer associations such as law societies and bar associations was dismissed on the basis that law societies and bar associations do not bargain employment contracts on behalf of employed lawyers. In addition, as recommended in the Woods Task Force (discussed above), concerns were expressed that the governing bodies of lawyers should not be involved in bargaining working conditions and compensation on behalf of employed lawyers because those organizations have control over labour supply through licencing powers.

156. The third argument has been addressed across Canada through a variety of legislative devices, including by substituting binding interest arbitration in cases of essential legal services. In addition, as noted on several occasions in this report, unions representing lawyers have bargained collective agreement clauses that recognize lawyers' professional obligations and clarify that these obligations are not diminished by collective agreement terms.

157. In 1965, Professor A.W.R. Carrothers, Dean of the University of Western Ontario, Faculty of Law, argued that there was nothing about collective bargaining that was inconsistent with professionalism, and he noted that insofar as work stoppages by professionals might be contrary to public interest, there were substitutes available:

> First, is collective bargaining, or should it be regarded as being unethical from a professional point of view. My brief answer this question is no…. if members of a profession can act in concert to protect their income as self-employed persons, why should they not act through the medium of collective bargaining to protect their income and other terms of employment as employees? In my opinion, there is no inconsistency from an ethical point of view between the status of professional and the determination by collective action of terms under which a professional employee works…. Assuming for present purposes that a given work stoppage would be contrary to the public interest, it seems to me that the question is not whether collective bargaining as such is improper, but whether a reasonable substitute can be devised for the sanction of the right to strike, which was submitted at the outset to be an essential ingredient of an effective system of collective bargaining.[150]
>
> Excerpts from Professor Carrothers' article, "Professional Bargaining", is attached as **Appendix N.**

158. In another 1965 article, Professor Mark MacGuigan of the University of Toronto Faculty of Law argued that professional employees have, "given up the status of independent practitioners to become salaries employees of business or government" who confront similar problems as other employees in terms of remuneration and working conditions.[151] A professional employee "in relation to his employer is nothing other than another employee, and for whom the economic

---

[150] A.W.R. Carrothers, "Collective Bargaining and the Professional Employee" in in John Crispo (Editor), *Collective Bargaining and the Professional Employee*: *Conference Proceedings* (U of Toronto, Centre for Industrial Relations, 1966), 19.

[151] M. MacGuigan in John Crispo (Editor), *Collective Bargaining and the Professional Employee*: *Conference Proceedings* (U of Toronto, Centre for Industrial Relations, 1966), 26 at 30.

aspect is therefore vital."[152] MacGuigan argued that collective bargaining "will make professional employees more rather than less fully professional, for it will restore to them in some measure the independence and self-control of which they have been deprived by their status as employees".[153]

Excerpts from Professor MacGuigan's article, "Professional Bargaining", is attached as **Appendix O**.

159. In a 1977 article, Professor George Adams described "the principal reasons" typically offered in justification of the professionals' exclusion as follows:

> First, because early labour laws made no reference to professionals they were often 'swept' into large heterogeneous bargaining units containing other employees to whom they could not relate. For example, in *British Columbia Distillery Co. Ltd. and Local 203 United Office and Professional Workers of America, Local 203 et al* Wartime L.R.B.2, the Board ruled:
>
> > The conditions of employment of the office workers and the professional and technical workers employed by the employer are the same. No good reason has been shown to warrant subdividing this group of employees into separate units. …
>
> Secondly, collective bargaining by professionals was thought by many to be unethical or at least undignified. The prototype professions are, generally speaking, service oriented and all have been granted a statutory monopoly over the provision of their services. Therefore, because collective bargaining could result in the concerted withholding of these services, abstract ethical and public policy questions were perceived. Moreover, this reticence was compounded by the fact that the professions had attracted persons into their membership who were very individualistic and in whom this individualism was reinforced by a service oriented professional training. From their viewpoint then collective action centering on monetary matters was not only unseemly but in direct conflict with a profession's principal purpose — serving the public. Thirdly, professional associations were dominated by either non salaried professionals who lacked identification with the problems of their salaried colleagues or by salaried professionals who had either managerial responsibility or ambitions in this regard. Finally, it is likely that governments of the day were affected by a common feeling that professionals are already well served by their status in society.[154]

Excerpts from Professor Adams' article, "Collective Bargaining by Salaried Professionals" is attached as **Appendix P.**

160. Professor Adams went on to argue in that paper that the lawyer exclusion should be eliminated where it still existed, and that collective bargaining would advance professionalism by giving professionals a greater say in decision-making:

---

[152] M. MacGuigan in John Crispo (Editor), *Collective Bargaining and the Professional Employee*: *Conference Proceedings* (U of Toronto, Centre for Industrial Relations, 1966), 26 at 33

[153] M. MacGuigan in John Crispo (Editor), *Collective Bargaining and the Professional Employee*: *Conference Proceedings* (U of Toronto, Centre for Industrial Relations, 1966), 26 at 31.

[154] George Adams, "Collective Bargaining By Salaried Professionals" (1977) 32(2) *Relations Industrielles/Industrial Relations* at 185-186.

> All salaried professionals should be able to engage in collective bargaining and this principle is gaining widespread acceptance. They face the same employment problems as others and therefore they ought to have the same rights as others in resolving these concerns…. It is now generally understood that salaried professionals have turned to collective bargaining for many of the same reasons as other employees, indeed for many of the same reasons their non-salaried colleagues established professional associations and sought licencing statutes. There is nothing 'unprofessional' about collective bargaining. In fact, it is through collective bargaining that an accommodation of the often conflicting cultures of professionalism and a bureaucracy may be achieved. Through the collective bargaining process professionals can achieve a greater say in the decision-making processes of the enterprise; working conditions more consistent with professional standards as well as salary scales that attract and retain highly qualified members of the profession to salaried positions.[155]

161. In his report prepared for the Changing Workplace Review, Professor Michael Lynk argued in favour of removing the professional exclusion found in the *Labour Relations Act*. Professor Lynk's report included the following observations about collective bargaining by professionals specifically:

> Three observations can be made about the presence of unions and collective bargaining where they exist among the regulated professions in Ontario. First, unions that represent, and collectively bargain for, members of a profession in their capacity as employees have co-existed alongside regulatory bodies and professional advocacy organizations without any evident irreconcilable differences arising. Each of the institutions and bodies within the profession – the regulatory body, the professional advocacy association and the union – have distinct roles and responsibilities to play, which together appear to enhance the professionalism, the collective voice, the employment interests and the job satisfaction of the membership. There is little reason to think, should the statutory exclusion that prevents the remaining five professions from access to collective bargaining be removed, that any different outcome would occur.
>
> Second, the industrial relations experience in Ontario and elsewhere has shown that the desire for collective bargaining among those regulated professionals in Ontario who have sought unionization to advance their workplace interests has been overwhelmingly in the public and quasi-public sectors, where the professional member is most clearly in the role of an employee, working along many other similarly-situated employees of the same profession. This observation is not to say that the right to collective bargaining should be limited to those professionals working in the public or quasi-public service, but rather it is those professionals in the public sector who will most likely take initial advantage of it. And third, collective bargaining is an inherently flexible institution, which can accommodate a variety of employment and quasi-employment relations.[156]

---

[155] George Adams, "Collective Bargaining by Salaried Professionals" (1977) 32(2) *Relations Industrielles/Industrial Relations* at 193, 199.

[156] Michael Lynk, "A Review of the Employee Occupational Exclusion under the Ontario *Labour Relations Act, 1995*", at 53-54: https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Lynk-11-Exclusions%20Under%20LRA.pdf

VI. RESPONSES TO SPECIFIC QUESTIONS POSED

162. Based on the facts described above, the following are my responses to the six specific questions posed:

1) What are the origins, history, and rationale for the lawyers' exclusion from collective bargaining legislation, in Canada in general, and in BC in particular?

The exclusion of practicing lawyers from collective bargaining legislation in Canada dates to the passage of the federal *Industrial Relations and Disputes Investigation Act, 1948* (IRDIA). The exclusion was added to that legislation because the Canadian Bar Association (CBA) requested it. In the 1940s, hardly any practicing lawyers were "employees" and of the relatively few who were, many or most would have been excluded from collective bargaining legislation anyways under the managerial or confidential employee exclusions found in the legislation. After the War, the provinces modeled their own post-War collective bargaining legislation on the IRDIA, and the lawyer exclusion was simply adopted into provincial legislation as part of that process (other than in Saskatchewan, which has never excluded professionals from its collective bargaining legislation). No rationale was provided by provincial politicians for including the exclusion of lawyers in the provincial legislation.

British Columbia included a lawyer exclusion mirroring the language found in the IRDIA in the 1954 *Labour Relations Act* and later also excluded lawyers from coverage from the *Public Service Labour Relations Act* when it extended collective bargaining rights to public sector workers in 1973. I could find no statement by a government official in BC explaining the rationale for including the lawyer exclusion in either the 1954 *Labour Relations Act* or the *PSLRA*. The Higgins Report of 1972 proposed the extension of statutory collective bargaining to professionals employed by the government and did not single out lawyers for special exception.

2) What is the present treatment, practice, and status of collective bargaining by employed lawyers across Canada in both the private and public sectors, both under legislation and outside of a legislative framework, and including lawyers being in their own bargaining unit or included in bargaining units with other non-lawyer employees?

Between 1964 and 1977, the federal government and all the provinces except for Ontario, Alberta, Nova Scotia, and PEI removed the practicing lawyer exclusion from the primary collective bargaining legislation. Thereafter, many employed practicing lawyers in those provinces unionized and commenced collective bargaining with their employers. In the private sector, lawyers who are unionized and covered by collective agreements primarily work for 'progressive' employers, such as unions and legal clinics. Sometimes lawyers are included in lawyers-only bargaining units and sometimes they are included in units that also include non-lawyers (such as bargaining units at union employers that include union staff representatives and in-house lawyers).

The only jurisdictions in Canada that still exclude practicing lawyers employed directly by governments from public sector collective bargaining legislation are British Columbia, Ontario, PEI, Newfoundland and Labrador, and Nova Scotia. Governments in Ontario, Nova Scotia, and BC nevertheless have recognized employee associations representing Crown

Attorneys and bargained agreements covering those employees. Of these exclusionary provinces, only the Ontario government has recognized and bargained with an employee association (ALOC) representing civil lawyers employed by the government. In Ontario, bargaining takes place with the government through a council comprised of the association representing crown attorneys (OCAA) and the association representing civil lawyers (ALOC).

Alberta's *Public Service Employee Relations Act* excludes government lawyers but permits those lawyers to join the existing "all employees" provincial bargaining unit represented by AUPE if a majority of lawyers elect this option. Although Crown Attorneys are represented by the Alberta Crown Attorneys' Association (ACAA), the lawyers have never sought to join the "all employee" unit and the government does not engage in collective bargaining with the ACAA. Civil lawyers employed by the Alberta government have their own association, but the government does not bargain with that association.

In every Canadian jurisdiction where government lawyers are covered by collective bargaining legislation and collective bargaining occurs between the government and an association representing the lawyers, the bargaining unit is comprised entirely of lawyers. Similarly, where Canadian governments bargain with associations representing government lawyers through an extra-statutory process, the bargaining units include only lawyers. There is no example in Canada of government lawyers ever joining or being swept into a larger bargaining unit comprised of either other types of professionals or other non-professionals.

3) Assess whether there is a present public policy rationale for the continued exclusion, including a review of the treatment of the lawyer exclusion from law reform reports and in academia.

Given that thousands of lawyers across Canada, in both the public and private sector have been unionized and engaging successfully in collective bargaining with their employers for decades, it is difficult to conceive of any present public policy rationale for the lawyer exclusion. Nor have Canadian governments defended the exclusion. As noted earlier, the lawyer exclusion was first introduced as the result of successful lobbying of the federal government by the CBA in the 1940s. Since then, the only rationale provided publicly by a Canadian government or government official to justify the lawyer exclusion was a vague assertion by the Ontario government that collective bargaining may be unsuitable for "professional offices". This was the response of the Ontario government in its defence of a 1997 complaint filed with the International Labour Organization alleging that the lawyer exclusion in Ontario's labour legislation was inconsistent with ILO Convention 87, Concerning Freedom of Association and the Protection of the Right to Organize, 1948. The ILO's Committee on Freedom of Association found that the complete exclusion of lawyers (and other workers) from collective bargaining legislation was inconsistent with Canada's obligations under Convention 87.

Every law reform report that has considered the lawyer exclusion, from the Woods Task Force in 1968 through to the Ontario Changing Workplaces Review of 2017, has recommended extending statutory collective bargaining protections to practicing lawyers. So too has every academic commentary considering the lawyer exclusion written since the 1960s.

4) Examine the extent to which access to collective bargaining for lawyers, whether under collective bargaining statues or otherwise (and including in their own bargaining units and with the right to be represented by their own democratically selected bargaining agent) has given rise to adverse labour relations or other public policy difficulties.

There is nothing distinctive about lawyers that creates any special labour relations or public policy difficulties when they engage in collective bargaining. Collective bargaining is a flexible and adaptable institution. In every case when lawyers employed by Canadian governments have unionized and engaged in collective bargaining with their employer, they have done so in lawyers-only bargaining units. This is true of bargaining in jurisdictions where lawyers are covered by collective bargaining statutes as well as extra-statutory collective bargaining that takes place in jurisdictions where government lawyers are excluded from labour legislation, but governments have entered voluntary bargaining arrangements. Insofar as concerns have been raised about "essential" lawyers striking, provision has been made for interest arbitration as an alternative to strikes and lockouts.

5) Assess the representational and bargaining effects of preventing lawyers from being represented by their own democratically selected bargaining agent in their own separate bargaining unit?

I did not find examples in the private sector of lawyers being prevented "from being represented by their own democratically selected bargaining agent in their own separate bargaining unit." In the public sector, Canadian governments that have extended statutory collective bargaining coverage to professionals, including lawyers, have recognized that members of a single profession share a strong community of interest, and collective bargaining legislation has often protected members of a single profession from being included against their wishes in a broader bargaining unit comprised of workers who are not members of that profession. For example, this is the case in the federal jurisdiction, Manitoba, New Brunswick, Quebec, and Ontario during the brief period (1992-1995) when the professional exclusion was removed.

In the only jurisdiction in which government lawyers' access to statutory collective bargaining is made contingent upon the lawyers joining a larger "all employee" bargaining unit that includes non-lawyers (Alberta), the lawyers have never engaged in collective bargaining. I have been unable to assess the 'bargaining effects' associated with preventing government lawyers from bargaining through their own chosen bargaining agent in a lawyers-only bargaining unit, because there is no example of government lawyers bargaining in a unit with non-lawyers.

6) Consider the extent to which placing lawyers into a broader "all professionals" bargaining unit is consistent with the pattern of lawyer representation and collective bargaining across Canada?

> I have found no example of legislation in Canada that conditions access to collective bargaining for lawyers upon the lawyers joining or being placed in an "all professionals" bargaining unit. Therefore, a legislative scheme that required government lawyers to join an "all professionals" bargaining unit against their wishes would be unique in Canadian collective bargaining history.

Dr. David Doorey

TAB B

Appendices

A	Excerpts from the 1968 Federal Task Force on Labour Relations (Woods Task Force)
B	Excerpts from 1968 study of Professional Workers and Collective Bargaining by Shirley Goldenberg
C	Voluntary recognition agreement, OPSEU and Advocacy Centre for Tenants Ontario, 2017
D	Paul Weiler, *The Professional in Government* (Weiler Report), 1988 (excerpts)
E	Excerpts from H.D. Higgins, Making Bargaining Work in British Columbia's Public Service", ('Higgins Report'), 1972.
F	New Brunswick Journal of Debates, May 22 and June 16 2009
G	Notice of Action, Attorney General of Nova Scotia and Nova Scotia Crown Attorneys' Association, October 23, 2019
H	Framework Agreement, 2010-2057, ALOC and OCAA and Government of Ontario
I	Collective Agreement, ALOC and OCAA and Government of Ontario
J	Excerpts from Paul Weiler, *Reconcilable Differences* (1980)
K	Excerpts from Stager and Arthurs, *Lawyers in Canada,* (1990)
L	Excerpts from Arthurs, Weisman, Zemans, Canadian Legal Profession (1986)
M	Excerpts from Zemans, Community Legal Clinics (1981)
N	Excerpts, Carrothers, Professional Bargaining (1965)
O	Excerpts, MacGuigan, Professional Bargaining (1965)
P	George Adams, Collective Bargaining by Professionals (1977)

TAB B

List of Resources

Cases Cited

Les avocats et notaires de l'État québécois c. Procureure générale du Québec, 2019 QCCS 3897 (CanLII)

Advocacy Centre for Tenants Ontario, 2017 CanLII 81402 (ON LRB)

Alberta Crow Attorneys' Association v Alberta (Justice and Solicitor General), 2021 ABQB 949

Association of Law Officers of the Crown (ALOC) v Ontario (Management Board of Cabinet), 2014 CanLII 87074 (ON LA),

Brant County Community Legal Clinic, [1994] OLRD No 529

Canadian Environmental Law Association, 2017 CanLII 81403 (ON LRB)

CUPE v. PNB, 2009 NBQB 164 (CanLII)

Crown in the Right of Ontario, [1999] OLRB Rep. May/June 383

Dunmore v. Ontario (Attorney General), 2001 SCC 94

Federal Law Officers of the Crown v. Treasury Board of Canada (2006) PSLRB 45 (CanLII)

In the matter of an interest arbitration between ALOC and OCAA and the Crown in the Right of Ontario (Management Board of Cabinet), October 26 2000 (Kaplan, Paliare, Dissent: Gray)

Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27

Lawyers and Notaries of the Quebec State c. Attorney General of Quebec, 2019 QCCS 3897 (CanLII)

Legal Aid Lawyers Association - and - Legal Aid Services Society of Manitoba - and - The Government of Manitoba, [1975] MLBD No 2

Legal Aid Ontario v The Society of Energy Professionals, IFPTE Local 160, 2017 CanLII 26673 (ON LA)

Neighbourhood Legal Services (London & Middlesex) Inc., [1993] O.L.R.D. No. 1039

New Brunswick Crown Prosecutors Association, (2012) CanLII 25296 (NBLEB)

Ombudsman Ontario, [1993] O.L.R.D. No. 466

Quebec (Government of) (Department of Professional Relations, Treasury Board) and Lawyers and Notaries of the Quebec State, 2016 QCTAT 6023 (CanLII)

Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4 (CanLII),

West Scarborough Community Legal Services, 2019 CanLII 74860 (ON LRB)

Workers' Compensation Board, [1995] OLRD No 875

Secondary Materials Cited

G. Adams, "Collective Bargaining by Salaried Professionals" (1977) 32(2) *Relations Industrielles/Industrial Relations* at 185-186

H.W. Arthurs, R. Weisman, & F. Zemans, "The Canadian Legal Profession" (1986), 11 American Bar Foundation Research Journal 447

H. Bartolomei de la Cruz, G. von Potobsky, & L. Swepston, *The International Labor Organization: The International Standards System and Basic Human* Rights (Harpers Collins, 1996)

CBC News, "Quebec legislates striking government lawyers, notaries back to work" (February 28 2017)

S. Campbell, "Continental Drift in the Legal Profession: The Struggle for Collective Bargaining by Nova Scotia's Crown Prosecutors" PhD Dissertation, St. Mary's University, 2010.

A.W.R. Carrothers, in John Crispo (Editor), *Collective Bargaining and the Professional Employee*: *Conference Proceedings* (U of Toronto, Centre for Industrial Relations, 1966), 1

A. Chung, "Crown Lawyers Go On Strike in Quebec" Toronto Star, February 9, 2011

J. Gallant, "Legal aid lawyers locked in legal battle with province over unionization" Toronto Star (August 13 2016)

T. Grant, "Nova Scotia Crown attorneys are not backing down in labour dispute with province" Toronto Star, October 23 2019

S. Goldenberg, *Professional Workers and Collective Bargaining* (Ottawa: Task Force on Labour Relations, 1968)

T. Hadwen, et al, *Ontario Public Service Employment and Labour Law* (Toronto: Irwin, 2005)

H.D. Higgins, Chairman, "Making Bargaining Work in British Columbia's Public Service", *Report and Recommendations of the Commission of Inquiry into Employer-Employee Relations in the Public Service of British Columbia* (December 1972)

J. Hodges-Aeberhard, "The Right to Organize in Article 2 of Convention 87: What is Meant by Workers 'Without Distinction Whatsoever?" (1989) 128(2) International Labour Review 177

M. Lynk, "A Review of the Employee Occupational Exclusion under the Ontario *Labour Relations Act, 1995*",

M. MacGuigan in John Crispo (Editor), *Collective Bargaining and the Professional Employee: Conference Proceedings* (U of Toronto, Centre for Industrial Relations, 1966), 26

J. Murray & M. Mitchell, *Changing Workplaces Review: Final Report* (Ontario: 2017)

D. A. Stager & H.W. Arthurs, *Lawyers in Canada* (U. of Toronto Press, 1990)

P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980)

P. Weiler, "The Professional Employee in Government: Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario, January 1988 (Weiler Report)

H.D. Woods, *Canadian Industrial Relations: Report on the Federal Task Force on Labour Relations* (Ottawa: 1972)

F. Zemans, "Community Legal Clinics in Ontario: 1980 A Data Survey (1981), 1 Windsor Yearbook of Access to Justice 230

International Law Instruments Cited

ILO Convention 87, Freedom of Association and Protection of the Right to Organize Convention, 1948

ILO Convention 98, Right to Organize and Collective Bargaining Convention, 1949

ILO CFA Case No 2467 (Canada), Report No 344, March 2007

TAB B

Schedule A

TAB B

DAVID J. DOOREY, PHD

ASSOCIATE PROFESSOR OF LABOUR AND EMPLOYMENT LAW

CONTACT

Telephone: 416.629.6333
Email: ddoorey@yorku.ca
Blog: Law of Work
SSRN Page (links to some published articles)

EDUCATION

PHD, LAW (2009)
Osgoode Hall Law School, York University
Supervisory Committee: Harry Arthurs (Osgoode), Mary Condon (Supervisor, Osgoode); Cynthia Williams (Osgoode)

Dissertation Title: *Transnational Domestic Labour Regulation: Using Domestic Disclosure Regulation to Influence Foreign Labour Practices*, 376 pages

MASTER OF LAW (LL.M, INTERNATIONAL LABOUR LAW) (2002)
London School of Economics and Political Science
Supervisors: Hugh Collins, Paul Davies

MASTER OF INDUSTRIAL RELATIONS (M.I.R.) (1993)
Centre for Industrial Relations, University of Toronto

BACHELOR OF LAWS (LLB) (1995)
Osgoode Hall Law School, York University

BACHELOR OF ARTS (INDUSTRIAL RELATIONS) (1990)
University of Toronto

ACADEMIC APPOINTMENTS

ASSOCIATE PROFESSOR 2011-Present
School of HRM, Faculty of Liberal Arts & Professional Studies
York University

DIRECTOR, OSGOODE HALL LAW SCHOOL 2010-2022
LL.M in Labour & Employment Law

VISITING RESEARCH FELLOW 2019-2020
Harvard Law School

SENIOR RESEARCH ASSOCIATE 2019-Present
Harvard Law School, Labor and Work Life Program

FULL MEMBER, GRADUATE PROGRAM IN LAW 2018-Present
Osgoode Hall Law School

DIRECTOR, SCHOOL OF HUMAN RESOURCE MANAGEMENT 2016-2019
Faculty of Liberal Arts & Professional Studies, York University

VISITING PROFESSOR, UNIVERSITY OF TORONTO 2012-13
Faculty of Law and Centre for Industrial Relations and HRM

ASSISTANT PROFESSOR 2006–2010
School of Administrative Studies, York University

LAW BLOGS

Founder, Editor, Author, *Law of Work Blog* 2008-Present

Senior Contributor, Harvard Law School, *OnLabor Blog* 2021-Present

Contributor, Jacobin 2021-Present

PUBLICATIONS

BOOKS

D. Doorey, *The Law of Work*, 2nd Edition (Emond, 2020)

D. Doorey & A. Braley-Rattai, *Canadian Labour Relations: Law, Policy, and Practice* (Emond, 2020)

D. Doorey, *The Law of Work: Complete Edition* (Emond, 2017)

D. Doorey, *The Law of Work: Collective Bargaining and Industrial Relations* (Emond, 2017)

D. Doorey, *The Law of Work: Common Law and the Regulation of Work* (Emond, 2016)

BOOK CHAPTERS IN EDITED VOLUMES

"The Contested Boundaries of Just Transitions Law" in C. Consuelo, *Labour Law and Ecology* (Forthcoming, 2022), with Anne Eisenberg (U. South Carolina, Law)

"Layoffs and Canadian Employment Law" in *Work Law Under COVID-19*, S. Pandya & J. Hirsch, eds (2021), https://worklawcovid19book.netlify.app/lyff-canada.html

With Ben Oliphant, Chapter 48, "The Charter of Rights and Freedoms at Work" in D. Doorey, *The Law of Work*, 2nd Ed (Emond, forthcoming, 2020)

With M. Lynk, "Human Rights Defences: Bona Fide Occupational Requirement and the Duty to Accommodate", in D. Doorey, *The Law of Work*, 2nd Ed (Emond, 2020)

"Industrial Conflict", *Labour and Employment Law: Cases and Materials*, Labour Law Casebook Group (9th Ed., Irwin Law Publishers, 2018).

With Ruth Dukes, "Labour Law Scholarship and Its 'Last Generation'" in P. Zumbansen, D. Drache, S. Archer, *Liber Amicorum Festschrift: In Tribute to Harry Arthurs* (McGill-Queens U. Press, 2017)

"A Transnational Law of Just Transitions for Labour and the Environment" in A. Blackett & A. Trebilcock, eds, *Handbook on Transnational Labour Law* (Edward Elgar, forthcoming, 2015)

"International Business and Globalization" in P. Kissick (Ed.), *Aspects of Business Ethics: Concepts, Cases, and Canadian Perspectives* (Emond Montgomery, 2012)

"The Labour Context" in L. Karakowsky, (Ed.), *Exploring the Canadian Business Environment* (Pearson Publishing, 2012)

"Industrial Conflict", Chapter 7, *Labour and Employment Law: Cases and Materials*, Labour Law Casebook Group (8th Ed., Irwin Law Publishers, 2010), 110 pages.

"Employee Rights and Discipline", Chapter 13, in M. Belcourt, et al., *Managing Human Resources,* (5th Ed., Nelson Canada, 2010)

ACADEMIC JOURNAL PUBLICATIONS

D. Doorey & J. Mandryk, "Mapping Ontario's Distinctive Model of Construction Labour Law" (2022), Canadian Labour & Employment Law J. (Forthcoming)

D. Doorey, "Unjust Dismissal Legislation in Canada: What is the Value of a Job?" (2022, Kings Law Journal (forthcoming), with Andrew Hills (McGill University)

D. Doorey, "The Stubborn Persistence of the Lawyer Exemption in Canadian Collective Bargaining Law" (2022) Dalhousie Law Journal (Forthcoming)

D. Doorey, "Reflecting Back on the Future of Labour Law (2021) 71 University of Toronto Law Journal 165

D. Doorey, "Clean Slate and the Wagner Model: Comparative Labor Law and a New Plurality" (2021) Employee Rights & Employment Policy Journal 95

D. Doorey, "Back to the Future of Labour Law" (2020) 75(2) Relations Industrielles/Industrial Relations 195

D. Doorey, "Just Transitions Law: Putting Labour Law to Work on Climate Change" (2017) 30(2) Journal of Environmental Law & Practice 201

D. Doorey, "Mapping the Ascendance of the Living Wage Standard in Non-State Global Labour Codes" (2015), 6(2) Journal of Legal Theory 512

D. Doorey, "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" (2013), 38 Queens Law Journal 511

D. Doorey, "A Model of Responsive Workplace Law", (2012) 50 Osgoode Hall Law Journal 47

D. Doorey, "The Transparent Supply Chain: From Resistance to Implementation at Nike and Levi-Strauss", (2011), 103 Journal of Business Ethics 587-603

D. Doorey, "In Defense of Transnational Domestic Labor Law" (2010), 42 Vanderbilt Journal of Transnational Law 953-1009

D. Doorey, "Union Access to Workers During Organizing Campaigns: A New Look Through the Lens of Health Services", (2009-10) 15(1) Canadian Labour & Employment Law Journal 1-49

D. Doorey, "Harry and the Steelworker: Or Teaching Labour Law to Non-Lawyers" (2008), 14 Canadian Labour & Employment Law Journal, 51-73

D. Doorey, "The Medium and the 'Anti-Union' Message: Captive Audience Meetings and Forced Listening in Canada" (2008), 29(2) Comparative Labor Law & Policy Journal, 79-118

D. Doorey, "Neutrality Agreements: Bargaining Representation Rights in the Shadow of the State" (2006), 11(1) Canadian Labour & Emplyyment Law Journal , 41-106

D. Doorey, "Who Made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation" (2005), 43 Osgoode Hall Law Journal, 353-406

D. Doorey, "'Employer Bullying': Implied Duties of Fair Dealing in Canadian Employment Contracts" (2005) 30 Queens Law Journal, 500-59 [*Recipient of the David Watson Award for the article in QLJ making the most significant contribution to legal scholarship*]

D. Doorey, "Disclosure of Factory Locations in Global Supply Chains: A Canadian Proposal to Improve Global Labour Practices" (2005), 55 *Canadian Review of Social Policy,* 104-12

Other Publications, Reports, Working Papers, e-Journals

D. Doorey, *The Future of Canadian Collective Bargaining Law,* Commissioned Report for the Institute on Research in Public Policy, Canada (forthcoming 2023)

D. Doorey, "COVID-19 and Canadian Labour Law" (2020) Italian Labour Law e-Journal (https://illej.unibo.it/article/view/10843)

D. Doorey, "Travailleurs de plateforme au Canada" (2020), *Le Grand Continent* (Paris, France): https://legrandcontinent.eu/fr/2020/07/18/travailleurs-de-plateforme-au-canada/

D. Doorey, "Canada's Largest Retailer, Auditor Not Negligent in Failing to Protect Workers at Rana Plaza" (2019) 5 International Labor Rights Case Law Journal 102

D. Doorey, "Lost in Translation: Rana Plaza, Loblaws, and the Disconnect Between Legal Formality and Corporate Social Responsibility" Working Paper Series, 2018 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265826)

D. Doorey, "Vacuousness of CSR on Display in Loblaws' Victory in Rana Plaza Class Action Lawsuit" (2017) 24(4) International Union Rights 18

D. Doorey, "A Law of Just Transitions?: Putting Labour Law to Work on Climate Change" (2016), Osgoode Legal Studies Research Paper No. 10/2016

D. Doorey, "A System of Transnational Business Interactions: The Case of the Living Wage" (2013), Osgoode Comparative Research in Law & Political Economy, Research Paper 37/2013

D. Doorey, "The *Charter* and Work Law: A Beginner's Guide" (2012), on-line educational tool, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2150279

D. Doorey, "Can Factory Disclosure Influence Labour Practices in Global Supply Chains: A Case Study of Nike and Levi-Strauss" (2008), v. 4 *Comparative Law and Political Economy Research Paper Series,* 1-64

Practitioner Publications, Blogs, Media Columns, Podcasts, Professional Journals

***** I have published hundreds of blog posts on labour and employment law on my personal blogs since 2006, *Law of Work.* I have not listed these posts here to save space.

D. Doorey, "The Ideal Right to Strike Would Merge the Strengths of the Canadian and U.S. Labor Law Models" *OnLabor,* Harvard Law School (October 2022)

D. Doorey, "A Nationwide Bargaining Unit to Fight Starbucks is a Moon Shot Worth Trying" *Jacobin* (August 7 2022)

D. Doorey & R. Arnow-Richman, "Treatment of Non-Competition Agreements in Canada and the United States" *OnLabor,* Harvard Law School (February 2022)

D. Doorey, "The Surprising Agreement Between Uber and UFCW in Canada, in Legal Context" *OnLabor,* Harvard Law School (January 2022)

D. Doorey, "Why Canadian Employers Don't Use Permanent Replacement Workers" *OnLabor,* Harvard Law School (December 2021)

D. Doorey, "The Contested Boundaries of Just Transitions Law" Law & Political Economy Blog, Yale Law School (December 2021)

D. Doorey, "Requirements for Notice of Termination and Just Cause in Canadian Employment Law" *OnLabor,* Harvard Law School (May 4 2021)

D. Doorey, "Amazon's Anti-Union Drive Shows Why US Labor Law is Broken" *Jacobin* (February 24, 2021)

D. Doorey, "Collective Bargaining Needs a Fresh Start, in Canada and the US Alike" *Jacobin* (December 16 2020)

D. Doorey, "The Classification of Gig Workers in Canadian Law" *OnLabor,* Harvard Law School, July 6 2020)

D. Doorey, "A Just Transition to a Stronger Post COVID19 Economy is Possible" *Rabble* (17 April 2020)

D. Doorey, "Clean Slate for Worker Power, Through a Canadian Lens", *OnLabor,* Harvard Law School (12 February 2020)

D. Doorey, "Alberta's Newly Elected Government Looks to the U.S. for Inspiration on Labor Law Reform", *OnLabor*, Harvard Law School (31 July 2019)

D. Doorey, "Cross Border Reflections on the Future of Labor Law Reform", *OnLabor*, Harvard Law School (2 January 2019)

D. Doorey, "Union Drive at WestJet Highlights Current Tensions in Labour Policy" (Op-Ed, Globe and Mail, Report on Business (7 August 2015)

D. Doorey, "Ontario's Labour Plans and "Right to Work" Laws" *Rabble* (22 October 2013)

Radio-Canada International Radio Interview Podcast, "Interview with Dr. David Doorey: Why Do Workers Support Laws That Are Against Their Own Economic Interests" (September 2013)

Globe and Mail, Have Your Say, Experts on Weight Discrimination (April 2013)

D. Doorey, "The Not-So-Secret Ballot" (January 2007) *Our Times,* 43-46

D. Doorey, "Codes of Conduct and Information Disclosure" (2005), 12 *International Union Rights Journal,* 7-9

D. Doorey, "A Canadian Organizing Strategy Comes to Canada" (2002), 10 *International Union Rights,* 10-11

Academic and Professional Conference Papers and Presentations

"Reflections on the Future of the Wagner Model", Discussant, CRIMT Conference, University of Montreal (October 2022)

"Implementing #DecocratizingWork in Canada: Some Thoughts), Panel Presentation, CRIMT Conference, University of Montreal (October 2022)

"Unjust Dismissal Legislation in Canada" (June 2022), Law and Society Annual Proceedings, Lisbon, Portugal

"Just Transitions and Labour Law: A Framework", University of Toronto, Climate Crisis and the Future of Work (June 2022)

"Imagining the Future of Labour Law", the *Warren Winkler Lecture on Labour Law*, Queens University (March 2022)

"Regime Interaction in Canadian Labour and Employment Law", University of New Brunswick, Faculty of Law, Employment Law course (December 2021)

"Human Resources Law and the Future of Labour Law" Labour Law Research Network Conference (June 2021)

"Labor Law Under a Biden Administration: Thoughts from Canada", Labour Law Research Network Conference Roundtable (June 2021)

"Gig Work and Legal Status: A Snapshot of the Issues" Canadian Economics Association Annual Conference (June 2021)

"The Contested Boundaries of Just Transitions Law", European Trade Union Institute (May 2021)

"The Future of Labour Law", Webinar with Harvard Law School professors Ben Sachs and Sharon Block, Osgoode Hall Law School, November 2020

"Fireside Chat: A Conversation about Precarious Work, Labour Law, and Labour Reporting with Professor David Doorey and Toronto Star Reporter Sara Mojtedhedah", International Labour and Employment Relations Association Conference, Toronto, July 2020 [Zoom panel recorded]

"Cross Border Reflections on the Future of the Wagner Model or Labour Law After the Wagner Model", International Labour and Employment Relations Association Conference, Toronto, July 2020 [Zoom panel recorded]

"Legal Oshidoshi and the Labour Law of "Gig" Work", Ontario Bar Association Conference, February 2020, Toronto

"Why Comply with Workplace Law?", Academy of Management, , with Shayna Frawley, Marie-Helene Budworth, Parbudyal Singh, Boston, August 2019

2019, H.D. Woods Prize, Public Lecture, "David Beatty's Redemption and Other Thoughts on the Future of Labour Law" (Vancouver, CIRA Conference, 2019)

"What is Human Resources Law?", Canadian Industrial Relations Association

Conference, Vancouver June 2019

"Lessons in Canadian Labour Law for a Clean Slate for Worker Power", Harvard Law School, October 2018

"Does Canada Need a Right to Engage in Concerted Activities?", Presentation at Dalhousie Law School, Halifax, September 2018

"CSR Imagery Through Rana Plaza", Law and Society Proceedings, Toronto, June 2018

"What is Just Transitions Law?", Presentation to the Alberta Chapter, Canadian Bar Association, April 2018, Edmonton

"The Treatment of Off-Duty Conduct in the Common Law", Presentation to the Judge Advocate General Continuing Legal Education Conference, Ottawa March 2018

"Rana Plaza Through the Lens of Canadian Transnational Tort Law", Labour Law Research Network, University of Toronto Faculty of Law, May 2017

Chair and Participant, Roundtable on Labour, the Environment, and Climate Change, Labour Law Research Network, University of Toronto Faculty of Law, May 2017

"Labour and Employment Law: A Year in Review", Canadian Bar Association, Ottawa, November 2016

""The Grandiose Mythology and Slow Death of Canadian Labor Law", invited public lecture, Marquette University, Faculty of Law, Milwaukee, February 2016

"The View from the Academy", Canadian Association of Labour Lawyers Annual Conference, St. Johns, May 2016

"Labour Law Reform Through a Theoretical Lens", presentation to an advanced labour law seminar, University of Western Ontario Law School, January 2015

"A Wicked Problem: Promoting Freedom of Association for Non-Standard Workers", Nonstandard Employment and the Union Response, Osgoode Hall Law School, Toronto, December 2014

"Graduated Freedom of Association" Law and Society Annual Proceedings, Minneapolis, May 2014

"A Law of Just Transitions", Canadian Industrial Relations Association Conference, Brock University, May 2014

"Traditional Unions Can't Help Baristas. Can Non-Traditional Unons?", talk to Global Labour Speaker Series, York University, February 2014

"Green Labour Law?", Work in a Warming World Conference, December 2013, University of Toronto

TAB B

"The Legal Dilemma of Unpaid Internships", talk to Toronto Youth Unemployment Forum, Toronto, November 2013

"Saskatchewan's Bill-85: A Rebellion Without a Cause", Canadian Industrial Relations Association, Ryerson University, 2013

"Labour Law as Vaccine: Harnessing Risk to Regulate Supply Chain Labour Practices" Labour Law Research Network Inaugural Conference, Barcelona, 2013

"What is Labour Law Scholarship For?", Law and Society Annual Conference, Boston, 2013 (with Professor Ruth Dukes)

"Laboring Through the Supply Chain", International Law and Society Conference, Honolulu, 2012

"Governing and Re-Governing the Workplace", Voices at Work Workshop, Osgoode Hall Law School, 2012

"The Future of Workplace Law: Three Ways", Faultlines and Borderlines in Labour Law Conference, University of Western Ontario Law School, 2012

"Good Employer, Bad Employer: Risk, Reward, and Polycentric Ordering in Employment Law", Society of Legal Scholars Annual Conference, 2011, Cambridge University

Lancaster House Canadian Labour Board Conference, "Union and Employee Access to Employer Property During Organizing Campaigns: Comparative and International Issues", October 2011, Toronto

"Authorizations, Contestations, and Problemitizations: The Case of the Living Wage", Workshop on the Dynamics of Interaction Among Transnational Business Regulatory Initiatives: Theoretical Approaches, Empirical Contexts and Practitioners' Perspectives, 2011, European University Institute, Florence

Lancaster House Canadian Labour Board Conference, "Top Labour Board Decisions" panel, 2009, 2010, 2011, Toronto.

"Decentring Labour Law?", Peer Review Selection, CRIMT Conference, Employee Representation in the New World of Work, Laval, 2010)

"Lessons from The Human Condition for Addressing Supply Chain Labour Practices", (Labour, Work, Action: Arendt & The Human Condition, Schulich School of Business/Osgoode Hall Law School, York University, April 30, 2009)

D. Doorey, "Labour and the City: What Role for Global Cities" (The Learning City Conference, Osgoode Hall Law School, March 5, 2009)

D. Doorey, "The Canadianization of the American 'Neutrality Agreement': Recent Developments" (Annual Law & Society Association Conference, Denver, 2009)

D. Doorey, "Union Access to Workers During Union Organizing Campaigns: A New Look Through the Lens of Health Services" (Paper presented to the Annual Law and Society Association Conference, Montreal, May 2008)

D. Doorey, "Can Factory Disclosure Influence Labour Practices in Global Supply Chains: A Case Study of Nike and Levi-Strauss" (CRIMT, What Labour Policies for a Global Era?, Montreal, 2007)

D. Doorey, "Six Questions About Neutrality Agreements (and some answers)?" (Centre for Work on Research and Society, Workers' Rights, Human Rights: Making the Connection Conference, Toronto, 2007)

D. Doorey, "Arthurs and the Steelworker: Teaching Labour Law to Non-lawyers" (Annual proceedings of the Canadian Industrial Relations Association, Montreal, 2007)

D. Doorey, "Unions, Social Advocacy Groups, and Transparency as Organizing Tool" (Spin Law Conference, University of Toronto Law School, 2007)

COMPETITIVE GRANTS AND FUNDING

2022, SSHRC Minor Research Grant, $5000, *What are Canadian Universities doing to enforce living wage standards in licensee codes of conduct?,* with Kelly Pike and Tinu Mathew

2022, CIFAR, Global Call, *Power, Democracy, and the Future of Work* (Finalist for major research grant, final decision to be announced in fall 2022), co-applicant.

2020, SSHRC Minor Research Grant, $3000
(Project: *Labour Law's Intersections: How Other Legal Fields Influence Labour Law and Labour Practices*)

2014, York University Faculty Merit Award, $3000

2011, SSHRC Aid in Support of Travel Grant, $800

2012, York University Faculty Merit Award, $2000

2012-15, SSHRC, Standard Research Grant, 3 Year $70,000
(Project: *Risk, Supply Chains, and Labour Practices*: *Lessons for Regulation)*

2010, York University Faculty Merit Award, $3000

2010-2017, Co-Investigator, SSRHC Environmental Community-University Research Alliance (E-CURA) Grant, *Work in a Warming World* (multi-million dollar funding research initiative)

2009, Junior Faculty Fund Award, York University
(Project: *Regulatory Theory and the Governance of Supply Chains*)

2008, Dean's Research Fellowship, School of Administrative Studies, York University

2008, Minor Research Grant , York University
(Project: "*Industrial Conflict in the Post-Health Services Era: Where Have We Been and Where Are We Going?)*

2007, Junior Faculty Fund, York University
(Project: *Employer Speech and the Captive Audience Meeting*)

2004-2006, Social Science and Humanities Research Council $40,000 Doctoral Fellowship (Osgoode Hall Law School).
(Project: *Using Domestic Disclosure Regulation to Influence Foreign Labour Practices*)

OTHER EMPLOYMENT AND PROFESSIONAL AFFILIATIONS

Instructor, Ryerson University, Certificate in Labour Relations (2019, 2021)

Workload Resolution Arbitrator, Humber College and OPSEU Local 562
2015-2017

Called the Law Bars of Ontario and British Columbia in 1997

General Counsel, United Steelworkers Canada
1998 – 2001, Toronto, Ontario

Labour Lawyer, Victory Square Law Offices
1997 - 1998, Vancouver, British Columbia

Articling Student, Summer Student, United Steelworkers
1994 – 1996, Toronto, Ontario

OTHER AWARDS, DISTINCTIONS, ACTIVITIES

2021, Established an annual Law of Work Award to be awarded to a JD student at Osgoode Hall Law School based on financial need and demonstrated interest in labour and employment law ($1500)

2019, H.D. Woods Prize for Contributions to Canadian Industrial Relations (Vancouver, CIRA Conference, 2019)

2018, Established an annual award (Law of Work Best Paper Award) with a donation of $500 per year that is awarded to the best paper dealing with labour and employment law submitted to the Canadian Industrial Relations Association annual conference.

2015, Inaugural inductee to the Canadian Law Blog Hall of Fame

2015, Deans' Award for Excellence in Teaching, Faculty of Liberal Arts and Professional Studies, York University

2014, Outstanding Teaching Award, School of HRM, York University

2012, Simon Fodden Award, Best Law Blog in Canada Professor Blog in Canada (Canadian Law Blog Awards), *Law of Work* Blog

2010, Morley Gunderson Award for Outstanding Contribution to Canadian Industrial Relations, awarded by the University of Toronto's Centre for Industrial Relations and Human Resource Management

2008, 2009, 2011: Canadian Law Blog Awards for *Doorey's Workplace Law Blog*, Best Law Professor Blog in Canada (http://www.clawbies.ca/2009-clawbies-canadian-law-blog-awards/)

2007, *Theory-Practice Award* (York University), for significant research bridging management theory and practice, for my paper "Who Made That?: Influencing Foreign Labour Practices Through Domestic Reflexive Disclosure Regulation" published in the *Osgoode Hall Law Journal*

2005, *David Watson Memorial Award*, for the paper published in the Queens Law Journal making the most significant contribution to legal scholarship: "Employer Bullying: Implied Duties of Fair Dealing in Canadian Employment Contracts"

PROFESSIONAL & COMMUNITY SERVICE

Chair, University Wide Dispute Resolution Committee, York University (2021-Present)

Editorial Board Member, Journal of Industrial Relations (2022-Present)

Articles Review Editor, Canadian Labour & Employment Law Journal (2010 - Present)

Dispute Resolution Committee, York University Faculty Association Representative (2009-2018, 2020-2022)

Organizing Committee, Labour Law Research Network Conference, Toronto June 2017

Chair, Academics Panel, Annual Conference of the Canadian Association of Labour Lawyers (2015, 2016)

Academic Advisor, Osgoode Hall Law School Certificate Program in Labour & Employment Law (2010)

Editorial Board, *Canadian Cases on Employment Law* (CCEL)

Organizing Committee, Canadian Industrial Relations Association 50th Anniversary Conference, University of Toronto/Ryerson University, 2013

Osgoode Hall Law School, Dean's Appointment, Parkdale Community Legal Services (2009-2012)

Affirmative Action Officer, recruitment exercises, SHRM, York University, 2013. 2015, 2020

YUFA Union Steward for School of HRM, School of Public Policy (2009-2012)

TEACHING AND COURSE DEVELOPMENT

GRADUATE PROGRAM COURSES DEVELOPED AND TAUGHT

- Master of Law, LL.M Osgoode Hall Law School, 2019
  With Professor Kevin Kolben (Rutgers), *Transnational Labour Law and the Global Supply Chain*

- Master of Law, LL.M Osgoode Hall Law School, 2018
  With Professor Paul Secunda (Marquette), *Contemporary Issues in Labour Law*

- Master of Law, LL.M Osgoode Hall Law School, 2016
  With Professor Ruth Dukes (Glasgow), *Contemporary Issues in Labour Law*

- Ph.D, Human Resources Management, 2012
  Seminar on Issues in Labour and Employment Law

- Master of Law, LL.M, Osgoode Hall Law School , 2010, 2012, 2014
  With Professor Eric Tucker, *Theories & Perspectives in Labour Law*

- Master of Human Resource Management, York University, 2006-Present
  Workplace Law, Practice, and Policy

- Masters of Law, LLM, Osgoode Hall Law School, 2008
  Industrial Conflict Law

- Master of Industrial Relation, University of Toronto, 2005
  With Professor Carla Lipsig-Mumme, *Labour and Globalization*

UNDERGRADUATE PROGRAM COURSES DEVELOPED AND TAUGHT

- *Advanced Issues in Law of Work*, Approved in 2019
- *Industrial Relations*, York University, 2006-Present
- *Industrial Relations, Distance Course,* York University, 2008-Present

- *Employment Law*, York University, 2006-Present
- *Employment Law, Distance Course,* York University, 2007-Present
- *Labour Relations Law, Osgoode Hall Law School,* 2007, 2008
- *Labour Law, Queens, Faculty of Law,* 2004-2006

STUDENT SUPERVISION (PH.D)

Tinu Koithara, Committee Member, Human Resource Management (York University) (Topic TBD, Committee formed 2022)

Shayna Frawley, Supervisor, Human Resource Management (York University)
Topic: Why Comply With Workplace Law? A Qualitative Investigation of HR Practitioners (Defended, 2018)

Bruce Curran, Committee Member, Industrial Relations (University of Toronto)
Topic: Assessing the Impact of *Wallace* and *Honda* on Reasonable Notice Damages (Defended, 2014)

Claire Mumme, Internal-External Member of Dissertation Defense Committee, Osgoode Hall Law School. (Defended 2013)
Topic: The Origins of the Employment Contract in Canadian Common Law

Rachel Aleks, Committee Member, Industrial Relations (University of Toronto)
Topic: Union strategies and potential targets for new member organizing in the United States (Defended 2013)

SUPERVISION (LLM THESIS)

Tim Maguire, "Increasing Collective Agreement Coverage Through Sectoral Bargaining", Osgoode Hall Law School, LLM, 2020

Scott Walsworth, "Saskatchewan's Essential Services Legislation and the Right to Strike", Osgoode Hall Law School, LLM, 2014

Timothy Mitchell, "Interest Arbitration and the Law of Firefighters' Collective Bargaining in Alberta", Osgoode Hall Law School, LLM, 2013

Andrew Langille, "The Law of Unpaid Interns in Canada", Osgoode Hall Law School, LLM, 2012

TAB B

Appendix A

TAB B

Canadian Industrial Relations

The Report of
Task Force on Labour Relations

Privy Council Office, December 1968

TAB B

CRITIQUE OF THE PRESENT COLLECTIVE BARGAINING SYSTEM[1]

250. This appraisal of the performance of the collective bargaining system covers limitations inherent in the process which should not be judged as completely remediable, and shortcomings in the system which warrant careful scrutiny and corrective action. It provides much of the base for our recommendations in Part Five.

IMPLICATIONS OF THE SYSTEM'S LIMITED COVERAGE

251. Even with a broad definition, trade unionism and collective bargaining embrace less than one-half of the paid non-agricultural work force. This limited coverage gives rise to a number of questions, several of which relate to the statutory framework within which collective bargaining is normally conducted. These questions concern the coverage of the existing labour relations acts and the extent to which the acts protect and assist workers in exercising their basic rights to organize and to act collectively.

252. As for the comprehensiveness of the applicable legislation, there are many exemptions in the statutes. Where the exempted group is covered by special enabling legislation, as is often the case for police and teachers and other public servants, they are not usually denied legislative support if they choose to bargain collectively, though they are subject to a different set of rules. This disparity leads to a more fragmented approach to industrial relations than is either necessary or desirable, given the goal of consistency of policy.

[1] Throughout this Part of the Report there are many general references to various provisions in the labour relations Acts in the federal and provincial jurisdictions. For more detailed references to Canadian collective bargaining statutes and for comparative analysis see Edith Lorentsen and Joel Bell, *The Development of the Public Policy on Labour Relations in Canada*, Task Force Study; and A. W. R. Carrothers, *Collective Bargaining Law in Canada*, (Toronto, Butterworths, 1965).

253. More disturbing are exemptions which apply to certain groups, such as the traditional professions of law and medicine, and agricultural and domestic workers, where no alternative legislative framework is provided. In some cases, as in many of the professions, this deprivation works no hardship on the group itself because it is strong enough to look after its interests without collective bargaining legislation; although not usually without statutory authority to administer an exclusive licensing arrangement. More often than not, the danger in these instances is to the public, since these groups are seldom subject to the same series of checks and balances as unions operating under the labour relations acts and, unlike unions, often confront no opposing force in the form of an organized employer of their services.

254. At the other extreme are workers who have no recourse to protect their interests aside from the right to quit. It is difficult to find a valid rationale for exemptions which apply to agricultural workers and domestic servants. If collective bargaining is to be supported by public policy, its benefits should be made available to as many groups as possible on an equal basis. Where particular problems arise, as in the case of "dependent contractors",[2] special provisions under the legislation rather than total exemption can provide a more defensible alternative.

255. Under present legislation, so-called managerial (including supervisory) employees and those having access to confidential industrial relations information are excluded from all bargaining units.[3] Although the principle behind some of these exclusions is understandable, in practice there sometimes appear to be far more than necessary. In the Canadian Broadcasting Corporation, for example, where all of the eligible employees are organized, about one-quarter of the total work force is excluded.

256. Within the present framework, workers are protected from management retaliation in the exercise of their rights to organize and bargain collectively. One of the most serious problems arises when union activity is an alleged cause of dismissal.[4] Bearing in mind the diffculty such cases entail, we have been impressed by the record of enforcement of those parts of the legislation designed to curb such practices. In particular, we note with approval the use of mediation as a preliminary step in the handling of such cases, the tendency to place the burden of proof on the employer to show cause for dismissal, and the policy of reinstating with back pay persons improperly discharged. It is questionable whether the prohibition in the *Criminal Code* against discharge for union activity is necessary.

257. Another provision in the federal legislation directed at the protection of workers in the exercise of their rights is the prohibition against the certification of employer-sponsored or company unions. Other provisions may be found in both the federal and the provincial statutes. For example, a

---

[2] See Part Two, paragraph 90.
[3] See Robert Rogow, *Supervisors and Collective Bargaining*, Task Force Study.
[4] See Innis Christie and Morley Gorsky, *An Exploratory Study of the Efficacy of the Law of Unfair Labour Practices in Canada*, Task Force Study and A. W. R. Carrothers, *op. cit.*

TAB B

PART FIVE

RECOMMENDATIONS AND OBSERVATIONS

TAB B. Reclusions

436. In some industries extensive exclusions from bargaining units have been made on the ground that individuals were exercising management functions or were in a confidential capacity respecting labour relations. Some exclusions may be justified to avoid conflicts of interest which are implicit in a situation where a union bargains with management respecting a unit that includes managerial as well as non-managerial personnel. Nevertheless, the exclusions deny these persons access to the normal processes of collective bargaining. In our view, the exclusions should be held to a minimum.

437. Employees appropriately excluded on these grounds are effectively denied access to any form of collective bargaining. This is unjust in the case of supervisory and junior managerial employees. We recommend, therefore, that the statutory right of collective bargaining be extended to these employees, subject to their being placed in separate bargaining units and in separate unions, and provided further that these unions not be permitted to affiliate with other unions or labour organizations except those composed exclusively of similar types of employees. We would not extend these formal collective bargaining rights to middle and senior levels of management, on the ground that the extension would be incompatible with efficient management and the economic welfare of the country.

438. We recommend that collective bargaining be extended to persons employed in a confidential capacity in matters relating to labour relations, subject to the same provisos for supervisory and junior managerial employees.

439. We recommend that collective bargaining be extended to security employees and private police, subject to these same provisos.

440. We recommend further that public law enforcement officers and firefighters have the right to organize and to engage in collective bargaining subject to these same provisos insofar as public law enforcement officers are concerned. In view of the high public interest in the continuing availability of the services of these officers as well as firefighters, we also recommend that binding arbitration be substituted for the right to strike or lock out.

441. We recommend that the coverage of collective bargaining legislation be extended to employees who are members of licensed professions, provided the bargaining agent be a separate organization from the licensing body. Where self-employed professionals choose to act collectively to establish fee schedules or otherwise to protect their economic interests, a case can be made that they too be required to act through an organization other than their licensing body in order to avoid a temptation to employ licensing as a restrictive device to reduce entry and control market supply. We suggest that this subject receive further investigation; it would be an appropriate assignment for the Incomes and Costs Research Board whose creation we recommend in a later section.

442. We are concerned about accessibility to collective action by groups of self-employed persons who are economically dependent for the sale of their product or services on a very limited market or who for other

Appendix B

TAB B

TASK FORCE ON LABOUR RELATIONS

(under the Privy Council Office)

STUDY NO. 2

PROFESSIONAL WORKERS AND COLLECTIVE BARGAINING

An analysis of the problems which professional workers and their employers face when they adopt a collective bargaining relationship

BY

SHIRLEY B. GOLDENBERG M.A.

Department of Economics and Political Science
McGILL UNIVERSITY

OTTAWA

DECEMBER 1968

present their common salary demands. If a formal collective bargaining relationship were to be adopted, however, certification of the Association by the Canada Labour Relations Board would be impossible, due to the professional exclusions of the IRDIA. Any attempt to bargain in provincial units, on the other hand, would discriminate in favour of the Quebec employees. The Labour Code of that Province would give them full collective bargaining rights; but their counterparts in Ontario, being excluded from the Labour Relations Act, would still be dependent on voluntary recognition.

Parties to the Bargaining Relationship

The Bargaining Agent for Professional Workers - The choice of a bargaining agent presents problems to professional workers which do not exist for other categories of employees. Three alternatives are available:

1. The professional association as a bargaining agent.
2. An independent structure for collective bargaining purposes.
3. Trade union affiliation.

A. The Role of the Professional Association - Professional associations differ in their official attitudes toward collective bargaining. Some, such as teachers' and nurses' associations, have taken the initiative in the adoption of collective bargaining practices and indeed, in some provincial jurisdictions, have been certified as bargaining agents for their members. Others, notably engineering associations, have been in the forefront of opposition to formal collective bargaining. 24/

Even when a professional association favours collective bargaining, however, the desirability of it being the negotiating agent for its employee members has been open to serious question. The principle objections that have been put forward may be summarized as follows:

1. The fact that members of the same profession may be employers or employees, and that, in the latter capacity, they may perform a variety of supervisory or non-supervisory roles, does not affect their membership in a single professional association but frequently places them on opposite sides of a common bargaining table. When the bargaining relationship involves a conflict of interest between members of the same profession, it has been suggested that it is incongruous, in principle at least, for the professional association, to which they all belong, to act as agent for one of the parties. The negotiators might be caught in a serious dilemma of divided loyalty. 25/

2. Serious objections have also been raised, on ethical grounds, to the combination in a single body, in this case, the professional association, of the public interest function of licensing with the self-interest function of collective bargaining. The possibility, however remote, of restricting numbers to improve self interest has been put forth as a forceful argument to preclude professional associations with licensing authority from acting as bargaining agents. 26/

B. Separate Bargaining Structures — It has been suggested that the conflicts of interest noted above could be most easily avoided and the ethical problem resolved if one organization, the established professional

TAB B

any group of workers, professionally trained or otherwise, from whom it withdraws the right to strike on the grounds of public interest. It has been suggested that negotiated settlements in related occupations and/or selected industries might provide guidelines for arbitration awards in cases where the ultimate bargaining weapon has been removed. 2/ It is not certain, of course, that the professional workers and employers concerned would find the comparisons appropriate.

While some professionals would undoubtedly renounce the strike weapon as "unprofessional" under any circumstances, others maintain that the right to strike must be kept as a bargaining weapon. I believe that this decision should be left to the professional workers concerned in all but exceptional circumstances. Unless the withdrawal of professional services would jeopardize a vital public interest, I feel that no legal restriction on the right to strike is indicated.

The Bargaining Agent

The choice of a bargaining agent is closely related to the issue of professional ethics. I would rule out professional associations with licensing authority on the grounds that it would be undesirable to combine in one body the public interest function of licensing with the private interest function of bargaining. The possibility, however remote, of restricting numbers to improve self interest is too great a public risk. The inclusion of employer and employee members in a single professional association is another reason precluding the choice of the association itself as the bargaining agent for employee groups. The conflict of interest that this could produce is self evident.

Conflicts of interest might be avoided and the ethical problem resolved if a separate negotiating body, with or without trade union affiliation, were designated as bargaining agent. While some prophets of doom deplore the possibility of trade union affiliation, in my opinion this is not a major problem. I have already noted that the method of dispute settlement is the crux of the moral issue where essential services are at stake, and experience shows that organized labour has no monopoly on strike action.

Engineers and nurses who struck in Quebec were, indeed, affiliated with the CNTU; teachers and radiologists were not. And the doctors in Saskatchewan, it may be remembered with interest, acted as members of the Medical Association of that province, not affiliates of the CNTU or the CLC, when they withdrew their professional services.

One complicating factor may be noted in considering the issue of trade union affiliation. Where an organized group of salaried professionals has supervisory or managerial authority over an organized group of non-professional workers employed in the same enterprise, and where each group forms a separate bargaining unit, the desirability of both being affiliated with the same labour "centrale" is open to serious question.

Determining the Appropriate Bargaining Unit

Two distinct problems are involved in defining the bargaining unit. One is the issue of craft versus industrial organization, the other relates to the demarcation line between labour and management functions. In both cases, a certain degree of flexibility seems desirable.

In considering the professional basis of organizing bargaining units, I noted that the protection of craft rights was to a large extent a

professionals on the employee and management sides (as noted to be the case in some universities), collective action of some sort seems to be the most likely solution to collective problems. However, the adoption by professional workers of collective bargaining on the industrial pattern poses a number of problems. Some of the problems, such as the recognition of individual initiative and merit and the protection of professional standards and prerogatives, fall within the purview of the collective agreement. As such, their solution rests with the parties to the bargaining relationship and does not directly concern the public authority. Because of the particular mandate of the Task Force that commissioned this study, this summary chapter will be confined to issues that bear most directly on public policy.

Collective Bargaining and Professional Ethics

First, there is the perennial question: Is collective bargaining compatible with professional ethics? An affirmative answer is indicated, but with certain qualifications.

While some of the liberal professions have objected to collective bargaining on the grounds of its incompatibility with professional ethics, these same professions have set precedents of collective action to protect the income of their self-employed members. Any scale or tariff of fees agreed to by a professional group does precisely that. If members of a professional group can act in concert, as they do, to protect their income as self-employed persons, it seems illogical that employed members of the same profession should be denied similar rights to secure their income and working conditions.

There is one caveat, however. While I do not see any moral objection to collective bargaining per se, provided, of course, that this is the wish of the professional workers concerned, it seems imperative that the bargaining methods be compatible with professional responsibility. This raises two related issues: the method of dispute settlement and the choice of the bargaining agent.

Dispute Settlement

The method of dispute settlement is probably the crux of the moral issue facing professional workers when they decide to bargain collectively. It is also a major issue in the area of public policy where, it should be remembered, the enforceability, as well as the desirability, of intervention must be considered.

Because the potential impact of a withdrawal of services varies both between and within professional groups, the question of professional responsibility in re dispute settlement, and of public intervention when negotiations reach an impasse, must be related to the public interest aspect of a given professional function. While recognizing the right to strike as an essential ingredient of the bargaining process, some restrictions are indicated, by private restraint or public intervention, where a vital public interest is involved.

Assuming that a work stoppage by a professional group would be contrary to the public interest, and here the problem of definition is self-evident, the moral or ethical question, as Dr. Carrothers has observed, is "not whether collective bargaining as such is improper but whether a reasonable substitute can be devised for the sanction of the right to strike." 1/ It certainly seems incumbent on the public authority to assure a fair deal to

Appendix C

TAB B

ORLB File No.: 2164-17-R

AGREEMENT

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

("OPSEU")

- and –

ADVOCACY CENTRE FOR TENANTS ONTARIO

("ACTO")

WHEREAS OPSEU has applied to the Ontario Labour Relations Board ("OLRB") for certification of employees of ACTO in a unit described in the Application;

AND WHEREAS in its Response to the Application, ACTO has disagreed with OPSEU's proposed bargaining unit and asserted that the proposed bargaining unit could not be appropriate because the proposed unit includes members of the legal profession who are entitled to practice in Ontario and who are employed in a professional capacity and that those persons are deemed not to be employees for purposes of the *Labour Relations Act, 1995*;

AND WHEREAS ACTO has proposed a different bargaining unit description to that proposed by OPSEU, which would exclude supervisors and those above the rank of supervisor, lawyers and those persons employed in a confidential capacity in matters related to labour relations;

AND WHEREAS a vote was conducted on November 29, 2017 by the OLRB and the ballot box was ordered sealed until such time as the OLRB ordered or the parties agree;

AND WHEREAS OPSEU has instructed its counsel to launch a constitutional challenge to the provisions of the *Labour Relations Act, 1995* which exclude lawyers from the *Labour Relations Act, 1995*;

AND WHEREAS ACTO would be prepared to voluntarily recognize OPSEU as the bargaining agent for a bargaining unit which includes lawyers on certain conditions which are set out herein;

AND WHEREAS OPSEU and ACTO wish to settle the issues raised in relation to the Application for Certification and establish a framework which would govern any future dealings between them;

AND WHEREAS it is the desire of both parties that if OPSEU is recognized that any relationship between them should be characterized by courtesy, fair dealing and good faith;

THEREFORE, the parties agree as follows:

1. It is agreed that the bargaining unit description is:

> All employees of ACTO in the City of Toronto and the City of Mississauga, including persons entitled to practice law in Ontario and employed in a professional capacity, excluding managers, lawyers who are members of the management team and persons employed in a confidential capacity in matters related to labour relations.

2. The ballots cast on November 29, 2017 by those persons who fall within the agreed bargaining unit description shall be counted on a date to be determined by the OLRB in accordance with usual OLRB practices. For clarity, the Program Administrator is excluded from the bargaining unit. Once the outcome of the vote is determined the ballots cast as part of the vote shall be destroyed pursuant to usual OLRB procedure.

3. The unfair labour practice provisions of the *Labour Relations Act, 1995* applicable to employers, persons acting on behalf of the employer, unions, and persons acting on behalf of the union, including the statutory "freeze," will apply on the execution of this settlement and will end if the majority of the ballots counting vote "No," or, if a majority of those ballots counting vote "Yes" will continue until a collective agreement is in place.

4. If a majority of those ballots counted vote "No," OPSEU shall have no representation rights with respect to any ACTO employees and the statutory bar in the *Labour Relations Act, 1995,* shall apply. .

5. If a majority of those ballots counted vote "Yes," ACTO agrees that it will recognize OPSEU as the exclusive bargaining agent for those persons in the agreed bargaining unit, and will not recognize or enter into bargaining with any other union or association. In that case, the parties will expeditiously enter into good faith negotiations to arrive at a collective agreement.

6. The parties agree that although the *Labour Relations Act, 1995* does not apply to this bargaining unit, the bargaining framework set out in the *Labour Relations Act, 1995,* shall apply to their collective bargaining relationship, including negotiations towards a first collective agreement, and to bargaining in respect of any renewal collective agreements. Without limiting the generality of the foregoing, and for greater clarity:

   (a) The parties shall bargain in good faith and make every reasonable effort to make a collective agreement.

   (b) Either party may file for conciliation at any time during bargaining in accordance with the applicable statutory criteria, and there shall be no objection to such

Application on the basis that the bargaining unit includes individuals who may not be "employees" for the purposes of the *Labour Relations Act, 1995*.

(c) The parties are agreed that they have their respective rights to strike or lockout, as the case may be, in accordance with the procedures, requirements, rights and obligations set out in the *Labour Relations Act, 1995*.

(d) Without limiting the generality of the foregoing, in the event of a strike or lockout, neither party will assert that the strike/lockout is illegal on the basis that the bargaining unit includes individuals who may not be "employees" for the purposes of the *Labour Relations Act, 1995*, and neither party will assert that a strike or lockout that would otherwise be lawful under the *Labour Relations Act, 1995* constitutes a tortious activity.

(e) Either party may apply for first collective agreement mediation-arbitration pursuant to and in accordance with the *Labour Relations Act, 1995*. Such Application shall be considered and decided by Arbitrator Bill Kaplan in accordance with the criteria set out in the *Labour Relations Act, 1995*, whom shall have all authority and jurisdiction as the OLRB in considering such application. Arbitrator Kaplan's decision shall be binding upon the parties and the employees in the bargaining unit.

(f) Any first or renewal collective agreement that the parties enter into shall include, or be deemed to include whatever mandatory clauses and provisions are required under the *Labour Relations Act, 1995*.

(g) The unfair labour practices provisions of the *Labour Relations Act, 1995* shall apply. Any complaint that either party has breached these provisions may be referred to Arbitrator Kaplan who shall have all the powers and authorities that the OLRB would have in considering an unfair labour practices complaint.

(h) The sale of business and successor rights provisions of the *Labour Relations Act, 1995* shall apply, subject to and in accordance with the terms of the *Labour Relations Act, 1995*.

7. Without limiting the generality of paragraph 6, ACTO shall not discharge or discipline an employee in the bargaining unit without just cause during the period that begins effective that OPSEU becomes exclusive bargaining agent pursuant to paragraph 6, above, and ends on the earlier of the date on which a first collective agreement is entered into and the date on which the trade union no longer represents the employees in the bargaining unit.

8. It is agreed that Arbitrator Kaplan will make a final and binding determination with respect to any disputes over the counting of the ballots, any unfair labour practice allegations brought by either party, or future exclusions from the bargaining unit, on a summary and expedited basis, in such manner as he determines, and in so doing will have all the powers and remedial authority of the OLRB under the *Labour Relations Act, 1995*.

9. Unless a question arises regarding the legality of a strike, or the Minister's, Arbitrator's, or OLRB's jurisdiction in relation to this bargaining unit on the basis that it includes lawyers employed in a professional capacity, OPSEU shall not commence or proceed with any constitutional challenge in relation to ACTO in connection with the provisions of the *Labour Relations Act, 1995* which exclude lawyers from the *Labour Relations Act, 1995* and any challenge that has been brought shall be discontinued on a without costs basis. Should OPSEU commence or proceed with such a constitutional challenge, this agreement is without prejudice to any position either party may take, and both parties reserve all of their respective rights in that regard.

10. ACTO and OPSEU recognize that lawyers and paralegals employed by ACTO are bound by Professional Standards and Rules of Professional Conduct of the Law Society of Ontario as well as the *Law Society Act* and other legislation, rules and regulations (collectively "codes of conduct"). These codes of conduct regulate, *inter alia*, the conduct of lawyers towards clients, other lawyers, and other parties. Nothing in this Framework Agreement or any collective agreement diminishes the obligations of ACTO employed lawyers to adhere to applicable professional standards and codes of conduct at all times and nothing in this Framework Agreement or any collective agreement provision shall be interpreted as diminishing or affecting the lawyers' duty to adhere to professional standards and codes of conduct. The parties shall work together to ensure that the rights and obligations of lawyers under this Framework Agreement or any collective agreement do not conflict with their professional obligations under the codes of conduct.

11. It is agreed that Arbitrator Bill Kaplan shall make a final and binding determination with respect to any issues that may arise in the interpretation, application or implementation of this Agreement, on a summary and expedited basis, in such manner as he/she determines and in so doing will have all the powers of an arbitrator or the OLRB, as appropriate, under the *Labour Relations Act, 1995*.

12. Should Arbitrator Kaplan be unavailable the parties shall forthwith agree on an alternate arbitrator.

13. An Order or Award of Arbitrator Kaplan may be enforced in court pursuant to the terms and provisions of the *Arbitrations Act, 1991*.

14. Any reference to the *Labour Relations Act, 1995* and/or *Arbitrations Act, 1991* includes any subsequent amendments made to that legislation, and/or successor legislation.

15. It is agreed that this Agreement constitutes, *inter alia*, a settlement for the purposes of s. 96(7) of the *Labour Relations Act, 1995*.

DATED at Toronto, Ontario, this 20th day of February, 2018.

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

ADVOCACY CENTRE FOR TENANTS ONTARIO per:

Appendix D

TAB B

THE PROFESSIONAL EMPLOYEE IN GOVERNMENT

A Report to the Honorable Murray Elston

Chairman

Management Board of Cabinet

Government of Ontario

on the

Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario

submitted by

Professor Paul C. Weiler

Harvard Law School

January, 1988

TAB B

Table of Contents

I. INTRODUCTION

On March 26, 1987, the Government of Ontario appointed me Special Advisor to the Chairman of the Management Board of Cabinet to review, report on and recommend appropriate methods for establishing the compensation levels, employee benefits and other terms of employment for professional public servants who are employed by the Government under the Public Service Act. The particular focus of this review are five groups of licensed professional employees--the doctors, lawyers, dentists, engineers and architects--who are not now entitled to engage in collective bargaining with the government under the Crown Employees Collective Bargaining Act (CECBA). In the succeeding months through July, I met with individuals from and representatives of these several professional employee groups, together with officials from the interested government ministries and other affected bodies. Following these initial discussions, the parties prepared detailed analyses of their concerns and proposals, which were circulated to the other participants in this review. On the basis of this extensive documentation of the issues, I had a second series of meetings with the parties, and also with several of the Ministers having special responsibility for professional employees. I now submit this Report with my review of the current problems and my recommendations for change.

II. THE LEGAL SETTING

In their briefs prepared in connection with this inquiry, the parties developed a voluminous record of how the status of licensed professional employees has evolved to the current situation within the public service of Ontario. That work was an indispensable basis for informed recommendations on my part, and this material will also be available to inform the judgments of those in government who will ultimately decide what steps will be taken. However, it is not necessary to burden this Report with lengthy and detailed repetition of these historical accounts. Thus, I shall include here just a summary of the essential features of this changing situation, sufficient to make it clear what and why I am recommending.

The licensed professionals who are the prime focus of this review are employed by the Ontario government on terms and conditions of employment established within the framework of the Public Service Act. As is true of the government work force generally, such professional employees may have classified civil service status--in which case their employment terms are prescribed by the Civil Service Commission--or they may be unclassified ministerial appointments--in which case their employment terms are set in individual contracts (which generally track the salaries and benefits enjoyed by comparable classified employees).

However, for the last fifteen years the bulk of Ontario government employees have been entitled under CECBA to bargain collectively with the government regarding a broad range of salaries, benefits and conditions. Under this legislation the Ontario Public Service Employees Union (OPSEU) represents some 65,000 classified and unclassified members in a single all-employee bargaining unit; which in turn is subdivided into nine categories for purposes of separate salary negotiations. One of these components--the Scientific and Professional category--contains some 4,300 members whose larger occupational groups include the nurses (over 1,900 in all), social workers (500), biologists (160), economists (140), psychologists (100), and so on.

However, CECBA explicitly excludes from its coverage anyone "who is a member of the architectural, dental, engineering, legal and medical professions entitled to practice in Ontario and employed in a professional category" (S.1 (1)(f)(iv)). That means that the engineers (about 800), lawyers (nearly 650), doctors (250), architects (30) and dentists (25) employed by the Ontario government do not have the legal right to union representation and collective bargaining to shape and influence their terms of employment. That exclusion from the Act stems simply from their professional status, and applies whether or not the job duties of the individuals in question put their employment in a "managerial or confidential capacity" as defined by S.1 (1)(l) of CECBA.

These five licensed professional categories are often referred to in the literature on this subject as the "prototype professions" to distinguish them from the variety of newer professional and scientific occupations which have emerged into prominence in recent decades. Historically, these prototype professionals tended not to engage in collective bargaining, and post-war Canadian labor law reflected that phenonemon by excluding these groups from statutory coverage. However, as is evidenced by the review of the current legislation across the country in Appendix A to this report, Ontario's CECBA is the only present-day public sector statute which continues to deny all these prototype professionals the right to union representation.

The current Canadian treatment of professional bargaining ranges across these different positions:

(i). Ontario excludes all five professional categories from its CECBA, the legislation covering provincial government employees, but does permit engineers to enjoy collective bargaining rights in a unit of their own under the Labor Relations Act which covers the private and the rest of the provincial public sector. There are a couple of certified engineer units in Ontario, but the most important potential use of this provision is now the subject of an application for certification on behalf of the several thousand engineers employed by Ontario Hydro.

(ii). While in form Alberta does permit all these professional government employees to elect to bargain through the single provincial employee bargaining agent, in practice none of these professional groups wants to be included in that all-employee unit, and thus none of them now have collective bargaining. Prince Edward Island, on the other hand, simply includes these professionals in its overall bargaining unit--with the exception of the lawyers in the Department of Justice--and thus these employees do have union representation from the Prince Edward Island Public Service Association.

(iii). Newfoundland and Nova Scotia permit and have separate collective bargaining for government engineers and architects, but not for doctors, lawyers or dentists.

(iv). British Columbia allows collective bargaining by its engineers, architects and dentists who participate in a single all-professional employee unit, separate and distinct from both the nurses who also have their own unit, and the rest of the provincial employees who are represented by the BC Government Employees Union. While both doctors and lawyers are excluded from this legislation, the provincial government does voluntarily negotiate with the BC Medical Association in respect of its doctor-employee.

(v). The Federal Government, Quebec and New Brunswick provide for collective bargaining rights for all government professionals with the exception of the lawyers (at least those who work for the Department of Justice or the Attorney-General). Collective bargaining for the other four prototype professionals is conducted either in separate units for each group (as under federal law and in New Brunswick) or in a single scientific and professional component (as in Quebec). In New Brunswick the doctors and dentists which have such a right to collective bargaining have not yet chosen to exercise it.

(vi). As for Saskatchewan and Manitoba, on the face of their respective statutes no professional groups are excluded from collective bargaining rights. However, by agreement of the Saskatchewan government and its Government Employees Association, doctors, lawyers, engineers and dentists are excluded from the single provincial government employee unit. In Manitoba, while architects and dentists are covered by the master all-employee contract, engineers, doctors and lawyers have the right to certification in a unit of their own. Engineers and doctors have exercised that right, with the Manitoba Medical Association being the bargaining agent for the doctors. The lawyers do not have a certified bargaining representative, but they do have a

staff association which voluntarily negotiates salaries and benefits with the government.

Thus when one situates the Ontario law within that broader Canadian picture, it remains true that CECBA is the only statute which excludes all five of these prototype professionals from bargaining with their government employer. But when one focuses on specific professional categories--particularly the doctors and lawyers who are the major groups which stimulated this review of the Ontario scene--it is also true that Crown prosecutors are denied bargaining rights in every jurisdiction but one (that being Manitoba where the present relationship actually rests on agreement, not legislation), and doctors do not have bargaining rights in six of the other jurisdictions, and have not elected to exercise such a right in a seventh province, New Brunswick (though doctors have been extended voluntary negotiations in British Columbia, which excludes them on the face of its legislation).

III. THE PARTIES AND THEIR POSITIONS

As we have observed in some Canadian jurisdictions, the fact that a group of professional employees does not enjoy under Ontario law the right to union representation and collective bargaining does not preclude their organizing and securing on a voluntary base some such relationship with their government employer. In fact, there has been a considerable degree of activity among at least some of the prototype professionals in the Ontario public service. Indeed, I am struck by the manner in which the variety of positions now occupied by these Ontario professionals mirrors the evolution of employment generally over the last fifty years--from a situation under which the individual employee simply accepts the terms offered by the employer to a process of collective employee organization and influence over these terms.

(a). Medical Staff

Farthest along that trajectory are the 280 or so psychiatrists, other medical doctors and dentists who work in the province's psychiatric hospitals and mental retardation facilities (many of them employed in the classified civil service, but the majority unclassified and under contract). As far back as 1973, these professionals had organized themselves into a Psychiatric Hospitals Medical Staff Association which dealt informally with the ministries who were operating these facilities. Eventually, in 1980 a formal framework agreement was adopted creating a

Joint Negotiation Committee with equal repr ;entation from the Association and the Ministries affected ;including one from the Civil Service Commission). This d ;ument provided for negotiations about salaries as well as ;nsideration of vacation and other benefits. In the event ; disagreement within the Committee, a fact-finding proced ;e was established with authority to make recommen ;tions just with respect to salaries.

After several years experience with th procedure, the Association became disenchanted with the di ;ute resolution mechanism--both its narrow compass and its ; ;n-binding character. Feeding that sense of grievance ;ere two factors. One was the fact that government ; ;ysician earnings appeared to be falling significant; behind those of doctors in private practice, who were re; esented by the Ontario Medical Association in collective n; otiations about the OHIP fee schedule. As well, to the ext; t that the government asserted that the appropriate co; arison was with other employees in the public service, the ; sociation members observed that every other occupatio; l group working in the public psychiatric facilities enjoye; full-scale collective bargaining, ending in binding ar; tration, about the broad spectrum of salaries, benefits an; working conditions. That was true not just of the ; n-professional hospital employees, but also the registered urses and even the medical interns and residents (the latte under a voluntary framework agreement secured by the Professional

Association of Interns and Residents of Ontario--PAIRO). And indeed the psychiatrists who worked for the federal government institutions inside Ontario also enjoyed comparable rights to interest arbitration under the federal Public Service Staff Relations Act. As a result, the Association began limited job action in these hospital facilities in early 1986, until on the eve of a full-scale walkout an agreement was reached to establish a tripartite Board of Conciliation chaired by Kevin Burkett which would consider and make recommendations not just on the issues of salaries and working conditions, but also about the "mechanism for addressing workplace issues" with these medical staff.

As I write this Report, the Burkett Board has not issued its recommendations on the doctors' substantive terms of employment. However, in late November 1986 that Board did report on the so-called "process issues" (see Appendix B). Burkett essentially accepted the Association position that there should be collective bargaining between the Government and the Association, the latter representing a unit of medical staff in these hospitals (perhaps also including the small number of doctors employed in non-clinical roles in other areas of the government). Negotiations should be conducted about the entire array of bargainable items specified in CECBA for other government employees. Most important from the Association's perspective, Burkett recommended final and binding

arbitration as the mechanism for resolving any deadlock in the negotiations.

Throughout these Conciliation Board proceedings, it wa known that the government had been conducting its own interministerial analysis of the issue of collective bargaining for all the prototype professionals. That exercise culminated in the decision to appoint me as Specia Advisor for this more public review, a decision which was made in the spring of 1987 some time after the Burkett award. The Association objected strongly to what it considered to be the governm effort to avoid Burkett's recommendations. However, participate in this revie at least to the extent of insisting emphatically upon the key Burkett proposals: collective bargaining by the government with an Association representing a unit limited to doctors and dentists; negotiations about a broad range c salaries, benefits and working conditions; with binding arbitration as the favored method of resolving bargaining impasses.

(b). Crown Attorneys

Thus these government doctors do now enjoy a form of union representation and collective negotiation about their salaries and working conditions, although they do not have access to binding arbitration as they would like. By contrast, while Ontario crown attorneys have also developed an organized association, they have never been able to

engage in meaningful negotiations with the provincial government about even their salaries.

Roughly 330 crown attorneys work for the provincial government in one capacity or another. Most are located in the county or district crown offices, which have anywhere from one or two to fifteen or twenty lawyers. However, about seventy-five crowns work on special prosecutions, appeals and policy and development work in the criminal division of the Attorney-General's headquarters in downtown Toronto.

A Crown Attorney Association was formed back in the 60's, initially for professional and soc
However, in the 70's the Association began
its attention upon the salaries and employm
its members. Perhaps the major step in that direction was the Association's commissioning and paying for a salary study by Peat Marwick, a management consulting firm. That 1981 report documented a considerable erosion of crown attorney earnings, not just vis-a-vis the private practitioner, but also by comparison with lawyers employed by other governments (federal and municipal), the county and provincial court judges, and others working in the criminal justice system.

The Attorney-General of the day did acknowledge the validity of the Peat Marwick findings and the need for a substantial "catch-up" increase for the crown staff. However, the government brought in a general pay restraint

program before any such special adjustments could be made. Feelings of discontent continued to simmer and grow, and thus in 1986 the Association and the Attorney-General jointly sponsored a second study of compensation trends since 1981. This Sibson Report concluded that the situation had not improved, that substantial salary increases were required, and also that "a mechanism should be established by which the Crown Attorneys may have ongoing input into the determination of compensation adjustments". Not long thereafter, the current government initiated my inquiry into the shape which any such mechanism might take.

Like the psychiatrists, the crown attorneys view themselves as at the front line of a vital area of professional service--performing on behalf of the public essentially the same counsel function as do the better-paid private practitioners for their clients. Crown attorneys also observe that just about everyone else in the criminal justice system now enjoys the right to some form of collective salary negotiations with government, including neutral intervention if that is needed. That is true of the court staff represented by OPSEU under CECBA, of both the municipal and provincial police with their own associations and binding arbitration, and the Legal Aid lawyers who now have bargaining and fact-finding regarding their fee schedules. Even the provincial court judges have been given equal representation on a Provincial Court Commission whose role it is to recommend improvements in judicial "allowances

and benefits" to the Chairman of Management Board, and thence to the Standing Legislative Committee on the Administration of Justice--which recommendations the government has explicitly undertaken "will be given the fullest consideration and very great weight in the decision-making process". By contrast, the Crown Attorney Association has been able to do no more than sit down informally with the Attorney-General to discuss its salary problem and receive a sympathetic ear. However, the Association has not been able to get to the negotiating table with the human resources officials within Management Board, the people who actually exercise the major responsibility for the government's salary policies and decisions.

Given this perception of their problem, the crown attorney prescription followed quite naturally. Ideally, they would like an amendment to the Crown Attorney Act which would entitle their Association to negotiate salaries and other terms of employment with someone in government who has the power to make an agreement (whether that be the Attorney-General or Management Board). And in the absence of such agreement, the final step in the process would be binding tripartite arbitration of the issues in dispute.

(c). Civil Lawyers

Unlike their counterparts on the criminal law side, the 300 or more civil lawyers employed by the government have never even had an association of their own to speak on their behalf about salaries and related matters. To some extent this lack of organization reflects the fact that only about one-third of these lawyers actually work within the Attorney-General department itself. While the others are formally employed by this Ministry, they are seconded to and actually work in one of the many government departments and commissions which need ongoing legal work and advice.

But even though they are scattered throughout the entire government, these civil lawyers feel essentially the same concerns as do the crown attorneys. They also are engaged in important civil, administrative and constitutional litigation (and also prosecutions under provincial safety, environmental and other such legislation), or they perform solicitor's work regarding the government's property or contracts, or they draft legislation or help in policy development. However, civil lawyer salaries, which are governed by essentially the same framework as the crowns', are also falling significantly behind the earnings of the private sector attorneys with whom the civil lawyers regularly deal. In addition, the actual administration of this salary system in individual cases is mystifying and unpredictable to the recipients, and

a variety of working conditions are felt to be inadequate to the lawyer's professional responsibilities.

In the result, the initiation of my inquiry occasioned a sustained collective effort on the part of these lawyers to try to improve their situation. A new Civil Lawyers Association was formed, meetings were held, counsel was hired, a program was developed, and a brief written and discussed in meetings with me. The civil lawyers' position did differ in significant respects from that of the psychiatrists and the crown attorneys--perhaps reflecting the fact that much of this civil law group sees itself in an ongoing collegial relationship with the senior management and policy teams of the ministries within which they work.

Thus, the civil lawyers would like to see established on a firm legal footing their right to a collective voice and influence over salaries and other conditions of employment. However, the specific procedures through which that voice would be expressed should be shaped and developed through a more consensual format. Voluntary agreements would be arrived at which specified the appropriate professional groups and ministerial counterparts and enumerated the range of matters that could appropriately be discussed between them--without these arrangements having to be confined to the CECBA statutory mold. That would give a more flexible, pluralist cast to the several relationships, tailored to the specific needs and concerns of different professional constituencies and government operations.

However, just as was true of the psychiatrists and the crown attorneys, it is vital to the Civil Law Association to secure some kind of final and binding arbitration mechanism for resolving disputes about salary levels.

(d). Engineers and Architects

By contrast to both the civil and criminal lawyers, and also the doctors and dentists, the engineers and architects employed by the provincial government do not have an association of their own even to develop a position for this inquiry, let alone represent them in dealings with their government employer. I did make contact with and speak with several individual engineers and architects to learn something of their feelings about the current situation. Unlike the lawyers and doctors, I did not hear complaints of a wide gap between engineering and architect salaries in the government service and the average earnings of their counterparts in private practice. While I did learn of a number of economic and professional concerns felt by these two professional groups, apparently they are not so profound as to have sparked any organization of the membership to press for group action.

That might be considered a rather striking fact given the considerable history of organization of, and collective negotiation by, professional engineers. Indeed, engineers have had the longest-lived and widest-ranging experience with union representation of any of these prototype professionals in this country. The vast majority of

engineers work as employees, most in settings which are conducive to collective activity: i.e., where there is a sizeable number of professionals employed by a large bureaucratic, non-professional enterprise (whether public or private).

In Ontario, the prime example is the Society of Ontario Hydro Professional and Administrative Employees (the Society), which represents some 6,500 professional engineers and middle or lower-echelon managers at the Ontario Hydro. The Society is the largest member of the Federation of Engineering and Scientific Associations (FESA), an umbrella grouping of all the Canadian organizations which represent engineers in their dealings with employers. And in fact there was a time in the late 70's when the Ontario government engineers did organize a Government of Ontario Professional Employees Group (GOPEG) which, along with FESA and the Hydro Society, pressed the provincial government for changes in its labor laws which would facilitate collective bargaining by licensed professionals in both the public and the private sectors. When nothing materialized by way of legislation, GOPEG soon faded away. But that experience does suggest that if a new policy were to emerge in response to the current efforts of the government-employed doctors and lawyers, it is reasonable to suppose that the 800 or so engineers working for the provincial government would also organize to take advantage of that policy (though I am not so sure about the small and scattered group of 30 government

architects whose profession has had little experience with such collective action).

In any event, given this background I did have meetings with and received written submissions from both FESA and the Hydro Society. These bodies were best able to appreciate and to express the likely position of government engineers about the ideal mode through which this profession might deal with their employer. Just as important, the Hydro Society is the most revealing case study of actual Ontario experience with collective employee activity by any of these prototype professions. The relationship between Ontario Hydro and the Society stretches back forty years, and has grown in scope and sophistication during these decades (though, as we shall see, it has now encountered some difficulties). The two bodies are parties to a Master Agreement that provides for negotiation through a Joint Society-Management Committee (JSMC), which has equal representation from both sides and a full-time secretariat to facilitate their dealings. The JSMC meets regularly to review and discuss a broad range of employment and professional concerns of both sides. The aim is to formulate jointly-agreed to recommendations for adoption by Hydro's senior management committee, an aim which is realized more often than not. Of course, a priority within the JSMC is the negotiation of salaries, benefits and working conditions for this group of Hydro employees. If the JSMC is deadlocked on any or all of these issues,

recourse is had either to fact-finding (i.e., mediation with recommendations), or to binding arbitration about salaries and specific salary-related items.

In the last couple of years, the Society has become disenchanted with some aspects of the JSMC--not so much with what has been achieved, but rather the limitations upon the process. The Society worries that the JSMC rests not on statutory entitlement but on voluntary agreement by Ontario Hydro, an agreement which the employer can and has revoked. As well, the Society has recourse to a final and binding procedure only with respect to salaries, not the variety of other subjects which concern the engineers. These and other factors have led to a Society application for certification under the Labor Relations Act which, as I stated earlier, covers engineers, the only one of the prototype professionals which it now does. In that OLRB proceeding, the Society has encountered a number of difficulties--most prominently, the designation by Hydro of several thousand of the Society's present constituents as managers or supervisors who would be excluded from union representation. And, of course, under the Labor Relations Act employees must strike about any bargaining deadlocks, and would not be entitled to binding arbitration even about salaries.

This experience has given added urgency to the position of both the Society and the FESA about the changes they have pressed government to make in both CECBA and the Labor Relations Act:

(i). No professions should be excluded on that account from the basic right of all employees to collective bargaining with their employer, whether the latter be a public or private entity.

(ii). Professional employees should be entitled to bargain within a unit confined to their own professional group unless the latter chooses to be part of a broader constituency.

(iii). There should be a much narrower definition of those management employees who are excluded from labor legislation and collective bargaining; with the employer's concern about managerial loyalty and conflicts of interest being accommodated through the creation of separate bargaining units and representation.

(iv). Professionals should have access to binding arbitration on all disputed employment issues, so that there would be no need to face the ethical and economic concerns of strike action.

(e). Registered Nurses

The Hydro and the Society were not the only parties outside the prototype professional employees of the provincial government to take an active interest in my review. The Ontario Nurses Association (ONA) also met with me and prepared a brief setting forth what it believed should be the rights of the registered nurses now working for the government.

ONA represents nurses in hospitals throughout the province. In its view, registered nurses closely resemble doctors in having both post-secondary education and training and a self-governing College of Nurses which licenses, monitors and disciplines its members to ensure quality of nursing care for patients. Under the Labor Relations Act which applies to acute and extended care hospitals in the province, nurses have been recognized as having a distinct professional community of interest which entitles them to a separate bargaining unit and union representation by ONA or another union of the nurses' choosing. ONA advances not only the economic interests of nurses, but also their professional concerns--e.g., through the negotiation in the standard hospital agreement of a professional responsibility clause that permits nurses to challenge work assignments which are felt to detract from the professional and ethical obligation of the nurse to the patient. The position of ONA in my inquiry, then, is that if the government were to grant separate bargaining rights to the (largely male) doctors (or lawyers, et al), it must also do the same thing for its (almost entirely female) nurses.

Though ONA, naturally enough, believes that nurses ultimately do belong in a professional organization of their own (i.e., ONA), it did not suggest that there was now any substantial dissatisfaction with OPSEU among government nurses. What ONA does insist on, though, is that the nurses who work in the provincial government's own psychiatric

hospitals and other facilities should have the same freedom of choice on that score as is now enjoyed by nurses in the acute care hospitals which are financially supported by the government, though covered by the Labor Relations Act.

(f). OPSEU

Unsurprisingly, ONA's suggestions did not find favor with OPSEU. The latter organization is the successor to the old Civil Service Association of Ontario (CSAO) which predated the enactment of CECBA in the early 70's, helped to establish the principle that provincial government workers should have collective bargaining, and is the designated representative of all 65,000 Ontario public servants covered by that Act. OPSEU has prepared a major brief to the Ministry of Labor proposing changes in a variety of CECBA's provisions. The union also took an active interest in my inquiry, and made extensive written and oral representations to me about what it considered the appropriate principles for bargaining by prototype professionals.

(i). The present exclusion of certain professional groups from CECBA should be repealed. Instead, the law should recognize that professional employees are equally entitled to union representation and collective bargaining.

(ii). Such a grant of bargaining rights to professionals should be done in tandem with a similar extension of such rights to many of the supervisors and lower echelon managers now excluded by what OPSEU (like the Hydro Society) believes to be far too broad a managerial exclusion from Ontario labor laws.

(iii). Acknowledging the historic absence of prototype professionals from membership in and representation by OPSEU, the latter does not believe that these people should automatically be swept into its single, all-employee unit through simple repeal of the professional exclusion. Rather, the doctors, lawyers, et al should be given the opportunity to choose whether to opt in or opt out of the OPSEU unit.

(iv). However, OPSEU does insist that the key CECBA policy of avoiding employee fragmentation and uncoordinated bargaining must still be respected here. That means that if the prototype professionals did decide that they wanted collective bargaining to advance their employment interests, they must do so through OPSEU, not through a variety of separate and unrelated associations.

OPSEU emphatically rejected any suggestions that it was incapable of representing the interests of professionals, whether nurses or others. There is now a 4,300-member Scientific and Professional category within OPSEU, which bargains separately about the salaries of this higher-paid

component, with recourse to binding arbitration if necessary. Nurses make up over 1,900 of the members of this category, they have three of seven members on the negotiating committee, and OPSEU's first vice-president is a registered nurse. Thus OPSEU would vigorously resist any effort to dismantle any portion of this existing bargaining structure, whether for nurses, or for accountants, economists and other such professional groups. And the union believed that if doctors and lawyers now want the advantage of collective organization and negotiation with their government employer, they also must work within this same process which has successfully advanced and accommodated the concerns of this variety of newer professional occupations.

IV. THE GOVERNMENT AND ITS PROFESSIONAL EMPLOYEES

(a) Alternative Models for Employee Voice

The foregoing review of the parties' positions indicates how complicated a set of problems is actually raised by the apparent simple request by provincial government doctors and lawyers for binding arbitration of their salaries. Even within the several groups of prototype professionals there are some significant differences of view about the appropriate shape and scope of any negotiating relationship with the government. As well, the prospect that the government might grant such a request has evoked responses from such interested observers as OPSEU and ONA, and at the crucial point those two organizations are diametrically opposed in their positions.

And of course, one cannot ignore the fact that the provincial government also has a major interest in this matter; and the interests of the government (as an employer if not as a policy-maker) could well diverge from any and all of the above. The Ontario government did not state to me an explicit position on these issues--it is awaiting my report and recommendations about what the appropriate position should be. However, I did hear a variety of views and concerns about the range of possible options from the Ministers and senior officials who are particularly involved on the government-employer side of this relationship.

A host of technical issues were raised in the written briefs and oral presentations: e.g., about the contemporary

validity of the statutory exclusion, or the breadth of the appropriate unit, or the scope of negotiations, or the availability of binding arbitration. It is important, however, to place these matters in a broader setting, through which one can understand the ways in which alternative models of professional employee voice may serve the values that the community believes to be important here.

As we observed in the previous section of the Report, even the model of collective bargaining can take quite different forms. A group of professionals might be represented by a large independent union or by its own home-grown association; these employees might be included in a broad multi-occupational unit or each professional group permitted to have a separate relationship; dealings with the government could focus just on salaries or on the broad range of employment and professional concerns; deadlocks in negotiations could be resolved through strike action or through third party intervention, which itself could be recommendatory or binding. Each and all the alternative positions are exhibited in either the current situation or the proposals of professional employees in Ontario, some inside and some outside the direct focus of this inquiry.

But whatever the specific guise that it takes, collective bargaining is just an instrument designed to serve further social values. Among the important objectives are the improvement of the relative economic position of workers, or guarantees of fair treatment and protection for

individual employees, or providing the work force with some influence over what happens to them in a working environment where they are destined to spend much of their adult lives. In each of these endeavors Canadian workers have enjoyed considerable success through collective bargaining in its more traditional sense--involving representation of employees by an independent organization which periodically negotiates a collective agreement with a management team representing the employer. In the 80's, many union and non-union firms have been experimenting with a variety of mechanisms through which to offer the work force direct involvement in, and some sense of contribution to, the affairs of the enterprise. Thus, while I must initially consider whether these prototype professionals should finally be granted the same right to collective bargaining which was won decades ago by their fellow workers in the province, one must not lose sight of these additional mechanisms of worker voice, some of which might seem particularly well-suited to the talents and interests of the professional.

With that preface I shall now take up these two distinct but related questions. First, as a matter of principle should professional employees have the right to organize themselves for purposes of some form of group dealing with their (provincial government) employer? If the answer is in the affirmative, what concrete shape(s) should such a collective relationship take? Both of these

questions have been addressed in detail in the writings of a number of distinguished Canadian scholars in labor law and industrial relations--e.g., by Adams, Beatty, Goldenberg, Gunderson, Swinton and Thompson. I have read this literature with care and found it very helpful in my own thinking. However I shall not burden this Report with a lengthy rehearsal of this extensive debate about professional bargaining. What I shall do is sketch the essentials of the problem, and then state my own views and the reasons for them.

(b) The Role of Professional Employee Representation

Early in the post-war life of Ontario (and most Canadian) labor legislation, these prototype professionals were excluded from the statutory right to collective bargaining, which then was and still is the dominant mode of worker influence over their terms and conditions of employment. That legal exclusion rested on the simple fact that the employee in question was practicing one of the designated professions. No further consideration was given to the particular sensitivity of the job being performed or the nature and needs of the employer involved. The feeling at the time was that it was unnecessary and inappropriate for professionals as such to join a union and to engage in the typical activities of such an organization.

To some extent these feelings rested on our understanding of what it meant to be a professional, at least in the stronger sense of that term.

(i). If one takes the doctor as illustrative of the prototype, the practice of medicine required long years of education and training in order to develop highly specialized knowledge and skills.

(ii). The expertise involved in medical care left the patient in no condition to judge and appraise the quality of the medical services which they were offered.

(iii). However, both the necessity of and the risks from medical treatment made it vital to have high standards for entry into this profession and to regulate the character and the quality of the medical services being performed.

(iv). The statutory responsibility for the development and enforcement of such standards had to be delegated by the community to the governing bodies of the profession, which alone had the capacity to perform that role (for reasons (i) and (ii) above).

(v). Within the framework of professional self-government, the individual doctor was viewed as independent and autonomous, ethically committed to treatment decisions made solely in the interest of the patients who were entirely dependent on their doctor's judgment and concern. In turn, the doctor would be paid by the patient in accordance with the value and quality of the services provided.

Given that conception of the profession of medicine and the responsibilities entrusted to its members, most people (both inside and outside the profession) felt that there was something unseemly about doctors organizing themselves into a union, trying to negotiate a collective contract which would specify what they would be paid, and perhaps even taking strike action in pursuit of economic gain.

Serendipitously, it turned out that these professional values of autonomy, ethical service and individual merit were not actually incompatible with the economic well-being of doctors, at least at the time that post-war labor policy was being developed. The structure of medical practice had long rested on the self-employed practitioner or partnership, under which doctors entered into contractual relationships with their patients. The value and the scarcity of medical services allowed doctors to earn comparatively lucrative incomes. For decades, doctors have consistently ranked right at the top of the scale of occupational earnings, with the lawyers and other prototype professionals close behind. That meant that the organization of doctors into unions for purposes of collective bargaining could readily be viewed as just as unnecessary as it was inappropriate.

Even forty years ago there was a good deal of stereotype in that image of the professional. However, in recent years the gap between the image and much of the reality has become even more pronounced. Indeed, even the supposedly independent, self-employed medical practitioner now finds himself relying on a single government health insurance plan for almost all his professional revenues. Thus Ontario doctors have had to adopt much of the paraphernalia of collective bargaining to exert some measure of influence upon increases in the government fee schedule (and the lawyers who rely on Legal Aid have now started down that same path). But even more pressing problems are experienced by the employed professional, and it is within this last category that we find the most urgent pressures for group action.

In actual fact most of our prototype professionals are employed by someone else, rather than work alone or in partnership with colleagues. Employment is the occupational situation of almost all Canadian engineers, of a large majority of its architects, a bare majority of the lawyers, and a significant minority of doctors and dentists. True, many of these people actually work for a professional firm, and thus do not experience anywhere near the same conflict between employment and professional status. They see themselves as associates in their firms for a relatively short period of time, while they are obtaining the training and experience they will need before they are admitted to

the ranks of self-employment and/or partnership: and in the meantime their employment rewards and regime are established by their senior colleagues in the same professional calling. However, in recent years more and more lawyers, doctors et al find themselves working in large, bureaucratic organizations whose mission and authority is not specifically professional. Epitomizing that kind of employer is the government--whether federal, provincial or municipal--and such crown corporations as the Ontario Hydro. It is in that latter setting that the initial professional distaste for collective organization has now largely disappeared.

As was evident in the previous section, the immediate reason why Ontario government doctors and lawyers want to organize is essentially the same as motivated non-professional employees, public or private. They believe that their salaries are too low, that their relative position is worsening rather than improving, and they want to take steps to alter that situation.

True, if one were to compare the salaries of government lawyers and doctors to those paid the average industrial or office worker, the former might seem to be quite well-paid. But that simply is not the reference point adopted for salary comparisons. The psychiatrist and the crown attorney can reasonably say that they have invested long years in education and training with little or no income during much of that period, in order to earn their way into their

respective professions. Now that they have this status, these professionals face major responsibilities and strain in the work which they perform. The relevant comparison, then, is with the earnings of people who have essentially the same training and responsibilities, but who happen to work in other settings. In that respect, in terms of both the process and the result the professionals employed by government tend to feel that they are faring quite poorly in comparison with their counterparts in private practice.

Unlike the defense attorney, for example, who sells his services to a variety of individual clients at a rate which is mutually agreeable to the two sides, the crown attorney who represents the prosecution in court must accept a pay scale which is determined by the Civil Service Commission and the Management Board. The individual crown has essentially no leverage with which to alter the scales established by a human resource branch which is responsible for the salary policy of a government enterprise employing over 75,000 people. This crown attorney basically has the choice of just taking the job with the salary and benefits offered, or leaving for a job somewhere else. But that market-exit option can be quite unattractive for the people who may like the kind of work that is possible only in government service (e.g., those who would rather prosecute than defend criminals), or those who have invested a substantial part of their working lives in a government

career and would find it personally difficult and disruptive to leave.

There are two reasons why that lack of individual influence of the typical career employee exerts a particularly depressing effect on the earnings of professionals in government. It is a well-documented fact that governments tend to pay their higher-level professional and managerial employees less than the "market rate" observed in the outside private sector, while the same government may pay its lower-level, less skilled employees close to or even more than the private sector average. Such compression of government salaries at the top stems initially from the political need to keep the salaries of the elected cabinet ministers within bounds that are tolerable to the ordinary voters; then the reluctance to pay Deputy Ministers appreciably more than the elected cabinet officers to whom they report; and finally a strong managerial disinclination to pay a staff psychiatrist or crown attorney as much as the deputies and directors who are the departmental superiors of these front-line professionals (and who often are promoted out of the latter ranks). But the consequence of all this is that the crown attorney and the psychiatrist see themselves falling farther and farther behind people who were classmates in law or medical school, and with whom they may be practicing regularly in the same court room or hospital.

At the same time as unorganized professionals see their salaries constrained by this political/administrative ceiling, they also observe that everyone else in these courtrooms or hospitals has been allowed to organize, to have skilled bargaining representation, to have recourse to binding arbitration (or, in some jurisdictions, to strike action) in order to extract a better deal than the government's human resource managers were initially inclined to offer. Over an extended period of time, such collective action has materially improved the relative earnings of nurses and other hospital workers, or police and court staff. The consequence is that the prototype professional in these facilities can see a gradual but persistent rise in the government salary floor, and thus a considerable narrowing of the earnings gap as between people who have far fewer years of training and significantly less responsibility.

I do not mean to endorse in this Report the specifics of the salary complaints of either the doctors or the lawyers working for the Ontario government. The doctors' case is now in front of the Burkett Board for review, and a decision is expected fairly soon. While the Attorney-General and his officials have not challenged the conclusion of the management consultants that there is some problem with current crown salary levels, I have not attempted to analyze the nature and the dimensions of this problem. My assignment was not to make actual recommendations about

salary increases or new terms and conditions of employment. Rather it was to consider the appropriate mechanism through which such substantive decisions should be made about professional salaries, benefits and working conditions. The point of the foregoing paragraphs has been to explain why there is an inherent problem with the current arrangements, a structural flaw which would remain even if the government were to provide an immediate infusion of funds to try to allay the current sense of grievance.

What is needed is some mechanism which would right the imbalance in the current situation under which these professionals feel themselves squeezed between the political pressures stemming from above and the bargaining pressures exerted from below their ranks. Such a mechanism might or might not result in substantial improvements in the salaries paid to all these currently excluded professionals. My impression is that somewhat different pay adjustments would likely be justified for the several professional groups with their varied experience under the current situation. But whatever the immediate substantive effects, the point of the process would be to give this comparatively small number of employees working for this large government organization much more confidence that their particular needs and concerns were being given a fair hearing and taken seriously.

The greater degree of satisfaction with the results of such a mechanism are important not simply to the

professional employees themselves, but also to their government employer and the general public which it serves. That point is worth some emphasis. Indispensable for the effective operation of our criminal justice system or our mental institutions, for example, are crown attorneys or psychiatrists who aspire to such a career with the government and who perform at a high level of morale and productivity. The senior officials in the Ministries charged with the operation of these institutions were quite candid about how the current discontents were hampering their ability to retain their best people and to elicit the fullest commitment from those who do stay. The province of Ontario spends a lot of money in these and other parts of its government operations where professional employees play a vital role. (My back-of-the-envelope calculations are that provincial expenditures on compensation alone for those 2,000 or so excluded prototype professionals is now approaching $150 million a year.) Thus the province needs to have the kind of employment arrangements under which it can obtain the quality of services that it is paying for.

The foregoing is the basic argument in favor of giving these government employees some kind of meaningful group voice in the determination of their salaries and employment conditions. In the next section I will tackle a variety of ticklish issues which must be faced in designing the precise format through which such a professional voice should be expressed and heard. Here, though, I must still address

some legitimate reservations which many might feel about such a step.

(c) Concerns About Collective Professional Action

Two concerns are typically expressed. One is that if salary determination is made on a purely collective basis, we will lose the opportunity to reward individual merit--something which is quite important for a highly-skilled and highly-paid group of professionals. Additionally, if professionals are allowed to organize collectively for purposes of salary and other economic gains, this could create some risk to their professional calling and to the welfare of the people whom they are obligated to serve.

My own judgment about each of these expressed reservations is that while the principles of individual merit and ethical service are unquestionably important, there is no inherent conflict between these values and a mechanism which offers professional employees a meaningful voice in their terms of employment.

With respect to salary, for example, the government of Ontario has recently adopted a Pay For Performance program for its senior executive employees. This program significantly increases the salary ranges for deputy ministers and the like--to a point more commensurate with the talents and responsibilities involved in running a large complex ministry--while insisting that actual pay increases for individual officials will depend much more on their own quality of performance. It is hoped that on the basis of

this initial experience, a similar program will then be developed for middle managers and professionals. Indeed, a happy byproduct of this current program is that it substantially elevates the deputy minister salary ceiling which now constrains the pay of our prototype professionals. If the government does follow through with comparable improvements in the professional salary scale, I quite understand why it would want to retain considerable leeway in using such a higher levels of pay to reward higher-quality individual performance, rather than be locked into rigid salary progression for the entire category.

However, there is absolutely no reason why that kind of "pay for performance" system could not be developed in a salary program negotiated with the professional employees, rather than only in a program unilaterally adopted by human resources management. Not only is such flexibility quite common within collectively-bargained pay schedules in some private sector industries such as the media or entertainment, but it is also to be found in the salary system that was jointly evolved by the Ontario Hydro and its Society of professionals and managers. True, such a negotiated system will likely contain some explicit formulation of the source, criteria and timing of such performance evaluations and merit pay increases. But that would be a positive advantage over the current regime which, in the eyes of the professional employees at least, seems mysterious, unpredictable and thence somewhat suspect.

Turning now to the issue of professional ethics, there is a popular impression that these values are somehow incompatible with any mechanism which smacks of unionism. To my mind, though, the problem, where it does exist stems as much from the bureaucratic employer organization as it does from collective employee action, and must be addressed accordingly.

Take the analogous case of the registered professional nurse. I am sure that those nurses who have occasionally been moved to strike action have felt serious qualms about the conflict this creates with their professional obligation to the patients in their care. If we prefer not to remove that conflict by eliminating all collective bargaining for nurses, one can avoid much of the dilemma through binding arbitration of bargaining deadlocks (though this option has some problems of its own, to which I will refer in the next section of this Report). But the nurse might also experience a comparable professional conflict when faced with a situation where hospital administrators--perhaps under severe financial constraints--have established work schedules and case loads which are not compatible with adequate levels of care for sick patients. In that situation the individual nurse acting alone and without protection has almost no leverage with which to reverse such administrative directives that might seem entirely inappropriate to professional colleagues. But when the nurses act as a professional group with effective

representation and meaningful negotiation, they can and have produced contract provisions which preserve rather than undermine the standards of their professional body. One can find similar examples of such positive support for professionalism in collective action taken by associations of university faculty, professional engineers, and the like.

I do not mean to suggest that the conflict between professionalism and bureaucracy is widespread--in particular, inside the provincial government--nor that employee organization is always the source of the solution rather than of the problem. Judgments about and responses to this tension must always be made in the light of concrete cases. But my general analysis of the problem and my reading of the historical experience leaves me confident that there is no inevitable conflict between the ideals of individual merit and professional autonomy and a mechanism which allows the group of professional employees to exert some meaningful influence upon the salary and personnel policies of their government employer. As we saw in Section II above, most public employers in Ontario and in the rest of Canada have now accepted that principle with respect to most of their professional employees--including some who work in the province's psychiatric hospitals and criminal courts. It is now time for the Government of Ontario to extend that same right to these prototype employees.

V. MECHANISMS FOR PROFESSIONAL EMPLOYEE VOICE

(a) The Design Dilemma

My analysis in the preceding section of the appropriateness of collective action by government-employed professionals was pitched at a sufficient level of abstraction that the conclusion followed relatively easily. The basic ingredients of my argument were as follows. Like other employees, professionals have important needs as workers which must be satisfied in their employment arrangements; when working for a large employer organization (like a government), the individual professional has little ability to directly influence the terms of employment that will be made available; thus professional employees should be given the same right as other employees to organize into a cohesive group which can deal more effectively with their employer; any possible conflicts between such group action and the values of individual professional quality and ethics can and should be addressed and resolved through such collective negotiations, rather than these potential problems being used as the reason to avoid such negotiations altogether. The conclusion, then, is that we should remove the legal barriers which now exist to such group action by prototype professionals--in particular, their exclusion from CECBA which governs the relationship of the provincial government to its employees.

That conclusion is now broadly accepted by both the scholars and the policy-makers within Canadian labor

relations (and indeed has already been recommended in the 1980 Report of the Ontario Professional Organizations Committee). However, that proposition is stated at far too abstract a level to be operational. When one begins to flesh out the nature and shape of a mechanism through which these government professionals might exercise some collective voice and influence upon the Ontario government, one immediately faces a whole series of difficult choices--e.g., regarding the scope of the employee group, the range of issues to be dealt with and the ultimate method for resolving negotiating deadlocks.

The significance of these problems can be appreciated as soon as one spells out the diversity of possible choices.

(i). Should one confine the definition of the appropriate employee unit to just a specific segment of one professional category (e.g., the crown attorneys), or should one include all the members of each single licensed profession (i.e., all doctors or all lawyers), or all the members of the five prototype professions (doctors, lawyers, engineers, et al bargaining together), or include all the members of all the professions (i.e., including the nurses, the accountants, et al), or all the employees of the Ontario government taken as a whole?

(ii). Another way of putting the same problem is to ask whether representation of these professional employees should be by such existing bodies as the

Crown Attorney Association, the Medical Staff Association and the Civil Lawyers Association (and probably sometime later the Professional Engineers Association and/or the Architects Association), or by some newly-fashioned Ontario Government Professional Employee Association, or should representation actually be provided by OPSEU, the current bargaining agent for all the government employees covered by CECBA, whether professional or non-professional?

(iii). Associated with this question is whether all professional employees should be entitled to engage in such collective action, or whether excluded from that activity should be any professionals who are employed in a managerial or confidential capacity. If there is to be that latter exclusion, does "management" require that the person actually make the relevant decisions on behalf of government or is it sufficient just to make effective recommendations about them? Does managerial authority have to be exercised over other professionals, or just over the support staff (e.g., in the hospital or the crown offices)? Upon judgments such as these will turn the issue of whether, e.g., the Directors in the A.G.'s Criminal Division, or the Regional Crown Attorneys, or even the local County and District crowns should be members of the Association, as also the Chief Psychiatrists, or the Program

Directors, or the Chiefs of Service in the province's mental hospitals.

(iv). With respect to the range of issues to be discussed, should one include everything that the professionals are interested in and about which they feel they can make a contribution (including government policy regarding mental patient care or criminal prosecutions); or just matters relating to professional terms of employment and working conditions (which likely would overlap considerably with the above); or all terms of employment except those specifically excluded by S.18 of CECBA (e.g., government operations, superannuation and the merit system); or should it also exclude a variety of terms and benefits that are now bargainable under S.7 of CECBA, but which might be difficult to deal with in numerous small and fragmented units (e.g., hours of work, holidays, vacations, and disability and life insurance); or should professional negotiations be confined just to salaries and salary-related items?

(v). Should the manner of resolving these issues be pure negotiations between the government and the representatives of the professionals (in which case the government would retain the ultimate authority to decide these issues in the absence of voluntary agreement); or third party fact-finding with recommendations (in which case the government employer

can still reject the latter); or final and binding arbitration or strike action (either of which does put the employees on a somewhat more equal plane with their employer, but presents some significant problems of their own)?

This synopsis of the variety of issues and options graphically displays the numerous difficult choices that must yet be made. There is a natural inclination to treat this problem as if it were, in effect, an industrial relations smorgasboard--in which each party was free to choose whichever item it wanted from these several categories in order to put together the most appetizing combination. If presented with that opportunity, I am sure this is what the professional groups would find most appealing: a very narrow professional grouping, one which is represented by its own home-grown association, which included within its membership all the professionals up to and even including the Director level, which would be empowered to discuss with government a broad range of both employment and professional concerns, with that process culminating in final and binding arbitration about any matter in dispute. However, my own experience in labor relations and its legal policy framework is that the problem is much more difficult than that. There is an affinity between these different components of a labor relations system, such that the choices that one makes at one point limit and shape the options available at other points. The

nature of these constraints becomes visible when one seeks to accomodate in the design of this employee voice model the interests of other parties who are also affected by that process.

(d) The Burkett Award

What I mean by that comment becomes clearer as one considers the specific proposal made by the medical staff within the government's psychiatric facilities. This is the professional group which is now farthest along the path towards collective bargaining and was most emphatic in its proposals--among other reasons because these have been largely endorsed by the Burkett award (which is reproduced as Appendix B to this Report).

The original position of the medical staff was that their own association should negotiate on behalf of all its members in these hospitals--psychiatrists, other doctors and dentists, with no explicit managerial exclusion. Negotiations should be about "all terms and conditions of employment...and all rights, privileges or duties of the employer, the Association and the medical staff", with the process ending in binding tripartite arbitration about "all matters in dispute". The Burkett Board essentially adopted this position with two significant modifications: the scope of the unit should not necessarily exclude the relatively small number of other government-employed physicians, while the scope of negotiations should exclude the range of issues specified in S.18 of CECBA and be confined to those matters

enumerated in S.7 of that Act. However, as regards the two most crucial points at issue, binding arbitration for a unit confined to medical staff, Burkett sided with the doctors who insisted that this also be the recommendation that I must make.

That conclusion is itself illustrative of the "pick and choose" approach which I referred to above. Binding arbitration is proposed because that is the policy already available under CECBA for the other provincial government employees working in the mental institutions (and elsewhere throughout the government's operations). On the other hand, a small professional unit confined to "medical staff" was recommended in the face of CECBA's contrary policy of a single, all-employee unit--because of the distinct community of interests supposedly created by the separate licensing and regulatory programs existing for each profession.

As I will now try to show, I find considerable difficulties in these Burkett recommendations. But I also understand how they would seem quite plausible if one viewed the problem, as Burkett necessarily did, from the point of view of the special history and current position of the medical staff alone. In my inquiry I have had to situate the medical staff within the broader context of all the governments excluded professionals, and also of organizations such as OPSEU and ONA which now represent (or, in the case of ONA would like to represent) some or all of the government employees now organized under CECBA. From

that perspective, the bargaining unit issue appears much different and more difficult.

In the first place, the unit sought by the Medical Staff Association does not precisely square with the provincial licensing schemes relied upon by Burkett. While the bulk of the Association members are psychiatrists or other doctors, some members are dentists working in the psychiatric facilities, and dentistry is a separate and distinct profession with its own statute and governing body. On the other side, the Association has only represented the doctors who work in the mental hospitals, and never evinced any particular interest in the handful of doctors working in largely non-clinical roles within the government. True, Burkett did suggest that these latter doctors need not be excluded from the Association's unit; and given the fact that these would be only a small fraction of its members (about 30 out of 300), the Association is prepared to take them in as the price for securing a separate "medical staff" unit. But this is a pressing problem among the lawyers where there is a long-established Crown Attorney Association representing the 330 lawyers in the Attorney General's criminal division, and another newly-created Civil Lawyers' Association representing the 310 lawyers in the various other aspects of government legal work. The crown attorneys, in particular, have no interest at all in becoming part of a broader unit which would also incorporate this heterogeneous group of civil lawyers with whom they

have never had any connection and with whom they feel little or no identity--irrespective of the fact that both criminal and civil lawyers do happen to belong to the same Law Society of Upper Canada.

The lesson from these cases is that the external professional affiliation of these employees bears only an accidental relationship to their actual community of interests in dealing collectively with their government employer. Undeniably, the fact of being a professional is very significant. The lengthy period of education and training, the greater responsibilities and status, the higher salaries and benefits, the history of exclusion from CECBA and OPSEU--all these are reasons why none of these prototype professionals have any current interest in being grouped with the other government employees now represented by OPSEU. But the positive group identification of these professionals is much more closely connected to the settings within which they work--i.e., the crown attorney in the criminal courts or the medical staff in the psychiatric facilities--than to the professional organizations to which they happen to belong. And there is nothing surprising in that fact. Recall that the earlier argument for collective representation was that these people had distinctive interests as employees which required some such group action irrespective of their professional allegiance and obligations. That is why the common experience of where they work and what kinds of work they do has produced rather

different organization of these prototype professionals as employees than the statutory licensing boundaries relied upon by Burkett to justify separate bargaining units for them.

The response which is made to that argument is that whatever its precise source, the fact is that there are these different histories and current identities of the various professional groups, and these differences can and should be acknowledged and accommodated in whatever framework is devised for professional employee negotiations. If that framework happens to produce a single medical staff unit for doctors and dentists, and separate units for crown attorneys and the civil lawyers, and perhaps another unit or two for engineers and architects, then so be it! Such a measure of self-determination for these prototype professionals is said to be a good thing for the employees and not a serious problem for the government employer--as is evidenced by the fact that some other Canadian jurisdictions (most notably the federal government) now do provide their professional employees with essentially that kind of bargaining automony.

Addressing first the point about the situation in other jurisdictions, the federal experience does show that a multiplicity of professional bargaining units is a viable, if not necessarily an ideal negotiating format: though the federal government situation is ameliorated somewhat by the fact that a single professional employees organization is

the designated representative of most of these units. It is also true, though, that most other Canadian jurisdictions do place restrictions of varying degrees upon the availability of separate bargaining for most if not all of these prototype professionals. And of course the most immediate precedent for our purpose is Ontario's own CECBA which exhibits a strong policy distaste for fragmentation of the provincial government work force, and attempts to supply the necessary degree of pluralism and flexibility through separate salary bargaining for nine different employee categories (across the roughly 65,000 employees represented by OPSEU).

A particular reason why CECBA's policy is so pertinent to this inquiry is that if I were to recommend that the government adopt separate bargaining representation for the doctors and for the lawyers, the question would immediately be raised how one could fairly deny that same self-determination to other government professionals. The ONA intervention in my proceedings brought that issue home vividly to me. As ONA put it, if the (still largely male) medical staff were given full-fledged bargaining rights within a unit of their own choosing, but the (almost entirely female) nurses continue to be submerged in the one big all-employee unit, that hardly appears conducive to the Ontario government's newly-proclaimed policy of pay equity for working women. But if the government (over the vehement objections of OPSEU) were to respond to that concern by

giving its 2,000 nurses the same freedom of choice which the 300 doctors are now seeking, one could hardly deny that same option to the variety of other employee groups within the scientific and professional category (an option they now enjoy under the federal law). Of course even if all these groups were given the legal right to separate representation, many would likely opt to stay with OPSEU because they were quite satisfied with its performance. But the likely consequence of such a policy would be to establish at least four, and perhaps as many as a dozen, professional bargaining units among the provincial government's 5,000 or so professional employees--side by side with a single unit for more than 60,000 non-professional employees (and that in turn would raise the question of how one could fairly limit such freedom of choice to those government employees fortunate enough to enjoy professional status on the job).

That leaves unanswered the question that is implicit in the foregoing analysis. What precisely is wrong with the proliferation of bargaining units freely chosen by a number of employee groups, professional or otherwise? The most pressing objection to such fragmentation would be the increased risk of strike action. Each unit carries on its own negotiations, any one of these negotiations can lead to an impasse and thence to a work stoppage, and this in turn will cause disruption to the employer, to other employees (in different units who might have settled their contracts),

and to the general public which is dependent upon these public services. However, that objection is not immediately applicable here, because the policy of CECBA is to require arbitration rather than strikes for resolving bargaining deadlocks, and each of the professional groups seeks that same termination point for its own negotiation procedures.

Even with arbitration, though, there are substantial difficulties with a multiplicity of negotiations. Simply having to go through numerous arbitration proceedings in each bargaining round can cause considerable drain upon the management time, if not the financial resources, of the government. More important, a variety of arbitration proceedings is likely to produce a variety of decisions about employment terms and working conditions--about hours of work, overtime, holidays, vacations, leaves of absence for different reasons, insurance benefits and so on. After all, if the law has provided for separate employee representation and arbitration, that implies an endorsement of the value of employment terms that are specially tailored to the needs and priorities of each employee group. But if all these employees are actually working in the same mental hospitals, or criminal courts, or other government departments or facilities, such disparities in employment conditions can make the management of such integrated operations a very difficult task.

Again, there is a possible solution to that problem. Suppose we were to reduce the scope of the bargaining agenda

to a narrow set of salary-related items: we would thereby avoid the disparity in working conditions and the effect that this has on government operations, while preserving the flexibility and diversity needed to establish a range of salaries for occupational groups (which must of necessity be nearly as diverse inside government as they are in the outside labor market). And indeed that is the policy of CECBA itself, which requires common bargaining about the general run of employment conditions but adopts categorical bargaining about salaries.

Even with respect to the salary issue, though, there is a particular problem with a multiplicity of negotiations in arbitration proceedings. While it is true that government doctors are going to be paid more than engineers, just as they are paid more than nurses, it is not so clear that the criteria for determining these salaries should differ. I was struck during the course of my inquiry by the fact that the salary grievance of the medical staff stemmed from their perception that they had fallen behind doctors in private practice, while in the case of the crown attorneys, much of their discontent stemmed from the erosion of their salary position vis-a-vis other people working within the public criminal justice system (i.e., the judges, police, et al). In fact, the government's salary brief to the Burkett Conciliation Board actually drew upon the Sibson Report which showed how salary increases for the government's medical staff had surged ahead of the crown attorneys during

the 80's. The point of that example is that a government employer would encounter a rather difficult problem if two separate arbitration boards were to make binding awards--one for the doctors and one for the lawyers--which rested on entirely different views about the appropriate reference point for government professional salaries.

I would emphasize the fact that it is arbitration which is a major source of this particular difficulty. If the government's work force were divided up into a number of separate bargaining units, each entitled to its own ad hoc arbitration panel, it would only be by accident that such an uncoordinated process would produce a coherent approach to the salary problem. By contrast, if bargaining deadlocks had to be resolved through strike action, then the Management Board could try to sustain a single government position about the criteria for professional salaries for the several bargaining units with which it was dealing. But that stance is no longer possible once the government has conceded to an outside third party the authority to make the final and binding decision on this issue--with the results dependent upon the nature of the arguments made in each proceeding and the views and reactions of particular arbitrators who happen to be selected.

I am not suggesting that the solution to this dilemma is to be found in adoption of the strike as the method of resolving negotiating disputes between the government and its professionals. These professional groups did not want

to have the strike weapon, and arbitration is the current legal policy under CECBA for all other provincial government employees, many working side by side with these same professionals. What I do insist upon, though, is that if one takes arbitration as a given in current provincial government bargaining, the prospect of that technique as the end point of the bargaining process produces a rather unhappy combination with another policy that favors a number of small bargaining units at the outset of the process. I feel quite strongly that such a framework would engender significant problems in negotiations about a broad range of working conditions, and I have real qualms even with respect to salaries.

VI. MY RECOMMENDED PROGRAM

My primary reason for having undertaken that rather extended analysis of the Burkett recommendations was to show how complex a task it is to design an instrument for employee voice and influence. The choices one makes in favor of one component are connected with and limit the options available at the next stage. In particular, if we respond to one priority of these prototype professionals--e.g., their desire for a final and binding procedure to resolve negotiating deadlocks--we thereby limit our choices about the scope of the unit, the range of issues to be discussed and so on. Contrariwise, if we want to encourage the emergence of small groups of professionals with close communities of interest who would regularly canvass with their employer a broad agenda of mutual concerns, it is considerably harder to justify arbitration as the end-point of that process.

Having taken this length of time to expound on the difficulties of the problem, I must now offer my own recommended solution. My proposal consists of quite a number of ingredients which are tied together in a manner which I shall explain. I express these recommendations as a set of fairly broad principles rather than as a detailed legal blueprint, and at certain points I suggest some alternative options. Within the framework of the key principles, some degree of flexibility is needed in mapping out the course to be followed, and judgments about these

specific features should be based on consultation with the affected professional groups about the precise format with which they would feel most comfortable.

A. The starting point must be formal endorsement and commitment by the government to the principle that these prototype professionals are entitled to deal with their employer on a group basis--i.e., that these people also have this fundamental right of association now enjoyed by almost all other non-managerial provincial employees. What this principle implies is that these professional employees would be free to organize themselves into an association which could represent them in the determination of their conditions of employment: the government would then be required to recognize and deal with such a representative body within the framework I will elaborate shortly. As well, any professional employee who is a member, official or spokesperson for such an association would be guaranteed protection against any discrimination or reprisal by reason of having undertaken such group action, whether in the formation or the operation of the professional employee association.

B. An immediate step through which one could implement this right of association would be the repeal of the current S.1 (1)(f)(iv) of CECBA which excludes these named professional groups from the statutory definition of "employee". That legal action would bring these prototype professionals under the umbrella of S.29 of CECBA and its

guarantee of no employment reprisals against someone who has engaged in the legal activities of an employee organization.

However, simple repeal of the professional exclusion from CECBA coverage could automatically sweep all these prototype professionals into the broad, all-employee unit designated under this Act and represented by OPSEU. Neither these professional employees, nor the government, nor OPSEU believe that this would be an appropriate result. Having been statutorily excluded from this system of provincial government-union bargaining during the crucial formative years of its life, these professional employees deserve a choice about whether they do now want to cast their lot with the rest of the government employees.

Thus, CECBA and its Regulations should be amended to establish a framework under which one or more of these professional groups could by majority vote opt into the OPSEU unit and one of its existing or newly-created categories. And given the history and current sentiments of these hitherto excluded professionals, I would also recommend that they be given the right to opt back out of broad-based bargaining if they so choose. Otherwise, the fear of being locked forever into this format would likely be an insuperable obstacle to any of these people initially electing to join OPSEU to see whether that organization might actually be suitable to their needs as employee professionals.

C. One reason why I am so concerned about the viability of CECBA for this purpose is that I do not recommend the creation of a separate statutory program which would give these prototype professionals their own special program of full-blown collective bargaining--with a unit confined to their own professional constituency, which negotiates about the full range of employment terms and working conditions, culminating in final and binding arbitration.

I recognize that such a regime has been the long-standing objective of the Medical Staff Association before and after its essentials were endorsed by Burkett, and that same position is now echoed by the Crown Attorney Association. I am also aware that the appetites of these organizations has been whetted by the fact that such a separate program is now enjoyed by a few other employee groups with whom their professional-members regularly work--e.g., the interns and residents in the mental hospitals and the police in the courtrooms. However, those special purpose arrangements are basically, available only to employees who do not work directly for the provincial government (the one exception being the Ontario Provincial Police whose situation is governed by the Public Service Act). The labor relations policy for Crown employees is contained in CECBA, which does entitle these employees to full-fledged bargaining ending in binding arbitration--but only within the safeguard of a broad-based bargaining unit with one union representative. The fact of their

professional status should no longer disentitle the medical staff and the lawyers from the advantages of such a bargaining regime which now represents, e.g., the nurses in the hospitals or the provincial probation officers in the courtroom. But if these prototype professionals wish to have the benefits of such collective bargaining with the Ontario government, that same professional status should not shield them from the restraints which CECBA imposes on all their fellow employees.

D. If my recommendations were to end at this point, they might seem fair in the abstract--i.e., the prototype professionals would be treated exactly the same as all other government employees--but they would not be responsive to the real-life problems which precipitated this review. There is no immediate prospect on the horizon that any of these professionals would soon vote to join OPSEU and to engage in collective bargaining under the latter's mantle. The discontents which I expressed earlier would continue, probably worsened by reason of the disappointed expectations that had been raised by this inquiry. That would be to the detriment not just of these employees but also of their government employer and of the public whom they serve. What one needs is some alternative to full-blown CECBA-like bargaining which could ameliorate at least their major problems, without offending the principle of equal treatment as between doctors and nurses or lawyers and probation officers. In fact, experimentation with such an alternative

for these prototype groups might provide some useful experience for the remaining professional and non-professional employees who now participate in just the conventional bargaining system.

E. The first component of such an alternative model would be a commitment by the provincial government to establish an ongoing relationship between these professional associations and the ministries which are responsible for the facilities and operations within which their members work. Such a relationship should be embodied in bilateral committee structures whose members address the broad array of problems that arise in the day-to-day lives of these ministries and their professional employees. The agenda would consist not simply in such "employee" concerns as compensation and working conditions but also "professional" views of how the mission of the ministries might better be performed in the interests of the constituencies being served as well as the people who work in it. Within such a committee structure there would be no need to hew closely to the lines now drawn in CECBA about who should be excluded from participation in or representation by the professional association, or about what subjects are properly open for discussion. The assumption, instead, is that this would be a comparatively non-adversarial, collegial arrangement; within which the participants around the table regularly addressed problems as they arose, did the necessary research and analysis about possible solutions, and agreed to solutions which could

either be implemented immediately or recommended to the responsible Minister or the Cabinet as a whole.

As is now gradually being appreciated within the private sector, there are considerable mutual advantages to such a process for both the enterprise and its employees, and this format is especially well-suited for people with the background, position and interests of these professionals. However, two features are essential for the success of such an endeavor.

First, the program must rest on a foundation whereby one side (in particular, the government employer) cannot unilaterally repudiate the exercise, e.g., because of the unhappiness of a particular Minister about how the Committee has dealt with an immediate and sensitive problem. Second, the government must be committed not just to the abstract concept of professional involvement, but also to the results as they regularly flow out of the process. What that means is that if there is bilateral consensus between the senior ministry officials and association representatives on the committee, their agreement should normally be decisive--at least in the absence of real problems this might create for other areas or policies of the government which could not readily have been appreciated here.

If the provincial government is not prepared to accept and to stand by these latter conditions, I think it best not to try out such a "professional involvement program". Otherwise, having awakened the latent interests and

contributions of the professional employees, consistently to deny the latter the benefit of the process would likely aggravate rather than allay the current unrest.

F. Such a non-adversarial, non-contract oriented approach might well be considered a reasonable substitute for CECBA-style collective bargaining about the broad array of working conditions. However, I do not consider this to be a sufficient vehicle for handling the key issue of salaries. Here these professional employees need the additional leverage which comes from direct salary negotiations with the Management Board and an appropriate mechanism for resolving deadlocks that occur in these negotiations. Given my own personal philosophy of industrial relations, I am not a strong admirer of compulsory interest arbitration as the standard technique for resolving bargaining disputes for any and all public employees. However, a preference for arbitration instead of the strike is the prevailing legal policy for all Ontario government employees, and for many others who work in the province's health care and criminal justice systems. Until and unless that general policy were to be rethought and revised, it should be followed in the case of these prototype professionals. I recommend, then, that salary disputes between the Management Board and these professional associations be resolved through binding arbitration.

G. For reasons I developed in detail earlier in this Report, the nature and scope of such arbitration would have

to be restricted in a number of ways, if and to the extent these prototype professional chose to operate outside the framework of CECBA. One such limitation which I recommend is that arbitration for a purely professional unit be confined to salaries and perhaps also a few items that are purely financial and distinctively professional (e.g., government reimbursement of professional fees). The broad array of fringe benefits and working conditions could usefully be discussed within the committee structure proposed above, and hopefully many problems resolved there. However, I do not think that the provincial government should have to face the risk of a precedent-setting award about disability benefits, for example, issued by an arbitrator responding to a case made by just a tiny handful of the government's employees. And again, that restriction on the use of arbitration by these professionals would be in accord with a long-standing agreement between OPSEU and the provincial government which provides that "local" arbitration (e.g, for the nurses within the scientific and professional category) is limited to salaries, to the exclusion of other benefits and conditions.

H. Even with respect to salaries I am concerned about the problem of the fragmentation of bargaining and the disparities in arbitral rulings (and the one-way ratchet effect this eventually would have on the government pay structure). There are two possible ways in which that

problem can be addressed--one preferable in principle, but the other perhaps easier in practice.

I would permit only a single salary arbitration proceeding each year (or during each bargaining round) for any and all of these opted-out prototype professionals. Thus, if the Management Board were able to reach a voluntary settlement with the Crown Attorney Association, for example, these parties should be able to sign such an agreement separately. But if the medical staff and the civil lawyers were both at a deadlock and seeking binding arbitration, then such adjudication would be done by a single arbitration board selected for both sets of negotiations. That procedure would insure that a single panel listened to and evaluated the arguments made in both settings, and wrote a decision which embodied a common approach to the two salary disputes. Over a period of time, I suspect this would also require these professional associations to meet regularly and to develop some coordination in their approaches to the salary questions (both in the immediate arbitration and also in earlier negotiations). Such a gradual convergence in the views and attitudes of these now highly-divergent groups would be all to the good.

I. The above is my preferred recommendation about how to secure some coordination in salary arbitration. Some might object that this would pose difficulties in arbitral selection, timing, case presentation and so. I believe that these admitted complications are solvable. But if the

eventual judgment is that such multi-dispute arbitration is unworkable, I recommend a fall-back alternative drawn from the framework agreement between the University of Toronto and its Faculty Association and suggested to me by the Civil Lawyers Association.

Under that contract binding arbitration is the standard mechanism for settling negotiation disputes. However, each side is given a limited escape valve from the finality of the proceedings: a particular award may be rejected in one round (in which case the employer's last offer is implemented), but in the next round that party is fully bound by the process. The point of this system is to protect each side from what might be considered a misguided "maverick" award (one which this party feels would not be followed by another arbitrator taking a second look at the problem the next time). However, the other side is given the assurance that this procedure will eventually produce--if not this year, then next year--an authoritative resolution of whatever issues are dividing the two.

J. Implicit in my analysis to this point is that I am not persuaded by ONA's proposal that the registered nurses be given freedom to choose separate bargaining through a union of their own (such as ONA). I did find ONA's intervention valuable in sharpening my own sense of these issues, and as is apparent I took serious account of its argument in reaching my judgment that the doctors and lawyers should have only limited room for separate dealings with the

provincial government. But I am not prepared to recommend additional measures which might well begin the unraveling of the existing OPSEU unit when there is no tangible evidence of any dissatisfaction by the employees immediately affected. Sound advice in labor relations is "If it ain't broke, then don't fix it!"

K. Finally, I offer no verdict about the argument by both OPSEU and the Hydro Society that the present managerial exclusion in CECBA reaches too far down into the ranks of provincial government employees, and should be substantially raised. That argument raises important issues that range far beyond these prototype professionals, and indeed beyond CECBA and the Labor Relations Act which covers the rest of the provincial work force. Within the confines of this limited inquiry, I could not begin to explore the ramifications of this issue with anything near the care and thoroughness it requires. The Minister of Labor now has a review underway about a variety of concerns with both CECBA and the Labor Relations Act. In my view that is the proper forum within which to raise and to settle the appropriate scope of the managerial exclusion from collective bargaining.

VII. CONCLUSION

The numerous recommendations in the preceding section and my analysis throughout the entire Report can ultimately be distilled down into these six essential propositions.

1. These prototype professional employees do have significant concerns about their employment with the provincial government, which can only be effectively addressed through some kind of group organization and dealings with their government employer. The experience with professional representation of other kinds of employed professionals in Ontario, and of the same prototype professionals in other parts of Canada, demonstrates that there is no inherent incompatibility between such employee organization and their professional obligations. Thus, these people should be extended that same basic right as is now enjoyed by just about everyone else employed in this province and across the country.

2. This basic principle of professional employee representation to deal with the government can be realized in two different forms. One involves repealing the exclusion of these prototype professionals from coverage under CECBA. That step would bring these employees within the general guarantee against any reprisal for undertaking such collective action, and with suitable adjustments it would also permit one or more of these professional

groups to opt into the CECBA system of collective bargaining within the unit designated under that Act and represented by OPSEU. Doctors and lawyers should have the same right to participate in this system of full-blown collective bargaining about all their terms and conditions of employment as is now enjoyed by other government professionals and scientists such as, nurses and economists.

3. In view of the fact that doctors and lawyers have long been excluded from that CECBA regime during the formative years of its life, the prototype professionals should also be offered a second vehicle through which to voice their employment concerns and to influence the government to improve their conditions. However, this alternative process should not consist of that same CECBA-like system of full-blown negotiation and arbitration, modified only by granting the doctors, lawyers, et al the special privilege of their own separate associations and units.

4. The second model which I envisage would itself have two components. One would involve joint committee structures at the ministerial or even more localized levels (e.g., within the criminal justice system of the Attorney-General ministry). These bilateral committees, made up of senior officials from the ministry and representatives of the professional association would address the broad array of employment

and professional concerns within the relevant settings -- but not in a bargaining mode that culminates in either arbitration or strike action. However, this alternative process would itself have a second track, under which there would be direct negotiations with Management Board about the salaries of these professionals.

5. My hope and expectation is that in these direct negotiations the provincial government will now be in a much better position to address the current salary discontents of the employed professionals. The reason is that the lid imposed by the artificially low salary ranges for Deputy-Minister and other senior executives has been lifted by the government under its new Pay for Performance system. Indeed, there is no reason why a comparable program could not be fashioned for these professionals through direct negotiations with their representatives.

6. But if and when such negotiations prove unsuccessful in producing voluntary agreements about these salary issues, then I recommend binding arbitration as the procedure for resolving such deadlocks. However, while I do believe that within this second model, the professionals should be able to retain their own separate associations as representative, I do not believe they should also have a right to their own separate arbitration proceedings.

Rather, a single arbitration panel would be used to resolve any outstanding salary disputes within any or all of these prototype professional categories.

Some aspects of the foregoing program would require statutory amendments to CECBA. However, the second approach would not require a statute to be established, and indeed I would recommend against legislation at the outset at least. What is required, instead, is a formal statement and commitment by the provincial government to the process, and then a considerable amount of work by the parties affected in the design of the precise format(s) which would be most suitable for their varying needs and concerns. The ultimate point of this entire exercise is to foster regular involvement by these professionals in their workplace, both to give the professionals greater influence over their own terms of employment, and to elicit their positive contribution to the mission of their ministries. Ideally, that involvement and that contribution should be drawn upon right at the beginning of such a new venture.

TAB B

AN OVERVIEW OF COLLECTIVE BARGAINING BY SCIENTIFIC AND PROFESSIONAL EMPLOYEES IN THE FEDERAL AND PROVINCIAL JURISDICTIONS

SUMMARY

1. Ontario is the only jurisdiction that specifically excludes all five professions under labour legislation applicable to the Crown. Alberta legislation specifies exclusion but provides for an opting-in to the bargaining unit.

2. Under legislation applicable to the private sector and other parts of the public sector excluding the Crown, Alberta, Nova Scotia, and Prince Edward Island are the only jurisdictions that prohibit members of all five professions from bargaining. Ontario prohibits members of the legal, medical, dental and architectural professions from bargaining but permits engineers to do so.

3. Quebec and Saskatchewan applies the same labour relations legislation to the private and public sectors, including the Crown. In Manitoba, professional employees come under the general labour relations statute for certification while the balance of the civil service are subject to the Civil Service Act.

4. In Saskatchewan, the exclusion of doctors, lawyers, dentists, and engineers is by agreement of the parties and not by statute.

5. All jurisdictions, except Manitoba, prohibit crown attorneys or prosecutors from bargaining. This prohibition may or may not include other lawyers. In some instances, while other lawyers have access to bargaining, they do not exercise it. Possible reasons are lack of interest, inability to organize, satisfaction with treatment provided by the employer.

6. In a number of jurisdictions crown attorneys/lawyers have staff associtations that enter into discussions with ministry management regarding salaries and other matters. Usually these associations are composed of persons from all levels in the organization.

7. The voluntary recognition of the association of crown attorneys and other lawyers in Manitoba allows a more broader membership base than would be possible if formal certification was followed.

8. Professional groups do not seem to want to pursue formal bargaining arrangements if it requires inclusion in a multi-occupation bargaining unit (e.g. Alberta).

9. Where arbitration is a dispute resolution mechanism by mutual agreement such as in New Brunswick, the profession's bargaining leverage is reduced. Most professionals prefer arbitration. Strike action is not a strong tool for many of the professions. (e.g. engineers). At the federal level, arbitration selection does not have to be by mutual agreement and as a result the professional group has the best of both worlds.

10. When the provincial medical association is the bargaining agent, such as in British Columbia and Maniboba, the association at-large has tended to remain at arms-length from the local bargaining between the provincial government doctors and the government.

MEMBERS OF THE ARCHITECTURAL, ENGINEERING, DENTAL, MEDICAL AND LEGAL PROFESSIONS

TABB

JURISDICTION	LEGISLATION	ARCH.	ENGR.	LEGAL		MEDICAL	DENTAL
				CROWN	OTHER		
ONTARIO	Crown Employees Collective Bargaining Act	Yes	Yes	Yes	Yes	Yes	Yes
	Labour Relations Act	Yes	No	n/a	Yes	Yes	Yes
FEDERAL	Public Service Staff Relations Act	No	No	n/a	No(1)	No	No
	Canada Labour Code	No	No	n/a	No	No	No
ALBERTA	Public Service Employee Relations Act	Yes(2)	Yes(2)	Yes(2)	Yes(2)	Yes(2)	Yes(2)
	Labour Relations Act	Yes	Yes	n/a	Yes	Yes	Yes
BRITISH COLUMBIA	Public Service Labour Relations Act Essential Services Disputes Act	No	No	Yes	Yes	Yes(3)	No
	Labour Code of British Columbia	No	No	n/a	No	No	No
MANITOBA	Civil Service Act	No	No	No	No	No	No
	Labour Relations Act	No	No	n/a	No	No	No
NEWFOUNDLAND	Public Service (Collective Bargaining) Act	No	No	Yes	Yes	Yes	Yes
	Labour Relations Act	No	No	n/a	No	No	No
NEW BRUNSWICK	Public Service Labour Relations Act	No	No	Yes	Yes	No(4)	No(4)
	Industrial Relations Act	No	No	n/a	No	No	No
NOVA SCOTIA	Civil Service Collective Bargaining Act	No	No	Yes	Yes	Yes	Yes
	Trade Union Act	Yes	Yes	n/a	Yes	Yes	Yes
PRINCE EDWARD ISLAND	Civil Service Act	No	No	Yes	No	No	No
	Labour Act	Yes	Yes	n/a	Yes	Yes	Yes
QUEBEC	Labour Code(5)	No	No	Yes	Yes	No	No
SASKATCHEWAN	Trade Union Act(6)	No	No	No	No	No	No

TAB B

NOTES

1. Lawyers employed in the Department of Justice specically excluded.

2. All professions have right to opt-in to the bargaining unit.

3. A negotiated agreement covering salaries, benefits and working conditions exists between the government and its medical doctors.

4. Medical doctors and dentists have not exercised their right to become certified.

5. Labour Code applies to both public and private sectors. Prosecutors in the Department of Justice are specifically excluded under the Code.

6. Trade Union Act applies to both the public and private sectors. Under the collective agreement between the government and the Saskatchewan Government Employee's Association, the parties have agreed to exclude members of the engineering, medical and dental professions and OIC appointments. Lawyers are such appointments.

Staff Relations and Compensation Division
Human Resources Secretariat

April 30, 1986

AN OVERVIEW OF COLLECTIVE BARGAINING BY SCIENTIFIC AND PROFESSIONAL EMPLOYEES IN THE FEDERAL AND PROVINCIAL JURISDICTIONS

TAB B

ONTARIO

Scientific and professional employees such as nurses, foresters, psychologists, librarians, etc., have collective bargaining rights under the Crown Employees Collective Bargaining Act. However, persons who are members of the architectural, dental, engineering, legal or medical professions and who are entitled to practise in Ontario and who are employed in a professional capacity, are specifically excluded under subsection 1(1) of the Act.

Scientific and professional classifications subject to bargaining under the Act are assigned to occupational groups within a Scientific and Professional Category. This category, along with seven other categories, represents a single bargaining unit covering all employees in the Ontario Public Service. Employees in the unit are represented by one bargaining agent, the Ontario Public Service Employees Union. While wage rates are negotiated category by category, employee benefits and working conditions are negotiated on a bargaining unit-wide basis. The Act specifies compulsory arbitration as the dispute resolution mechanism.

Although members of the medical profession are exempt from bargaining under the Act, the government in 1980 entered into an agreement with the Ontario Psychiatric Hospitals and Hospital Schools Medical Staff Association concerning salaries for physicians and psychiatrists who provide direct patient care in government-run hospitals. No statutory provision exists to cover the agreement or the related discussion process. The agreement provides for the appointment of a factfinder should negotiations on salaries reach an impasse. The terms of reference under

TAB B

the agreement restrict the factfinder's investigation to salary issues only. Recommendations made are not binding on either party. The final determination of salary increases and any other changes rests with Management Board of Cabinet.

Salary concerns and other related matters affecting architects, engineers, dentists, lawyers, and those medical doctors who are not employed in a direct patient care capacity, are dealt with as part of the normal process applicable to the review of management and excluded staff salaries.

Although a staff association of crown attorneys in the Ministry of the Attorney General has made representations to the govenment from time to time on matters of concern to them, no formal bargaining or discussion arrangement is provided.

Clause (a) of subsection 1(3) of the Labour Relations Act specifically excludes members of the architectural, dental, land surveying, legal and medical professions entitled to practise in Ontario and employed in a professional capacity. Under the Act, professional engineers have the freedom to join a trade union and bargain collectively. However, subsection 6(4) of the Act requires that professional engineers comprise a separate and distinct bargaining unit unless the Labour Relations Board is satisfied that a majority of the engineers wish to be included in a bargaining unit of other employees. There are no restrictions on the bargaining rights of other scientific and professional employees.

TAB B

FEDERAL GOVERNMENT

Under the Public Service Staff Relations Act, all scientific and professional staff, including architects, engineers, dentists, medical doctors, and lawyers have the right to bargain. These scientific and professional groups are certified by the Public Service Staff Relations Board amd each form separate bargaining units within the Scientific and Professional Category of the federal public service Classification Plan. While the Professional Institute of the Public Service of Canada is the certified bargaining agent for the majority of groups in the category, a few groups are represented by the Public Service Alliance of Canada or independent staff associations.

Separate collective agreements covering wages and those working condition and employee benefit items that are bargainable under the Act, are negotiated for each group. The Act permits strikes and lock-outs to take place to resolve a bargaining impasse. The legislation also contains a provision whereby a party can ask the Board to refer a dispute to binding arbitration. The request must be made prior to any strike or lock-out action being taken. The request for arbitration does not need to be by mutual agreement.

Although lawyers employed in the federal public service have the right to bargain, legal staff in the Department of Justice are excluded under the Act. Specific reference to these employees is made in the statute under the definition that excludes persons employed in a "managerial or confidential capacity". As of September 1985, only 30 lawyers were covered by the Law group collective agreement while some 761 lawyers were excluded.

TAB B

In comparison, inclusion/exclusion figures for the engineering, medical, dental and architectural groups were;

Group	Inclusions	Exclusions
Architecture and Town Planning	354	30
Engineering and Land Surveying	2730	250
Medicine	229	86
Dentistry	44	1

The Canada Labour Code places no restriction on employees who are members of the architectural, engineering, dental, medical or legal professions from belonging to a trade union.

ALBERTA

While scientific and professional employees have the right to bargain and to belong to a single bargaining unit covering all Alberta government employees, subsection 22(1) of the Public Service Employee Relations Act specifically excludes from the bargaining unit persons who are members of the architectural, dental, engineering, legal and medical professions who are practising their profession as a condition of employment. However, subsections 22(2) and 22(3) of the Act allow an "opting-in" and an "opting-out" arrangement for these excluded professions. The Public Service Staff Relations Board may direct that members of the professions be included in the bargaining unit if a majority of persons in the profession express such a desire. The Board may also direct that members

of the professions be opted-out, if at a later date they do not wish to remain in the unit. Only members who would not be excluded under the general exclusion criteria (i.e. managerial or confidential capacity) can express the preference to opt in or out. At the present time, architects, engineers, dentists, lawyers and medical doctors have chosen to remain excluded from the bargaining unit. None of the excluded professions have formally requested inclusion in the bargaining unit although from time to time some employees have expressed an interest. If a profession did opt for inclusion, it would have to become part of the single bargaining unit covering provincial employees and have to accept the Alberta Government Employees' Union as its bargaining representative. Compulsory arbitration to resolve disputes is provided for under the Act.

Informal discussions regarding salaries and other terms and conditions of employment are held with medical doctors at the ministry level Recommendations on changes resulting from these discussions can be accepted or rejected by the government. Only twelve doctors, representing all levels of work, are involved in the departmental discussion process. Most medical doctors required by the Alberta government for direct patient care are retained on a fee-for-service arrangement and are therefore not employees.

Subsection 1(1) of the Labour Relations Act specifically exempts from a bargaining unit persons who are practising members of the medical, dental, architectural, engineering and legal professions.

TAB B

Under the Public Service Labour Relations Act all scientific and professional employees have the right to bargain except persons who are qualified under the Barristers and Solicitors Act and persons who are qualified under the Medical Practioners Act and who are engaged and working in the practice of their profession. Section 4 of the Act establishes separate bargaining units for (a) licensed and registered nurses, (b) licensed professional staff, and (c) the balance of the public service. At the present time the licensed professional bargaining unit includes architects, engineers, dental officers and other professional groups.

While medical doctors are specifically excluded by statute, the province has a formal agreement with its doctors covering salaries and related terms and conditions of employment. The British Columbia Medical Association represents the doctors and provides negotiation and administrative support services. Medical doctors at all levels, including management, are covered by the agreement. While salaries, working conditions and benefits are subject to negotiation, the agreement does not contain a dispute resolution mechanism should an impasse arise in negotiations. Final determination on changes rests with the government. Although the medical association is the bargaining agent, the Association has tended to separate bargaining for provincial government employed doctors from fee-for-service negotiations. However, in 1981 when the provincial government doctors went out out "on-strike", the Association used the fee-for-service negotiations at the time as leverage to obtain a favourable settlement for the doctors. The agreement between the province and its medical doctors serves as a guide for salaried doctors employed by other public and private organizations in the province.

TAB B

There are no similar bargaining or formal discussion arrangements with crown attorneys and lawyers.

Under the British Columbia Labour Code, qualified and practising members of professions are allowed to bargain collectively. Prior to 1975, the Code excluded such persons from bargaining.

MANITOBA

All scientific and professional employees have bargaining rights. A single bargaining unit, with the Manitoba Government Employees' Association as the bargaining representative covers all provincial government employees except those who are professional engineers, lawyers, and medical doctors. Separate bargaining units for engineers and medical doctors have been certified under the Labour Relations Act while the provincial government has voluntarily recognized the crown attorney's association. Architects and dentists are covered by the master agreement with the MGEA. Although the Civil Service Act is silent with respect to the dispute resolution mechanism it has been the practice to use arbirtration to resolve disputes involving employees covered by the master agreement. The professional groups certified under the Labour Relations Act are allowed to strike.

The Manitoba Medical Association is the bargaining agent for medical doctors employed by the province while engineers are represented by the Organization of Professional Engineers Employed by the Province of Manitoba. The bargaining units were certified by the Labour Relations Board in 1974 and 1975 respectively. Under the Labour Relations Act both groups are allowed to strike. Negotiations have been kept separate from

TAB B

fee-for-service negotiations between the government and the Manitoba Medical Association. The Association has primarily provided administrative and research support with the medical doctors retaining their own legal counsel to represent them in negotiations.

The agreement with the Crown Attorneys covers some 80 crown attorneys and 25 other legal staff at all job levels. The agreement provides for a tri-partite board of arbitration, or a sole arbitrator by mutual agreement, to resolve an impasse in negotiations. The Chief Justice of the Province of Manitoba appoints an arbitration board chairman if the parties cannot agree on a mutually acceptable person.

Under the Labour Relations Act there is no restriction on the right to bargain by employees who are members of the various professions.

NEWFOUNDLAND

Under the Public Service (Collective Bargaining) Act, scientific and professional employees including architects and engineers have the right to bargain. Medical doctors, dentists and lawyers are excluded under the Act. While the Act permits strike action to be taken, legislation introduced in 1983 places limitations on such action.

The Labour Relations Act places no restriction on employees who are members of various professions to unionize and bargain collectively.

TAB B

NEW BRUNSWICK

Under the Public Service Labour Relations Act, all scientific and professional employees except legal officers employed under the Attorney General have the right to bargain. Bargaining units are certified on a group basis and form the scientific and professional category. Professional engineers and architects are certified bargaining units. Medical doctors and dentists, while having the right to bargain, have not made formal application as a group to become certified. Some 10 years ago, the Public Service Staff Relations Board, without providing reasons, turned down the application for certification made by a group of hospital psychiatrists. At the time, the employer argued that certification of a bargaining unit had to represent a majority of all eligible doctors in the province's employ, not just a few. The statute permits strike/lock-out to resolve disputes. It also provides for an arbitration option. However, the selection of arbitration has to be by mutual agreement. This later requirement has a significant impact on the bargaining position of the parties. Since many of the professional groups lack strong economic and/or political power, they favour arbitration over striking. The employer, by refusing arbitration, is able to gain considerable bargaining leverage and achieve settlements in direct negotiation because of the reluctance of professionals to take strike action.

Legal officers employed under the Attorney General are specifically excluded as a person employed in a managerial or confidential capacity. They have a staff association and it makes its views known to Treasury Board on salaries and terms of employment through the Deputy Attorney General and the Attorney General. No formal discussion process exists with the association.

Senior management in the Department of Health regularly meet with medical doctors to discuss matters of mutual concern. Salary and working condition issues arising from these meetings are transmitted to Treasury Board through normal ministry channels. Recently, it has been the policy of the government to grant increases in salary to its medical doctors that correspond to the adjustments made in the fee-for-service schedule.

The Industrial Relations Act does not prevent scientific and professional employees from forming a bargaining unit. The Act defines "employee" as a person employed to do skilled or unskilled manual, clerical, technical or professional work.

NOVA SCOTIA

While scientific and professional staff, including professional engineers and architects, are included in a Professional Category bargaining unit, Section 11 of the Civil Service Collective Bargaining Act specifically excludes employees who are members of the medical, dental, and legal professions and who are qualified to practise and are employed in that capacity. A separate collective agreement is negotiated for the category. Compulsory arbitration is the dispute resolution mechanism. Employees who are members of the medical, dental, architectural, engineering, and legal professions qualified to practise under the laws of a province and employed in that capacity are excluded from bargaining under the Trade Union Act.

PRINCE EDWARD ISLAND

Section 40 of the Civil Service Act provides the framework for collective bargaining in the Prince Edward Island public service. The Act designates the Prince Edward Island Public Service Association as the bargaining representative for all employees covered by the Act and not excluded by regulation. All scientific and professional staff, including employees who are members of the architectural, engineering, dental, medical and legal professions have collective bargaining rights except those lawyers who are solicitors employed in the Department of Justice. All employees are included in a single service-wide bargaining unit. Compulsory arbitration is the dispute resolution mechanism.

The Labour Act of Prince Edward Island specifically designates as exclusions persons who are practising members of the architectural, dental, engineering, legal or medical professions.

QUEBEC

The Labour Code governs both public and private sector labour relations in the province. It is applicable to provincial government employees. The Code places no restriction on the right of employees of professional organizations from forming a union and to bargain collectively. A Professional Category covers the various scientific and professional groups in the Quebec public service. A separate collective agreement is negotiated for the category. The right to strike exists as a mechanism to resolve disputes.

While architects, engineers, dentists, medical doctors, and lawyers have the right to bargain, the Code specifically exempts prosecutors employed by the Quebec Department of Justice. Prosecutors and other legal staff up to the level of Deputy Minister belong to a staff association. The concerns of the members of the association with respect to salaries and terms and conditions of employment are made known to the President of Treasury Board by the Minister of Justice. The ability of the association to have their concerns considered by the government rests very much on the fact that all persons involved, including the Minister of Justice, are lawyers. Bargaining rights have not been a major concern of the association.

Some 25 associations representing different types of management and excluded employees such a foremen, directors of education, hospital administrators, etc., are found in the public sector at-large. These associations cover some 25,000 persons. A "Confederation" acts as a co-ordinating and governing body. Membership in the respective associations is voluntary. The associations meet and present briefs to the President of Treasury Board and/or the Premier once a year.

SASKATCHEWAN

The Trade Union Act governs labour relations in both the public and private sectors, and is applicable to the Crown. Under the Act there is no restriction on the right of employees who are members of a professional organization from joining a trade union.

The inclusion/exclusion of employees of the provincial government is by agreement of the parties rather than by statute. Article 2 of the collective agreement between the government and the Saskatchewan

Government Employees' Association sets out the exemptions from coverage under the agreement. Persons who are (a) registered members of the Association of Professional Engineers of Saskatchewan and Engineers-in-training, (b) members of the Saskatchewan Land Surveyors Association, (c) physicians and dentists are listed as exclusions. The Article also provides for the exclusion of Order-in-Council appointments and as a result, legal officers and crown attorneys are excluded. Professional architects along with other scientific and professional employees are included in the single bargaining unit covering all Saskatchewan government employees. The right to strike is permitted under the Trade Union Act.

Staff Relations and Compensation Division

April 30,1986

TAB B

APPENDIX B

APPENDIX B

TAB B

IN THE MATTER OF A CONCILIATION BOARD HEARING

BETWEEN: THE GOVERNMENT OF ONTARIO .

AND: THE ONTARIO PSYCHIATRIC HOSPITALS AND HOSPITAL SCHOOLS MEDICAL STAFF ASSOCIATION

RE: BARGAINING RELATIONSHIP AND PROCESS

BOARD OF CONCILIATION:	Kevin M. Burkett	- Chairman
	Frank C. Burnet	- Government Nominee
	Chris Paliare	- Association Nominee
APPEARANCE FOR THE GOVERNMENT:	F. G. Hamilton, Q.C.	- Counsel
APPEARANCE FOR THE ASSOCIATION:	Jeffrey Sack, Q.C.	- Counsel

A hearing was held in Toronto on June 20, 1986.

Award Dated - Nov 27/86

TAB B

R E P O R T

1. These proceedings arise from a Memorandum of Agreement signed between the parties on March 21, 1986. The Memorandum of Agreement provides, in part, that:

> "1 (a) A Board of Conciliation be established to inquire into and make non-binding recommendations with respect to salaries, working conditions and the processes under which these matters are to be determined. The working conditions that are to be inquired into are:
>
> (i) workload; administrative, clinical and teaching
>
> (ii) improved secretarial assistance
>
> (iii) workplace safety
>
> (iv) education leave
>
> (v) legal representation
>
> (vi) the mechanism for addressing workplace concerns. "

2. The Association was formed in 1973 to represent the medical staff at the Ontario Psychiatric Hospitals. The Association was incorporated under the Ontario Corporations Act in 1979. Presently the Association represents some 280 psychiatrists, physicians and dentists employed by the government of Ontario at 10 provincial psychiatric hospitals operated by the Ministry of Health and 6 mental retardation facilities operated by the Ministry of Community and Social Services. There are 90 physicians who are members of the classified Civil Service of which 56 are psychiatrists and 34

are general practitioners. In addition there are 151 physicians employed under contract of which 107 are psychiatrists and 44 are general practitioners. The terms and conditions of employment of the medical staff of these provincial institutions are governed by the Public Service Act and Regulations. Under that act the public service consists of both classified employees (civil service) and u classified employees (ministerial appointments). Salaries and work conditions of positions in the classified service are prescribed by the Civil Service Commission which is responsible to the Chairman of Management Board. The terms and conditions of the unclassified staff are contained in individual contracts of employment.

3. The medical staff of these institutions is excluded from the Crown Employees' Collective Bargaining Act since the term "employee" in that Act does not include persons who are members of the medical profession entitled to practise in Ontario and employed in a professional capacity: section 1(f)(4). On the same basis, the medical staff is excluded from the operation of the Labour Relations Act: section 1(3)(a); in any event, the Labour Relations Act does not apply to the Crown or its employees. Nor is the medical staff covered by the Hospital Labour Disputes Arbitration Act since that Act applies only to hospital employees to whom the Labour Relations Act applies: HLDAA, section 2.

4. The Association bargained with representatives of the Ministries of Health and Community and Social Services on

an informal basis in the period 1975-1980. In 1980 a framework agreement entitled "Salary Negotiation for Specified Staff Physicians" was negotiated. The agreement provided as follows:

"1. A Joint Negotiating Committee will be established to negotiate salary levels and standby pay for specified staff physicians employed in psychiatric facilities operated by the Ministry of Health and in facilities governed by the Developmental Services Act and Children's Mental Health Services Act and operated by the Ministry of Community and Social Services.

2. The Joint Negotiating Committee will have the following membership:

5	representatives	of	the	Ontario Psychiatric Hospitals & Hospital Schools Medical Staff Association and the Ontario Medical Association
3	"	"	"	Ministry of Health
1	"	"	"	Ministry of Community & Social Services
1	"	"	"	Civil Service Commission.

3. Negotiations will include salary and standby pay for the classes of PMD-20 and PMD-22.

4. After agreement is reached under 3 above, the Joint Negotiating Committee will also consider the salary of the PMD-23 class, the basic listed contract salary rates for Category II and III psychiatrists and contract physicians and sessional fees paid for medical services rendered in the facilities listed in 1 above.

5. Vacations and other benefits will be considered by the Joint Negotiating Committee at the request of either party.

6. Matters included under items 4 and 5 above will not come within the jurisdiction of the fact-finder.

7. Either party may initiate the negotiation process within five months prior to the end of the fiscal year.

8. The Joint Negotiating Committee will consider submissions presented by the Associations prior to the April 1 review date and will endeavour to formulate a joint recommendation acceptable to the respective principals. If the Joint Negotiating Committee agrees, matters included under 4 and 5 above will be included as part of the final recommendation to the principals.

9. If no agreement is reached under 3 above, a fact-finder shall be appointed by mutual agreement of both parties. Where there is no agreement, a fact-finder will be appointed by the Chairman of the Ontario Labour Relations Board by February 15, or a later date agreed to by the parties.

10. The remuneration of the fact-finder will be shared equally by the parties.

11. The fact-finder will consider the information provided by the parties and make a recommendation to the Joint Negotiating Committee with respect to salaries of the PMD-20 and PMD-22 classifications, and standby pay. This recommendation will be made within four weeks of his/her appointment.

12. The Joint Negotiating Committee will then consider the fact-finder's recommendations and again endeavour to formulate a joint recommendation that will be acceptable to the respective principals.

13. If the committee reaches an agreement, it shall recommend acceptance of the agreement to the respective principals.

14. Either party may make public the recommendation of the fact-finder after seven (7) days of its receipt by the committee provided that the other party is given two (2) working days' advance notice.

15. This negotiating mechanism will be effective for a two-year period from November 1, 1980, and subject to review at the completion of the second year. "

5. Under the framework agreement fact-finder reports were issued by Professor E. E. Palmer in 1981 and again in 1982 by Professor Arthur Kruger. Professor Kruger's recommendations spanned the period 1982-83 and 1983-84. Both fact-finders were of

the view that for purposes of salary determination the relationship of these physicians with other physicians was more relevant than the relationship with senior civil servants "whose training and work is so different from the physicians' ". The government would not accept the salary recommendations made by Professor Kruger. A third fact-finding report was issued by Mr. J. C. Wilson. The Association, which had become increasingly disenchanted with the bargaining process, in particular the absence of a final impartial dispute resolution mechanism, proposed a binding arbitration process covering all terms and conditions of employment. The fact-finder made these comments in respect of the bargaining process:

> "I would fail to be forthright in my advice if I did not point out at the outset of this Report that the negotiation process leading to the function of the Fact-Finder has become questionable.
>
> There are two fundamental problems with the present process. First, the Government directive of October, 1980, which authorized the process makes little sense unless it can be considered to have specifically identified the Psychiatrists as a separate negotiating entity within the Ontario public service. Despite that, however, in the present negotiations the Government has been quite clear with the Psychiatrists that it cannot consider any agreement which would constitute a departure from its position with the other professional groups. This suggests that in fact the Government is not prepared to negotiate with the Psychiatrists as a separate entity.
>
> Secondly, the mandate of the Joint Negotiating Committee limits the Committee's range of consideration to salary and standby pay - that is, the cash components only of compensation. It is reasonable to point out that generally accepted practice in compensation questions includes the terms and conditions of employment as an integral part of compensation negotiations. The

> Psychiatrists appear to be expected to negotiate any other employment conditions which might directly impact on compensation levels in entirely separate discussions with the Ministry of Health. This arrangement clearly limits the possibility of effective negotiation.
>
> Any government must of course be free within the applicable constitutional limits to take whatever position it considers to be necessary in the public interest. Since there appears to be no written commitment by the Government to continuation of the mandate of the Joint Negotiating Committee, it is reasonable to suggest that if the Government cannot justify identification of the Psychiatrists as a separate negotiating entity, nor permit sufficient breadth of mandate to permit effective negotiation, it should abandon this process for some more suitable alternative. It serves nothing here to hold to an illusory prospect.
>
> I have submitted the recommendations of this Report on the assumption that the present process can be made satisfactorily flexible in the future. "

6. The government's unilateral imposition of a 4% pay increase prior to the release of the fact-finder's report led to work to rule action and a refusal to accept transfers to these provincial institutions from general hospitals with psychiatric units. In December, 1985 the Association met and adopted a motion calling for independent and binding arbitration and authorized the Association executive to schedule study days in the event of a continued impasse. The Ministry accepted the compensation portion of the fact-finder's report and proposed discussions with respect to process. The result was a series of study days followed by a strike vote on March 18, 1986. The threatened strike was averted with third party assistance when the parties entered into the above-noted memorandum of settlement dated March 21, 1986; the same memorandum which gives us our authority to recommend in this matter.

7. There is currently underway an interministerial review of the bargaining procedures for all of the professionals employed by the Ontario Government. Those who are affected by this review are some 29 architects, 803 engineers, 532 crown attorneys, 26 dentists and 199 medical doctors of which 125 are classified. They are employed in a number of different ministries. The psychiatrists and other physicians and dentists represented by the Association in these proceedings are the only group to have engaged in a formalized bargaining process with the Government. It is understood between the parties that our recommendations with respect to bargaining process will be considered by the Government along with the recommendations that are handed down by the interministerial committee.

8. At the hearing which took place on June 20, 1986 the Association took the position that we should limit ourselves to the question of process and then dispose of questions relating to terms and conditions of employment by recommending that those questions be dealt with under whatever bargaining process is recommended. The Goverhment objected, arguing that we had been constituted to consider and make recommendations with respect to the specified terms and conditions of employment and, therefore, were obliged to consider these matters on the merits. The Government maintains that because the two questions are separate and distinct, and because we do not have the authority to make a binding award with respect to process, and because of the time lapse that will be occasioned by the need to study and consider our recommendations with respect to process along with those

that will be forthcoming from the interministerial committee, there is no reason to delay considering and making recommendations with respect to the specified terms and conditions of employment that are referred to us. We made an oral ruling at the hearing that we accepted the Government's position and would commence by hearing the submissions with respect to process first. These submissions were completed on the first day of hearing.

9. The Association proposes a system that it refers to as "fair, independent and binding" arbitration. The specifics of its proposal are set out below:

"1.1 The Agreement shall be effective from January 1, 198 through December 31, 198 . Either party may notify the other in writing at any time of its desire to negotiate with a view to the renewal with or without modification of the existing Agreement.

1.2 In the event of notification being given in accordance with paragraph 1.1, the parties shall meet within twenty (20) days for the purpose of negotiating a new Agreement or renewing this Agreement.

1.3 If the parties are unable to reach an agreement, the current Agreement shall be extended without modifications until the conditions contained in the following paragraphs have been satisfied.

1.4 The process for resolving all future contract negotiations disputes shall be binding under The Arbitrations Act, R.S.O. 1980, as amended:

(i) In the event that negotiations do not result in agreement, either party may at any time after thirty (30) days of the first meeting, or such shorter period as may be mutually agreed upon, submit all matters in dispute to arbitration, and for this purpose this agreement constitutes a submission under The Arbitrations Act, R.S.O. 1980, c.25, as amended.

(ii) Each party shall appoint a member to the Board, and the third member, who shall be the Chairperson, shall be appointed by the two members so appointed.

(iii) Where either party fails to appoint a member to the Board within thirty (30) days, the Chief Justice of Ontario may be requested in writing by the other party to appoint a member in lieu thereof, and such appointment shall be made within fifteen (15) days of the said request.

(iv) Where the two members of the Board appointed by the parties fail, within fifteen (15) days of the appointment of the one last appointed, to agree upon a third member, the Chief Justice of Ontario may be requested in writing by either party to appoint a third member, and such appointment shall be made within fifteen (15) days of the said request.

(v) The Board shall commence its proceedings within thirty (30) days after it is constituted and shall deliver the award within sixty (60) days after the commencement of the proceedings, and the award shall be final and binding on the parties.

(vi) Any of the periods mentioned herein may be extended at any time by agreement of the parties in writing.

(vii) The Board shall examine into and decide on the matters in dispute. The Board shall determine its own procedure but shall give full opportunity to the parties to present their evidence and make their submissions.

(viii) The Board shall have jurisdiction to determine all terms and conditions of employment including salaries, benefits and working conditions and all rights, privileges or duties of the employer, the Association and the medical staff.

(ix) The decision of the majority of the members of the Board is the decision of the Board, but, if there is no majority, the decision of the Chairperson is the decision of the Board.

(x) Each party shall assume its own costs, including those of its appointees, and shall share the cost of the fees and expenses charged by the Chairperson equally.

(xi) The provisions of this Agreement shall remain in effect, unless amended by agreement of the parties, and until replaced by a new Agreement or an award.

(xii) Within sixty (60) days following an award hereunder, the parties shall incorporate the terms of the award in an Agreement, failing which this Agreement, as amended by the award, shall be deemed to constitute the Agreement between the parties.

(xiii) The foregoing provisions in this article are intended to establish a mechanism for the resolution of all future differences between the parties, for the next and all subsequent years, and the Board shall have no jurisdiction, except upon the agreement of the parties, to amend, modify, alter or delete any of the said provisions and no request to amend, modify, alter or delete any of the foregoing provisions in this article shall be made to the Board by either party. "

10. The Association's argument in support of a system of binding arbitration is straightforward. The Association submits that it is government policy to provide binding arbitration wherever essential services are provided. The Association points to the provision of binding arbitration for police, fire, nursing home and hospital services and, in particular, to the fact that interns and residents, nurses, support staff, and professional and technical employees at the very institutions involved in this dispute are all subject to binding arbitration as the ultimate dispute resolution mechanism. The Association submits that "it makes no sense for interns and residents to have access to arbitration, on the basis that they are essential, while the very physicians whom they assist, and who supervise them, do not". The Association

suggests as well that it is anomalous that psychiatrists in Ontario employed in federal institutions have access to binding arbitration, while psychiatrists in provincial institutions do not. The Association characterizes this issue as the most important factor prompting the work action and threatened withdrawal of services that was resolved on the basis of the memorandum of agreement giving us our authority to act. In asking us to recommend binding arbitration the Association asserts that there has been a consistent refusal by the Government to negotiate working conditions and an outright rejection of the last fact-finder's conclusion that a new negotiating process be devised. The Association maintains that the fairness of the procedure it proposes is guaranteed by the tripartite constitution of the Board, its independence by the provision for appointment of a chairperson by the chief justice if necessary, and its binding nature by the reference to the Provincial Arbitrations Act.

11. The Government finds itself in a somewhat anomalous situation. The Government is committed to considering the recommendations of this Board before acting on the question of bargaining procedure for all of the professions. However, as we have observed, that question is presently before an interministerial committee. If the Government was to make recommendations to us, therefore, which mirrored the thinking of the interministerial committee, to which it is privy, and, if these recommendations were to be rejected by us but subsequently acted upon, the Government could be accused of not

keeping the commitment to the psychiatrists to consider our recommendations before acting. The Government, therefore, opted to discuss the various problems associated with formulating a bargaining process within the Ontario public service for this particular profession, without making specific recommendations.

12. The Government submits that the most sensitive matter affecting public policy in these proceedings is whether the unique role occupied by physicians, including the psychiatrists employed by it, can be reconciled within the framework of a collective bargaining structure. The Government characterizes the question as whether society is prepared to share with an independent organization such as a trade union, with its own code of conduct and discipline, responsibility for the trust bestowed upon the members of the medical profession in their personal involvement in patient care. It is submitted that in the face of the multifaceted relationship that the psychiatrists have with the Government as their employer, the College of Physicians and Surgeons, the Health Disciplines Board of the Province of Ontario, committees of their respective hospitals, a university if engaged in teaching and, most importantly, the patient, their situation is not susceptible to a rational accommodation with a system of collective bargaining which is predicated upon a one-on-one contractual relationship. The Government comments that the core functions normally pertinent to collective bargaining

have been pre-empted by legislation. By way of illustration it asks how a grievance procedure or the principle of seniority can be realistically applicable when the most sensitive consequences of their application are governed by parties who are extraneous to the process. While the matter of compensation could clearly be bargained, the Government points out that compensation and the other substantive conditions of employment are interrelated for bargaining purposes. The Government maintains, therefore, that "the wisdom of a collective bargaining regime for the psychiatrists is indeed very questionable".

13. The Government points to a number of difficult issues that would have to be resolved in order to provide the psychiatrists, as one professional group within the Ontario public service, with collective bargaining. The first such issue relates to the description of the appropriate bargaining unit. Should the psychiatrists bargain as part of the already existing scientific and professional services category of some 4000 employees including research scientists, education officers, economists, and psychologists? Should the psychiatrists bargain as part of an all-professional bargaining unit? Should the psychiatric physicians bargain as part of an all-physicians group, or should they bargain alone? The second issue raised by the Government pertains to the status of the representing organization. The Government submits that the representing organization would have to be an "employee organization" as that term is commonly defined in labour

relations legislation and, in addition, there would have to be some requirement of constitutional guarantee of democratic freedom and fitness to fulfill the mandate sought and some process to deal with the acquisition and loss of bargaining rights. The third issue referred to by the Government is the scope of negotiable issues. The Government points out that under the Crown Employees' Collective Bargaining Act there is legislative regulation of matters that are bargainable together with an articulation of functions that are exclusively the prerogative of the employer. The Government submits that the licensing and regulatory bodies will also have a substantial impact in prescribing and limiting bargainable or grievable matters and, in addition, depending on the scope of the bargaining unit, a number of insurance and welfare benefits, including superannuation programs, would not be feasible for a civil service fragmented into small bargaining units. The Government also lists the right to strike, grievance rights determination and authority and criteria for managerial exclusions as other contentious issues. The Government concludes by reminding us that while the Association may have a viewpoint on these various issues other organizations and employees may have differing or conflicting views which deserve consideration before any conclusions are reached.

14. The first matter to be disposed of is the suggestion that because of the statutory regulation of the profession collective bargaining is not appropriate for government-employed physicians. We start by confirming that these physicians,

as employees of the Government, as distinct from self-employed practitioners, have a whole range of employment considerations that are unaffected by the statutory regulation of the profession, which are appropriate for collective bargaining. I refer specifically to salary, benefits, hours, premiums and vacations, among others; not unimportant employment matters. There are other aspects of the employment relationship such as the application of seniority and/or the procedures to deal with employment complaints which, although there may be certain statutory restrictions or parallel procedures, are nevertheless bargainable. The existence of a statutorily established "complaints committee" to consider and investigate complaints made by members of the public or the profession or a statutorily established "discipline committee" to hear and determine allegations of professional misconduct or incompetence does not rule ou a grievance procedure to resolve employment-related complaints. The potential for overlapping authority has not restricted bargaining agents for nurses, teachers and police, who are also subject to statutory bodies that deal with complaints made by members of the public and/or allegations of misconduct or incompetence, from negotiating contractual grievance procedures. University faculty, who now bargain collectively, are also in a somewhat analogous situation. There is no statutory prohibition against government-employed psychiatrists engaging in the process of collective bargaining with their employer and clearly, notwithstanding the statutory overlap, the scope of matters that may be bargained would, in our view, permit meaningful collective bargaining. Indeed, in our view the already existing process,

notwithstanding its flaws, recognizes the viability of a bargaining relationship.

15. If there is any doubt that collective bargaining is an appropriate mechanism for employee physicians, reference need only be had to the extension of collective bargaining to the interns and residents who work in Ontario hospitals, including the Ontario Government psychiatric hospitals where they work under the psychiatrists who are the subject of this inquiry. The interns and residents are subject to the same statutory framework as the psychiatrists who are employed by the Ontario Government. They negotiate under a process that provides for binding arbitration under the Arbitrations Act as the final method of dispute resolution. Under their collective bargaining process the Board of Arbitration is given jurisdiction "to determine terms and conditions of employment including salaries, benefits and working conditions, subject to the specific exclusion of hours of work including any penalties or bonuses arising from hours of work or training. The Board (does) not have jurisdiction to determine matters which are primarily educational, provided that employment aspects of such matters (are) subject to arbitration where they can be dealt with separately and where to do so would not adversely affect clinical education." Similarly, the psychiatrists employed by the federal government who work in Ontario and are also subject to the same statutory framework as the psychiatrists employed by the Ontario Government

engage in collective bargaining under the Public Service Staff Relations Act. Clearly, collective bargaining is not an inappropriate process for physicians who are also employees. The process is one that can operate within the statutory framework that governs the medical profession in the Province of Ontario and, therefore, cannot be rejected on grounds that "the matrix of parties, regulatory controls and procedures resulting from this division of interests, rights, responsibilities, obligations and remedies, is not susceptible to a rational accommodation within a system of collective bargaining which is predicated upon a one-on-one contractual relationship".

16. The essential question that follows relates to the form of the bargaining process. We concur in the comments of fact-finder Wilson with respect to the inadequacies of the existing process. In our view any bargaining process that encourages negotiation and provides for third party involvement but leaves the ultimate decision-making authority to the employer will eventually result in the dissatisfaction of the employees. In order for a process of collective bargaining to accommodate the legitimate aspirations of both the employer and the employees, in the sense that the terms of the employment relationship are not dictated by one side or the other, the ultimate method of dispute resolution must be left to the relative bargaining strength of the parties or, in those instances where the public interest dictates that the individual parties not be permitted to resort to strike

TAB B

or lockout, to the determination of a neutral third party. This underlying reality has been recognized by the Ontario Government. The preamble to the Ontario Labour Relations Act, which provides the right to free collective bargaining generally in the province, reads:

> "Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees."

Where the provincial government has determined that employees ... provide essential services provision has been made for binding arbitration. I refer specifically to police, fire, government and hospital employees. Governments in Canada, including the Ontario Government, have not declared themselves supreme in their dealings with their employees. Free collective bargaining, abridged to the extent of substituting binding arbitration for the right to strike or lockout where essential services are provided, is the norm. Against this backdrop it is difficult to argue that the psychiatrists who are employed in hospitals where all of the other employees are designated as essential and subject to binding arbitration, should be treated differently. They should be declared essential and made subject to compulsory binding arbitration as the final method of dispute resolution. The government does not contest that the services provided by the psychiatrists, physicians and dentists in these proceedings are essential and there was ample evidence at the hearing to support the essentiality of these employees.

17. Having rejected the suggestion that collective bargaining is inappropriate for government-employed psychiatrists, and having come to the conclusion that, as hospital employees, the ultimate method of dispute resolution must be binding arbitration, the

problems raised by the Government with respect to the scope of the bargaining unit, the status of the representing organization, and the extent of the matters to be bargained, although they must be resolved, are ancillary. They are matters that are normally dealt with in any application for certification before the parties commence to bargain. However, they are not matters that justify a refusal to recognize a collective bargaining relationship.

18. The Government has enumerated a number of possible bargaining units. The suggestion that the psychiatric physicians could bargain within the existing 4000-employee professional and technical category must be rejected for the reasons enunciated by the Government in support of its contention that collective bargaining may not be appropriate for government-employed psychiatric physicians. While these arguments do not support the conclusion that collective bargaining is inappropriate, they do cause us to conclude that the government-employed psychiatric physicians do not share a sufficient community of interest with other government employees not subject to the same statutory controls and restrictions. For essentially the same reasons physicians do not share a sufficient community of interest with other professionals. The statutory framework that governs each of the professions is unique to the individual profession, thereby requiring, for each profession, a separate accommodation with collective bargaining. As importantly, it seems to us that each of the employee professions has its own set of work-related concerns that would be difficult to accommodate within a single bargaining unit. Even if some

accommodation could be reached between the professions, therefore, whereby representation rights extended across professional boundaries, which is problematic, collective bargaining would be most effective if carried out on a profession-by-profession basis. The difficulties that would arise if the professions were to be lumped together far outweigh the administrative advantages that might result from such a bargaining structure. In our view physicians should bargain together as a separate entity.

19. Although government-employed psychiatric physicians have bargained together as an autonomous unit in the past and would, in our view, constitute a viable bargaining unit, we would not be prepared to recommend that other government-employed physicians be excluded. The statutory framework is the same for all physicians, thereby laying the foundation for a shared community of interest, and the fragmentation that would result from separate physician units would weaken the bargaining power of the non-psychiatric physicians and create an administrative burden upon the employer that is difficult to justify.

20. We now turn to the question of whether both the classified and the unclassified physicians should bargain together. As we have noted, under the Public Service Act the public service consists of both classified employees (civil service) and unclassified employees (ministerial appointments). The salaries and working conditions of the

classified service are prescribed by the Civil Service Commission, while the terms and conditions of the unclassified staff are contained in individual contracts of employment. In reality, the terms and conditions set out in the individual contracts of employment of the unclassified psychiatric physicians reflect what has been stipulated for the classified psychiatric physicians. We have been told that the individual physician has the option of being employed in the classified service or under an individual contract. The unclassified physicians receive a percentage in lieu of certain benefits that are provided to the classified service only. The unclassified psychiatric physicians work side by side with the classified psychiatric physicians performing the same functions in the same work environment. There are 90 classified psychiatric physicians and 151 unclassified psychiatric physicians employed by the Ontario Government. There can be no dispute that the classified and the unclassified psychiatric physicians share a strong community of interest. In our view the distinction between them is one of form rather than substance. Although the unclassified psychiatric physicians are party to individual contracts of employment, these can be bargained in light of and made subject to amendment on the basis of whatever changes are collectively negotiated. This is in essence what occurs presently. The two groups seek to bargain together and, in our view, there would be no real prejudice to the Government if they were to do so. On the contrary, the identity of interest between the two constitutes a compelling reason for recommending that they be included in the same bargaining unit. Indeed, a unit comprised of both staff and contract producers bargains effectively with the Canadian Broadcasting Corporation.

21. We accept the submission of the Government that the recognition of the Association for collective bargaining purposes would necessarily involve attainment of minimum standards normally required of an organization seeking certification to represent a bargaining unit of employees. These are commonly accepted prerequisites to the attainment of representation rights which serve to protect the rights of individual employees and to legitimize the status of the representing organization and, therefore, we recommend that the organization that seeks to represent government-employed physicians satisfy them. The task of determining if the organization that seeks to represent these employees meets the necessary prerequisites should fall to an independent adjudicative body such as the Ontario Labour Relations Board or the Ontario Public Service Labour Relations Tribunal. Indeed, depending upon the Government's ultimate decision with respect to collective bargaining for all of its professional employees, it is conceivable that a separate body could be established to certify the organizations seeking to represent each of the various professional groups. Without going further we endorse the Government's submission and leave it to the Government to decide who is to make the necessary determinations as to status and majority support. Beyond recommending that the assignment of jurisdiction to determine these matters be made as soon as is reasonably possible we do not consider the interim arrangements to be within our terms of reference. Indeed, neither party spoke to the matter of interim arrangements.

22. The final issue to be addressed is the question of the extent of the matters to be bargained. We start by endorsing the comments of fact-finder Wilson, as set out at paragraph 5 herein. Under the Crown Employees' Collective Bargaining Act there is legislative regulation of matters that are negotiable together with an articulation of the functions that are exclusively the prerogative of the employer. That Act stipulates as follows:

> "7. Upon being granted representation rights, the employee organization is authorized to bargain with the employer on terms and conditions of employment, except as to matters that are exclusively the function of the employer under subsection 18 (1); and, without limiting the generality of the foregoing, including rates of remuneration, hours of work, overtime and other premium allowance for work performed, the mileage rate payable to an employee for miles travelled when he is required to use his own automobile on the employer's business, benefits pertaining to time not worked by employees including paid holidays, paid vacations, group life insurance, health insurance and long-term income protection insurance, promotions, demotions, transfers, lay-offs or reappointments of employees, the procedures applicable to the processing of grievances, the classification and job evaluation system, and the conditions applicable to leaves of absence for other than any elective public office or political activities or training and development. 1974, c. 135, s. 3.
>
> 18. (1) Every collective agreement shall be deemed to provide that it is the exclusive function of the employer to manage, which function, without limiting the generality of the foregoing, includes the right to determine,
>
> (a) employment, appointment, complement, organization, assignment, discipline, dismissal, suspension, work methods and procedures, kinds and locations of equipment and classification of positions; and

(b) merit system, training and development, appraisal and superannuation, the governing principles of which are subject to review by the employer with the bargaining agent,

and such matters will not be the subject of collective bargaining nor come within the jurisdiction of a board.

While the extent of the matters that are open for bargaining is a subject of dispute between O.P.S.E.U. and the Government, it is our view that at this juncture government-employed physicians should be no better or no worse than other government employees. The dispute with respect to the extent of bargaining is one that they may wish to join but it is not one that we intend to influence. It is our recommendation, therefore, that they be given the same scope for bargaining as is provided under the Crown Employees' Collective Bargaining Act.

23. The Government is concerned that the statutory framework will have a substantial impact in restricting the bargainable or grievable matters set out in section 7 of the Crown Employees' Collective Bargaining Act. In addition the government submits that, depending on the scope of the bargaining unit, a number of insurance and welfare benefit programs would not be feasible for a Civil Service fragmented into small bargaining units. The government suggests that at the very least section 18(1) of the Crown Employees' Collective Bargaining Act would have to be amended to take into account the basic requirements of government in determining patient and institutional care levels. The negotiation of rates of

remuneration, hours of work, overtime and other premium allowances, the mileage rate, paid holidays, paid vacations, group life insurance, health insurance, long-term income protection, promotions, demotions, transfers, layoffs, re-appointments, grievance procedure, job evaluation system and leaves of absence, the subject matters for bargaining that are expressly articulated under article 7 of the Crown Employees' Collective Bargaining Act, are all matters that are of acute interest to these government employed physicians and, although there may have to be a realization by the parties of the existence of regulatory legislation and indeed a realization that this unit is part of a much larger group of public servants (especially in respect of the negotiation of insured benefits), there is no statutory impediment to these matters being negotiated. Indeed, there are innumerable examples of relatively small bargaining units in both the private and public sectors, that negotiate within the confines of a large organization where economies of scale dictate that insured benefits and pension plans span various bargaining units and where the bargaining positions adopted by one or other of the parties reflect the pattern set by a larger bargaining unit within the same organization. In addition, the exclusive functions reserved to the employer under section 18(1) of the Crown Employees' Collective Bargaining Act appear to us to be sufficientl broad to allow the government to exercise its responsibilities in the areas of patient and institutional care levels. Having regard to the foregoing it is our recommendation that these government employed physicians be given the same scope for collective bargaining as government employees under the Crown Employees' Collective

Bargaining Act.

24. Having regard to all of the foregoing our recommendations, which are broadly framed in order to allow some flexibility with respect to the specifics, are as follows:

1. that the bargaining unit be defined to include either all government-employed psychiatrists, physicians and dentists employed at its psychiatric hospitals and mental retardation facilities or these employees and in addition all other government-employed physicians, whether within the classified or the unclassified service;

2. that an independent body such as the Ontario Labour Relations Board or the Public Service Labour Relations Tribunal ~~Board~~ be given authority to determine whether the organization seeking to represent those in the bargaining unit satisfy the usual requirements with respect to status to represent and majority support;

3. that the subject matters for bargaining be as stipulated under the Crown Employees' Collective Bargaining Act;

4. that the final method of dispute resolution with respect to the bargainable matters referred to above be a system of binding arbitration which has as its primary features:

   (i) a tripartite board composed of one representative from each side with a neutral chairperson selected by agreement between the two nominees, failing which the neutral chairperson shall be appointed by the Chief Justice of Ontario;

(ii) that the proceedings be conducted under The Arbitrations Act R.S.O. 1980, c. 25;

(iii) that the proceedings be conducted within a stipulated time period;

(iv) that the decision of the majority be the decision of the Board but if there is no majority the decision of the chairperson be the decision of the Board;

(v) that each party assume its own costs and share equally the fees and expenses charged by the chairperson;

(vi) that the terms and conditions of employment continue in effect pending an answer.

I will remain seized in the event either party wishes to seek clarification of this report.

All of which is respectfully submitted.

DATED at Toronto the 27th day of November, 1986.

Chairman

I concur "Chris Paliare"
Association Nominee

TAB B

In the matter of a Concilation Board hearing

Between: The Government of Ontario

And: The Ontario Psychiatric Hospitals and Hospital Schools Medical Staff Association.

Recommendations of Board Member F.C.Burnet

I do not accept that the imposition of the traditional union collective bargaining structure on the small and distinct group of professionals here involved is the most suitable solution to their problems, nor to the promotion of a stable and progressive employee relations environment between the Government and its professional employees. My reasons and alternative recommendations are as follows:

First, the scope of bargaining that would be either legally or practically feasible would be so narrow, relative to traditional trade union practice as to seriously call into question the applicability of that model to this group of professionals. Specifically, as noted by my colleagues, any bargaining structure that might be contemplated could not presently encompass the responsibility of the Government to manage, as defined in the Crown Employees Collective Bargaining Act. This would exclude, among other matters, "(a) employment, appointment, complement, organization, assignment, discipline, dismissal, suspension, work methods and procedures, kinds and location of equipment and classification of positions, and (b) merit system, training and development, appraisal and superannuation, the governing principles of which are subject to review by the employer with the bargaining

agent--"

Moreover, the practical scope of bargaining would be further confined by considerations of equity between various groups of employees within the public service, as well as considerations of cost and administrative efficiency. It is unquestionable that employee relations policies and benefits should be applied to like groups across the public service in a uniform and non-discriminatory fashion, and the responsibility for this falls squarely on the Government as employer. That responsibility cannot be discharged if the physicians and psychiatrists have the power, through binding arbitration to "cut their own deal" in respect of such usually bargainable matters as vacations, health and medical benefits, life insurance, sick leave entitlement, maternity leave, redundancy terms and similar conditions of employment. Nor would any such potential deviations from general practice be confined to this group, since lawyers, accountants, engineers, economists and any other professional group would have an equal and irresistable claim to similar determination of their conditions by outside parties on demand. To permit a multiplicity of practices to develop across the public service through a system of bargaing and binding arbitration would be neither equitable to employees or taxpayers, nor in the long run, conducive to stable and harmonious employee relations. It is an approach with the potential to create more problems in the future than the one it professes to solve in the present.

Nor is it correct, in my view, to assume that the various employ-

 TAB B

ment conditions for the various professional groups would follow a general pattern of uniformity if subject to binding arbitration. The very purpose of the proposal would seem to be to be to depart from the general pattern--otherwise, why have it?

Primarily for these reasons I do not think that the traditional collective bargaining model, capped by binding arbitration is appropriate. That is not to say that tha Association and others like it should be deprived of any voice in these matters. The full range of employment conditions can and should be allowed as proper subjects for discussion and consultation, and employee views and recommendations sought as to the adequacy of current arrangements and the preferred direction of future change--but they should not be permitted to become the occasion for a strike in this essential area, nor should ~~should~~ their ultimate determination be taken out of the hands of the responsible government.

Moreover,in addition to the difficulties and ramifications of broad-based bargaining and arbitration, one can legitimately ask if that is the sole route to the achievment of a reasonable accomodation of the needs of Government and the aspirations of the physicians in the employment relationship. I think it is incumbent on the parties to further examine the shortcomings of the existing process and of all possible alternatives before concluding that the problems of their relationship are so intractable that they must be delegated to a third party for resolution. And the place to start is the issue of compensation.

While the issue of compensation is not the sole matter of concern

to the parties, it is probably the major, and recurring, one. If the parties were able to develop a process for reaching agreement on that basic matter, it is likely--or at least more likely- that they could do likewise on the other issues set forth in this Boards' mandate. It follows that priority attention should be directed to the process of compensation determination, before the lesser, albeit important, issues are tackled.

Isuggest that their are two vital requirements for a viable compensation determination process for this group. The first is the establishment of detailed and comprehensive, mutually acceptable policy objective, and procedures for accomplishing it; and second, an independent audit procedure on request of either party to measure compliance and where there is a shortfall, to provide a further base for the parties to correct it. The following sketches the major components of such a process, which is not intended as a full blueprint but only a conceptual outline for development and refinement by the parties themselves.

1. It should be acceptable to both parties that neither should be expected to subsidize the other in regard to compensation levels. The Government on its part should expect to compensate in step with the competitive private market for the profession if it is to attract and retain competent staff, and it should not undercut that level because of actual or potential impact on relationships with other professional groups. Similarly, theAssociation must accept that it is reasonably entitled to compensation consistent with their professional market--but they should not expect to lead or exceed that market, nor to look to the rates of other government professionals to justify

rates in excess of their market sector. Accordingly, the Government should develop such a statement of compensation for all physicians employed by it, specifically affirming that the general policy will be to establish a total compensation level that will be competitive with the compensation earned by physicians of comparable skill and experience in the private sector; and providing further, the detailed procedures and standards by which this policy will be implemented.

2. Categories or classifications of employees should be defined and described according to specialty, years of required training and experience and other pertinent factors, for all employees, including contract employees.

3. The private sector should be defined to include full-time physicians employed by corporations and hospitals where there are counterpart classifications, as well as independent practising physicians

4. The comparison of compensation should take account of the value of benefits, such as vacations, pensions, insurance(life, health, disability, sick pay continuation)etc., as well as the costs of operation of offices in both sectors, all with a view to arrive at a net total comparative position.

5. Necessary data on earnings in each defined classification should be secured by the Government from O.H.I.P. on a non-identifiable basis, and private operational costs of offices on an estimated or typical sample basis. Likewise, the Association should provide on a non-identifiable basis, by audited statement, tax returns, or affidavit, an accurate statement of earnings derived by its members from private supplemental practice.

6. The system should basically be on a province-wide basis, but allow for regional differences or rural-urban differences where these are significant.

7. The studies of comparative compensation should be made at reasonable intervals, normally annually.

8. The control point of comparison should be the mean or average for each defined classification. Ranges should be built around such mid-points to accomadate newly-hired, experience levels, unusual work load, or hazard exposure etc., subject to the usual standards of administration and control as practised in most sophisticated salary systems.

9. These policies and procedures should be prepared by the Government, with full opportunity to the Association to discuss them and to formulate its views and recommendations prior to adoption and implementation, all with a view to establishing agreement on underlying principles and procedures. The Government should be responsible for administration, with appropriate data input from the Association. Such actuarial or cost accountancy expertise as is required should be paid by the Government and provided from mutually agreeable sources.

10. The Association should be entitled to full disclosure of the Governments' data and rationale, and if not satisfied that the policy and procedures have been properly applied, should be able to refer the matter to a Board of Review. The Board should be comprised of citizens of recognized stature and impartiality and should function as an audit group to assess compliance of any compensation decision with the established policy and

and procedure--but not to amend or depart from them. The Board would report its findings to the parties, with such recommendations as it considered necessary to secure compliance. The recommendations should be made public and would be intended as a base for further negotiations and settlement within the agreed framework. Strikes in this essential occupation should continue to be prohibited.

Given that the recommended format deals with the application of an explicit and quantifiable compensation policy, and is one which, even in the absence of a formal representative body, might well be followed as a matter of good employee relations, I see no compelling reason to impose the requirement of certification or the other appurtenances of trade union legislation on a professional association. The Government has already recognized it, as these proceedings attest, and the question of recognition, having been settled by the parties themselves is not at issue now and would not be under the suggested consultative format. The Government should be prepared to explain, consult and to take due account of employee opinion, even in the unlikely event that the Association had less than fifty percent as paid up members.

Finally, although the resolution of the compensation issue often has a salutary effect on the disposal of other issues, this would not necessarily follow and there remains the issues of work load secretarial assistance, workplace safety, educational leave, and legal representation, as well as a method of addressing work place concerns. While the approach recommended for the compensation issue is not readily transferable to some of these other areas, it does

contain a common requisite, being the development of general policy standards and a mutually agreed factual base on which to apply them and to direct the consultative process constructively. If the parties see fit to implement the compensation recommendations, I suggest that they themselves develop the most appropriate similar processes for other issues. A specific suggestion is that the parties consider the value of engaging in joint fact-finding on their own, and at the beginning of the annual or periodic review and not after discussions have broken down and positions hardened.

Where despite agreement on a framework of policy and procedure, disagreement persists on their implementation, I would recommend referral to an audit Board of Review on the same basis as earlier discussed. And, in the event that agreement is not reached on the framework itself, I would recommend that the differing proposals of the parties and their recommendations be submitted to a Board of Conciliation such as this, to make its public recommendations either as to process or as to the resolution of a specific case on the merits.

Appendix E

TAB B

48
3/8145

MAKING

BARGAINING WORK

IN

BRITISH COLUMBIA'S

PUBLIC SERVICE

Report and Recommendations
of the Commission of Inquiry
into Employer-Employee Relations
in the Public Service of British Columbia

December 1972

D 2413

EMPLOYEE REPRESENTATION

The determination of appropriate bargaining units is central to the collective bargaining process in the public service of British Columbia. Before negotiations can commence, appropriate units for collective bargaining must be defined and procedures for certifying the representative bargaining agents must be implemented.

The size and composition of the bargaining units profoundly affect:

- the likelihood of all groups within the public service being organized for bargaining purposes;
- the range of subjects that can be negotiated meaningfully;
- the probability of jurisdictional disputes arising between competing employee organizations; and
- the chances of disputes occurring during negotiations being resolved peacefully.

Indeed, the manner in which the bargaining unit question is handled can ultimately determine the success or failure of the whole idea of collective bargaining in the public service.

It is therefore not surprising that the definition of appropriate bargaining units within the public service was one of the most difficult questions confronting the members of the Commission. Much time was spent on this issue because the Commission realized, from the outset, that the determination of

appropriate bargaining units is essentially a discretionary exercise. Such discretion, the Commission felt, should only be invoked after a thorough examination of all available information.

Many will no doubt disagree with the manner in which the Commission has dealt with this subject and with our recommendations regarding it. It should therefore be stated that, in developing the recommendations on the bargaining unit question, the Commission applied precisely the same criteria that were applied in dealing with all the issues before us.

In the first place, the Commission's recommendations are designed to ensure that collective bargaining, when introduced into the public service of British Columbia, will work smoothly. Secondly, it is our belief that collective bargaining should be available to as many employees of the provincial government as possible. Thirdly, we consider that the scope of subject matters for collective bargaining should be as broad as possible. But above all, the Commission believed that it had an obligation to consider all parties involved in the bargaining process when making its recommendations. Decisions should not be made, the Commission felt, without due regard to their impact not only on the government as employer and the employees, but also upon the public of the province at large.

Two Basic Approaches

The experience in other government jurisdictions reveals a wide diversity in the comprehensiveness of bargaining units. On the one hand, there is the federal system with nearly

one hundred bargaining units. At the other extreme, we find the Manitoba provincial scene where the Manitoba Government Employees' Association is recognized by statute as the bargaining representative for all provincial government employees. While neither approach would appear suitable for British Columbia, an examination of the situation in other jurisdictions does serve to illustrate that there are fundamentally different approaches to the question of bargaining unit determination.

One of the briefs submitted to the Commission raised the issue in the following terms:

> The determination of an appropriate unit for collective bargaining in the public service will be one of the most difficult questions facing the provincial government in devising this new legislation.
>
> There are essentially two possibilities in this respect: 1) The Public Service Labour Relations Act could allow for only one bargaining unit for all provincial government employees, or 2) it could allow for a multiplicity of bargaining units within the British Columbia civil service.

Those who argue in favour of the multiple bargaining unit approach emphasize the importance of the criteria of "community of interest" in determining appropriate bargaining units. On this basis, it is suggested that groups of employees having a like profession, craft or classification should each be determined as an appropriate unit for collective bargaining purposes. Such groups of employees should not be included in bargaining units with other classifications of employees. One of the arguments in support of this position is that such employees could be in the minority within a larger unit and, thus, their special interests and needs might be subordinated to the wishes of the larger unit's majority. Furthermore, the point is made that particularly for certain professional groups their licens-

ing association has available to it information, experience and resources that would enable better representation of the group involved and thus better results at the bargaining table. Finally, the advocates of multiple bargaining units point to the fact that the only way to ensure strict adherence to the principle of "freedom of choice" is to permit all government employees to pick the bargaining agent of their individual choice.

At the same time, there are many arguments against the multiple bargaining unit approach. There are some 1482 classifications within the provincial government service. Rigid adherence to the "community of interest" concept could theoretically lead to the establishment of a similar number of bargaining units. Obviously, such a situation would make bargaining administratively unwieldy, if not impossible.

It is highly probable that the creation of multiple bargaining units would lead to jurisdictional disputes within the government service. In addition, government employees could easily end up in organizations whose memberships were composed mainly of employees from the private sector. As a minority group, the provincial government employees would be bound by policies determined by a majority who had no connection with, and little understanding of, the special conditions prevailing within the public service.

Serious morale problems would inevitably arise, if employees working side by side within the same department of government, but being members of different bargaining units, found themselves subject to significantly different conditions of employment. As well, the operation of a service-wide promotional policy would be inhibited by the existence of differing sets of basic working conditions.

Under a system of multiple bargaining units, any real hope of maintaining standard service-wide conditions of employment would disappear as the various employee organizations engaged in tactical manoeuvres against each other as part of their bargaining strategy. Similarly, management would be free to whipsaw one employee group against another. The likelihood of costly and damaging disputes is obviously greater under such circumstances. Although it is possible for these problems to be avoided by all the employee organizations agreeing upon a common bargaining strategy, there is little evidence to support the position that such a common front is probable.

The employer's bargaining workload, under a multiple unit system, would be exceedingly heavy. This situation would most likely lead to delays in negotiations which only tend to undermine the effectiveness of the collective bargaining process.

For all these reasons, the Commission found the multiple unit approach to be impractical. The Commission is further convinced that while the fragmentary approach might serve the wishes of several special interest groups in the short run, nevertheless, it will soon prove unworkable and could well jeopardize the whole bargaining process within the public service of British Columbia.

The case in favour of separate bargaining units was pressed most strongly before the Commission by certain professional groups of employees, particularly the engineers, foresters and nurses. Submissions of a similar nature were also received from the doctors, chartered accountants and the physiotherapists and related occupations. In all cases, the groups involved represented employees whose professional association has statutory authority to license persons to practise that profession.

TAB B

During questioning, it became apparent that there was a genuine worry on the part of the members of the groups concerned that their inclusion in a large bargaining unit could lead to a situation whereby their ethical and professional responsibilities would, in their view, be at odds with the requirements of that bargaining unit. These dual loyalties could result in disciplinary action and, in extreme cases, the loss of accreditation might be involved. Such potential conflicts could be avoided provided: (1) the professional groups were not grouped into a bargaining unit with non-professionals; (2) membership in the bargaining agent were not compulsory; and (3) a method of dispute settlement, other than strike, were open to these professional groups.

The Commission was not initially convinced that the need to treat these professional groups separately was sufficiently great to warrant adopting a fragmentary approach to bargaining unit determination. One alternative open to the Commission was to exclude professional groups from the collective bargaining process altogether, as is the case in many private sector jurisdictions. Another option was to emulate other provincial jurisdictions which permit professionals to opt out of collective bargaining. However, neither alternative was acceptable, since the Commission believes that as many employees as possible should have the collective bargaining process available to them.

After much deliberation, we were able to devise a formula that had the two-fold advantage of extending collective bargaining to the professional groups involved while, at the same time, avoiding the conflict of interest about which these groups seemed so concerned.

The Commission recommends that all employees (other than managerial and confidential exclusions) in professional classifications whose association has statutory authority to license persons to practise that profession be placed by statute within a single bargaining unit to be known in the Public Service Labour Relations Act as the "licensed professional bargaining unit".

Considerable support was voiced during the public hearings in favour of determining the widest possible bargaining unit within the public service of British Columbia. This was the position expressed by both the British Columbia Federation of Labour and the Canadian Labour Congress on behalf of the trade union movement in the province. The major employee organization, the British Columbia Government Employees' Union, took a similar approach, and its stand was backed by a variety of professional and non-professional groups within the public service including architects, laboratory scientists, social workers and ships' masters and chief engineers.

The all encompassing approach to bargaining unit determination in the public service has many advantages.

- It recognizes that employees in the provincial public service all work for a "single" employer (the provincial government). The salaries and other benefits of all employees within the provincial public service come from a single central source, namely the Consolidated Revenue Fund.

- It takes account of a historical tendency within the public service to seek to standardize basic working conditions. With a service-wide bargaining unit, the advantages derived from having service-wide conditions of employment could be maintained under a system of collective bargaining. Any alternative approach could only serve to exacerbate the problems associated with inter-group tensions between different staff interests.

- It serves to encourage stability within the collective bargaining process. This is extremely important in the public sector. It is very doubtful that an approach to bargaining unit determination that will invite jurisdictional disputes, inter-union rivalry and whipsawing at the bargaining table can be considered to be in the public interest.
- It recognizes that weaker groups within the public service will tend to be protected within a larger bargaining unit, and the situation whereby groups with considerable bargaining power make gains at the expense of the groups who have less negotiating strength will be avoided.
- It appreciates the likelihood that within a large bargaining unit greater bargaining expertise and more comprehensive backup resources will be available to the negotiators. This, in turn, will tend to avoid lengthy delays in the bargaining process.

In short, an all encompassing bargaining unit would avoid the many disadvantages associated with a proliferation of bargaining units, as outlined earlier in this section.

There is, however, a major weakness to the all encompassing approach to bargaining unit determination. For while it is true that employees working for a single employer will have many problems in common, they will also have many that are quite different. These concerns, insofar as they are common to a group of employees, can be neglected within a broadly based bargaining unit. In order to overcome this weakness, it is imperative that special bargaining procedures be developed to permit the effective handling of specialized group problems. The Commission believes that this can be accomplished and has made

detailed recommendations which are designed to facilitate the implementation of such procedures under the section entitled, "Bargaining Scope and Procedures".

As previously stated, the Commission examined the bargaining unit question very carefully. However, it was obvious that no approach to the question of unit determination could satisfy all who appeared before us. This is so because we were urged to recommend the establishment of bargaining units based upon a variety of conflicting criteria.

The Commission is convinced, as a result of its investigations, that the advantages to be derived from the establishment of the widest possible bargaining unit far outweigh the disadvantages inherent in such an approach. This is especially so since it is possible to devise bargaining procedures which effectively accommodate the "loss of identity" criticism. We are further convinced that it is in the best interests of all parties concerned not to fragment the public service of British Columbia by introducing a multiplicity of bargaining units.

In summary the all encompassing approach means that the employees will be represented by a single effective organization, able to negotiate standard conditions of employment throughout the provincial public service. The employer derives the not inconsiderable administrative advantage of negotiating service-wide conditions of employment with a single authoritative spokesman of the employees. The public is assured of a system of employer-employee relations in the public service of the province that will minimize the likelihood of important government services being disrupted.

The Commission recommends that, except where otherwise specifically excluded by statute, the public service of British Columbia comprise a single unit for collective bargaining purposes.

The Commission also recommends that, in order to facilitate the orderly introduction of collective bargaining into the public service, the bargaining unit recommended above be described in the Public Service Labour Relations Act.

It is further recommended that this bargaining unit be known as the "public service bargaining unit".

Choosing the Bargaining Agent

Once the bargaining unit is defined in the legislation, procedures must be available to permit the employees within the unit to choose a bargaining agent to represent them. In some provincial jurisdictions, the majority employee organization is granted statutory recognition as the exclusive bargaining agent for all the employees covered by the legislation. Despite these precedents, the Commission is completely opposed to such statutory recognition. It is the Commission's view that such recognition denies the employees affected the freedom to choose or to change their bargaining representative in the normally accepted manner of a majority decision without the approval of the legislature.

The Commission recommends that the employees within the bargaining units must be free to select the bargaining agent of their choice.

In order to ensure that this freedom of choice is exercised in an impartial and orderly fashion, certification procedures will need to be included in the Public Service Labour Relations Act.

It is recommended that the following certification provisions be included in the Public Service Labour Relations Act:

Where a union applies to be certified as the bargaining agent for the employees in the "public service bargaining unit" or for the employees in the "licensed professional bargaining unit",

TAB B

(a) if the Public Service Adjudication Board is satisfied that, upon examination of records and other inquiries as it deems necessary, including the holding of such hearings as it deems expedient to determine the merits of any application for certification, more than fifty (50) per cent of the employees in the bargaining unit were members in good standing of the applicant union on the date of filing the application, then the Board shall certify the union;

(b) if the Board is in doubt as to whether or not more than fifty (50) per cent of the employees in the unit were members in good standing of the applicant union on the date of filing the application, the Board may order a vote to be taken to determine the wishes of the majority of the employees in the unit as to the selection of a bargaining agent;

(c) if the Board is satisfied that, at the date of filing the application, thirty-five (35) per cent or more, but not more than fifty (50) per cent, of the employees in the unit were members in good standing of the applicant union, the Board shall order a vote to be taken to determine the wishes of the majority of the employees in the unit as to the selection of a bargaining agent; and

(d) if the Board is satisfied that, at the date of filing the application, less than thirty-five (35) per cent of the employees in the unit were members in good standing of the applicant union, the Board shall dismiss the application and refuse to certify the union.

For certification purposes, the "public service bargaining unit" shall comprise all employees, except those specifically excluded by statute or regulation, in the public service on either the first day of April or the first day of October, whichever immediately precedes the date on which the application is filed.

Even after a bargaining agent has been democratically chosen by the majority of the employees in the bargaining unit, it is necessary to ensure that provisions are made to enable the employees to change the bargaining agent, if they so desire, at some future date.

The Commission recommends that the provisions used to certify a bargaining agent also be used to permit the employees in the bargaining unit to change their bargaining agent, subject to the following conditions:

An application to the Public Service Adjudication Board to change the bargaining agent for the public service bargaining unit or the licensed professional bargaining unit may be made under the following conditions:

(a) where no collective agreement is in force and twelve months have elapsed since the certification of a bargaining agent for the unit; or

(b) where a collective agreement is in force, the application may be made only during the last two months in each year of its term of any renewal or continuation thereof, except with the consent of the Board.

EXCLUSIONS

It is the view of the Commission that when determining exclusions from the collective bargaining process the criterion to be used is that of a genuine "conflict of interest" arising from membership in the bargaining unit being incompatible with the nature of the dutes being performed. At the same time, the Commission believes that since to be excluded is to be denied access to the collective bargaining process, the number of exclusions should be kept to a minimum. Thus, it is the position of the Commission that when determining exclusions in the public service great care must be taken to ensure that only those persons having a definite responsibility for management of employees, as well as those persons engaged in a truly confidential capacity, are excluded.

The Commission does not favour the approach of certain other public jurisdictions where legislation specifies the exclusion of persons involved in managerial and/or confidential responsibilites in considerable detail. It is the Commission's view that such an approach would do nothing but encourage management to strive for the maximum number of exclusions.

The Commission considers that the Public Service Labour Relations Act should refer to those to be excluded from collective bargaining in broad terms, and that the employer's bargaining agent and the employees' representative should get together as soon as possible after certification of the latter for the purpose of reaching

TAB B

agreement as to the actual positions to be excluded. In cases where the two parties cannot reach agreement within a period of ninety days, the area of disagreement should be placed before the Public Service Adjudication Board for a ruling. The same procedure would apply at the end of a contract period should either side proposed any change to the list of exclusions.

The Commission recommends that:

(a) the Public Service Labour Relations Act provide that those persons performing managerial or confidential roles are not considered employees for the purposes of the Act:

(b) the designation of positions as managerial or confidential be left to the two parties; and

(c) if the two sides cannot agree within a period of ninety days after the matter has been raised at the bargaining table, the area of disagreement be placed before the Public Service Adjudication Board for a ruling. (See section entitled "An Independent Staff Relations Board" for recommendation concerning purpose and duties of Public Service Adjudication Board.)

Appendix F

TAB B

JOURNAL OF DEBATES
(HANSARD)
LEGISLATIVE ASSEMBLY
PROVINCE OF NEW BRUNSWICK

JOURNAL DES DÉBATS
(HANSARD)
ASSEMBLÉE LÉGISLATIVE
PROVINCE DU NOUVEAU-BRUNSWICK

Third Session **56th Assembly**

Troisième session **56e législature**

Hon. Roy Boudreau
Speaker

Présidence de
l'hon. Roy Boudreau

Daily Sitting 48
Friday, May 22, 2009

Jour de séance 48
le vendredi 22 mai 2009

FREDERICTON **NEW BRUNSWICK**

FREDERICTON **(NOUVEAU-BRUNSWICK)**

Il a été avancé que le transfert des programmes visés permettra de mieux adapter les programmes d'aide financière pour l'agriculture, l'aquaculture et les pêches aux besoins des personnes qui participent au développement des secteurs en question. Les modifications proposées refléteront le transfert du pouvoir en supprimant toute mention d'Entreprises Nouveau-Brunswick dans les lois et règlements modifiés. En outre, les modifications uniformiseront le nombre de membres de la commission et du conseil, ainsi que les conditions de nomination.

(**Hon. Mr. Burke** moved that Bills 78, *An Act to Amend the Credit Unions Act,* and 79, *An Act to Amend the Securities Act,* be now read a first time.)

Continuing, **Hon. Mr. Burke** gave the following explanations:

Bill 78: This bill amends the *Credit Unions Act* to establish the New Brunswick Credit Union Deposit Insurance Corporation as an agent of the Crown, retroactive to October 31, 2008. It also makes a consequential amendment to the *Proceedings Against the Crown Act* to add the New Brunswick Credit Union Deposit Insurance Corporation to the definition of "Crown corporation" in section 1 of that Act, retroactive to October 31, 2008.

021 11:25

Bill 79: This bill amends the *Securities Act* to give government, whomever that may be at that point, flexibility in appointing or reappointing the Chair of the New Brunswick Securities Commission.

(**Hon. Mr. Brewer** moved that Bill 80, *An Act to Amend the Public Service Labour Relations Act,* be now read a first time.)

Continuing, **Hon. Mr. Brewer** said: The *Public Service Labour Relations Act* governs labour relations and collective bargaining for New Brunswick's public service. The Act defines which employees can belong to a union and bargain collectively. At this time, legal officers under the jurisdiction of the Attorney General are prohibited from doing so. Today, we are proposing an amendment that will allow these Crown lawyers to be represented by a bargaining agent, to seek certification as a bargaining unit, and to negotiate collective agreements with their employer.

The Supreme Court of Canada has ruled in other jurisdictions that the right to join a union is protected under the *Canadian Charter of Rights and Freedoms.* With this amendment, we are demonstrating the commitment of the province of New Brunswick to respect the Supreme Court's ruling.

(**Hon. Mr. Keir** moved that Bill 81, *Condominium Property Act,* be now read a first time.)

Continuing, **Hon. Mr. Keir** said: The government will repeal the existing *Condominium Property Act* and replace it with a modernized consumer protection framework governing the approval, purchase, and sale processes for condominiums in New Brunswick. Over the past 15 years, condominiums have become an increasingly popular housing choice in New Brunswick, with nearly

TAB B

JOURNAL OF DEBATES
(HANSARD)
LEGISLATIVE ASSEMBLY
PROVINCE OF NEW BRUNSWICK

JOURNAL DES DÉBATS
(HANSARD)
ASSEMBLÉE LÉGISLATIVE
PROVINCE DU NOUVEAU-BRUNSWICK

Third Session **56th Assembly**

Troisième session **56e législature**

Hon. Roy Boudreau
Speaker

Présidence de
l'hon. Roy Boudreau

Daily Sitting 61
Tuesday, June 16, 2009

Jour de séance 61
le mardi 16 juin 2009

FREDERICTON **NEW BRUNSWICK**

FREDERICTON **(NOUVEAU-BRUNSWICK)**

034-039 14:00

Debate on Second Reading of Bill 80

Hon. Mr. Brewer, after the Deputy Speaker called for second reading of Bill 80, *An Act to Amend the Public Service Labour Relations Act*: I would like to speak on a bill entitled *An Act to Amend the Public Service Labour Relations Act*. This Act governs labour relations and collective bargaining for New Brunswick's public service, and the Act defines which employees can belong to a union and bargain collectively and which employees are prohibited from doing so.

At this time, legal officers under the jurisdiction of the Attorney General are specifically excluded from bargaining under the legislation. The amendment we are proposing will allow these legal officers to be represented by a bargaining agent, seek certification as a bargaining unit, and negotiate a collective agreement.

In essence, the amendment will allow Crown lawyers to be treated like all other unionized employees. The Supreme Court of Canada has ruled that similar provisions in other jurisdictions are unconstitutional under the *Charter of Rights and Freedoms.* The court has ruled that the right to join a union and to bargain for the terms and conditions of employment is protected under the freedom of association provisions of the Charter.

As a government, we are proactively making this change to meet the Supreme Court's expectations. Approximately 90 people will be affected by this amendment. They include drafters of legislation, Crown prosecutors, and legal counsel serving with the Office of the Attorney General.

We do not anticipate any change in service to the public as a result of this amendment. The *Public Service Labour Relations Act* provides for essential services in the event of any labour dispute. This would apply to lawyers, as well as to other unionized groups in the public service. We would expect a high level of lawyers to be designated essential, given the importance of the service they provide. The designations will be determined by the Labour and Employment Board.

040 14:05

I have the utmost respect for the men and women who serve as legal officers in the province of New Brunswick, and I believe that the amendment we are proposing recognizes the important work they do and their right to form a union and bargain collectively.

Mr. D. Graham: We will certainly have many questions when it comes to Committee of the Whole. The minister stated that this legislation was forced by the Supreme Court of Canada, so we will have some questions in that area.

We will also be very interested to know about the fact that this affects only 90 people. In what sectors and in what areas are those 90 people? We know that in the Liberal caucus, there are many lawyers at the table, and I am sure that if there is any way that they can protect their own, they will

Persons. I think that it is vital that the government move on this, through this consultation process over the next year, to be able to do that. It should not wait another five, six, or seven years before the *National Building Code* process comes up with a set of standards for universal access.

Some people have asked: What do you mean by accessibility standards? There are many examples of how we can increase our accessibility, but one would be the following. Right now, as you know, we have fire alarms that you can hear. One thing that the disability community would like to have is visual alarms with flashing lights. That is just one example of many that we would like to have in our building code standards.

I would like to say that, overall, this is a good bill, moving in the same direction that the previous government took, to have a universal building code Act. It is very good, too, that the government included all the stakeholders that it did. There were 100 stakeholders, including people from the disability community. My only concern is that, by going with the majority of those stakeholders and the majority on the advisory committee, you will never have the wishes of a minority group heard or passed. If you go with the majority, the disability community will always lose out. We have to do the right thing. We have to include universal accessibility standards for those with accessibility issues and include regulations for energy efficiency. We will look forward to debating this issue later on this afternoon and asking questions in Committee of the Whole.

Second Reading

(**Mr. Deputy Speaker** put the question, and Bill 75, *New Brunswick Building Code Act,* was read a second time and referred to the Committee of the Whole House.)

Mr. Deputy Speaker: Honourable members, is it agreed that Bills 80, 82, 81, 89, and 75 be considered in Committee of the Whole forthwith?

Hon. Members: Agreed.

Committee of the Whole

(**Mr. Deputy Speaker** vacated the chair, the House going into Committee of the Whole.

Mrs. C. Robichaud took the chair at the committee table.)

043 14:20

Bill 80

Mrs. Poirier, after Bill 80, *An Act to Amend the Public Service Labour Relations Act,* had been presented: I do not have a lot of questions, but I do have a few, to try to help us determine the purpose of the bill and to understand a little bit about why this is going on. It looks as though the

government wants to expand the scope of who is considered to be a confidential employee. Basically, my first question would be: Why is this action being taken at this time?

Hon. Mr. Brewer: This group of employees had been considered to be unable to bargain. Due to a Supreme Court ruling, they do have that right, so we are being proactive about putting this amendment in place now.

Mrs. Poirier: Can you tell me when this was brought to the Supreme Court?

Hon. Mr. Brewer: That was in 2007.

Mrs. Poirier: Can you explain what happened prior to that? Why did they feel that they had to go to the Supreme Court? Was something going on at that time?

Hon. Mr. Brewer: In June 2007, a decision came out of the province of British Columbia. That decision went to the Supreme Court.

Mrs. Poirier: You mentioned in your opening remarks, if I remember correctly, that this would affect approximately 90 employees. Can you tell me where these 90 employees are? Are they spread throughout the government?

Hon. Mr. Brewer: They are all within the Office of the Attorney General, and they are what are called Crown lawyers.

Mrs. Poirier: Are there absolutely none in any of the other departments, such as Post-Secondary Education, Education, or Health? Are there none anywhere else in the government?

Hon. Mr. Brewer: They are all lawyers within the Attorney General's Office.

Mrs. Poirier: If I understand this correctly, how will this bill improve the public service?

044 14:25

Hon. Mr. Brewer: This new legislation will affect the Crown prosecutors who deal directly with the public. This gives them the right that they are entitled to, through the Supreme Court decision and the *Canadian Charter of Rights and Freedoms.*

Mrs. Poirier: Can you help me understand? If I look at the Act, it says:

> *"person employed in a managerial or confidential capacity" means any person who*
>
> (a) *is employed in a position confidential to the Lieutenant-Governor, a Minister of the Crown, a judge of The Court of Queen's Bench of New Brunswick, a judge of The Court of Appeal of*

New Brunswick, a judge of the Provincial Court of New Brunswick or the deputy head or the chief executive officer of any portion of the Public Service,

(b) *is employed as a legal officer under the Attorney General,*

(c) *is employed as an industrial relations officer under the Minister of Post-Secondary Education and Training,*

(d) *is employed in a position under the Minister of Post-Secondary Education and Training and*

(I) *who has executive duties and responsibilities in relation to the development and administration*

The list goes on. I am having a hard time understanding why you are telling me that these employees are only "under the Attorney General". This Act, when it explains who these people are, seems to go beyond that.

Hon. Mr. Brewer: This legislation is only removing subsection *(b).*

Mrs. Poirier: The amendment that we received says:

(a) by repealing paragraph (b);

(b) by repealing subparagraph (e)(iv) and substituting the following:

You are telling me that this is not going to affect any of the other employees who are listed here.

Hon. Mr. Brewer: Not at all. You are correct.

Mrs. Poirier: Am I to understand that the 90 employees who are affected by this are already in place?

Hon. Mr. Brewer: You are correct again.

Mrs. Poirier: Do you anticipate that, in the near future, there could be more than 90 employees?

Hon. Mr. Brewer: We definitely do not anticipate that.

Mrs. Poirier: Can you reassure me again that this bill will in no way include people who are not "under the Attorney General"? Specifically, does this give any power, anywhere at all, for government to have a higher number of special assistants or executive assistants in the departments, or any other confidential employees in higher positions within government?

Hon. Mr. Brewer: This is very limited to these 90 employees in the Office of the Attorney General.

Mrs. Poirier: Will there be a difference in the status of these employees, in their travel expenses, or anything like that, which would be added or included because of this?

Hon. Mr. Brewer: These people are nonbargaining employees right now. Through this legislation, a point will come when they will be negotiating, the same as every other employee in the province.

Mrs. Poirier: I know that you mentioned that this came down from a Supreme Court ruling, from a situation that occurred in British Columbia, if I understood that correctly. Has a situation arisen in New Brunswick where we have had demands or requests from these 90 employees? Before this ruling, were there problems? If there were no problems, did it automatically become law because of a ruling of the Supreme Court?

045 14:30

Hon. Mr. Brewer: The discussions with this group have been ongoing for several years, but with this Supreme Court decision, we are going to be proactive and give the employees this right to form a union.

Mrs. Poirier: You told me that the Supreme Court ruling was in 2007. Have the employees already started the process of forming this union or deciding which union they want to join? Have the discussions of that already started? Are they ongoing but not yet formalized because the law was not yet in place?

Hon. Mr. Brewer: The employees are doing the preparatory work right now so that, when this law does get Royal Assent, they will be ready to move forward. They do not have any formal vehicle yet, because the law is not in place. They are doing some preparatory work.

Mrs. Poirier: I am wrapping up here. I just have a few more questions. In the old process, because the employees were not under the bargaining Act, they were just given a raise every so often, like everyone else. Is that right? When this is put in place, will there a time frame? Will they have to wait until a certain year or a certain time of the year in order to start the process by saying: Okay, now we are going into bargaining with our union, and we want to sit down at the table? Do they have to wait until the end of the fiscal year to do that? When is that going to take place?

Hon. Mr. Brewer: Once the bill receives Royal Assent, the employees will apply to the labour board to formalize a union. We expect that that will be formalized by the end of this calendar year.

Mrs. Poirier: Can you tell me if, once the employees have bargaining rights, there will be any other groups of employees out there that still do not have bargaining rights?

Hon. Mr. Brewer: This group in particular was named in the Act. It could not form a union, and that was where the Supreme Court decision became involved. Do we anticipate other groups at this time? We are not sure about that.

Mrs. Poirier: There are other groups within government and other government employees that are not unionized, right?

Hon. Mr. Brewer: Most definitely, there are. Management is not unionized, and neither are deputy ministers. There are several groups. You are right.

Mrs. Poirier: Why do we feel that this group needs to be unionized and the rest do not?

Hon. Mr. Brewer: These groups were named in the legislation. That is the reason we are removing it. We do not know what the future holds. If we had a crystal ball, it would be nice to know. When the group was named and it went to the Supreme Court of Canada, we felt that it was the right thing to do. This is happening in other provinces, and the federal government has already done it, so we felt that New Brunswick should fall in line. Instead of being the last to do something, sometimes it does not hurt to be in the middle of the pack.

046 14:35

Mrs. Poirier: I understand that, and we are not against the Act. That is not where I am going. I just want to make sure, if we feel that this group is important and that it needs to have that right and that this is a service we should be offering . . . I am just questioning whether there are other groups out there. Why are we treating them differently? Can we anticipate that there will be another amendment coming down in future years? If it is not right for this group, then once we are looking at it, is it perhaps not right for other groups? I am just questioning where this stands, in terms of treating everybody equally.

Hon. Mr. Brewer: Those employees actually have that right now. This group did not have that right, because legislation specifically named it. Those people you refer to, those other employees, would have that right today, if they wanted to formalize it and form a union.

Mrs. Poirier: Does the legislation already allow them to do that if they want to? Is that what you are telling me?

Hon. Mr. Brewer: If they are truly management people, they cannot bargain. That is part of the legislation as well.

Mrs. Poirier: What is the difference between a manager and a person who works in confidence?

Hon. Mr. Brewer: Again, this group was named in the legislation. If other groups, management or whatever, came forward, we would have to go through the process to find out where it would go from there.

Mrs. Poirier: From my understanding, just to wrap this up, you do not see a difference between the two different groups. The only thing that exists is that, basically, there is a group of people in management positions and confidential positions who have been named by the Supreme Court.

Because they have been named by the Supreme Court, we are going to give them this. Because this group of people has not been named by the Supreme Court and they are in management positions, we are not going there yet. Am I understanding right?

Hon. Mr. Brewer: If they came forward, we would definitely have to consider it.

Mrs. Poirier: I keep saying I only have a couple more questions, but your answers keep bringing me back with a few more questions. That is okay; I am getting near the end.

In this group of people, the 90 or so people—I think I got this in your remarks, but I just want to reconfirm it—during the bargaining process, there will also be issues of numbers of essential employees who need to stay. Right now, because they do not have that right, they are probably all, in a way, essential. Do we have an idea of the number of essential employees, out of the 90 that we anticipate will be requesting or looking for this?

047 14:40

Hon. Mr. Brewer: You are right, we would require a high level for them to be mandatory on the job. However, that process . . . The number would be worked out with all parties involved at the labour board before they were formalized.

Mrs. Poirier: Basically, then, under the bargaining rights, it will give them the ability to bargain not only for their wages but also for benefits and other things attached to that, I would imagine.

I want to thank you for the answers, as I wrap up. As I say, we do support the bill. The questions were for more clarification and understanding as to why one group was included and not the other, and to see if this was being expanded beyond what we thought.

Hon. Mr. Brewer: I would like to thank my colleague, the member for Rogersville-Kouchibouguac, for the very good questions. I would also like to thank Doreen from our office. I appreciate her being here with all the information for the technical answers. I have no further comments.

(Bill 80, *An Act to Amend the Public Service Labour Relations Act,* was agreed to as presented.)

Bill 82

Hon. Mr. Haché, after Bill 82, *An Act to Amend the Clean Environment Act,* had been presented: Madam Chairperson, I am ready to entertain questions.

Mr. Northrup: I am wondering, with all the tough questions I have, if we could have permission to take off our jackets.

Hon. Members: Agreed.

Appendix G

TAB B

Form 4.02A

Hfx. No. 493208

Supreme Court of Nova Scotia

Between:

The Attorney General of Nova Scotia
representing Her Majesty the Queen in right of the Province of Nova Scotia ("The Attorney General")

Plaintiff

and

The Nova Scotia Crown Attorneys' Association ("The Association")

Defendant

Notice of Action

To: The Nova Scotia Crown Attorneys' Association
c/o Brian Cox, recognized agent
1505 Barrington Street, STE 1325
Halifax, Nova Scotia
B3J 3K5

And to: Paul J.J. Cavalluzzo
474 Bathurst Street, Suite 300
Toronto, ON M5T 2S6

And to: Perry Borden
President, Nova Scotia Crown Attorneys Association
Maritime Centre
1305 – 1505 Barrington Street
Halifax, NS B3J 3K5

An Action has been started against you
The plaintiff takes action against you.

The plaintiff started the action by filing this notice with the court on the date certified by the prothonotary.

TAB B

The plaintiff claims the relief described in the attached statement of claim. The claim is based on the grounds stated in the statement of claim.

Deadline for defending the action
To defend the action, you or your counsel must file a notice of defence with the court no more than the following number of days after the day this notice of action is delivered to you:

- 15 days if delivery is made in Nova Scotia
- 30 days if delivery is made elsewhere in Canada
- 45 days if delivery is made anywhere else.

Judgment against you if you do not defend
The court may grant an order for the relief claimed without further notice, unless you file the notice of defence before the deadline.

You may demand notice of steps in the action
If you do not have a defence to the claim or you do not choose to defend it you may, if you wish to have further notice, file a demand for notice.

If you file a demand for notice, the plaintiff must notify you before obtaining an order for the relief claimed and, unless the court orders otherwise, you will be entitled to notice of each other step in the action.

Rule 57 - Action for Damages Under $100,000
Civil Procedure Rule 57 limits pretrial and trial procedures in a defended action so it will be more economical. The Rule applies if the plaintiff states the action is within the Rule. Otherwise, the Rule does not apply, except as a possible basis for costs against the plaintiff.
This action is not within Rule 57.

Filing and delivering documents
Any documents you file with the court must be filed at the office of the prothonotary The Law Courts, 1815 Upper Water Street, Halifax, NS B3J 1S7 (telephone # (902) 424-8962).

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact information
The plaintiff designates the following address:

Kevin Kindred/Andrew Taillon
Nova Scotia Department of Justice
1690 Hollis St.
Halifax, NS B3J 3J9

Phone: (902) 722-5162
Fax: (902) 424-1730

Documents delivered to this address are considered received by the plaintiff on delivery. Further contact information is available from the prothonotary.

Proposed place of trial

The plaintiff proposes that, if you defend this action, the trial will be held in Halifax, Nova Scotia.

Signature

Signed the 23rd day of October 2019.

Andrew Taillon, Counsel for the Attorney General

Kevin Kindred, Counsel for the Attorney General

Prothonotary's certificate

I certify that this notice of action, including the attached statement of claim, was filed with the court on the ____ day of October 2019.

Prothonotary

TAB B

Form 4.02B

Statement of Claim

1. The Attorney General of Nova Scotia is the party designated under the *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360, to represent Her Majesty the Queen in litigation in the Province of Nova Scotia.

2. This matter arises from a strike by the Nova Scotia Crown Attorneys' Association (the "Association") and its members, which was publicly announced at or around 3PM on Tuesday, October 22, 2019 and which took effect on October 23, 2019.

3. The strike is a breach of contract, specifically the agreement between the Province and the Association, which prohibits the Association and its members from going on strike. This agreement is known as the "Framework Agreement."

4. Crown Attorneys work for the Plaintiff under the Nova Scotia Public Prosecution Service, which prosecutes charges laid under the *Criminal Code* and offences under Nova Scotia statutes. Approximately one hundred Crown Attorneys across Nova Scotia handle approximately fifty thousand cases per year. Crown Attorneys are barristers appointed pursuant to the *Civil Service Act,* RSNS c.70 and have duties pursuant to the *Public Prosecutions Act*, SNS 1990, c. 21. They report to the Director of Public Prosecutions and, where applicable, a chief Crown Attorney or a regional Crown Attorney.

5. The Association is a society registered under the *Societies Act*. RSNS, c. 435. It serves as a representative body for Crown Attorneys in the province. Crown Attorneys, as members of the legal profession, are excluded from collective bargaining pursuant to the *Trade Union Act*, RSNS, c.475, s.2(2)(b). However, the Plaintiff has agreed to negotiate with the Association as the representative of Crown Attorneys in Nova Scotia.

6. The Framework Agreement sets out the terms and conditions for negotiations between the parties. The Framework Agreement includes the following Articles:

   > 7.NO STRIKE OR LOCKOUT: The Employer shall not lockout and the persons in the employee group shall not strike.
   >
   > 8.NO SANCTION OF STRIKE: The Association shall not sanction, encourage, or support financially or otherwise, a strike by its members or any of them who are governed by the provisions of this Framework Agreement.

7. The Employment Agreement contains the actual terms and conditions of employment negotiated pursuant to the Framework Agreement. The Employment Agreement includes the following Articles:

ARTICLE 8 - RIGHTS AND PROHIBITIONS

8.01 No Lockout or Strike

The Employer shall not lockout and an employee shall not strike.

8.02 Sanction of Strike

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

8. The Employment Agreement also includes, at Article 1.01(10), the following definition of the term "strike":

> "Strike" includes a cessation of work, a refusal to work or to 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 or to aid other employees in compelling their Employer to agree to terms or conditions of employment.

9. At a press conference at or around 3PM on Tuesday, October 22, 2019, the Association announced publicly its intention to strike.

10. On October 23, 2019, members of the Association acted in concert to refuse to perform the work of Crown Attorneys.

11. The Plaintiff alleges that the Association and its members are in breach of the contractual obligation not to strike, pursuant to Articles 7 and 8 of the Framework Agreement and Article 8 of the Employment Agreement. As set out about, the definition of strike in the Employment Agreement includes the cessation of work and the refusal to work, done in combination or in concert of with a common understanding.

12. Regardless of the specific obligation not to strike, Crown Attorneys are employees and the Plaintiff alleges they are in breach of the contractual duty of every employee to perform work. Crown Attorneys also have duties under the *Public Prosecutions Act*, s.8, to conduct prosecutions. Finally, the Crown Attorneys, as appointees under provincial legislation, have an overall obligation under the *Public Service Act*, s.83, to "perform such duties as are specified in any statute". The Plaintiff alleges they are in breach of these statutory duties as well.

13. As a result of the breaches of law set out herein, the Plaintiff alleges specific harms have been caused to the public interest in the prosecution of offenses and the administration of justice, the particulars of which will be proven, which are not compensable by any award of damages. In addition, the Plaintiff has suffered specific harm such as the cost of engaging replacement labour.

14. The Plaintiff claims damages for the breach and seeks the following relief:

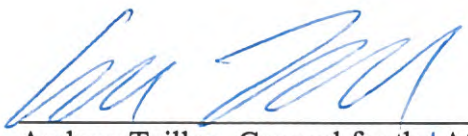
a. A declaration that the strike is a breach of contract and illegal;

b. A permanent injunction against such strike action;

c. Special damages in an amount to be determined; and

d. Costs.

Signature
Signed on the 23rd day of October 2019



Andrew Taillon, Counsel for the Attorney General

Kevin Kindred, Counsel for the Attorney General

TAB B

Appendix H

PUBLIC SECTOR COMPENSATION FRAMEWORK AGREEMENT

between

ASSOCIATION OF LAW OFFICERS OF THE CROWN
"ALOC"

AND

ONTARIO CROWN ATTORNEY'S ASSOCIATION
"OCAA"

AND

THE CROWN IN RIGHT OF ONTARIO
"The Employer"

A) Purpose

The parties engaged in consultations with respect to compensation in the public sector further to the policy statement announced in the 2010 Ontario Budget. Through these consultations, the parties have worked together to develop agreements that help manage spending pressures and protect key public services.

B) Parties to the Agreement

This Public Sector Compensation Framework Agreement has been reached after discussions among representatives of ALOC and OCAA and the Crown in Right of Ontario.

C) Pay Equity

Nothing in this Public Sector Compensation Framework Agreement is to be interpreted or applied so as to reduce any right or an entitlement under the *Pay Equity Act*.

For greater clarity, any pay adjustments in established pay equity plans may continue.

D) Provisions of Agreement

WHEREAS the role and value of ALOC/OCAA members and their contribution to the Ontario Public Service is acknowledged.

WHEREAS the parties recognize the Government of Ontario's Policy Statement to seek agreements of at least two years' duration that do not include net compensation increases.

The parties therefore agree as follows:

1. The Employer and ALOC/OCAA agree to amend the 2009-2013 collective agreement so that there will be no general wage increases for employees in the CC1, CC3, CC4 classifications for the period of July 1, 2011 to June 30, 2013.

2. The Employer and ALOC/OCAA agree to the amendments to the Framework Agreement as attached in Appendix A.

   The Employer and ALOC/OCAA agree that these amendments to the Framework Agreement resolve any and all disputes regarding the constitutionality of the exclusion from the *Crown Employees Collective Bargaining Act, 1993* pursuant to s. 1.1(3) paragraph 5, the content of the Framework Agreement and the conduct of the parties under the Framework Agreement.

E) Dispute Resolution

Where a dispute arises between the parties relating to the interpretation, application, administration or alleged violation of section D of this agreement, the complainant parties must set out the difference or allegation in writing and deliver it to the respondent party. The appropriate Association and Employer representative must meet in an effort to resolve the issue within fourteen (14) days of receipt of the written complaint.

If such a meeting fails to produce a resolution to the issue, by the end of the fourteen (14) day period, either party may refer the matter to a mutually agreed upon adjudicator to be selected from the list of Vice-Chairs sitting at the OLRB. If the Employer and Association are unable to agree upon an adjudicator from this list, one shall be appointed by the Chair of the OLRB. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee and employer affected by it.

The parties agree that for differences relating to the above noted paragraphs, this dispute resolution process modifies the provisions of any process in a collective agreement covered by this Public Sector Compensation Framework Agreement including any question as to whether a difference is to be addressed by this dispute resolution process and, in particular, agree that only adjudicators appointed pursuant to this process have the authority to hear and determine the difference or allegation relating to the above noted paragraphs of this Public Sector Compensation Framework Agreement.

F) Ratification Process

The parties to this Public Sector Compensation Framework Agreement agree to recommend to their respective principals for ratification and once ratified, agree to implement and abide by the terms of this Public Sector Compensation Framework Agreement.

The parties agree that this Public Sector Compensation Framework Agreement is of no force or effect before a board of interest arbitration unless it has been ratified by the parties to the particular agreement.

Dated at Toronto, this 18th day of August 2010.

For ADOC:	For OCAA:	For the Employer:

APPENDIX A TO THE PUBLIC SECTOR COMPENSATION CONSULTATION FRAMEWORK AGREEMENT

FRAMEWORK AGREEMENT

between

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
REPRESENTED BY MANAGEMENT BOARD OF CABINET
(the "Employer")

and

THE ONTARIO CROWN ATTORNEYS' ASSOCIATION (OCAA) and
THE ASSOCIATION OF LAW OFFICERS OF THE CROWN (ALOC)
(when bargaining together referred to as "the Council")

1.0 – RECOGNITION OF ASSOCIATIONS

The agreement applies to all lawyers represented by ALOC and OCAA as set out in this article.

(i) The Government of Ontario as the Employer recognizes a council comprised of OCAA and ALOC as the exclusive bargaining agent representing lawyers employed in their professional capacity to negotiate the terms and conditions of employment pursuant to this Framework Agreement.

(ii) For greater certainty, OCAA represents lawyers employed in their professional capacity in the Criminal Law Division including fee-for-service lawyers who are either employees or dependent contractors as defined by the *Ontario Labour Relations Act*.

(iii) For greater certainty, ALOC represents all other lawyers employed by the Government of Ontario including lawyers employed in Schedule 1 and 4 Agencies, boards or commissions and any fee-for-service lawyers who are either employees or dependent contractors as defined by the *Ontario Labour Relations Act*. Subject to paragraph (iv) below, ALOC also represents all articling students, including in both the criminal and non-criminal law divisions, and the provisions of the April 19, 2007 letter to MGS from ALOC and OCAA will apply.

(iv) Lawyers who exercise managerial functions or who are employed in a confidential capacity in matters relating to labour relations as defined in the *Labour Relations Act* are not represented by either Association and are, therefore, excluded from this Agreement.

(v) Should a dispute arise as to the inclusion/exclusion of any employees, the parties shall follow the procedures set out in Article 11 of this Framework Agreement.

TAB B

Public Sector Compensation Consultation
ALOC OCAA Table - Confidential, Without Prejudice or Precedent
August 18, 2010 2:20pm

1.1 Association Dues Deduction

1.1 The following rules apply in respect to dues payable to the Associations:

(a) The Employer shall deduct from the wages/fees of every classified and unclassified lawyer covered by this Agreement a sum equivalent to the dues or assessments of the Association of which the lawyer is a member or is entitled to be a member.

(b) The deductions referred to in clause 1.1 (a) of this article shall be remitted to the relevant Association forthwith, together with a list of the names and addresses of the lawyers in respect of whom deductions have been made.

(c) Each Association must advise the Employer in writing of the amount of its dues and assessments. The amount so advised shall continue to be deducted until changed by further written notice from the relevant Association. The change shall be implemented within three (3) full pay periods after giving of notice.

(d) Each Association agrees to indemnify and save the Employer harmless from any and all claims or other forms of liability whatsoever that may arise out of, or by reason of, deductions or remittances made to it by the Employer in accordance with this Article.

(e) Association dues or assessments, or the equivalent amount, shall be itemized in the annual T-4 slip as annual membership dues or the equivalent amount for the relevant Association.

1.2 Association Activities

1.2 The following rules apply in respect to Association activities:

The Employer agrees to provide paid leave of absence from full time employment with continuation of all benefits on the request of either Association for up to three members of each Association as may be required to conduct business of the Association. The Association will reimburse the Employer for salary and all benefits including the Employer's share of contributions required by statute and pension contributions, and on such other terms as are agreed. The leaves of absence will be renewed annually. Upon the expiry of any leave of absence, the lawyer will be returned to the lawyer's former position and location if such position and location still exist. If the position does not exist, the lawyer shall be reinstated in accordance with the lay-off/ redeployment provisions in place at the time that the leave expires or in accordance with any other agreement. Notwithstanding the above, the Employer and lawyer may agree on a suitable position to which the lawyer will be returned, subject to the requirements of any agreement related to job security and redeployment or in accordance with any other agreement.

With notice, Association representatives are entitled to take time off with pay if reasonably engaged in meetings with management on issues relating to labour relations or assisting a lawyer in respect to any grievance under Article 6 of the collective agreement or for any reasonable time in preparing for any of these activities, unless the time off would impair operational requirements.

The Employer shall grant time off without pay for Association representatives for the purpose of labour relations education, unless the time off would impair operational requirements.

Upon request of either Association, the Employer shall:

(i) provide the name, office, classification, employment status, salary level, date of commencement and date of appointment for all classified lawyers, and for any unclassified or ALOC fee-for-service lawyers and any contract or retainer expiry date, forthwith to the Association.

(ii) provide notification as soon as is reasonably possible to the relevant Association of any new lawyers including the information as provided in clause 1.2 (i) above, and the names of departing lawyers, or any lawyer going on a transfer or secondment with details of the transfer or secondment.

(iii) provide information as provided in clause 1.2(i) above as well as contractual provisions in respect of any fee-for-service lawyer the Employer asserts is not engaged as dependent contractor; and

(iv) provide to all lawyers, within a reasonable time, copies of or electronic access to this Agreement, and any other documents which the Association may reasonably request and the Employer grant.

2.0 – SCOPE OF BARGAINING

2.1 The parties agree that the following matters are to be negotiated between the Employer and the Council comprised of OCAA and ALOC:

a) Salary and fees, including bonuses, incentives, professional insurance premiums, levies and professional association dues, legal indemnification and opportunities for and quantum of educational allowances;

b) The following wage issues; classification structure, the width of salary bands; progression through the salary grids, frequency and size of merit/pay for performance increases and population controls;

c) Reimbursement for expenses including travel, out of town accommodation and related expenses, meal allowance, and after hours transportation.

d) Benefits, including (i) group and individual sickness, disability; life and other insurance arrangements, either provided through insurance or provided directly by the Employer and (ii) monetary benefits; including vacation, holiday and other similar benefits;

e) Paid and unpaid leaves including educational leave, parental leave, pregnancy leave, child care leave, self-funded leaves, bereavement leave, and other leaves for personal or family reasons; and alternate work arrangements.

f) Job security and related issues, including seniority; layoff/surplusing rules and procedures; notice period, notice pay and severance pay; bumping rights; temporary assignment rights; redeployment rights; recall rights; relocation expenses; training, alternate work arrangements and other measures related to job security;

g) Mobility and transfers of lawyers between the OCAA and ALOC units, to the extent not included in (a) to (f) above;

h) Relationship issues including association/management committees and grievance/arbitration process;

i) Work related activities such as, trial preparation and education and professional development;

j) discrimination and harassment;

k) pensions.

2.2 To the extent not covered in Article 2.1, the following items are not covered by this Framework Agreement and are, therefore, not negotiable: classification level of individual lawyer or groups of lawyers, complement and anything which would have the effect of increasing the complement, and job offer guarantees in any form.

3.0 – NEGOTIATION

3.1 When a party requests in writing to bargain a renewal collective agreement, the party shall make the request within ninety (90) days prior to the expiry of the existing collective agreement, and the parties shall, within twenty (20) days after receipt of the request, bargain in good faith and make every reasonable effort to reach a collective agreement, with respect to all terms and conditions of employment.

3.2 A request to bargain made by the Council pursuant to paragraph 3.1 shall be made to the Secretary of the Management Board of Cabinet, and a request to bargain made by the Employer shall be made to the Presidents of ALOC and OCAA.

3.3 The parties shall, with reasonable dispatch, provide each other with such information and documentation as may be reasonably requested to enable full and rational discussion of the matters in dispute.

4.0 – SCOPE OF NEUTRAL THIRD PARTY ASSISTANCE

4.1 Issues Referable to Article 6 Dispute Resolution Mechanism

4.1.1 The parties agree that only the following issues are within the jurisdiction of the interest arbitration panel, and are subject to the Article 6 Dispute Resolution Mechanism unless the parties agree otherwise:

a) Salary and fees, including professional insurance premiums, levies and professional association dues.

b) Reimbursement: for expenses including travel, out of town accommodation and related expenses, meal allowance, and after hours transportation;

c) Benefits, including (i) group and individual sickness, disability, life and other insurance arrangements, either provided through insurance or provided directly by the Employer and (ii) monetary benefits including vacation, holiday and other similar benefits;

d) Paid and unpaid leaves including parental leave, pregnancy leave, child care leave, self-funded leaves, bereavement leave and other leaves for personal or family reasons, except that the parties agree that no determination under the Article 6 Dispute Resolution Mechanism shall contain a provision which would directly interfere with the Employer's ability to determine staffing levels and work assignments, or with the Employer's discretion to determine when such leaves are granted, provided that the Employer agrees to exercise its discretion fairly and reasonably. Furthermore, in determining collective agreement provisions relating to paid and unpaid leaves, the interest arbitration panel under Article 6 will look initially to paid and unpaid leaves provided to other unionized public servants in Ontario.

4.1.2 The terms of this Framework Agreement shall not be altered by the interest arbitration panel under Article 6. In addition, to the extent that a matter described in 2.1 (a) to ~~(k)~~ (j) is subject to negotiation but not arbitration, no changes will be made to the existing terms and conditions of employment in relation to those matters.

4.2 Issues for Mediation

4.2.1 With the exception of trial preparation, which is not subject to mediation or interest arbitration, all those issues set out in Article 2.1 will be subject to the non-binding mediation process pursuant to Article 5 of this Framework Agreement.

4.2.2 In light of the importance of trial preparation to the employees, the parties agree to a meaningful process to assist in the resolution of general trial preparation issues. The Employer and the Associations recognize that it is in their mutual interest to resolve trial preparation issues in a timely way and they agree to expedite resolution of such issues through the following process:

a) The Associations or the Employer may at any time raise a general trial preparation issue on a systemic, regional or local basis. Complaints over trial preparation which only affect an individual employee will be exempt from this process. It is understood that, for employees represented by ALOC, the term "local basis" means complaints raised on an office-wide or branch-wide basis.

b) Depending upon the Law Division or Divisions in which the trial preparation issue arose, either Association or both Associations will meet with the Employer to discuss the issue.

c) If the parties cannot resolve a general trial preparation issue between themselves, either party may ask George Adams to assist them in attempting to resolve the issue.

The procedure to be adopted before Mr. Adams will be agreed upon with his assistance, except where the procedure is specified herein. All discussions between the parties will be kept confidential by the parties and Mr. Adams.

d) The parties agree to fully co-operate with Mr. Adams. They shall provide to him any available or readily obtainable information, studies, documentation or other related materials which he requests. With the agreement of the parties, Mr. Adams may request the assistance of a person with expert knowledge of trial preparation issues.

e) Mr. Adams may make a recommendation in regard to the resolution of trial preparation issues. However, such recommendation will not be binding on the parties and will be kept confidential by all parties to this process. If the Adams recommendations are not accepted, in the case of OCAA, the ADAG Criminal Law, and in the case of ALOC, the ADAG Legal Services Division will, within 60 calendar days, respond to the President of the relevant association, with reasons for not accepting the Adams recommendations, and the decision and reasons will be kept confidential by all parties to this process.

f) The expenses of Mr. Adams and any person with expert knowledge referenced under paragraph 4.2.2(d) above will be shared equally between the Employer and the applicable Association or the Council, as the case may be.

5.0 – MEDIATION PROCESS

5.1 Where a request to bargain has been made under Article 3.0, and either party believes an impasse has been reached, either party may request mediation. The parties may then agree on a mediator, or the Referee, upon the request of either party, shall appoint a mediator.

5.2 The mediator shall confer with the parties and endeavour to effect an agreement and shall, within fourteen (14) days from his/her appointment, advise the Referee whether the collective agreement has been settled. The mediator shall deal with only those items for which mediation is permitted.

5.3 The period set out in Paragraph 5.2 may be extended by the Referee for a further fourteen (14) day period, upon the advice of the mediator that an agreement may be reached if the period is extended.

5.4 Upon receipt, the Referee shall forthwith by notice in writing inform the parties of the advice from the mediator.

5.5 The fees and expenses of the mediator shall be borne equally by the Employer, on the one hand, and by the local bargaining agents, on the other.

5.6 The discussions and positions taken by the parties during negotiations and mediation shall be without prejudice to any proceedings under Article 6, and shall not be revealed to the interest arbitration panel.

5.7 Nothing herein precludes the parties from extending, by mutual agreement, the period of mediation under this Article, but any such agreement does not affect the right to refer outstanding issues in dispute under Article 6.

6.0 – DISPUTE RESOLUTION MECHANISM

6.1 Where the bargaining differences between the parties subject to dispute resolution under Article 6 have not been resolved by the mediator, either party may, any time after fourteen (14) days have elapsed from the agreement on, or appointment of, the mediator under Paragraph 5.1, refer the outstanding issues in dispute to be resolved in accordance with the Dispute Resolution Mechanism set out below.

6.2 The party wishing to invoke the Dispute Resolution Mechanism must give notice in writing to the other party naming its nominee to the interest arbitration panel and specifying what outstanding issues it wishes to refer. Within ten (10) days of receipt of this notice, the other party shall give notice in writing of its nominee to the interest arbitration panel and its agreement or disagreement that the issues specified by the other party remain outstanding. Within ten (10) days thereafter, the nominees shall agree upon a person to act as chair of the interest arbitration panel. Failing agreement within ten (10) days thereafter, the Referee shall appoint the Chair. Where the members of the interest arbitration panel do not reach a unanimous decision, the decision of the Chair will be the decision of the Panel.

6.3 Interest Arbitration

6.3.1 The general salary adjustments applicable to all lawyers and to all classifications for each of July 1 of 2011 and 2012 will be 0%.

6.3.2 Thereafter, the parties will bargain in four year cycles, the first cycle covering the period July 1, 2013 to June 30, 2017. For each cycle, the second two years of the cycle will be based on the annual change in the Ontario Industrial Aggregate, rounded to the nearest 1/10 of 1%. The formula to determine this adjustment is set out immediately below.

It is the intention of the Employer that these salary adjustments will be implemented reasonably close to July 1 of the year in question.

For the second two years of each cycle, effective on the first day of July in every year:

(1) Determine the most recent Industrial Aggregate for the twelve-month period that most recently precedes the IA published immediately before the first day of July of the year for which the salaries are to be calculated. Unless the parties agree otherwise, this will be deemed to be the twelve-month period ending January 31, as adjusted, if at all, in the report for the next month ending February 28 (or 29th in a leap year).

(2) Determine the Industrial Aggregate for the twelve-month period immediately preceding the period referred to in paragraph 1.

(3) Calculate the percentage that the Industrial Aggregate under paragraph 1 is of the Industrial Aggregate under paragraph 2.

"Industrial Aggregate" for a twelve-month period is the average for the twelve-month period of the weekly wages and salaries of the Industrial Aggregate in Ontario as published by Statistics Canada under the authority of the *Statistics Act* (Canada). Currently, this is found at Table 9 to Employment Earnings and Hours, 2001, Statistics Canada – Catalogue No. 72-002-XIB).

The parties agree that notwithstanding the above formula, the general salary adjustment will not be below 0% or above 7%.

6.3.3 Negotiations and mediation pursuant to Articles 3, 4 and 5 of this Framework shall occur for the first two years of each four year cycle, with the first two year period covering July 1, 2013 to June 30, 2015.

6.3.4 If the negotiations and/or mediation conclude with a ratified collective agreement, the process will not extend beyond 6.3.3 for the duration of that renewal collective agreement.

6.3.5 If negotiations and/or mediation do not result in a ratified agreement for those years, the parties will utilize an interest arbitration panel appointed pursuant to paragraph 6.2 above, which for purposes of this framework agreement will be called an interest arbitration panel.

6.3.6 Both parties would present their positions before the interest arbitration panel, including any evidence and submissions by both parties as to the relative merit of their respective positions. The interest arbitration panel will determine the matters in dispute through a process of conventional arbitration, on the basis of the four categories of arbitrable issues identified in Article 4.1.1 (a), (b), (c) and (d), and provide published reasons to the parties. Subject only to 6.3.7 and 6.3.8 below, the decision of the interest arbitration panel will be final and binding on the parties and on all lawyers in the bargaining units.

6.3.7 For the period of three four year cycles 2013 to 2025, the Government, within thirty (30) days of the completion of the interest arbitration process, may decline to implement the arbitration determination on one or more issues for the first (2013 to 2017) collective agreement. However, the right to decline to implement the arbitration determination will not apply for the collective agreements 2017 to 2021 and 2021 to 2025. With respect to salary, where the Government declines to implement the determination of the interest arbitration panel concerning the first two years of the four year cycle, the across the board salary increases for those two years will also be determined based on the IAI. With respect to other matters within the scope of arbitration, if the Government declines to implement the determination of the interest arbitration process, the existing terms and conditions of employment on those matters will continue in effect for the duration of the collective agreement.

6.3.8 For the period of four year cycles commencing with the 2025 to 2029 through to the 2053 to 2057 collective agreement, Government, within thirty (30) days of the completion of the interest arbitration process, may decline to implement the arbitration determination on one or more issues, in which case the Government will give reasons for its decision within the same thirty (30) day period. With respect to salary, where the Government declines to implement the determination of the interest arbitration panel concerning the

first two years of the four year cycle, the across the board salary increases for those two years will also be determined based on the IAI. With respect to other matters within the scope of arbitration, if the Government declines to implement the determination of the interest arbitration process, the existing terms and conditions of employment on those matters will continue in effect for the duration of the collective agreement.

6.3.9 If in any four year cycle to which 6.3.8 applies, the Government declines to implement the determination of the interest arbitration panel on one or more issues pursuant to 6.3.8 then for the next two four year cycles, the determination of the interest arbitration panel will be final and binding on all issues. In other words, if the Government exercises its right to decline to implement under 6.3.8 above, then it will only have the right to do so in respect of a four year cycle subsequent to the conclusion of the next two four year cycles subsequent to the conclusion of the next two four year cycles. If in such circumstances the Government exercises its right to decline then the same rules as set out in 6.3 apply.

6.4 General Rules Applicable to the Dispute Resolution Mechanism

At any time during the Article 6 Dispute Resolution Mechanism under 6.3, the parties may agree to resolve any or all issues in dispute and those issues shall no longer fall within the jurisdiction of the interest arbitration panel.

The parties agree that the neither the interest arbitration mechanism nor the use of the Ontario Industrial Aggregate with the interest arbitration mechanism prejudice in any way the positions of either party as to the appropriate comparators or benchmarks for salary adjustments, and agree that the use of the Mechanism and the Industrial Aggregate shall not be relied upon or taken into account in determining the appropriate comparators or benchmarks by the interest arbitration panel.

For the purposes of the interest arbitration panel, issues shall be grouped by the categories set out in paragraph 4.1.1 of this Framework Agreement.

While certain economic issues may be set out as separate issues, pursuant to item 3 above, this segregation of issues is not intended to diminish any arguments relating to the concept of total compensation.

6.5 Within twenty-one (21) days of the completion of the interest arbitration process, the parties shall incorporate the terms of the final decision in a collective agreement, failing which those terms, together with any other matters agreed to, shall be deemed to constitute the collective agreement between the parties.

6.6 The interest arbitration panel shall each be the master of its own procedures and shall determine the manner in which the hearing shall be conducted, including imposing any time limits but not altering those set out in this Agreement. The parties acknowledge that the intention is to conduct a hearing process which is fair, cost-effective, informal and expeditious. The interest arbitration panel shall have the powers of an arbitrator under the *Arbitrations Act, 1991* subject to this Agreement and to the provisions of section 6.7, but shall not have the power to abridge or extend any time period under this Article.

6.7 The Parties agree to contract out of the following provisions of the *Arbitrations Act, 1991* and agree these provisions do not apply to proceedings under this Article:

- power to appoint receivers (s.8(1));
- the ability of an arbitrator to appoint an expert at the expense of the parties (s.28);
- the ability to appeal to the courts (s.45);
- the ability to award costs against a party (s.54, 56);
- interim awards, except it is agreed that the interest arbitration panel have the power to make interim procedural rulings (s. 41); and
- the ability to make binding awards, except for procedural rulings, and where this Article provides that the award is binding (s. 37).

6.8 Should the *Arbitrations Act, 1991* be amended the Parties agree that no new or amended provisions shall apply to any proceeding under this Article unless the parties agree or unless any amended or new provisions of the *Arbitrations Act, 1991* cannot by law be subject to an agreement to exclude their application.

6.9 These provisions constitute an arbitration agreement for the purposes of the *Arbitrations Act, 1991*. The parties agree that they are, to the extent provided under this Agreement, bound by decisions made under this Article, and will apply these decisions to the lawyers to whom this Agreement applies.

6.10 The interest arbitration panel shall also be empowered, in their discretion, to direct the Employer, the Council, or either local bargaining agent, to make disclosure of relevant facts or documentation within its possession in respect of the proceedings under this Article.

6.11 If there is disagreement, the interest arbitration panel shall have jurisdiction and power to determine which issues are in dispute, and which issues are subject to the interest arbitration mechanism.

6.12 The fees and expenses of the interest arbitration panel shall be borne equally by the Employer, on the one hand, and by the Associations, on the other.

7.0 – CENTRAL PROVINCIAL JOINT COMMITTEE

7.1 The Central Provincial Joint Committee (CPJC) shall be replaced by the Management and Associations Committee (MAC) established under Article 4 of the collective agreement, which provision is hereby incorporated into this Framework Agreement.

The MAC will delegate its role under Article 11 to a dispute resolution committee established by the parties, which will meet within ten (10) days of receiving notice. In the

event the dispute resolution committee is not established or operating, the MAC will carry out this function.

8.0 – PROFESSIONAL EXCELLENCE COMMITTEE

8.1 The Professional Excellence Committee will be replaced by the Management and Associations Committee established under Article 4 of the collective agreement, which provision is hereby incorporated into this Framework Agreement.

9.0 – REFEREE

9.1 The parties agree that Owen Shime shall continue to act as Referee under this Framework Agreement. If he becomes unable or unwilling to act, the parties agree to request that he select the successor Referee. If he is unable or unwilling to select a successor Referee, and the parties cannot agree upon a successor within ten (10) days from becoming aware thereof, it is agreed that either party may request the Chief Justice of the Ontario Court of Appeal to appoint a Referee. The fees and expenses of the Referee shall be borne equally by the Employer and the Council.

10.0 – DURATION

10.1 This Framework Agreement is effective on the day both parties ratify the agreement and unless terminated pursuant to its terms, continues in effect until June 30, 2057.

10.2 For all purposes either ALOC, or OCAA, or the Employer may terminate this Framework Agreement by giving written notice of termination to the other parties between February 1, 2057 and April 1, 2057 in which case this Agreement will terminate on June 30, 2057. However, should the Government decline to implement the determination of the interest arbitration panel on one or more issues pursuant to 6.3.8 in the final four year cycle of this Framework Agreement (2053 to 2057), the Framework Agreement will automatically renew for a further eight year period, and the results of the interest arbitration process, if any, for the period 2057 to 2061 and 2061 to 2065 will be final and binding on the parties and on all lawyers in the bargaining units. In such circumstances, any party may terminate this Framework Agreement by giving written notice of termination to the other parties between February 1, 2065 and April 1, 2065, in which case this Agreement will terminate on June 30, 2065.

In addition, should the Government decline to implement the determination of the interest arbitration panel on one or more issues pursuant to 6.3.8 in the second last four year cycle of this Framework Agreement (2049 to 2053), the Framework Agreement will automatically renew for a further four year period, and the results of the interest arbitration process, if any, for the period 2057 to 2061 will be final and binding on the parties and on all lawyers in the bargaining units. In such circumstances, any party may terminate this Framework Agreement by giving written notice of termination to the other parties between February 1, 2065 and April 1, 2065, in which case this Agreement will terminate on June 30, 2061.

10.3 Subject to 10.2, in 2057, and for each subsequent four (4) year renewal period, if notice of termination is not given under paragraph 10.2, this Framework Agreement will continue in effect for a further four (4) year period, unless the parties agree to some other period, after which the provisions of paragraph 10.2 shall apply with all necessary modifications.

10.4 The term of any collective agreement, including those terms and conditions of employment awarded under Article 6, shall be effective for successive four (4) year periods, unless the parties agree, or this Framework provides otherwise.

10.5 This Framework Agreement may be amended and/or terminated pursuant to its terms or by the parties. Any rights and obligations that arise under this Framework Agreement prior to its expiry may be enforced through the dispute resolution process set out in Article 11 of this Framework Agreement. This provision does not give rise to any substantive rights beyond the expiry of this Framework Agreement.

10.6 The parties agree that any terms and conditions contained in a collective agreement, including the 2009-2013 Collective Agreement, and any subsequent agreement, which are not within the jurisdiction of the interest arbitration panel, shall continue in full force and effect in any renewal collective agreement under this Framework Agreement, unless the parties mutually agree otherwise. During the term of this Framework Agreement, while the parties are renegotiating a collective agreement, the terms and conditions of the previous collective agreement will continue until a renewal collective agreement is negotiated or selected.

11.0 – ENFORCEMENT CLAUSE

11.1 If a dispute arises from the interpretation, application, administration or alleged violation of this Framework Agreement the matter shall be submitted in writing to and discussed at the dispute resolution sub-committee of the MAC within ten (10) days of receiving notice, such subcommittee to be established forthwith following ratification and to be composed equally of Association and Employer representatives. If no agreement on the dispute is reached at that meeting, or if the required meeting does not take place, the matter can be referred to an arbitration panel to render a final and binding decision. The parties shall each appoint a member to the panel who shall then select a chair. Should the parties be unable to agree to a chair, the referee in Section 9 shall appoint one. Only the Associations and the Employer can raise an issue for discussion and resolution to the MAC and to an arbitration panel pursuant to this clause.

11.2 The arbitration panel shall be the master of its own procedures and shall determine the manner in which the arbitration shall be conducted. The parties acknowledge that the intention is to conduct an arbitration which is cost-effective, informal and expeditious. The arbitration panel shall have all the powers of an arbitrator under the *Arbitrations Act, 1991* subject to the provisions of section 11.3, but shall not have the power to abridge or extend any time period under this Article.

11.3 The Parties agree to contract out of the following provisions of the *Arbitrations Act, 1991* and agree these provisions do not apply to an arbitration under this article:

- power to appoint receivers (s.8.1);
- power of Court to appoint an arbitrator (s.10);
- the ability of an arbitrator to appoint an expert at the expense of the parties (s.28);
- the ability to appeal to the courts (s.45); and
- the ability to award costs against a party (s.54, 56).

11.4 Subject to the agreement of the parties, the arbitration panel may act as a mediator as well as an arbitrator.

11.5 Should the *Arbitrations Act, 1991* be amended the Parties agree that no new or amended provisions shall apply to an arbitration under this article unless the parties agree or unless any amended or new provisions of the *Arbitration Act, 1991* cannot by law be subject to an agreement to exclude their application.

11.6 These provisions constitute an arbitration agreement for the purposes of the *Arbitrations Act, 1991.* The parties agree that they are bound by the decisions of the arbitration panel and will apply these decisions to the lawyers to whom this Agreement applies.

11.7 The arbitration panel shall also be empowered, in its discretion, to direct the Employer, the Council, or either local bargaining agent, to make disclosure of relevant facts or documentation within its possession in respect of the proceedings under this article.

11.8 If there is disagreement, the arbitration panel shall have the jurisdiction and power, to determine which issues are in dispute, and which issues are subject to final and binding dispute resolution.

11.9 The fees and expenses of the arbitrator shall be borne equally by the Employer, on the one hand, and by the Associations, on the other.

11.10 The arbitration panel shall provide a decision in respect of a dispute within fifteen (15) days of the completion of the submissions or hearing before it.

TAB B

Appendix I

TAB B

2013-2017 COLLECTIVE AGREEMENT

between

THE CROWN IN RIGHT OF ONTARIO
represented by
MANAGEMENT BOARD OF CABINET

and

THE ONTARIO CROWN ATTORNEYS' ASSOCIATION (OCAA)

and

THE ASSOCIATION OF LAW OFFICERS OF THE CROWN (ALOC)

July 1, 2013 - June 30, 2017

TAB B

TABLE OF CONTENTS

TAB B

TAB B

SECTION I — GENERAL TERMS AND CONDITIONS OF EMPLOYMENT

ARTICLE 1 – RECOGNITION OF ASSOCIATIONS[1]

1.1 This Agreement applies to all lawyers represented by the Association of Law Officers of the Crown (hereinafter referred to as "ALOC") and the Ontario Crown Attorneys' Association (hereinafter referred to as "OCAA") pursuant to the 2002- 2057 Framework Agreement.

1.2 The Government of Ontario as the Employer recognizes a council comprised of OCAA and ALOC as the exclusive bargaining agent representing lawyers employed in their professional capacity to negotiate the terms and conditions of employment pursuant to the 2002-2057 Framework Agreement, which Framework Agreement remains in full force and effect in accordance with its terms, including provision for enforcement of the Framework Agreement.

1.3 For greater certainty, OCAA represents lawyers employed in their professional capacity in the Criminal Law Division including fee-for-service lawyers who are either employees or dependent contractors as defined by the *Labour Relations Act*.

1.4 For greater certainty, ALOC represents all other lawyers employed by the Government of Ontario including lawyers employed in Commission Public Bodies prescribed under the *Public Service of Ontario Act, 2006* and any fee-for-service lawyers who are either employees or dependent contractors as defined by the *Labour Relations Act*. ALOC also represents all articling students, including in both the criminal and non-criminal law divisions.

1.5 Lawyers who exercise managerial functions or who are employed in a confidential capacity in matters relating to labour relations as defined in the *Labour Relations Act* are not represented by either Association and are, therefore, excluded from this agreement.

1.6 Should a dispute arise as to the inclusion/exclusion of any employees, the parties shall follow the procedures set out under Article 11 of the Framework Agreement.

ARTICLE 1A – NO DISCRIMINATION

1A.1 It is understood that the parties are committed to principles which will foster and encourage diversity in the workplace.

1A.2 There shall be no discrimination or harassment practiced by reason of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, same sex partnership status, or disability, as defined in section 10(1) of the *Ontario Human Rights Code (OHRC)*.

1A.3 The Employer has a general duty to take every precaution reasonable in the circumstances to protect an employee from personal harassment. Personal harassment is engaging in a course of vexatious comment or conduct against an employee in the workplace that is known or ought reasonably to be known to be unwelcome.

ARTICLE 2 – ASSOCIATION DUES DEDUCTION & HOME POSITION

2.1 The following rules apply in respect to dues payable to the Associations:

[1] Articles 1, 2, 3 and 4 of this Collective Agreement are taken from the 2002-2057 Framework Agreement.

(a) The Employer shall deduct from the wages/fees of every regular and fixed term lawyer covered by this agreement a sum equivalent to the dues or assessments of the Association of which the lawyer is a member or is entitled to be a member.

(b) The deductions referred to in clause 2.1(a) of this Article shall be remitted to the relevant Association forthwith, together with a list of the names and addresses of the lawyers in respect of whom deductions have been made.

(c) Each Association must advise the Employer in writing of the amount of its dues and assessments. The amount so advised shall continue to be deducted until changed by further written notice from the relevant Association. The change shall be implemented within three (3) full pay periods after giving of notice.

(d) Each Association agrees to indemnify and save the Employer harmless from any and all claims or other forms of liability whatsoever that may arise out of, or by reason of, deductions or remittances made to it by the Employer in accordance with this Article.

(e) Association dues or assessments, or the equivalent amount, shall be itemized in the annual T-4 slip as annual membership dues or the equivalent amount for the relevant Association.

2.2 Lawyers from outside the ALOC and OCAA bargaining units temporarily assigned to an ALOC or OCAA position for a period of more than thirty (30) calendar days will on the 31st calendar day commence paying dues and be governed by the terms of the ALOC/OCAA collective agreement except that pensions and insured benefits as well as job security entitlements will continue to be governed by the rules applicable to the lawyer's home position.

2.2.1 When an ALOC or OCAA bargaining unit member is temporarily assigned to a position in another non-lawyer bargaining unit for a period of more than thirty (30) calendar days, he or she will on the 31st calendar day commence paying dues and be governed by the terms of the collective agreement of the position to which he or she has been assigned except that pensions, insured benefits, and job security entitlements, will continue to be governed by the rules applicable to the lawyer's home position.

2.2.2 When an ALOC or OCAA bargaining unit member is temporarily assigned to a non-bargaining unit position, including a management/excluded position, he or she shall continue to pay dues to ALOC or OCAA. He or she will also be governed by the other terms of the ALOC or OCAA collective agreement for the first 30 calendar days, but on the 31st calendar day, he or she will be governed by the non-bargaining unit or management/excluded position, with the exception of the home position pension, insured benefits, job security and competition entitlements, which will continue to govern. In addition, where the Employer's actions adversely affect the temporarily assigned lawyer's employment status or substantive rights in relation to her or his home position, that lawyer will continue to have the right to proceed to grievance and arbitration under the ALOC/OCAA collective agreement in relation to that matter.

2.2.3 When an ALOC bargaining unit member is temporarily assigned to an OCAA position or an OCAA bargaining unit member is temporarily assigned to an ALOC position, all entitlements as well as Association dues, will continue to be governed by the rules applicable to the lawyer's home position. The lawyer's dues will be directed to the Association representing his or her home position.

ARTICLE 3 – ASSOCIATION ACTIVITIES

3.1 The following rules apply in respect to Association activities:

(a) The Employer agrees to provide paid leave of absence from full time employment with continuation of all benefits on the request of either Association for up to three members of each Association as may be required to conduct business of the Association. The Association will reimburse the Employer for salary and all benefits including the Employer's share of contributions required by statute and pension contributions, and on such other terms as are agreed. The leaves of absence will be renewed annually. Upon the expiry of any leave of absence, the lawyer will be returned to the lawyer's former position and location if such position and location still exist. If the position does not exist, the lawyer shall be reinstated in accordance with the lay-off/ redeployment provisions in place at the time that the leave expires or in accordance with any other agreement. Notwithstanding the above, the Employer and lawyer may agree on a suitable position to which the lawyer will be returned, subject to the requirements of any agreement related to job security and redeployment or in accordance with any other agreement.

(b) With notice, Association representatives are entitled to take time off with pay if reasonably engaged in meetings with management on issues relating to labour relations or assisting a lawyer in respect to any grievance under Article 6 of the Collective Agreement or for any reasonable time in preparing for any of these activities, unless the time off would impair operational requirements.

(c) The Employer shall grant time off without pay for Association representatives for the purpose of labour relations education, unless the time off would impair operational requirements.

3.2 Upon request of either Association, the Employer shall:

(a) provide the name, office, classification, employment status, salary level, date of commencement and date of appointment for all regular lawyers, and for any fixed term or ALOC fee-for-service lawyers and any contract or retainer expiry date, forthwith to the Association.

(b) provide notification as soon as is reasonably possible to the relevant Association of any new lawyers including the information as provided in clause 3.2 (a) above, and the names of departing lawyers, or any lawyer going on a transfer or secondment with details of the transfer or secondment.

(c) provide information as provided in clause 3.2 (a) above as well as contractual provisions in respect of any fee-for-service lawyer the Employer asserts is not engaged as a dependent contractor; and

(d) provide to all lawyers, within a reasonable time, copies of or electronic access to this agreement, and any other documents which the Association may reasonably request and the Employer grant.

ARTICLE 4 – MANAGEMENT AND ASSOCIATIONS COMMITTEE

4.1 Committee Mandate

The Committee shall have representation from all parties for the purpose of discussing employment-related matters of mutual concern and to promote, support and recognize excellence and professionalism in the delivery of legal services in the Ontario Public Service. The Committee shall:

(a) discuss employment matters of mutual concern, other than those matters which are the subject of collective bargaining between the parties;

(b) be consulted on objective criteria/standards and fair procedures by which employee performance is assessed and evaluated pursuant to the provisions of the Collective Agreement;

(c) review policies and practices relating to the operation of other provisions of the Collective Agreement to determine whether the provisions are consistently achieving the goals and objectives of the parties;

(d) discuss strategic initiatives to promote effective leadership and management; and

(e) carry out such other tasks and functions as provided by the Collective Agreement and such other tasks and functions as agreed by the Committee members.

The Committee shall conduct its meeting and carry out its work in an open and transparent manner having due regard to confidentiality requirements. The Committee shall encourage timely, open dialogue to promote constructive and harmonious relations.

The parties recognize that matters brought to the Committee that are primarily local, regional or divisional in nature should be initially discussed or dealt with at the local, regional and/or divisional levels.

Nothing in this Article affects the negotiation, mediation and Dispute Resolution Mechanism under Articles 3, 5 and 6 of the 2002-2057 Framework Agreement.

4.2 Committee Chair and Location

The Employer and the Associations will alternate the role of Chair for each meeting. The location of meetings will alternate between a location chosen by the Employer and one chosen by the Associations. The Chairperson of the meeting will determine its location.

4.3 Committee Composition

The Committee shall be composed of the following members:

- Assistant Deputy Attorney General, Criminal Law Division, or his/her representative and such representative will have the required authority to make decisions on behalf of the Division;
- Assistant Deputy Attorney General, Civil Law Division, or his/her representative and such representative will have the required authority to make decisions on behalf of the Division;
- Two representatives of the Ministry Human Resources Branch including the Committee Co-ordinator;
- Representative of the Centre for Public Sector Labour Relations and Compensation, Treasury Board Secretariat
- The President of the Ontario Crown Attorneys' Association, and one other OCAA representative; and
- The President of the Association of Law Officers of the Crown, and one other ALOC representative.

In addition to the designated members, the Employer, ALOC and OCAA may appoint up to two more persons as members of the Committee.

4.4 Decision-Making Authority

Where a representative attends a meeting on behalf of the specified Assistant Deputy Attorney General, it is understood that their decision-making authority on behalf of their division will be limited to those items already placed on the meeting's agenda.

4.5 Frequency of Meetings, Agenda, Materials and Minutes

The Committee will meet a minimum of once every two months unless otherwise agreed to by the parties with standing dates to be agreed by Committee members on an annual basis. Additional meetings may be scheduled if required, and mutually agreed to.

The agenda will include a review of all outstanding items from the previous agenda. Committee members must forward their suggested agenda items to the Committee's Coordinator at least ten (10) working days prior to the meeting. An agenda is to be finalized and circulated by the Committee's Coordinator at least five (5) working days in advance of the meeting. Matters for discussion at the Committee will be limited to items on the agenda unless, prior to the commencement of the meeting, the parties specifically agree that additional matters may be discussed.

Any materials for review or discussion at meetings will be provided to the Committee's Coordinator for distribution at least one week in advance of the meeting. Materials not distributed a week in advance may still be distributed before or at the meeting, and a notation will be made in the minutes.

Minutes of Committee meetings will reflect action required, responsibilities and timelines. It is the responsibility of each Committee member to ensure completion of their assigned tasks in accordance with the specified timelines. Meeting minutes will be prepared and distributed to Committee members by the Committee's Coordinator no later than ten (10) working days following the meeting. Meeting minutes will be reviewed, amended as agreed, and adopted at the start of the next following Committee meeting.

4.6 Additional Procedural Matters

The Committee shall establish its own procedures, sub-committees and other bodies or include individuals that may be required to assist the Committee to carry out its functions. These functions may include conducting research, gathering information, reviewing other practices and making presentations to the Committee. The Committee may agree to retain the services of a facilitator. In addition, by agreement between the parties at least five (5) working days prior to the meeting, the Committee shall be entitled to have additional resource personnel attend for specific agenda items.

However, the Committee shall have no power to alter, amend, add to or modify the terms of the Collective Agreement and the Framework Agreement.

ARTICLE 5 – DISCIPLINE AND DISCHARGE

5.1 No lawyer shall be disciplined or discharged except for just and sufficient cause, except as provided in 5.5, and without his or her receiving beforehand a written notice showing the grounds on which the discipline or discharge is imposed. It is agreed that the Employer will apply a progressive discipline system.

5.2 Any disciplinary notation placed in a lawyer's file will be removed and no longer relied upon for any reason three (3) years after it has been placed in the file if no other related disciplinary notation has been placed in the file in the intervening period.

5.3 Upon written request, each lawyer shall have access to his or her employee file(s). The file will be produced within ten (10) business days after receipt of the request, unless in exceptional circumstances, with notice to the employee, additional time is required. The file shall be reviewed, in

the presence of a management representative, at a time mutually agreed upon between the employee and the management representative at the Human Resources Branch of the Ministry of the Attorney General. Where attending at the Human Resources Branch is not possible for the employee, reasonable alternative arrangements will be made**.**

5.4.1 Where a lawyer has been notified that he or she is required to attend a disciplinary interview, the lawyer may, at his or her option, be represented by a representative of his or her respective Association. The lawyer shall be responsible for arranging such representative for the appointed interview. For greater clarity, a lawyer may not bring a representative to the interview other than the one person provided by his or her respective Association. The Association representative may also be accompanied by Association legal counsel. Where the lawyer has elected to be represented, the Employer will provide the Association with reasonable advance notice of the meeting.

5.4.2 If the Employer permits a lawyer to be represented by his or her Association at a meeting other than a disciplinary interview, the Employer will provide reasonable advance notice of the meeting to the Association. For greater clarity, if the Association attends, a lawyer may not bring a representative to the interview other than the one person provided by his or her respective Association. The Association representative may also be accompanied by Association legal counsel.

5.4.3 In addition to representation rights with respect to discipline, where a lawyer has been notified that he or she is required to attend a meeting with a supervisor or other Employer representative with respect to termination of employment for any reason other than layoff or the non-renewal of fixed term contracts he or she may, at his or her option, be represented by a representative of his or her respective Association. The lawyer shall be responsible for arranging such representative for the appointed interview.

5.5.1 The parties agree that, in the circumstances described in a) and b) below, the just cause provision in 5.1 will only apply to culpable misconduct:

(a) for the first eighteen (18) months from the date of appointment to the regular service in the case of a lawyer with less than eighteen (18) months prior fixed term service, and

(b) for the first twelve (12) from the date of appointment to the regular service in the case of a lawyer with eighteen (18) months or more of prior fixed term service.

For greater certainty, a lawyer described above will only have access to arbitration to challenge his or her dismissal for culpable misconduct.

5.5.2 Nothing precludes the Employer from agreeing with a lawyer to reduce the eighteen (18) month time period described in 5.5.1(a) or the twelve (12) month time period described in 5.5.1(b).

5.5.3 Where the Employer dismisses a lawyer during the period described in 5.5.1 or 5.5.2, for reasons other than culpable misconduct, the lawyer is entitled to:

(a) two (2) weeks salary where the lawyer's seniority, as defined in Section III (Job Security), Article 35 of this Collective Agreement**,** is less than one (1) year;

(b) otherwise, one (1) month of salary for each completed year of seniority.

5.5.4 This provision (5.5) is intended to modify the application of s. 37(2) of *Public Service of Ontario Act, 2006*.

5.5.5 For clarity, Section III (Job Security) of this Collective Agreement, including any right to bumping, redeployment or recall, does not apply to a lawyer dismissed under this provision (5.5). However,

nothing in this provision (5.5) overrides the rights and obligations arising, under Section III, where a lawyer is laid off.

5.5.6 This provision (5.5) only applies to regular or fixed term lawyers initially hired on or after July 25, 2002.

ARTICLE 6 – GRIEVANCE AND ARBITRATION PROCESS

6.1 A grievance is defined as a difference between the Employer, one or both of the Associations and/or one or more of the lawyers on whose behalf this Collective Agreement was entered into, concerning the interpretation, application, administration or alleged violation of this Collective Agreement.

6.2 The Employer, the Associations and the lawyers acknowledge that it is in their mutual interest to resolve grievances expeditiously and as early in the grievance process as possible.

6.3 The parties agree to fully disclose at the earliest stages of this process all information on which they rely in support of or in response to a grievance.

6.4 A lawyer, who considers herself or himself aggrieved, will attempt, verbally or in writing, to obtain a satisfactory resolution with the Employer, assisted by his or her Association representative, if he or she so desires. If no satisfactory resolution is reached, the lawyer may lodge a grievance, in writing, through his or her Association.

The following steps and time limits apply to the processing of grievances:

6.5 Formal Resolution Stage

6.5.1 A lawyer's grievance may be referred by the applicable Association to the Strategic Business Unit Director, who will in turn forward the grievance to the designated management representative. The grievance must be lodged within thirty (30) days of the decision giving rise to the grievance. The Associations may not bring a discipline or discharge grievance without consent of the lawyer. For any other grievances, in the event that a lawyer had not indicated his or her consent, the only relief that may be sought by the Association is a declaration that the Collective Agreement was contravened.

6.5.2 The designated management representative shall be from a different office in the case of ALOC or a different region in the case of OCAA. Where the grievance affects more than one office or region, the designated management representative will be the Assistant Deputy Attorney General or their designee. The designated management representative shall hold a meeting with the Association and the lawyer within fifteen (15) days of receipt of the Association's notice that the grievance was being referred to the Formal Resolution Stage of the grievance process. The Employer's final decision shall be rendered within ten (10) days of the meeting.

6.6 **Referral to Arbitration**

6.6.1 If the grievance is not resolved at the Formal Resolution Stage, either party may initiate the single mediator/arbitrator procedure, pursuant to Article 6.7, within fifteen (15) days of receipt of the Employer's final decision, or, if no final decision is issued, within twenty-five (25) days of the delivery of the Association's notice of referral to the Formal Resolution Stage.

6.7 Mediation/Arbitration Procedure

6.7.1 Unless the parties otherwise agree, the grievance will be submitted to a single mediator/arbitrator for determination. The mediator/arbitrator shall be selected consecutively from a roster of persons who have been mutually agreed between the Employer and the Associations.

6.7.2 If the selected mediator/arbitrator is unavailable to resolve the dispute within fifteen (15) days of referral, the next person on the roster shall be contacted until a mediator/arbitrator is found who can deal with the dispute on an expeditious basis.

6.7.3 Subject to Article 6.9.4, where the differences between the parties have not been resolved with the mediator/arbitrator pursuant to Article 6.7.1 and where the procedures in Articles 6.4, 6.5 and 6.6 have been fully exhausted, the mediator/arbitrator will resolve the dispute through final and binding arbitration. Where the differences concern Article 11 [Job Trades], subarticles 34.5, 34.6, 34.8, 34.11, and 34.12 [Lay-offs], Article 35 [Redeployment], and Articles 39 and 40 [fee for service], the differences may be referred to mediation, but not arbitration.

6.8 Separate Mediator/Arbitrator Option

6.8.1 Pursuant to Article 6.7.1, where the parties agree to use a separate mediator and arbitrator, either party may initiate the arbitration procedure in accordance with Article 6.8 no later than fifteen (15) days from the last day of mediation.

6.8.2 Where the parties agree to the use of a separate mediator and arbitrator, the arbitrator shall be appointed in accordance with Article 6.7.1 and Article 6.7.2.

6.8.3 The discussions and positions taken by the parties during mediation under 6.8 shall be without prejudice to any arbitration proceedings under Article 6.9 (Arbitration Procedure).

6.9 Arbitration Procedure

6.9.1 For the purposes of Article 6.9, arbitrator means a single arbitrator where the parties agree to separate mediation/arbitration under Article 6.8 and otherwise the mediator/arbitrator.

6.9.2 The arbitrator shall be the master of his or her own procedures and shall determine the manner in which the grievance shall be resolved with or without an oral hearing.

6.9.3 Except as provided in 6.9.4, the arbitrator shall have jurisdiction to consider any matter properly submitted to him or her under the terms of this collective agreement arising out of the interpretation, application, administration or alleged violation of the collective agreement. The arbitrator shall have the power to interpret and apply the human rights code, except in matters where he or she has no jurisdiction pursuant to Article 6.9.4 of the collective agreement.

6.9.4 An arbitrator appointed under Article 6 shall not have jurisdiction to determine differences over the interpretation, application, administration or alleged violation of the following provisions of the collective agreement:

Article 10 (Filling Vacancies)
Article 11 (Job Trades)
SubArticles 34.5, 34.6, 34.8, 34.11, 34.12
Article 35 [Redeployment]
Article 39 [ALOC fee for service]
Article 40 [OCAA fee for service]

This clause does not affect any rights the Associations or lawyers may have to enforce the above non-arbitrable issues.

The parties agree that issues arising out of the application, interpretation and administration of this Agreement that are not subject to arbitration in accordance with 6.9.4 may be brought to the Management and Associations Committee for discussion to ascertain whether a resolution satisfactory

to the parties and the affected lawyer or lawyers is possible. This does not affect any rights the Associations or lawyers may have to enforce such issues in the courts.

6.9.5 The arbitrator shall have no jurisdiction to alter, modify, amend or make any decision inconsistent with the terms of this collective agreement.

6.9.6 The arbitrator or mediator/arbitrator shall have all the powers of an arbitrator under the *Arbitrations Act, 1991,* subject to the provisions of Article 6.9.8.

6.9.7 The parties agree to contract out of the following provisions of the *Arbitrations Act, 1991* and agree the following provisions do not apply to an arbitration under this section:

- power to appoint receivers (s.8(1));
- power of the Court to appoint an arbitrator (s. 10);
- the requirement to have an oral hearing if a party requests (s. 26(1));
- the ability of an arbitrator to appoint an expert at the expense of the parties (s. 28);
- the ability to appeal to the courts (s. 45); and
- the ability to award costs against a party (s. 54, 56).

6.9.8 Should the *Arbitrations Act, 1991* be amended the parties agree that no new or amended provisions shall apply to an arbitration or mediation/arbitration under Article 6 unless the parties agree or unless any amended or new provisions of the *Arbitrations Act, 1991* cannot by law be subject to an agreement to exclude their application.

6.9.9 The arbitrator shall provide a decision in respect of a grievance within fifteen (15) days of the completion of the submissions or hearing before him or her.

6.9.10 The fees and expenses of the arbitrator or mediator/arbitrator shall be borne equally by the Employer and by the applicable Association.

6.9.11 These provisions constitute an arbitration agreement for the purposes of the *Arbitration Act, 1991*. The parties agree that they are bound by the decisions of the arbitrator and will apply these decisions to the lawyers to which this collective agreement applies.

6.9.12 Time limits set out in this Article may only be extended with the consent of the applicable Association and the Employer.

6.9.13 Notwithstanding the provisions of this Article, the parties may mutually agree to substitute non-precedential expedited arbitration or arbitration by a three-person panel for the arbitration and mediation/arbitration process described herein.

6.10 Group Grievances

6.10.1 Grievances affecting more than one lawyer may be consolidated as a group grievance providing the grievances address the same issues.

6.11 Association Grievances

6.11.1 Grievances of a general or policy nature may be initiated by one of the Associations or both at the Formal Resolution Stage within thirty (30) days of the occurrence or when the Association or Associations became aware of the occurrence.

6.12 Discipline and Dismissal

6.12.1 Within thirty (30) days from the date of discipline or dismissal, a lawyer may grieve such discipline or dismissal, in writing, through his or her Association directly at the Formal Resolution Stage of the grievance process.

6.12.2 Where an arbitrator finds that the dismissal of a lawyer was not for just cause, the arbitrator has the power to:

(a) reinstate the lawyer with or without full compensation for any time lost;

(b) award damages to the lawyer in lieu of reinstatement; or

(c) make whatever order the arbitrator otherwise deems appropriate in the circumstances.

6.13 General

6.13.1 A lawyer who has initiated a grievance under this Article 6 shall be given time off with no loss of pay and no loss of credits to attend meetings with management under this Article. Where a lawyer's grievance has been referred to mediation pursuant to clause 6.6 or Article 6.8 or referred to arbitration pursuant to Article 6.9, he or she will be allowed leave of absence with no loss of pay and no loss of credits to attend the mediation sessions or arbitration hearing.

6.13.2 Clause 6.13.1 shall also apply to the Association representative who is authorized to represent the lawyer.

6.13.3 Where a grievance has not been processed by a lawyer or the Association(s) within the time limits prescribed, it shall be deemed to have been abandoned.

6.13.4 In this Article, days shall mean consecutive calendar days, including Saturdays, Sundays and designated holidays.

6.13.5 Despite clauses 6.9.12 and 6.13.3, an arbitrator may extend the time limits in this Article, but only where the Association(s) demonstrate that there are reasonable grounds for the extension, and that the Employer will not be substantially prejudiced by the extension.

ARTICLE 7 – ALTERNATE WORK ARRANGEMENTS

7.1 The Employer will apply the alternate work arrangements policy for management and excluded employees (dated February 1993 and July 1993) as set out in the Human Resources Manual of the Ministry of the Attorney General.

7.2 In the event the Employer does not consent to a request for an alternate work arrangement, the reason for the denial will be provided, in writing, within thirty (30) days of the lawyer's request for an alternate work arrangement.

ARTICLE 8 – TRAVEL BY ROAD

8.1 The use of privately owned vehicles on the Employer's business is not a condition of employment.

8.2 Where a regular or fixed term lawyer is required to use his or her own vehicle on the Employer's business, he or she shall be reimbursed at the following rates:

Kilometres Driven	Southern Ontario	Northern Ontario
0 - 4,000 km	40.00 cents per km	41.00 cents per km
4,001 - 10,000 km	35.00 cents per km	36.00 cents per km
10,001 - 24,000 km	29.00 cents per km	30.00 cents per km
over 24,000 km	24.00 cents per km	25.00 cents per km

Calculation of kilometres travelled shall be based on the lesser of the distance travelled from home to destination and return or the distance travelled from the lawyer's home office to destination and return.

8.3 Kilometres are accumulated on the basis of a fiscal year (April 1 to March 31, inclusive).

8.4 In accordance with the Employer's Travel, Meals and Hospitality Expenses Directive (as amended from time to time), and without limiting the Employer's discretion under that Directive to reimburse in larger amounts, reimbursement for meals shall be:

Breakfast	$ 8.75
Lunch	$11.25
Dinner	$20.00

8.5 To the extent that the current provisions of Article 8 would be improved by OPS-wide changes to the kilometrage or meal amount reimbursement amounts found in the Employer's Travel, Meals and Hospitality Expenses Directive (as amended from time to time), then the new Government-wide policy as it relates to those provisions will be applied instead of Article 8.

ARTICLE 9 – CONVERSION OF POSITIONS IN THE FIXED TERM SERVICE

9.1 Effective from April 5, 2006, where a fixed term lawyer has been working as a fixed term lawyer full-time in the same office for a period of at least 36 consecutive months, the Employer shall at that point in time establish a position in the regular service in that office. For the purposes of Article 9.1, the defined period of time specified above means the thirty-six consecutive months immediately preceding the establishment of a position in the regular service under Article 9.1.

9.2 For the purposes of Article 9.1, calculation of the thirty-six (36) consecutive months means full-time service in the same office that accrues from the most recent break in service that exceeds thirteen (13) consecutive weeks. For clarity, full-time service during a contract includes a period of time during which an employee is on paid leave, unpaid absences of less than thirteen (13) weeks and pregnancy and parental leave.

9.3 Notwithstanding Article 9.1, where a fixed term lawyer has been working as a fixed term lawyer for a period of 48 consecutive months, the Employer shall assign the lawyer to a position on a permanent basis. At the employer's discretion, the position to which the lawyer will be assigned will either be the position in the office last held (if that position was held for a minimum of six months), or the position in the office in which the lawyer worked the most time, or such other position as the lawyer and the employer agree. If necessary, the Employer shall establish a new position in that office in the regular service.

9.4 For the purposes of Article 9.3, calculation of the forty-eight (48) consecutive months means full-time service that accrues from the most recent break in service that exceeds thirteen (13) consecutive weeks. For clarity, full-time service during a contract includes a period of time during which an employee is on paid leave, unpaid absences of less than thirteen (13) weeks and pregnancy and parental leave.

9.5 Article 10 (Filling Vacancies) does not apply to positions created and filled under Article 9, except for the competition principles set out in Articles 10.2.2 (Competition Principles) and 10.7 (Review of Competitions).

9.6 Where Article 9.1 or Article 9.3 does not apply, and the Employer decides to create a position in the regular service, Article 10 (Filling Vacancies) will apply.

9.7 Where a fixed term lawyer is given a duty assignment to work in a different office, the time spent at that different office shall be included for the purpose of qualifying for conversion rights under this Article.

ARTICLE 10 – FILLING VACANCIES

10.1 Placement Rights: Order of Placement

10.1.1 Notice of Vacancies

The Employer shall give written notice of all vacancies to each Association as soon as possible as those vacancies arise, and make them available to currently employed members and lawyers whose names are on the Redeployment Lists job postings by means of an “intranet” and “internet” system.

Vacancies will be posted for 10 working days prior to the established closing date. The competition process will be held amongst those individuals who have applied for the vacancy on or between the date the vacancy became available and the date the competition closes.

10.1.2 Order of Placement/Eligibility

Where the Employer decides to fill a vacancy, the following order will be followed to fill the vacancy:

(a) Step 1 All ALOC/OCAA lawyers – regular and fixed term, and ALOC/OCAA lawyers on the Redeployment lists, but not individuals in the articling student hireback pool;

(b) Step 2 Articling Student Hireback Pool Members

The vacancy posting at Steps 1 and 2 will have a geographic area of search. Any OPS lawyer residing outside the identified area of search may apply for the position. If they apply, they will be deemed to have waived entitlement to any relocation or travel expenses as a condition to gaining access to the competition process.

(c) Step 3 Open competition, which competition will not be initiated unless there has been no qualified candidate at the earlier steps.

The vacancy posting at Step 3 will not have a geographic area of search.

Any OPS lawyer who applies to a posting at Step 3 shall have waived any entitlement to any relocation or travel expenses and no claim can be made for any expenses incurred during the decision to hire the employee into the position.

10.2 Placement Rights: Competition Process

10.2.1 Sequence

In the competition process, assessment of qualified candidates will be completed on a sequential basis as outlined in Article 10.1. In the course of sequentially following the order outlined in Article 10.1, the Employer must select, in a competition based on merit, an individual to fill the vacancy at the first stage of the sequence at which an individual has the skills, competence and ability to perform the work. The manager may choose not to select any candidate if no candidate demonstrates the skills, competence and ability for the position.

10.2.2 Competition Principles

The competitions for vacancies under each of the sequential steps set out in 10.1.2, will be conducted in accordance with the following principles:

(a) Recruitment activities will be based on a description of the actual duties and responsibilities, and skills, competencies and ability required for the position;

(b) Employee selection will be based on a fair and objective assessment of a candidate's skills, competence and ability;

(c) The assessment of candidates who are selected for an interview will be based on rating methods which reasonably measure the skills, competence and ability required for the position, which are consistently applied within that competition, and which include at least two rating methods other than an interview.

(d) Where requested, an employee will receive feedback with regard to his/her performance in the competition regarding screening and selection.

10.2.3 Previous Competition

Where a competition for a vacancy was held, and within the next twelve (12) months, another vacancy arises in the same office for a position which is substantially the same, the vacancy may be filled without holding another competition, so long as it is filled in descending order of qualification based on the previous competition. This exception to the requirement to post a vacancy does not apply where the vacancy is for a permanent position, and the initial vacancy was for a temporary position.

10.3 Contract Renewal Not a Vacancy

Where a fixed term lawyer is employed in an office and the Employer renews the lawyer's contract for the lawyer to continue to work in the same office, the expiry of the prior contract shall be deemed not to be a vacancy.

10.4 No Limitation of Power under *Public Service of Ontario Act, 2006*

Nothing in Article 11 will be construed as limiting the Deputy Attorney General's authority under *Public Service of Ontario Act, 2006* and its directives to transfer an employee.

10.5 Temporary Vacancies

10.5.1 The Employer is not required to fill a vacancy through competition under Article 10 where the Employer has:

(a) less than two (2) months' advance notice that the absence will be occurring, in the case of a backfill vacancy; or

(b) in the case of a non-backfill vacancy, less than two (2) months' advance notice of the need to fill the vacancy and there is a need for the work to be done on an immediate basis.

10.5.2 Vacancies filled under Article 10.5.1 may be filled only for a period of up to six (6) months. The Employer and Association may mutually agree to extend this period for a further three (3) months. The vacancy may not be filled beyond six (6) months, or beyond nine (9) months where the foregoing three (3) -month extension is applied, unless the position has been filled by competition.

10.5.3 Where the circumstances do not meet the posting exceptions outlined in Article 10.5.1, the Employer may fill a vacancy without competition provided the vacancy is being filled for four (4) months or less. However, a position cannot be filled under Article 10.5.3 where, within the last six months, it has been filled under Article 10.5.3 or under Article 10.5.1.

10.5.4 Where a vacancy is filled under Article 10.5.3, the individual filling the vacancy cannot be renewed in, or appointed to, the position being filled except through competition, with such individual only being eligible to compete at Step 3 (Open Competition) of the competition process. For all other vacancies, the individual would be eligible to compete at the Step they would otherwise have been eligible to compete but for filling the vacancy under 10.5.3. If the individual referenced in Article 10.5.4 is subsequently the successful candidate in a competition, any prior limitation on their competition rights under Article 10.5.4 will end. For clarity, external candidates hired upon four (4) months contract under this Article are restricted from being placed on the redeployment list.

10.5.5 Where a vacancy is filled under Article 10.5.1 or 10.5.3, the Employer will provide to the relevant Association the name of the individual filling the vacancy, the location and type of work involved, and the reasons for filling the vacancy under Article 10.5.1. The foregoing information will be provided to the Association as soon as possible, but no later than 10 days following the filling of the vacancy. Disputes over the interpretation and application of Article 10.5 may be processed through Article 10.7 (Review of Competitions).

10.6 Exception to Requirement to Posting and Filling of Positions (Secondments)

Where the same full-time work has been performed by a regular OPS employee on a temporary basis for a period of at least 18 continuous consecutive months, and the Employer has determined that there is a continuing need for that work to be performed on a full-time basis, the parties may agree that the regular OPS employee can be assigned into a full-time regular position on a permanent basis to perform that same work, subject to the following:

- The full-time temporary work was obtained through competition as per Article 10.1; and
- If the temporary full-time work is that of an existing full-time position in the regular service, the position must be otherwise vacant at the time of the permanent appointment.

For the purposes of Article 10.6, "vacant" is understood to mean that:

- there is no incumbent with rights to the position who is absent from the position due to temporary assignment or secondment, or paid or unpaid leave of any nature; or
- If the temporary full-time work is not that of an existing full-time position in the regular service, the Employer has elected to create a full-time position in the regular service to perform that work.

10.7 Review of Competitions

10.7.1 In light of the importance of a merit-based system for hiring and promotion of Crown Counsel, the parties agree to implement a meaningful process to assist in the review of issues related to the integrity of the process and compliance with job competition rules and principles set out in Article 10. The Employer and the Associations recognize that it is in their mutual interest to resolve job competition issues in a timely way and agree to expedite resolution of such issues through the following process:

10.7.2 A dispute concerning whether a competition has met the job competition rules and principles set out in Article 10 may be commenced by the Association by referring the dispute in writing through the Strategic Business Unit Director to the Competition Review Subcommittee of the Management and Associations Committee within 30 days of being notified of the successful candidate in a competition.

10.7.3 The Competition Review Subcommittee of the Management Associations Committee for the purposes of this competition review will be comprised of one representative from the Employer and one representative of the Association. Representatives will be from workplaces other than those involved in the competition issue.

10.7.4 The Competition Review Subcommittee of the Management Associations Committee will attempt to resolve the dispute within 30 days of its being initiated, failing which, the Association may request that the dispute be referred to a designated mediator. There shall be one designated mediator for any ALOC disputes and one designated mediator for any OCAA disputes, although nothing precludes the parties from agreeing to use the same designated mediator. The parties agree that, if they cannot agree upon a designated mediator for either ALOC or OCAA disputes, he or she will be appointed by the Referee under the Framework Agreement.

10.7.5 The designated mediator will commence an informal review of the competition issue within ten (10) days of the request. The parties agree to fully cooperate with the designated mediator and shall provide him/her any relevant information, documentation or other related materials he/she requests. The designated mediator will determine whether to convene a formal mediation session with the parties and/or to issue his or her findings and a recommendation upon completion of his or her review. The Association and the Employer may, however, agree that the designated mediator not make findings or make a recommendation.

10.7.6 Any findings and recommendations of the designated mediator will be provided to the Assistant Deputy Attorney General for the Division involved or the equivalent official in the agencies, boards and commissions, for review and to the relevant Association.

10.7.7 The Assistant Deputy Attorney General for the Division involved or the equivalent official in the agencies, boards and commissions will have 10 calendar days to respond to the relevant Association with respect to the designated mediator's recommendations. Having regard to the importance of the review process, it is the parties' shared expectation that the designated mediator's recommendations will normally be implemented.

10.7.8 The findings and recommendations will be discussed at the next scheduled Management Associations Committee meeting, with the discussion being recorded in the Committee minutes which will be posted. Review of competitions will become a standing item on the Committee agenda.

10.7.9 The costs of the designated mediator will be shared equally by the parties.

ARTICLE 11 – JOB TRADING POLICY

11.1 Job Trade Process

If no vacancy has been identified, but a regular lawyer in one office on the job trade list maintained by an Association wishes to transfer to another office which also has a regular lawyer who has expressed interest in transferring to the first lawyer's office and who is on the Association's job trade list, then those two lawyers, with the approval of both managers may exchange their positions, provided that each lawyer has the skills, competence and ability to perform the work at the new office. This approval will not be unreasonably withheld. This shall be known as a "job trade".

11.2 Where Multiple Lawyers Interested

Subject to the rules in 11.1, if there is more than one lawyer interested in a job trade for a specific job, then the managers, if approval is given, will select the individual for the job trade.

11.3 Interest in Job Trade

Lawyers wishing to job trade may indicate to the Employer at any time through their Association their wish to do so, but at the same time if so indicating, their name must be on the job trade list of their Association, as must the name of the lawyer with whom they wish to job trade.

11.4 Reasonable Implementation Time

The Employer shall implement the job trade as set out by the provision above within a reasonable time.

11.5 Trades Between Associations

No job trades shall be allowed between lawyers represented by different Associations, unless both Associations, and the Employer, consent, which consent will not be unreasonably withheld.

11.6 No Additional Costs

All job trades must be achieved at no net additional cost to the Employer.

ARTICLE 12 – LIMITS ON USE OF TERM CLASSIFIED FIXED TERM LAWYERS

12.1 The Employer will appoint no more than 2% of each of the total number of lawyers represented by ALOC and OCAA respectively as term classified fixed term lawyers at any one time during the term of this Collective Agreement. The terms and conditions of employment for regular lawyers under this Collective Agreement shall, for term classified fixed term employees, be modified to comport with the terms and conditions applicable to MCP term classified fixed term employees, with any necessary modifications.

ARTICLE 13 – WORK-RELATED TRAINING

13.1 Unless the parties agree otherwise, the Employer shall only schedule work-related training for lawyers during regular office hours (that is, between 8:00 a.m. to 5:00 p.m., Monday through Friday).

13.2.1 The parties agree that it is in the interests of the Employer and each lawyer to value, demonstrate and support continuous individual, team and organizational learning.

13.2.2 The learning and development programs and initiatives for the lawyers will, among other things, take into consideration the knowledge and skills requirements identified by the Employer and the learning needs, objectives and professional obligations identified by the lawyer.

13.2.3 The Employer recognizes and supports the contribution of ALOC and OCAA to the development and delivery of education and training. Subject to appropriate fiscal and operational considerations, the Employer will make every effort to allow lawyers to attend this education and training without loss of pay or credits, and to continue to provide funding and reimbursement associated with the costs of such education and training.

13.2.4 The Employer will consider individual requests for other education and training courses without loss of pay or credits, and/or pay for such courses, recognizing that this represents an important component of education and training. The Employer agrees that it will not exercise its discretion under this paragraph in a manner that is arbitrary.

13.2.5 The parties agree to consult in the development and delivery of education and training to lawyers.

ARTICLE 14 – LAW SOCIETY FEES AND OTHER LEVIES

14.1 The Employer shall pay, on behalf of each lawyer, all sums required by the Law Society of Upper Canada, or by statute, to practice law in the province of Ontario, on a pro-rata basis, depending on date of hire.

14.2 When a lawyer is on an approved leave of absence for more than three (3) months in any calendar year, during which he or she is not engaged in the practice of law on behalf of the Employer, or when a lawyer is absent due to illness or injury for more than three (3) months in any calendar year, the lawyer shall forthwith sign a form provided by the Employer at the end of the calendar year notifying the Law Society of Upper Canada and requesting pro-rata reimbursement of fees remitted by the Employer for the period in question. The form shall also include a direction from the lawyer to the Law Society of Upper Canada to reimburse the funds directly to the Employer.

14.3 When a lawyer resigns from the Ontario Public Service, the lawyer shall forthwith sign a form provided by the Employer notifying the Law Society of Upper Canada and requesting pro-rata reimbursement of fees remitted by the Employer for that calendar year. The form shall also include a direction from the lawyer to the Law Society of Upper Canada to reimburse the funds directly to the Employer.

ARTICLE 15 – LEGAL INDEMNIFICATION

15.1 Process for Indemnification

Whenever a lawyer is named in a civil action other than as a plaintiff, or where a law society commences an investigation against a lawyer or a lawyer is otherwise advised that a law society complaint has been made against him/her, and the subject matter arises out of the lawyer's practice of law in the OPS, the Employer shall:

(a) provide counsel of the Employer's choice and at the Employer's expense to represent the lawyer throughout the proceeding and on any appeal;

(b) pay any sum of money the lawyer becomes liable to pay in connection with the matter;

(c) agree to have any dispute as to the need for independent counsel to represent the lawyer decided by arbitration pursuant to Article 6.9 of this Collective Agreement. Any disputes shall be

heard on an expedited basis within 10 days by the Honourable Pat LeSage. If the Honourable Pat LeSage is not available, such disputes will be heard by Owen Shime or William Kaplan; and

(d) Provide independent counsel of the lawyer's choice at the Employer's expense if the arbitrator finds that there is a need for independent counsel. Such independent counsel will be remunerated at rates which shall not exceed those set by the Ministry of the Attorney General for retention of private sector counsel.

15.2 Limitation Payments

The Employer is not required to make any payments under Article 15.1 and any sum already paid is recoverable where the Court or a law society finds that the lawyer has been deliberately dishonest or has committed a criminal offence in relation to the matter.

SECTION II — BENEFITS FOR LAWYERS

In this section, only the following articles apply to fixed-term lawyers; 19, 22.3 (3), 23.9, 25, 27, 28.2, 28.3 and 31.

ARTICLE 16 – DEFINITIONS

Continuous Service

16.1 For the purposes of the benefits section of this Collective Agreement, "continuous service" for regular lawyers means the period of unbroken service in the Ontario Public Service during which a person is an employee and during which he or she receives his or her salary. Continuous service shall include absences on unpaid leave for a period that does not exceed thirty (30) days, and absences on pregnancy or parental leave.

For greater certainty,

(a) If a regular lawyer was a fixed term employee within thirteen (13) weeks before his or her last appointment to the regular service, the period of fixed term service is included in the lawyer's period of continuous service.

(b) If a lawyer described in a) was a fixed term employee whose fixed term service was broken, and if the breaks in service were not more than thirteen (13) weeks long, the periods of fixed term service are included in the lawyer's period of continuous service.

(c) If a lawyer described in a) was a fixed term employee whose fixed term service was broken, and on one or more occasions the lawyer's break in service was more than thirteen (13) weeks long, the lawyer's period of continuous service does not include periods of service that occurred before the most recent break of more than thirteen (13) weeks.

(d) The period of unbroken service during which a person is an employee and during which the employee qualifies for or is receiving a benefit under the Long Term Income Protection Plan is included in the lawyer's period of continuous service.

16.2 A "regular" lawyer or employee is a public servant appointed under section 32 of the *Public Service of Ontario Act* other than for a fixed term.

16.3 A "fixed term" lawyer or employee is a public servant appointed under Part III of the *Public Service of Ontario Act* for a fixed term.

ARTICLE 17 – INSURED BENEFITS FOR REGULAR LAWYERS

17.1 Subject to the agreement of the parties and the terms of this Collective Agreement, the parties agree that, while the terms and conditions of this Collective Agreement are in effect, no existing specifically provided and continuing benefit will be reduced on any issue within the jurisdiction of an arbitration panel.

17.2. (a) The group insured benefits coverage under this Article shall not be provided for a lawyer during a leave of absence without pay except to the extent that the lawyer arranges through Ontario Shared Services to pay the amount of the full premium for any of the coverages that the lawyer chooses to have continued during the leave and pays the amount at least one week before the first of each month of the leave of absence.

(b) Within a reasonable time after granting a leave of absence without pay to a lawyer, the Employer shall inform the lawyer that group insured benefits coverages during the leave of absence will continue only in accordance with this article.

(c) Subject to Article 17.1, and except as stated in this article, the benefits provided to lawyers under the group insured benefits coverages shall be those set out in the existing insurance plan.

17.3 Life Insurance Plan for Regular Lawyers

(a) The Basic Life Insurance Plan shall provide life insurance coverage equal to 100 per cent of the annual salary of every lawyer, and such coverage shall not be less than $10,000 for a full-time lawyer and $5,000 for a part-time lawyer.

(b) The premium for the Basic Life Insurance Plan coverage shall be paid by the Employer.

(c) The Supplementary Life Insurance Plan shall provide additional group life insurance coverage equal to the annual salary, twice the annual salary or three times the annual salary, at the choice of the lawyer, for those lawyers who choose to participate in the Plan.

(d) A lawyer who participates in the Supplementary Life Insurance Plan or the Dependents' Life Insurance Plan shall pay the premium for his or her insurance coverage in the Plan.

(e) Effective September 1, 2009, the Dependents' Life Insurance Plan shall provide, in respect of each employee who chooses to participate in the Plan, life insurance coverage chosen by the employee as follows:

1. A multiple of $10,000 to a maximum of $200,000 for the spouse of the employee.

2. $1,000, $5,000, $7,500 or $10,000 for each child of the employee.

3. If the employee chooses to insure any of his or her children in an amount set out in paragraph 2, the employee shall insure all of his or her children in the same amount.

(f) In Article 17.3, "child" means,

(i) an unmarried child who is under 21 years of age,

(ii) a child who is 21 years of age or older but not yet 25 years of age and in full-time attendance at an educational institution or on vacation from it, or

(iii) a child who is 21 years of age or older and who is mentally or physically infirm and dependent on the lawyer.

17. 4 Long Term Income Protection Plan for Regular Lawyers

In Article 17.4,

"Plan" means the Long Term Income Protection Plan;

"rehabilitation earnings" means earnings for employment following directly after a period of total disability during which the lawyer is not fully recovered from the disability;

"total disability" means, with respect to a lawyer, a disability that renders the lawyer totally disabled as described in Article 17.4.2.

17.4.1 The Long Term Income Protection Plan shall provide the benefit described in Article 17.4.4 to a regular lawyer who participates in the Plan and who is totally disabled, is under the care of or is receiving treatment from a legally qualified medical practitioner and is not, except for the purpose of rehabilitation, engaged in any occupation or employment for which he or she receives a wage or profit.

17.4.2 For the purposes of Article 17.4, a lawyer is totally disabled if,

(a) during the qualifying period and for the first 24 months of the period in respect of which benefits may be paid, the lawyer is continuously unable, as a result of sickness or injury, to perform the essential duties of the lawyer's normal occupation; and

(b) during the balance of the period in respect of which benefits may be paid, the lawyer is unable, as a result of sickness or injury, to perform the essential duties of any gainful occupation for which the lawyer is reasonably fitted by education, training or experience.

17.4.3 The lawyer is entitled to receive the benefit beginning immediately after a qualifying period of six continuous months of total disability and continuing until the earliest of,

(a) termination of the total disability;

(b) death; or

(c) the end of the month in which the lawyer reaches 65 years of age.

17.4.4 The amount of the annual benefit payable during a calendar year (the "payment year") to a lawyer is calculated using the formula,

$$A – (B + C)$$

in which,

"A" is,

(a) for the first payment year in which the benefit is paid, 66⅔ per cent of the lawyer's regular salary immediately before the beginning of the qualifying period,

(b) for each subsequent payment year, the amount of "A" for the previous year, increased by the average annual increase, expressed as a percentage, in the Ontario Consumer Price Index as published by Statistics Canada in January of the payment year, to a maximum of 2 per cent,

"B" is the total amount of the other disability and retirement benefits, if any, payable for the year to the lawyer under any other plans to which the lawyer contributes, other than payments under the *Workplace Safety and Insurance Act, 1997* for an unrelated disability, and

"C" is 50 per cent of any rehabilitation earnings of the lawyer for the year.

17.4.5 Every regular lawyer shall participate in the Plan.

17.4.6 The Employer shall continue make pension contributions and premium payments for insured benefits for the period in respect of which the lawyer is receiving benefits under this sub article.

17.4.7 The Employer shall pay 85% of the premium cost for every lawyer who participates in the plan. The lawyer shall pay the balance of the premium costs through payroll deduction.

17.5 Supplementary Health and Hospital Insurance Plan for Regular Lawyers

17.5.1 The Supplementary Health and Hospital Insurance Plan shall provide to every regular lawyer who joins the Plan, subject to any restrictions set out in Article 17.5:

(a) Reimbursement for 90 per cent of the cost of drugs and medicine, that by law require a physician's prescription, including injectable drugs and medicines prescribed by a licensed physician or other licensed health professional who is legally authorized to prescribe such drugs and dispensed by a licensed pharmacist or by a physician legally authorized to dispense such drugs and medicines. The payment of 90 per cent is subject to a deductible amount of $5 for each Drug Identification Number (DIN).

In addition, provided that a generic drug is listed in the Canadian Pharmaceutical Association Compendium of Pharmaceuticals and Specialties reimbursement for drugs covered by the Plan will be based on the cost of the lowest price generic version of the drug. If the prescribing physician or health professional stipulates no substitution, reimbursement will be based on the cost of the drugs prescribed provided that the employee submits a photocopy of the physician's or health professional's direction, together with the claims submission. For clarity, a photocopy of the prescription containing the prescribing physicians or health professionals no substitution direction would be sufficient.

(b) Effective July 1, 2009, the Employer will provide reimbursement for ninety percent (90%) of the cost of medically necessary vaccinations or immunizations when prescribed and administered by a qualified health care practitioner where such vaccine or immunization is not covered by a provincial health plan.

(c) Reimbursement for charges for private or semi-private room hospital care made by a hospital within the meaning of the *Public Hospitals Act* or by a hospital that is licensed or approved by the governing body in the jurisdiction in which the hospital is located of $100 more than the charge by the hospital for standard ward room hospital care.

(d) Reimbursement for one pair of orthotics per person in a calendar year and the maximum amount of the reimbursement for a pair of orthotics is $500.

(e) Reimbursement for 75 per cent of the cost of one pair or one repair of orthopaedic shoes per person in a calendar year to a maximum amount of the reimbursement of $500.

(f) Reimbursement of $30 per visit per covered person for licensed paramedical practitioners with an annual maximum of $1,200 for each practitioner per covered person. Eligible paramedical

practitioners are defined as chiropractors, podiatrists, chiropodists, physiotherapists, massage therapists, acupuncturists, naturopaths and osteopaths. The $100 calendar year podiatry surgery allowance per covered person will continue.

(g) Effective July 1, 2009, charges for the services of a psychologist (which shall include a Master of Social Work) up to forty dollars ($40) per half-hour to a maximum of one thousand and four hundred dollars ($1400) a year.

(h) Effective July 1, 2009, charges for the services of a speech therapist up to forty ($40) per half hour to a maximum of $1400 a year.

(i) Effective September 1, 2009, the Supplementary Health and Hospital Plan excludes coverage for expenses incurred outside of Canada and the Global Medical Assistance Plan.

17.5.2 Unless otherwise indicated, effective January 1, 2008, the Supplementary Health and Hospital Insurance Plan the following:

1. A drug card with positive enrolment**.**
2. Enhanced Diabetic Supplies:
   - insulin pump - $2000 every 5 years for adults and $5000 every 5 years for children;
   - jet injectors - $1000 every 5 years;
   - glucometer - one purchase or repair every 4 years;
   - required supplies for all of the above appliances capped at a total of $2000 per year per person
3. Hearing Aid coverage: existing maximum of $2500 every 5 years includes reimbursement for batteries and repair costs.
4. Vision Care: maximum reimbursement will be $350 per eligible person every 24 months. The eligible expenses outlined in the vision care plan include one routine eye examination every 24 months - reimbursement of this eye examination is limited to $75, within the $350 maximum.

17.5.3 The Employer shall pay,

(a) the premiums for every full-time lawyer who joins the Supplementary Health and Hospital Insurance Plan; and

(b) 40, 50, 60, 70 or 80 per cent of the premiums for every part-time lawyer who joins the Supplementary Health and Hospital Insurance Plan, whichever percentage is closest to the relation that the lawyer's regularly scheduled hours of work bear to full employment, and the lawyer shall pay the balance of the premium through payroll deduction.

(c) Effective July 1, 2009, the Employer agrees to pay 100% of the monthly premiums for vision care and hearing aid coverage under the Supplementary Health and Hospital Plan.

17.5.4 A lawyer may elect to participate in the Supplementary Health and Hospital Insurance Plan,

(a) on appointment;

(b) in December of any year, for coverage commencing on the 1st day of January next following, if the lawyer has satisfied the waiting period of the Plan and the lawyer,

(i) did not join the Plan on appointment, or

(ii) previously opted out of the Plan; or

(c) on providing evidence that similar coverage available to the lawyer under the Plan of another person has been terminated, for coverage commencing on the 1st day of the month coinciding with or following the presentation of the evidence.

17.5.5 A lawyer may elect in December of any year to opt out of the Supplementary Health and Hospital Insurance Plan and coverage shall cease at the end of that month.

17.5.6 A lawyer may elect to participate in the plan's additional coverage for vision care and hearing aids.

17.6 Dental Insurance Plan for Regular Lawyers

17.6.1 The Dental Insurance Plan shall reimburse every lawyer who elects to participate in the Plan for the following expenses and the reimbursement is in the following amount:

(a) Eighty-five per cent of the cost of basic dental services, endodontic services, periodontic services and repair or maintenance services for existing dentures or bridges specified by the Plan. However, the amount of the reimbursement shall not exceed eighty-five per cent of the fees set out in the Ontario Dental Association schedule of fees for general practitioners that is in effect one year before the expense is incurred.

(b) Fifty per cent of the cost of new dentures specified by the Plan, to a maximum of 50 per cent of the fees set out in the Ontario Dental Association schedule of fees in effect when the expense is incurred. However, $3,000 per person is the maximum reimbursement under this Article in respect of a lawyer, the lawyer's spouse and each dependent child of the lawyer.

(c) Fifty per cent of the cost of orthodontic services specified by the Plan and provided to unmarried dependent children of the lawyer who are more than six years old and less then 19 years old, to a maximum of 50 per cent of the fees set out in the Ontario Dental Association schedule of fees in effect when the expense is incurred. However, $3,000 is the maximum reimbursement under this Article in respect of each dependent child of the lawyer.

(d) Fifty per cent of the cost of crowns, bridgework and other major restorative services specified by the Plan, to a maximum of 50 per cent of the fees set out in the Ontario Dental Association schedule of fees in effect when the expense is incurred. However, $2,000 per person per year is the maximum reimbursement under this in respect of a lawyer, the lawyer's spouse and each dependent child of the lawyer.

(e) Coverage for pit and fissure sealants for eligible dependent children age twelve (12) and under.

17.6.2 The benefits described in this Article are subject to the restriction that the lawyer is not entitled to be reimbursed for more than one recall examination by a dentist,

(a) every nine months for an individual who is over 12 years old; and

(b) every six months for a younger individual.

17.6.3 The benefits described in Article 17.6.1 are subject to a deductible amount each year of $25 for an individual and $50 for a family. This deductible applies to all dental services, excluding accidental dental services payable under the supplementary health and hospital plan.

17.6.4 The Employer shall pay,

(a) The premiums for every full-time lawyer who joins the Dental Insurance Plan; and

(b) 40, 50, 60, 70 or 80 per cent of the premiums of the Dental Insurance Plan for every part-time lawyer who joins the Plan, whichever percentage is closest to the relation that the lawyer's regularly scheduled hours of work bear to full employment and the lawyer shall pay the balance of the premium through payroll deduction.

17.6.5 A lawyer may elect to participate in the Dental Insurance Plan,

(a) on appointment; or

(b) in December of any year for coverage commencing on the 1st day of January next following, if the lawyer has satisfied the waiting period of the Plan and the lawyer,

i. did not join the Plan on appointment, or

ii. previously opted out of the Plan; or

(c) on providing evidence that similar coverage available to the lawyer under the plan of another person has been terminated, for coverage commencing on the 1st day of the month coinciding with or next following the presentation of the evidence.

17.6.6 A lawyer may elect in December of any year to opt out of the Dental Insurance Plan and coverage shall cease at the end of that month.

17.7 Catastrophic Drug Plan For Regular Lawyers

The existing employee paid catastrophic drug plan, which covers the gap between 90% reimbursement for the cost of eligible drugs and 100% reimbursement under the plan, where overall drug expenses in any year exceed $10,000 will continue in effect.

17.8 Insured Benefits Claims Appeal Process

Disputes regarding entitlement to benefits will first be raised by the employee with the insurance carrier. Any dispute which may arise concerning a complaint by a lawyer that he or she has not received the entitlement to benefits under the insured benefit plans (including LTIP) provided for in this agreement, is subject to the arbitration procedures of this collective agreement.

Requests for special or compassionate consideration under any of the insured benefit plans are specifically limited to the Insurance Appeals Committee process, will include an opportunity for the lawyer and/or an Association representative to make a written submission to the Committee.

ALOC and OCAA understand and agree that the affected employee must complete a "Release of Information – Insured Benefits Appeal" form, before the matter can proceed under this clause.

Prior to proceeding to mediation or arbitration, the Association must make a written submission to the Insurance Appeals Committee via the Director of Centre for Employee Relations Division, OPS. If the issue is not resolved at this stage, the complaint can proceed to arbitration under the agreement (except in the case of requests for special or compassionate consideration).

The parties agree that Felicity Briggs will be the arbitrator for benefits disputes, and if she is unable or unwilling to serve, the Referee shall appoint another arbitrator for that purpose.

17.9 Employment Insurance Rebate

Effective January 1, 2008, the employees' share of the employment insurance rebate will be retained by the Employer to offset the cost of benefit improvements.

ARTICLE 18 – SHORT TERM SICKNESS PLAN FOR REGULAR LAWYERS

18.1 A full-time lawyer who is unable to attend to his or her duties due to sickness or injury is entitled, in each year, to leave of absence,

(a) with regular salary for six working days; and

(b) with 75 per cent of regular salary for an additional 124 working days.

18.2 A part-time lawyer who is unable to attend to his or her duties due to sickness or injury is entitled, in each year, to leave of absence,

(a) with regular salary for that portion of six working days equal to the portion the lawyer's regularly scheduled hours of work bear to full employment; and

(b) with 75 per cent of regular salary for that portion of an additional 124 working days equal to the portion the lawyer's regularly scheduled hours of work bear to full employment.

18.3 A lawyer is not entitled to a leave of absence with pay under this Article until after completion of, in the case of a full-time lawyer, twenty consecutive working days of employment, and in the case of a part-time lawyer, all of the lawyer's regularly scheduled hours within a period of four consecutive weeks.

18.4 A lawyer who is on leave of absence with pay under this Article that commences on a regularly scheduled working day in one year and continues to include a regularly scheduled working day in the next following year is not entitled to leave of absence with pay for a greater number of working days than are permitted under Article 18.1 or 18. 2, as the case may be, in the two years until the lawyer has again completed the service requirement described in Article 18.3.

18.5 A lawyer who was on leave of absence with pay under this Article for the number of days in a year permitted under Article 18.1 or 18. 2 as the case may be, is not entitled to leave of absence with pay under this Article in the year next following until the lawyer has again completed the service requirement described in Article 18.3.

18.6 The pay of a lawyer under this Article is subject to:

(a) all deductions for insurance coverages as set out in Article 17 and in relation to the *Public Service Pension Plan* that would otherwise be made from the pay; and

(b) all contributions that would otherwise be made by the Employer in respect of the pay, and such deductions and contributions shall be made as though the lawyer were receiving the lawyer's regular salary.

18.7 A lawyer who is on leave of absence and receiving pay under Article 18.1 (b) or Article 18.2 (b) is entitled, at the lawyer's option, to have sufficient credits deducted from the lawyer's accumulated credits for each day to which Article 18.1 (b) or 18.2 (b) applies and to receive regular salary for each such day.

18.8 A lawyer who is absent from employment due to sickness or injury beyond the total number of days leave of absence with pay provided for under Article 18 shall have his or her accumulated attendance credits reduced by a number of days equal to the number of days of such absence and is entitled to leave of absence with pay on each such day.

18.9 Article 18.8 does not apply to a lawyer who qualifies for and elects to receive benefits under the Long Term Income Protection Plan instead of using his or her accumulated attendance credits.

18.10 After seven consecutive calendar days absence caused by sickness or injury, no leave with pay shall be allowed unless a certificate of a legally qualified medical practitioner or of such other person as may be approved by the Deputy Attorney General is forwarded to the Deputy Attorney General, certifying that the lawyer is unable to attend to official duties.

18.11 Despite Article 18.10, the Public Service Commission or the Deputy Attorney General may require a lawyer to submit the certificate required by Article 18.10 for any period of absence.

18.12 Where for reasons of health, a lawyer is frequently absent or unable to perform his or her duties, his or her Deputy Attorney General may require him or her to submit to a medical examination at the expense of the ministry.

ARTICLE 19 – SICK LEAVE AND ATTENDANCE CREDITS FOR FIXED TERM LAWYERS

19.1 A fixed-term lawyer is entitled to an attendance credit of 1¼ days for each full month in which he or she is at work or is on vacation leave of absence or leave of absence with pay.

19.2 A fixed-term lawyer who is unable to attend to his or her duties due to sickness or injury is entitled to leave of absence with pay at the rate of one working day for each day of accumulated attendance credits and his or her accumulated attendance credits shall be reduced by the leave taken.

19.3 Where a person who is a fixed-term lawyer is appointed to the regular service, attendance credits accumulated by the person under this Article in respect of the period of time after the date of the coming into force of the short term sickness plan in respect of the position to which the person is appointed as a regular lawyer cease to stand to the credit of the person.

19.4 In this Article, “short term sickness plan” means the short term sickness plan described in Article 18.

19.5 After five days absence caused by sickness, no leave with pay shall be allowed unless a certificate of a legally qualified medical practitioner or of such other person as may be approved by the Deputy Attorney General is forwarded to the Deputy Attorney General of the ministry, certifying that the lawyer is unable to attend to his or her official duties.

19.6 Despite Article 19.5 the Deputy Attorney General or a person designated by the Deputy Attorney General for the purpose of this Article may require a lawyer to submit the medical certificate required by Article 19.5 for a period of absence of less than five days

ARTICLE 20 – BENEFITS UNDER THE *WORKPLACE SAFETY AND INSURANCE ACT, 1997* FOR REGULAR LAWYERS

20.1 Where a lawyer is absent by reason of an injury or occupational disease for which a claim is made under the *Workplace Safety and Insurance Act, 1997*, his or her salary shall continue to be paid for a period not exceeding thirty working days and if the claim is rejected any salary paid in excess of that to which he or she is entitled under Article 18 shall be an amount owing by the lawyer to the Employer.

20.2 Where a lawyer is absent by reason of an injury or occupational disease for which an award is made under the *Workplace Safety and Insurance Act, 1997*, the lawyer's salary shall continue to be paid for a period not exceeding three consecutive months, or a total of sixty-five regularly scheduled working days where such absences are intermittent, following the date of the first absence because of the injury or disease.

20.3 The regular salary of a lawyer to whom an award is made under the *Workplace Safety and Insurance Act, 1997* that is less than the lawyer's regular salary but that applies for a period beyond that set out in Article 20.2 may be paid after the period set out in Article 20.2 or the lawyer has accumulated credits.

20.4 For any payment made under Article 20.3, the difference between the lawyer's regular salary paid after the period set out in Article 20.2 and the compensation awarded shall be converted to its equivalent time and deducted from his or her accumulated credits.

20.5 Under this Article, "accumulated credits" includes compensation option credits under Article 26 of this Collective Agreement, vacation credits and attendance credits.

20.6 Where a lawyer is absent by reason of an injury or occupational disease for which an award is made under the *Workplace Safety and Insurance Act, 1997*, the Employer shall continue to pay the premiums otherwise payable by the Employer for group insurance coverage under Article 17.

ARTICLE 21 – SELF-FUNDED LEAVE PLAN FOR REGULAR LAWYERS

21.1 A regular lawyer may request a full-time leave of absence without pay and without accumulation of credits by participating in the self-funded leave plan as permitted under the *Income Tax Act* (Canada). For clarity, this Article applies only to regular lawyers.

21.2 Under the self-funded leave plan, the lawyer will defer pre-tax salary dollars to fund a leave of absence. The deferral period must be at least one (1) year and not more than four (4) years in length.

21.3 The funds being deferred shall be held in a trust account with a financial institution selected by the Employer and shall have interest paid annually to the lawyer. The funds will be paid out to the lawyer on a bi-weekly or lump sum basis, at the lawyer's option during the leave of absence.

21.4 Leaves of absence granted pursuant to this Article will be for periods of at least six (6) months and will not exceed twelve (12) months' duration.

21.5 A lawyer granted a leave of absence pursuant to this Article shall not accrue credits during such leave.

21.6 A lawyer granted a leave of absence pursuant to this Article may choose to continue insured benefits coverage during the leave, provided he or she arranges to continue to pay the employee portion of the premiums.

21.7 Notwithstanding Article 21.5 above, for the purposes of determining annual vacation entitlement only, leave time under this Article will be credited towards years of continuous service.

21.8 A lawyer returning to work after self-funded leave shall be reinstated to the position he or she most recently held with the Employer, save that where a lawyer on a self-funded leave of absence has received a notice of layoff, Section III (Job Security), including Article 38 (Treatment of Seconded Lawyers / Lawyers on Leave), shall apply.

ARTICLE 22 – FAMILY LEAVE; BEREAVEMENT LEAVE

22.1 A regular lawyer may be granted a full-time leave of absence, without pay and without accumulation of credits, for a period of up to one (1) year for the purpose of caring for a dependent person. It is agreed that operating requirements are a factor in the approval of such leaves. For clarity, this Article applies only to regular lawyers.

22.2 For the purpose of this Article, dependent person means:

an employee's spouse including common law and same sex partner, mother, father, mother-in-law, father-in-law, son, daughter, stepson, stepdaughter, brother, sister, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, grandchild, ward or guardian, aunt, uncle, niece, nephew or any other person who is dependent on the employee and with whom the employee has a family relationship.

22.3 1. A regular lawyer is entitled to the following:

(a) In the case of a full-time lawyer, to not more than three working days leave of absence with pay; and
(b) In the case of a part-time lawyer, to not more than three consecutive days leave of absence with pay,

in the event of the death of the lawyer's spouse, common-law spouse, same-sex spouse, parent, step-parent, mother-in-law, father-in-law, child, step-child, daughter-in-law, son-in-law, sister, brother, step-brother, step-sister, sister-in-law, brother-in-law, grandparent, grandchild, step-grandparent, step-grandchild, ward, foster parent or guardian.

2. A lawyer who would otherwise have been at work is entitled to one day leave of absence with pay in the event of the death of the lawyer's aunt, uncle, niece or nephew.

If the funeral service for a person on whose death a lawyer is entitled to a leave of absence under subsections (1) and (2) is held at a location more than 800 kilometres from the lawyer's residence, the lawyer is entitled to two additional days leave of absence without pay immediately following the leave of absence taken by the lawyer under those subsections.

3. A fixed term lawyer who would otherwise be at work is entitled to the following:

in the case of the death of his or her spouse, common-law spouse, same-sex spouse, mother, father, step-parent, mother-in-law, father-in-law, son, daughter, step-child, brother, sister, step-brother, step-sister, ward, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, grandchild, step-grandparent, step-grandchild, foster parent or guardian, to not more than three days leave of absence with pay.

ARTICLE 23 – PREGNANCY AND PARENTAL LEAVE

23.1.1 For the purposes of this Article, "parent" includes a lawyer with whom a child is placed for adoption and a lawyer who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own.

23.1.2 "Last day at work" in respect of a lawyer on a leave of absence referred to in clauses 23.3.1, 23.4.1, and 23.5.5 means the last day the lawyer was at work before the leave of absence.

23.2 Except as provided in 23.9, this Article applies only to regular lawyers.

23.3 Pregnancy Leave

23.3.1 A lawyer who is pregnant and who started her service at least thirteen (13) weeks before the expected birth date is entitled to a leave of absence without pay in accordance with this Article.

23.3.2 A lawyer may begin pregnancy leave no earlier than seventeen (17) weeks before the expected birth date.

23.3.3 The pregnancy leave of a lawyer who is entitled to take parental leave ends seventeen (17) weeks after the pregnancy leave began.

23.3.4 The pregnancy leave of a lawyer who is not entitled to take parental leave ends on the later of the day that is seventeen (17) weeks after the pregnancy leave began or the day that is six (6) weeks after the birth, still-birth or miscarriage of the child.

23.3.5 A lawyer who has given notice to end pregnancy leave may change the notice:

(a) to an earlier date if the lawyer gives the Employer at least four (4) weeks written notice before the earlier date; or

(b) to a later date if the lawyer gives the Employer at least four (4) weeks written notice before the date the leave was to end.

23.4 Parental Leave

23.4.1 The Employer shall grant a leave of absence without pay to a lawyer who has at least thirteen (13) weeks service and who is the parent of a child.

23.4.2 Parental leave may begin,

(a) no earlier than the day the child is born or comes into the custody, care and control of the lawyer for the first time; and

(b) no later than fifty-two (52) weeks after the day the child is born or comes into the custody, care and control of the lawyer for the first time.

23.4.3 The parental leave of a lawyer who takes pregnancy leave must begin when the pregnancy leave ends unless the child has not yet come into the custody, care and control of the lawyer for the first time.

23.4.4 Parental leave ends thirty-seven (37) weeks after it began for a lawyer who did not take pregnancy leave and thirty-five (35) weeks after it began for a lawyer who takes pregnancy leave. A lawyer who has given notice to end parental leave may change the notice:

(a) to an earlier date if the lawyer gives the Employer at least four (4) weeks written notice before the earlier date; or

(b) to a later date if the lawyer gives the Employer at least four (4) weeks written notice before the date the leave was to end.

23.5 Supplemental Employment Benefit Plan

23.5.1 A lawyer on pregnancy leave or on parental leave who provides to the Employer proof that he or she has applied for, and is eligible to receive, benefits under the *Employment Insurance Act* (Canada) in

respect of the pregnancy or adoption is entitled to an allowance under the Supplemental Employment Benefit Plan.

23.5.2 The amount of an allowance under the Supplemental Employment Benefit Plan to a lawyer on pregnancy leave shall be,

(a) for the first two (2) weeks of the leave of absence, an amount equal to ninety-three per cent (93%) of the lawyer's weekly pay less all other wages or salary earned by the lawyer during the two (2) weeks; and

(b) for each week, to a maximum of fifteen (15) additional weeks, that the lawyer receives maternity benefits under the *Employment Insurance Act* (Canada), an amount equal to the difference between ninety-three per cent (93%) of the lawyer's weekly pay and the sum of the maternity benefits under the *Employment Insurance Act* (Canada) that the lawyer receives for the week and of all other wages or salary earned by the lawyer during the week.

(c) for each week up to a maximum of fifteen (15) additional weeks, where the employee elects to take parental leave in accordance with 23.4, an amount equal to the difference between ninety-three per cent (93%) of the lawyer's weekly pay and the sum of the maternity benefits under the *Employment Insurance Act* (Canada) that the lawyer receives for the week and of all other wages or salary earned by the lawyer during the week.

23.5.3 The amount of an allowance under the Supplemental Employment Benefit Plan to a lawyer on parental leave who has not taken pregnancy leave shall be,

(a) where the lawyer serves the employment insurance waiting period, for the first two (2) weeks of the leave of absence, an amount equal to ninety-three per cent (93%) of the lawyer's weekly pay less all other wages or salary earned by the lawyer during the two (2) weeks; and

(b) for each week, to a maximum of fifteen (15) additional weeks, that the lawyer receives benefits under the *Employment Insurance Act* (Canada), an amount equal to the difference between ninety-three per cent (93%) of the lawyer's weekly pay and the sum of the benefits under the *Employment Insurance Act* (Canada) that the lawyer receives for the week and of all other wages or salary earned by the lawyer during the week.

23.5.4 Payments under the Supplementary Employment Benefit Plan will not apply to leave that continues after fifty-two (52) weeks following the day the child is born or comes into the custody, care and control of the parent for the first time, where employment group insurance benefits do not apply.

23.5.5 For the purposes of clauses 23.5.2 and 23.5.3, a lawyer's weekly pay will be adjusted to include a merit component, calculated in accordance with clauses 23.5.6 and 23.5.7, and any negotiated wage increases for the classification of the lawyer's position on the last day of work as per clause 23.1.2, that are implemented during the leave.

23.5.6 For lawyers in the CC1 classification, the adjustment to the lawyer's weekly pay will be one (1) step at each point in time when the stepped increase would normally occur, and will include progression to the next salary classification level.

23.5.7 For lawyers in a salary classification higher than CC1, the adjustment to the lawyer's weekly pay will be the Level 3 rating.

23.5.8 In no case shall weekly pay exceed the maximum for the classification.

23.6 Continuance of Benefits

23.6.1 During pregnancy leave, parental leave, or leave under 23.7.3, a lawyer may continue his or her participation in group insurance coverage and the pension plan unless the lawyer elects in writing not to do so. Vacation credits and seniority and service shall also continue to accrue during such leaves. Continuous service for severance accrues during pregnancy and parental leaves except during the six (6) week extended leave for a biological father or adoptive parent.

23.6.2 Unless a lawyer gives the Employer written notice referred to in clause 23.6.1, the Employer shall continue to pay the premiums for the group insurance coverages and contributions to the pension plan that the Employer was paying immediately before the lawyer's pregnancy leave or parental leave and the lawyer shall continue to pay the premiums for the group insurance coverages and pension plan contributions that he or she was paying immediately before the pregnancy leave or parental leave. Pensionable service shall also continue to accrue.

23.7 Additional Leave Without Pay

23.7.1 A lawyer on pregnancy leave is entitled, upon application in writing at least two (2) weeks prior to the expiry of such leave, to a parental leave of absence for not more than thirty-five (35) weeks.

23.7.2 The parental leave to which clause 23.7.1 applies shall commence immediately following the expiry of the pregnancy leave, if taken.

23.7.3 Except for a lawyer to whom clause 23.3 (Pregnancy Leave) applies, a lawyer on parental leave is entitled, upon application in writing at least two (2) weeks prior to the expiry of the leave, to a consecutive leave of absence without pay and with accumulation of credits for not more than six (6) weeks. Continuous service for severance purposes does not accrue during the six week extended leave period.

23.8 Reinstatement

23.8.1 A lawyer returning to work after pregnancy leave, or parental leave or a leave referred to in Article 23.7 shall be reinstated to the position he or she most recently held with the Employer on a regular and not a temporary basis, if the position still exists, or to a comparable position, if it does not.

23.8.2 The Employer shall pay a reinstated lawyer salary that is at least equal to the greater of,

(a) the salary he or she was most recently paid by the Employer; or

(b) the salary that he or she would be earning had he or she worked throughout the leaves of absence referred to in this Article.

Fixed Term Lawyers

23.9 A fixed term lawyer shall continue to receive entitlements as of June 6, 2002, pursuant to the *Public Service Act* as replaced by Directives under the *Public Service of Ontario Act* and the provisions of the *Public Service Pension Plan*, subject to the *Employment Standards Act, 2000*.

ARTICLE 24 – VACATION ENTITLEMENTS FOR REGULAR LAWYERS

24.1 A full-time lawyer is entitled to vacation credits at the rate of:

- one and one-quarter (1 1/4) days per month during the first eight (8) years of continuous service;

- one and two-thirds (1 2/3) days per month after eight (8) years of continuous service;
- two and one-twelfth (2 1/12) days per month after fifteen (15) years of continuous service;
- two and one-half (2 ½) days per month after twenty-six (26) years of continuous service.

24.2 A part-time lawyer is entitled to a pro-rated portion of the vacation credits shown in Article 24.1 above based on the ratio that the lawyer's regularly scheduled hours of work bear to full-time employment.

24.3 A lawyer is entitled to vacation credits under Articles 24.1 or 24.2 as the case may be in respect of a month or part thereof in which he or she is at work or on a leave of absence with pay.

24.4 A lawyer is not entitled to vacation credits,

(a) in respect of a whole month in which he or she is on leave of absence without pay;

(b) in respect of a whole month in which he or she receives benefits under the Long Term Income Protection Plan; and

(c) where he or she receives benefits under an award made under the *Workplace Safety and Insurance Act*, in respect of a whole month after the first six (6) months in which he or she receives such benefits unless the lawyer is receiving payment for accumulated credits during such whole month.

24.5 A lawyer shall be credited with his or her vacation credits for each calendar year on the first (1st) day of January in that year.

24.6 A lawyer may accumulate vacation credits to a maximum of three (3) times his or her annual credits but a lawyer's vacation credits shall be reduced to a maximum of two (2) years' credits not later than the 31st day of December in each year. For the purposes of vacation payout in the event of resignation, retirement, layoff, termination of employment or commencement of Long Term Income Protection, the lawyer's vacation credits shall be reduced to a maximum of one (1) year's credits not later than the 31st day of December in each year.

24.7 Where a lawyer is prevented from taking a vacation as a result of,

(a) an injury for which an award is granted under *the Workplace Safety and Insurance Act*;

(b) total disability; or

(c) an extraordinary requirement of the Employer;

and the lawyer's vacation credits in respect of that vacation are forfeited under Article 24.6, the lawyer's Deputy Attorney General shall grant him or her, at the lawyer's request, a leave of absence with pay to replace the forfeited vacation days.

24.8 A lawyer commencing employment during a year shall be credited at that time with vacation credits calculated in accordance with Article 24.1, in the case of a full-time lawyer, or Article 24.2 in the case of a part-time lawyer, for the balance of the calendar year, but the lawyer shall not take vacation until six (6) months of continuous service have been completed.

24.9 A lawyer who has completed six (6) months of continuous service may, with the approval of his or her manager, take vacation to the extent of his or her vacation entitlement and his or her

accumulated vacation credits shall be reduced by the vacation taken.

24.10 Where a lawyer has completed twenty-five (25) years of continuous service, there shall be added to the lawyer's accumulated vacation, on that occasion only,

(a) for a full-time lawyer, five (5) days of vacation; and

(b) for a part-time lawyer, that portion of five (5) days' vacation equal to the portion his or her regularly scheduled hours of work bear to full-time employment.

24.11 A lawyer who completes twenty-five (25) years of continuous service on or before the last day of the month in which the lawyer attains sixty-four (64) years of age is entitled, after the end of that month, to:

(a) five (5) days of pre-retirement leave with pay, if the lawyer is a full-time lawyer; or

(b) that portion of five (5) days pre-retirement leave with pay equal to the portion that the lawyer's regularly scheduled hours of work bear to full-time employment if the lawyer is a part-time lawyer.

24.12 When a lawyer leaves the Ontario Public Service prior to the completion of six (6) months of continuous service, he or she is entitled to vacation pay at the rate of four percent (4%) of his or her earnings during the period of his or her employment.

24.13 A lawyer who has completed six (6) or more months of continuous service is entitled, upon his or her request, to be paid in an amount computed at the rate of the lawyer's last regular salary, for any unused vacation standing to his or her credit at the date on which he or she qualifies for payments under the Long Term Income Protection Plan.

24.14 Where a lawyer ceases to be an employee, there shall be deducted from his or her accumulated vacation credits an amount in respect of the whole months remaining in the year after he or she ceases to be an employee computed at the rate set out in Article 24.1 in the case of a full-time lawyer and at the rate set out in Article 24.2 in the case of a part-time lawyer.

24.15 Vacation taken in excess of the vacation credits to which a lawyer is entitled on the date he or she ceases to be an employee shall be deducted from the amount of severance under Article 32 (Termination Payments) paid to him or her and from any salary to which he or she may be entitled.

ARTICLE 25 – VACATION ENTITLEMENTS FOR FIXED TERM LAWYERS

25.1 A fixed-term full-time lawyer is entitled to vacation credits at the rate of 1¼ days for each full month in which he or she is at work or is on vacation leave of absence or leave of absence with pay.

25.2 A fixed-term full-time lawyer who leaves the fixed-term service prior to the completion of six months service is entitled to vacation pay at the rate of 4 per cent of the earnings of the lawyer during the period of his or her employment.

25.3 A fixed-term full-time lawyer who has completed six or more months of continuous service in the public service shall be paid for any unused vacation standing to his or her credit at the date he or she ceases to be an employee.

25.4 A fixed-term full-time lawyer may take vacation leave of absence only to the limit of his or her earned vacation credits, may not take vacation leave of absence during the first six months of employment and his or her accumulated vacation credits shall be reduced by the vacation leave of absence taken.

25.5 A fixed-term lawyer who is not full-time is entitled to an additional amount equal to 4 percent of total earnings as vacation compensation.

ARTICLE 26 – COMPENSATION OPTION CREDIT FOR REGULAR LAWYERS

26.1 A lawyer is entitled to accumulate compensation option credits in each year for the portion of the year during which he or she is a lawyer at the rate of,

(a) 5/12 of one credit per month in the year, if the lawyer is a full-time lawyer, and

(b) that portion of 5/12 of one credit per month in the year that is equal to the portion that the lawyer's regularly scheduled hours of work bear to full employment, if the lawyer is a part-time lawyer.

26.2 The compensation option credits that a lawyer is entitled to accumulate in a year under Article 26.1 shall be credited to the lawyer on the 1st day of January in the year or on the day in the year when the lawyer first becomes a regular lawyer, whichever is later.

26.3 From the compensation option credits credited to a lawyer in a year in accordance with this Article, there shall be deducted, to a maximum of the credits credited to the lawyer in the year, credits at the rate set out in this Article, as the case requires, for,

(a) each whole month in the year throughout which the lawyer is on leave of absence without pay;

(b) each whole month in the year throughout which the lawyer receives benefits under the Long Term Income Protection Plan;

(c) each whole month in the year throughout which the lawyer receives benefits under an award made under the *Workplace Safety and Insurance Act, 1997*, if that month is after the first six months for which the lawyer received benefits under that award, and if the lawyer is not receiving payment for accumulated attendance credits or accumulated vacation credits in that month;

(d) each whole month in the year after the month in which the lawyer ceases to be a lawyer;

(e) each whole month in the year throughout which the lawyer is on leave of absence with pay under Article 32.6.3 or 32.6.6 and for the month in the year, if less than a whole month, in which the leave of absence with pay ends;

(f) any month wholly comprised of consecutive periods of less than a month for which credit would be deducted under clauses (a) to (e) if the periods were whole months.

26.4 With the approval of the Deputy Attorney General, a lawyer may take leave of absence with pay in respect of some or all of the lawyer's accumulated compensation option credits at the rate of one day of leave of absence with pay for each compensation option credit to which the lawyer is entitled, and the lawyer's accumulated compensation option credits shall be reduced by the leave of absence with pay taken.

26.5 If, after making any deduction required in Article 26.3 and 26.4, a lawyer's accumulated compensation option credits at the end of a year exceed twenty, the excess shall be deducted from the lawyer's accumulated compensation option credits before compensation option credits for the next year are credited to the lawyer.

26.6 Each day or part thereof by which a leave of absence with pay taken by a lawyer under Article 26.4 exceeds the lawyer's accumulated compensation option credits after making any deduction required by Article 26.3 or 26.2 shall be deducted from the regular lawyer's vacation credits, and the lawyer shall repay to the Crown the salary paid to him or her for any day or part thereof of the leave of absence with pay that cannot be so deducted.

26.7 Any amount to be repaid under Article 26.6 may be deducted from any payment the lawyer is entitled to receive from the Crown in respect of salary or termination of employment or otherwise.

26.8 A lawyer is not entitled to be paid for any accumulated compensation option credits to which the lawyer remains entitled when the lawyer ceases to be a lawyer or when the lawyer is on a leave of absence with pay under Article 32.6.3 or 32.6.6.

ARTICLE 27 – HOLIDAYS

27.1 A full-time regular or fixed-term lawyer is entitled to a holiday in each year on each of the following days:

New Year's Day	Civic Holiday
Family Day	Labour Day
Good Friday	Thanksgiving Day
Easter Monday	Remembrance Day
Victoria Day	Christmas Day
Canada Day	Boxing Day

Any special holiday proclaimed by the Governor General or the Lieutenant Governor.

In this Article "Civic holiday" means the first Monday in August.

27.2 A part-time regular lawyer shall be entitled to a holiday each year on each of the days shown in Article 27.1 which fall on a regularly scheduled working day.

27.3 Special holidays granted during vacation leave of absence shall be computed as part thereof, but no other holidays shall be computed therein

27.4 Where a regular or fixed-term lawyer is required to work on any holiday specified in Article 27.1, he or she is entitled to a compensating day as a holiday in lieu thereof.

27.5 When a holiday specified in Article 27.1 falls on a Saturday or Sunday, or when any two of them fall on a successive Saturday and Sunday, the regular working day or days next following is a holiday or are holidays, as the case may be, in lieu thereof, but when such next following regular working day is also a holiday the next regular working day thereafter is in lieu thereof a holiday.

27.6 Article 27.5 does not apply to New Year's Day, Canada Day, Remembrance Day, Christmas Day and Boxing Day in respect of a lawyer whose work schedule is subject to rotating work weeks that include scheduled weekend work on a regular or recurring basis.

27.7 A part-time fixed-term lawyer is entitled as holiday compensation to additional pay equal to four per cent of total earnings other than vacation compensation.

ARTICLE 28 – WITNESS DUTY LEAVE

28.1 Where a full-time or part-time regular lawyer or a full-time fixed term lawyer is absent by reason of a summons to attend as a witness, the lawyer may at his or her option,

(a) treat the absence as leave without pay and retain any fee he or she receives as a witness;

(b) deduct the period of absence from his or her vacation credits and retain any fee he or she receives as a witness; or

(c) treat the absence as leave with pay and pay to the Minister of Finance any fee he or she has received as a witness.

28.2 Where a part-time fixed term lawyer is absent by reason of a summons to attend as a witness, the lawyer may at his or her option,

(a) treat the absence as leave without pay and retain any fee he or she receives as a witness;

(b) treat the absence as leave with pay and pay to the Minister of Finance any fee he or she has received as a witness.

ARTICLE 29 – DISCRETIONARY LEAVE FOR REGULAR LAWYERS

29.1 The Deputy Attorney General may grant a lawyer leave of absence with pay for not more than three days in a year upon special or compassionate grounds.

29.2 Leave of absence without pay and without accumulation of credits may be granted to a lawyer by the Deputy Attorney General

29.3 Leave of absence with pay may be granted for special or compassionate purposes to a lawyer for a period of,

(a) not more than six months with the approval of his or her Deputy Attorney General; and

(b) over six months upon the certificate of the Public Service Commission.

29.4 No lawyer shall absent himself or herself from duty on a leave of absence provided for in this Article unless he or she has previously obtained the authorization required by this Article.

29.5 An application for leave of absence under this Article shall be in writing and shall set out the reasons for the leave of absence.

29.6.1 Where a “leave of absence” is a leave of absence for the purpose of undertaking employment under the auspices of the Government of Canada or other public agency or in the private sector the following provisions apply:

(a) The Deputy Attorney General may grant to a lawyer leave of absence with pay for a period of not more than two years and, if the leave was granted for less than two years, may extend it from time to time, provided the total period of the absence is not more than two years.

(b) The Deputy Attorney General may grant to a lawyer leave of absence with pay for a period of not more than five years and, if the leave was granted for less than five years, the Deputy Attorney General, with the approval of the Secretary of Management Board of Cabinet, may extend it from time to time, provided the total period of the absence is not more than five years.

(c) Where a leave of absence was originally granted under Article 29.6.2, the Deputy Attorney General may extend it from time to time provided the total period of absence does not exceed five years.

(d) Where leave of absence with pay is granted,

the lawyer is entitled to the same sick leave benefits and vacation credits to which the lawyer would be entitled if the lawyer had not taken the leave of absence;

the lawyer shall submit regular personal attendance reports; and

the employing agency shall reimburse the Minister of Finance,

(i) for the salary of the lawyer, and

(ii) for contributions made by the Government of Ontario on behalf of the lawyer in respect of the Public Service Pension Plan, the Canada Pension Plan, the *Employment Insurance Act* (Canada) and group insurance plans.

(e) The Deputy Attorney General may grant to a lawyer leave of absence without pay and without accumulation of credits for a period of not more than two years and, if the leave was granted for less than two years, may extend it from time to time, provided the total period of the absence is not more than two years.

(f) The Deputy Attorney General may grant to a lawyer leave of absence without pay and without accumulation of credits for a period of not more than five years and, if the original leave was for less than five years, the Deputy Attorney General, with the approval of the Secretary of Management Board of Cabinet, may extend it from time to time, provided the total period of the absence is not more than five years.

(g) Where a leave of absence was originally granted under Article 29.6.1 (e), the Deputy Attorney General may extend the leave of absence from time to time, provided the total period of absence does not exceed five years.

(h) Where leave of absence without pay and without accumulation of credits is granted, the lawyer, at the lawyer's option, may continue to participate in the group insurance plans in which the lawyer would have participated if the lawyer had not taken the leave of absence if the lawyer pays the full premiums for the coverage under the plans

ARTICLE 30 – CANADIAN FORCES TRAINING LEAVE FOR REGULAR EMPLOYEES

30.1 The Deputy Attorney General may grant leave of absence for not more than one week with pay and not more than one week without pay in a year to a lawyer in his or her ministry for the purpose of Canadian Forces Reserve training.

ARTICLE 31 – FIXED TERM LAWYER PERCENT IN LIEU OF BENEFITS

31.1 (a) fixed term CC1 lawyers initially hired or offered employment prior to April 5, 2006 will receive six percent (6%) in lieu of benefits and entitlements.

(b) fixed term CC3 lawyers initially hired or offered employment prior to July 25, 2002 will continue to receive the same percentage in lieu of benefits that they were receiving prior to April 5, 2006. Fixed term CC3 lawyers initially hired or offered employment between July 25, 2002 and April 5, 2006 will continue to receive the same percentage in lieu of benefits that they were receiving prior to April 5, 2006.

31.2 Fixed term CC1 or CC3 lawyers initially hired or offered employment after April 5, 2006 shall receive four percent (4%) of regular salary in lieu of those benefits and entitlements available to regular lawyers, but not available to fixed term lawyers.

31.3 If a fixed term lawyer becomes a regular lawyer, salary in lieu of benefits and entitlements will cease

ARTICLE 32 – TERMINATION PAYMENTS FOR REGULAR EMPLOYEES

32.1 A full-time employee who is appointed on or after the 1st day of January, 1970 is entitled to severance pay for each year of continuous service up to and including the 31st day of December, 1975,

(a) where the employee has completed one year of continuous service and ceases to be an employee because of,

i. death,

ii. total and permanent disability that entitles him or her to a pension or payment under the Public Service Pension Plan, or

iii. dismissal from employment under section 39 of the *Public Service of Ontario Act*,

in an amount equal to one week of salary for each year of service; or

(b) where the employee has completed five years of continuous service and ceases to be an employee for any reason other than,

i. dismissal for cause under section 34 of the *Public Service of Ontario Act*, or

ii. abandonment of position under section 42 of the *Public Service of Ontario Act*,

in an amount equal to one week of salary for each year of service.

32.2 Despite the definition of “continuous service” in Article 16.1, for the purposes of Articles 32.3 to 32.6, a leave of absence without pay granted to an employee under section 14 or 15 of the Key Directive on HR Administration issued by the Public Service Commission or an absence for a period not exceeding two years in respect of which a direction has been given under section 17 of the Key Directive on HR Administration issued by the Public Service Commission shall be deemed not to interrupt a period of continuous service ending immediately before and commencing immediately after the absence, and shall not be included as part of the continuous service of the employee.

32.3.1 An employee

(a) who has completed a minimum of one year of continuous service and who ceases to be an employee because of,

i. death,

ii. total and permanent disability that entitles him or her to a pension or payment under the Public Service Pension Plan, or

iii. dismissal from employment under section 39 of the *Public Service of Ontario Act*; or

(b) who has completed a minimum of five years of continuous service and who ceases to be an employee for any reason other than,

i. dismissal for cause under section 34 of the *Public Service of Ontario Act*, or

ii. abandonment of position under section 42 of the *Public Service of Ontario Act*,

is entitled to severance pay for continuous service from and after the 1st day of January, 1976.

32.3.2 The severance pay in Article 32.3.1 is equal to

(a) one week of salary for each year of continuous service as a full-time employee from and after that date; and

(b) equal to that portion of a week's salary that is equal to the portion the employee's regularly scheduled hours of work bear to full employment, for each year of continuous service as a part-time employee.

32.3.3 Articles 32.3.1 and 32.3.2 do not apply to an employee in respect of service on or after January 1, 2005:

(a) who is in a class of position of Crown Counsel 1, 3 or 4 on April 5, 2006, and who ceases to be employed in the part of the public service consisting of persons appointed under section 32 of the Public Service of Ontario Act because he or she has resigned.

(b) who is in a class of position of Crown Counsel 1, 3 or 4 on April 5, 2006, and who ceases to be employed in the part of the public service composed of lawyers appointed under section 32 of the Public Service of Ontario Act on or after January 1, 2007 because he or she has retired, but only if he or she is entitled to a pension, other than a disability pension, under the Public Service Pension Plan immediately after retiring.

(c) who is in a class of position of Crown Counsel 1, 3 or 4, who first becomes employed in the part of the public service consisting of persons appointed under section 32 of the *Public Service of Ontario Act* on or after April 5, 2006, and who ceases to be employed in the part of the public service consisting of persons appointed under section 32 of the *Public Service of Ontario Act*,

(i) because he or she has resigned, or

(ii) because he or she has retired, but only if he or she is entitled to a pension, other than a disability pension, under the Public Service Pension Plan immediately after retiring.

32.3.4 For the purpose of clause 32.3.2, "week's salary" means the salary the employee would receive if the employee were in full employment.

32.3.5 Despite the definition of "continuous service" in Article 16.1 for the purpose of this section, an employee's period of continuous service under the *Legislative Assembly Act* immediately prior to the employee's appointment as a public servant under section 32 of the *Public Service of Ontario Act* shall be taken into account in computing the minimum period of continuous service mentioned in Article 32.3.1 (b) and in computing the severance pay mentioned in Article 32.3.1, but the severance pay to which the employee is entitled under that subsection shall be reduced by an amount equal to the amount, if any, of the severance pay received by the employee in respect of the termination of his or her service under the *Legislative Assembly Act* for any period of such service that is also taken into account in computing is or her severance pay under Article 32.3.1.

32.3.6 In Article 32.3.5, "service under the *Legislative Assembly Act*" includes continuous service for at least one year as an employee of the caucus of a political party or of a member of the Assembly where the

regular salary is paid out of money appropriated for the use of the caucus or member under the Legislative Assembly Act.

32.4.1 The following employees who have completed less than five years of continuous service on or before April 5, 2006 are entitled to severance pay under this section for their continuous service on or before December 31, 2004:

(a) An employee in a class of position of Crown Counsel 1, 3 or 4 who ceases to be an employee because:

i. because he or she has resigned, or

ii. because he or she has retired, but only if he or she is entitled to a pension, other than a disability pension, under the Public Service Pension Plan immediately after retiring.

(b) An employee who on April 5, 2006 was a fixed term employee in a class of position of Crown Counsel 1, 3 or 4 and who became a regular employee on or before December 31, 2006 and who ceases to be employed in the part of the public service composed of employees appointed under section 32 of the *Public Service of Ontario Act,*

i. because he or she has resigned, or

ii. because he or she has retired, but only if he or she is entitled to a pension, other than a disability pension, under the Public Service Pension Plan immediately after retiring.

32.4.2 Articles 32.3.4, 32.3.5 and 32.3.6 apply, with necessary modifications, with respect to severance pay to which an employee is entitled under this Article.

32.5.1 The total of the amount paid to an employee in respect of his or her severance pay must not exceed one-half of his or her annual salary,

(a) on the date when he or she ceases to be an employee; or

(b) in the case of an employee receiving benefits under the Long Term Income Protection Plan, on the date when the employee received his or her last salary before receiving benefits under the Plan.

32.5.2 The calculation of the severance pay in Article 32.5.1 is based on his or her salary,

(a) on the date when he or she ceases to be an employee; or

(b) in the case of an employee receiving benefits under the Long Term Income Protection Plan, on the date when the employee received his or her last salary before receiving benefits under the Plan.

32.5.3 Where a computation for severance pay involves part of a year, the computation in respect of that part shall be made on a monthly basis, and,

(a) any part of a month that is less than fifteen days shall be disregarded; and

(b) any part of a month that is fifteen or more days shall be deemed to be a month.

32.5.4 For the purposes of Article 32.5 the salary of a part-time employee shall be determined as if he or she were in full employment.

32.6.1 An employee may receive only one termination payment for a given period of continuous service.

32.6.2 An employee whose total period of service is interrupted by a hiatus in service may, at the employee's option, repay any termination payment received as a result of that absence to the Minister of Finance, and thereby restore termination pay entitlements for the period of continuous service for which the payment had been made.

32.6.3 An employee who intends to terminate his or her employment and who would, upon the termination of employment, be entitled to a termination payment under Article 32.1 and 32.3 may elect, in lieu of the payment, to take a leave of absence with pay of not more than the lesser of,

(a) the length of time determined under those sections for computing the termination payment to which the employee would be entitled; and

(b) the length of time between the commencement of the leave of absence with pay and the end of the month in which the employee will attain sixty-five years of age.

32.6.4 The employment of an employee who has elected to take a leave of absence with pay under Article 32.6.3 continues until the end of the leave of absence.

32.6.5 Subject to Article 32.6.6 an employee's entitlement to a termination payment under Article 32.1 and 32.3 shall be reduced to reflect the time taken by the employee as a leave of absence with pay under Article 32.6.3.

32.6.6 Where a leave of absence with pay under Articles 29.1, 29.2, 29.3, 29.4 and 29.5 has been granted to an employee,

(a) in consequence of the employee's intended termination of employment and election to take a leave of absence with pay under Article 32.6.3; and

(b) for a period of time equal to the leave of absence with pay taken by the employee under Article 32.6.3.

The employee's entitlement to a termination payment under Article 32.1 or 32.3 shall be reduced to reflect one-half of the time taken by the employee under Article 32.6.3 as a leave of absence with pay, and one-half of each day of the total number of days of leave granted under Articles 29.1, 29.2, 29.3, 29.4 and 29.5 and of leave taken under Article 32.6.3 shall be allocated to each of the leaves of absence.

32.6.7 Articles 32.6.3 to 32.6.6 apply despite Articles 32.1 and 32.3.

32.7 Despite Article 32.5.1, where in the opinion of the Public Service Commission special circumstances exist, a payment may be made by way of termination allowance to a lawyer on the termination of the employment of the employee.

SECTION III — JOB SECURITY

ARTICLE 33 – DEFINITIONS

In this Section,

"Seniority" means continuous OPS regular or fixed term service, from the date of hire, except where the break in service is in excess of 13 weeks (including service as an office holder or as an ALOC fee

for service lawyer but reduced for any service which the fee for service lawyer had as an independent contractor engaged on a specific project. However, continuous service is not broken by and continues to accumulate during paid or unpaid leaves. Lawyers working less than half-time shall have their seniority pro-rated with the exception of lawyers employed at the time of ratification of this agreement, who shall be treated as if they were full-time employees.

ALOC: "Office" means a work unit, including an established and existing part of a Branch other than a Branch in the Criminal Law Division, to which the lawyer is assigned and for the purposes of this section, where two or more offices have been or are to be merged, those offices are to be treated as a single office.

OCAA: "Office" means a location (including any satellite offices of that location) which is normally led by a Crown Attorney or Director in the Criminal Law Division. For greater certainty, a region is not an office.

"Lay-off" means the reduction of the workforce because of shortage of work, economic or fiscal conditions, or any other reasons unrelated to discipline, and includes the termination or failure to renew the contract of a fixed term lawyer.

"ALOC fee-for-service lawyer" means a fee-for-service lawyer outside of the Criminal Law Division who is a dependent contractor not engaged on a specific project.

ARTICLE 34 – LAY-OFFS

34.1 Order of Lay-off

34.1.1 Order of Lay-off — OCAA

In the event of lay-off of lawyers in an office, the following rules apply in the Criminal Law Division:

(a) fixed term lawyers with two (2) or less years of seniority shall be laid off first;

(b) fixed term lawyers with more than two years seniority shall be laid off after the lay-off in (a), in reverse order of seniority;

(c) any remaining lawyers shall be laid off in the reverse order of seniority;

(d) in applying (a), (b), or (c) where the least senior lawyer is performing legal work of a unique and specialized nature that cannot be performed by another lawyer in that office, the next lawyer on the seniority list in that office shall be laid off.

34.1.2 Order of Lay-off — ALOC

In the event of lay-off of lawyers in an office, the following rules apply in an office other than an office in the Criminal Law Division:

(a) ALOC fee-for-service lawyers with two (2) years or less of seniority shall be laid off first, followed by fixed term lawyers with two (2) or less years of seniority;

(b) ALOC fee-for-service lawyers with more than two (2) years of seniority shall be laid off after the lay-off in (a), in reverse order of seniority;

(c) fixed term lawyers with more than two (2) years of seniority shall be laid off after the lay-off in (a) and (b), in reverse order of seniority;

(d) any remaining lawyers shall be laid off in the reverse order of seniority;

(e) in applying (a), (b), (c) and (d) where the least senior lawyer is performing legal work of a unique and specialized nature that cannot be performed by another lawyer in that office, the next lawyer on the seniority list in that office shall be laid off.

34.1.3 With respect to Article 34.1 (order of lay-off), it is agreed that for the sole purpose of ascertaining whether a fixed term lawyer has reached the two year seniority threshold used to determine order of layoff, only time that the lawyer has spent employed in his or her professional capacity, other than time as an articling student, will be included in the computation of the two years. For clarity, this means that articling time will not count for the purpose of ascertaining whether a fixed term lawyer has reached the two year seniority threshold used to determine order of layoff under Article 34.1

However, it is understood that fixed term lawyers who have seniority as of April 5, 2006 continue to accrue seniority for the purposes of Article 34.1 in respect of articling time in the office in which the lawyer receives a notice of layoff, but not in respect of articling time in a different office.

34.2 Notice Period

The Employer shall give at least nine (9) months' notice of the lay-off to any regular lawyer or any fixed term lawyer with five (5) or more years of seniority or any ALOC fee-for-service lawyers with five or more years of seniority, with a copy of the notice of lay-off to the relevant Association.

34.3 Exception to Notice Period

In the case of a lay-off of a fixed term lawyer with less than five (5) years seniority and an ALOC fee-for-service lawyer with less than five (5) years seniority and any fee for service lawyer represented by OCAA, the lawyer shall receive notice in accordance with the *Employment Standards Act*, or the applicable provisions of his or her contract, whichever is greater, with a copy of the notice of lay-off to the relevant Association.

34.4 Contents of Notice

The lay-off notice shall be in writing and shall include the following:

(a) a statement of the reason for the lay-off;

(b) a statement of each lawyer's entitlements under this section (Job Security);

(c) the date at which the lay-off is to be effective.

34.5 Pay-in-lieu Option

A regular lawyer, or fixed term lawyer with five (5) or more years of seniority, who receives notice of lay-off under Article 34.2 (Notice Period) may within three (3) weeks of receiving notice of lay-off, choose to take nine (9) months of pay-in-lieu of remaining notice. A regular lawyer who receives a notice of lay-off prior to June 30, 2013 is also entitled to receive, as part of the pay-in-lieu option, severance payment of one (1) week per year of service which is in addition to severance under Article 32 (Termination Payments) of this agreement. A lawyer who chooses the pay-in-lieu option is deemed to have waived any rights under Article 11 (Job Trading Policy) and Articles 35 (Redeployment), 36 (Bumping Rights) and 37 (Maintenance of Salary and Status). Where a lawyer chooses the pay-in-lieu

option, and advises the Employer of preferences for payment to ensure tax-effective treatment, the Employer will comply, subject to requirements at law.

34.6 Mid-notice Pay-in-lieu Option

If a regular lawyer, or fixed term lawyer with five (5) or more years of seniority, does not choose the pay-in-lieu option within three (3) weeks of receipt of his or her notice of lay off but subsequently chooses to leave before the end of his or her nine months' notice period, he or she may take the remaining period of notice in pay-in-lieu of the remaining notice. A regular lawyer is also entitled to severance under Article 32 (Termination Payments) of this agreement. If a regular lawyer chooses to exercise this option within three (3) months of receiving notice of lay-off and the notice of lay-off was received prior to June 30, 2013, the lawyer will also be entitled to receive, as part of the mid-notice pay-in-lieu option, the enhanced severance payment of one (1) week per year of service. A lawyer who chooses to take this payment is deemed to have waived any rights under Article 11 (Job Trading Policy) and Articles 35 (Redeployment), 36 (Bumping Rights) and 37 (Maintenance of Salary and Status). Where a lawyer chooses this payment and advises the Employer of preferences for payment to ensure tax-effective treatment, the Employer will comply, subject to requirements at law.

34.7 Severance

Where a regular lawyer has received a notice of lay-off and does not take the pay-in-lieu option or the mid-notice pay-in-lieu option, the lawyer continues to be entitled, upon leaving, to one (1) week per year of service in severance under Article 32 (Termination Payments) of this agreement.

34.8 Voluntary Exit

Where less than the full complement of regular lawyers in an office receive notice of lay-off under Article 34.2 (Notice Period) and some or all of those lawyers do not wish to take the pay-in-lieu option, the other regular lawyers in the office will be offered the opportunity to volunteer for the pay-in-lieu option under Article 34.5 (Pay-in-Lieu Option). Approval of requests to volunteer for the pay-in-lieu option will be in the discretion of the work unit manager, acting reasonably. For the purpose of greater certainty, this does not mean that lawyers can volunteer for pension related provisions, such as the provisions of Articles 34.9 (Pension) and 34.10 (Pension Bridging).

34.9 Pension

Regular lawyers who receive a notice of lay-off on or before June 30, 2009 and choose the pay-in-lieu option or the mid-term notice option may continue to accrue pension credits for the period represented by their notice period and any severance entitlement under Article 32 (Termination Payments) of this agreement and enhanced severance payment, subject to making employee contributions to the pension plan. The June 30, 2009 date may be extended by mutual agreement of the Associations and the Employer, or in accordance with the terms of the pension plan.

34.10 Pension Bridging

34.10.1 A regular lawyer who has received a notice of lay-off on or before March 31, 2006 may choose the pension bridging option, which will be subject to the following rules:

(a) For any specific lawyer the maximum amount of leave that can be taken for the pension bridging option shall be calculated as follows:

(i) determine the total amount of time from the date on which the lawyer receives the notice of lay-off that is needed for the lawyer to reach the next earliest of his or her actuarially unreduced pension options and, from that amount, subtract:

- the lawyer's nine-month notice period; and

- the number of weeks of paid leave of absence that the lawyer's severance under Article 32 (Termination Payments) can be converted into under the existing provisions of the collective agreement.

(ii) the remainder, to the extent that it is no more than two (2) years, shall be available as a leave of absence without pay but with continued accrual of pension credits. During the leave without pay, employees may choose to purchase all benefit coverages with the exception of the Short Term Sickness Plan and Long Term Income Protection.

(b) The leaves of absence shall commence before the conclusion of the lawyer's nine (9) month notice period and shall be taken as follows:

(i) the unpaid leave of absence, the maximum length of which is determined in accordance with clause 34.10.1(a)(ii) above, shall be taken first. During this leave of absence, in lieu of the employee pension contributions being made directly by the lawyer, the lawyer's right to enhanced severance under this agreement, if any, shall be reduced by an amount equivalent to the lawyer's pension contribution, which contribution the Employer shall pay into the pension plan and the Employer contributions shall also be paid into the pension plan by the Employer;

(ii) the leave of absence with pay equal to the lawyer's number of weeks of severance under Article 32 (Termination Payments) of this agreement shall be taken after the leave without pay in clause 34.10.1(a)(ii). During this leave of absence the employee pension contributions shall be deducted from the lawyer's biweekly payments;

(iii) at the conclusion of the leave of absence with pay the lawyer shall return to complete whatever portion of the nine-month notice period remains. At the end of this period the lawyer:

- shall retire;

- shall receive the enhanced severance, reduced by an amount equivalent to his or her pension contributions for the unpaid leave of absence; and

- shall be entitled to exercise his or her right to an actuarially unreduced pension.

34.10.2 The March 31, 2006 date may be extended by mutual agreement of the Associations and the Employer, or in accordance with the terms of the pension plan.

34.10.3 The arrangement is contingent on Revenue Canada approval.

34.11 Alternate Working Arrangement Option

Upon receipt of the lay-off notice by any lawyer in an office, the lawyers in the office shall be given the opportunity, with the assistance of the relevant Association, to propose, within one (1) week of receipt of notice, alternate work arrangements, voluntary unpaid leaves of absence, or any other measures, for the purpose of avoiding the lay-offs. The measures proposed must address the nature of the reduction (e.g. temporary or permanent). Upon the request of ALOC or OCAA, the Employer shall meet with the relevant Association and lawyers within ten (10) days of the request to discuss the proposed arrangements or measures, and the Employer shall reasonably consider the proposed arrangements or measures. Where such arrangements are agreed to, any person subsequently

exercising rights under Article 11 (Job Trading Policy) and Articles 35 (Redeployment), 36 (Bumping Rights) and 37 (Maintenance of Salary and Status), shall be obliged to comply with such arrangements as a condition of exercising rights under Articles 11, 35 or 36 of this Collective Agreement, with the bumping salary maintenance rules under Article 37 applied on a pro-rated basis.

34.12 Provision of Information

The Employer shall supply each Association with such information as is reasonably required so that the parties and individual lawyers can make fully informed decisions as to the exercise of their rights under this Section, including each lawyer's seniority/service date, and will use its best efforts to make available to each Association on at least a quarterly basis, and as needed for lay-off purposes, a seniority list sorted by such categories, including office, division/region and salary, as will facilitate the bumping process.

34.13 Agency Transfers

Where a lawyer receives notice of lay-off because the Employer is transferring an office, branch or other work unit, or part thereof, to a provincially established agency, board, commission, corporation or organization or to the broader public sector or the private sector:

(a) A lawyer who accepts an offer with the new Employer will not be entitled to enhanced severance, where the new Employer agrees to recognize the lawyer's OPS continuous service for purposes of determining reasonable notice or severance entitlements with the new Employer. Such a lawyer also will waive entitlement to bumping, recall and redeployment rights under the Collective Agreement. Otherwise, the provisions of the Collective Agreement apply. However, where a lawyer accepts an offer with the new Employer within nine (9) months of the transfer, and previously received pay-in-lieu or mid pay-in-lieu after receiving notice of lay-off under 34.2 (Notice Period), the lawyer is obligated to repay any such pay-in-lieu or mid pay-in-lieu. The amount owing will be a debt due and owing to the Crown;

(b) A lawyer who declines a job offer with the new Employer and then elects to receive payment of pay-in-lieu or mid pay-in-lieu, and/or enhanced severance under the Collective Agreement, but who then accepts a job with the new Employer within nine (9) months of the offer, is obligated to repay any such pay-in-lieu, mid pay-in-lieu and/or enhanced severance. The amount owing will be a debt due and owing to the Crown. Otherwise, the provisions of the Collective Agreement apply; and

(c) In addition to the obligation under (b), a lawyer who declines a job offer with the new Employer, where the offer is equal to at least ninety percent (90%) of the sum of the current salary and the Employer's contribution to pension and insured benefits, waives entitlement to exercise his or her rights under Article 36 (Bumping Rights) of the Collective Agreement. Otherwise, the provisions of the Collective Agreement apply.

ARTICLE 35 – REDEPLOYMENT

35.1 Maintenance of Redeployment List

The Employer shall maintain a redeployment list on which it shall immediately place the name of each regular lawyer, each ALOC fee-for-service lawyer with more than two (2) years seniority, and each fixed term lawyer who have been given a lay-off notice or notice of termination in accordance with the requirements of this Section. If a lawyer successfully exercises bumping rights under Article 36 (Bumping Rights) or obtains another position through Article 10 (Filling Vacancies), the lawyer shall be removed from the redeployment list.

35.2 Contents of Redeployment List

The Redeployment List shall be a list for lawyers only and shall contain the following:

(a) the name of each regular lawyer, and each fixed term lawyer, or ALOC fee-for-service lawyer with more than three (3) years of seniority, who has not yet been laid off and is the subject of a lay-off notice; who will continue to be on the list for an additional period of eighteen (18) months beginning from date of termination;

(b) the name of each fixed term lawyer or ALOC fee-for-service lawyer with at least two (2) but less than three (3) years of seniority, who will continue to be on the list for a period of twelve (12) months beginning from the lawyer's date of termination;

(c) the name of each fixed term lawyer with less than two (2) years of seniority for a period of six (6) months beginning from the lawyer's date of termination;

(d) the name of the lawyer's office and its location;

(e) the date at which the termination is to occur; and

(f) the lawyer's seniority date.

35.3 Redeployment Rights

Lawyers on the redeployment list have placement rights in the filling of vacancies as is set out in Article 10 (Filling Vacancies).

35.3.1 For clarity, lawyers on the Redeployment List are eligible to apply to competitions at Step 1.

35.3.2 If a lawyer is the successful candidate in a competition under Article 10, the lawyer's seniority shall be deemed to be his or her seniority at the time of lay-off.

35.4 Deferral of Redeployment

Time on the redeployment list may be deferred in special circumstances, where requested by the affected lawyer in writing and with agreement of the Employer and the respective Association, and this agreement shall not be unreasonably withheld.

35.5 Confidentiality Respecting Lists

Except for human resource and redeployment purposes, the Employer shall keep confidential the identity of lawyers whose names have been placed on the redeployment list, except that the Employer shall, each month, if there has been a change from the previous month, provide a copy of the list to each Association indicating the period for which each lawyer has been on the list.

ARTICLE 36 – BUMPING RIGHTS

36.1 Definitions

In this Article,

"Classification" means a lawyer's level (i.e. "CC") in the Crown Counsel Series for lawyers represented by ALOC or OCAA.

"Division" means the divisional structure of the Ministry of the Attorney General (currently the (1) Civil Law Division , (2) Victim and Vulnerable Persons Division, (3) Court Services Division, (4) Agency and Tribunal Relations Division), (5) Policy Division), (6) such other separate organizational structures within the Ministry of the Attorney General that are not structures within a particular division (currently restricted to the office of the Legislative Counsel), (7) a Division collectively consisting of Commission Public Bodies prescribed under the *Public Service of Ontario Act,* 2006 which are not included in the Agency and Tribunal Relations Division or the Policy Division; but does not include the Criminal Law Division.

"Region" means the geographic regions used by the Ministry of the Attorney General in the Criminal Law Division.

36.2 Holder of Rights

For the purposes of this Article, Article 11 (Job Trading Policy) and Articles 35 (Redeployment), 36 (Bumping Rights) and 37 (Maintenance of Salary and Status), only regular lawyers have bumping, redeployment and recall rights. Fixed term lawyers and ALOC fee-for-service lawyers have such redeployment rights as are set out under Article 35.

36.3 Right to Bump

Where a lawyer is in receipt of a lay-off notice, and if the lawyer has not been redeployed in accordance with Article 35 (Redeployment) by the end of the fifth (5^{th}) month from the receipt of the notice of layoff, he or she may, within three (3) weeks, give notice of the office into which the lawyer seeks to exercise bumping rights under this Article.

36.4 No Bumping Across Associations

There will be no bumping between the OCAA and ALOC bargaining units.

36.5 Order of Bumping — ALOC

An ALOC lawyer will be entitled to bump on the following basis:

(a) initially, the lawyer will be entitled to bump the least senior lawyer in his or her classification (or if the lawyer chooses, at a lower classification), whose work he or she has the skills, competence and ability to perform, in any office in his or her division;

(b) in addition, if the lawyer is unable to bump a lawyer at the same classification within his or her division, the lawyer will be entitled to bump the least senior lawyer at his or her classification, whose work he or she has the skills, competence and ability to perform, in any office in any of the other divisions;

(c) however, if the lawyer is unable to bump a lawyer at the same or lower classification in his or her division, the lawyer will be entitled to bump the least senior lawyer at the same classification (or if the lawyer chooses, at a lower classification) whose work he or she has the skills, competence and ability to perform in any office in any division.

36.6 Order of Bumping — OCAA

An OCAA lawyer will be entitled to bump on the following basis:

(a) initially, the lawyer will be entitled to bump the least senior lawyer in his or her classification (or if the lawyer chooses, at a lower classification), whose work he or she has the skills, competence and ability to perform, in any office in his or her region;

(b) in addition, if the lawyer is unable to bump a lawyer at the same classification in his or her region, the lawyer will be entitled to bump the least senior lawyer at the same classification, whose work he or she has the skills, competence and ability to perform, in any office in any of the other regions;

(c) however, if the lawyer is unable to bump a lawyer at the same or lower classification within his or her region, the lawyer will be entitled to bump the least senior lawyer at the same (or if the lawyer chooses, a lower classification), whose work he or she has the skills, competence and ability to perform in any of the other regions.

36.7 Timing of Bump

Any bump will be carried out within a reasonable period of time following the identification of the lawyer being bumped, subject to any other mutually agreeable arrangements. It is agreed that the expiry of the notice period under Article 34 (Lay-offs) will not result in the lay-off of a lawyer if that lawyer has successfully bumped another lawyer, and is waiting for the bump to be carried out.

36.8 Notice to Lawyer to be Replaced

A lawyer who is bumped pursuant to the provisions of this Article shall immediately be given notice of lay-off, and is entitled to exercise the rights of a lawyer under this Section who is given notice of lay-off including the bumping provisions. The lawyer bumped by the first lawyer who is bumped will also be entitled to exercise the rights of a lawyer under this Section who is given notice of lay-off including the bumping provisions. However, should that lawyer exercise bumping rights, the lawyer he or she subsequently bumps will have all rights under Article 34 (Lay Offs) and Article 35 (Redeployment) but not bumping rights under Article 36.

36.9 CC1 to CC3 Bumping

For the purpose of the application of Articles 35.5 and 35.6, a lawyer in the CC1 classification shall be permitted to bump a less senior lawyer in the CC3 classification and in such circumstances, the CC1 and CC3 classifications shall be deemed to be one classification.

36.10 Bumping Rules

A lawyer must have greater seniority than the lawyer being bumped in order to exercise bumping rights, and if more than one lawyer is entitled to bump the same lawyer, the lawyer with greater seniority shall prevail.

36.11 No Relocation Expenses

The Employer will not pay relocation expenses as a result of the exercise of the right to bump under this Article.

36.12 Clarification of Bumping Qualifications

For greater certainty, the term "skills, competence and ability to perform the work" as used in this Section means without training but with a brief period of familiarization, not exceeding four (4) weeks.

Further, it is acknowledged that relevant experience is a relevant criterion in assessing whether a lawyer has the skills, competence and ability to perform the work.

ARTICLE 37 – MAINTENANCE OF SALARY AND STATUS: BUMPING, AND REDEPLOYMENT

37.1 Maintenance of Salary Level: Bumping

37.1.1 Where a regular lawyer bumps under Article 36 (Bumping Rights):

(a) into the same classification, then if the salary of the lawyer being bumped is more than or less than, but within $10,000 of the bumping lawyer's salary, the bumping lawyer shall maintain his or her salary. However, if the salary of the lawyer being bumped is more than $10,000 lower than the bumping lawyer's salary, the bumping lawyer shall assume a salary equal to the salary of the lawyer being bumped plus $10,000. In either case, the bumping lawyer shall maintain his or her classification and shall continue to be entitled to increments, merit/pay for performance increases and promotion.

(b) into a lower classification, other than the CC1 classification, then if the salary of the lawyer being bumped is more than or less than but within $10,000 of the bumping lawyer's salary, the bumping lawyer shall assume the maximum salary of the lower classification or his or her own salary, whichever is less. However, if the salary of the lawyer being bumped is more than $10,000 lower than the bumping lawyer's salary, the bumping lawyer shall assume a salary equal to the salary of the lawyer being bumped plus $10,000. In either case, the lawyer shall assume the lower classification and continue to be entitled to increments, merit/pay for performance increases and promotion.

(c) into the CC1 classification from a higher classification, the bumping lawyer's salary shall be the greater of the floor of the CC3 classification or $10,000 more than the salary of the lawyer being bumped but it is agreed that the bumping lawyer will not assume a salary greater than his or her salary at the time of the bump. In addition, the bumping lawyer shall be deemed to be in the CC3 classification and shall continue to be entitled to increments, merit/pay for performance increases and promotion.

(d) in the case of a lawyer moving from CC1 to CC3, the lawyer shall retain his or her classification and salary and shall continue to be entitled to salary increments and merits but not above the maximum of the CC1 classification unless the lawyer is formally advanced to the CC3 classification.

37.2 Maintenance of Salary Level: Redeployment

Where a lawyer fills a vacancy through redeployment under Article 35 (Redeployment), the lawyer shall maintain his or her salary and classification.

37.3 Status Not Altered

In exercising bumping and redeployment rights, the parties agree that a lawyer's status (i.e. regular, fixed term or fee-for-service) will not be altered.

ARTICLE 38 –TREATMENT OF SECONDED LAWYERS/LAWYERS ON LEAVE

38.1 For the purposes of this Section (Job Security), a lawyer who is on leave of absence, or seconded from his or her home position, will be treated as if the lawyer was working in his or her home position. A lawyer taking leave of absence or a secondment, other than under Article 34.10 (Pension Bridging), who is laid off may request the deferral of the time for exercising his or her rights under these

redeployment and job security provisions, and the Employer agrees that it will not unreasonably deny the request.

ARTICLE 39 – ALOC FEE-FOR-SERVICE LAWYERS

39.1 Resolution of Status

The Employer and ALOC agree to meet and attempt to resolve the status of all existing fee-for-service lawyers represented by ALOC, on an expeditious basis. The parties recognize that there may be fee-for-service lawyers, and agree that the Employer will request each Legal Director to identify any fee-for-service lawyers, and if there are any such lawyers, 39.2 of this Collective Agreement will apply and Article 39.3 of this Collective Agreement will apply to lawyers with more than two (2) years seniority.

39.2 Alteration of Status

Where the parties agree that a fee-for-service lawyer is a dependent contractor not engaged in a specific project in an office, the lawyer's status will be altered to that of fixed term lawyer.

39.3 Dispute Resolution

If the parties cannot resolve the matter, either party can request the assistance of Martin Teplitsky, who shall determine the status of the lawyers in question. If Mr. Teplitsky determines that a fee-for-service lawyer is a dependent contractor not engaged on a specific project, the lawyer's status will be altered to that of fixed term lawyer, and the determination will be final and binding.

39.4 Limitation

The parties agree that the procedure set out in Articles 39.2 and 39.3 will apply only once a lawyer has more than two (2) years of seniority.

39.5 Impact on Seniority

Where a lawyer's status is altered, the lawyer's seniority shall date from his or her start date with the Employer, whether as fee-for-service lawyer or otherwise, subject to the thirteen (13) week break in service rule set out in the definition of seniority in Article 33 (Definitions), reduced for any service which the lawyer had as an independent contractor.

ARTICLE 40 – OCAA FEE-FOR-SERVICE LAWYERS

40.1 Discussion of Fee-for-Service

Upon the request of the OCAA, the Employer agrees to meet and discuss the use of fee-for-service lawyers that meet the criteria for OCAA membership in the Criminal Law Division including the development of a system of giving preference in retention of fee-for-service assistant crown attorneys to lawyers laid off in the Criminal Law Division.

40.2 Limits on Fee-for-Service

The Employer agrees that no fee-for-service lawyer in the Criminal Law Division shall be retained for a period which exceeds thirty (30) working days in any quarter, but that this period of time may be extended in emergency situations, but only with the consent of the Assistant Deputy Attorney General, Criminal Law Division.

Any disputes concerning the interpretation or application of this clause will be referred to a designated mediator, The Honourable Pat Lesage. If the Honourable Pat Lesage is not available, such disputes will be heard by William Kaplan or Brian Keller. The designated mediator will commence an informal review of the use of fee for service lawyers in an office or offices within 30 days of the request. The parties agree to fully cooperate with the designated mediator and shall provide him with any relevant information, documentation or other related material. The designated mediator will determine whether to convene a formal mediation session with the parties and/or issue his or her findings and recommendations upon completion of his or her review. The OCAA and the Employer may, however, agree that the designated mediator not make findings or make a recommendation.

Any findings of the designated mediator will be provided to the ADAG, Criminal Law Division and to the President of the OCAA.

The ADAG, Criminal Law will have 30 calendar days to respond to the President of the OCAA with respect to the designated mediator's recommendations. Having regard to the importance of the review process, the ADAG, Criminal Law Division will consider the designated mediator's recommendations. If the recommendations are not implemented, the ADAG, Criminal Law Division will give the President of the OCAA reasons in writing as to why they will not be implemented in whole or in part.

The parties will share the costs of the designated mediator equally.

SECTION IV — SALARY AND MERIT/PAY FOR PERFORMANCE

ARTICLE 41 – SALARY

41.1.1 The Lawyers' Compensation Plan (LCP) is amended to eliminate the classification title CC2/CC3 effective January 1, 2003. The new classification title for the purposes of the salary schedule is called CC3.

41.1.2 The schedule to be paid to lawyers is as follows:

ALOC/OCAA Salary Schedule (2013-2016) (amended)

		1-Jul-13	1-Jul-14	1-Jul-15	1-Jul-16
01CCB	Step 0	77,234	78,470	80,039	82,040
	Step 1	79,483	80,755	82,370	84,429
	Step 2	81,810	83,119	84,781	86,901
	Step 3	84,234	85,582	87,294	89,476
	Step 4	86,745	88,133	89,896	92,143
	Step 5	89,360	90,790	92,606	94,921
	Step 6	92,073	93,546	95,417	97,802
	Step 7	94,888	96,406	98,334	100,792
	Step 8	97,833	99,398	101,386	103,921
	Step 9	103,216	104,867	106,964	109,638
	Step 10	106,313	108,014	110,174	112,928
03CCB	Min	113,978	115,802	118,118	121,071
	Max	187,482	190,482	194,292	199,149
04CCB	Min	155,418	157,905	161,063	165,090
	Max	204,139	207,405	211,553	216,842

41.1.3 In accordance with the Framework Agreement, the general salary adjustments applicable to all lawyers and to all classifications for July 1, 2016 will be based on the annual change in the Ontario Industrial Aggregate, rounded to the nearest 1/10 of 1%, as per the formula set out in Article 6.3.2.

ARTICLE 42 – MERIT/PAY FOR PERFORMANCE PLAN

42.1 General

42.1.1 The Merit/Pay for Performance Plan and Lawyer's Compensation Plan provide the following:

Level of Performance	Merit/Pay for Performance Pay	Applicable To
I	0%	A maximum of 5% of the lawyers.*
II	2%	A maximum of 15% (subject to Article 42.3.4 below) of the lawyers.*
III	5%	A minimum of 65% of the lawyers.*
IV	7%	A maximum of 15% of the lawyers respectively.*

* Does not include CC1 lawyers

42.1.2 There will be a common anniversary date for all lawyers of April 1 of each year, and merit/pay for performance awards will be made retroactive to that date based on assessment of performance for the prior year.

42.1.3 The merit/pay for performance award is applied to base salary effective April 1 of the year following the performance year in review.

42.1.4 Lawyers in the CC3 and CC4 classifications who are at the maximum of their salary range will be included in each Association's overall merit/pay for performance pool, and the same rules will apply, but it is agreed that the merit/pay for performance bonus shall be a re-earnable lump sum payment and will not increase the lawyer's base salary beyond the maximum of the salary range for any purpose.

42.1.5 Where a lawyer receives a merit/pay for performance rating that would exceed the maximum of his/her salary range, that portion of the rating which is within range will be included in base salary, and that part which exceeds the maximum of the salary range will be paid as a re-earnable lump sum payment.

42.1.6 Subject to the rules in this Article, the administration of the Merit/Pay for Performance Plan is within the discretion of the Employer, and individual lawyers' disputes over their ratings and merit/pay for performance bonuses will not be arbitrable. However, lawyers who are assessed at Level I or Level II, but not lawyers who are assessed at Level III or Level IV will continue to have review and appeal rights in accordance with the pre-existing Lawyers' Compensation Plan.

42.1.7 Each employee must have a performance development plan

42.1.8 A fixed term lawyer is treated the same as a regular lawyer for the purposes of Article 47. Any payment (to be incorporated as part of salary, or paid out in lump sum pay out) will be calculated on base salary, exclusive of pay in lieu of benefits.

42.1.9 If a lawyer is eligible for a merit/pay for performance award under the lawyer's pay for performance scheme, the lawyer would not be eligible to receive a merit/pay for performance award for the same period of time under another Ontario Public Service scheme.

42.2 Eligibility

42.2.1 'Eligible Employees' mean:

- All employees in a CC3 or CC4 job class as of April 1 who have performed work during the performance year (i.e., physically at work) in a CC3/CC4 job class for at least 6 months (defined to be equal to 26 weeks), excluding those promoted from CC1 to CC3 on April 1 (referred to below as the "six month eligibility rule");
- all employees who would have been in a CC3 or CC4 job class but for accepting an assignment in a CC5 job class and who have performed work in a CC3 or CC4 job class for at least twelve (12) weeks during the performance year, pro-rated for the time spent in the CC3/CC4 job class; or
- all employees in a CC3 or CC4 job class who retired during the performance year, pro-rated for the time spent in the CC3/CC4 job class.

NOTE: Full-time and part-time employees are eligible

42.2.2 The Six Month Eligibility Rule does not apply to the period of time that a lawyer is at the maximum of the salary range during the performance year in review. Lawyers at the maximum of the salary range who have been absent during the performance year in review will receive a pro-rated award – that is, they will only receive a lump sum merit/pay for performance award above the maximum in proportion to the time actually worked while at the maximum during the year.

42.2.3 The Six Month Eligibility Rule does not apply to CC3 or CC4 lawyers hired between October 1 and December 31 of the performance year in review. A lawyer hired during this time period will be eligible for a merit/pay for performance award.

42.2.4 The Six Month Eligibility Rule does not apply to employees on pregnancy or parental leave.

If a lawyer is on pregnancy or parental leave**,** upon return to work, the employee is eligible for a merit/pay for performance increase at the Level III rating to base salary up to the salary range maximum.

As per Article 23.5.7 of the collective agreement, the adjustment to the lawyer's weekly sub-allowance, if sub-allowance is being paid on April 1, will be based on a Level III rating.

This subsection does not apply to lump sum performance bonuses. In such cases, the employee is eligible for a prorated bonus for the period of time in the year actually worked, and not for the period of the leave. The lawyer is assessed with respect to the time spent at work.

42.2.5 Where management determines that it is appropriate, and with Assistant Deputy Attorney General (or equivalent) approval, a merit/pay for performance award for a lawyer who has not been at work for more than six months during the performance year in review may be provided upon the lawyer's return to work based on the following:

Where the lawyer has worked for a period of more than 3 months in the performance year in review, the lawyer's merit/pay for performance award will be based on an assessment of their time worked during the performance year in review.

Where the lawyer has worked for a period of less than 3 months in the performance year in review, the lawyer will receive the lesser of a Level III rating, or the rating from the previous year in review (if one exists).

42.3 Rules for Administering the Merit/Pay for Performance Scheme

42.3.1 The total merit/pay for performance envelope in any year will be 5.03% of the total eligible annualized salaries of all CC3 and CC4 lawyers as of April 1 of each year as set out in Article 42.3.2 below. It is the intention of the parties that the envelope be expended in each year, but in circumstances where it is not 42.3.5 and 43.3.6 will apply.

Note: *The year of call rule under the Crown Counsel Hiring Salary Guidelines will be based on an average 5% merit/pay for performance within the CC3 and CC4 salary ranges, as adjusted by economic increases.*

42.3.2 The total merit/pay for performance envelope in any year shall be determined by the following steps:

Step 1 Identify Eligible Employees as defined in 42.2 above.

Reconciliation Calculation:

Note: AS_i = Annualized Salary (pro rated for part-time, a lawyer working, for example, three days per week or pro-rated for time spent in the CC3/CC4 job class for a lawyer who has accepted a permanent or temporary assignment in a CC5 classification or who retired during the performance year) as of April 1 (inclusive of any across-the-board or IAI salary increase effective April 1) of the i^{th} eligible employee (as defined in step 1).

P4P% *i* = finalized merit/pay for performance rating percentage of the i^{th} eligible employee (as defined in Step 1)

Step 2 $\sum (AS_i \times 5.03\%) = X$
"X" represents the total merit/pay for performance envelope

Step 3 $\sum (AS_i \times P4P\%_i) = Y$

Step 4 $(X - Y) = Z$

(Step 4 to be completed within the first week in May)

It is the intention of the parties that "Z" in Step 4 be a zero value in each year, but in the circumstances where it is not clauses 42.3.5 and 43.2.6 will apply.

42.3.3 Levels of I, II and IV merit/pay for performance cannot be other than 0%, 2% or 7% respectively. Level III merit/pay for performance must be at least 5% and must exceed 5% in the circumstances described in clause 42.3.6 below.

42.3.4 If there are fewer than 5% of the lawyers at Level I, the percentage of lawyers at Level II can exceed 15% but only to the extent of the shortfall at Level I.

42.3.5 Where the value of "Z" in Step 4 above has a negative value in a year, the negative balance may be recovered by reducing the number of lawyers receiving Level IV merit/pay for performance to less than 15%, in the next year.

42.3.6 Where the value of "Z" in Step 4 above has a positive value in a year, the full amount of the positive balance will be used in the next year to increase the merit/pay for performance, on a percentage basis, above 5%, for all lawyers at Level III.

42.3.7 The Employer will provide to each Association a report setting out information reasonably required to demonstrate that the Merit/Pay for Performance Plan rules, including the LCP provisions that incorporate these rules, have been followed. This includes information respecting the number of lawyers who received merit/pay for performance at each level, the amount expended on each level and in total, total salaries of all CC3 and CC4 as of April 1 of each year, and individual lawyer salaries and merit/pay for performance amounts (which the Associations agree to treat as confidential except

where disclosure is required to ensure compliance with the terms of the Merit/Pay for Performance Plan and LCP provisions).

42.3.8 These rules are to be applied separately to lawyers in their respective associations.

42.4 Arbitration Under This Collective Agreement

It is agreed that the only issues that either Association can pursue under the grievance and arbitration provisions of this Collective Agreement with respect to the Merit/Pay for Performance Plan are:

1. An allegation that a positive balance in one year has not been fully used in the next year in accordance with 42.3.6;

2. An allegation that the Employer has reduced more than is provided for under 42.3.5;

3. An allegation that the maximum percentage for a level has been exceeded or that a minimum percentage for a level has not been met, that the amounts paid to each individual lawyer do not conform with the prescribed percentage amounts, including an allegation that 42.1.1,or 42.3 have not been complied with; and

4. An allegation that the Employer has failed to comply with its reporting requirements.

Signed at the City of Toronto, on this 30th day of November, 2016

2013 Bargaining Teams

For the Employer	For the ALOC	For the OCAA

APPENDICES

APPENDIX 1
Roster of Mediators/Arbitrators
Under ALOC/OCAA Agreement

LETTER OF UNDERSTANDING

Between

The CROWN IN RIGHT OF ONTARIO
(MANAGEMENT BOARD OF CABINET)
"the Employer"

and

ASSOCIATION OF LAW OFFICERS OF THE CROWN
and
ONTARIO CROWN ATTORNEY' ASSOCIATION
"the Associations"

IN THE MATTER OF:

Mediator/Arbitrators

The parties agree to the following list of mediator/arbitrators to comprise the roster of ten mediator/arbitrators under Article 6 (Grievance and Arbitration Process):

Christopher Albertyn
Stanley Beck
Pam Chapman
Louisa Davie
Nimal Dissanayake
Russel Goodfellow
Bill Kaplan
Kathleen Martin
Susan Stewart

Should any of these arbitrators decline to serve, or become unwilling or unable to serve, the parties will attempt to agree on a replacement, failing which he or she will be appointed by the Referee.

Signed at the City of Toronto on this 21st day of November 2006

David Brook	Ed Wren	Scott Rogers
For the Employer	For the ALOC	For the OCAA

APPENDIX 2
Canadian Bar Association Fees

LETTER OF UNDERSTANDING

Between

THE CROWN IN RIGHT OF ONTARIO
(MANAGEMENT BOARD OF CABINET)
"the Employer"

and

ASSOCIATION OF LAW OFFICERS OF THE CROWN
and
ONTARIO CROWN ATTORNEYS' ASSOCIATION
"the Associations"

IN THE MATTER OF:

Canadian Bar Association Fees

The parties agree that in the event the lawyers are required by the Law Society of Upper Canada or by statute, to join the Canadian Bar Association (OBA) to practice law in the province of Ontario, the Employer will pay the lawyers' membership fees.

This letter forms part of the Collective Agreement.

Agreed by the parties at the City of Toronto on this 6th day of June, 2002.

For the Employer	For the ALOC	For the OCAA
Karen Blackledge	Eileen Hipfner	Tony Loparco
Nancy Austin	Stephen McCann	William Lightfoot
Margaret Dwyer	Sean Hanley	James Chaffe
John Pearson	Troy Harrison	
Martha Otton		
Ellen Simms		
Karen Pashleigh		
Malliha Wilson		

APPENDIX 3A
Compensation for
Travel Time
Outside Regular Hours
—Letter to Employer

May 15, 2000

Dear Ms Wendel:

Re: Compensation for Travel Time Outside Regular Hours (9:00 a.m. - 5:00 p.m.)

This letter will confirm the Employer's representation in bargaining on July 28, 1999, that the *status quo* in respect of the above noted benefit would be maintained. In particular, it was stated that if in a particular office the practice or policy is to compensate for travel time outside the regular hours of 9:00 a.m. to 5:00 p.m., such practice or policy will continue.

Yours very truly,

Steven M. Barrett

CAVALLUZZO HAYES SHILTON
McINTYRE & CORNISH

Paul J.J. Cavalluzzo

APPENDIX 3B
Compensation for
Travel Time
Outside Regular Hours
— Employer Response

May 18, 2000

Mr. Paul J.J. Cavalluzzo
Cavalluzzo Hayes Shilton McIntyre
& Cornish
Barristers & Solicitors
43 Madison Avenue
Toronto, Ontario
M5R 2S2

Dear Mr. Cavalluzzo:

Re: Your File No. 94-1042 (Compensation for Travel Time Outside Regular Hours)

We are writing in reply to your letter dated May 15, 2000, which concerns the Employer's representation during bargaining on the issue of travel time for lawyers. In order to ensure there are no misunderstandings, we would like to clarify the use of the word "compensation" in this regard and what maintenance of the *status quo* means. It means that if, in a particular office the practice has been to grant time off to lawyers who have been required to spend considerable amounts of time travelling outside regular working hours, that informal practice will continue. We want to be clear that compensation in monetary terms has not been the practice nor has it been contemplated.

Yours very truly,

Linda J. Wendel

Linda J. Wendel
Corporate Staff Relations Officer

cc: Steven Barrett
Michael Fleishman
Sarah Welch
Crystal Nikolich
Kevin Wilson
Michele Migus
Kevin Whittaker

APPENDIX 4
Insured Benefits Coverage
—Same Sex Spouses

May 17, 2000

Mr. Michael Fleishman
President
Association of Law Officers
of the Crown
Suite 406, Box 144, LuCliff Place
700 Bay Street M5G 1C7
Toronto, Ontario
M5G 1Z6

Ms Sarah Welch
President
Ontario Crown Attorney Association
180 Dundas Street West, #1505
Toronto, Ontario

Dear Mr. Fleishman and Ms Welch:

Re: Insured Benefits Coverage

This will confirm that for the purposes of insured benefits pursuant to this Collective Agreement, family coverage shall be extended to include same sex spouses.

This letter forms part of the Collective Agreement.

Yours very truly,

Linda J. Wendel

Linda J. Wendel
Corporate Staff Relations Officer

APPENDIX 5
Fixed Term Employees/
Successful Candidates
Revised August 20, 2009

LETTER OF UNDERSTANDING

between

THE CROWN IN RIGHT OF ONTARIO
(MANAGEMENT BOARD OF CABINET)
"the Employer"

and

ASSOCIATION OF LAW OFFICERS OF THE CROWN

and

ONTARIO CROWN ATTORNEYS' ASSOCIATION
"the Associations"

IN THE MATTER OF:

Fixed Term Employees/Successful Candidates

The parties agree that those lawyers who have been successful candidates on competitions for positions in the regular service but not yet appointed to the regular service will be treated for the purposes of the Collective Agreement as if they were regular lawyers.

This letter forms part of the Collective Agreement.

Agreed by the parties at the City of Toronto on this 6th day of June, 2002.

For the Employer	For the ALOC	For the OCAA
Karen Blackledge	Eileen Hipfner	Tony Loparco
Nancy Austin	Stephen McCann	William Lightfoot
Margaret Dwyer	Sean Hanley	James Chaffe
John Pearson	Troy Harrison	
Martha Otton		
Ellen Simms		
Karen Pashleigh		
Malliha Wilson		

APPENDIX 6
Appointment by
Order in Council

LETTER OF UNDERSTANDING

between

THE CROWN IN RIGHT OF ONTARIO
(MANAGEMENT BOARD OF CABINET)
"the Employer"

and

ASSOCIATION OF LAW OFFICERS OF THE CROWN

and

ONTARIO CROWN ATTORNEYS' ASSOCIATION
"the Associations"

IN THE MATTER OF:

Order in Council

Nothing in this agreement is intended to change the practice of appointing and removing Crown Attorneys and Assistant Crown Attorneys by Order in Council.

This letter forms part of the Collective Agreement.

Agreed by the parties at the City of Toronto on this 6th day of June, 2002.

For the Employer	For the ALOC	For the OCAA
Karen Blackledge	Eileen Hipfner	Tony Loparco
Nancy Austin	Stephen McCann	William Lightfoot
Margaret Dwyer	Sean Hanley	James Chaffe
John Pearson	Troy Harrison	
Martha Otton		
Ellen Simms		
Karen Pashleigh		
Malliha Wilson		

APPENDIX 7
Public Service of Ontario Act 2006
Regulations & Directives

Revised August 20, 2009

LETTER OF UNDERSTANDING

between

THE CROWN IN RIGHT OF ONTARIO
(MANAGEMENT BOARD OF CABINET)
"the Employer"

and

ASSOCIATION OF LAW OFFICERS OF THE CROWN

and

ONTARIO CROWN ATTORNEYS' ASSOCIATION
"the Associations"

IN THE MATTER OF:

***Public Service of Ontario Act 2006,* Regulations and Directives**

The Employer will not seek to rely upon the statutory and regulatory authority provided under sections 38 and 39 of *Public Service of Ontario Act, 2006* to override the provisions of Section III of the Collective Agreement.

This letter forms part of the Collective Agreement.

Agreed by the parties at the City of Toronto on this 6th day of June, 2002.

For the Employer	For the ALOC	For the OCAA
Karen Blackledge	Eileen Hipfner	Tony Loparco
Nancy Austin	Stephen McCann	William Lightfoot
Margaret Dwyer	Sean Hanley	James Chaffe
John Pearson	Troy Harrison	
Martha Otton		
Ellen Simms		
Karen Pashleigh		
Malliha Wilson		

APPENDIX 8
Term Classified Fixed Term lawyers

Revised August 20, 2009

LETTER OF UNDERSTANDING

between

THE CROWN IN RIGHT OF ONTARIO
(MANAGEMENT BOARD OF CABINET)
"the Employer"

and

ASSOCIATION OF LAW OFFICERS OF THE CROWN

and

ONTARIO CROWN ATTORNEYS' ASSOCIATION
"the Associations"

IN THE MATTER OF:

TERM CLASSIFIED FIXED TERM LAWYERS

The parties agree to consider whether the rationale for appointing employees to term classified fixed term positions applies to lawyers. As a result, the parties agree that there will not be any appointment of new or existing lawyers to term classified fixed term positions under the directives issued under the *Public Service of Ontario Act,* 2006 and its Directives during this Collective Agreement, or under any renewal collective agreements negotiated under the 2002-2057 Framework Agreement, without the mutual agreement of the Employer and the Associations.

This letter forms part of the Collective Agreement.

Agreed by the parties at the City of Toronto on this 6th day of June, 2002.

For the Employer	For the ALOC	For the OCAA
Karen Blackledge	Eileen Hipfner	Tony Loparco
Nancy Austin	Stephen McCann	William Lightfoot
Margaret Dwyer	Sean Hanley	James Chaffe
John Pearson	Troy Harrison	
Martha Otton		
Ellen Simms		
Karen Pashleigh		
Malliha Wilson		

APPENDIX 9
Transition Exit Initiative

February 18, 2014

TRANSITION EXIT INITIATIVE
MEMORANDUM OF AGREEMENT
Between
THE ONTARIO CROWN ATTORNEYS' ASSOCIATION (OCAA)
And THE ASSOCIATION OF LAW OFFICERS OF THE CROWN (ALOC)
("the Associations")
and
THE CROWN IN RIGHT OF ONT ARIO as represented by the
MINISTRY OF GOVERNMENT SERVICES
("the Employer")

The parties have agreed to work collaboratively to support the transformation of the Ontario Public Service while minimizing the impact to lawyers. Accordingly, the parties have agreed to establish a Transition Exit Initiative (TEI) as follows:

1. All regular and regular part-time lawyers will be eligible to apply to a Transition Exit Initiative (TEI).

2. A lawyer may request in writing voluntary exit from employment with the OPS under the TEI, which request may be approved by the Employer in its sole discretion. The lawyer's request will be submitted to the Corporate Employer.

   The Employer shall provide written confirmation of receipt of the lawyer's request within 30 days with a copy to the applicable Association. If the lawyer's request is approved, the Employer shall provide written notification to the lawyer with a copy to the applicable Association. A lawyer may withdraw his/her request by written notice to the Corporate Employer.

3. A lawyer who has received notice of Employer approval to exit under the TEI shall be deemed to have accepted one of the options as outlined in Paragraph 4.

4. A lawyer who exits from employment under the TEI will only be entitled to the following:
   i. A lump sum of six (6) months' pay, plus one (1) week pay per year of continuous service; or
   ii. Continuance of salary plus benefits (except STSP and LTIP) for six (6) months commencing on the date set out in Paragraph 5, plus one (1) week pay per year of continuous service or its equivalent period of further salary continuance plus benefits (except STSP and LTIP). For clarity, during the salary continuance period, lawyer and Employer pension contributions and vacation and pension credits will continue to accrue. Notwithstanding the above, the further salary continuance period shall not be greater than the length of time between the commencement of the salary continuance and the end of the month in which the lawyer will attain sixty-five (65) years of age. Any remaining balance will be paid forewith to the lawyer as a lump-sum.
   iii. Where the lawyer does not choose a specific pay-in-lieu option, the lawyer shall be deemed to have chosen the lump sum option under 4(i).

5. Where a lawyer is exiting under the TEI, his or her last day at work shall be five (5) working days after the notice of Employer approval to exit is received, or such other period as the lawyer and the Employer shall agree.

6. The payment under Paragraph 4 and any payout of unused vacation are payable as soon as possible, but not later than three (3) pay periods following the lawyer's exit under the TEI.

7. Lawyers exiting under the TEI shall have the entitlements in Paragraph 4 in lieu of the entitlements in Article 32 (Termination Payments) and Article 34.5 of the Collective Agreement.

8. This MOA forms part of the collective agreement.

Signed this 18 day of February, 2014

Sean Hanley
For the Association (ALOC)

David Logan
For the Employer

Scott Childs
For the Association (OCAA)

APPENDIX 10
Education and Training

April 5, 2006

Ms. Deanna Exner
President
Association of Law Officers of the Crown
481 University Avenue, #703
Toronto, Ontario
M5G 2E9

Dear Ms. Exner:

Re: Education and Training

For the purpose of the agreement to consult in Article 13.2.5 of the collective agreement (Education and Training), ALOC agrees that, in relation to the conference for ALOC lawyers, ALOC's obligation means:

1. Management representatives can attend sessions at the conference, except where there is a legitimate reason otherwise.

2. The current process for input into discussing and planning the conference will be continued.

3. The conference will be renamed to be the ALOC/Ontario Government Educational Conference, or any other name ALOC and the Government may agree to from time to time.

Yours very truly,

Lori Sterling

Lori Sterling
Assistant Deputy Attorney General

APPENDIX 11
Revisions to Article 42 (Pay for Performance Plan) in the 2009-2013 Collective Agreement

January 10, 2012

Mr. Ed Wren
President
Association of Law Officers of the Crown (ALOC)
481 University Avenue, #703
Toronto, ON
M5G 2E0

Mr. Scott Rogers
President
Ontario Crown Attorney's Association (OCAA)
180 Dundas Street West, #1905
Box 30
Toronto, ON
M5G 1Z8

Dear Mr. Wren and Mr. Rogers:

Re: Revision to Article 42 (Pay for Performance Plan) in the 2009-2013 Collective Agreement

Further to our discussions, this is to confirm the parties' agreement to consolidate all previous settlements and agreements from June 2002 onwards regarding the Merit/Pay for Performance Plan for ALOC and OCAA represented employees into Article 42 of the 2009-2013 Collective Agreement. The parties also agree that Article 42 supersedes and replaces all of those prior agreements and settlements concerning Merit/Pay for Performance Plan for ALOC and OCAA represented employees.

The parties also confirm their mutual intention that there be no diminution or expansion of entitlements provided for under any of those previous agreements as a result of the consolidation.

Regards,

David Brook
Director
Union Management Relations Branch
Employee Relations Division, HROntario
Ministry of Government Services

APPENDIX 12
Change in Employment Contract of Fixed-Term Employees

August 20, 2009

Mr. Nick Hedley
President
Association of Law Officers of the Crown
481 University Avenue, #703
Toronto, ON
M5G 2E9

Mr. Tom Hewitt
President
Ontario Crown Attorney's Association
180 Dundas Street West, #1015
Box 30
Toronto, ON
M5G 1Z8

Dear Mr. Hedley and Mr. Hewitt:

Re: Change in Employment Contract of Unclassified Employees

I am writing to notify you that pursuant to Article 14 of the ALOC/OCAA collective agreement, the Employer will be changing unclassified contract terms and conditions to include a provision that where the Employer is entitled to reimbursement for fees pursuant to Articles 14.2 and 14.3, and the employee has not signed the form referenced in Article 14.2 and 14.3 after being given a reasonable opportunity to do so, any recoverable law society fees paid by the Employer for the time period the employee is not at work shall be first recovered by monies owing. Should sufficient monies owed not be available, other recovery measures will be used. This change will be effective July 1, 2009.

Regards,

Original Signed by

David Logan
Assistant Deputy Minister
Employee Relations Division, HROntario
Ministry of Government Services

APPENDIX 13
Merit/Pay for Performance Six Month Eligibility Rule (LTIP)

January 10, 2012

Mr. Ed Wren
President
Association of Law Officers of the Crown (ALOC)
481 University Avenue, #703
Toronto, ON
M5G 2E0

Mr. Scott Rogers
President
Ontario Crown Attorney's Association (OCAA)
180 Dundas Street West, #1905
Box 30
Toronto, ON
M5G 1Z6

Dear Mr. Wren and Mr. Rogers:

Re: Merit/Pay for Performance Six Month Eligibility Rule (LTIP)

This letter confirms the Associations' and the Employer's agreement that the six month eligibility rule in Article 42 of the ALOC/OCAA Collective Agreement is without prejudice to any position the parties may adopt regarding the impact of a period of absence from the workplace by reason of being found to be eligible for LTIP, or otherwise on authorized leave of absence for disability for a period of greater than six months, for CC3 or CC4 lawyers who are not at the salary maximum on the Sixth Month Eligibility Rule that is set out in Article 42.2.1 of the Collective Agreement. The parties agree to submit the issue to arbitration if they cannot resolve it.

Regards,

David Brook
Director
Union Management Relations Branch
Employee Relations Division, HROntario
Ministry of Government Services

APPENDIX 14
Out of Country Medical Assistance/Global Medical Assistance Plan

August 20, 2009

Mr. Nick Hedley
President
Association of Law Officers of the Crown
481 University Avenue, #703
Toronto, ON
M5G 2E9

Mr. Tom Hewitt
President
Ontario Crown Attorney's Association
180 Dundas Street West, #1015
Box 30
Toronto, ON
M5G 1Z8

Dear Mr. Hedley and Mr. Hewitt:

Re: Out of Country Medical Assistance/Global Medical Assistance Plan

This is to confirm our discussion during bargaining that employees that have an out of country trip booked as of the date of ratification will continue to be covered by the out of country medical assistance/Global Medical plan for the duration of that trip notwithstanding that the out of country medical assistance/Global Medical Assistance plan will cease on the first day of the month following ratification by the Associations and the Employer.

Regards,
Original Signed By

David Logan
Assistant Deputy Minister
Employee Relations Division, HROntario
Ministry of Government Services

APPENDIX 15
Formal Resolution Stage Training for Employer Representatives
Revised July 11, 2013

July 11, 2013

Mr. Earl Dumitru
President
Association of Law Officers of the Crown
481 University Avenue, Suite 703
Toronto, ON
M5G 2E9

Ms Kate Matthews
President
Ontario Crown Attorney's Association
180 Dundas Street West, Suite 1905
Box 30
Toronto, ON
M5G 1Z8

Dear Mr. Dumitru and Ms Matthews:

Re: Formal Resolution Stage Training for Employer Representatives

This is to confirm the discussion of the parties during collective bargaining regarding the training requirements for Employer representatives who deal with grievances at the Formal Resolution Stage of the Grievance Procedure.

The Employer shares the interest of the Associations in settling disputes as early as possible in the Grievance Procedure. To that end, the Employer will develop training materials for Employer representatives on their roles and responsibilities at the Formal Resolution Stage of the Grievance Procedure. Further, the Employer will consult with the Associations on the content of this training as it relates to the OCAA/ALOC collective agreement.

Regards,
Original Signed By

David Logan
Assistant Deputy Minister
Employee Relations Division, HROntario
Ministry of Government Services

APPENDIX 16
References to *Public Service Act* and the *Public Service of Ontario Act*

LETTER OF UNDERSTANDING

Between

THE CROWN IN RIGHT OF ONTARIO
(MANAGEMENT BOARD OF CABINET)
"The Employer"

And

ASSOCIATION OF LAW OFFICERS OF THE CROWN
And
ONTARIO CROWN ATTORNEYS' ASSOCIATION
"The Associations"

IN THE MATTER OF:

References to *Public Service Act* and the *Public Service of Ontario Act*

For clarity, the parties agree that there will be no diminution or expansion of entitlements provided for under the previous collective agreement as a result of changing the description of entitlements from the former *Public Service Act* and the regulations under that Act, to the *Public Service of Ontario Act* and any applicable Management Board of Cabinet Compensation Directives made under that Act.

Dated this 20th day of August, 2009

NICK HEDLEY	TOM HEWITT	DAVID LOGAN
FOR ALOC	FOR OCAA	FOR THE EMPLOYER

APPENDIX 17
Addition of Compensation Directive Wording in 2009-2013 Collective Agreement

January 10, 2012

Mr. Edward Wren
President
Association of Law Officers of the Crown
481 University Avenue, #703
Toronto, ON
M5G 2E9

Mr. Tom Hewitt
President
Ontario Crown Attorney's Association
180 Dundas Street West, #1015
Box 30
Toronto, ON
M5G 1Z8

Dear Mr. Wren and Mr. Hewitt:

Re: Addition of Compensation Directive Wording in 2009-2013 Collective Agreement

The parties agree there will be no diminution or expansion of entitlements provided for under Section III (Job Security) of the previous collective agreement as a result of changing references to "legislated severance" of the 2005-2009 collective agreement to "severance under Article 32 (Termination Payments)" in the 2009-2013 collective agreement.

Regards,

David Brook
Director
Union Management Relations Branch
Employee Relations Division, HROntario
Ministry of Government Services

APPENDIX 18
Overtime in a SARS Emergency

LETTER OF UNDERSTANDING

Between

THE CROWN IN RIGHT OF ONTARIO
(MANAGEMENT BOARD OF CABINET)
"the Employer"

and

ASSOCIATION OF LAW OFFICERS OF THE CROWN

and

ONTARIO CROWN ATTORNEYS' ASSOCIATION
"the Associations"

IN THE MATTER OF:

OVERTIME IN A SARS EMERGENCY

The parties agree that if Management Board of Cabinet declares an emergency relating to severe acute respiratory syndrome to be an emergency requiring extraordinary measures to protect public health, public safety or property. Full-time lawyers are entitled to compensation when they work overtime at time-and-a-half for the authorized overtime that the lawyer works.

For clarity, a lawyer's regular work period, regularly scheduled work day and regularly scheduled work week are to be determined without reference to a period in which there is a SARS related emergency.

The lawyer receives 45 minutes credit for each half-hour of the applicable work.

For the purposes of calculating a lawyer's overtime credit, the period of applicable work is to be rounded to the nearest half-hour. A period of 15 minutes' work is to be rounded to a half-hour. This rounding rule does not apply with respect to the first half-hour of the period of applicable work.

A lump sum payment to a lawyer for overtime credit is to be calculated using the lawyer's salary that was in effect when he or she earned the credit. The regular work week shall be deemed to be 36¼ hours, for the purpose of calculating the hourly salary rate to be used to determine the amount of a lump sum payment to the lawyer.

For clarity, "SARS emergency" means an emergency declared by Management Board of Cabinet relating to severe acute respiratory syndrome.

David Brook	Ed Wren	Scott Rogers
For the Employer	For the ALOC	For the OCAA

APPENDIX 19
Articling Students

TERMS AND CONDITIONS OF EMPLOYMENT

FOR

ARTICLING STUDENTS

DEFINITIONS

For the purposes of this appendix, the following definitions apply:

Collective Agreement:	2013-2017 ALOC/OCAA Collective Agreement
Framework Agreement:	2002-2057 ALOC/OCAA Framework Agreement
Law Society:	Law Society of Upper Canada
Parties:	Association of Law Officers of the Crown and Employer
Students:	Persons within the ALOC bargaining unit identified in Article 2.02 of this Appendix

ARTICLE 1 – PURPOSE

1.01 The purpose of this Appendix is to establish conditions of work, to confirm the obligations of the students and the parties, and to provide for a method for the settlement of any differences which may arise.

ARTICLE 2 - RECOGNITION OF ASSOCIATIONS

2.01 The Framework Agreement applies to students and its provisions apply *mutatis mutandis* to students.

2.02 The ALOC represents all Articling Students employed by the Government of Ontario including students employed in Commission Public Bodies prescribed under the Public Service of Ontario Act, 2006.

2.03 Students who are employed in a confidential capacity in matters related to labour relations as defined in the *Labour Relations Act* are not represented by ALOC and are, therefore, excluded from representation pursuant to the Framework Agreement, the Agreement and this Appendix.

ARTICLE 3 - EMPLOYMENT STATUS

3.01 It is understood that students are fixed term employees for such fixed term as determined by the Law Society. That term may be extended upon the express

agreement of the student and the Employer, provided that in no case shall persons be employed as students after their call to the bar. In the event that the extension continues beyond one (1) month, the Employer will notify ALOC.

3.02 Students will not be subject to layoff during the term of their articles but will be subject to discipline up to and including termination for just cause.

3.03 A student's rights under the Collective Agreement shall terminate at the end of the articling period except where expressly stated in Article 6 of this Appendix.

3.04 The parties recognize that the student employment relationship is subject to the authority of the Law Society. The parties agree that the requirements of the Law Society shall prevail in the event of any conflict between said requirements and this Appendix.

3.05 The Articles of Clerkship, the Education Plan, and the Employer's and students' rights and responsibilities with respect to the Law Society, including Evaluations referred to in Article 5.03, are not incorporated into the collective agreement or this Appendix, nor are they matters which may be the subject of a difference, grievance, dispute or claim under the collective agreement or this Appendix.

3.06 The Employer will inform all students that a collective agreement is in effect with respect to their employment and will inform them where they may obtain a copy of the Framework Agreement, the Collective Agreement and this Appendix.

ARTICLE 4 – COLLECTIVE AGREEMENT PROVISIONS APPLICABLE TO STUDENTS

4.01 The following provisions of the Collective Agreement are incorporated by reference into this Appendix and shall be applied *mutatis mutandis* to students:

Article 2	- Association Dues Deduction & Home Position
Article 3	- Association Activities [Articles 3.1 (b) and 3.2 only]
Article 4	- Management and Associations Committee
Article 5	- Discipline and Discharge [Articles 5.1, 5.2, 5.3, 5.4.1, 5.4.2 only]
Article 6	- Grievance and Arbitration Process
Article 7	- Alternate Work Arrangements
Article 8	- Travel by Road
Article 15	- Legal Indemnification
Article 22	- Family Leave; Bereavement Leave [Article 22.3.3 only]
Article 23	- Pregnancy and Parental Leave [Article 23.9 only]
Appendix 1	- Roster of Mediators/Arbitrators
Appendix 3A	- Travel Time Outside Regular Hours (Letter to Employer)
Appendix 3B	- Travel Time Outside Regular Hours (Employer Response)

4.02 In the event of any conflict between the provisions of this Appendix and the articles incorporated by reference from the Collective Agreement, the provisions of this Appendix shall govern.

ARTICLE 5 - EDUCATIONAL RESPONSIBILITIES

5.01 The parties agree that students are entitled to receive constructive feedback on their performance, through both formal and informal communication channels.

5.02 Written or oral feedback concerning a student's work performance made during the course of performance evaluations will not be considered disciplinary, will not be subject to a grievance, and will not be arbitrable.

5.03 The Employer will provide students with Evaluations required by the Law Society. Unless the student requests otherwise, written evaluations will remain confidential with the Employer, unless required to be forwarded to the Law Society or by law. If requested by the student, and subject to the rules of the Law Society, Evaluations and written comments will be removed from the student's permanent file after the expiration of any period of eligibility that student may have to participate in the Articling Student hireback pool.

5.04 Notwithstanding Articles 3.05 and 5.02 of this Appendix, ALOC or the Employer may elect to bring any concern or issue with respect to the articling program or with respect to any student(s) for discussion at the Management and Associations Committee (or its equivalent) or any appropriate subcommittee thereof.

5.05 Subject to appropriate fiscal and operational considerations, the Employer will make every effort to allow students to attend educational conferences and other educational activities conducted by the Associations (i.e., ALOC or OCAA) without loss of pay or credits.

5.06 The Employer may provide external professional development opportunities including, but not limited to attending conferences, seminars or other educational events without the loss of pay or credits. Any such continuing legal education must be approved in advance by the Employer and receipts must be provided. The Employer agrees that it will not exercise its discretion under this paragraph in a manner that is arbitrary.

5.07 A subcommittee of the Management and Associations Committee or its equivalent will be established to discuss issues relating to students. Up to six student designates, as appointed by ALOC, will be invited to attend together with ALOC representatives. The Employer will appoint its representatives.

ARTICLE 6 - ARTICLING STUDENT HIREBACK POOL

6.01 All students will be placed in the Articling Student hireback pool, referenced in Article 10.1.2 of the Collective Agreement, on the first of the month, two months before the month of the call to the bar and will remain in the hireback pool for a period of two (2) years following their call to the bar date. Time in the Articling Student hireback pool may be deferred in special circumstances, where requested by the affected student in writing and with the agreement of the Employer and ALOC.

6.02 The Employer will, on an individual basis, make reasonable efforts to advise Articling Students of their employment prospects within their branch six (6) weeks prior to the completion of the student's articles. In any event, the Employer will advise students on an individual basis of the prospect of there being positions available to be filled within their branch, no later than three (3) weeks prior to the completion of the student's articles.

6.03 The Employer will advise students of their right to participate in the Articling Student hireback pool.

6.04 The parties agree to discuss the operation of the Articling Student hireback pool as may be required.

ARTICLE 8 - LEAVES OF ABSENCE

8.01 All leave provisions within this Appendix will be exercised in accordance with Law Society guidelines. The parties recognize that some leaves may reduce a student's articles significantly such that the Law Society may require an extension of the articling period. When such a situation arises, the Employer shall ensure that all required notices are sent to the Law Society and shall co-operate with the Law Society for the continuation and completion of the student's articles.

8.02 All requests for leave under this Appendix will be made in writing to the Employer, indicating the date(s) being requested as well as the reason for the leave.

8.03 Requests for a leave of absence without pay will be given consideration but shall be granted at the discretion of the Employer.

ARTICLE 9 – EDUCATIONAL STIPEND AND BAR ADMINISTRATION PROCESS FEES

9.01 Articling Students are to receive an educational stipend of $4,975, of which $3,000 is to be paid at the commencement of Articles with the balance paid on January 1st of the Articling year.

9.02 Each Articling Student will receive a $410 non-taxable payment towards the call to the Bar Fee and the Bar Admissions Application Fee, which is to be paid at the commencement of Articles.

ARTICLE 10 – VACATION

10.01 Effective August 1, 2007, Articling Students are entitled to ten (10) paid vacation days.

ARTICLE 11 – HOLIDAYS

11.01 Effective August 1, 2007, Articling Students are entitled to the paid holidays provided to ALOC & OCAA represented lawyers which fall during the period the students are employed.

ARTICLE 12 – BENEFITS

12.01 Effective August 1, 2009, Articling Students shall receive four percent (4%) of regular earnings in lieu of those benefits and entitlements available to regular lawyers but not available to Articling Students.

ARTICLE 13 – SALARY

13.01 The salary schedule to be paid to students is as follows:

Job Code:	Weekly Salary:	
0SCCB	Effective July 1, 2013:	$1,209.95 per week
0SCCB	Effective July 1, 2014:	$1,229.31 per week
0SCCB	Effective July 1, 2015:	$1,253.90 per week

0SCCB Effective July 1, 2016: $1,285.25 per week

In accordance with the Framework Agreement, the general salary adjustments applicable to Articling Students for July 1, 2016 will be based on the annual change in the Ontario Industrial Aggregate, rounded to the nearest 1/10 of 1%, as per the formula set out in Article 6.3.2.

ARTICLE 14 – VACATION ENTITLEMENT AND EDUCATION STIPEND FOR PART TIME ARTICLING STUDENTS

14.01 This Appendix applies to all part-time Articling Students represented by the Association, except as modified by paragraph 14.02 below. Part-time Articling Students are individuals fulfilling their requirements under the Law Society to be called to the bar, who are hired for an articling period with the OPS of less than ten (10) months, or who are hired to work less than 36.25 hours per week over the course of a ten (10) month articling period. For clarity, these provisions will apply to participants in the Law Practice Program, during the term of their placement with MAG and Clerks who have not been called to the bar.

14.02 The terms and conditions of this Appendix enumerated in Article 9.01 (Educational Stipend) and Article 10 (Vacation) shall be pro-rated on the basis of a traditional ten (10) month, 36.25 hours per week articling period.

For example, the parties agree that a student who works five (5) months with the OPS shall be entitled to half the monetary value of the education stipend and half the paid days of vacation.

For clarity, time under Article 6.01 (Hireback Pool) and the entitlement under Article 9.02 (the Bar Admission Process Fee) will not be prorated.

14.03 For greater certainty, there will be no pro-ration if, at the start of the articling assignment, it was intended that the student would be employed by the Government of Ontario for the full ten (10) month articling period or more, and/or that the student would work 36.25 hours per week over the course of a ten (10) month articling period.

Articling Student Hireback Pool List

September 29, 2009

Mr. Nick Hedley
President
Association of Law Officers of the Crown
481 University Avenue, #703
Toronto, ON
M5G 2E9

Dear Mr. Hedley:

Re: Articling Student Hireback Pool List

I am writing to confirm the discussion during bargaining that the Ministry of the Attorney General will post the Articling Student Hireback Pool list in order to encourage managers to consider potential candidates in the Hireback Pool for temporary vacancies under Article 10.5.

Yours truly,

David Logan
Assistant Deputy Minister, Ministry of Government Services
HROntario

Excluded Articling Student

Mr. Nick Hedley
President
Association of Law Officers of the Crown
481 University Avenue, #703
Toronto, ON
M5G 2E9

Dear Mr. Hedley:

Re: Articling Students Working in Ministry of Government Services

I am writing to confirm the discussion during bargaining that beginning the 2010-2011 articling period, Articling Students working at the Ministry of Government Services labour Practice Group should only be excluded from ALOC for the duration of their rotation, when they are employed in a confidential capacity in matters relating to labour relations as defined in the *Labour Relations Act*.

Yours truly,

David Logan
Assistant Deputy Minister, Ministry of Government Services
HROntario

APPENDIX 20
Category A Conversions

LETTER OF UNDERSTANDING

Between

THE CROWN IN RIGHT OF ONTARIO
(MANAGEMENT BOARD OF CABINET)
"the Employer"

and

ASSOCIATION OF LAW OFFICERS OF THE CROWN

and

ONTARIO CROWN ATTORNEYS' ASSOCIATION
"the Associations"

IN THE MATTER OF:

Category A Conversions

The parties agree that Article 9.1 (Category A conversions) in the 2009-13 collective agreement will continue to apply to a lawyer hired prior to the date of implementation of the revised conversion rules to be contained in the 2013-17 collective agreement. Moreover, for the purposes of calculating the 48 month period in 9.3 and 9.4, time worked prior to this collective agreement is to be included.

TAB B

Appendix J

TAB B

RECONCILABLE DIFFERENCES

New Directions in Canadian Labour Law

Paul Weiler

Mackenzie King Professor
of Canadian Studies
Harvard Law School

1980
THE CARSWELL COMPANY LIMITED
Toronto, Canada

4. The Role of the Law

Perhaps I should now return from that rather high-flown rhetoric about the virtues of collective bargaining to the earthy details of the law which tries to bring it about. In the final analysis, the employees must choose, by majority vote, whether they want collective bargaining or not. It would be self-defeating for a labour statute to force employees to participate in what is supposed to be a mode of self-government. The law cannot force workers to be free (and thus it should not permit a trade union to coerce the employees either). A legislature may well agree with me that collective bargaining is a good thing. But the most that it can do is to facilitate the free selection of that alternative by the employees. In certain crucial points in the design of the legal scheme of representation, it may be able subtly to tilt the balance in that direction.

It is by no means evident that the law can make that much difference. It cannot force feed workers a diet of union representation. The employee appetite for collective bargaining is a function of a variety of social and economic factors: the condition of the economy (inflation or recession), the size of the employer (large and bureaucratic or small and personalized), the nature of the employees' work (blue-collar, craft or white-collar professional), their commitment to the labour force (full-time breadwinners or part-time second family earners). It is the conjunction of these features which will predispose or prejudice a group of workers regarding the message of a trade union. The influence of the law operates only at the margin.

Yet a glance back at the history of the North American trade union movement suggests that we should not be too modest in our legal expectations for the law. After all, it was the passage of labour legislation in the Thirties and Forties which sparked the surge of industrial unionism in mass production plants. Then it was the adoption of public sector labour legislation in the Sixties and early Seventies which triggered the explosion of unionism among employees at all levels of government. Of course, the various natural forces I mentioned earlier had laid the foundation. But the process of enactment of these statutes gave that movement the blessing of the community, and the presence of a protective legal framework enabled it to overcome the opposition of employers who were not at all enamoured of this challenge to their managerial prerogatives.

The simplest step which a legislature can take to encourage collective bargaining is merely to let all workers have access to that kind of statutory

---

of people who were elected from the shop floor to a local union office, who proved to be articulate voices of the aspirations of their constituents; who moved up the union ladder and won the opportunity to speak to audiences, to political parties, even to governments, about the social and economic issues of the day. Some even ran for office themselves and served in legislatures and cabinets. The one I know best guided the B.C. Labour Code into law. I do not mean to suggest that this political voice is the *raison d'etre* of trade union representation. But it certainly is a happy byproduct.

TAB B

framework. Historically, many types of workers have been excluded entirely from the legislation which establishes a right to trade union representation. One estimate, made in 1951[10] — fifteen years after the National Labor Relations Act was passed — was that fully one-half of the U.S. workforce was denied access to that legislation. The scope of Canadian law at that time was essentially the same. Since then there is no doubt about the direction of Canadian public policy. Professional employees now enjoy trade union representation, finding no conflict between their professional obligation to the client and their desire to have a meaningful voice in the huge organizations for which they may work (for example, the professional engineers working for the Ontario Hydro). Agricultural workers are now conceded the right to engage in collective bargaining in at least some Canadian jurisdictions, in recognition of the economic fact that they often work for a large agribusiness rather than on a small family farm. Probably the most significant breakthrough concerns public servants who work for the largest and most powerful employers of all — the federal and provincial governments and their agencies and instrumentalities. The basic principle has now been conceded all across Canada that government employees should enjoy the right of collective bargaining with their sovereign employer. (Of course, there does remain the issue of how to settle a negotiating deadlock between a government and its employees, a matter I shall address in detail in a later chapter.)

An intriguing development in recent years is the fact that the impulse toward collective bargaining is now being felt outside the standard employment context. There are many social settings in which people find themselves in a position of marked inequality in dealing with a large organization. These include tenants dealing with a corporate landlord, students with their university, prisoners with correction authorities, welfare recipients with a government agency, farmers with food processors, even doctors who must now deal with compulsory government insurance schemes. Each of these relationships is salient in the lives of the people affected. It is difficult if not impossible for them to leave and take their business elsewhere. Hence the powerful impulse for some kind of collective voice in shaping the conditions which so much affect their daily lives. Perhaps there is no better testimonial to the model of trade union representation than that so many other groups in modern society are now trying to follow that example, to weld themselves into cohesive, countervailing forces which can deal effectively with the powerful bureaucratic organizations on which they depend for their livelihood.

Labour legislation is not able to accommodate that widespread impulse to collective action within a statutory framework designed for "employees": for workers who earn their living for services which they perform under the direction of managers, and who seek improvements in their working conditions by the economic threat of a collective withdrawal of their labour. Yet some of the more ticklish cases brought before labour boards in recent

TAB B

Appendix K

TAB B

Lawyers in Canada

DAVID A.A. STAGER

in collaboration with
HARRY W. ARTHURS

Published in association with Statistics Canada
by University of Toronto Press
Toronto Buffalo London

Geographic Distribution The ratio of population to lawyers is often used by lay persons as evidence of lawyer shortages or surpluses in different regions of the country. Such ratios have little significance, however, unless they are compared between geographic areas having similar economic characteristics. One would not expect to find the same population-lawyer ratio in Victoria and Vancouver, in Quebec and Montreal, or in Hamilton and Toronto, if only because there are more corporate head offices and greater personal wealth in Vancouver, Montreal, and Toronto. There should therefore be more lawyers in these commercial centres in relation to the total population than in Victoria, Quebec, or Hamilton. The same consideration applies to changes in the lawyer-population ratio over the years as the economy generates higher incomes and there is greater wealth and complexity in the organization of its resources.

Toronto and Vancouver had relatively low ratios of, respectively, 400 and 370 persons per lawyer in 1986 (Table 7.3). Similar low ratios also occurred in quite dissimilar cities such as Fredericton and Calgary, while Montreal had a somewhat higher ratio, at 560. The highest ratios of population to lawyers were in Hamilton and Windsor. These cities are dominated by single industries (steel and automobile manufacturing) and therefore have fewer corporate offices, especially in the trade and finance sector, where there usually is a greater demand for lawyers' services.

In 1986, almost 80 per cent of the lawyers in private practice, but only 55 per cent of the Canadian population, were in the twenty-three metropolitan areas shown in Table 7.3. Sixty-three per cent of the lawyers in private practice, but only 30 per cent of Canada's population, were in Montreal, Toronto, or Vancouver. Thirty-one per cent of all lawyers in private practice in Canada were in Toronto; 18 per cent were in Montreal; and 13 per cent in Vancouver.

Comparisons of ratios for 1971, 1981, and 1986 show locations of major growth in lawyers, as well as distribution across the main metropolitan areas. During the 1970s, the greatest increase in lawyers relative to population occurred in the secondary cities of Moncton, Sherbrooke, Saskatoon, and Victoria. During the early 1980s, however, the greatest increase took place in Montreal, Ottawa-Hull, and St John's.

Inside Law Offices

Partner:Employee Ratio Prior to the 1950s, law firms were characterized by one or two lawyers working in a modest office, with the assistance of a typist-bookkeeper and occasionally a law clerk or student.

Large firms of 25 to 50 lawyers were non-existent; the *Canada Legal Directory* for 1950 shows no firm with more than 28 lawyers. As firms grew in size and took on young lawyers as employees rather than as partners, the percentage of self-employed lawyers declined steadily. For men, this figure dropped from 92 per cent in 1931 to 70 per cent in 1986 (Table 7.4). For women, the change was even greater – from 76 per cent in 1931 and 1941 to 45 per cent in 1986. The combined effect is that the ratio of partners to salaried lawyers declined from 3:1 in 1971 to 2:1 in 1986. This lower partner:employee ratio can be expected to continue, at least for the near future, with the increased proportion of young lawyers who serve their junior years in salaried positions. But gradually the ratio will shift toward more partners, as the average age of the profession continues to rise through the 1990s.

Non-lawyer Staff Lawyers are obviously the key persons in the production of legal services in private law firms; but they are outnumbered in those firms by other occupations by a ratio of about two to one (Table 7.5). Clerical workers constitute half of all personnel in law offices; these include secretaries, typists, bookkeepers, clerks, and equipment operators. A further 6 or 7 per cent of law office staff consists of 'other law occupations' or paralegals, such as articling students, title searchers, and law clerks. A small but important group is made up of office managers and accountants.

The non-lawyer staff in law offices has increased faster in the post-war period than has the number of lawyers (Table 7.6), particularly in Newfoundland, Nova Scotia, and Saskatchewan, where there may have been a shift from one-lawyer firms to somewhat larger units, with higher ratios of clerical staff.

Although there has been little change in the occupational structure of law offices, this may mask some trends that offset each other. In 1971, the number of employees (including salaried lawyers) per partner in law

---

* Firm did not exist in that year.

a Largest firms in each province in 1971. A listing by size without reference to province would have omitted representation from most provinces. Names of firms may have changed in part, but the core of the firm has remained.

b Since 1988, most of the largest firms in Ontario and Quebec, and some of the larger firms in the Atlantic and western provinces, have formed joint partnerships, with much variation in their functional and financial structure. Several firms in the larger provinces also have inter-city branches. The data for 1989 do not include lawyers added to the firm through such mergers or branches.

TAB B

TABLE 7.4
Self-employed lawyers in private practice, by gender, Canada, 1931–86

	Male		Female		Self-employed as percentage of total	
	Total	Self-employed	Total	Self-employed	Male	Female
1931	7,515	6,919	49	37	92	76
1941	7,183	6,515	102	78	91	76
1951	7,796	6,514	170	97	84	57
1961	10,299	8,111	274	126	79	46
1971	13,355	9,600	635	285	72	45
1981	24,850	16,325	3,925	1,400	66	36
1986	28,145	18,810	6,935	2,550	67	37

Source: Statistics Canada, *Census of Canada, Occupation by Industry*, and special tabulations for 1971 and 1981

TABLE 7.5
Labour force in law offices, percentage distribution by occupation, Canada, 1971–86

Occupation	Percentage of total law office labour force			Female (%)
	1971	1981	1986	1986
Lawyers	36	38	37	20
Other law occupations	6	6	7	67
Managerial occupations[a]	3	2	3	69
Clerical occupations[b]	52	51	51	97
Other occupations	4	2	1	57
Total (per cent)	100	100	100	65
(number)	37,755	74,095	94,590	

Source: Statistics Canada, *Census of Canada, 1971 and 1981, Occupation by Industry*, and special tabulations for 1986

a Includes managers, administrators, accountants, and auditors

b Includes secretaries, typists, bookkeepers, data processing operators, library and file clerks, and receptionists

TAB B

TABLE 11.1
Industrial distribution of lawyers, Canada, 1931–86

Industry	1931	1941	1951	1961	1971	1981	1986
Mining, petroleum	0	1	35	103	105	275	260
Manufacturing, construction	21	37	102	139	175	285	380
Transportation, communication	78	54	101	160	220	220	490
Trade, finance, insurance	89	125	241	277	355	755	1,375
Private industry, total	188	217	479	679	855	1,535	2,505
Private industry (%)	2.3	2.7	5.3	5.6	5.2	4.5	5.8
Public administration (%)	3.0	4.5	6.2	6.7	8.5	10.3	10.8
Law offices and others[a] (%)	94.6	92.8	88.4	87.5	86.3	85.2	83.2

Source: Statistics Canada, *Census of Canada*, decennial publications; special tabulations for 1986

a Includes a small number in education, health, and other community services

The most dramatic growth in employment of in-house counsel was in the Canadian banking system during the decade 1976–86. In 1976, only the Toronto-Dominion Bank had a legal department, but within five years each of the major banks had a department of substantial size. Between 1976 and 1986, the total number of lawyers at these five banks rose from three to seventy. (Although the banks developed their legal departments at the same time, each bank followed a different pattern of internal growth and organization.) Increasing competition among the banks was one reason for the expansion of their law staff; since most of a bank's legal costs in arranging and documenting loans are charged directly to customers, banks that could reduce these legal costs could be more competitive.

An analysis of the distribution of corporate lawyers in the United States in 1970 found that the number of lawyers increases less than proportionately with the size of the corporate firm and its industry, suggesting that economies of scale exist in the provision of in-house legal services (Pashigian 1982). The study did not find a strong relationship between the number of lawyers and an industry's research and development activity or the scale of patent work. And although industries with more federal government regulation employed more lawyers, expansion of regulation did not produce a comparable increase in employment of lawyers.

TABLE 6.5
Lawyers, by gender, Canada, 1931–86

Year	Male	Female	Total	Female as percentage of total	Interdecade percentage increase		
					Male	Female	Total
1931	8,004	54	8,058	1	–	–	–
1941	7,791	129	7,920	2	–3	139	–2
1951	8,841	197	9,038	2	13	53	14
1961	11,759	309	12,068	3	33	57	34
1971	15,535	780	16,315	5	35	152	35
1981	29,030	5,175	34,205	15	87	563	110
1986	33,300	9,410	42,710	22	29[a]	64[a]	50[a]

Source: Statistics Canada, *Census of Canada*, decennial publications, and special tabulations for 1986

a Actual percentage increases for 1981–6 are doubled to provide comparability with preceding decade.

composition of younger lawyers, the ratio changes substantially. In Ontario, for example, female lawyers in 1988 constituted only 21 per cent of the total, but they represented 42 per cent of the total in the under-30 age group. (It should also be recalled from chapter 4 that women now constitute about half of law school graduates.)

Reasons for this surge of female lawyers require more detailed examination than can be undertaken here. Several possibilities are suggested, however. Was the rapid increase simply an extrapolation of women's increased enrolment in post-secondary education, or were there distinct factors influencing their enhanced presence in law schools? Did they, like many of their male colleagues, pursue law because this career did not require science and mathematics? Or with the declining demand for teachers, did women choose law as their major alternative? In a study of the teaching profession in Canada, it is suggested that the increasing percentage of women in law and other professional fields occurred because women from professional and executive family backgrounds increasingly chose these fields rather than teaching (Lockhart 1990). Did they respond to a much higher rate of return to an educational investment in law than in teaching, as they began to perceive that the legal profession was opening to women? Or did the increasing demand for legal services in the area of family law appeal to women more than did the traditional fields of corporate, taxation, and property law? Have female lawyers been more readily accepted by clients?

TAB B

Appendix L

The Canadian Legal Profession

Author(s): H. W. Arthurs, R. Weisman and F. H. Zemans

Source: *American Bar Foundation Research Journal*, Summer, 1986, Vol. 11, No. 3 (Summer, 1986), pp. 447-532

Published by: Wiley on behalf of the American Bar Foundation

Stable URL: http://www.jstor.com/stable/828141

TAB B

The Canadian Legal Profession

H. W. Arthurs, R. Weisman, and F. H. Zemans

This article seeks to weave together the limited information available on the legal professions of the Canadian provinces. Following the same general format as the other comparative studies in this series, it also offers several critical observations of special interest to readers in the United States, whose experience the Canadian bar so closely tracks. The phenomenon of stratification—familiar to American observers—is clearly visible in the Canadian legal profession. Combined with other centrifugal forces, it threatens the unity of a profession which, until recently, has managed to preserve a high degree of cohesion in training, ideology, and institutional structures. On the other hand, in certain respects, the Canadian experience seems to differ from that of the United States, especially in the strength and peculiar structure of publicly funded legal aid schemes, in the profession's continuing formal autonomy and relative immunity from public regulation, and in its long-lasting attachment to apprenticeship as a necessary stage in professional formation. These and other convergences and divergences between the two countries raise questions of general significance: To what extent do the similarities between Canada and the United States verify the assumption implicit in the theoretical literature (principally Abel, Freidson, and Larson) that there is an empirical referent for something called legal professionalism? And to what extent do the differences suggest that containing societies contribute distinctive characteristics to their legal professions, whose qualities are therefore highly contingent?

H. W. Arthurs is a professor of law at Osgoode Hall Law School and President of York University. B.A. 1955, LL.B. 1958, University of Toronto; LL.M. 1959, Harvard Law School. **R. Weisman** is an associate professor of sociology at Glendon College, York University. B.A. 1964, Columbia University; M.A. 1967, Ph.D. 1977, University of California; LL.B. 1985, Osgoode Hall Law School. **F. H. Zemans** is a professor of law at Osgoode Hall Law School. B.A. 1960, LL.B. 1964, University of Toronto.

EDITORS' NOTE: The article on the Canadian legal profession differs from conventional articles in that it takes the form of a comprehensive overview of a national profession. The paper arises out of a cross-national program of inquiry stimulated by the Working Group on Comparative Studies of Legal Professions. By developing a set of categories that may be used to analyze the structure and functioning of any legal profession, the Working Group, under the chairmanship of Philip Lewis and Richard Abel, commissioned a series of reports on the legal professions of some 20 countries. These reports were initially presented at the conference of the Working Group in Bellagio, Italy, July 1984. Through its financial support for the Bellagio conference, the ABF has gained the rights to publication of several national reports and the comparative essays that drew on them. Further national reports and/or comparative essays will appear in future issues of the *Journal*. By publication of these materials, both the Working Group and the Editors of the *Journal* hope to encourage comparative inquiry into legal professions and to provide a comparative perspective on the distinctive features of the American profession. The papers of the Bellagio conference will be published by the University of California Press, in revised form, in Richard L. Abel and Philip Lewis, eds., *Lawyers in Society.*

I. INTRODUCTION

Any attempt to offer a comprehensive portrait of Canadian lawyers is fraught with difficulty. No one knows very much about them, but there is a great deal to know. Canada is a federal state that embraces two official languages and legal cultures and ten provincial jurisdictions; its lawyers are dispersed across three thousand miles of territory in diverse social settings and economic circumstances; their functions are nowhere formally defined or faithfully recorded. Moreover, our attempt to capture the resulting complex and elusive data is made especially difficult by the extreme paucity of secondary writing on the Canadian legal profession.

We forewarn our readers, then, that we have often had to make descriptive bricks without empirical straw, to rely on "common knowledge," general impression, and logical inference from occasional bits of evidence. We hope that subsequent work by ourselves and others will gradually provide the detail that ought to have been available before we began this work and will test, perhaps falsify, many of the ungrounded generalities we have had to offer. However, we take solace in the expectation that this essay will make future Canadian projects a little easier and will contribute to a body of comparative data from which further speculation and theory formation may proceed.

These caveats notwithstanding, we believe that Canadian materials may indeed contribute to current theorizing about the professions. Recently students of the sociology of law, such as Abel[1] and Heinz and Laumann,[2] have begun to develop a historical and comparative approach to the study of the legal profession which complements the valuable work of Freidson, Johnson, and Larson[3] on the professions in general. Central to this approach, as Abel has formulated it, is the assumption that "all occupations under capitalism are compelled to seek market control, the attainment of which is the defining characteristic of a profession."[4] From this perspective, professions such as law and medicine may be conceived of as dominative occupations that have achieved and can maintain control over a market of services through a particular combination of political and economic strategies.

Freidson's seminal work on the sociology of medicine emphasized the terms in which this professional dominance was manifest.[5] Freidson found that professions were distinguished from other occupations by virtue of

1. R. Abel, Toward a Political Economy of Lawyers, 1981 Wis. L. Rev. 1117; *id.*, Comparative Sociology of Legal Professions, 1985 A.B.F. Res. J. 1.
2. J. P. Heinz & E. O. Laumann, Chicago Lawyers: The Social Structure of the Bar (New York: Russell Sage Foundation; Chicago: American Bar Foundation, 1983).
3. E. Freidson, The Profession of Medicine: A Study in the Sociology of Applied Knowledge (New York: Dodd, Mead & Co., 1970); *id.*, Professional Dominance: The Social Structure of Medical Care (Chicago: Aldine Press, 1970); T. J. Johnson, Professions and Power (London: Macmillan, 1972); M. Larson, The Rise of Professionalism: A Sociological Analysis (Berkeley: University of California Press, 1977).
4. Abel, Toward a Political Econony of Lawyers, *supra* note 1, at 1120.
5. Freidson, Professional Dominance, *supra* note 3.

their position of hegemonic privilege in the division of labor. Not only did organized medicine enjoy a legally enforced monopoly over the supply and production of services, and control over its own conditions of work, but it also achieved authority over other occupations in related domains of activity. Larson's work both extended and modified Freidson's analysis by tracing the emergence of professionalism in general and by identifying medicine (through a comparison between the United States and England) as the exception rather than the rule for the development of the professions.[6] Like Freidson, however, she argued that the essence of professionalism—the "professional project" in her phrase—entailed an attempt to control a market for services by securing a monopoly of competence.

Two elements were crucial to the professional project, in Larson's view: the creation of a systematic body of knowledge with reference to which claims to exclusive competence could be measured, and the achievement of control over the production of producers of this knowledge. The university—with its emphasis on formalized training, its espousal of meritocratic standards, and its high public credibility—became the primary vehicle by which professional organizations could attain these objectives. Through affiliation with universities, professions could buttress their arguments for exclusive control with claims of scientific legitimacy. By instituting more selective standards of admission and by enhancing performance standards through changes in the curriculum, they could also reduce the pool of qualified applicants, thereby creating a scarcity of producers.

Several ambitious recent attempts to track the professional project point to a decline in professional dominance. Abel suggests that in both England and the United States the profession has lost control over the supply of legal services and that various defensive strategies, by which it has sought to regain control, have been markedly ineffective. Heinz and Laumann also offer evidence of professional transformation and decline, as they describe the increasingly stringent division of the metropolitan bar into mutually exclusive subgroups based on function, income, ethnicity and education.[7] Other studies identify the rapid shift from private practice to employment, in both public and private sectors, as further evidence of a departure from the professional ideal in which members exercise control over the terms and conditions of their work.[8] It may be noted that similar trends toward a loss of market control and loss of autonomy have been observed in medicine, although the causes of deprofessionalization differ.[9]

Much of the historical and contemporary material that grounds these studies is American, although there is considerable reference to the English

6. Larson, *supra* note 3.
7. Heinz & Laumann, *supra* note 2.
8. See Abel, Toward a Political Economy of Lawyers, *supra* note 1, at 1159–60.
9. D. Coburn, G. M. Torrance, & J. Kaufert, Medical Dominance in Canada in Historical Perspective, 13 Int'l J. Health Services 407 (1983); J. McKinlay & J. Arches, Towards the Proletarianization of Physicians, 15 Int'l J. Health Services 161 (1985).

experience, and recently more extensive international comparison. It is in this regard that the study of the Canadian experience becomes material. If the theories of Freidson, Larson, and Abel are to have a general explanatory value, they must be able to accommodate data and developments in contexts other than the one from which they were primarily drawn. Their application to the Canadian experience (itself a congeries of experiences) thus offers a test of the theories themselves. At the same time, the relative paucity of Canadian data ought to introduce a note of caution into any claims that the theories do or do not survive transplantation into the Canadian context.

Is it probable that a theory of the political economy of the professions transcends national boundaries? Local political forms and culture, local economic circumstances and social organization, and especially the notorious parochialism of law in its formal manifestations, all would seem to argue in favor of highly distinctive local experiences of legal professionalism. Canada's emergence from agrarian colonial status to modern industrial nationhood during the formative period of professionalism might especially be expected to yield a distinctive pattern, unlike that of the two countries most influential in its professional history—England and the United States. Given these considerations, the wonder is not that the Canadian experience in certain respects seems to invite modification of the "professional project" thesis, but rather that it so frequently seems to confirm it. A few examples from the materials that follow will help to make the point.

As will be recounted below, significant elements within the Canadian legal profession appear not to have recognized the possibility that its monopoly of competence might be enhanced by closer association with the university and by at least the affectation of a scientific knowledge base. Both of those developments continued to be resisted until well into the twentieth century (and are even today resisted in some quarters) by a profession that clung adamantly to its own guild tradition. Does this historical evidence qualify Larson's thesis? Or can it be explained by the contingency of colonialism, in which conscious departures from British tradition were eschewed on principle long after that tradition itself had begun to change? Or can it be explained by the relatively unevolved state of Canadian universities as compared with the prestige and power that accrued early on to professional governing bodies?

To take another example, the Canadian legal profession has undergone considerable expansion since the mid-1960s. This period of sustained growth, coupled with a protracted economic recession, has weakened—if not eliminated—the profession's control in the market for legal services. While the effects of this loss of control on the distribution of income and opportunities are not reliably documented, there is at least a widespread perception that prospects for individual and collective upward mobility within law have declined appreciably.

While this phenomenon parallels the American experience, the Canadian bar's reaction to it may be seen to differ somewhat. There have in fact been several explicit proposals (none of which matured into effective action) to restore market control by limiting the number of new entrants.

Some patently protectionist proposals to restrict access to law studies have been given a thin wash of legitimacy by being framed as attempts to avoid the wasteful expenditure of public funds on the education of those who would never be able to practice what they had learned. Other proposals for restriction purport to rest on wholly altruistic motives, such as protection of the public. For example, it has been argued that the incidence of professional misconduct has risen disproportionately as competition within an overpopulated profession has driven new entrants to attempt work they cannot handle or to supplement inadequate fee incomes with other, illicit sources of revenue. Unhappily, for proponents of this view, such misconduct appears to be more prevalent among established practitioners than among new ones.

Were such proposals more openly espoused (if not more successfully pursued) in Canada than in, say, England or the United States because of the exaggerated strength or the political ingenuousness of its professional bodies, because of their closer linkages with traditional political elites, or because of the absence of effective antitrust deterrents? In more general terms, was the reaction of the Canadian legal profession to a perceived threat to its market dominance determined by its indigenous political economy, or by exogenous factors related to broader trends in Canadian society? Does this history of protectionist proposals, then, tell us less about the professional project per se than it tells about the historical contingency that gives it explicit shape and form in particular times and places?

The growth of public and private bureaucracies in Canada, comparable to that in England and the United States, likewise led to diversification within the legal profession, thus affecting its control over the supply side of the market. Rapidly increasing numbers of lawyers now work outside the traditional context of private practice—in government, business, universities, and elsewhere in the quasi-public sector. Their conditions of work are largely determined by norms that differ from those of private practitioners, as to some extent their knowledge base and perhaps even their ideology differ.

Despite their special circumstances and perspectives, however, in Canada such lawyers have largely failed to assert their distinctive interests within the profession, and they have rather passively acquiesced in having formal control of professional governing bodies held by private practitioners. Is this acquiescence a particular instance of a widely observed Canadian tendency to defer to authority? Evidence of the practical irrelevance of professional regulation? Or a tribute to the continuing power of professional myths?

Whichever is the explanation, the considerable expansion of practice in bureaucratic settings is an important component of the erosion in Canada of effective and coherent professional control of supply in the market for legal services. The issue that invites speculation is why this erosion has occurred without any significant impairment of professional prerogatives at a formal level.

If the profession has not succeeded in controlling the supply of legal services, it has not been indifferent to the generation of demand. The creation of an expanded client base through the creation of publicly financed legal aid schemes has been on the agenda in Canada since the mid-1960s. For the most part, provincial professional bodies (although not always their rank-and-file members) have accepted the introduction of such schemes in exchange for administrative arrangements that ensured the profession some role in their management.

Provincial schemes use either or both of two methods of supplying counsel—salaried legal aid lawyers or private practitioners reimbursed out of public "judicare" funds on a fee-for-service basis. Generally speaking, the profession has preferred the latter approach, whereas governments have favored the former. In the three most populous provinces, a compromise prevails in which some of the client demand is dispersed among private practitioners—the major part in Ontario and British Columbia, the lesser in Quebec—with the balance handled by local government offices or community clinics.

While legal aid in each of its manifestations has obviously increased aggregate demand (or at least the economic expression of that demand), the effects of this increase on the profession's market position have not been constant. Where primary reliance is placed on salaried lawyers, most of the profession has not benefitted at all: hence the bar's general preference for judicare schemes. But even where judicare schemes predominate, comparatively low fees militate against broad-based participation. Only a minority of lawyers tend to remain on legal aid panels; most of those handle only a few cases; and a disproportionate share of all judicare cases is handled by junior lawyers. Thus, while legal aid has doubtless helped many young lawyers to establish a practice and has provided ongoing support for a small number of lawyers in the public and private sectors, it has not transformed market conditions for the bulk of the profession. Indeed, it is sometimes urged that low legal aid fees have exercised a depressing effect on fee levels generally.

Once again, we see the bar's relative failure to assert its interests positively enough to maximize the economic interests of its members: on one side it is willing to support a scheme of obvious benefit to the public; on the other it is able to veto any administrative structure it deems incompatible with its formal autonomy and privileges. Once again we note differences among the experiences of various Canadian jurisdictions, and between Can-

ada and either the United States or England. Once again, therefore, questions are raised about the relative power of the bar's "project" and of the other socioeconomic factors at play.

In one sector at least, the profession seems to have survived all its recent difficulties not only unscathed but with considerable advantage. Over the past 20 years, a relatively small number of large, elite firms have emerged in Canada, located in the major metropolitan centers and serving the needs of governments and major domestic and foreign corporations. The professional opportunities and financial rewards of practice in these firms have grown just as those available to lawyers in many other practice settings have diminished, with a resulting tendency to the stratification—at least in metropolitan areas—that has been widely observed in the American literature.

However, temptations to merely extrapolate from the American experience must—yet again—be resisted. Ironically, certain conservative forces in Canadian society may retard (if not arrest) the tendency to stratification.

For example, three of the important (and sometimes related) determinants of stratification within the American legal profession are class, ethnicity, and education. Members of disadvantaged groups, minorities, and graduates of nonprestigious law schools populate the lower orders of the American profession to a disproportionate degree, while members of favored groups tend to be overrepresented in elite schools and to dominate the best practice opportunities. In Canada, the lower and upper orders are not so easily typified. This is not evidence of egalitarianism. Rather, entry to law school may be even more difficult than in the United States for members of disadvantaged groups, while the relative homogeneity and small number of the law schools in Canada make invidious distinction difficult.

But stratification there is notwithstanding, and it does reflect to some extent the socioeconomic background of lawyers, to some extent their academic attainments, and to a significant degree the nature of their clientele and practice. Perhaps the nuance of the Canadian experience suggests that the American interpretations have tended to overemphasize the internal political economy of the profession, as opposed to more general social and economic influences.

These developments have set in motion changes within the profession—in Canada as elsewhere—that threaten its cohesion and thus, ultimately, its capacity to realize the "professional project." Yet, as has been observed, in several respects the Canadian experience differs from (or has not yet come to resemble) that observed in comparable countries. These differences may help to explain why the Canadian bar has been able to sustain, in several respects, strong indicia of classic professionalism as that term is understood in the work of Freidson, Larson, Abel, and others.

As we shall suggest, despite considerable loss of market control, the Canadian bar remains surprisingly strong. Professional governing bodies are

still able to maintain a degree of both formal and effective autonomy greater than their American counterparts'; an immunity from antitrust and other general regulatory legislation that exceeds even that of the English legal professions; rules favoring collective market management of professional practice, rather than the individualistic and competitive rules increasingly characteristic of the United States; and a residuum of influence over public policy, at least in areas deemed by the profession to affect its vital interests. In light of this controlled and somewhat elitist pattern of development, it is not at all clear that the responses of the American legal profession to changes in its market position can serve as a guide to the responses of the Canadian profession.

To put the matter more generally, we must ask yet again whether the difference in the experience of these two closely similar countries provides a new empirical referent for theories of professionalism—and helps to falsify those theories—or whether it merely verifies what intuition might suggest: that containing societies have the capacity to mold professions, as they do other social components, while leaving them recognizably related to the ideal types we must use if we are to engage in historical and comparative discourse.

II. The Canadian Legal Profession

A. Terminology

In general parlance, legal practitioners everywhere in Canada are called "lawyers" (or, in Quebec, "avocats"). However, in formal or statutory terms, legal practitioners are referred to as "barristers" or "solicitors" or "barristers and solicitors."[10] These terms have historic significance, reflecting the British background of the Canadian legal profession, but they have no functional significance; all Canadian lawyers are automatically both barristers and solicitors. Quebec, however, represents a special case. In that province, "notaires" form a separate branch of the legal profession, reflecting the French and civil law traditions of the province. "Notaires," or notaries, are concerned with the formalization, authentication, and preservation of title documents, wills, and other formal legal instruments.[11] (They will not be dealt with elsewhere in this study.)

When the term "lawyers" is used in Canada, it embraces all qualified members of the legal profession whether they are employed in advisory or representational functions, whether on behalf of private clients, governments, or other institutions. Lawyers are also sometimes referred to as "counsel" (in a litigation context), sometimes as "legal adviser" or "legal representative" (both of which may include persons without professional credentials who enjoy a right of audience before some particular tribunal).

10. See, e.g., Law Society Act, Ont. Rev. Stat. ch. 233, § 28 (1980); Barristers and Solicitors Act, N.S. Rev. Stat. ch. 18, §§ 3–5 (1967); Barristers and Solicitors Act, B.C. Rev. Stat. ch. 26, § 42 (1979).
11. Notaries Act, Que. Rev. Stat. ch. N-2 (1977).

However, lawyers who perform adjudicative or regulatory functions may suspend or terminate their formal professional membership; after doing so, they will be referred to as judges, members of a board or commission, etc., rather than as lawyers.

"The legal profession" denotes a collectivity, sometimes referred to as "the bar" and embraces all qualified lawyers. However, the terms in some contexts may connote only those in active practice (excluding, e.g., those in law teaching), and it certainly does not extend to paraprofessionals, law clerks, and others doing "legal" work without professional credentials.

A purely honorific title, "Queen's Counsel" (Q.C.), has been awarded to a rather large number of lawyers in some provinces (e.g., Ontario) but to a rather small number in other provinces. Borrowed from the British tradition, it signals neither preeminence in advocacy (as it does in England) nor government employment but (if anything) merely some degree of seniority and professional or public repute.[12]

Lawyers perform a variety of tasks, many of which require little or no specialized training but are nonetheless functionally related to other tasks that do.[13] The two historical and basic functions of lawyers, conveyancing and litigation, have now acquired extended meaning, roughly translating in modern idiom as advice giving and advocacy.

"Conveyancing" involves, technically, the legal and formal means by which property is transferred. Canadian lawyers continue today to perform this historic function, but the modern analogue to traditional conveyancing is the practice of commercial law. And it involves much more than the effectuation of property transfers: it extends to the negotiation, drafting, and interpretation of commercial documents; advising and planning for commercial transactions and corporate and tax planning; and general strategic advice—including all kinds of practical business and political counsel. As well, lawyers give advice to individual nonbusiness clients about a wide variety of problems—including family relationships, arrangement of their financial affairs, their dealings with government over pensions and other benefits, employment contracts—and take appropriate measures to translate the advice into effective action.

"Litigation" in the strict sense includes representation of parties in a dispute that will be adjudicated by a court. By extension, it includes all phases of a dispute, including strategic and tactical advice before litigation, preparing for trial, negotiating outcomes, and drafting legal documents that respond to those outcomes. In addition, litigation has come to encompass

12. B. Laskin, The British Tradition in Canadian Law 28 *et seq.* (London: Stevens, 1969); K. Fowler, Queen's Counsel: Honour Without Meaning? Can. Law., June 1978, at 30.

13. See E. Colvin, The Division of Legal Labour, 17 Osgoode Hall L.J. 595 (1979); P. D. Macfarlane, The Legal Profession in Canada: A Research Perspective and Prospectus, 28 Chitty's L.J. 50 (1980); S. Colvin, D. Stager, L. Taman, J. Yale, & F. Zemans, The Market for Legal Services: Paraprofessionals and Specialists, Working Paper No. 10 (Toronto: Professional Organizations Committee, 1978).

representation and associated functions before adjudicative bodies other than courts. Other types of contentious business, such as dealing with government regulatory regimes, interpreting existing legislation, attempting to secure changes in that legislation, and contacts with media and critics often fall to lawyers involved in litigation.

While some lawyers by preference concentrate entirely on conveyancing (in its broad sense) and others specialize in litigation, there are no formal constraints on individuals who wish to be involved in both, and many are. Indeed, to an extent specialities have developed (e.g., urban planning, taxation, securities regulation) that cut across the conveyancing/litigation distinction.

In addition to these two generic functions of advice giving and advocacy, there is a third small but growing group of lawyers concerned with the "scientific jobs" in law. The group includes not only legal academics but also employees of government departments, law reform commissions, research staffs of corporations and community groups, and specialist researchers in large law firms. What distinguishes their work is the relative infrequency with which it bears directly on the affairs of, or involves contact with, a particular client.

Finally, some lawyers are deeply involved in political-administrative functions that do not usually engage the same legal skills employed by lawyers in private practice on behalf of clients, although law often forms a background for their activities. Corporate and government administrators, lobbyists, journalists, and elected officials are in the broad spectrum of "nonlegal" occupations in which lawyers may be found.

In each group, the more attenuated the connection with the original knowledge base of lawyers' functions, the more likely is the presence of nonlawyers as important actors in the same field of activity.[14] Thus, advice giving in matters related to business often involves the significant participation of accountants and others with "expert" knowledge. Advocacy in many tribunals not mandated to administer conventional legal rules is shared with laymen. The development of "legal science" increasingly attracts the participation of economists, sociologists, scientists, and philosophers. Public policy development and public administration are not the special preserve of lawyers; indeed they are by no means a dominant presence in such activity.

However, in matters more closely related to the traditional conveyancing and litigation functions of lawyers, they tend to assume an exclusive or dominant role. "Law clerks" or "legal assistants" typically work under the

14. S. Colvin et al., *supra* note 13; J. Quinn, Multidisciplinary Services: Organizational Innovation in Professional Service Markets, Working Paper No. 7 (Toronto: Professional Organizations Committee, 1978); R. G. Evans & M. J. Trebilcock, eds., Lawyers and the Consumer Interest (Toronto: Butterworths, 1982).

supervision of qualified lawyers.[15] Sometimes they are given considerable latitude in the preparation of routine documents and in the prosecution of legal proceedings, including full responsibility for such minor matters as the collection of small debts. "Community legal workers," "lay advocates," or "paralegals" perform analogous functions in the context of community legal service delivery systems.[16] Typically, however, they enjoy rather greater de facto autonomy and assume much broader responsibilities, particularly in areas such as community mobilization and legal education. Neither "law clerks" nor "community legal workers" need have any particular training or formal credential, although courses and training programs have appeared in recent years designed to prepare individuals to perform such functions.[17]

Accountants, trade union representatives, and various types of advisers, consultants, and representatives do have limited rights of audience in certain forums,[18] and they may negotiate, draft, and interpret certain types of legal documents, so long as they are not deemed to engage in "the practice of law." Their activities typically involve specialized functions that relate to such matters as immigration, labor relations, social welfare, and landlord-tenant problems, but extend as well to taxation, estate planning, and to financial and corporate transactions for middle-class and corporate clients.

A few historical anomalies exist in some jurisdictions, in which people may be formally qualified to practice law of a particular type without being in either a popular or a technical sense lawyers. These anomalies include patent attorneys (or patent agents) who are licensed to practice industrial property law only,[19] "conveyancers" who may perform title searches and other conveyancing functions,[20] notaries public (who authenticate documents), commissioners (who swear affidavits),[21] and "notaires" who perform special functions in Quebec.

15. L. Taman, The Emerging Legal Paraprofessionals, *in* P. Slayton & M. Trebilcock, eds., The Professionals and Public Policy (Toronto: University of Toronto Press, 1978); F. H. Zemans, The Non-Lawyer as a Means of Providing Legal Services, *in* Evans & Trebilcock, *supra* note 14.

16. N. Gold, The Interface Between the Paraprofessional and the Professional: Some Reflections on the Lawyer and the Community Services Paralegal Worker, *in* Public Sector Paralegalism in Canada Today (Montreal: National Legal Aid Research Centre, 1979); C. Thomasset, Les juristes non avocats au Quebec, 4 Can. Legal Aid Bull. 89 (April 1981); T. H. Taylor, Paralegals in Saskatchewan Community Legal Services Clinic, 4 Can. Legal Aid Bull. 73 (April 1981); F. H. Zemans, The Public Sector Paralegal in Ontario: Community Legal Worker, 4 Can. Legal Aid Bull. 130 (April 1981).

17. T. Marmor & W. D. White, Paraprofessionals and Issues of Public Regulation, Working Paper No. 16 (Toronto: Professional Organizations Committee, 1978); A. Zaklad & R. J. Wicks, The Training of Paralegals, 26 Chitty's L.J. 196 (1978); J. Ronson, The Training of Paralegals in Ontario, 12 Law Society of Upper Canada Gazette 192 (1978) (hereinafter cited as L.S.U.C. Gaz.).

18. See, e.g., Criminal Code, Can. Rev. Stat. ch. C-34, § 735 (1970) ("agent" may appear in summary conviction proceedings); Statutory Powers Procedures Act, Ont. Rev. Stat. ch. 484, § 10 (1980) ("agents" may appear in administrative proceedings); *Re* Nissan Automobile & Pelletier, 1981 S.C.R. 67 (province may exclude representation by counsel in small claims court).

19. Patent Act, Can. Rev. Stat. ch. 203, § 15 (1970).

20. M. J. Trebilcock & B. Reiter, Licensure in Law, *in* Evans & Trebilcock, *supra* note 14, at 101 n.36.

21. See generally N. Schloesser, History and Organization of Notaries in Ontario (Toronto: Professional Organizations Committee, 1979).

B. Sociographic Data and Social Position

In very general terms, one might expect that fluctuations in the number, social position, and function of lawyers would reflect general demographic fluctuations, economic trends, and changes in attitude toward the legal system itself. No doubt this sensible expectation applies to Canada as well. However, as noted earlier, in a country that is federal in structure, that embraces two legal systems, that supports a small population base spread across a very large land mass, that has experienced recent immigration resulting in an increasingly heterogeneous population, it is not really possible to generalize with any degree of accuracy. Some attempt will therefore be made to identify and evaluate several aspects of Canadian society, particularly as these may require a province-by-province assessment of the issues that are the subject of this study.

1. Numbers

In general, the following data relate to lawyers who are licensed to practice, even though not all of those licensed do practice. This distinction is a significant one in view of the increasing tendency for professionally qualified young lawyers not to enter private practice. For example, in Ontario, the most populous province of the country, the number of graduates entering private practice has declined from 86% to 70% over a period of about ten years.[22]

Subject to this caveat, we may now consider the present size of the legal profession. As of 1982, there were some 39,000 lawyers in Canada (including Quebec notaries).[23] This represents a significant growth in absolute numbers since the mid-1960s and, as well, a significant decline in the ratio of lawyers to population. For example, in Ontario the ratio of lawyers to population in 1960 was 1/1,142 but in 1981 was 1/574 (see table 1). But the data must be treated somewhat circumspectly, and the lawyer-population ratio even more so.[24] It would appear that these changes resulted rather more from a demographic anomaly[25] than from any surge in the popularity of legal studies.[26] Nonetheless, especially as absolute numbers rose

22. Report of the Special Committee on Numbers of Lawyers, 17 L.S.U.C. Gaz. 222, 227–28 (1983).

23. Canadian Law List (1983).

24. In determining the "real market" for legal services, regard must be had to the effect on aggregate demand of corporate as well as individual clients, of changing intensities of legal regulation, and of overall fluctuations in economic activity.

25. On the one hand, an unusually low number of graduates entered the profession in the 1940s and 1950s, thus a corresponding low number would be leaving the profession through retirements and deaths a career generation later. On the other hand, since the birth rate peaked in the early 1960s, the population of the country as a whole has been growing at an unprecedentedly low rate. The combination of these two demographic facts obviously exaggerates the declining ratio of lawyers to population.

26. The percentage of university students studying law has remained relatively constant since the 1960s. See Law and Learning (Report of the Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council), at 25–26 (Ottawa: Social Sciences and Humanities Research Council, 1983).

TABLE 1
Lawyer/Population Ratio, Ontario, 1960–81

Year	Ratio
1960	1/1,142
1965	1/1,143
1970	1/1,043
1975	1/817
1980	1/599
1981	1/574

Source: Report of the Special Committee on Numbers of Lawyers, 17 L.S.U.C. Gaz. 222, 227 (1983).

and ratios declined after a protracted period of stability,[27] the changes have come to be perceived (especially in professional circles) as unprecedented. In historical terms, they probably are not.[28] Rather, they seem to be part of a long-term trend in which episodes of rapidly expanding supply of lawyers are interspersed among lengthy periods when the supply remains constant or contracts.

2. Regional Distribution

There are considerable disparities in the distribution of lawyers among the various areas of the country and within each area. In general terms, lawyers are clustered in the most economically advanced and densely populated parts of the country, and in government centers.[29] For example, Toronto, which is a provincial capital, the commercial center of the country, and located in the midst of the industrial heartland, contains about 10% of the total population of the country, but about 25% of its lawyers.[30] Conversely, small towns in remote areas often have few lawyers and almost certainly have a much smaller proportion of lawyers to the general population than is found in the major metropolises.

3. Deployment Within the Profession

Not only are lawyers found in disproportionate numbers in metropolitan areas, but there are considerable differences in type of practice between metropolitan and nonmetropolitan settings, and even among metropolitan lawyers in the city core and in suburban locations.[31]

27. See generally D. Stager, The Market for Lawyers in Ontario: 1931 to 1981 and Beyond, 6 Can.–U.S. L.J. 113 (1982).

28. For longer-term historical figures, see also J. Nelligan, Lawyers in Canada: A Half-Century Count, 28 Can. B. Rev. 727 (1950); *id.*, Income of Lawyers, 29 Can. B. Rev. 34 (1951).

29. E. Berger, Ltd., Demographic Survey of the Canadian Bar 8 (Ottawa: Canadian Bar Association, 1979).

30. *Id.* at 32.

31. See, e.g., *id.* at 46; M. E. Mullagh, The Law Firm in British Columbia: Economics, Organization, Size and Composition, 11 L.S.U.C. Gaz. 270 (1977); L. Snider, Legal Services in Rural Areas: An Evaluation Report (Ottawa: Department of Justice, 1981).

Outside metropolitan centers, general practitioners predominate.[32] In part, this is because there is an insufficient population to support a large cadre of specialist practitioners, in part because specialist practitioners tend especially to perform services on behalf of governments, corporations, and other institutional clients whose head offices are generally located in the larger cities.

The needs of such institutional clients are typically catered to by medium-sized and large law firms, which are almost all located in the central business and financial districts of large cities. However, lawyers catering to a "household clientele" tend to be found elsewhere, and with increasing frequency in suburban shopping precincts and in storefronts in working-class and ethnic districts.[33] Outside the central business districts, small firms and solo practitioners predominate.[34]

A relatively recent development is the growth of identifiable subgroups outside of private practice. For example, while there were only some 40 law teachers as recently as 1950 in all of Canada, the number has grown now to more than 650.[35] Government lawyers working at the municipal, provincial, and federal levels have experienced a similar dramatic increase in numbers. For example, the Province of Ontario employed approximately 6 lawyers in the Ministry of the Attorney General in 1945. By 1981, 150 were employed in the Ministry's head office, and a further 500 in local crown attorneys' (prosecutors') officers.[36] In the same year, of 15,011 members of the Ontario legal profession, 1,098 were employed by various levels of government.[37] Staff lawyers (sometimes called "house counsel") have expanded their numbers greatly, especially in the past 10 years.[38] And, finally, lawyers working for community groups, trade unions, legal aid or legal services schemes, and advocacy organizations (such as the Environmental Law Association or the Civil Liberties Association) were almost nonexistent 15 years ago, but today they number some hundreds of practitioners across the country.[39]

32. For a unique, extensive, and intensive study of the bar of Sudbury, Ont., a small-to-medium city, see the work of F. Ribordy: Les avocats de Sudbury 1891–1981 (unpublished, Université Laurentienne, 1982); Sudbury's Lawyers 1891–1981 (unpublished, 10th World Congress of Sociology, Mexico City, 1982); *id.,* Les services d'aide juridique à Sudbury, Can. Legal Aid Bull., Oct. 1982, at 18; *id.,* Cent ans de présence des avocats à Sudbury, 17 L.S.U.C. Gaz. 51 (1983).

33. S. Colvin et al., *supra* note 13, esp. chs. 4–9.

34. See H. W. Arthurs, L. Taman, & J. Willms, The Toronto Legal Profession: An Exploratory Survey, 21 U. Toronto L.J. 498 (1971); Berger, *supra* note 29.

35. Law and Learning, *supra* note 26, at 30.

36. H. A. Leal, Are There Too Many Lawyers? 6 Can.–U.S. L.J. 166, 171 (1982).

37. D. Stager, Report to the Special Committee on Numbers, Law Society of Upper Canada, at 25 (unpublished, 1981).

38. I. R. Feltham & E. A. Campin, The Emerging Role of Corporate Counsel (Banff, Alta.: National Conference of Corporate Counsel, unpublished, 1981).

39. Legal aid and community clinic staff lawyers are the most numerous of these groups. In Ontario, e.g., community clinic lawyers alone increased from 18 in 1976 to 60 in 1983, F. H. Zemans, Community Legal Clinics in Ontario: 1980 A Data Survey, 1 Windsor Yearbook of Access to Justice 230 (1980); M. J. Mossman, former Manager, Clinical Funding, Ontario Legal Aid Plan, correspondence (July 25, 1983). Across the country some 534 lawyers were employed by legal aid services in 1979–80,

4. The Numbers Debate

The relatively rapid increase in numbers of lawyers admitted to practice, especially for the past five to ten years, has produced a widespread conviction among members of the bar (and some members of the public) that there are "too many lawyers." In the absence of any other standard for measuring the appropriate number of lawyers, this belief is typically supported by reference to the alleged stability or decline in lawyers' incomes in recent years.

However, it is by no means clear to what extent lawyers' incomes have been affected by rising numbers. In fact, even with variations attributable to type of practice, seniority, clientele, and location, Canadian lawyers generally have managed to maintain their relatively advantaged position in the economic pecking order.[40] And to the extent they have not done so, what they have suffered from has been largely the adverse effects of recent reversals in Canada's economic fortunes.[41] At a period when the economy has been running considerably under capacity, and when unemployment in many industries is high, real estate and other commercial markets are depressed, and business expansion is negligible, it might be expected that lawyers' income would suffer accordingly.

In fact, the extent of fluctuations in lawyers' incomes is difficult to measure. Average annual income may indeed have remained relatively stable, which would imply an actual decline after making adjustment for inflation. However, because of the large influx of relatively low-earning recent graduates, it is not surprising that overall average income has not increased. No figures have yet been produced to suggest that this average decline has had a significant effect on the real earnings of senior elite lawyers over the past few years. On the contrary: for reasons to be discussed below, the present economic situation may well have had the effect of exaggerating existing disparities—to the prejudice of new entrants, solo practitioners, small firms, practitioners serving a household clientele and legal aid clients, and salaried lawyers (the categories overlapping somewhat).

Additional controversy in the numbers debate arises from an alleged increase in incompetence, which some seek to attribute to conditions created by excessive numbers.[42] Because lawyers must cut prices to compete, it is argued, they will also trim the quality of service provided. Moreover, lawyers whose traditional source of business (e.g., real estate transactions) has

---

Legal Aid Services in Canada 1979/80 (Ottawa: National Legal Aid Research Centre, 1981). Recent restraint-induced cutbacks in government services may well have halted, or even reversed, this growth trend.

40. Altman & Weil, Inc., Economic Survey of Canadian Law Firms (Ottawa: Canadian Bar Association, 1981); Lawyers' Incomes Holding Up Well, Financial Post, Nov. 20, 1982, at 20.

41. Stager, *supra* note 27, at 116–18; all articles by Ribordy, *supra* note 32.

42. See, e.g., R. D. Yachetti, The Views of the Practising Bar, 6 Can.–U.S. L.J. 103 (1983). It has also been suggested that incompetent service may result if too few lawyers attempt to cope with too great a demand for legal services, see Stager, *supra* note 37, at 33–34.

diminished will be tempted to try their hand at types of legal practice (e.g., criminal law) in which they are not experienced. To date, these allegations remain unsubstantiated by any factual analysis. While the latter suggestion prima facie seems possible, the former is at odds with at least one verifiable fact: recent significant increases in claims for incompetence result from the activities of experienced lawyers and from errors committed by them during a period of increasing activity and prosperity.[43]

But whatever may be the facts, it is undeniable that a considerable sentiment exists within the profession for limiting further increase in numbers. In a 1981 survey of the Ontario legal profession, 73% felt that controls on entry would benefit the public, and 85% felt controls would benefit the profession.[44] The difficulty is that it is by no means clear that the profession has the power to embark on any such scheme. While the application of antitrust legislation to the legal profession is a matter of some doubt,[45] the judgment has been so far made that any attempt by the profession to restrict numbers would result in a public outcry to the likely prejudice of the profession.[46] However, governments facing financial constraint might be willing to trim the numbers of graduating law students in order to save the costs of both legal education and claims on legal aid funds.

So far, this possibility remains mere conjecture. No doubt some potential applicants to law school have been dissuaded from applying by publicity over the "numbers problem" and by reports of unemployed law graduates. Indeed, there is some evidence that the play of market forces has been felt most severely by recent graduates, who have suffered periods of unemployment or been displaced into nonlegal careers in business, government, or elsewhere. However, law schools continue to enjoy a vast surplus of highly qualified applicants for the limited number of places available each year.

The numbers debate within the legal profession is likely to be translated into a broader public debate over manpower policy in the legal-professional market.[47] If so, it will likely be resolved only after fuller articulation of the competing interests of various elements of the bar, of consumer and other community groups, and of the government departments responsible for finance, legal services, and education.

43. Unpublished study, Law Society of Upper Canada, 1982.

44. Yachetti, *supra* note 42, at 105.

45. L. Hunter, Are There Too Many Lawyers? The Government's View, 6 Can.–U.S. L.J. 199 (1983).

46. The Report of the Special Committee on Numbers, *supra* note 22, at 238, concluded that "the imposition of controls either during the Bar Admission Course or at the stage of entrance into it cannot be justified" and acknowledged that limitation of places in law faculties "would involve the appropriate government ministries entering into discussions with the universities." Having also received an opinion that it lacked statutory power to limit numbers (at 234), the Law Society did not seek amending legislation to acquire such power.

47. E. Kirsch, Manpower Policy and the Legal Profession, *in* Evans & Trebilcock, *supra* note 14.

5. Connections with Other Institutions

a) Legal connections. There are strong ties that bind lawyers to legal institutions. Beginning with their common educational background in which attitudes toward these institutions are first formed, reinforced by participation in similar functions, socialized by a professional culture, lawyers in general identify closely with, and tend to support, traditional legal institutions. These institutions include the organized legal profession, the courts, and organizations such as the bar association. Informal professional networks of colleagues and friends are also important.

However, not all lawyers exhibit the same sense of identification with legal institutions and culture. Those who stand at a greater distance may do so as a result of their responsibilities, functions, or intellectual or ideological perspectives. Judges, for example, may attract either deference or criticism (or both) rather than close collegiality.[48] Law professors may likewise see themselves as either critics of "the system" or deferential to those who are its authority figures.[49] Government officials, legal aid and clinic lawyers, tribunal members, and other lawyers employed by nonlegal employers are exposed to centrifugal influences.

b) Nonlegal connections. Some specialist practitioners maintain close connections with other professions with whom they collaborate. For example, doctors and lawyers compose the membership of the Medical-Legal Society;[50] lawyers and accountants, of the Canadian Tax Foundation. But much more common are the involvements of lawyers particularly with their business clients. These obviously include annual retainers (sometimes reflecting decades of close association), the acceptance of directorships, participation in active management, and partnerships or co-venture arrangements in "one-off" investments. Beyond these business relationships, lawyers and their business clients are often involved in a social-political nexus, the lawyers serving as lobbyists, informal intermediaries, or (in their political capacities) as a responsive audience for their business clients.[51]

To some extent, as well, lawyers maintain connections with nonbusiness community groups. These include political parties, religious and ethnic groups, and special interest groups such as consumers' associations, credit unions, conservationists, and civil rights and similar organizations. While in some cases this form of identification may be motivated solely by a desire

48. E.g., Canadian Bar Association, Code of Professional Conduct, rule XII, commentary para. 4 (1974), cautions lawyers against excessive criticism of tribunals.

49. See, e.g., B. Laskin, The Common Tie Between Judges and Law Teachers, 6 L.S.U.C. Gaz. 147 (1972).

50. W. MacEachern, Medicine, Law, and Politics, 24 Chitty's L.J. 109 (1976).

51. W. Clement, The Canadian Corporate Elite: An Analysis of Economic Power ch. 5 (Toronto: McLelland & Stewart, 1975); G. Gall, The Lawyer as Lobbyist, 15 Alta. L. Rev. 400 (1977); R. Pike, Education, Class and Power in Canada, *in* R. J. Ossenberg, ed., Power and Change in Canada (Toronto: McLelland & Stewart, 1980); B. Adam & K. Lahey, Professional Opportunities: A Survey of the Ontario Legal Profession, 59 Can. B. Rev. 674 (1981).

to attract business, in many others it reflects a genuine and intense involvement in the cause espoused by the organization.

Certainly, lawyers must be seen as important links between the widest possible variety of institutions, social sectors, and political perspectives.[52] Indeed, this "linkage" function might be seen as divided loyalty, and may help to explain why lawyers are so often viewed with suspicion by the nonlawyers with whom they are associated.

6. Lawyers and Politics

The direct involvement of lawyers in politics is rather extensive.[53] For example, between 1930 and 1980, four of the seven serving Canadian prime ministers have been lawyers (including one law professor, Trudeau). Their combined tenure of office makes up some 30 of the last 50 years. Significant numbers of federal cabinet ministers, provincial premiers and cabinet ministers, and members of legislative bodies at all levels have been lawyers. While to some extent the presence of businessmen, teachers, and representatives of other occupations is increasing, lawyers remain vastly overrepresented in all Canadian political contexts. For example, in 1983, 25% of the members of the federal House of Commons were lawyers, as were five of the ten provincial premiers, the federal prime minister, and the leader of the opposition.[54]

Moreover, lawyers are deeply involved in party politics as campaign managers, policy advisers, strategists, and so on. However, they have not been inordinately prevalent in senior policy positions and administrative positions in government, with two exceptions. First, administrative positions that involve adjudicative functions are frequently (but not inevitably) staffed by lawyers; second, royal commissions (used in developing major policy initiatives) are often chaired by lawyers, especially serving or retired judges. For example, between January 1977 and May 1980, 36 royal commissions were appointed; at least 22 of the chairmen or chief commissioners were lawyers, including 17 service judges (no information was available for 6 chairmen).[55] But while lawyers do not dominate the public service, they often have a good deal to do with it in their capacity as spokesmen, representatives, and lobbyists on behalf of various groups. Thus, a number of the important representatives of the corporate community in both public forums and private discussions with government are lawyers. Lawyers likewise appear before legislative committees, municipal councils, and similar bodies on behalf of interest groups seeking or resisting legislative change. They are prominent in some citizen groups such as the Canadian Civil Lib-

52. E.g., recent prominent N.D.P. (social democratic) lawyers include two provincial premiers and the federal and Ontario party leaders.

53. H. Pasis, Lawyers and Political Participation (M.A. thesis, McMaster University, 1970); E. Goodman, The Lawyer in Public Life, [1971] Pitblado Lectures 129.

54. Canadian Parliamentary Guide, 1983.

55. Canada Year Book, 1980–81 (Ottawa: Statistics Canada, 1981).

erties Association and the Canadian Environmental Law Association and play a less central role in such others as the Consumer's Association of Canada and native people's groups.

There are several possible explanations for the relative decline in lawyers' membership in legislative bodies, and for their relative absence from senior policy and administrative positions. First, there is the increasing complexity of legal practice and the concomitant tendency toward specialization, a combination that may make it more difficult for lawyers to leave and to reenter professional practice, and that may also tend to limit their potential usefulness as generalists within government. Moreover, to whatever extent lawyers' predelictions for politics were a function of their rhetorical skills, these skills may now be less valuable than other talents such as managerial ability or knowledge of business or economics. Third, the growth of various policy disciplines, especially economics, has encouraged reliance on those so trained for relevant government positions. But it must be emphasized again that without regard to party affiliation, lawyers assert an influence in the political process out of all proportion to their numbers.

7. Public Attitudes Toward the Legal Profession

Public attitude surveys generally reveal considerable ambivalence toward lawyers.[56] In terms of trustworthiness and respect, lawyers on the whole rank rather low. On the other hand, Supreme Court judges rank extremely high, and surveys of people who have used lawyers' services indicate a high degree of satisfaction. The ambivalence thus revealed is reflected in a number of contradictory tendencies. On the one hand, there is ample literary evidence to support the conclusion that Canadians dislike legalism, the aggressive and obfuscatory style of lawyers, and their apparent influence.[57] On the other hand, Canadians imagine themselves to be law-abiding; they have recently amended their constitution to enshrine in it a Charter of Rights and Freedoms, with its necessary implication of far-reaching legal influence;[58] and they are quick to assume that "there ought to be a law" to deal with perceived social, economic and even cultural problems.

In one important respect, however, Canadian lawyers have at least avoided attracting public censure, if they have not won public approbation. The history of the introduction of legal aid plans in Canada[59] has by and large proceeded without significant professional opposition, even with pro-

56. See, e.g., J. Yale, Public Attitudes Towards Lawyers: An Information Perspective, *in* Evans & Trebilcock, *supra* note 14; R. Moore, Reflections of Canadians on the Law and the Legal System: Legal Research Institute Survey of Respondents in Montreal, Toronto, and Winnipeg, *in* D. Gibson & J. Baldwin, eds., Law in a Cynical Society? Opinion and Law in the 1980's, at 41 (Calgary, Alta.: Carswell, 1985).

57. See, e.g., S. Robins, Our Profession on Trial, 7 L.S.U.C. Gaz. 1 (1973); J. Farris, Let's Kill All the Lawyers, 3 Can. B.A.J. (No. 2) 4 (1972), for a lawyer's reaction to these attitudes.

58. P. Russell, The Effect of a Charter of Rights on the Policy-making Role of Canadian Courts, 25 Can. Pub. Ad. 1 (1982); H. W. Arthurs, The Law Giveth; the Law Taketh Away: Notes from an Agnostic on the Rule of Law in Canada (conference, York University, 1984, unpublished).

59. *Infra* at sec. II.G.

fessional acquiescence and (on occasion) support. In some provinces, indeed, the profession adopted the tactic of itself advocating the introduction of a legal aid plan, thus winning for itself the right to administer the plan on terms agreeable to the profession. Even where it is not directly responsible for administration of legal aid, the legal profession asserts considerable influence over it. By contrast, the medical profession resolutely opposed the introduction of medical insurance and has continued to criticize it, to seek ways of working outside it, and to encourage public opposition to the notion of "state medicine." Ironically, none of these medical maneuvers appear to have damaged public admiration for and trust in doctors, as such attitudes are revealed in opinion surveys.

8. The Legal Profession and Social Stratification

Historically, law has been an "open" profession through which it was assumed that any qualified person could progress. Indeed, one of its functions (reflected in its early educational arrangements) may be said to have been the recruitment, socialization, and certification of members of an incipient "new class" of considerable importance in colonial society.[60] In this regard, legal education, in mid-nineteenth-century Upper Canada at least, somewhat paralleled that offered by the English Inns of Court.

However, whatever reality there may have been in original assumptions about law as an open profession, by the 1950s (if not earlier) those assumptions were increasingly open to question. For the past generation or more, entry into the legal profession, and especially access to its most prestigious positions, has been disproportionately reserved for persons from professional families and other privileged socioeconomic groups.[61] Indeed, entry into the professions generally, and into other elite groups, has not been significantly democratized, largely because educational and financial barriers have operated in a regressive fashion against members of recently arrived immigrant groups, the poor, and other disadvantaged minorities.[62] These barriers, moreover, have been exaggerated by increasing competition to enter law school since the 1960s, and by more recent economic pressures that have resulted from a downturn in the Canadian economy. On the other hand, many law schools have made efforts (without legislative compulsion) to make admission possible for mature students who have not attended university, for native peoples, and for other qualified persons whose credentials may have been adversely affected by social or economic circum-

60. G. B. Baker, Legal Education in Upper Canada 1785–1889: The Law Society as Educator, *in* D. Flaherty, ed., 2 Essays in the History of Canadian Law (Toronto: Osgoode Society, 1983); D. Smith & L. Tepperman, Changes in the Canadian Business and Legal Elites 1870–1970, 11 Can. Rev. Soc. & Anthrop. 97 (1974).

61. H. W. Arthurs et al., *supra* note 35; A. Lajoie et al., La place de juriste dans la société Québecoise (Montreal: Themis, 1976); Adam & Lahey, *supra* note 51.

62. W. Clement, Inequality of Access: Characteristics of the Canadian Corporate Elite, 12 Can. Rev. Soc. & Anthrop. 33 (1975); *id.*, *supra* note 51; and see generally J. Porter, The Vertical Mosaic (Toronto: University of Toronto Press, 1965); P. Newman, 1 The Canadian Establishment (Toronto: Seal Book, 1975).

stances. Within the profession, meritocratic tendencies have, to some extent, enabled highly qualified individuals to progress into legal positions formerly denied to them.

Setting aside questions about recruitment and internal stratification, there is no doubt that the profession as a whole ranks high in terms of income and social prestige. For example, lawyers' salaries have consistently been the second or third highest in income surveys.[63] Lawyers are identified as an important group within Canadian social and corporate elites.[64] And, as mentioned, many lawyers have obtained positions of political prominence, and those who serve as Supreme Court judges enjoy the highest measure of public respect.[65] As will be seen, these generalizations about the social location of Canadian lawyers conceal considerable distinctions among them in public and professional prestige, clientele, income, and job functions and satisfactions.

C. The Demographic Background of Lawyers

1. Significance

Because Canada is a country of ethnic diversity, especially in light of postwar immigration,[66] it is particularly important to measure the extent to which demographic patterns in the general population are reflected within the legal profession. The extent of congruence or divergence between the two populations may offer some clues to the extent of social mobility within Canadian society, and provide a basis for speculation about the extent to which various sectors of the population might enjoy access to legal services. Unfortunately, this subject has been virtually neglected in the Canadian literature. Because of the paucity of research, it is not possible to extrapolate from documented instances to a more general picture, nor is it possible to pass beyond mere impressions of change over a protracted period.

American studies of the demography of the legal profession, which reveal stratification based on ethnicity, religion, socioeconomic background, and law school attendance,[67] are of limited relevance to Canada. Whereas entry to the profession in the United States was historically facilitated by unaccredited, night, part-time, and lower-status law schools, no such diversity existed in Canada. In most provinces, there was—and is—but a single law school (or at the most two), rather closely identified with the provincial professional body, and seldom far removed in either direction from a na-

63. However, between 1970 and 1980, average income of lawyers grew only 72% compared to that of accountants (76%), physicians (79%), and dentists (143%), according to Revenue Canada tax statistics. M. Salter, Society Would Limit Ontario Lawyers' Ranks, Financial Post, Mar. 12, 1983, at 22.

64. Sources cited in *supra* note 51; Smith & Tepperman, *supra* note 60.

65. See, e.g., M. Boyd et al., Status Attainment in Canada, 18 Can. Rev. Soc. & Anthrop. 657 (1981); P. Pineo & J. Porter, Occupational Prestige in Canada, 4 Can. Rev. Soc. & Anthrop. 24 (1967).

66. A. Richmond, Postwar Immigrants in Canada (Toronto: University of Toronto Press, 1967).

67. See R. Abel, American Lawyers (Study for the Working Group of Comparative Study of Legal Professions; unpublished manuscript, 1984); R. Stevens, Law School: Legal Education in America from the 1850s to the 1980s (Chapel Hill: University of North Carolina Press, 1983).

tional norm. Certainly, there is no obvious hierarchy of law schools, although some are favored by geographic location or historical circumstances. Thus, on one side, there are no elite law schools whose graduates may be clearly identified by their social characteristics or by subsequent professional careers.[68] On the other side, the absence of part-time and night schools forecloses patterns of recruitment into the profession that are commonly pursued by members of ethnic minorities and disadvantaged groups in the United States.

It is, as well, significant that in Canada full-time legal education became universal only after World War II, largely as a result of pressure from within the academic community as it strove to improve standards, rather than (as has been suggested in the United States)[69] as a result of professional attempts to preclude entry by unwanted minorities.[70]

2. *Data*

a) Age. Because various Canadian provinces offer 11, 12, or 13 years of primary and secondary education, and because various jurisdictions require from 2 to 4 years of pre-law university education, the age of beginning law studies varies considerably. However, in every province a 3-year law degree is required, together with some period of service under articles (apprenticeship). In addition, most provinces require systematic practical instruction in law either contemporaneous with articling or before or after it. Thus, the minimum age for entry to practice runs from about 24 to 27. However, because most law students have at least a first degree in some other field, many have pursued graduate studies in other disciplines or had other careers before entering law school, and some undertake graduate studies in law before entering practice, the average age of entry is, in fact, much higher than the minimum.[71]

b) Sex. Although Canada was the first country in the British Empire to admit women to legal practice (in 1896),[72] the number of women in law school remained minuscule until about 1970. However, over the past dec-

68. However, it is possible that some law schools may be even less elite than others, see Adam & Lahey, *supra* note 51, at 685; M. Huxter, Survey of Employment Opportunities for Articling Students and Graduates of the Bar Admission Course in Ontario, 15 L.S.U.C. Gaz. 169 (1981).

69. J. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (New York: Oxford University Press, 1976).

70. B. Bucknall et al., Pedants, Practitioners and Prophets: Legal Education at Osgoode Hall to 1957, 6 Osgoode Hall L.J. 137 (1968); B. Laskin, Cecil A. Wright: A Personal Memoir, 33 U. Toronto L.J. 148 (1983); Law and Learning, *supra* note 26, at 11 *et seq.*

71. It has been suggested that the combination of pre-university, university, law school, articling, and bar admission requirements results in students in Ontario completing their legal educations at a more advanced age than anywhere else in the English-speaking world, Report of the Special Committee on Legal Education (MacKinnon Committee) (Toronto: Law Society of Upper Canada, 1972) (hereinafter cited as MacKinnon Committee Report).

72. C. Harvey, Women in Law in Canada, 4 Man. L.J. 9 (1970).

ade the number has grown rapidly, and women are now 35–40% of new entrants in most jurisdictions.[73]

Although as a result of conscious effort, women have been appointed in increasing numbers to law faculties, boards, commissions and courts (including the Supreme Court of Canada, which now has its first female puisne judge), it cannot be said that women are as yet well represented in the elite of the legal profession.[74] Neither can it be said that they are found in proportionate numbers in all types of practice. In part, this is a function of residual prejudice, in part a reflection of the relative youth of most women lawyers. What is noteworthy, however, is that after a history of virtual exclusion, women have indeed begun to register significantly in the legal profession without either constitutional or legislative support for their position.

c) Ethnicity. There is a clear preponderance in the legal profession of members of the well-established charter groups. In Quebec, French Catholics, and in the rest of Canada, English Protestants tend to predominate.[75] However, some of the more established immigrant groups have managed to achieve significant representation within the profession on a local or regional basis, sometimes far in excess of their numbers within the general population, for example, English Protestants in Montreal, Jews in several metropolitan centers.[76] After a time lag, members of newer immigrant groups, including Italians and Ukrainians, are also beginning to appear in discernible numbers. Some of the most recently arrived groups, such as West Indians, Orientals, Portuguese, and Greeks, are likely still significantly underrepresented. And despite conscious efforts to recruit and support native law students, their number remains very small.[77]

As has been suggested, the ethnic skew within law schools and the legal profession itself is in part a reflection of the more general problem of financial and educational barriers. Despite the virtually universal availability of state support for higher education and for scholarships, bursaries, and loans

73. Berger, *supra* note 29, at 33 *et seq.;* J. McKennirey, Canadian Law Faculties 3 (Ottawa: Social Sciences and Humanities Research Council, 1983).

74. See generally L. Guppy & J. Siltanen, A Comparison of the Allocation of Male and Female Occupational Prestige, 14 Can. Rev. Soc. & Anthrop. 320 (1977); Huxter, *supra* note 68, at 213; B. Adam, Stigma and Employability: Discrimination by Sex and Sexual Orientation in the Ontario Legal Profession, 18 Can. Rev. Soc. & Anthrop. 216 (1981).

75. Adam & Lahey, *supra* note 51, at 680; H. W. Arthurs et al., *supra* note 34, at 500 *et seq.;* Cadres Professionnels, Inc. Les Advocat du Quèbec: étude socio-économique (Montreal: Cadres Professionnels, Inc., 1968).

76. Sources cited in note 75 *supra.*

77. As of 1973, there were apparently only 4 lawyers of native ancestry in Canada; by 1980, 44 native persons had graduated from law school. In 1972–73, there were only 5 native students enrolled in law schools; by 1980–81, there were 45. This development is attributable to the pre-law preparatory course offered by the Native Law Centre, University of Saskatchewan and the explicit commitment of most Canadian law schools to offer places to Native Law Centre "graduates." Program of Legal Studies for Native People (Saskatoon: University of Saskatchewan Native Law Centre, 1981).

for students, individuals from disadvantaged circumstances are found in diminishing numbers as one ascends the educational ladder.[78]

d) Urban versus rural background. While no data are available relating to lawyers, Canada has experienced a high degree of urbanization over the past several generations, on the basis of which one might anticipate a preponderance of lawyers with an urban background. Moreover, this preponderance is likely exaggerated by the centripetal influences of education, government, business, and professional practice. Thus, many students from nonmetropolitan areas doubtless end up practicing law in the largest cities, while relatively few migrate in the opposite direction.

e) Socioeconomic class. As mentioned, there is a general skew in any population at higher levels of educational attainment reflecting the underrepresentation of persons from lower socioeconomic backgrounds. Some data suggest the specific preponderance of children from professional and managerial families in law schools.[79] Law schools have made some attempts to reduce this preponderance, particularly by admitting mature students who had been forced out of the educational system or who perhaps were unable to perform well in it because of financial pressures or unfamiliarity with English or French, the two official Canadian languages. As a matter of internal policy, a number of law schools have made attempts, as well, to urge members of disadvantaged groups to attend law school and have contrived various administrative procedures to assist them to do so.

Nonetheless, especially in a time of economic downturn, legal education, and thus legal practice, remains in general the preserve of a relatively privileged population.

f) Stratification. Within the Canadian legal profession, there seems to be a division of labor based on socioeconomic status. Thus, in the high-prestige, large corporate law firms, there is an overrepresentation of white Anglo-Saxon Protestant males—not only in English Canada but in the predominantly French city of Montreal as well—and an underrepresentation of Jews, Catholics, members of ethnic minorities, and women.[80] On the other hand, there is also some tendency toward ghettoization, especially within the "household sector" of legal practice. "Ethnics," and particularly Jews, have tended to practice disproportionately in such areas as criminal law, real estate, service to small businesses, and domestic relations—all areas largely neglected by the biggest firms, which cater to sophisticated

78. J. Porter, The Measure of Canadian Society: Education, Equality and Opportunity (Agincourt, Ont.: Gage, 1979); C. Cuneo & J. Curtis, Social Ascription in the Educational and Occupational Status Attainment of Urban Canadians, 12 Can. Rev. Soc. & Anthrop. 6 (1975).

79. Adam & Lahey, *supra* note 51, at 681; H. W. Arthurs et al., *supra* note 34, at 502.

80. Adam & Lahey, *supra* note 51, at 682 *et seq.*; H. W. Arthurs et al., *supra* note 34, at 516–18.

institutional clients, especially in areas such as taxation, corporate law, regulatory law, and major civil litigation.[81]

Some change in this pattern may be expected as minority groups penetrate business and political elites, thus becoming valued clients of prestigious law firms and either contributing lawyers to them, or forming their own, ethnically based elite firms.

Thus, while professional stratification, for reasons already mentioned, may perhaps be less extreme in Canada than in the United States, it is at least sufficient to support the conclusion that meritocracy has not yet triumphed. This theme is explored in greater detail below.

D. The Structure of the Legal Profession.

1. History

The pattern of the legal profession's development across Canada differs considerably from province to province. Quebec's early history under the French colonial regime makes it the most obvious special case.[82] In general terms, however, the pattern during early periods of settlement was that the very few lawyers in each of the Canadian colonies or territories were largely or entirely foreign trained. Some of those lawyers came directly from the United Kingdom, some were loyalist emigrés from postrevolutionary America, and others (especially judges and law officers) served in Canada before or after other colonial postings.[83]

In the older colonies at least, such as Nova Scotia and Upper Canada (Ontario), local professional bodies early assumed regulatory functions in imitation of the English Inns of Court, sometimes acting under statutory mandate, sometimes under executive control and direction.[84] In the initial period, when few trained lawyers were available, a large part of the legal business was typically conducted by nonqualified functionaries such as conveyancers, notaries, and attorneys.[85] Throughout the nineteenth century, however, the profession was gradually asserting its monopoly.[86] Still, even

81. S. Colvin et al., *supra* note 13; H. W. Arthurs et al., *supra* note 34, at 512–13, 517. (In Canadian-English usage, "ethnic" refers to non-British, non-French communities that exist in most sizable cities and in many rural areas, largely as a result of immigration after 1945).

82. L. Lortie, The Early Teaching of Law in French Canada, 2 Dal. L.J. 521 (1975); A. Sinclair, L'avocat au Québec: 209 ans d'histoire, 16 Cahiers de droit 689 (1975); A. Lachance, Le barreau au Canada sous le régime Française (Quebec: Societé Historique de Québec, 1966); A. Buchanan, The Bench and Bar of Lower Canada down to 1850 (Montreal: Burtons, 1925).

83. G. Parker, The Pedigrees of the Nova Scotia Judiciary, 2 Now & Then 2:36 (1982); A. MacAlister, The Bench and Bar of the Provinces of Québec, Nova Scotia, and New Brunswick (Montreal: John Lovell, 1907); W. Riddell, The Bar and Courts of the Province of Upper Canada or Ontario (Toronto: MacMillan, 1928).

84. G. Johnson, The Law Society of Upper Canada 1797–1972, 6 L.S.U.C. Gaz. 1 (1972); W. E. Smith, The Law Society of Upper Canada, 26 Can. B. Rev. 437 (1948); Riddell, *supra* note 83; MacAlister, *supra* note 83.

85. See, e.g., D. Gibson & L. Gibson, Substantial Justice: Law and Lawyers in Manitoba 1670–1970 (Winnipeg: Peguis, 1972).

86. See, e.g., J. Newman, Reaction and Change: A Study of the Ontario Bar, 1880–1920, 32 U. Toronto Fac. L. Rev. 51 (1974); M. Orkin, Professional Autonomy and the Public Interest: A Study of the Law Society of Upper Canada (D. Jur. thesis, York University, 1971); R. Hawkins, A State of Siege:

as late as mid-twentieth century, lay magistrates were being appointed in Ontario, the most heavily urbanized and legally advanced of the Canadian common law jurisdictions.

The professional body in each province, often called the "Law Society," exercised licensing functions. It determined who had the right to be called to the bar (which effectively determined who, in a merged profession, could be a solicitor), set standards of admission and professional conduct, and undertook discipline and disbarment proceedings. These professional bodies also retained active control of legal education at least until the late nineteenth century, and they dominated it thereafter by their joint or sole proprietorship of law schools, by specification of formal educational requirements, and by informal articulation of what lawyers "ought to know."[87]

The "numbers problem" that is much debated today surfaced as early as the 1830s and 1840s when many complaints were voiced by lawyers and others about the surfeit of lawyers in Upper Canada. "Lawyers are not wanted [as immigrants]; Canada swarms with them; and they multiply in the province so fast, that the demand is not by any means equal to the supply."[88] However, so far as can be determined, until mid-nineteenth century the profession was a relatively open one in which lax standards of entry and discipline generally posed no serious barriers to entry. Thereafter, episodes of intensified educational requirements alternated with periods of relative (even total) laxness—the alternations reflecting divergent views about whether the Law Society of Upper Canada should pursue its project of professional socialization by means of formal or informal, centralized or decentralized, training schemes. In the end, however, no serious challenge emerged from the universities or elsewhere to the law society's control over education and admissions. In the end, it has been argued, during the nineteenth century legal education in Upper Canada was informed by an unusually strong commitment to professionalism.[89] But whether this—or baser motives—led to a tightening of standards remains open to debate.

From the end of the nineteenth century, law societies elsewhere in Canada pursued varying—but generally declining—degrees of involvement in legal education. In many jurisdictions they gradually conceded to the universities responsibility for formal instruction in law, but everywhere they retained control over entry through a required period of apprenticeship. The economic effects of these changing educational requirements had, and were sometimes perceived to have had, a direct effect on access to the pro-

---

The Legal Profession in Ontario at the Turn of the Century (unpublished manuscript, 1978); C. Cole, A Developmental Market: Competition and Professional Standards in the Ontario Legal Profession, 1881–1936, 6 Can.–U.S. L.J. 125 (1983).

87. This was especially true in Ontario and remained so until the late 1960s. See Bucknall et al., *supra* note 70; Laskin, *supra* note 70.

88. Smith's Canadian Gazette, 1846, *quoted in* Miscellany, 16 L.S.U.C. Gaz. 387 (1982).

89. Baker, *supra* note 60, at 121–23.

fession for poor students, those from outlying areas, or foreign lawyers who had emigrated to Canada.[90] In periods such as the Great Depression of the 1930s, this effect was considerable, especially since it coincided with the general impoverishment of the universities, their faculties, and their potential students.

However, in the years following World War II, provincial law societies came to be at most marginally involved in providing the basic educational program in law (not without a struggle in some jurisdictions),[91] and their attention shifted to other matters.

Today, the functions of professional governing bodies tend to focus on three matters: (1) "practical" professional education immediately before admission to practice and on a continuing basis thereafter; (2) regulatory functions, especially those connected with the protection of clients' funds and other aspects of lawyers' honesty, and to a lesser extent, those directed to the maintenance of intraprofessional relations, (3) public functions, including direct or indirect participation in the management of legal aid schemes, dissemination of public information about law, protection of the profession's monopoly, and lobbying on behalf of the interests of the legal profession—above all, those that may be said to involve its autonomy.

Indeed, it has been argued that the profession's struggle to maintain its autonomy has been the central theme of its relationship with the community as a whole. Fearing that a failure to respond to public concern and criticism might lead to legislative reprisals, law societies have been moved to pursue important policy initiatives that they might not otherwise have undertaken.[92] One such episode was the profession's relatively restrained response to the numbers debate described above; others will be examined below.

2. Professional Monopoly: The Scope of Practice

The right to define the scope of practice is no less valuable a prerogative in protecting the professional monopoly over the production of services than is the regulation of entry into the profession. The device by which the Canadian legal profession protects its boundaries against intrusions from other occupations is the same as that employed in the United States, namely, statutory provisions against unauthorized practice. To borrow a phrase used by one American commentator on the subject,[93] the statutes of some Canadian provinces are "breathtaking" in their scope.

90. *Id.* at 113–19; Bucknall et al., *supra* note 70, at 196 *et seq.*

91. Laskin, *supra* note 70, at 153; J. Arnup, The 1957 Breakthrough, 16 L.S.U.C. Gaz. 180 (1982); Bucknall et al., *supra* note 70, at 207 *et seq.*

92. P. J. Giffen, Social Control and Professional Self-Government: A Study in the Legal Profession in Canada, *in* S. D. Clarke, ed., Urbanism and the Changing Canadian Society (Toronto: University of Toronto Press, 1961).

93. D. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 45 (1981).

Until recently, the clear trend in twentieth-century enactments had been to define the jurisdictional claims of law ever more expansively. While earlier statutes tended to confine the exclusive areas of law to court practice, later statutes have extended the scope of law to include not only advocacy but also the preparation of documents that are intended to have legal effect and even the giving of legal advice itself.[94]

In one province, for example, the practice of law is defined to include the preparation of formal documents such as deeds, mortgages and wills, applications for incorporation or "any document to be used in any proceedings in any court," "appearing in or before any court, public board, or commission on behalf of another person," and the giving of legal advice.[95]

That most statutes permit laymen to act on their own behalf or as unremunerated agents does little to dispel the suspicion that restrictions on practice have less to do with protecting consumers than with protecting markets.

Certain exemptions or limited rights to practice have been granted explicitly or by acquiescence to occupations that could not function if such restrictive provisions were enforced literally. Some provinces exempt insurance claims adjusters and real estate agents so long as they function within narrowly defined limits; others allow public officials to draw up legal documents in the course of their official duties.[96] Elsewhere, provincial statutes authorize the appearance of "agents" before small claims courts and administrative agencies;[97] federal legislation guarantees a similar area of lay practice in relation to minor criminal matters.[98] Apart from specialist lay advisers, such as trade union officials before labor boards and accountants before taxation tribunals, these rights of audience largely accrue to law clerks and articled students (apprentices) employed by law firms. Finally, in "gray areas" that the profession's monopoly does not clearly reach, explicit jurisdictional understandings have been developed to ensure due regard for professional interests. Thus, trust companies are allowed to draw wills, provided they are later "reviewed" by private practitioners, and community clinics may dispense legal advice and service in less important matters through law students and lay advocates, provided that significant remunerative work is largely forwarded to qualified private practitioners.

Judicial interpretation of jurisdictional statutes has also tended to enlarge the protected scope of professional practice. The preparation of papers for probate, the drawing up of wills, the preparing of legal documents by a collection agency, applications for incorporation, and the processing of un-

94. For a brief history of Ontario legislative developments see M. Orkin, Legal Ethics, 248–53 (Toronto; Cartwright, 1957).

95. Law Society Act, Man. Rev. Stat. ch. L-100 § 48(2)(7) (1970).

96. See, e.g., Legal Profession Act, Alta. Rev. Stat. ch. L-9, § 93(2a) (1980); Barristers and Solicitors Act, B.C. Rev. Stat. ch. 26, § 1 (1979).

97. See, e.g., Statutory Powers Procedures Act, Ont. Rev. Stat. ch. 484, § 10 (1980); Small Claims Courts Act, Ont. Rev. Stat. ch. 476, § 92(1) (1980).

98. Criminal Code, Can. Rev. Stat. ch. C-34, § 735 (1970).

contested divorces have all been designated as unauthorized practice when performed for gain by a nonlawyer, even in the absence of compelling statutory language.[99] A recent Alberta ruling, however, appears to set some limits on the legal monopoly by requiring that activities be reserved to lawyers only if it can be demonstrated that the public would otherwise be placed at risk.[100] Whether other courts will adopt this test to narrow the scope of practice remains to be seen.

Legal action against unauthorized practice is typically initiated by a law society, usually at the request of a member. There is some indication that the adverse market conditions that began to appear in the late 1970s and early 1980s are reflected in an increase in the number of complaints received by the unauthorized practice committees of professional bodies. In Ontario, for example, 10–15 complaints were received annually during 1968–73; during 1974–81 this increased to 35–90 per year.[101] It should be noted that most of these complaints are either diverted or negotiated. Very few lead to actual prosecution. Nevertheless, because of the transparent element of self-interest in a professional group's undertaking to initiate prosecutions against persons who trespass on its own borders, a recent commission in Ontario recommended that no prosecution be commenced for unauthorized practice except with the consent in writing of the attorney general of the province.[102] The legislature has not yet acted on this recommendation.

3. *Professional Monopoly: Professional Autonomy and Public Accountability*

The general success of provincial law societies in achieving domination over the market for legal services should not lead one to conclude that the professional hegemony of Canadian lawyers has gone entirely unchallenged or undebated. Both the demand from professional groups themselves that provincial legislatures mediate jurisdictional disputes and the attempts by several occupational associations to secure certification or licensure regimes have caused governments to reevaluate public policy toward the professions in general. Moreover, governments have been increasingly willing to respond to appeals from consumer groups for greater accountability from the professions. Although public debate has centered on the organization and financing of the health occupations, the position of the bar in the division of labor has also been a subject of examination by several governmental commissions and inquiries over the past 20 years.[103]

99. See, e.g., Regina v. Engel & Seaway Divorcing Service, 11 Ont. 2d 343 (1974) (processing of uncontested divorces).

100. R. v. Nicholson, 96 D.L.R. 3d 693 (Alta. C.A. 1979).

101. Compiled from Minutes of Convocation, Law Society of Upper Canada, 1968–82.

102. Professional Organizations Committee, Report 242 (Toronto: Province of Ontario, 1980).

103. See especially Royal Commission Inquiry into Civil Rights (McRuer Commission) (Toronto, 1968); Report of the Commission of Inquiry on Health and Social Welfare, Part V (Castonguay-

No province has implemented more far-reaching changes in the relationship between the state and the professions than has Quebec. In 1973, several years after a provincial royal commission spoke extensively to the issues, Quebec enacted a Professions Code that—at least in formal terms—expanded public control over all professional groups, including the bar, far beyond the limits prevailing in other provinces.[104] The central innovations in the code are the organization of all professions into corporations with parallel mandates and the subordination of these corporations to an overarching provincial professions board, all members of which belong to some profession but are appointed by the provincial cabinet. The professions board is charged with overseeing each of the professions, ensuring that each fulfills its statutory obligations, approving regulations proposed by the professions, vetting fee schedules, and publishing decisions in disciplinary cases. As well, a provincial professions tribunal hears appeals from the disciplinary tribunal of each body. In general, however, the changes instituted in Quebec have been rejected in other provinces on the ground that they threaten the independence of the bar. There is, in fact, little concrete evidence to nurture this fear, or to suggest that the autonomy of the Quebec bar has been eroded.[105]

A much more typical response to demands for professional accountability has been to leave the bar's historic governing structures essentially intact, while engrafting onto them additional elements designed to provide symbolic reassurance to the public, but not to provide close control.[106]

The experience of Ontario is instructive.[107] Responding as well to the recommendations of a royal commission of inquiry, the Ontario legislature in 1970 created a "Law Society Council," made up of representatives of the profession's governing body and of other legal "estates" and some public members, which would render an annual report to the legislature on the manner in which the profession discharged its public responsibilities. Lacking a fixed agenda, its own secretariat, and public members with identifiable constituencies, the council soon ceased to function. In its place, the legislature mandated the direct appointment of four lay members to the governing body (about 10% of its membership). Hostages to fortune, and no more influential than their individual exertions and talents dictate, these lay members have served mainly to deflect public demand for further state control of the profession, without actually providing any effective means of en-

---

Nipveau Commission) (Quebec, 1970); Economic Council of Canada, Interim Report on Competition (Ottawa: The Council, 1969); Professional Organizations Committee, *supra* note 102.

104. Que. Stat. ch. 43, as amended (1973).

105. See, e.g., P. Issalys, The Professions Tribunal and the Control of Ethical Conduct Among Professionals, 24 McGill L.J. 588 (1978); G. Pepin, L'avenir du professionalisme au Québec, 39 Rev. Bar. 820 (1979).

106. H. W. Arthurs, Public Accountability of the Legal Profession, *in* P. Thomas, ed., Law in the Balance (Oxford: Martin Robertson, 1982).

107. *Id.*, Authority, Accountability and Democracy in the Ontario Legal Profession, 49 Can. B. Rev. 1 (1971).

forcing public accountability. Similarly, there seems little practical result from a statutory admonition that the provincial attorney general (an ex officio member of the governing body) should serve as guardian of the public interest within the legal profession.

Other arrangements for public accountability planned with a more specific focus may, however, be more effective. For example, lay membership of local and provincial legal aid committees does seem to give some support and direction to attempts to provide legal services to the poor.[108]

However, public accountability seems in the end to depend on rather episodic pressure from a variety of external sources: a royal commission or legislative committee investigating some aspect of professional practice or government; newspaper editorials or legislative debates signaling concern with the bar's policies; occasional threats of investigation or prosecution by the combines (antitrust) authorities; or adverse comments on the behavior of lawyers or law societies, made by judges in the course of litigation or extrajudicially.

Given the relatively unobtrusive and occasional nature of these criticisms and demands for accountability, it is difficult to construe the profession's virtual obsession with "independence of the bar" as related to real events. Rather, it can be seen as a central premise of professional ideology, pronounced as much for internal as for external consumption.

4. Regulation of Entry

Typically, subject to a few local idiosyncracies concerning subject requirements, everyone with a basic credential (LL.B.) from any Canadian law school may complete the professional requirements for admission in any Canadian jurisdiction (other than Quebec, which has a civil law system). For at least 20 years, emphasis has been on the "portability" of law degrees among Canadian jurisdictions,[109] although this is subject to several practical restraints.

First, "portability" applies only at the moment of graduation from law school. The interprovincial mobility of practitioners has been inhibited by various measures designed to discourage either transfers or simultaneous practice in several jurisdictions. However, the recent enactment of a constitutional guarantee of "occupational mobility," coupled with the first appearance of "interprovincial" law firms, may alter this position.[110]

Second, even though LL.B. degrees are in principle "portable," attempts have been made to encourage preferential hiring for articling positions of

108. See *infra* text at text following note 265; text following note 279.

109. E. Murray, Transfer of Professionals from Other Jurisdictions to Ontario (Toronto: Professional Organizations Committee, 1978); Berger, *supra* note 29, at 41, traces interprovincial movements 1973–78.

110. J. Clarry, Interprovincial Law Firms, 16 L.S.U.C. Gaz. 266 (1982). Section 6(2) of the Canadian Charter of Rights and Freedoms guarantees the right "to move to and . . . to pursue the gaining of a livelihood in any province."

graduates from within the province. Such attempts have been only partially successful because of the self-interest of law firms in hiring the best available candidates.

Third, applicants for admission who do not have Canadian credentials obviously do not benefit from this arrangement. Specifically, holders of foreign degrees (even those of considerable distinction and experience) find it difficult to requalify in Canada; almost always they must complete further formal education, as well as professional training requirements, before obtaining entry. The specific requirement that all entrants possess Canadian citizenship has been subject to a recent, unsuccessful challenge on constitutional grounds.[111]

Apart from such formal restraints, it might be thought technically possible to regulate entry into the profession by regulating the number of articling positions available. Indeed, some such restrictive practices may exist in small communities. But most law societies have undertaken to secure articling places at least for all local graduates. Likewise, except for a few well-publicized and atypical instances, law societies have not attempted to restrict entry by ensuring artificially high failure rates on bar admission examinations.[112]

In general, then, the point at which entry into the profession is effectively determined is the point at which an LL.B. degree is awarded. Indeed, because Canadian law schools typically have a very low failure rate (due to the high standards of entry) acceptance in the first year of an LL.B. program virtually ensures ultimate admission to practice.

This emphasis upon the LL.B. program points up its strategic importance in determining the ultimate size of the profession. Although professional bodies may exert influence on policy making by governments which financially support university law programs, and on the policy determinations of law faculties, the professional bodies do not themselves have direct control over law school admissions. Canadian law schools actually experienced substantial growth from the mid-1960s through the mid-1970s, going from 2,896 LL.B. students enroled in 1962–63 to 9,351 enrolled in 1976–77.[113] Existing faculties expanded greatly, and a significant number of new law schools were opened. But despite this expansion, law students constituted about the same proportion of students enrolled in postsecondary education at the end of the period as at the beginning. Students enrolled in LL.B. programs were 2.2% of all students in 1962–63 and still only 2.9% in 1976–77.[114]

111. *Re* Skapinker, [1983] 40 Ont. 2d 481 (Ontario C.A.) (reversed, Sup. Ct. Can. 1984, unreported). The Supreme Court of Canada reversed the decision of an intermediate appellate court striking down the citizenship requirement as violative of the "mobility" provisions of the charter, § 6(2), *supra* note 110. See R. Lenoir, Citizenship as a Requirement for the Practice of Law in Ontario, 13 Ottawa L. Rev. 527 (1981).

112. J. Bowlby, Annual Report of the Treasurer, 16 L.S.U.C. Gaz. 133, 135 (1982).

113. Law and Learning, *supra* note 26, at 25.

114. *Id.* at 27.

Factors that inhibited the further growth of law faculties, and thus the further expansion of the profession, lay largely outside the realm of professional concerns: law faculties' reluctance to grow further based on difficulties of recruiting and retaining faculty, unfavorable faculty/student ratios, inadequate financial support, and, in general, the absence of a firm foundation on which further growth and expansion might be based.

Despite the fact of declining birth rates that might have been expected to reduce the number of applicants for admission to law school by the early 1980s, fierce competition persists among highly qualified applicants, who usually outnumber the available places in ratios of 5/1 and 10/1.

The unanswered question, however, is the extent to which law schools have internalized professional assumptions and values, have unwittingly or unconsciously responded to professional interests, and thus have helped to limit professional growth and to ration entry on terms acceptable to the profession.[115] Such behavior by the law schools would not be unexpected, given their relatively recent emancipation from formal professional control coupled with concern that their newfound autonomy might be imperiled in the event of a direct confrontation with the profession.

In general terms, the current situation relating to restrictions on entry is one of unresolved conflict. As mentioned, Canada is experiencing a considerable economic downturn after a golden period during the 1960s and 1970s. The legal profession has felt the effects of general economic decline and there is extreme grassroots pressure, therefore, for entry controls.[116] This pressure is being resisted at several points. Professional governing bodies acknowledge that they lack formal legal authority to restrict numbers and, fearing legal and political repercussions, are loath to seek necessary statutory changes.[117] These governing bodies, moreover, have to an extent been dominated by established practitioners who are less exposed to the adverse effects of economic decline and thus able to afford the luxury of taking a principled stand in favor of the play of market forces rather than artificial entry restrictions. For example, in 1983, of the 40 newly elected benchers (members of the Ontario profession's governing body), 13 had not served previously. Of these 13, only 3 were general practitioners, 9 were members of middle-sized or large corporate firms, 1 was a senior public servant.

As for the law faculties, since their government grants are typically related to enrollment, they are (apart from other considerations) understandably reluctant to consider entry controls that would erode their funding base. Finally, restriction of entry is unlikely to significantly alter existing

115. *Id.* at 42.

116. In Ontario, this was manifest in the response to a 1981 survey conducted by the law society, see *supra* text at note 44, in the creation in 1983 of an Ontario Lawyers Association overtly committed to working for a limitation on numbers, and in the pro-limitation rhetoric of most candidates seeking election to the profession's governing body in the 1983 quadrennial election.

117. *Supra* note 46.

economic problems within the profession in any event—because of the absence of any machinery for deployment of existing or future practitioners.[118] Even in the absence of controls, however, the effect of market forces is already being felt. The number of lawyers in private practice is growing rather slowly, with many new graduates (and some established practitioners) being diverted into new areas of activity,[119] especially into nonpractice roles in business, government, and elsewhere. Between 1971 and 1982, the percentage of Ontario lawyers in private practice declined from 86% to about 71%.[120]

A further complicating factor in the relationship between the law schools and the profession is that regulation of entry is not the only item on their mutual agenda for debate. As will be seen, the law schools represent for the bar a somewhat unwelcome challenge to traditional assumptions about the nature of legal knowledge, the ideology of the profession, and the appropriate role of law and lawyers in society. Thus, the profession's efforts to maintain (or regain) control over entry stem in part from its desire to regulate the skills and attitudes of its new recruits.

Given this convergence of quantitative and qualitative concerns on the part of the profession, it is perhaps surprising that entry restrictions have nowhere in Canada emerged as an overt and formal policy, translated into genuine barriers against qualified entrants. While such barriers may yet materialize, their absence so far is likely attributable to the bar's own sense of what is politically prudent and administratively possible. Overt limitation of numbers would be imprudent; selective scrutiny of individual candidates with a view to rejecting those with inadequate or inappropriate educational attainments would tax the capacities of at least the larger law societies, if not all.

5. *Voluntary Professional Associations*

a) Canadian Bar Association. The Canadian Bar Association is the only national body of Canadian lawyers. It is organized into provincial branches whose membership ranges from 100% of the practicing bar in some provinces to a rather lower level in Quebec.

The CBA performs many of its functions through special sections (and counterpart provincial subsections) organized around various areas of professional practice such as labor relations, estate planning, and taxation, or around special interests such as legal education. The function of these sections is largely educational but also includes participating in law reform and expressing views on matters of public concern or professional interest. These educational and representational efforts vary considerably in quality, and range across a reasonably broad spectrum of ideological positions, de-

118. Stager, *supra* note 27, at 134.

119. Berger, *supra* note 29, at 18, 49, 50, observes regional tendencies of recent graduates to rely heavily on legal aid as a source of income.

120. Report, *supra* note 22, at 227.

pending on the section in which they originate and the happenstance of participation patterns on the given occasion when the national body decides to take a particular stand. Thus, the CBA expended considerable effort and funds in developing its contribution to recent debates over changes to Canada's constitution.[121] It has also adopted relatively liberal resolutions on such matters as capital punishment, abortion, and various civil liberties issues.[122] On the other hand, the CBA regularly endorses modestly conservative positions on such matters as taxation and government regulation of the economy.[123] Understandably, the organizational behavior of the CBA, its ideology, and its formal public positions are all heavily influenced by a desire to advance professional interests and values—sometimes couched in terms of public contribution and responsibility.[124]

Although the views of the bar association are seldom themselves dispositive of any issue in the forum of public debate, they are regarded as influential not least by legal policy makers—attorneys general, their senior officials, law reform commissioners—whose own assumptions and values are often similar to those that prevail within the CBA.

In addition to these functions, the CBA has traditionally provided important social links across the national community of Canadian lawyers, although such links are probably diminishing as the profession expands in number, diversifies in function, and stratifies in terms of social background and economic attainment. More important in recent years than its social links have been the services it provides to members—insurance and pension schemes, advice on law office management, and other group-purchased advantages.

b) Local lawyers' clubs. While the picture varies from community to community and from province to province, generally speaking most communities in which lawyers practice have at least one organization whose membership is open to all local practitioners. While a few local organizations are relatively large and sophisticated, almost all of them are devoted to parochial interests such as social activities, seminars, and the provision of a local law library, often in or adjacent to the local courthouse.

To the extent that there are direct attempts at price-fixing within the legal profession, their locus is almost certainly within such local organizations. As mentioned, the application of antitrust legislation to the legal profession is a matter of continuing dispute. In *Attorney General of Canada v. Law*

121. Towards a New Constitution (Ottawa: Canadian Bar Association, 1978).

122. E.g., in favor of prisoners' rights (Res. 19, Ann. Mtg., 1980), rights of the disabled and handicapped (Res. 10, Ann. Mtg., 1981), and the abolition of writs of assistance (open-ended search warrants) (Res. 8, Ann. Mtg., 1982).

123. E.g., rather oblique resolutions, which are in part intended to inhibit administrative adjudication or enforcement activities that depart from common law norms: constitutional entrenchment of the independence of the judiciary (1979), procedural changes before the Canada Labour Relations Board, and extended exclusionary rules for all documents seized from lawyers (typically in income tax, securities, and antitrust matters) (1980).

124. E.g., MacKimmie, The Presidential Address, 6 Can. B.J. 347 (1963).

Society of British Columbia (the *Jabour* case),[125] it was held that the federal Combines Investigation Act (antitrust act) should not be construed as applying to the activities of law societies operating within a mandate conferred by provincial legislation. This decision did not, on its face, deal with the activities of other lawyers' organizations operating in the absence of such statutory mandates. Moreover, the Jabour case dealt with restrictions on advertising, not on price-fixing. However, at least before recent amendments made such legislation arguably applicable to lawyers, it was quite common for local law associations to adopt minimum fee tariffs for standard transactions and services. For example, in Ontario a standard fee of 1% or 1¼% was commonly stipulated as the minimum fee to be charged when acting for the purchaser or vendor of a house. Such tariff arrangements are apparently still enforced in small communities, largely by social pressures, occasionally abetted by such restrictive tactics as an agreement not to employ articling students, to diminish the chances of increased competition in the local community.

In recent years, as the legal validity of such arrangements has come somewhat into doubt,[126] the focus of local law associations has shifted somewhat away from direct attempts to control prices to political activities designed to produce the same result. Thus, local law associations have been in the forefront of attempts to persuade provincial governing bodies to restrict entry and to adopt legally binding fee tariffs, breach of which would give rise to disciplinary sanctions. For example, a province-wide meeting of local lawyers' associations was convened in Ontario in 1983 to establish a lobbying group whose efforts would be directed at members of the legislature with the specific objectives of limiting numbers and increasing lawyers' incomes. A spokesman noted that the group was concerned with "the interests of lawyers." By contrast, he said, "the Law Society looks after the public interest, the Bar Association . . . is heavily involved in education."[127] To date, such attempts have not been particularly successful, although they are increasing in intensity.

c) Professional specialists' organizations. In various provinces, organizations have been formed of criminal lawyers, corporate counsel, crown attorneys, advocates, or other professional specialists. A few specialists' bodies (such as the Canadian Association of Law Teachers) exist on a national basis; one or two (such as the Osgoode Society, formed to promote research and publication in legal history) embrace lawyers who work in different areas of practice but have a mutual concern to advance a particular type of professional learning. Another such group is the Continuing Legal Educa-

125. Attorney-General of Canada v. Law Soc'y of British Columbia, Jabour v. Law Soc'y of British Columbia, 137 D.L.R. 3d 1 (Can. 1982).

126. G. Henderson, Advertising and Professional Fees Under the Combines Investigation Act, [1977] L.S.U.C. Spec. Lect. 411; D. Posluns, Professional Advertising Policies Under the Amended Combines Investigation Act, 4 Can. Bus. L.J. 235 (1980).

127. G. Valcour, Pres. Ont. Law. Ass'n, Ont. Law. Wkly., May 27, 1983, at 6.

tion Society of British Columbia, which pursues its mandate on behalf of the provincial branch of the bar association, the law society of the province, and the law faculties of the province.

d) Special constituencies within the profession. Canada has several relatively small organizations uniting lawyers not so much on the basis of common professional interests as on the basis of other characteristics. For example, the Women's Law Association is a relatively long-lived organization of women lawyers. Women and Law is a more recently established, feminist grouping of lawyers and other women concerned about the role of women within the profession and the impact of law on women generally.

The Thomas More Lawyers' Guild is an organization of Catholic lawyers. From time to time various organizations have been formed on a local or national basis of Jewish lawyers, of other religious groups, and of ethnic groups such as native peoples.

The Law Union is a rather small grouping of progressive lawyers and other legal workers. At the other end of the spectrum is the recently founded Ontario Lawyers' Association, which might be described as a right-wing grassroots organization; its precise interests and extent of influence have yet to become apparent.[128]

6. *Quasi-Public Professional Bodies*

A number of bodies operate under joint auspices of the legal profession and the government. Three examples illustrate their range of interests. First, the Canadian Law Information Council (CLIC) is concerned with dissemination of information concerning law both within the profession and to the public. Its activities include promotion of systems for computerized data retrieval, assessments of the legal knowledge needs of the profession, and promotion of public knowledge about law.

The Canadian Institute for the Administration of Justice (CIAJ) is concerned to enhance the quality of the administration of justice. In aid of this objective, the CIAJ has been largely preoccupied with the organization of conferences on such topics as the cost of justice, with the organization of judicial seminars, and to a lesser extent with the stimulation of research concerning the justice system.

The third type of body, which has appeared in almost all Canadian jurisdictions since 1970, is the provincial law foundation. Legislation in almost all Canadian provinces now requires that interest accruing on lawyers' trust accounts (at a stipulated rate) should be paid to a "law foundation," which is to disburse it for various "public" purposes.[129] These purposes—includ-

128. See *id.* and accompanying text.

129. Clients may leave funds in their lawyers' care, typically for a brief period of time, pending payment to the client or a third person on completion of the legal business in question. All practicing lawyers are required to maintain closely audited trust funds. Since the funds of all clients are mingled in a single, fluid account, it was not thought practical to attempt to attribute the interest generated by the funds of any one client to that client. Since lawyers themselves could not legally retain the interest

ing law libraries, legal research and education, public legal education, and legal aid—obviously in the end benefit the profession as well. The foundation is usually administered by trustees representing both the provincial government and the professional governing body in the province.

7. Compulsory Professional Organizations

In every Canadian province, membership in the provincial law society (variously named) is required of everyone practicing law in the province.[130] In addition, membership is open to all those qualified to practice, even if they are not doing so, so long as they wish to retain membership. Termination or suspension of membership terminates or suspends the right to practice. Practicing law without membership is an offense.[131]

The internal structure and politics of these provincial governing bodies vary only somewhat from province to province.[132] (Quebec is a special case, since the Barreau du Quebec is subject to the province's Professions Code, described *supra*.)[133] The governing body is effectively controlled by an elected executive group, whose members are generally referred to as "benchers" but occasionally by other names. Although elected by the profession as a whole, these executive bodies typically exhibit significant overrepresentation of membership from large, prestigious firms and from the ranks of leading civil and criminal advocates.[134] Rank-and-file practitioners, and especially lawyers employed by a government, university, or corporation, tend to be underrepresented.[135]

However, it is likely fair to say that except in Ontario, where no geographical constituencies have been created, local representatives on the professions' executive body may well be relatively close to the views of most of their fellow practitioners. Such individuals are also likely to be members of the social, political, and economic elites of their local communities. In the result, minority and dissident viewpoints are seldom represented in the effective decision-making processes of the provincial bar.

It is not surprising, then, that for the most part, these executive bodies tend to be club-like, rather than parliamentary or ideological. This fact is

---

earned on their trust accounts, banks were for a time simply permitted to hold and use the money without the payment of interest. Legislation was required to alter this situation. See, e.g., Barristers and Solicitors Act, B.C. Rev. Stat. ch. 26, § 76 (1979); Legal Profession Act, Alta. Rev. Stat. ch. L-9, § 110 (1980).

130. See, e.g., Law Society Act, Ont. Rev. Stat. ch. 233, § 50 (1980); Bar Act, Que. Stat. ch. 77 (1967–68), as amended, Que. Rev. Stat. ch. 44, § 74 (1973).

131. See, e.g., Barristers and Solicitors Act, B.C. Rev. Stat. ch. 26, § 81 (1979); Legal Profession Act, Alta. Rev. Stat. ch. L-9, § 96 (1980); Law Society Act, Ont. Rev. Stat. ch. 233, § 50 (1980); Que. Rev. Stat. ch. 44, § 133 (1973).

132. See generally H. W. Arthurs, *supra* note 106.

133. See text and notes at notes 104 & 105.

134. See, e.g., the description of the 13 newly elected benchers in Ontario, text following note 117 *supra*. Note further that the average age of these 13 "new" benchers was 50 and that only 2 of them were women (for a total of 3 women among the 40 elected benchers).

135. In Ontario, e.g., only one of 40 elected benchers was not in private practice as of 1983 (2.5%), as compared with some 30% of the members of the law society as a whole.

reflected in their relatively restrained, indeed sometimes virtually passive, behavior. To an extent, however, this club-like atmosphere has a positive side. For example, with one notable exception—the *Martin* case[136]—the Canadian legal profession, even during the most intense period of the cold war, avoided attempts to enforce ideological conformity within the Canadian legal profession. Indeed, leaders of the bar were among those prepared to defend accused persons during the notorious "spy trials" in the late 1940s.[137] And an air of noblesse oblige still often characterizes the official positions of law societies on public policy issues.[138]

While in every Canadian province primary responsibility for governance of the affairs of the legal profession is in the hands of an elected body of professionals, there have been a number of initiatives to promote the accountability of these professional governing bodies.[139] As mentioned above, in some provinces, public representatives are appointed to serve as members of the profession's executive body. In fact, since these public representatives do not purport to speak on behalf of any particular constituency (such as consumers, trade unions, or other professions), and since they have no access to independent staff or other resources, they tend to be co-opted by the professional representatives or submerged within their ranks. On the other hand, their very presence may serve symbolically to remind the professional group of its public obligations.

Rank-and-file members of a provincial law society have an equally limited opportunity to influence the policies of the governing body. Usually, there is only a pro forma annual meeting of members, often no regular communication to advise them of developments or enable them to contribute to decisions, and only the periodic occasion of elections to enable them to express their views on the decisions taken by their elected representatives.

However, to some extent, governing bodies are susceptible to pressure from the profession's voluntary organizations. For example, in the area of continuing legal education, provincial law societies and provincial CBA branches compete or cooperate. Organizations of defense counsel may be offered an opportunity to contribute to the formation of professional conduct rules that govern their activities. And local law associations may influence decisions about establishing of local legal clinics or other facilities.

The political stance of governing bodies requires further attention. In general terms, as indicated, they are relatively conservative both on issues of public policy and on matters relating to the internal governance of the

136. *Re* Legal Profession Act, *Re* Martin, [1949] 1 D.L.R. 106 (B.C. Law Soc.), *aff'd*, [1950] 3 D.L.R. 173 (B.C.C.A.).

137. These included G. A. Martin, K.C. (subsequently an Ontario appellate judge); R. A. Hughes, K.C.; and Joseph Sedgwick, K.C.—all prominent Toronto counsel—and Joseph Cohen, K.C., of Montreal.

138. See, e.g., J. Chadwick, Legal Aid in the '80s, 15 L.S.U.C. Gaz. 278 (1981).

139. See generally H. W. Arthurs, Clients, Counsel, and Community, 11 Osgoode Hall L.J. 448 (1973); H. W. Arthurs, *supra* notes 106, 107.

profession. However, there are certain countertendencies or leavening influences that have modified this general stance.

Because the provincial law societies exercise delegated statutory powers, and because they are involved with government in a number of important respects (for example, legal aid and law reform), leaders of the profession are relatively sensitive to the possibility of unfavorable government reaction and to the need to avoid unnecessary political risks.[140]

As a result, provincial governing bodies relatively seldom intervene directly in political controversies; when they do so, they tend to focus on issues perceived to affect crucial professional interests. Sometimes, it is true, those perceptions may be influenced by symbolic rather than practical considerations. Thus, in Ontario recently a good bit of attention was devoted to fending off a provincial inquiry into the processes of professional government, in part by the assertion of overstated claims to professional autonomy.[141] But not atypically, the law society simultaneously moved in several respects to respond to well-founded concerns about effective operation of the discipline system and like matters.

In general, the governing bodies of the Canadian legal profession have been fairly astute politically. They have perceived that there is more to be gained by cooperation than by opposition to government. Thus, the initial establishment, in Ontario, of a legal aid plan was supported by the profession's governing body, despite some rank-and-file skepticism, with the result that the law society was given responsibility for the administration of the scheme.[142] Similarly, pressures to displace the fee-for-service aspects of the Ontario Legal Aid Plan with a system of clinics was met by an accommodation on the part of the professionally administered plan that established a system for funding community-based clinics.[143] The government's influence, of course, remains strong not only because of its ultimate access to legislative powers, but also because it provides virtually the whole legal aid budget, save for the Ontario Law Foundation's contribution.

As a result of the relatively modest role played by provincial law societies in the public arena, much of the burden of legislative lobbying and political activity has fallen to voluntary groups. The law societies' passive role has attracted criticism from both ends of the political spectrum. On the left, the complaint is that law societies have not taken a sufficiently active role in law reform and have not been sufficiently aggressive in pursuing adequate funding for legal aid. On the right, the complaint is that they have failed to secure from government explicit legislative powers that would enable them to restrict competition in various ways. Nonetheless, law societies have

140. Giffen, *supra* note 92; Orkin, *supra* note 86.

141. Law Society of Upper Canada, Submission to the Ministry of the Attorney General, Professional Organizations Committee, 13 L.S.U.C. Gaz. 182 (1979).

142. See *infra* text accompanying notes 265-70.

143. *Id.*

hewed rather carefully to the line that their primary functions are to regulate admissions, standards of conduct, and (recently) competence.[144]

Only in a very few cases, in fact, has it been possible to see in the exercise of their traditional powers overt expressions of political or social values. As mentioned, only in a single instance is it known that admission was refused to someone on political grounds. Conceivably, some other similar decisions may have been made sub rosa, but there has been no published documentation of such events. Admissions committees in most Canadian provinces have been relatively lax in terms of scrutinizing the nonacademic credentials of applicants for entry. Moreover, even when matters such as prior criminal convictions have been brought to light, in a number of instances the position has sensibly been taken that minor drug convictions and other offenses connected with adolescent crises or student culture ought not to function as barriers to entry. In one recent unusual case, a lawyer convicted of a criminal offense involving egregious sexual misconduct with minors was disbarred;[145] in another, a similar fate befell a lawyer implicated in the theft of valuable securities.[146] However, rarely is anyone disbarred except for dishonesty or other matters directly connected with professional functions. One study of the grounds of disbarment revealed that in Ontario 83% of disbarments during a 20-year period were for misappropriation of clients' trust funds (see table 2).

TABLE 2
Grounds for Disbarment in Ontario, 1945–65

Improper use of funds (trust fund misappropriation)	83%
Other fraud, forgery	6
Neglect of client's affairs	8
Other	3
Total	100%

Source: S. Arthurs, Discipline in the Legal Profession in Ontario, 7 Osgoode Hall L.J. 235 (1970).

8. *Systems of Professional Control: Codes of Ethics*

In formal terms, professional discipline is typically based on the statutory power usually given to the provincial governing body to discipline its members for "conduct unbecoming a barrister or solicitor" or "unprofessional conduct."[147] In some jurisdictions, these vague standards are made more explicit by additional statutory language[148] or, more frequently, by the

144. See, e.g., S. Thom, The Nature and Function of the Law Society of Upper Canada, 8 L.S.U.C. Gaz. 173 (1974).

145. *Re* Cwinn & Law Soc'y of Upper Canada, 28 Ont. 2d 61 (Div. Ct.) (1980) (leave to appeal refused).

146. Novak v. Law Soc'y of British Columbia, 31 D.L.R.3d 89 (B.C.S.C.) (1972).

147. See, e.g., Law Society Act, Ont. Rev. Stat. ch. 233, § 34; Law Society Act, Man. Rev. Stat. ch. L-100, § 45 (1970).

148. See, e.g., Barristers & Solicitors Act, B.C. Rev. Stat. ch. 26, § 50 (1979) ("misappropriation or wrongful conversion"); Legal Profession Act, Alta. Rev. Stat. ch. L-9, § 47 (1980) ("conduct . . . inimi-

adoption of regulations (subordinate legislation), which are subject to the approval of the provincial cabinet (and in Quebec, of the professional council).[149] In Ontario, for example, very extensive regulations have been enacted in order to ensure honesty in the handling of trust funds.[150] These regulations stipulate the required methods of bookkeeping, audit procedures, and periodic reporting.

In addition to the general provisions of legislation, or specific subordinate legislation, most provinces have also adopted professional conduct rules governing a broad variety of matters.[151] These are treated as guidelines rather than as binding codes by bodies responsible for discipline, since they must ultimately respond to the standards contained in their enabling legislation.

Generally speaking, the provincial codes of ethics or professional conduct rules are borrowed from the codes adopted by the Canadian Bar Association in 1920 and in 1974.[152] The 1920 code was extremely vague (being modeled on a contemporary American Bar Association document) and did not respond to the changing nature of legal practice for the next half-century: it was never amended prior to its repeal in 1974, was seldom referred to in disciplinary proceedings or even in hortatory discussions of professional ethics and was, in effect, a well-kept secret.

By contrast, the 1974 code was well publicized and formally adopted in most provinces in its original or a modified form, and it seems to be the subject of much greater ongoing scrutiny both in discipline proceedings and in discussion of appropriate standards of professional conduct. However, while the 1974 CBA Code of Professional Conduct is a distinct improvement over its predecessor, it certainly lacks either the precision or the firm roots in reality that would permit its use as a guide to daily conduct. Nor does it function in this way.

The code, and its formally adopted provincial counterparts, appear to adopt the perspective of the client and of the public in defining standards of appropriate professional conduct. For example, rule 1 admonishes the lawyer to "discharge his duties to his client, the court, members of the public

---

cal to the best interests of the public"); Professions Code, Que. Rev. Stat. ch. C-26, § 87 (1977) ("the duty to discharge [his] professional obligations with integrity").

149. Professions Code, Que. Rev. Stat. ch. C-26, s§ 12, 13, 94, 95 (1977).

150. Law Society Act, Ont. Rev. Stat. ch. 233, § 63 (1980); Ont. Rev. Regs., Reg. 573 (1980) (deals with the keeping of books and accounts).

151. See, e.g., Law Society of Upper Canada, Professional Conduct Handbook (as amended to 1983), which covers the following: integrity; competence and quality of service; advising clients; confidential information; impartiality and conflict of interest; outside interests and the practice of law; preservation of clients' property; the lawyer as advocate; the lawyer in public office; fees; withdrawal of services; the lawyer and the administration of justice; making legal services available; responsibility to the profession generally; practice by unauthorized persons; responsibility to lawyers individually; disbarred persons; borrowing from clients; retired judges returning to practice; delegation to nonlawyers.

152. Canons of Legal Ethics (Ottawa: Canadian Bar Association, 1920); Code of Professional Conduct (Ottawa: Canadian Bar Association, 1974).

and his fellow members of the profession" with integrity.[153] Indeed, even intraprofessional concerns are addressed in terms that purport to favor the public interest. For example, restrictions on advertising are contained in a rule directed toward "making legal services available" and are couched in terms of the desire to avoid burdening the public with the cost of advertising or to avoid misleading the public, rather than in terms of avoiding undesired competition between practitioners.[154]

In terms of the active enforcement of professional standards, by far the greatest preoccupation in discipline proceedings is with the honesty of lawyers.[155] As mentioned, extensive formal regulations prescribe appropriate methods of bookkeeping. Periodic audits are required. In addition, in some provinces, a proactive system of "spot audits" enables the law society to keep close check on compliance with its regulations. Noncompliance, even when negligent rather than dishonest, generally attracts discipline. Dishonesty is almost certain to lead to disbarment, save when there are unusual mitigating circumstances, such as mental problems or personal tragedy, sufficient to vitiate the lawyer's responsibility for his actions. Victims of lawyers' dishonesty receive payments (generally within significant but fixed limits) from a compensation fund to which all lawyers must contribute annually.[156]

On the other hand, there is virtually no form of discipline exercised on lawyers except where the public is injured by way of fraud, perjury, or some other criminal act by a lawyer.[157] Only exceptionally, and in a few high-profile cases, is the discipline process used to enforce professional interests. Indeed, even in those cases, discipline is likely to be invoked only where the authority of the law society is overtly challenged.[158] For example, a recent well-publicized and extensive advertising campaign by a lawyer in violation of local professional rules evoked in turn the threat of disciplinary sanctions, an extensive period of litigation and some relaxation of the rules.[159]

However, informal enforcement processes may greatly influence the behavior of members of the profession. These processes include threatened and actual investigation of behavior by the staff of the law society, informal admonitions or formal warnings given by members of the governing body either in direct conversation with "offenders" or in the context of formal proceedings, and social and economic sanctions imposed by formal and informal local lawyer groups. In general, such informal processes are di-

153. Canadian Bar Association, Code of Professional Conduct (1974).

154. *Id.*, Rule 13.

155. S. Arthurs, Discipline in the Legal Profession in Ontario, 7 Osgoode Hall L.J. 235 (1970).

156. See, e.g., Legal Profession Act, Alta. Rev. Stat. ch. L-9, § 76 (1980); Barristers and Solicitors Act, B.C. Rev. Stat. ch. 26, § 67 (1979); Law Society Act, Ont. Rev. Stat. ch. 233, § 51 (1980).

157. See, e.g., *Re* Cwinn & Law Soc'y of Upper Canada, 28 Ont. 2d 61 (Div. Ct.) (1980); Novak v. Law Soc'y of British Columbia, 31 D.L.R.3d 89 (B.C.S.C. 1972).

158. Merchant v. Law Soc'y of Saskatchewan, 32 D.L.R.3d 178 (Sask. C.A. 1973).

159. Attorney-General of Canada v. Law Soc'y of British Columbia, Jabour v. Law Soc'y of British Columbia, 137 D.L.R. 3d 1 (Can. 1982).

rected toward matters of intraprofessional concern and, occasionally, toward minor infractions relating to public behavior or service to clients.

Overall, most significant problems in the processes of social control within the profession relate to the detection of serious offenses and to the administration of the discipline process. However, because the profession is extremely concerned to preserve its image—and to forestall public criticism or governmental intervention—it has managed to achieve a reasonable record of punishing high-visibility "criminal" activity by lawyers, albeit often operating in arrears.

By contrast, the least satisfactory exercise of social control within the legal profession relates to competence.[160] While there is a great deal of exhortation, and a certain amount of education, there has been relatively little enforcement of competence standards by means of systematic or random testing or other forms of monitoring of the standard of service provided. Indeed, until the adoption of the new CBA Code of Professional Conduct in 1974, incompetence was not explicitly stigmatized as unacceptable behavior.[161] As a consequence, almost no one in Canada has ever been disbarred for incompetence except lawyers who have suffered a virtually total collapse of personality and have become unable to carry on their practice; in such cases, removal from practice is viewed as nondisciplinary.[162]

Recently, however, in an effort to provide public reassurance about the effects of incompetence, a number of provincial bars have instituted compulsory "errors and omissions" insurance schemes. Within a few years after their introduction, claims—hence premiums—began to mount (see table 3). This engendered considerable concern and has led to the development of three strategies designed to enhance competence and thus to reduce both claims and premiums.[163] First, prophylactic measures have been greatly strengthened, and programs of continuing legal education and "claims control" have been widely instituted. Second, "rehabilitative programmes" have been put in place, involving remedial measures for any lawyer whose practice as a whole appears to be falling below an acceptable standard.[164] Third, both positive and negative reinforcement for proper standards of practice have been provided in the form of experience rating within the compulsory insurance scheme. Thus, lawyers with a high incidence of claims will pay much higher premiums; those with no claims, lower premiums. While an increase in the use of disciplinary sanctions against incom-

160. See generally W. Hurlburt, ed., The Legal Profession and Quality of Service (Ottawa: Canadian Institute for the Administration of Justice, 1979).

161. See present Rule 2, Competence and Quality of Service.

162. Statutory provisions permit suspension or termination of the right to practice for physical or mental disability, see, e.g., Law Society Act, Ont. Rev. Stat. ch. 233, §§ 35, 43 (1980).

163. J. Swan, Regulating Continuing Competence, *in* Evans & Trebilcock, *supra* note 14; Hurlburt, *supra* note 160.

164. Barristers and Solicitors Act, B.C. Rev. Stat. ch. 26, §§ 50(c), 51(2) (1979) provides for suspension from practice or limitation of the right to practice and for mandatory remedial studies and reexamination; see A. Marshall, Practice Advisory Services, 14 L.S.U.C. Gaz. 357 (1980).

TABLE 3
Claims Made on Errors and Omissions Insurance in Ontario, 1972–80

Year	Claims Per 1,000 Lawyers
1972	29.2
1973	37.0
1974	46.3
1975	48.5
1976	70.0[a]
1977	49.3
1978	74.3
1979	83.6
1980	96.4

[a]Distortion due to change in insurer.

petent lawyers has not yet become manifest, as a result of these developments such an increase can be anticipated in the near future.

In addition, of course, victims of incompetent practice may have recourse to civil suit against lawyers,[165] and judgments in such proceedings appear to be increasingly frequent and liberal. The law society may be drawn into such proceedings as an insurer. Finally, limited intervention by a judge presiding over an incompetently presented case may offer some prospect of diminishing the harm done by incompetent advocacy.[166] However, such intervention remains exceptional.

In the recent history of professional control, the issue of specialization warrants special attention.[167] As has been noted, there is an observable tendency, at least in larger urban centers, toward de facto specialization.[168] There exists as well general acknowledgment of the difficulty encountered by clients in such centers of finding lawyers who can provide competent service even in such prosaic, household "specialties" as criminal law, family law, and civil litigation.[169] It might be thought, therefore, that the development of procedures for the formal certification of specialists would at once recognize their de facto existence, assure their competence, and enhance

165. E. Belobaba, Civil Liability as Professional Competence Incentive (Ottawa: Professional Organizations Committee, 1978); R. Prichard, Professional Civil Liability and Continuing Competence, *in* L. Klar, ed., Studies in Canadian Tort Law (Toronto: Butterworths, 1978).

166. Such intervention may take the form of a critical public statement by the judge either during the course of the proceeding or at the time of delivering judgment or of a direct communication to the law society inviting disciplinary action. Incompetent service may also justify a partial reduction (or complete forfeiture) of professional fees, see *Re* Solicitor, [1971] 1 Ont. Rep. 138.

167. See generally A. Esau, Specialization and the Legal Profession, 8 Man. L.J. 255 (1979); *id.*, Recent Developments in the Specialization Regulation of the Legal Profession, 11 Man. L.J. 133 (1981); S. Colvin et al., *supra* note 13; E. Colvin, *supra* note 13.

168. H.W. Arthurs et al., *supra* note 34.

169. M. Trebilcock, Competitive Advertising, *in* Evans & Trebilcock, *supra* note 14.

their visibility to clients. Proposals to that end, indeed, were recently adopted in principle by the Canadian Bar Association.[170]

But the law societies seem adamantly opposed to formal certification of specialists, or even to more informal systems of self-designation. For example, in 1979, Ontario adopted an experimental policy that enabled lawyers to advertise up to three "preferred areas of practice," provided they were prepared to attend a stipulated number of continuing education sessions in those areas. The latter requirement was quickly repealed, and the policy itself allowed to expire in 1984. Instead, the weight of professional control has been brought to bear against those who "advertise" their specialty, as if they were thereby claiming illicit competitive advantages. In adopting this stance, the bar has clearly turned its back on the public interest in both greater competence and in greater accessibility of legal services. It is perhaps significant that one of the most unequivocal recommendations concerning the legal profession that emanated from a recent government study encompassed this topic.[171]

9. Systems of Professional Control: Procedural and Institutional Issues

As mentioned, much of the social control exercised by the bar over its members is of an informal nature. If a complaint against a lawyer progresses beyond the stage of informal discussion, it will be dealt with, typically, by the disciplinary committee of the provincial governing body. There it will be litigated with some degree of procedural formality, with the law society staff or special counsel assuming the prosecutor's role. Often, the decision of the committee will be subject to approval by, or appeal to, the full governing body, where (because of its size and composition) procedural problems are more likely to arise.[172]

Sanctions available include formal reprimands, limitations on the right to practice, suspension from practice, and disbarment. Some law societies also have power to impose financial penalties.[173] Many also have the power to suspend from practice individuals suffering from physical or mental illness, and to meanwhile manage their practices to protect clients' assets and interests.[174]

Further appeal or review is in principle available in court proceedings to the lawyer being disciplined (but not to the complainant) if the professional body has committed a legal or procedural error.[175] However, there is a marked reluctance on the part of judges to make new determinations of fact

170. Canadian Bar Association, The Unknown Experts: Legal Specialists in Canada Today (Ottawa: Canadian Bar Foundation, 1983).

171. Ontario, Professional Organizations Committee, Report, Recommendations 10.1–.2 (Toronto: Professional Organizations Committee, 1980).

172. See, e.g., Law Society Act, Ont. Rev. Stat. ch. 233, §§ 33, 34, 39 (1980).

173. See, e.g., Barristers and Solicitors Act, B.C. Rev. Stat. ch. 26, § 51(1) (1979).

174. See *supra* note 162.

175. See, e.g., Law Society Act, Ont. Rev. Stat. ch. 233, § 44 (1980).

or independent assessments of the penalties imposed, absent egregious injustice.[176]

Thus, in effect, the profession controls both the prosecution and adjudication of discipline matters. Moreover, there is no provision for a "lay observer" or other forms of lay participation in the discipline process, except for the involvement, if any, of lay benchers. Clients or other complainants may, of course, initiate the process of discipline, but they do not have the right to carry it forward. As noted, however, victims of professional negligence may sue civilly, with ultimate recourse to an insurance fund established by the law society itself or through an insurer. Likewise, victims of a lawyer's dishonesty may sue civilly. However, since dishonest lawyers are generally bankrupt, the claim must in the end be against the profession's compensation fund in internal proceedings; such payments are ex gratia and may not be enforced in the courts. In general, then, where a lawyer has committed either a civil wrong or a crime against a client, the client may pursue all normal avenues of recourse in the courts. Professional discipline or remedial procedures preclude such recourse only where the profession provides recompense to the client through an insurance or compensation fund, on terms that extinguish the client's claim. But these obvious exceptions apart, the control of Canadian lawyers, to all intents and purposes, resides within the profession itself.

E. Education, Socialization, and Allocation

1. Historical Development

For most of the nineteenth century, and in some cases (including Ontario, the largest common law jurisdiction) for the first half of the twentieth, apprenticeship was the primary means by which Canadian lawyers received their education. From about 1880, it is true, full-time law schools began to appear and permanent arrangements were made to supplement apprenticeship ("articling") with programs of lectures and other forms of systematic instruction. But the law faculties of the University of Montreal (dating from 1878) and Dalhousie University (from 1883) had minuscule professorial complements until after 1945 and depended largely on part-time lecturers from the bench and bar. A similar situation prevailed at the Universities of Saskatchewan and Alberta. Elsewhere, provincial law societies opened their own law schools—alone or in collaboration with universities—but inevitably with teaching staffs composed predominantly of practitioners, with only a very few (if any) full-time academics.[177]

Thus, when A. Z. Reed completed his classic study of legal education in Canada and the United States in 1928, it was clear that the Canadian legal

176. See, e.g., Prescott v. Law Soc'y of British Columbia, 19 D.L.R.3d 446 (B.C.C.A. 1971).
177. See Bucknall et al., *supra* note 70; Baker, *supra* note 60.

profession enjoyed a degree of control over the supply and production of lawyers that far surpassed that of its U.S. counterpart.[178]

This professional dominance was reinforced by (and in turn helped to reinforce) the considerable standardization among law schools. Whatever their differences, Canadian law schools varied significantly less than American law school in terms of both their prerequisites of admission and requirements for successful completion of study.

By 1927, seven out of nine provinces required at least two years of college before entry to law school; the remaining two required some attendance at college. All provinces required at least three years of legal studies. Four provinces—Ontario, Manitoba, Alberta, and Quebec—required attendance at local law schools; the remaining provinces permitted attendance at extraprovincial law schools. All required for admission to legal practice a period of office work and a final examination set by the various provincial law societies.[179]

In contrast, American law schools required from one to five years of legal education; some schools admitted students with no high school education whereas others required two years of college.[180] And significantly, the absence of night law schools in Canada removed another factor that contributed to educational disparities in the United States—albeit at the expense of individuals who could not afford day-time attendance.

Potentially the most significant basis for distinguishing among Canadian law schools was their institutional affiliation. Some were operated by the legal profession itself (including the largest common law school, Osgoode Hall in Ontario), some by a university alone, some jointly by a university and the local bar. Yet these alternative models of control were in fact neither conflictual nor competitive; they merely coexisted. Each model reigned supreme in a particular province, thus eliminating at least the troublesome problem of which—university or local bar—would represent the profession to the public. Moreover, all schools, however constituted, had been able to agree on a common curriculum proposed by the Canadian Bar Association in the early 1920s.[181] Finally, the development of any substantial conflict between academically-oriented and practitioner-oriented schools was inhibited by the sheer lack of full-time academic instructors. Reed's data indicate no more than 16 full-time faculty in law in all of Canada in 1928.[182]

It is no wonder, then, that the same assumptions that led Reed to propose a dual system of legal education in the United States (in effect, institutional-

178. A. Z. Reed, Present-Day Law Schools in the United States and Canada 530 (New York: Carnegie Foundation for the Advancement of Teaching, 1928).

179. A. Z. Reed, Advance Extract, *in* Twentieth Annual Report, Carnegie Foundation for the Advancement of Teaching at 13 (Boston: The Foundation, 1925).

180. *Id.* at 21.

181. Law and Learning, *supra* note 26, at 12 *et seq.*

182. Reed, *supra* note 178, at 373.

izing the marked variation then prevailing in the quality of legal instruction) also persuaded him to recommend a uniform system of legal education in Canada—no less in acknowledgment of the homogeneity that already prevailed.

Thus, by direct participation in legal education, by partnership with universities, or by indirect influence projected through admission standards, the common, professionally oriented curriculum, or merely the overwhelming presence of practitioner instructors, the bar achieved an effective monopoly over all phases of the production of lawyers. This monopoly lasted until the 1950s when the university law faculties gradually claimed an increasing share of authority over legal education.

Not until 1957, under pressure from the academic community, did Canada's largest legal professional body, the Law Society of Upper Canada (Ontario), negotiate a new arrangement with the universities that gave the professoriat ultimate responsibility in shaping the LL.B. curriculum, the first stage of professional formation.[183] Only in 1968 did the law society itself terminate its direct involvement in the LL.B. program—by transferring its own law school to York University.[184] Similar developments in other provinces during the 1950s and 1960s, coupled with the rapid proliferation and expansion of law faculties from the mid-1960s onward, assured the universities their present considerable influence over Canadian legal education.

But the universities arrived at their present position in a sense unprepared to assume it, and perhaps unsure of the extent to which it would remain theirs.

As to the former point, as late as 1950, there were only about 40 full-time law teachers in all of Canada; in 1960, there were not more than 100. Thus, the late emergence of Canada's legal academic community helps to explain its relative deference to professional expectations, at least until the late 1960s. However, by 1970 the number of full-time law teachers in Canada had tripled in ten years to about 450, and by 1980, despite a slower growth rate, there were some 650. During this latter period, there was indeed considerable innovation in curriculum, teaching methods, and modes of research, sometimes engendering expressions of professional concern.[185] But it could not be realistically said that Canadian law schools have at any time offered a radical challenge to the profession's ideology or intellectual capital.[186]

183. Arnup, *supra* note 91.

184. H. W. Arthurs, The Affiliation of Osgoode Hall Law School with York University, 8 U. Toronto L.J. 194 (1967).

185. See, e.g., R. Macdonald, Legal Education on the Threshold of 1980's, 44 Sask. L. Rev. 39 (1979); E. Veitch, The Vocation of Our Era for Legal Education, 44 Sask. L. Rev. 19 (1979); J. MacLaren, Legal Education: Common Law Canada, 11 U. Ottawa Colloque Int'l Droit Comparé 54 (1974).

186. Law and Learning, *supra* note 26, at ch. 2.

As to the latter point, we must ask whether this restrained assertion of academic autonomy resulted from a self-denying ordinance, from a simple failure of will and imagination, or from a fear of the profession's reaction. The contingent nature of academic autonomy must be recalled. The expanded role of the law faculties depended not only on their new location within the public educational sector but also on the willingness of the profession to tolerate their growth and development. In effect, the law societies had agreed to accept for professional training all graduates of law faculties that met bare minimum standards of staff and facilities and that offered initially a lengthy, and subsequently a short, list of required subjects. The professional training phase, still controlled by the provincial law societies, almost everywhere comprises a period of apprenticeship and a concurrent or separate period devoted to formal instruction in various adjectival and practical matters as well as skills training.

The consensual origin of this division of labor between the universities and the law societies left open the possibility of revision, to the prejudice of the universities. And the continued control by the law societies of the final stages of professional formation also enabled them to influence the earlier, university stage. However, the longer the status quo persists, the less likely it is that the profession will be able to reassert its former comprehensive and direct control over legal education. Occasional proposals that it do so are more in the nature of a lament for older and simpler times than serious projects for revived emphasis on narrow trade training.

2. Legal Education as a Strategy of Socialization and Allocation

A considerable length of time is required to complete pre-law studies, a first degree in law, and the required period of articling and practical bar admission instruction. Thus, the average age of entry into practice in Canada is likely 24–27; for mature and second-career entrants, it is likely much higher. This fact has important implications for access to legal education, for its form and content and for its socializing potential.

Entry to law school is highly competitive, and the predictable disadvantage of lower-class applicants is exacerbated by the need to finance this lengthy program of study and experience. Financial support for law studies (and for higher education in general) is largely governmental—and therefore at the mercy of government's financial priorities. These have not included a special concern for access to legal education.

The mature age and previous education and experience of law students ought, in principle, to contribute to the diversity and richness of the LL.B. program. To an extent it does. But it also enhances the desire of many students to get on with their life's work and to bring to an end their lengthy educational experience.

To come more directly to the content of academic legal education, here we are able to see the significance of its relatively recent coming-of-age.

There is no received scholarly tradition in Canadian law to offset traditionally important, if not predominant, professional priorities.[187] To an extent, therefore, the most recent strategy of the law schools has been to stand at a distance from the profession, so far as this is possible. Sometimes this strategy has taken the form of scholasticism, of an obsessive concern with doctrinal analysis. Sometimes it is expressed as a robust critique of existing professional knowledge and ideology. Most often, it involves considerable ambivalence about the mission of legal education, reflected in a desire to be perceived as highly "professional"—often more so than the practicing bar itself—without being involved in, or even considering, the full range of activity in which practicing lawyers participate. In effect, legal education projects an artificial and misshapen representation of legal reality, rather like Dürer's rhinoceros.

Thus, the importance of the socialization process: the law schools try to socialize students so that they will react to an internally defined model of legal practice and social reality. Whether that model is intended to produce conformity or nonconformity to the existing "real world" of practice, the attempt largely fails. However, the profession, imagining that it is successful, lavishes considerable energy upon the project of resocializing students to conform to what the profession itself believes to be appropriate attitudes and values. This it does especially through articling and its bar admission course, but also through post-call, informal treatment of its new recruits. And the bar has a valuable ally: the majority of law students, who tend to identify with what they imagine to be the professional project. Thus, student concerns about future professional careers feed a culture within the law schools that supports attitudes perceived as being professional. And another ally as well: those faculty members who are concerned to demonstrate that they are "relevant," to gain acceptance and recognition by students and practitioners alike, thus further fortifying the professional ethos of law schools.

These general observations hold true to a greater or lesser extent for all law schools. The credentials of entering students, the quality of faculty members, the content of curriculums, the degree of professional repute do not vary greatly from school to school across the country. In most provinces, there is only a single law school (with perhaps a second added in the 1970s). This situation ensures a close identification between the bar and "its" local law school, an identification not necessarily translated into direct professional interference in academic decision making (which is, in any event, seldom needed). A somewhat greater degree of "product differentiation" can be observed in the largest provinces, Ontario and Quebec, but even there differences are of degree and not of kind.

187. See generally *id.* at chs. 4–7, where the following analysis is documented and developed in detail.

A few exceptions may be mentioned. The University of Quebec at Montreal (UQAM) deliberately embarked on an alternative vision of legal education that emphasized its social dimension and expressed itself in overt antagonism toward professional elitism.[188] Recently founded law schools in Calgary and Victoria, as the "second" law schools in their respective provinces, made important pedagogic innovations. McGill, Ottawa, and Moncton have all responded to the bilingual and bisystemic nature of Canadian law by offering appropriate elements in their curriculums. In several schools, clinical legal education has emerged as a promising (but not yet widespread) technique for stimulating interest in the social application of law and the acquisition of a broader repertoire of intellectual and professional skills. And opportunities for broad-based interdisciplinary study in law, even for joint degrees in law and some other field (typically business), have become available in most law schools. But the opportunities are taken up relatively rarely, and these innovations affect the margins rather than the professional mainstream of LL.B. studies.

As mentioned, students move from their first degree in law to a program of articling and practical instruction as explicit preparation for professional careers. Professional control of entry to practice, coupled with professional administration of articling and bar admission courses, historically preempted the appearance at this level of private, entrepreneurial "cram" schools. These factors did not, however, ensure that the profession's own educational programs would meet a high standard.[189] Articling is essentially a matter between student and principal. Law societies do admonish both as to the objectives and aims of articling, but there is virtually no quality control. Very recent attempts to improve the quality of the "practical instruction" component (which does not even exist in some provinces) are promising,[190] but in general there has been a very little pedagogic sophistication up to this time. One can only conclude that the primary function of both articling and bar admission courses, indeed, has been less to educate than to socialize students, to symbolically continue the nineteenth-century system of professional formation.

A more careful description of the articling period is warranted because it also bears on the issue of "allocation" of legal resources, although articling is ostensibly organized solely to provide learning opportunities. In theory, an articling principal agrees to teach students how to practice, to observe standards of professional conduct, to manage the business affairs of the law office, and to deal with other institutions and actors in the legal system. But this teaching activity is a sideline for the principal, who is primarily (and

188. P. Mackay, L'enseignement du droit dans une perspective de changement social, 44 Sask. L. Rev. 73 (1979).

189. At least one inquiry concluded that the articling experience was too uncertain and uneven to warrant its continuation, MacKinnon Committee Report, *supra* note 71.

190. Principally in British Columbia, which has organized a skills training program employing, inter alia, clinical techniques of instruction.

sometimes totally) preoccupied with the service of clients. While some principals do take their educational obligations seriously, students are more likely either to be passive observers, or to perform delegated tasks, at best of legal research and drafting, at worst of mere logistical support. But seldom are the functions of an articling student related directly to the practical business of interviewing, advocacy, negotiation, or other legal tasks, even to the extent that the performance of such tasks is permitted by law to as yet unadmitted personnel.

But articling has acquired a secondary importance: it is often an entrée to future jobs. Large law firms use articling as a screening device to identify junior lawyers who may be hired upon their call to the bar. Small law firms may use articling students to cope with their work load, selecting occasional recruits for the firm as work builds up to the point where expansion is warranted.

There is therefore considerable competition for articling jobs, especially those that will advance students' ultimate career goals.[191] The prestige and professional quality of large law firms, and the clear advantages they offer in terms of professional income, make them very much sought after by articling students. While historically these firms may have tended to recruit new members primarily on the basis of the "old school tie," there is now a much greater emphasis on academic credentials. This reflects, in part, the need for able students and juniors to handle sophisticated legal work; in part, the diminishing acceptability in Canada of discrimination in any form of employment; and in part, the growing economic power of various minority groups, whose legal business is more likely to gravitate to law firms that are seen to be willing to hire their best young members, than to those firms that discriminate against them.

The culture of large law firms is considerably influenced by their corporate clientele and by their own sense of importance and high professional standards. And it is quickly transmitted to students and new recruits. Idiosyncratic personal behavior, political views, or life-styles are tolerated only to a limited degree. By the same token, there has been some tendency toward the development of "ethnic" law firms, the predominant character of which is occasionally deliberately diluted by the addition of a few members of other groups. More recently, too, there have emerged some "political" law firms, or aggregations of lawyers who share both office space and general left-wing ideological predispositions. Each of these types of firms has its own characteristic culture, to which members are generally assimilated.

When a law school graduate enters articles or is called to the bar, the initial choice of practice setting tends to prevail throughout that person's entire career. There is some degree of weeding out by large law firms after, in effect, a period of probation, some tendency toward amalgamation of small firms with each other or with large firms, and some career changes

191. See Huxter, *supra* note 68.

due to unusual success or lack of success. But, by and large, there is relatively little occupational mobility within the legal community.[192]

It is not too much to say that while, even in a large center, lawyers in a particular type of practice or a particular locality are likely to come to know each other reasonably well, and perhaps to share tacitly or explicitly a general legal culture with its underlying values, they may be virtually isolated from other elements of the profession in which different styles of practice and attitudes prevail. Thus, while the formal ethic of the profession projects a picture of a homogeneous group, sharing a common background, education, skills, experience, rewards, and problems, the truth is very much to the contrary. This paradox will be examined next.

F. Division and Stratification Within the Legal Profession

1. The Myth of a Single Legal Profession

The Canadian legal profession seems to cling strongly to the notion that all its members are engaged in a common activity, share common attitudes, pursue common interests, and enjoy equal partnership in the common enterprise of bringing legal services to the public. There is but a single professional credential earned in a single fashion in each jurisdiction (except Quebec, with its Chambre des Notaires), a single provincial professional organization, no formal recognition of specialties or distinctive codes of ethics for those who pursue them, and only rather loose, voluntary organizations of lawyers on the basis of special roles or interests.

Yet the notion that the legal profession is one and indivisible is patently at odds with the facts. Within the profession, there is clearly a division of labor, a division of clientele, and a division of rewards.[193] There are, moreover, "rankings" both within the profession and in the eyes of the public—differential respect and recognition accorded various individuals and practice roles.

Why, then, should the profession insist so vigorously on its unity and homogeneity? At least three answers suggests themselves. First, there is a dearth of "hard" facts about Canadian lawyers and, in any event, very little objective self-scrutiny by the profession. Thus, the myth of professional unity may be a function of ignorance, albeit self-imposed ignorance. Second, preservation of the myth of professional unity helps to reinforce existing hierarchies by making them less visible. Elites that are able to present themselves as closely identified with the rank and file are perhaps less likely to encounter challenges and criticism than those that stand at a conscious distance. Third, a unified profession can better protect its autonomy and

192. See Adam & Lahey, *supra* note 51; Huxter, *supra* note 68; Berger, *supra* note 29, reports a very low level of geographic (as opposed to occupational) mobility.

193. In addition to the particular sources cited, the most comprehensive Canadian study of lawyers' functions and markets is S. Colvin et al., *supra* note 13. Data in the Colvin study are pertinent to much of the analysis that follows.

influence public and governmental opinion than one that speaks with many voices.

The significance of these issues of division and stratification within the profession, then, derives from the juxtaposition of social facts with professional beliefs and institutional arrangements. The latter have already been documented, and the former at least briefly noted. It is now appropriate to return to the context in which those social facts are made manifest—the work settings of lawyers. Through an extended description of the characteristics, activities, clientele, rewards, and organization of lawyers in various work settings, the extent of division and stratification can be clarified and its significance probed.

2. "Elite" Law Firms

Elite firms in Canada tend to reflect a familiar American pattern, albeit on a somewhat reduced scale and with some distinctive Canadian touches. That the patterns are similar reflects parallels in the work, clientele, recruitment, and organization of large law firms on both sides of the international border, and indeed the sharing of some multinational clients and involvement in transactions stretching across national boundaries,[194] as well as membership in international legal organizations, immersion (to some extent) in common sources of legal knowledge, and occasionally explicit association in international partnerships or networks of law firms.[195]

Elite firms are generally large, their sizes ranging from those with 25–50 lawyers to those with 100–200. While these firms have up to now generally operated from a single suite of offices at a single location within a single city, a discernible tendency toward multiple locations has recently appeared. A few Canadian firms now have branches abroad, while others are expanding on a multicity or interprovincial basis, a development whose future is dependent on the extent and success of local protectionism.[196] Typically, however, the elite law firm is found in the business or financial districts of the large metropolitan centers or at close proximity to provincial capitals or other foci of political and economic influence. Characteristically elite firm offices are extensive, well-appointed, and provided with a variety of up-to-date equipment, a good working law library, and other facilities designed to make work in the firm more efficient and pleasant.

Elite law firms tend to be organized both hierarchically and functionally. At the top of the hierarchy are the senior partners, sometimes (in newer

194. The Canadian economy is closely integrated with, and influenced by the behavior of, that of the United States. Foreign ownership (principally American) dominates many key sectors. And even purely Canadian businesses are heavily involved in international trade, finance, and technology transfers, especially with the United States.

195. Local professional rules generally require that the names of law firms include only their present partners or former partners who were licensed to practice within the jurisdiction. Hence, none of the large international law firms operates under its own name in Canada. See, e.g., Law Society of Upper Canada, *supra* note 151, rule 13, para. 6.

196. See *supra* notes 109 & 110.

firms) the "founding fathers," or (in older firms) their successors, the most successful and experienced lawyers in the firm. Admission to partnership occasionally comes about as a result of merger with, or absorption of, another law firm, or by relocation of a senior lawyer from one firm to another. More often, however, it is made available to associates who have served as salaried employees of the firm for a period of years. In effect, this service constitutes a probationary period at the end of which a decision may be taken either to promote the associate to partnership rank or to terminate his relationship with the firm. In addition to associates, elite firms employ a number of articling students. These students are with the firm to complete the apprenticeship required by local law society regulations, but they also provide a pool of candidates from among whom associates may be selected.

Turning to nonqualified personnel, elite firms tend to depend heavily on technical specialists such as office managers, accountants, and librarians, as well as a large number of law clerks.[197] Indeed, in some law firms the number of specialists and law clerks equals or exceeds that of professionally qualified lawyers.[198] And of course, every elite law firm employs a large number of highly skilled secretaries and clerical personnel.

Management of this vast enterprise is typically vested in a managing partner or management committee with responsibility for making and administering personnel policy, overseeing the financial affairs of the firm, and defining its relationship to its clients and the community at large.

Professional recruitment and advancement through the ranks is, of course, crucially important for the success of the firm. Historically, recruitment and advancement seem to have been significantly affected by old-school-tie affinities with members of the firm and with its principal clients. As a result, elite firms were (and still are to some extent) dominated by white Anglo-Saxon Protestant males in English Canada and even in predominantly Catholic, Francophone Montreal. However, since 1945, political and economic power in Canada has begun to be dispersed among people with more varied ethnic and religious backgrounds; overt expression of illicit forms of prejudice has somewhat receded;[199] and especially striking changes have occurred in the power structure of Quebec. Accordingly, technocratic considerations now figure more prominently in recruitment to, and advancement within, elite firms, so that the names of highly qualified Jews, Catholics, women, and second-generation Mediterranean and Slavic ethnics are now beginning to appear on firm letterheads.[200] By actual count (1984), two of the largest firms—with about 100 and 140 members, respec-

197. The extent to which professional functions may be delegated to such specialists and clerks is becoming a matter of formal concern, see Law Society of Upper Canada, *supra* note 151, rule 20, Delegation to Non-lawyers (adopted 1983).

198. See, e.g., Taman, *supra* note 15.

199. See generally sources cited in *supra* notes 62, 65, 66, & 78.

200. See H.W. Arthurs et al., *supra* note 34; Adam & Lahey, *supra* note 51; Adam, *supra* note 74; Huxter, *supra* note 68.

tively—apparently include 13 female members in one firm and 16 in the other, and about 13 ethnics and 6 Jews in one firm and 12 ethnics and 10 Jews in the other. Most of these names appear in the lower reaches of the firms' letterheads, indicating relatively recent association with the firm. (The number of ethnics and Jews may be understated, since not all surnames accurately reflect ethnicity or religion. Several of the female members appear to be either ethnic or Jewish.) Despite these changes, however, there is no doubt that especially at the senior levels, elite firms continue to be dominated by persons with a relatively narrow spectrum of social credentials.

When we turn to the organization of work within elite firms, the most obvious organizing principle is that of specialization. Firms generally have significant corporate, tax, litigation, and conveyancing departments, and sometimes industrial property, labor, transportation and communications, estate planning, or other specialty departments as well. Formally or informally, certain individuals within the firm are identified as having a special aptitude for legal research and tend to provide service to other members of the firm who may require it.

Cutting across these functional divisions of the firm is another form of distribution of labor, often related to the hierarchy described earlier. In general terms, senior partners may come to be preoccupied with the affairs of major clients whom they at once cultivate and seek to assist by providing advice on business strategies, governmental and community relations, and other matters not necessarily involving the immediate application of technical legal skills.[201] While many of these senior partners retain an active interest in "lawyers' law" as well, and are looked to for guidance and expertise by their junior colleagues, it is probably true to say that some of them have, in effect, "graduated from" the practice of law.

Often, it is partners in their forties and fifties who perform the most sophisticated work in the firm, assuming responsibility for its most challenging cases and transactions and for the quality of legal work performed by junior lawyers. However, some of those partners, depending on aptitude and opportunity, may be drawn increasingly into the affairs of their corporate clients and occasionally leave the firm permanently or on secondment to serve as senior executives of major business organizations. For example, two of Canada's largest corporate empires, the Thompson and Bronfman groups of companies, are now headed by the lawyers who formerly advised them as private practitioners.[202]

The junior partners and associates tend to support the work of senior lawyers, although gradually assuming responsibility for matters of increasing importance. Law clerks work almost entirely in a subordinate role, although assuming de facto responsibility for many routine and minor mat-

201. See, e.g., Clement, Gall, both *supra* note 51; Clement, Porter, Newman, all *supra* note 62.
202. J. Batten, Lawyers, ch. 5, Tory, Tory (Toronto: Macmillan, 1980).

ters. Articled students are assigned specific tasks of research and drafting and are afforded occasional exposure to clients. They learn through participant-observation and occasional discussions with their lawyer-preceptors, through firm seminars, and through experience gained in the course of the firm's work.

What determines the structure, allocation of functions, indeed the very existence of the elite law firm, is its clientele. The financial lifeblood of the firm is, typically, the performance of legal services for its ongoing clients—major business, financial, or governmental institutions—which require a variety of legal services related to their own functions.[203] Inevitably, therefore, there is a heavy skew of manpower within the firm toward the areas of law that are of special concern to this institutional clientele. The relationship of the elite firm to its clientele is further cemented by a policy of recruiting important individuals who have left politics or the public service, and of seconding firm members to various governmental bodies. The knowledge thus gained and the connections established are in the end placed at the service of business clients.

Specialist divisions within the firm also attract clients, often referred by other lawyers, who require specialists' assistance. While such clients themselves are often drawn from the corporate sector, at least in the area of litigation, they are sometimes individuals drawn from other walks of life. Firms that do attract referrals are at some pains to ensure that the client who is referred is returned to the referring lawyer upon completion of the task at hand. Failure to observe this unwritten rule would likely choke off future referrals. Finally, elite firms may also maintain a modest "household" practice, partly reflecting commitments antedating the firm's rise to eminence, partly catering to the personal legal needs of employees of their corporate clients, and partly responding to the beliefs of individual partners about their professional and community responsibilities.

Whatever its internal division of labor, and whatever its precise client mix, practice in an elite law firm clearly generates considerable rewards for its members. Most obviously, these rewards are financial. Because their clients are wealthy institutions, elite law firms are able to charge very large fees and to compensate associates—and especially partners—accordingly. For example, a 1979 survey showed an income of $30,000 for the average solo practitioner, compared with $93,500 for the average member of firms of 40 or more. Moreover, 99% of solo practitioners had no prefunded retirement plan as opposed to only 33% of members of the largest firms.[204] Indeed, quite apart from the high professional remuneration, close association with a corporate clientele affords lawyers in these firms unusual opportunities to develop their own investments and business activities (subject to

203. See *id.;* Clement, Gall, both *supra* note 51; E. Colvin, *supra* note 13.

204. Altman & Weil, Economic Survey of Canadian Law Firms (Ottawa: Canadian Bar Association, 1980).

professional conduct and "insider trading" rules).[205] To an extent, the financial rewards of firm members may also trickle down to paraprofessional and clerical staff.

However, the rewards offered by the elite firms are not solely financial. Because they serve large and wealthy clients and offer a range of specialized services, elite firm lawyers enjoy the opportunity to become involved in extremely sophisticated legal work, which demands, and generally elicits, a very high level of competence.[206] As a result, lawyers working for these firms may derive great psychic satisfaction and acquire substantial professional reputations. And because the elite firms are large organizations and hierarchically structured, they can afford to exhibit tolerance for the pursuit by firm members of interests other than the practice of law. Thus, members of the firm may become active in professional bodies, community organizations, part-time law teaching, postgraduate study, or political activity.[207]

While the point is very difficult to document, it would appear that the very conditions that generate these rewards also exact a considerable price. As noted, the basis of the prosperity of elite firms, and the most influential force in their internal organization, is a core of corporate or institutional clients. Indeed, the very prestige of its clients is conventionally used as an index of the firm's elite character.[208]

Accordingly, members of elite firms may be quite concerned to avoid conduct that might alienate such clients. On the one hand, this produces an extreme commitment to meeting deadlines, covering all eventualities, and otherwise avoiding technical errors that might prejudice the client's interests. Thus, the pace and intensity of such professional work may well constrain the personal lives of the lawyers who undertake it. On the other, because of the close relationship that often develops between elite firm lawyers and their corporate clients, the former—if not self-selected prior to joining the firm—may subsequently be socialized in matters ranging from personal dress and deportment to political perspectives. While the point may be overstressed, members of large, elite firms are unlikely to espouse radical political causes or pursue unusual life-styles. Indeed, as already suggested, such considerations may forestall the recruitment and promotion of those who are not seen to possess appropriate personal characteristics.

205. Adam & Lahey, *supra* note 51, identify "elite law firms" in part by reference to the number of directorships held by firm members in major Canadian corporations. See also Smith & Tepperman, *supra* note 60.

206. Anecdotal evidence such as that provided by Batten, *supra* note 202, tends to be confirmed by statistics which reveal that "errors and omissions" insurance claims are most numerous among solo practitioners and small firms. Of course, errors by large firms might result in a proportionately smaller number of proportionately larger losses.

207. Smith & Tepperman, *supra* note 60, suggest that community activities by members of the legal elite may be less common than formerly. Nonetheless, members of elite firms (not necessarily senior members) seem to be overrepresented in professional government (see text following *supra* note 117) and in various aspects of legal education.

208. See, e.g., Adam & Lahey, *supra* note 51.

3. Metropolitan Medium-sized Firms

Medium-sized firms—in the range of 10 to 30 lawyers—may share many of the characteristics of the elite firms. Indeed, they are generally either the remaining elite firms of an earlier period that have opted against significant growth or themselves incipient elite firms, constituted by the merger of several small partnerships. Some, however, are organized around a small number of specialties, and do not purport to offer a complete line of legal services.

While these medium-sized metropolitan firms often embrace some highly skilled and well-reputed lawyers, and offer their members extensive financial and other rewards, they will not necessarily be involved with the largest business clients that offer the most lucrative retainers. Indeed, those firms that are built around particular specialties may provide incomes that are very generous on any other basis of measurement but considerably lower than the rather extravagant professional and business incomes available in the elite firms.[209]

Perhaps because of their ambition, or their focus on technical excellence in limited fields, medium-sized metropolitan firms may generally be described as aggressive in their pursuit of both new recruits and clients.[210] Some of them, for example, have been particularly willing to hire very able women and members of minority groups, etc., while others, for essentially the same reason, have apparently decided to opt for impeccable social credentials in their recruitment. Among these medium-sized firms, moreover, there are some whose members are largely (although usually not exclusively) Jewish or from other ethnic groups. This combination of an identifiable firm personality and high professional competence enables them to attract the important business of members of significant and increasingly affluent communities who were not part of Canada's older elite.

4. Solo Practitioners and Small Firms in Metropolitan Areas

Just as the unity of the legal profession is part of its mythology, so is the central importance of the general practitioner. It is indeed true that lawyers in solo practice and in small partnerships comprised the most common form of legal practice until after World War II. However, an existing trend toward larger firms was evident even by the 1950s[211] and accelerated thereafter. By the 1970s, fewer and fewer lawyers were practicing on their own or in small partnerships of two to five lawyers.[212] However, the tendency toward consolidation was halted, possibly reversed, by recent economic

209. The Altman & Weil survey, *supra* note 204, reveals a direct correlation at all levels between firm size and income.

210. A common manifestation is active participation by firm members in the leadership of civic, community, cultural, political, religious, or ethnic organizations; obviously, such participation may also flow from other motives.

211. See Nelligan, Lawyers in Canada, *supra* note 28.

212. Arthurs et al., *supra* note 34, at 522–23.

conditions and by the growth in annual entry into professional practice. Established firms are expanding at a slower rate, and small and medium firms are wary of hiring new lawyers and adding to their overhead costs. Indeed, for the first time in many years, a significant number of able young graduates in and outside metropolitan areas apparently find themselves in solo practice by default rather than by choice. For example, Huxter reports that between 1975 and 1979, the proportion of graduates seeking articling positions in medium-sized or larger firms rose, but the number who were able to get the positions fell significantly, from 78% to 64%.[213] She also reports a slightly less clear pattern in relation to finding employment following call to the bar. The pattern may since have become more pronounced because of a general economic downturn in the 1980s, which would lead to some curtailment in hiring (and even to layoffs) by medium-sized and large firms.[214]

Solo practitioners or members of small firms in metropolitan areas represent three quite identifiable groups. First, there are the specialists,[215] including some of the most highly regarded practitioners of criminal law and family law. These specialists attract a good deal of referral work, although they are free to—and certainly do—respond to direct requests for their services from clients. However, operating largely for noncorporate clients and within a relatively narrow range of issues, these specialists do not require the elaborate staffs and facilities characteristic of the elite firms. Criminal defense counsel, perhaps the ultimate symbolic embodiment of the whole professional tradition, often stand self-consciously apart from the paraphernalia of modern practice.[216] Their special practice ethic illustrates the point. Whereas an extensive (if not perfect) legal aid system exists across Canada, it is not unusual for leading defense counsel to refuse to accept legally aided clients. Instead, they prefer to—and do—act without charge for some clients, thus at once underlining the bar's traditional independence and its service ethic.

Many of these solo specialists, however, especially those who practice criminal and family law, are heavily involved in legal aid schemes. Particularly in provinces where these schemes operate primarily through the use of private practitioners rather than staff lawyers, their practices are significantly dependent on legal aid. The extent and effect of this dependency will be considered below. Suffice it to say here that the introduction of legal aid has coincided with the enhanced visibility and increased viability of practice in these two areas. But what is cause and what is effect? Important

213. Huxter, *supra* note 68, at 177.

214. *Id.* at 180–82.

215. See Arthurs et al., *supra* note 34, at 507 *et seq.*; S. Colvin et al., *supra* note 13.

216. J. Batten, In Court 1 (Toronto: Macmillan, 1982), fondly refers to counsel—civil and criminal—as "the renegades of the Canadian legal profession," as they are perceived by those "who practise in the more mainstream and respectable areas"; the irony is palpable. See also M. Schumiatcher, Man of Law: A Model (Saskatoon, Sask.: Western Producer, 1979).

changes in substantive law in these two areas have coincided with the change in their economic attractiveness. Were the new possibilities of practice in criminal and family law attributable to the availability of new financial resources for a generally nonaffluent clientele? To the liberalization of divorce, reforms in the law of family property, and the dramatic injection of an earlier Bill of Rights and the more recent Charter of Rights and Freedoms into the area of criminal procedure and evidence? Or simply to the growth of demand generated by the social consequences of rapid urbanization?

A quite separate category of small practitioners can be described as lawyer-entrepreneurs. While legal contacts may have provided an initial impetus for their activities, the main focus of their work is entrepreneurial. Thus, especially during several protracted periods of real estate speculation, a number of lawyers devoted their energies to land assembly, mortgage financing, and other remunerative "deals." It is important to note that they do not generally enjoy high repute within the profession, despite the economic success that many of them achieved through such activities. A disproportionately high number of disbarments occurred within the ranks of these lawyer-entrepreneurs, perhaps because they too readily accepted marketplace assumptions about the relationship with investors and partners, rather than the much more circumscribed fiduciary role stipulated by codes of professional ethics.[217]

Recently quite a different type of lawyer-entrepreneur has begun to emerge. In the shadow of economic difficulties, a number of young lawyers have begun to search about for unconventional ways of providing legal services. Thus, several attempts have been made to open up "law shops" offering standard legal services at attractive fees to ordinary clients, through franchised local offices in store fronts, department stores, or other unconventional settings. To an extent, these activities have encountered hostility from established lawyers, who have not hesitated to use restrictions on advertising as a way of inhibiting the expansion of such services.[218]

Another, and altogether uncontroversial, type of entrepreneurial activity has been the provision of services of various kinds for legal practitioners. Numbers of young lawyers, who might otherwise have practiced law in a more conventional sense, have become involved in producing law reports, manuals, and practitioner-oriented texts and in providing research services for firms that lack adequate access to a local law library or are too small or economically marginal to spare the time to use it.

By far the greatest concentration of solo practitioners and small partnerships is in the so-called household sector. Delivering conventional legal

217. See S. Arthurs, *supra* note 155.

218. E.g., in Ontario, the law society is involved in two current lawsuits on the point, see Can. Law., April 1984, at 5. Similar litigation has occurred in Nova Scotia, McFetridge v. Nova Scotia Barristers' Soc'y, 123 D.L.R. 475 (N.S.C.A. 1981); and in British Columbia, Jabour v. Law Soc'y of British Columbia, 137 D.L.R. 3d 1 (Can. 1982).

services to ordinary citizens—house transfers, uncontested divorces, debt collection and other minor civil litigation, and dealings with officials at various levels of government—is the essence of this kind of practice.[219] Of all of these tasks, house transfers may well be the most important in terms of income generated. Thus lawyers serving the household sector, who in any event are dealing with less affluent clients, are particularly vulnerable to economic fluctuations, and especially to fluctuations in the residential real estate market. As the amount that can be billed on any given transaction is not great, it is possible to generate significant earnings only by maintaining high volume. Particularly in relation to real estate transactions, this volume can be handled largely by lay assistants, especially stenographers and title searchers, leaving the lawyer free essentially for supervisory functions and dealings with clients. Relatively insulated from professional contacts by their practice setting, these lawyers may also come to be relatively insulated from law itself by the logistics of office management.

While this pattern of practice does offer substantial rewards at given moments in time to some urban solo practitioners, the continuing nexus between the practitioner and his clientele is not necessarily strong. Ordinary people, after all, require legal services only occasionally. Thus, the solo practitioner or member of a small partnership has constantly to be concerned about attracting clients. This is a special problem in large centers where social contact is attenuated and competition for legal business relatively fierce. Moreover, informal understandings about price maintenance and other noncompetitive activities are much more difficult to initiate and enforce in metropolitan areas than in small communities.

For all these reasons, economic prospects for lawyers in this practice situation are uncertain and, at moments, disappointing. But the possibility of upward movement into other legal roles is limited. By and large, disproportionate numbers of Jews and Catholics, and members of other minority groups, are located in this sector of practice.[220] The very factors that may have initially prevented their obtaining more prestigious and remunerative jobs, and led them to enter the practices described—their sex, ethnicity, religion, or academic underachievement—would continue to make them unattractive recruits for the elite firms.[221] Moreover, as the household sector offers only limited opportunity for sophisticated legal work, they will not be able to offer prospective employers in other sectors of the profession highly developed skills and reputations. Such lawyers, therefore, are likely to remain in the same general circumstances throughout their careers.

This is not to deny that service to the household sector is, in many respects, socially important and potentially gratifying. Indeed, there are ample opportunities for humane and helpful intervention by lawyers in the

219. Arthurs et al., *supra* note 34, at 522 *et seq.;* Yale, *supra* note 56, at 38.
220. Arthurs et al., *supra* note 34, at 516 *et seq.*
221. S. Arthurs, *supra* note 155, at 267 *et seq.*

affairs of ordinary citizens. Thus, positive as well as negative factors contributed to the decision of some individuals to practice in this setting—but in diminishing numbers, until recently.

Two things have recently happened to change the pattern. First, as has already been mentioned, economic uncertainties have closed off many opportunities that would otherwise have been available for large numbers of recent graduates, many of them able and well educated. It is quite possible that the decision of these young people to open up their own practices will lead to a qualitative and quantitative change in legal service in the household sector. Coupled with this development is the emergence of a small group of students who are graduates of law school clinical training programs, most of which have as their focus the provision of legal services to poor people in law school-sponsored clinics. To an extent, ideological commitments formed or reinforced during service in a law school or other community clinic setting have led a number of young graduates to deliberately choose practice in the household sector or in criminal or family law and to turn their backs on the elite firms. Some of these young people also enter into loose associations or partnerships that focus on such issues as women's rights, employment law, immigration, and prisoners' rights.

Putting aside, then, the leading specialists and the entrepreneur-lawyers, what characterizes the urban lawyer in a setting of individual or small partnership practice is relative deprivation of financial rewards and of professional opportunities.[222] It is not unlikely that the current economic situation has produced even greater gaps between their situation and that of lawyers in medium-sized and, especially, elite firms. Lawyers in this situation may well be described as the proletariat (or, arguably, the lumpen proletariat) of the profession.

5. Lawyers in Smaller Centers

Practice in smaller centers seems to be concentrated within a narrower spectrum of settings than in the large metropolitan areas. The largest firms are much smaller, and even solo practice is potentially more rewarding and prestigious than it might be in Toronto, Montreal, or Vancouver.

There are several reasons for this. First, large industrial or commercial concerns with plants or offices in small communities tend to rely for their important legal needs on the elite metropolitan firms—principally in Toronto and Montreal—whose contacts are with their bankers, directors, and head office managers, rather than with local operational personnel. Thus, while some routine matters may find their way to local lawyers for routine handling, much corporate business does not. On the other hand, when household clients in small centers encounter atypical legal problems of extreme complexity—a patent, a murder charge, a regulatory issue—they may well decide to seek the aid of an expert in the field. As small communi-

222. Altman & Weil, *supra* note 204.

ties do not have a population base to support such experts, recourse will frequently be had to an "imported" expert from a large center. In short, extreme disparities in practice situations in small centers tend to be collapsed by reason of the narrow range of clients and causes that typically confront small-town lawyers.[223]

Offsetting the more limited opportunities for professional advancement in small centers, however, is the much greater scope for community recognition and collegial support. Lawyers are frequently assimilated to local community elites, finding their way into politics, civic works, charities, and similar activities. Participation in such activities provides them with personal satisfaction and public exposure that are generally unavailable in large centers.

Moreover, lawyers in small communities know each other and support each other in ways that would not be possible in large centers. Formal and informal arrangements concerning fees, assistance with personal problems in the event of disability or even professional misconduct, and the sharing of knowledge and technique are all manifestations of these closer professional ties.

The sense of distance between practitioners in small centers and those in larger ones (themselves a heterogeneous group) is therefore rooted in differences in life-style and professional behavior, as well as in sometimes conflicting economic interests. This tension finds expression both in the strong attachment of small-town practitioners to their local legal and community organizations, and in their sometimes vocal opposition to having provincial and national legal organizations controlled by members of metropolitan elites.

6. Lawyers Employed in Business, Government, and Education

Lawyers working as legal professionals but in settings other than private practice appear to share certain common characteristics. First, their identification with their employer's organizational aims and style is likely to produce a distinctive subculture that sets them apart from private practitioners. Thus, law professors will tend to develop attitudes toward their career tasks of teaching and writing that are influenced to some extent by their setting within a university. At a minimum, they may define themselves as more intellectual, innovative, or critical than lawyers in practice. Government lawyers (depending on their specific jobs) may similarly cultivate talents as administrators or policy planners or decision makers, roles that have few equivalents in conventional private practice. And even lawyers employed by business corporations may conceivably define legal problems and seek

223. Ribordy, Les avocats de Sudbury, *supra* note 32, stresses the impact on that city's lawyers of a number of exogenous changes, including the introduction of tax provisions that encouraged partnership formation, the advent of legal aid, and the collapse of the international market for nickel (the city's sole major industry). For a more anecdotal account of the life of a small-town lawyer, see Batten, *supra* note 202, at ch. 2, The Country Lawyer.

practical solutions in ways influenced by their inside knowledge of corporate behavior, rather than adhere to the conventional responses of lawyers in law firms.

Second, lawyers in these nontraditional settings are not likely to be generalists; indeed, they may be specialists with highly developed skills and a particular sense of the political, social, and economic context of law. Corporate staff lawyers, for example, may have a keen instinct for which legal strategies will "sell" to the government agencies with which they routinely deal. Academic lawyers may become authorities in particular fields of law, as authors of articles, studies, and texts, researchers for significant law reform projects, and originators of new classifications and concepts. Government lawyers may draft and administer regulatory legislation and acquire an insider's familiarity with the premises and practices of the regulatory regime.

Third, while employed lawyers rarely earn very high salaries, they are usually paid at a level that enables their employer to hire and retain people of considerable ability and specialized, hence marketable, knowledge. However, as their earnings are not related to the frequency of routine transactions processed or the number of "billable hours" worked, employed lawyers are spared both the insecurity of solo practice and the intense pressure within elite firms.

Thus, in a society characterized by increasing bureaucratization, institutional growth, legal complexity, and more refined division of labor, the number of employed lawyers has grown over the past 10 to 20 years,[224] their status has improved, and their rewards have been enhanced.

7. Lawyers Employed in Public Practice

Several groups of employed lawyers have not yet been mentioned—those employed in legal aid offices, community clinics, and advocacy organizations. They will be dealt with in greater detail in the final section of this study. However, in the context of a discussion of division and stratification within the profession, several preliminary points may be noted.

First, these lawyers are employed by organizations that are supported by membership fees, by foundation or other charitable grants, and sometimes by government subsidies. Such organizations are chronically short of funds. Accordingly, lawyers in these roles are often rather poorly paid and called upon to carry heavy caseloads. Second, lawyers in public practice are often in a position to—indeed required to—develop special skills and insights into the particular area of law with which they are concerned, and to campaign for its reform. Their contribution and influence are therefore out of all proportion to their number and their rewards. Third, as in the case of the employed lawyers mentioned above, the attitudes and insights of these lawyers are informed by their work setting. Their close and ongoing

224. Report of the Special Committee, *supra* note 22.

identification with a single "client" and its cause tends to mark them off from other lawyers in terms of their ideology, life-style, and perception of the legal system itself.[225]

Employment for lawyers in public practice is a relatively recent development in Canada. It has tended to appeal largely to junior lawyers, many of whom, by choice or necessity, have moved on to other positions after a relatively brief period. The ultimate significance of these lawyers as a force within the profession thus remains to be seen.

8. Stratification: Public and Professional Ranking

There appear to be at least three sources of prestige for lawyers: their professional skills, their public activities, and their close association with other prestigious persons and institutions. Each of these sources tends to yield different professional and public perceptions. Not all highly skilled lawyers—specialists or generalists—are equally visible to professional colleagues and members of the public. Those who engage in high-profile litigation are, of course, known and respected by both. However, it is not uncommon for a lawyer to be highly regarded by his colleagues as careful conveyancer, tax planner, or procedural specialist, yet to be virtually unknown by the general public.

Conversely, lawyers who are extremely active in business or community affairs, in politics or journalism, may be extremely well known to the public, yet lack either reputation or regard in professional circles. Indeed, their very preoccupation with matters lying outside the normal range of practitioners' concerns may cause them to be viewed with some disdain or incomprehension in lawyers' circles. This is, to some extent, the fate of lawyers employed in business, government, and the universities as well.[226] However, the specialist reputations of many members of this latter group serve to reassure their colleagues in private practice and sometimes to launch them on new, more lucrative, private practice careers.

Finally, there are lawyers whose reputation is essentially vicarious. Often associated with elite firms, they are involved in transactions or litigation of great magnitude, which brings in turn great rewards—not to say new clients. Moreover, since the elite firms are usually able to muster large concentrations of specialists and to deliver legal services of high quality, their members tend in any event to be held in high esteem for their professional skills. It is therefore within the large elite firms that public and professional

225. G. Finlayson, The Lawyer as a Professional, 14 L.S.U.C. Gaz. 229 (1980). The author, who is the treasurer (presiding officer) of the law society, denounced the "role of the lawyer as a social advocate" in immigration, environmental, and civil rights matters, admonishing newly called lawyers: "[D]on't hype yourself up with high sounding titles—Barrister and Solicitor says it all" (at 235).

226. See, e.g., *id.* at 235: "Please remember that you are not law professors, students of human behaviour or social or political scientists. You are lawyers first and last." Finlayson also draws a line between those who "may wish to leave the profession at some point in time to become politicians, sociologists, government bureaucrats, and many other honourable callings" and those who "choose to practise law in the traditional sense: the representation of a client in any sphere."

reputations tend to coalesce, although some leading specialists located in other settings will be similarly recognized.

These rankings are of course difficult to verify. To an extent they are reflected in the bestowal of honors by government: appointments to the bench, to boards, commissions, and inquiries, or ad hoc special assignments.[227] However, such appointments may be somewhat (in the case of lower court judgeships) or considerably (in the case of Q.C.'s in some provinces) influenced by political patronage rather than by purely meritocratic considerations.[228] To an extent these rankings are evidenced by election to offices in provincial governing bodies and various voluntary organizations of lawyers.[229] Here, too, political influences tend to predominate over "pure" peer judgment of reputation. Energetic self-promotion and deference to local constituencies within the profession will obviously affect the outcome of elections. Finally, to an extent rankings can be measured by the frequency of consultations sought, briefs referred, and requests made to speak or write on matters of professional or public concern.

But in the end, ranking should not be trivialized by using it to locate individual lawyers within the pecking order of the bar. Rather, as described, it enables us to glimpse the existence of higher, lower, and intermediate orders within the profession. The power and prestige of these orders, as we have seen, derive from combinations of professional skills and client characteristics, the two interacting to reinforce each other. Next we will explore how these orders are differentially affected by distribution of the financial rewards of practice and the ensuing efforts to regulate competitive forces within the profession.

9. The Material Circumstances of Practice

The financial success of any law practice—at least in the private sector—is determined by the lawyer's ability to generate revenue sufficiently in excess of costs to yield the income he or she feels entitled to. Income expectations are highly subjective, and they are heavily influenced by perceived relativities (How much are others of "comparable" experience, ability, and dedication earning?) as well as by individual life-style, family circum-

227. Using such appointments as an index of professional prestige and recognition, it may be said that law teachers have recently moved up in ranking, as reflected in their appointments to the Supreme Court of Canada, the higher provincial courts, law reform commissions, and the like.

228. Fowler, *supra* note 12; S. Robins, The Appointment of Queen's Counsel, 8 L.S.U.C. Gaz. 157 (1974); W. Angus, Judicial Selection in Canada—the Historical Perspective, 1 Can. Legal Stud. 220 (1967); E. Ratushny, Judicial Appointments: The Lang Legacy, *in* A. Linden, ed., The Canadian Judiciary (Toronto: Osgoode Hall Law School, 1976).

229. M. Trebilcock, C. Tuohy, & A. Wolfson, Professional Regulation, P.O.C. Staff Study (Toronto: Professional Organizations Committee, 1979), show that members of large firms are distinctly overrepresented in the profession's governing body; employed lawyers (other than law teachers) are entirely unrepresented; and solo practitioners and members of small firms are underrepresented (at 205). However, this may reflect not only professional ranking but also the willingness and ability of large firms to subsidize the nonremunerative activities of their members, who thereby escape the financial sacrifices made by lawyers who take time off from their own practices.

stances, and so on. But realistic income prospects are to a great degree determined by the setting in which a lawyer practices.

Lawyers may therefore devote much attention to creating a practice setting in which overhead costs bear some relationship to the clientele they serve and the income that clientele can generate.[230] There is thus a fairly direct correlation between the location, size, and attractiveness of law offices, at least in large cities, and the affluence of their clientele. Similar correlations tend to exist in relation to other overhead cost items such as office machinery, libraries, and support staff.

In an effort to escape from the rigid caste system and cost structure implied by this correlation, lower-cost substitutes for various items are sought. Labor-saving devices and paraprofessional staff may be employed, especially in large firms.[231] Offices may be located in older buildings or beyond the central core of the city to gain the advantage of lower rents.[232] Individual practitioners and small firms may share premises with common library facilities, reception, and telephone service.

But cost cutting has its limits. With less prestigious quarters and less adequate staff, the ability to attract and service affluent clients may decline. And even practices in the household sector, which are often located in very modest surroundings, face certain inescapable costs. Law society regulations regarding clients' accounts demand the employment of auditors. All practitioners must pay a standard annual fee to the provincial professional body, a fixed contribution to a compensation fund (to indemnify clients who have been defrauded by their lawyer), and premiums for "errors and omissions" insurance, now compulsory in most Canadian jurisdictions. The current (1984) combined fees in Ontario total about $1,500 per annum. Errors and omissions insurance premiums and contributions to the client compensation fund are adjusted in light of fluctuating claims levels. In Alberta, for example, two recent large thefts by lawyers led to the imposition of a special levy of $1,100 per annum. Since the provincial law societies have become involved in insurance schemes, whether through negotiating a group contract for all lawyers or through self-insurance (or both), the individual lawyer's right to practice is not contingent on his being able to find a private insurer who is willing to deal with him. However, he must bear the expense of insurance or forfeit the right to practice.

How is the lawyer to generate sufficient income to meet these overhead costs and to earn a profit on the practice? Generally speaking, lawyers are free to bill their clients whatever charges they think reasonable, subject to

230. Altman & Weil, *supra* note 204, at 36, indicate that regardless of size, Canadian law firms tend to spend half their revenue on costs.

231. See *id.* at 13.

232. In fact, geographic dispersal may be a relatively recent phenomenon in large cities, see Arthurs et al., *supra* note 34, at 526–28. Ribordy, Les avocats de Sudbury, *supra* note 32, at 136, similarly reports geographical concentration in a small city.

subsequent arbitration by a court official (in Ontario, a "taxing master")[233] and—in principle, but not in practice—to the risk of professional sanctions for overcharging.[234]

Lawyers and clients, especially large institutional clients, may reach general understandings or explicit contractual arrangements concerning fees. A sophisticated client may well shop around from lawyer to lawyer, or bargain effectively with a lawyer, in order to secure an advantageous fee, particularly for relatively predictable transactions such as securities issues or conveyancing. Litigants in most Canadian provinces may arrange to pay their lawyer a fee contingent upon his success in the lawsuit.[235] However, even in jurisdictions where contingent fees have been permitted by law and under professional conduct rules since the 1960s, they are not inevitably agreed in practice. And even in jurisdictions in which contingent fees are not formally permitted, it is not unusual (or thought improper)[236] for lawyers to take into account the "results achieved" in setting their fees or to lower the fees charged to impecunious and unsuccessful litigants.

Apart from explicit advance agreements, statutory tariffs cover some matters, such as the probate of wills, while court-authorized schedules of "party-and-party" costs are used as the basis of calculation when a losing litigant is ordered to indemnify the winner for his legal fees.[237] Although these official indicia of acceptable fee levels influence what lawyers may charge their own clients, they are subject to adjustment in respect of the importance of the matter, the results achieved, and time spent on the case.[238] Minimum or suggested fee tariffs have also been adopted by many local lawyers' groups covering standard, nonlitigious services.

Federal legislation prohibiting anticompetitive agreements would appear to outlaw such arrangements. However, the federal statute has been read down, so as to leave beyond its reach the activities of professional governing bodies in the exercise of their regulatory functions under provincial legislation;[239] to the extent that local fee tariffs are contemplated or sheltered by such regulatory activities, therefore, they may indeed be lawful. In addition, the whole question of whether federal competition legislation may constitutionally apply to the activities of provincially regulated professions

233. See, e.g., Solicitors Act, Ont. Rev. Stat. ch. 478 (1980); M. Orkin, The Law of Costs chs. 4, 5 (Toronto: Canada Law Book, 1968); P. Halpern & S. Turnbull, An Economic Analysis of Legal Fees Contracts, *in* Evans & Trebilcock, *supra* note 14.

234. Canadian Bar Association, Code of Professional Conduct, rule 10 (1974). In Ontario, for example, while overcharging amounting to virtual fraud could conceivably attract formal sanctions, client complaints to the law society on this subject are routinely channeled into the taxing process, B. Reiter, Discipline as a Means of Assuring Continuing Competence in the Professions, P.O.C. Working Paper No. 11, at 66 (Toronto: Professional Organizations Comittee, 1975).

235. B. Arlidge, Contingent Fees, 11 Ottawa L. Rev. 374 (1974); Halpern & Turnbull, *supra* note 233. The contingent fee is not authorized in Ontario or Quebec.

236. See, e.g., Law Society of Upper Canad, *supra* note 151, rule 10, paras. 1(e), 2.

237. Orkin, *supra* note 233, at ch. 2.

238. See, e.g., *Re* Solicitors, [1972] 3 Ont. 2d. 433.

239. Attorney-General of Canada v. Law Soc'y of British Columbia, Jabour v. Law Soc'y of British Columbia, 137 D.L.R.3d 1 (Can. 1982).

remains a matter of controversy.[240] But whatever the technical legal position, it certainly is true that formal and informal fee tariffs do exist, particularly in smaller communities, where self-interest and social sanctions doubtless combine to give them effect.

If governments' ability to enforce price competition through the use of antimonopoly legislation is unclear, their willingness to intervene in other ways that might affect the price of legal services is equally equivocal. Governments have enacted legislation defining the scope of the profession's monopoly, and to that extent they have forestalled competition from lay sources or members of other occupational groups, such as accountants. This support for the profession's monopoly has yielded considerable financial advantage for lawyers.[241] But on the other hand, governments have displayed no obvious eagerness to respond to professional pressure to limit the number of new entrants and thus to restrict competition within the defined scope of professional practice.

However, the greatest effect government has on professional incomes lies elsewhere. As noted, legal aid schemes exist in all Canadian jurisdictions. Their existence has two important effects in the context of the present analysis.

First, while legal aid fee structures do not directly apply to legal services rendered outside the scope of a legal aid plan, they likely have some effect. They may set a standard against which fees charged for privately paid services will be measured and may exercise downward pressure on private fee scales insofar as legal clinics, legal aid staff lawyers, and publicly reimbursed private practitioners undercut prices for services similar to those performed by private practitioners. To some extent, this undercutting may reflect no more than government-imposed budget limitations on legal aid. But it may also reflect economies of scale and other efficiencies accomplished by clinic lawyers and staff lawyers working under public auspices.[242]

Government funding of legal services has, however, a second effect on the political economy of the legal profession. In those provinces where a significant portion of legal aid funds is used to pay the fees of legally aided clients, such payments have become a mainstay of the incomes of many lawyers. As a result, in periods of government budget cutbacks, lawyers who depend on legal aid funds and legally aided clients may find themselves pressed to the wall. Professional criticisms of cutbacks in legal aid thus

240. *Id.*

241. See, e.g., M. Trebilcock & B. Reiter, Licensure in Law, *in* Evans & Trebilcock, *supra* note 14, esp. at 84 *et seq.*

242. For a study of the potential effects of privately funded legal insurance schemes see C. Wydrzynski, The Development of Prepaid Legal Services in Canada, *in* Evans & Trebilcock, *supra* note 14. So far the effects remain largely potential, as such schemes are in their infancy, in part due to lack of support from the law societies.

bear the double imprint of a concern for access to justice and a desire to preserve professional incomes.[243]

Nor is legal aid funding the only government policy with an effect on lawyers' incomes. Insofar as general measures such as levels of taxation, restrictive or expansive macroeconomic policies, and changes in substantive law that generate or restrict professional opportunities affect their incomes, lawyers will react either by seeking alternative employment or by attempting to influence those policies, especially through collective lobbying.

However, the effects of government policies, and indeed of professional efforts to control the price of legal services, are not felt equally by all elements within the profession. Elite firms and certain specialists, for example, operate largely without concern for suggested fee tariffs, because they are dealing with nonstandard services or atypical clients. Solo lawyers who practice family or criminal law exclusively may be highly sensitive to the presence of legal aid but be largely indifferent to attempts to establish minimum conveyancing charges. Those for whom real estate is the mainstay of practice may more willingly cooperate in price-fixing—especially if they work in communities small enough to make the prospects of success realistic.

The material circumstances of practice, then, help to reinforce differences based on professional ranking and public perception. These circumstances also help to explain the internal political dynamic of the bar as groups with different economic interests and professional concerns vie for the right to define the policies and public positions of the profession, and to control the levers of regulatory power within it.

10. The Regulation of Nonprice Competition

Given the considerable differences in opportunity and resources that exist within the legal profession in Canada, it is not surprising that the rules of professional conduct devote so much attention to the regulation of competition. At the forefront of these concerns has been the issue of how to limit the form and content of advertising.[244]

While the controls exercised in each of the provinces are in general more restrictive than those in the United States, particularly after *Bates v. State Bar of Arizona,*[245] there are nevertheless important differences among the provincial jurisdictions with respect to price advertising, nonprice advertis-

243. See, e.g., J. Bowlby, Annual Report: 1982, 17 L.S.U.C. Gaz. 126, 145–47 (1983), where the Law Society's Legal Aid Committee complained of inadequate increases in the legal aid fee tariff, since "practising members of the bar who act for legally-aided clients . . . are carrying the unfair share of the financial burden . . . in these hard times." The committee also argued that "during an economic recession . . . the disadvantaged segments of our society require a strong legal aid delivery system to help them when they face legal problems."

244. A. Hudec & M. Trebilcock, Lawyer Advertising and the Supply of Information in the Market for Legal Services, 20 U.W. Ont. L. Rev. 53 (1982); R. Evans & A. Wolfson, Cui Bono—Who Benefits from Improved Access to Legal Services? *in* Evans & Trebilcock, *supra* note 14.

245. 433 U.S. 350 (1977).

ing, and access to the different media of communication. In Manitoba, the most liberal jurisdiction, lawyers are permitted to advertise price and nonprice information in any medium. However, content is closely supervised: nonprice advertising must not mislead the public and must be free of "puffery"; and those who advertise price are required to accurately describe the services offered and to adhere to the fees quoted.[246] Ontario is representative of the more restrictive provinces. Law society rules in Ontario not only forbid all fee advertising (except for an initial consultation fee) but also confine nonfee advertising to publication of the lawyer's professional card in newspapers and other printed matter.[247]

Recently, pressure to liberalize the rules on advertising has come from two sources. First, as the report of Ontario's Professional Organizations Committee suggested,[248] the most serious problems of information about legal services are likely to arise among individuals and small businesses in large urban settings, since (*a*) they lack the knowledge enjoyed by frequent consumers of legal resources such as large corporate clients and (*b*) informal referral networks are a less effective source of information in large metropolitan areas. The vulnerability of this client population has been explicitly recognized in the advertising rules adopted by the Canadian Bar Association and many provincial bodies. A commentary to those rules notes that "when considering whether or not limited advertising in a particular area meets the public need, consideration must be given to the clientele to be served."[249] An explicit distinction is drawn between a small community with a stable population in which persons will presumably be able to make an informed choice of counsel on the basis of informal inquiries, and larger communities in which information on the competence and qualifications of lawyers may not be easily available. The clear implication of both documents is that the individual or small business client in large urban settings may require a less restrictive policy on advertising than those who reside in rural areas or small cities.

The second source of pressure complements the first. There is some evidence, albeit modest, that the greatest support within the legal profession for increased advertising comes from solo practitioners or small firms (fewer than four lawyers) located in large cities.[250] Indeed, these data suggest that support for advertising is more highly correlated with the population of the city in which the lawyer resides than with the size of the firm in which the lawyer practices.

246. C.W. Mitchell, The Impact, Regulation and Efficacy of Lawyer Advertising, 20 Osgoode Hall L.J. 119, 129 (1982).

247. Law Society of Upper Canada, *supra* note 151, rule 13, para. 14. For a comparison of the various rules respecting advertising in the Canadian provinces, see W. Shupe, Legal Advertising in Saskatchewan: Tune-up or Overhaul, 45 Sask. L. Rev. 259 (1981).

248. Professional Organizations Committee, *supra* note 102, at 192.

249. Canadian Bar Association, Code of Professional Conduct, ch. xiii, para. 6 (1974).

250. Shupe, *supra* note 247, at 279.

At the same time, there are important sources of resistance to any liberalization of advertising policy. The same study that shows that lawyers in small firms in large cities tend to favor fewer restrictions on advertising also reveals that their colleagues in rural areas and in small cities oppose—by an even greater margin—any easing of these restrictions.[251] Elements within the profession opposed to liberalization of advertising rules have, moreover, been strengthened by the recent ruling of the Supreme Court of Canada that held such rules repugnant to neither federal combines (antitrust) legislation nor quasi-constitutional guarantees of freedom of expression.[252]

Explicit advertising is not the only technique of nonprice competition among lawyers that is regulated, although it is perhaps the most easily controlled. Codes of conduct also warn against "touting" through direct importuning of potential clients, claims of "specialist" status, attracting publicity in the media, and arrangements with real estate agents, clubs, or other intermediaries to "steer" business to favored lawyers.[253] Other anticompetitive strictures include a ban on multiprofessional firms that would in effect create an internal referral system[254] and, in some provinces, on the simultaneous pursuit of another profession or occupation that might attract clients to a lawyer.

In terms of the source and effect of these measures, it must be noted that they seem generally to be imposed on the profession's urban "proletariat"—solo practitioners—at the behest of its intermediate orders—practitioners in smaller centers. Why should this be? There is no question of metropolitan solo practitioners "poaching" the clients of country lawyers. Rather, there seems to be a fear that the emergence of competition in small markets will disturb existing patterns of practice. Adoption of anticompetitive rules provides a legitimating device for the harassment of nonconformists in country towns and small cities. In larger centers, where enforcement is more difficult, some competition exists sub rosa in the household sector despite the rules.

Competition in the sense of advertising, price-cutting, and development of referral networks is not perceived as a problem for elite firms or for specialists. Their search for new clients generally occurs among sophisticated and well-informed clients or within the bar itself, in the case of specialists. Club memberships, corporate directorships, political service, magazine profiles, part-time teaching, and the authorship of books are all "acceptable" ways of attracting business.[255]

251. *Id.*

252. The *Jabour* case, 137 D.L.R.3d 1 (Can. 1982). The case arose before the adoption of Canada's new Charter of Rights and Freedoms, which, by according constitutional priority to various freedoms, recast the "freedom of expression" argument in a form the Supreme Court has yet to address.

253. Law Society of Upper Canada, *supra* note 151, rule 13, para. 17.

254. See Quinn, *supra* note 14.

255. Occasionally, however, even these public activities may attract censure, see Merchant v. Law Soc'y of Saskatchewan, 32 D.L.R.3d 178 (Sask. C.A. 1973).

The interests of the profession's middling and upper orders coincide to this extent only: the suppression of competition reinforces the self-image of the whole profession as a superior social class rather than a mere trade or business. But as suppression also invites public disapproval, without compensatory benefit to them, elite lawyers and leading specialists have no interest in actually enforcing anticompetitive rules.

On a final, ironic note, the internal politics of the profession in regard to rules limiting competition may yield at least a little incidental benefit for consumers. If there is to be no active advertising of information about the fees, specialties, and other characteristics of individual lawyers, law societies may themselves feel obliged to provide such information, in order to deflect public criticism. Thus, in Ontario, the same law society that prohibited the publishing of fees and specialties also introduced a lawyer referral system that enables clients to identify practitioners in various areas of law and to receive an initial consultation at relatively low cost. In addition, pressure from some segments of the profession (and the public) for more advertising have led to the establishment by the law society of Law Line, a telephone service providing basic information on typical legal problems, and directing callers—prospective clients—to the referral service.[256]

In place of competition in the household sector, then, the profession is apparently committed to a managed market. To what extent that management will be relatively benign (as in the case of referral service and Law Line) and to what extent it will be merely self-serving (as in the case of local oligopolies in nonmetropolitan areas) will depend in part on the shifting coalitions of power among the profession's constituent interest groups.

G. Effect on the Canadian Legal Profession of Recent Developments in Legal Services Delivery

The development of legal aid in Canada during the last several decades is of significance because of its stimulation, broadening, and diversification of professional roles in both the private and public sectors of the Canadian legal profession. This recent phenomenon has been the major impetus for the development of nontraditional lawyering in Canada. Some writers have suggested that the significant injection of public funds into legal representation for the poor has had a greater impact on lawyers and the professional careers that they pursue than it has had on low-income Canadians. Legal aid programs not only have stimulated lawyers to begin developing legal aid practices in criminal law and (to a lesser extent) in family law but in several provinces have also provided the funding and the structure for lawyers to become salaried professionals in either community-based legal services clinics (Ontario, Nova Scotia, and Saskatchewan) or government legal aid bureaux (Quebec).

256. J. Bowlby, Annual Report: 1982, 15 L.S.U.C. Gaz. 133, 158 *et seq.* (1982).

The governing bodies and professional organizations of Canadian lawyers have exhibited a growing interest in legal aid matters since the creation of the Ontario Legal Aid Plan in 1967. The provincial law societies attempted to gain administrative control of legal aid plans through committees composed primarily of lawyers. Alternatively, if such direct control was opposed by government, the law societies sought a significant voice in the administration of legal aid plans while simultaneously asserting their members' claims to adequate payment for legal assistance. The organized legal profession's intentions and attitudes toward legal aid have often been ambiguous: The profession's positive response could be seen either as an attempt to create employment opportunities for the growing number of young lawyers or as an expression of genuine concern for the legal rights of citizens who could not afford to retain counsel. Nor is it clear whether the profession's desire to retain "control" of legal aid plans was an outgrowth of its guild-like mentality or of its desire to avoid socialization of the legal profession, a fate that had only recently befallen the Canadian medical profession.

It is significant that institutionalized legal aid was so late in coming to Canada. Historically, little has been written about legal services to the poor in Canada, but the limited statistics and descriptions available create the impression that scant concern was shown for the unrepresented or impoverished litigant by either the federal or provincial governments or by the legal profession before World War II. After 1945, Canadian lawyers remained preoccupied with traditional lawyering and expended little professional time and resources on legal aid.

The extent to which legal aid has grown in Canada can be demonstrated by briefly examining how representation of persons facing criminal charges developed in Ontario, where the first provincially funded judicare scheme was established in 1967. In a 20-year period representation of persons facing criminal charges grew from 1,587 persons in 1963[257] to nearly 41,000 persons represented by the judicare scheme in 1983, at a total cost of $21 million, or $523.86 per case.[258]

One must suppose that Canadian lawyers had little need for legal aid clients or for government-funded legal services before the 1960s and therefore tended to provide pro bono assistance on an ad hoc and infrequent basis. It is essentially within the past decade that legal aid has been accepted in Canada as a joint venture of the provincial law societies and the federal and provincial governments. The Ontario government was encouraged by the Law Society of Upper Canada to introduce the first funded program in Canada, which provided private lawyers with 75% of their pre-

257. M. Friedland, Legal Aid Working Papers 1964, Part III—Legal Aid in Ontario, 1963—A Statistical Summary (prepared for the Joint Committee on Legal Aid), at 6. Friedland indicates that these statistics may actually be high, as the data compare charges handled by legal aid with 1961 Dominion Bureau of Statistic figures with respect to persons charged.

258. 1983 Annual Report, Ontario Legal Aid Plan, Law Society of Upper Canada 49.

scribed fee in significant criminal and civil litigation when the client was found to be financially eligible for aid.

1. Models of Legal Aid

As mentioned, the development of legal aid services in Canada is a reflection of the country's federal political system. Because the provinces have responsibility under the Constitution Act, 1867, for the administration of justice,[259] the delivery of legal aid services is essentially a matter for provincial decision making. For this reason, each province in Canada administers its own individual legal aid program, with resulting diversity in services,[260] delivery systems, and administrative structures.

As in most countries, legal aid services are provided and paid for in conditions where the client's economic circumstances indicate that he or she is financially eligible for the services and where the scheme considers that the problem is one that entitles a citizen to be provided with legal services. The federal cost-sharing agreements require the provinces to administer a flexible means test to determine whether an applicant can retain a lawyer without contracting major debts or having to sell assets.[261] In general, the Canadian provincial schemes require an examination of income, disposable assets, indebtedness, maintenance obligations, and other expenses to determine eligibility.[262]

As with most legal aid systems that have developed since 1945, legal aid services are oriented toward representing clients involved with the courts, and an attempt is made to compare the legal aid recipient with the fee-paying client in determining whether services should be given. In fact, legal aid schemes have continued to ignore the differences between the recipient of legal services and the more typical users of the legal system, rather than acknowledge that "poor people are not the same as rich people" and that their problems are not the same.[263] In addition to providing legal services for representation by counsel before the courts, many Canadian legal aid schemes have adopted the Scottish duty counsel system—that a lawyer be provided to anyone who has been taken into custody or charged with an offense. In some of the more remote areas of the country, including the Yukon and the Northwest Territories, duty counsel lawyers travel with the court itself. Duty counsel are generally private lawyers paid on a per diem basis. Recently in Ontario, salaried full-time duty counsel have been hired

259. Constitution Act, 1867, 30 & 31 Victoria, ch. 3, § 92(14).

260. This diversity is described in Frederick Zemans, Canada, *in* F. Zemans, ed., Perspectives on Legal Aid: A Comparative Survey 93–133 (London: Frances Pinter, 1979). See also *id.*, Recent Trends in the Organization of Legal Services, *in* W. J. Habscheid, ed., Effectiveness of Judicial Protection and Constitutional Order 373–435 (Bielefeld, West Ger.: Gieseking, 1983).

261. National Legal Aid Research Centre, Legal Aid Services in Canada 1979/80, A Justice Information Report prepared on behalf of the Implementation Work Group on Justice Information and Statistics 2 (Ottawa, 1981).

262. Statistics Canada, Legal Aid, 1981, at 20 (Ottawa: Miniter of Supply and Services, 1981).

263. See generally Stephen Wexler, Practicing Law for Poor People, 79 Yale L.J. 1049 (1970).

on two-year contracts to appear on bail applications and guilty pleas in the criminal courts of Metropolitan Toronto. As well, part-time duty counsel now appear on a regular basis in the family courts and appear on behalf of unrepresented parents and spouses before the courts on domestic and child welfare matters.

The need for legal aid to be provided independently of government, notwithstanding governmental financial support, has been generally recognized in the arrangements adopted by Canadian provinces. Only in Prince Edward Island are legal aid services provided directly by the provincial Justice Department. In seven provinces, independent corporations were created, generally by statute.[264] In Ontario and New Brunswick legal aid is provided under the direction and administration of a committee of the provincial law society.

In two provinces, New Brunswick, and Alberta, legal aid is delivered primarily on the "judicare" model, with services provided by lawyers in private practice who bill the legal aid program for services rendered in accordance with a prescribed tariff. In contrast, in two others, Nova Scotia and Prince Edward Island, almost all legal aid is provided by salaried lawyers, with only a small proportion of services offered by private lawyers. In Ontario, while the vast majority of services are provided by private lawyers under the judicare scheme, an expanded community clinic system as well as a small segment of the duty counsel program utilize salaried lawyers. In most other provinces, legal services are similarly provided in a mixed delivery system that has become known as "the Canadian compromise" because of its melding of English judicare with the American community-based salaried lawyer system.

The most successful of the mixed delivery systems in Canada has been developed in Ontario. Although at first stridently opposed to community-based clinics with their salaried lawyers and their more broadly based welfare rights agenda, the profession in Ontario has gradually come to accept the concept. The profession's acceptance of the welfare rights approach was brought about in no small measure by two judicial inquiries that strongly approved the clinic model and encouraged government to fund those clinics with a greater community orientation and to place less emphasis on providing Band-aid, case-by-case, legal services.[265] There are now more than 50 clinics in Ontario operating with many of the features of the original American welfare rights model of legal services. Many of these clinics provide specialized legal services or serve specific constituencies or ethnic communities. Community-elected boards of directors have authority

264. The exception is Alberta, where the independent organization—the Legal Aid Society of Alberta—was established in 1973 as an incorporated society under the Societies Act of Alberta, Alta. Rev. Stat. ch. 347 (1970) (Certificate of Registration No. 7163).

265. Report of the Task Force on Legal Aid, Mr. Justice Osler, Commissioner (Ministry of the Attorney General, 1974); Report of the Commission on Clinical Funding, Mr. Justice Grange, Commissioner (Oct. 1978).

to set both case criteria and financial eligibility standards for their clinics, allowing the clinics to move beyond a service-dominated program to attempt to achieve a more reform-oriented approach to the provision of legal services. As an auxiliary to the original judicare scheme, the Ontario clinics have generally developed a strategic approach to legal services and, in most instances, have moved beyond a service model to become involved in community education, community development, and some significant law reform litigation.

The significance of the variety of models of legal services in Canada should not be overemphasized. The predominant concern of Canadian legal aid is to deal with the discrete claims and readily categorized legal problems of clients who present themselves to legal services programs.[266] Thus, despite the diversity of delivery models, the emphasis on caseload in judicare provinces is echoed in salaried lawyer schemes such as Quebec's. In other words, legal aid in Canada has followed the traditional approach of the legal profession by responding to the individual needs of the clients.

The unfortunate reality of the Canadian system is that government decisions about models of legal services are generally based on cost control rather than on an analysis of the most effective utilization of limited public resources. Avrim Lazar, a federal evaluator of legal aid programs in Canada wrote:

> When money was more readily available, discussion about legal aid concentrated on meeting needs. Now discussions focus on controlling cost. But the objectives of legal aid have not changed, they still relate to meeting needs. What has changed is the resources available in legal aid. Thus, this, like our newly heightened interest in the cost of justice, is a result of government financial restraint.[267]

From the cost perspective, two provincial studies that compared salaried and private lawyers have reached opposite conclusions. A British Columbia study analyzed the cost of delivering criminal legal aid services under a salaried public defender system and concluded that there was little difference in per unit cost of services whether provided by a salaried lawyer or through a fee-for-services model using lawyers in private practice.[268] In contrast, a 1981 study of Quebec's mixed delivery system confirmed the cost effectiveness of the salaried model that had been demonstrated in an earlier Quebec study.[269]

266. A similar phenomenon has been noted in India; see Marc Galanter, New Patterns of Legal Services in India (paper prepared for Conference on the Career and Prospects of Law in India, University of Wisconsin, Madison, June 1982).

267. Avrim Lazar, Legal Aid in the Age of Restraint, *quoted in* M. J. Mossman. Legal Aid in Canada 48–49 (unpublished); see sources by Zemans cited *supra* note 260.

268. P. Brantigham & P. Burns, The Burnaby, British Columbia Experimental Public Defender Project: An Evaluation, Report III, 65 (Ottawa: Department of Justice, Canada, and British Columbia Legal Services Society, 1981).

269. P. Gervais, Evaluation de l'aide juridiques; rapport final 35–36, 56, 80 (Quebec: Ministere de justice du Quebec, 1982). A cost comparison was undertaken using the methodology of an earlier study of the Quebec system, Etude des coutes d'execution des dossiers juridiques (1977–78).

Since, however, both salaried and private lawyer schemes provide similar services, the cost effectiveness debate becomes a digression from the crucial discussion of the democratization of legal services and provision of appropriate legal services to respond to the socioeconomic needs of underprivileged and low-income persons. Mossman writes in her recent paper, "Legal Aid in Canada":

> To an extent, the focus on the cost-effectiveness has distracted from, rather than contributed to, a better understanding of legal aid objectives. Thus, rather than questioning decisions about equality objectives or the approaches to providing legal aid services, most legal aid efforts have been directed to assessing models of delivering such services; and because both salaried and private practice lawyers provide essentially similar services, the focus on cost-effectiveness has been directed very narrowly indeed.[270]

Cost effectiveness may also be assessed from the perspective of the "expertise" or experience of fee-for-service and salaried lawyers delivering the services. The cost-effectiveness ratio is affected by the time required of both private and public lawyers to handle a case. The British Columbia and Quebec studies, as well as an Ontario study, suggest that a specialized private bar may be developing to provide legal aid services, at least in criminal law matters. It also appears that there may be less experience or expertise among the private practitioners handling legal aid matters. Whether the private bar members who are willing to handle legal aid cases are developing expertise and experience comparable to that of the salaried clinic lawyers is a question that current research does not allow us to answer. An increase in the fees paid to private practitioners would undoubtedly attract more experienced counsel to handle legal aid matters but would similarly increase judicare costs.

2. Support of Professional Leadership

Judicare systems have generally required that lawyers accepting legal aid certificates contribute part of their fee by reducing their accounts by 25%.[271] This legislated charitable contribution, which grew out of similar requirements in other judicare countries, attempted to recognize that the legal profession was concerned about the plight of the poor who were only now (through the assistance of government funding) being admitted to the antechambers of justice. This concept of fee contribution was based on the expectation that the entire legal profession would participate in legal aid services and that both young and old lawyers, as well as large and small firms, would assume their collective social responsibility. Unfortunately, recent data indicate that fewer than 50% of lawyers have remained on the

270. Mossman, *supra* note 267, at 56.

271. The first Canadian judicare scheme was established in Ontario in 1967. The 25% reduction in fees was criticized by the Osler Commission in 1975 but remains an inherent part of the plan's administration. See Legal Aid Act, Ont. Rev. Stat. ch. 234, § 22(1) (1980).

legal aid panels and that the vast majority of those on the panels handle a minimal number of cases.[272]

In virtually every province of Canada, the profession remains suspicious of the legal aid lawyer who leaves the private sector to become a staff lawyer. Despite the fact that there are now many private practitioners who are virtually full-time judicare lawyers handling varying ratios of criminal, civil, and immigration matters, the organized profession barely tolerates the legal aid practitioner.[273] Clinic lawyers have tended to associate primarily with other clinic employees and have in some instances taken the antiprofessional step of joining or associating with a clinic union.[274] Such nontraditional steps have tended to further alienate the clinic lawyers from the mainstream of the profession. Private legal aid specialists, although slightly more integrated into the mainstream of the Canadian legal profession, are perceived as being on the fringes of the profession and have tended to practice in collectives or to locate their offices in one area or one building of major centers. Many of these legal aid specialists have been the prime movers in the development of left-wing law groups such as the Law Union of Ontario and the Lawyers for Social Responsibilty.[275]

From the outset of legal aid in Canada an uneasy partnership has existed between the legal profession and government. The profession has been committed to expanding legal aid and to resisting attempts to deplete its power and authority with respect to both the delivery and administration of legal aid. Although initially opposed to community clinics, the judicare jurisdictions—particularly Ontario—have responded to the political pressure of government to broaden the legal aid agenda and have in some instances incorporated the community clinic into "their" legal aid scheme. The possessiveness and involvement of Canadian lawyers in legal aid has assisted in the continuing growth of legal aid budgets during the past decade. The cost of legal aid in Canada has continued to increase rapidly until very recently. For example, the total expenditures rose from $142 million

272. Ribordy, Les Services d'Aide Juridique à Sudbury, *supra* note 32, at 28 (1982); and Brantigham & Burns, *supra* note 268, Report VII, at 26 (table 8.1.2).

273. For an interesting examination of this tenuous relationship see Pauline Morris & Ronald N. Stern, Cui Bono? A Study of Community Law Offices and Legal Aid Society Offices in British Columbia (Vancouver, B.C.: Ministry of the Attorney-General, 1976). See also Brief Presented on Behalf of the British Columbia Section of the Canadian Bar Association Concerning the Burnaby Public Defenders Pilot-Project Study 7 (1982). The British Columbia branch's brief also criticizes a number of conclusions of the Burnaby report and disputes several of its assumptions, including assertions that the lawyers in the pilot project were average criminal lawyers. The bar clearly rejected the concept of staff or salaried legal aid lawyers.

274. In Ontario, 13 of the 47 community-based clinics are unionized, with the vast majority of the membership composed of community legal workers and support staff. Some articling students and staff lawyers have joined the union. Twelve of the clinics have joined the Ontario Public Services Union (O.P.S.U.), while the Sudbury clinic is affiliated with the steelworkers' union. Staff lawyers working in legal aid are unionized in Quebec and Manitoba, and most clinics are unionized in Saskatchewan, with all legal and nonlegal staff being union members in those clinics that have unions.

275. See R. Martin, The Law Union of Ontario, Law Union News, v. 2 (N.S.), No. 1 (Sept. 1985), at 1. It is our observation that much of the pressure for reform of legal aid and the legal profession generally comes from the more radical members in these organizations.

in 1981–82 to $162 million in 1982–83, of which 90% was paid by governments (both federal and provincial). The remaining amount was paid for by interest on lawyers' trust accounts and clients' contributions and recoveries. In the same period, the per capita expenditure rose from $5.81 to $6.57. The latter figure is an average; actual per capita expenditures varied considerably, from $1.05 in Prince Edward Island and $2.22 in Newfoundland to $27.63 in the Northwest Territories and $25.00 in the Yukon. The total dollar expenditures in Ontario ($58 million) and Quebec ($53 million) indicate that many provinces exceed the per capita average. For example, the per capita expenditures were $7.25 in British Columbia and $8.12 in Quebec in 1982–83. The total dollar expenditures increased to $70 million in Ontario and to approximately $60 million in Quebec in 1984–85.[276]

Although initially opposed to community clinics and particularly to their competition with the predominant judicare model as well as their potential for removing legal aid from the private sector, the profession has always remained involved in the debate. For example, in response to the inception of community clinics, the Law Society of Upper Canada in 1972 commissioned its own "independent" study, which reviewed the arguments for and against salaried legal services and came to the following predictable conclusion:

> Except for limited special purposes which may suggest the full engagement of a solicitor for Legal Aid purposes, we remain of the view that the public is better served by a profession forced to compete for public patronage (rich or poor) in circumstances most likely to offer the public a meaningful choice and where the lawyer is only paid for the work done.[277]

It is not surprising that the law society attempted to assert the requirement of competition for legal services, couching its fear of the socialization of the legal profession in terms of concern for the public.

Notwithstanding the profession's limited enthusiasm for clinics, offices continued to be established, with funding from various sources, to provide service to a wide range of clients and using a variety of delivery models. By 1974, the Report of the Task Force on Legal Aid (the Osler Report) took a much more positive attitude toward community legal services.[278] This commission recommended the ongoing funding of community clinics and the removal of the control of the legal aid plan from the legal profession.

Today the legal profession is active in virtually all aspects of the development and administration of legal aid. Within judicare jurisdictions most regions have area committees, which are composed primarily of volunteer members, generally lawyers who set policy and deal with appeals from re-

276. Canadian Legal Statistics Centre, Legal Aid Services in Canada 1981–82 and 1982–83 (Ottawa: the Centre, 1984).

277. Law Society of Upper Canada, Community Legal Services Report 42 (Toronto: the Law Society, 1982).

278. Report of the Task Force on Legal Aid, *supra* note 265.

fusal of service.[279] As well, provincial plans are administered in some instances by committees of the provincial law societies, which are again populated by senior members of the legal profession.[280] The provincial base of legal aid, and the active involvement of the provincial law societies, has meant that the profession has been vigilant about government involvement and government attempts to restrict or reorganize legal aid. The Canadian legal profession has become committed to legal aid subsidized by government and would tolerate neither an attempt to dismantle the existing programs nor a massive reduction of government funding.

The profession's commitment to legal aid has been tested during the 1980s as governments and their policies have changed. Legal aid schemes are perceived as both a financial burden and a potential threat to government policy. Effective legal schemes require governments to respond and to expend large public funds on services and programs for traditionally unrepresented and often less powerful members of society. By the beginning of the 1980s, public funding for legal aid services was being curtailed in the wake of the economic recession. This required the profession to accept the dismantling of some legal aid programs as well as cutbacks of both staff and services to clients. As no coherent rationale for legal aid had developed during its early period, the programs and the role of lawyers in the administration and delivery of legal services were vulnerable to arbitrary cutbacks and, in some instances, to political attacks on the more creative programs.

As mentioned earlier, diversity (judicare, community-based clinics, and mixed delivery schemes) is itself one of the most significant aspects of the development of legal aid in Canada. Professional pressure and concern about a movement away from the private sector has increased the involvement of lawyers in both the delivery of services and the administration of schemes. Legal aid has therefore become a growing preoccupation of the Canadian legal profession. The profession has supported those schemes it thought were beneficial and in keeping with the leadership's perception of the professional project. It must be acknowledged that the profession's involvement has provided legal aid the support of many leaders of the profession and has, in some respects, prevented the abrupt changes in government attitude toward legal aid that characterized the American situation during the same period.

3. Targeting of Legal Services

The most significant specialization of legal services has occurred within the mixed delivery jurisdiction—particularly in Ontario. Only about one-

279. See Ontario's Legal Aid Act, Ont. Rev. Stat. ch. 234, § 4 (1980).

280. Section 2 of the act stipulates that the law society is to establish and administer a legal aid plan; § 9 further provides for the creation of an advisory committee on legal aid composed of a judge of the Supreme Court, a judge of a county or district court, a provincial judge, two members of the bar of Ontario, and a person holding a responsible position in the field of public welfare. It is noteworthy that no mention is made of citizen participation or, for that matter, of client input. Similar provisions exist in New Brunswick. See Legal Aid Act, N.B. Rev. Stat. ch. L-2, §§ 2(1), 6(1) (1973).

third of Ontario's clinics could be categorized as generalist, community-based legal clinics. Some legal clinics form part of multiservice centers that offer clients not only legal assistance but other social and sometimes medical services in multidiscipline community centers. Staff, legal and otherwise, in such a center participate in an internal referral service. One Ontario clinic is devoted entirely to community education and does no casework; another is concerned entirely with environmental matters; three direct their attention to injured workers; one acts for landlords, and two for tenants only; three of the northern Ontario clinics have a high proportion of native Canadian clients; one serves only Spanish-speaking clients; one clinic, recently closed, served Metropolitan Toronto's black communities; a recently opened clinic serves only handicapped persons, and another deals only with the legal needs of children. Six of the Ontario clinics have a law school connection, and one of those limits its services to the inmates of several penitentiaries located in its community.

The evolution of specialty clinics has allowed for the development of effective reform-oriented advocacy within the Canadian legal services movement. Public interest advocacy has had a limited development in Canada. In turn, this has restricted the use of the legal system for reform and for litigation oriented to social change. The limited amount of test-case litigation that has arisen occurs in the specialized clinics that have handled both individual and group representation and have also lobbied federal and provincial governments for reform of legislation. These specialty clinics have been assisted by the limited public interest advocacy projects developed by the Consumer's Association of Canada and by one of its former general counsel, who has received private and law foundation funding to establish public interest advocacy offices in Vancouver and Toronto. These public interest law offices represent the public interest before administrative tribunals primarily with respect to applications for rate increases of public utilities.

4. Paraprofessionals

This article has concentrated on legal aid in relation to the legal profession of Canada and has not attempted to discuss the development of the associated groups of law workers including legal secretaries, law clerks, and community legal workers. But our discussion of the impact of recent developments in legal services delivery would be incomplete if we did not at least mention the significant developments in the provision of legal services by nonlawyers.

Paralegals represent a significant element in the delivery of legal services in Canada, as they do in American legal clinics. While the percentage of community legal workers relative to the number of persons employed in clinics has declined in recent years, the ratio of community legal workers remains higher in the Canadian context than in the American. Canada has seen much less resistance by both staff lawyers and legal aid funders and

administrators to the presence of community legal workers in community clinics.

These paralegals bring to their tasks varying degrees of formal training and experience, but they usually have a special awareness of the situation confronting the clinic's clientele. Through familiarity with the community and its needs and an ability to communicate easily with members of the community, paralegals offer the potential for innovative solutions that may not always be apparent to the university-trained professional. It has been argued that the well-trained community advocate can articulate more effectively the problems of the underprivileged person or community group to government and public agencies that dispense services and funds.

The continuing concern with respect to paralegals is the extent to which they are capable of functioning independently. Several Canadian studies have indicated that paralegals working in community clinics have been given the freedom to handle a wide assortment of legal tasks with little or no supervision by members of the profession; and several legal services programs in Canada are staffed exclusively by paralegals who receive limited assistance from either part-time clinic lawyers or private practitioners.

The 1980s have witnessed both a growth in the demands for legal service and a diminution of funds. It seems clear that the role of legal paraprofessionals and their relationship to the various models of legal services must be further developed and their effectiveness monitored to determine whether more innovative and reform-oriented services at a moderate cost will in fact develop. Training citizen advocates to represent their own community and its needs offers a new potential and new challenge to the delivery of legal services.

III. Conclusion

The cherished notion of a unified profession, we may now see, must give way before a more accurate portrait of a profession divided by function, clientele, and practice setting, ranked in terms of prestige both internally and externally, in varying degrees attracted to anticompetitive arrangements, and in intermittent disagreement over professional policies and public positions.

And yet the persistence of an ideology of professional solidarity cannot be entirely discounted. It does mediate the differences of interest and identity within the profession and does enable the bar to close ranks in the face of perceived threats to fundamental professional interests from within or without. This helps to explain the severe discipline sanctions imposed for trust violations and other acts of dishonesty: such conduct puts in question the fundamental fiduciary premise on which lawyer-client relationships are based. Devotion to the notion of a unified profession may also reinforce the profession's extreme sensitivity to any impairment of its independence: a challenge to either aspect of its belief system may affect the bar's internal

political processes and, in the end, the distribution of financial and other rewards that those processes so vitally affect.

The Canadian bar has been able to sustain the indicia of classic professionalism as that term is understood in the work of Abel, Larson, Freidson, and others. Yet despite the strength of the "professional project" Canadian lawyers have been weak in asserting their distinctive interests. They have insisted that governing bodies should be dominated by private practitioners but have failed to use those governing bodies as effective instruments for innovation, the advancement of long-term professional interests, or even the reconciliation of differences among various lawyer groups. The profession's desire to control legal aid programs is an example of its often self-defeating hegemonic tendencies. The preoccupation with avoiding the "socialization" of legal services has retarded the development of new areas of practice that would be in the profession's interest.

Despite eroding market control, the Canadian bar, through its governing bodies, is able to exert formal and effective autonomy to a greater degree than its American counterpart. Its immunity from antitrust and other regulatory legislation exceeds that of the English profession. These differences do not necessarily falsify general theories of the profession. They do suggest that separate societies have the capacity to mold their professions. Comparative examination must be sensitive to these particularities.

TAB B

Appendix M

COMMUNITY LEGAL CLINICS IN ONTARIO: 1980 A DATA SURVEY

Frederick H. Zemans*

Community legal clinics have been in existence in Ontario for a decade. By employing a modified version of the questionnaire used in a similar English study in 1975, Professor Zemans has obtained a comprehensive data survey of all the community based clinics funded by the Ontario Legal Aid Plan. The data charts are preceded by an explanatory text which summarizes the data and draws comparisons with the English survey results and with the legal services movement in the United States. It is intended that this survey should provide the data base for a larger project which will study Ontario community clinics in depth. Subsequent stages of investigation will involve personal visits to clinics, interviews, caseload studies and an overall impact study.

Cliniques juridiques communautaires en Ontario en 1980. Etude de données

Les cliniques juridiques communautaires existent en Ontario depuis dix ans. En utilisant une forme modifiée du questionnaire élaboré pour une étude pareille faite en Angleterre en 1975, le professeur Zemans a réuni des données compréhensives sur toutes les cliniques à base communautaire subventionnées par le Plan ontarien d'assistance juridique. Les données sont précédées d'un texte explicatif qui les résume et qui établit des comparaisons avec les résultats de l'étude anglaise et avec le mouvement de services juridiques aux Etats-Unis. Il est prévu que cette étude fournira la base de données pour un projet plus détaillé qui examinera en profondeur les cliniques ontariennes. On fera par la suite des visites personnelles aux cliniques, des interviews, des analyses de tâches et une étude générale d'impact.

* * *

Following the growth of the neighbourhood law firm system in the United States and England, the Canadian Department of Health and Welfare experimented by funding four clinics in 1971: Dalhousie Legal Aid Service (Halifax, Nova Scotia); Community Legal Services (Point St. Charles, Montreal, Quebec); Parkdale Community Legal Services (Toronto, Ontario); and Saskatoon Community Legal Services (Saskatoon, Saskatchewan). Each of these clinics had been

*Professor, Osgoode Hall Law School, York University.

opened with no lawyers on staff. At the time of our survey there were eight clinics which still had no full-time lawyer working in the clinic. The absence of staff lawyers is unlikely to continue as the Clinical Funding Committee has accepted the proposal of the Grange Commission that all clinics hire staff lawyers to assume responsibility for the clinic's legal services.[13]

The number of staff lawyers working in clinics has risen from eighteen to forty-two while the number of community legal workers has increased from fifty-one to ninety-two. At the time of their opening the Ontario clinics had three paralegals for every staff lawyer, while at the time of this survey there was a slightly greater than two to one ratio in favour of community legal workers.

It is helpful to contrast the Ontario situation with that in the United States in 1974 — a comparable stage of development of the American legal services movement. At that time paralegals composed 17.5% of the total staff and lawyers composed 39.4% of the staff employed in American clinics. Ontario clinics employ twice as many paralegals as staff lawyers, whereas in the American clinics the situation is reversed with a two to one ratio in favour of staff lawyers.[14]

The Ontario experience is still too embryonic to allow us to discern the full significance of the community legal worker in the provision of legal services. There is little doubt, however, that the high profile of the community legal worker in the legal services movement in Ontario and the deployment of many community legal workers in community organization, community education, law reform and preventive law has had a significant influence on the development of the Ontario clinic movement. The early clinics have emphasized community control and the involvement of community members in setting office policy as well as the employment of community members. The training of community legal workers has been undertaken, thus far, on an informal basis within the clinic movement and, in most instances, within the clinics. As caseloads increase and the pressure for service builds on individual clinics, it remains to be seen whether this informal type of training can continue and whether community legal workers will be allowed to retain some freedom from caseloads.

Only four clinics do not have (or do not intend to establish) a Board of Directors responsible for long-range planning, hiring,

---

[13] Recommendation 4 of the *Report of the Commission on Clinical Funding*, 1978, at page 62, states that "[t]he aim should be to ensure that each clinic has a lawyer on staff. In some cases one lawyer will have to serve more than one clinic. The provision of duty counsel only to a clinic should be discouraged".

[14] National Paralegal Institute survey of paralegals in O.E.O. Legal Services Projects (1974) cited in Victor Savino, *Paralegalism in Canada: A Response to Unmet Needs in the Delivery of Legal Services* (unpublished thesis for LL.M. degree at Dalhousie University), Appendix B-2, 389.

TAB B

Appendix N

TAB B

Collective Bargaining and the Professional Employee

PROFESSOR A. W. R. CARROTHERS,
Dean of the Faculty of Law, University of Western Ontario.

AMONG Dr. Crispo's many natural gifts is a remarkable talent for devising a simple title for a complicated question. At the Founding Conference of the Centre for Industrial Relations held last October we were invited to consider challenges and responses in industrial relations, and at the end of three days it was the audience, not the subject, that was exhausted. Tonight we are embarking on a similar venture in the direction of collective bargaining and the professional employee. The waters between the point of departure and the point of landing can be treacherous even for the alert sailor, and as aids to navigation I have chosen to break the subject down into four questions. I do not claim that they are beacons of light, but if they sound a bell or two they may at least help more observant navigators than I to tell us over the next two days where we are from time to time.

The ultimate and most interesting question asked of this conference, as implied in the conference title, is whether professionals should engage in collective bargaining. It would seem important to determine at the outset a common meaning for the term "professional". But there is a wide range of interests represented both among the conference participants and in the audience, to whom the word professional has different shades of meaning. I therefore ask myself what is it that concerns people when they raise the

does and the manner in which he does it. If there is such control, the former is regarded as a master or employer and the latter as a servant or employee. But the significance of the common law of master and servant has been supplanted in major areas by important legislation, and each statute may have its own definition of what constitutes an employee. We are particularly concerned tonight with collective bargaining statutes. For the purposes of collective bargaining legislation, which is designed to give a statutory framework to the concept of the countervailing power of organized labour against the prevailing power of management, it is important to separate from the definition of employee those against whom the collective power of labour is to countervail and those who must be assumed to be identified with the prevailing power of management. Thus we find that the federal collective bargaining statute begins by stating that an employee is a person employed to do skilled or unskilled manual, clerical or technical work. It then excludes from the definition management and industrial relations personnel. But then it proceeds on quite a different rationale to exclude classes of persons for which the Parliament of Canada must have considered the framework of collective bargaining was inept. The list includes members of the medical, dental, architectural, engineering and legal professions qualified to practise under the laws of a province and employed in that capacity. The Ontario Act adds to the list of exclusions policemen, firemen, school teachers, domestics and persons engaged in agriculture, horticulture, hunting and trapping. Other provinces have other logs of exceptions. But the generalization can be made that collective bargaining statutes in Canada exclude persons from the definition of employee on three distinct grounds. One is the ground that the person is regarded as a management person. Another is the ground that although the person is an employee, his work is such that the framework of collective bargaining is regarded as inappropriate, and here I am thinking of persons such as domestics and those engaged on the land. And another ground appears to be that the persons are members of professional associations that number amongst their members persons who

range all the way from self employed professionals to those who are employed to do non-professional work. This group it appears are excluded because it is too messy to include them, or because legislators were influenced by lobbies. In addition to these limitations, one finds within the statutes further restraints. These relate particularly to the identification of units that are considered appropriate for collective bargaining. For instance, some statutes require that security personnel such as guards be in separate units. Further, although provision is made for craft certification, craft units tend to be small. It is necessary to organize unit by unit, and it is always within the discretion of the Labour Relations Board to conclude that the particular unit being advocated is not appropriate for collective bargaining. Thus even where a group of professionals can meet the statutory definition of employee they may have to surmount obstacles that are not put before non-professional employees.

Another important question is that of the employee in public employment. For instance an employee of a municipality in Ontario may not be able to claim the benefit of the Ontario Labour Relations Act. In some other jurisdictions special legislation relates to municipal police and fire services, to municipal and school corporations, and to school teachers. Again, the legislation respecting collective bargaining by Civil Servants, employees of Crown agencies and employees of Crown corporations is a long way from being uniform. And lurking behind the question of collective bargaining for employees in the public service is the constitutional question whether subjecting the Crown to the processes of collective bargaining constitutes an impairment of the concept of sovereignty on which the Canadian constitution is founded. This issue seems to be an everlasting phoenix, because no matter how often the issue is flogged to death it seems to manage to rise from the ashes of its own funeral pyre.

It is high time I got on to the fourth question, should professionals engage in collective bargaining?

First, is collective bargaining, or should it be regarded as being, unethical from a professional point of view? My

brief answer to this question is no. There is precedent within the learned professions for collective action to protect the incomes of members in their capacity of self employed persons. Any scale or tariff of fees agreed to by a professional group does just that. It is unrealistic to ask a professionally trained person to forego the reasonable assurance of a standard of living commensurate with his education, ability and service to society merely because he is serving society. If you want professional service you must pay for it; and if you will not pay for it you will not get it. In short, a professional boycott operates against persons who want professional service at cut-rates. The notion of service to society clearly is not regarded by the professions as being incompatible with collective action, albeit diffuse in its application. And if members of a profession can act in concert to protect their income as self employed persons, why should they not act through the medium of collective bargaining to protect their income and other terms of employment as employees? In my opinion, there is no inconsistency from an ethical point of view between the status of professional and the determination by collective action of the terms under which a professional employee works.

Why is the issue of collective bargaining for professional employees put in terms of professional ethics? Is not a significant reason to be found in the fact that people performing non-professional functions have professional status? Individuals in a profession who for the most part are performing non-professional functions, for instance, professionally qualified engineers performing tasks that are merely technical, may feel that their situation is one that needs the protection of collective bargaining. Others in the association who are professionally occupied may feel, quite possibly because of temperament, ability and function, that collective bargaining is incompatible with professionalism, and that those in the association but not professionally occupied must accept that proposition if they wish to claim the status of professional through membership in the association. A person professionally occupied tends to have

a strong sense of individualism, of personal achievement or ambition, and a personal relationship with his employer. He may tend to identify himself with his profession rather than his industry, and at the same time he may very well be management oriented. Those who are non-professionally or marginally professionally occupied tend to have a more egalitarian point of view. The dilemma is made worse by two further facts: the line between professional and non-professional employment is obscure; and people move from one kind of job function to another and possibly back again over a short or long period of time. In addition, some professions may find that their vocation is open to them only or principally as employees.

It is sometimes useful to go abroad for illustrations in areas where conflict of domestic opinion is strong. In the United Kingdom the Royal Institute of British Architects sponsored a trade union — th e Association of Official Architects. This Association now has a separate existence, but it has the same address as the parent that sired it. What this profession has done is to perceive as separate functions the professional and the unionist role of the Association and to create two distinct bodies to perform these roles. The British Medical Association has managed to keep the two roles in the one Association, although it has set up a collateral body as its fiscal strike wing, the British Medical Guild. Other professionals in the United Kingdom may be found in separate units for the purpose of collective bargaining.

On the question of collective bargaining for public employees, it may be noted that such a system, buttressed by a remarkably effective system of arbitration, has been known to the public service in the United Kingdom since 1925.

The second part of this fourth question concerns the morality of collective bargaining where a work stoppage is contrary to the public interest. Assuming for present purposes that a given work stoppage would be contrary to the public interest, it seems to me that the question is not whether collective bargaining as such is improper, but

whether a reasonable substitute can be devised for the sanction of the right to strike, which was submitted at the outset to be an essential ingredient of an effective system of collective bargaining.

University professors have found a modus vivendi which perhaps may better be described by the term consultation than collective bargaining. Its efficacy varies from place to place, as do opinions as to the adequacy of the technique. Most associations of university professors premise their position on the concept that a university is a community of scholars and that the citizens of the community have a legitimate claim to participate in its government in one form or another. In addition they assert a claim that they are entitled to have the governing body consider carefully a collective opinion of the association on any matter relating to the welfare of the institution. The issue of collective bargaining as such generally is kept in the background, and I make so bold as to suggest that it should stay there unless associations are prepared to go the full distance of acquiring the necessary legal status under relevant collective bargaining legislation, and all that that means in terms of reconstituting the associations and redefining their objectives.

However, not all professionals are able to invoke the broad communal concept that is available to the hewers of wood and drawers of water in the groves of academe. Although one can talk conceptually of the industrial community and the role of the collective agreement as a constitution for that community, something more specific is required by way of a sanction to make joint negotiation work besides the argument that the governing body should listen carefully to the considered judgment of the citizenry. Some type of lobbying, of political action, may give form to a system of collective bargaining that would otherwise be emasculated by the absence of the right to strike. But the only substitute which seems to have any lasting currency is the technique of arbitration.

May I say at once that I do not like arbitration as a device for resolving conflicts of interest in the negotiation

of a collective agreement. I regard it not as a happy solution to this kind of industrial conflict but only as the least undesirable solution available, imposed by the necessity for protecting interests that in the immediate exigency are judged to take precedence over interests which the device impairs. My objections to arbitration of interests disputes are both ideological and practical.

In terms of ideology, if one accepts as a legitimate object the sharpening in the parties to industrial disputes of their awareness of a moral obligation to consider and defer to the general social interest, gains toward that goal might not be made by converting the moral duty into a legal one; certainly the goal will not be gained merely by making a public or private tribunal the custodian of the public interest: for the protagonists may then proceed to advance their own interests, secure in the knowledge that responsibility for protecting the public welfare reposes elsewhere. Furthermore, to impose machinery of arbitration may well be to induce protagonists ultimately to deliver into the hands of third parties the responsibility which at present rests with the disputants themselves: the responsibility of coming to terms with one another. I suggest that this shift in responsibility has great significance for the kind of relationships of power and obligation which we judge to be desirable for our society; for the shift means a surrender of a measure of personal responsibility, and, to that extent at least, a belittling of the human personality. It is tantamount to saying that the parties either are not mature enough, or are not free enough, to be trusted with such responsibilities, at least insofar as their affairs relate to the public interest. Another ideological argument against arbitration is that if the returns to a large part of the labour factor of production are to be determined by arbitration it may lead to a determination of fair prices and fair profits by similar methods. Another ideological argument against arbitration is that many issues that might ultimately be taken to arbitration are matters of social and economic policy that ought to be settled by Parliament and the Legislatures and not by a quasi-judicial institution.

Appendix O

a much greater issue. Peter Drucker, the eminent writer on management affairs, claims that the greatest problem that business will have to face in the future is the management of managers and the management of professionals. Harold Koontz, the eminent scholar at UCLA, has made a similar statement. He says the most serious problem that management faces is the integration of behavioural and technological sciences with administration.

DR. MARK R. MacGUIGAN,
Associate Professor of Law, University of Toronto.

A SUBJECT such as this morning's which is substantially identical in description with the subject matter of the whole Conference poses certain problems of delineation, but as I studied the program for the Conference it seemed to me that since the more concrete aspects of collective bargaining by professional employees will be covered in the following sessions—the behavioural aspect this afternoon and the legal tomorrow morning—I should therefore concentrate in this paper on the more abstract—or what I might call the philosophical—aspects of the subject.

Let me say at the outset a few words about collective bargaining. I have not thought it necessary at this late date to indulge in any general justification of collective bargaining in itself: unequal economic power between employer and individual employee is an observable fact, and history has amply demonstrated the illusory freedom of the employee in individual bargaining. Generally speaking, the rights of individual employees depend initially on the institution and on the effectiveness of the collective bargaining process. I have therefore devoted my attention principally to what in the professional character of the professional employee might make it inappropriate—or appropriate—for such an employee to have similar rights of collective action to non-professional employees. I might

also add that I do not take the position that the work stoppage or strike is the inevitable sanction in the collective bargaining process but am open at least to the possibility that compulsory arbitration might achieve as good results in some circumstances.

Before beginning my analysis in detail, perhaps I might first of all state my conclusions: to my mind collective bargaining for professionals is in their own interest as employees and in the interest of their professions (and for both these reasons indirectly in the public interest), and that it is also directly in the public interest. I hope that the analysis which follows will substantiate each of these conclusions.

The first point which I should like to emphasize is the analogous nature of the notion of profession: there is no single meaning of the word 'profession' which can do justice to the multiplicity of professions and professional life. Perhaps there is no better indication of the folly of attempting to establish a conceptual strait-jacket than a recognition of the number of possible classifications of occupations. The traditional division of professions was into divinity, law and medicine, and it could be argued from this historical fact that no other callings should be recognized as professions today. But the original recognition of these three callings as professions was based on their university origin and their identification with the scholarship of the university community, whereas the subsequent connection of all three with the university has been nebulous. At the turn of this century, for example, physicians were being turned out by non-university "diploma mills" in the United States. The law that was taught at the University of Bologna in the twelfth century was a far cry from the "wilderness of single instances" which Tennyson poetically but not so inaccurately saw as the essence of the English common law; the law was divorced from the university for many centuries in common-law lands, and indeed in Ontario it will not be for several years yet that the final reunion of legal education and university community will occur. And as for divinity, many seminaries

have no university connections, and of those that have, many are noted more for their pastoral concern than for the speculative thought associated with a university, and most are looked down upon by the university community as intellectual weak sisters. What claim could the traditional professions have to exclusivity as professions when they have been able to maintain so inconstantly the university membership from which their dignity originally arose?

Another possible classification of occupations is with regard to legal status: that is, those callings are to have status as professions which are granted by legislation the exclusive right to practise in a particular field, along with the privilege of self-government and the right to determine fee structure. Certainly many callings generally recognized as professions do have such legal status, and usually continue to exercise the powers legislatively conferred without any public control—though when there is evidence of misuse of licensing powers, as for example in the recent controversy over licensing of physicians trained in Indian medical schools, there is always the possibility of a legislative curbing of monopolistic practices. But, on the one hand, there are callings generally considered professions, such as teaching and preaching, which do not have legal status; and on the other hand there are many callings not generally considered professions which are granted self-governing powers by legislation. In the United States over 200 occupations are subject to licensing requirements, though in some cases the regulation is from outside rather than from within the occupation itself. The interesting thing is that in most cases licensing is welcomed by the members of the licensed group as a form of public recognition and sometimes as a guarantee of economic security free from competition. Vance Packard comments in *The Status Seekers* (1959, at p. 97): "The nation's 25,000 undertakers have undertaken a campaign to become known as 'funeral directors', a title that conveys more dignity. They are striving to become accepted as professional men 'on the same level as a doctor or lawyer'. To this end, their academic requirements have been raised to include attend-

ance at one of the nation's twenty-four mortuary colleges." And only a year ago this month the Toronto *Star* protested editorially against attempts by Ontario funeral directors to obtain a more complete monopoly through new legislation (December 2, 1964). Obviously any attempt to classify professions solely in terms of a special status conferred by legislation cannot be satisfactory.

Other bases of classification would prove equally inadequate. For example, it is comforting to professionals to indulge the belief that a spirit of public service is a characteristic peculiar to professions, but in fact many callings regard the rendering of service as their main object and the receiving of reward as incidental. The truth is that 'profession' is not an unequivocal term, signifying a number of callings with the same nature and differing only in their matter and in their manner of practice. Indeed many characteristics are generally predicated of professions—university origin, learning, tradition, a fiduciary relationship to a client, a spirit of public service, a moral code, organization, legal status, self-government, social importance, prestige—and few professions possess all of these characteristics, whereas all of those callings we should be likely to denominate as professions possess some of them. In other words, the notion of profession is not unequivocal, but analogous; it does not mean the same thing in every case, but all the professions have a certain resemblance, while differing in some characteristics.

While we can formulate a definition of profession, we cannot therefore expect to find it verified in all respects in every profession. A good contemporary definition is that "a profession is a self-selected, self-disciplined group of individuals who hold themselves out to the public as possessing a special skill derived from education and training and who are prepared to exercise that skill primarily in the interests of others." [Peter Wright (1951), 29 Can. Bar Rev. 748, 757]. Such a definition will apply to some but not to all professions.

I refrain from entering into a detailed discussion of the hierarchy of professions, if only because of the embarrass-

ment we might each feel at the discovery of our own profession's place in the pyramid. But we must draw the conclusion that there are certainly professions and segments of professions which must be acknowledged to be attenuated or diminished professions, and their members professionals in something less than a complete way. Such are the professional employees who are the subject of this Conference.

The attributes which are common both to complete and to diminished professions seem to be those of learning and of public service, and these would therefore seem to be deepest characteristics of professionalism, though at least one writer has maintained that "the most important test of professional status is the test of independence." [Smyth, "The Criteria for Professional Status" (1951), 58 Can. Chartered Accountant 271, 280]. Of the professional attributes listed above, it is that of self-discipline and self-government which necessitates a group membership characterized by independence of organization and operation, members who are independent practitioners—in law, independent contractors. Traditionally even in large firms of professional people, where some professionals are employees, there has been a large partnership or independent practitioner group, and the employed professionals have been junior men with reasonable expectations of advancement to membership in the firm .

Professional employees, on the other hand, are by definition professionals who have given up the status of independent practitioners to become salaried employees of business or of government. I take it that among government employees we are not here concerned with civil servants in the strict sense but only with those employed by emanations of the Crown, though a good argument could be made for applying the same considerations to civil servants proper.

Professional employees, even if they retain membership in their general professional organization, will share only to a small extent the professional independence and self-direction characteristic of the independent practitioner,

since they will be submerged in a business organization as subordinate units, perhaps with little contact with the upper administration. Such a state of affairs poses many problems for the professional involved. First, it raises issues of remuneration, since normally the amount he can earn in any year is limited by his contract, which he has had to negotiate as an unequal party with his employer, and also raises the question of working conditions. Second, at a subtler level it raises problems of professional and moral integrity, which the employee, unaided, may find it difficult to solve. We have all seen the engineer employed by an automobile manufacturer ineffectually and sometimes dishonestly attempt to defend the absence of safety features in automobiles on scientific grounds, in the face of scientific evidence to the contrary, when it is clear that the only real explanation for their absence is a commercial one. In the legal field we can hardly refrain from questioning the integrity of the battery of lawyers employed by an entrepreneur, on either management's or labour's side, for the sole purpose of staging every possible legal move to keep him out of jail. These are undoubtedly the more dramatic cases, but it is easy to visualize other less extreme cases of disagreement between management and the professional employee as to the quality of service or of product.

The argument which I am making essentially boils down to this: the creation of a staff association for the purpose of collective bargaining will make professional employees more rather than less fully professional, for it will restore to them in some measure the independence and self-control of which they have been deprived by their status as employees.

I have already referred to the importance of the attribute of public service in the notion of professionalism. Putting it another way I might describe it as the subordination of the economic factor to the ethical factor. But we must keep in mind that subordination is not elimination.

Taking the example of the law, the profession with which I am most familiar, the conventional wisdom is that the lawyer should only last of all make a living, for his first

duty is to the public, primarily through selfless service to his client. Shrewder commentators have noted that although "the professions generally define a type of behaviour which by lay standards seems high-minded . . . the professional community so structures professional practice that in fact the man who conforms to these ethical standards may very well profit in the long run from an apparent idealism." [Goode, Book Review (1957), 57 Col. L. Rev. 746, 747]. And one hard-bitten observer of the law has commented: "No amount of preaching can alter the cold, indisputable fact that the law has ceased to be a sacrosanct profession and has become a highly competitive business."* However clear the Bar's position as something more than a business organization may be from the fact that the Bar accepts responsibility for citizens defrauded by lawyers, there is no denying the fact that the commercial element looms large in contemporary law.

That this is generally true of professions is illustrated by the abandonment of the traditional mode of payment. Historically the professional received neither fee nor salary but only an honorarium. Indeed until early in this century physicians in England were paid by their patients not on a fee-for-service basis but on the basis of their ability to pay. Today the fee for service is considered the standard method of remuneration for professionals, to such an extent that many physicians, for instance, are willing to fight to the death to retain it. The professional man today is perhaps best described in the telling phrase of the late C. Wright Mills as the "entrepreneurial professional."

I do not suggest that this is in itself wrong, but merely that it does not square with all of the traditional professional cant about the nobility of service for its own sake. In my opinion it is a realistic view of the contemporary professional, recognizing as it does the practical importance of the economic factor.

If this is an accurate depiction of the independent professional practitioner today, it must be, a fortiori, a

*Argument of counsel in Barton v. The State Bar of California (1930), 209 Cal. 677, 681; 289 p. 818; quoted in Cheatham, Cases and Materials on the Legal Profession (2nd ed. 1955), p. 74.

meaningful description of the professional employee, who in relation to his employer is nothing other than another employee, and for whom the economic aspect is therefore vital. In other words, the very factors which make for the diminished professionalism of the professional employee as contrasted with the independent practitioner also make him a man inherently more involved with the economic factor. A professional staff association with the purpose of collective bargaining can render efficacious the interest which the professional employee has, in common with all other employees, in the economic factor. Of equal importance, it can advance the ethical factor at the same time: as observed earlier, the attitude of the professional employee and his employer towards adequate standards of service or adequate products may not coincide, since the employee is likely to have a greater loyalty to quality and the employer to profits. Without the support of his fellow employees the professional employee will be able to uphold his position only at the expense of his own economic welfare. But interestingly enough, where this support is assured through collective action, there is no opposition between the economic factor and the ethical factor, and in this respect it is dissimilar to the case of the professional practitioner; the opposition is rather between the employee's economic and ethical factors on the one side and the employer's economic factor on the other. That is, both the professional employee and the profession stand to gain from the formation of professional staff associations. It is the employer who stands to lose, through increased costs resulting from better salaries and working conditions and through loss of traditional management prerogatives.

The remaining question, then, is whether such interference with the employer's freedom is in the public interest. We should first of all be clear on which freedom of the employer is in issue. It is not his freedom to contract which is at stake. With respect to freedom of contract the effect of collective bargaining is not to interfere with the employer's freedom but merely to create freedom of contract for the employee; as Mr. Justice Holmes put it some fifty years ago, collective bargaining establishes that

TAB B

Appendix P

TAB B

TAB B

Collective Bargaining By Salaried Professionals

George W. Adams

This paper examines whether the traditional approach to collective bargaining fits the needs of the salaried professionals or if special treatment is necessary.

Recent legislative initiatives in many Canadian jurisdictions suggest a growing recognition that the salaried members of many of the prototype[1] or traditional professions are subject to the same social and economic forces confronting other employees. These initiatives have granted salaried members of one or more professions access to collective bargaining and in doing so have generally accorded them special bargaining unit treatment. Because the forces that have caused salaried professionals to turn to collective bargaining are accelerating, other jurisdictions will move in the same direction and many of the current initiatives are likely to be broadened. The number of employed professionals is steadily, in fact, dramatically increasing and many of the large bureacracies in which they tend to be employed do not readily and voluntarily adjust to the culture of professionalism. As a general matter professional associations have not been able to respond to the employment problems experienced by their salaried membership and thus these professionals have had no alternative but to turn to collective bargaining. The first part of this paper surveys the employment problems of salaried professionals that have given rise to these developments.

However these employment problems are not unique to the prototype professions but rather are common to a growing number of intellectual occupations with whom the prototype professionals often work side by side. This increasing number of intellectual workers and their

ADAMS, G.W., Associate Professor of Law School, York University; Assistant Deputy Minister of Labour, Province of Ontario.

* This paper was prepared for the National Conference On The Professions and Public Policy (October 15-16, 1976) sponsored by The Law and Economics Program, Faculty of Law, University of Toronto.

[1] By prototype I mean the architectural, dental, legal, medical, and engineering professions.

« professionalization » therefore raises doubts about the appropriateness — in fact fairness — of singling out the salaried members of the prototype professions for special treatment in collective bargaining statutes of general application. For example, in a number of jurisdictions recent amendments apply only to salaried members of particular professions and mandate craft bargaining units for them — bargaining units restricted to these individual professions. What is the justification for giving these particular occupations craft status and is it a desirable policy? How should legislatures and labour boards respond to claims for similar treatment by members of the growing number of intellectual occupations that possess many if not all of the important hallmarks of « professionalism » ? Quite clearly a similar approach with respect to them could lead to an unworkable fragmentation of bargaining units. But does it then follow that no special treatment ought to be accorded to any intellectual occupation whether it is part of a prototype profession or not? In seeking to address this question the paper is critical of most of the approaches adopted in Canada to date but concludes that special treatment along the lines taken in the United States is both necessary and practical.

SALARIED PROFESSIONALS AND COLLECTIVE BARGAINING: SOME HISTORY

While legislation in Newfoundland, Nova Scotia, Alberta and Prince Edward Island exclude all of the prototype professions from collective bargaining by providing that the definition of « employee » does not include « a member of the medical, dental, architectural, engineering, or legal profession, qualified to practise under the laws of a province and employed in that capacity », the earliest Canadian labour laws did not do so. However after a very short and unsatisfactory experience Parliament decided against their inclusion and most jurisdictions, save for Saskatchewan, followed suit. The principal reasons for exclusion can be briefly summarized. First, because early labour laws made no reference to professionals they were often « swept » into large heterogeneous bargaining units containing other employees to whom they could not relate. For example, in *British Columbia Distillery Co. Ltd. and Local 203 United Office and Professional Workers of America,* Local *203 et al Wartime L.R.B.* [2], the Board ruled:

> The conditions of employment of the office workers and the professional and technical workers employed by the employer are the same. No good

[2] 1947 *CLLC* para. 10, 513 (Wartime Labour Relations Board)

> reason has been shown to warrant subdividing this group of employees into separate units.

A similar response to a particular working relationship that continues as a problem today is revealed in *Quebec Federation of Professional Employees in Applied Science and Research, Unit 4, and Canadian Broadcasting Corporation, Wartime, C.L.R.B.*,[3] in which the Wartime Board stated:

> The Board does not consider that for the purpose of collective bargaining there is any important difference in interest between a professionally qualified engineer and an engineer who has no such professional qualifications, provided both are carrying on work of the same or similar nature and under similar conditions. Academic attainment cannot by itself determine the community of interest.

Secondly, collective bargaining by professionals was thought by many to be unethical or at least undignified. The prototype professions are, generally speaking, service oriented and all have been granted a statutory monopoly over the provision of their services. Therefore because collective bargaining could result in the concerted withholding of these services, abstract ethical and public policy questions were perceived. Moreover, this reticence was compounded by the fact that the professions had attracted persons into their membership who were very individualistic and in whom this individualism was reinforced by a service oriented professional training. From their viewpoint then collective action centering on monetary matters was not only unseemly but in direct conflict with a profession's principal purpose — serving the public. Thirdly, professional associations were dominated by either non-salaried professionals who lacked identification with the problems of their salaried colleagues or by salaried professionals who had either managerial responsibility or ambitions in this regard. Finally, it is likely that governments of the day were affected by a common feeling that professionals are already well served by their status in society. Even today, it is difficult for the general public to identify with the employment problems related to professional occupations because of the obvious advantages enjoyed by the non-salaried faction of the professions.

FORCES OF CHANGE

As fundamental technological and market forces had their impact on labour market structure and business form, these views began to be

[3] 1946 *CLLC* para. 10, 485 (Wartime Labour Relations Board)

TAB B

reconsidered. While the increase in white-collar workers in relation to the total labour force was the most salient aspect of the overall occupational shift in the first half of this century, the growth of the «professional» group within this white-collar segment has been the most striking recent change. Between 1951 and 1971 professionals showed the largest percentage increase of any occupational classification, rising in absolute numbers from 385,696 to 848,725, a gain of 120.1% compared to a 114.2% increase in the white-collar work force and only 65.4% in all occupational categories.[4]

Professor Bell believes these changes to be at the heart of what he calls «the post-industrial society». In describing this same occupational distribution in the United States he writes:

> *The pre-eminence of the professional and technical class.*
> The second way of defining a post-industrial society is through the change in occupational distributions; i.e. not only where people work but the kind of work they do. In large measure occupation is the most important determinant of class and stratification in the society.
>
> The onset of industrialization created a new phenomenon, the semi-skilled worker who could be trained within a few weeks to do the simple routine operations required in machine work. Within industrial societies, the semi-skilled worker has been the single largest category in the labour force. The expansion of the service economy, with its emphasis on office work, education and government, has naturally brought about a shift to white-collar occupations. In the United States, by 1956 the number of white-collar workers for the first time in the history of industrial civilization outnumbered the blue-collar workers in the occupational structure. Since then the ratio has been widening steadily; by 1970 the white-collar workers outnumbered the blue-collar by more than five to four.
>
> But the most startling change has been the growth of professional and technical employment — jobs that usually require some college education — at a rate twice that of the average. In 1940 there were 3.9 million such persons in the society; by 1964 the number had risen to 8.6 million and it is estimated that by 1975 there will be 13.2 million professional and technical persons, making it the second largest of the eight occupational divisions in the country, exceeded only by the semi-skilled workers. One further statistical breakdown will round out the picture — the role of the scientists and engineers who form the key group in the post-industrial society. While the growth rate of the professional and technical class as a whole has been twice that of the average labour force, the growth rate of the scientists and engineers has been triple that of the working population. By 1975 the United States may have about 550,000 scientists (natural and social sci-

[4] GOLDENBERG, Shirley B., *Professional Workers and Collective Bargaining*, Task Force on Labour Relations (1968) p. 14 & 15 and *1971 Census of Canada*, Statistics Canada, Catalogue 94-717.

entists) as against 275,000 in 1960, and almost a million and a half engineers compared to 800,000 in 1960.[5]

But it is also important to note another and related feature of «the post-industrial society». Despite the image of individualism traditionally associated with professional work, almost all teachers and nurses are paid employees as are 96% of engineers and architects, 97% of economists, and 93% of accountants and auditors.[6] Even in the most traditionally individualistic professions of law and medicine, approximately 43% are not engaged in private practice.[7] Almost all of the «new professionals», ranging from social workers to systems analysts, work for an employer. And salaried professionals tend to be concentrated in *large* work organizations that may not easily adapt to the culture of professionalism.[8]

Quite clearly these occupational shifts will continue at an even more rapid rate in the decade ahead. The growing emphasis in manpower requirements will be upon relatively high degrees of skill, knowledge and specialized training of various kinds. The shift from an agricultural economy to a predominantly urban industrial society has brought with it the need to concentrate large amounts of capital and numbers of people in order to meet the needs of an interdependent urban economy. The result has been an integrated economy comprised of large industrial, scientific and commercial bureaucracies housing the vast number of specialized white-collar employees needed to coordinate complex production and marketing activities. More recently, there has been a distinct trend towards a service oriented economy which has even accelerated these occupational shifts. As national incomes have risen there has been an increased demand for services and a corresponding occupational shift to trade, finance, transport, health, recreation, research, education and government activities. These area represent the greatest expansion of intellectually based occupations. This occupational shift has also been magnified by the dramatic growth of scientific and technical knowledge and the correlative rise of science based industries (computers, electronics, optics, polymers, health).[9] The

[5] BELL, *The Coming of Post-Industrial Society* (1973) 15.

[6] *1971 Census of Canada,* supra, p. 6.

[7] *ibid.*

[8] For example, by 1962, 54% of all engineers and scientists in the United States worked in establishments employing 1,000 or more employees. (See *Kleingartner, Professional Associations: An Alternative to Unions?* in Woodworth and Peterson, *Collective Bargaining for Public and Professional Employees* (1969) p. 294).

[9] Professor Bell argues that what is distinctive about this stage in our development is the centrality of theoretical knowledge and its exponential growth. BELL, *supra,* p. 20.

end result has been a bureaucratization of the sciences and an increasing specialization of intellectual work. These features of contemporary society challenge the adequacy of our collective bargaining laws as well as any attempt to confine the term « professional » to the prototype professions.

INTEREST OF SALARIED PROFESSIONALS IN COLLECTIVE BARGAINING

These background forces have contributed to the interest of salaried professional employees in the collective bargaining process because they mean that salaried professional employees are exposed to the same economic and social risks as other wage and salary earners.

The bureaucratization of intellectual work and the explosion of knowledge not only in new fields but within existing fields has led to the specialization of intellectual work into minute parts. For example, after World War II, 54 specializations in the sciences were listed in the United States National Register of Scientific and Technical Personnel. *Twenty* years later there were over 900 distinct scientific and technical specializations listed.[10] As this happens, skills are inevitably broken down, compartmentalized and routinized to the point where salaried professionals may be unable to realize the skills for which they were educated. This problem is often aggravated by the immediate profit-making interests of an enterprise which cause it to employ its labour in the most efficient manner.[11] It may be more efficient to have work which a professional considers to be within his profession's exclusive jurisdiction performed by persons with a lesser but related education or at least to intersperse such persons amongst the professional employees. Similarly it may be more economical to require a salaried professional to perform work which a lesser educated but unavailable person, with training, could perform and thereby avoid immediate recruitment and training costs. Salaried professionals may therefore turn to collective bargaining as a method of perserving or recovering what they believe to be an exclusive work jurisdiction.

Another motivating factor may arise out of a desire to play a more significant or active role in the decision-making processes of the enterprise. An interest in direct participation in the decision-making of a firm is but a corollary of professional expertise. In this sense, claims for greater involvement in decision-making are based upon the premise

[10] See BELL, *supra*, p. 187.

[11] See CHARTIER, *The Management of Professional Employees* (1968)

that those persons who have undertaken protracted studies or acquired experience which give them a special ability to perform a given type of work, have the right to participate in decisions relating to that work and to share this decision-making power only with persons of at least equal competence.[12] However in a bureaucratic setting guided by managerial authority, salaried professionals may have no freedom to choose the direction of work and little or no control over the conditions under which they must work. Indeed, salaried professionals may not be considered as real workers or their contribution may be discounted because their efforts seldom result directly in a physical product and this only aggravates feelings of alienation.[13] The end result is that salaried professionals, having undergone a training that reinforces a strong sense of competence and autonomy, can find themselves distinctly subordinate to, in their perception, an insensitive managerial authority.

But muffled claims for greater job control may not be the central concern. In many instances salaried professionals turn to collective bargaining simply for economic reasons. For example, employed professionals may be paid in accordance with the internal job hierarchy of a bureaucracy which has little or no relationship to professional status, but lack personal mobility to react to these « unacceptable » pay scales because their skills are specific to the enterprise or the similarity in salary scales between firms may make moving pointless.

Financial considerations are very often the primary reason why intellectual workers paid from public funds opt for collective bargaining. In our so-called post-industrial society the government has become the single largest employer of intellectual workers, and indirectly, through public funding, supports the employment of many more. These workers are caught up in one of to-day's most perplexing employment dilemmas — the search for an appropriate mechanism to set the terms and conditions of employment of public employees or employees dependent upon public funds. Winning wage increases from the government is a far different matter than from private industry. The multiplication of government functions creates an unremitting need for new revenues and a concommitant public outcry against rising taxes. Increasingly the end result has been a decision to end or limit existing programs and to hold

[12] See GROSS, *When Occupations Meet: Professions in Trouble*, p. 45, Minneapolis, University of Minnesota (1967)

[13] See CUVILLIER, *Intellectual Workers and their Work in Social Theory and Practice* (1974) Int'l. Lab. Rev. 291 at 294.

down spending and this has had an adverse effect on wages and salaries. Indeed, one often gets the impression that the public expect intellectual workers who profess a devotion to work and to public service to be indifferent to economic advantages. Buffetted by these political winds, many salaried professionals have simply been driven to collective action with public school teachers, university faculty and hospital employees being good cases in point.

But why turn to collective bargaining? Why didn't salaried professionals turn to their professional associations for assistance? The answer is that most did at first, and these professional associations were unable or unwilling to grapple with employment related problems, leaving no alternative to collective bargaining for the salaried professional. On the whole, professional associations have shied away from direct confrontation with employers. It has been suggested that the associations have a practitioner orientation and cannot identify with the problems confronting salaried members or that the associations are dominated by employer oriented members who are unsympathetic.[14] But whatever the reason professional associations by themselves were unable to respond to the problems of their salaried members and collective bargaining was opted for by many.

SOME RECENT LEGISLATIVE RESPONSES

In[15] Ontario the Legislature has recently provided professional engineers with access to collective bargaining under *The Ontario Labour Relations Act*.[16] Section 6(3) stipulates that « (a) bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective bargaining. » The Board may include engineers in a bargaining unit with other employees only if a majority of the engineers wish to be included — in short, professional engineers have been given a craft status in Ontario. New Brunswick[17] has taken this craft concept further by providing that the members of the medical, dental, dietetic, architectural, engineering, and legal professions may engage in collective bargaining and each profes-

[14] For example, one study observed that a survey of over 3,000 engineers and scientists showed that 38 per cent of them were desirous of a future in administration, rather than in research or engineering. KLEINGARTNER, *Professionalism and Salaried Worker Organization* (1967) p. 80.

[15] This review is limited to private sector labour legislation.

[16] *R.S.O.* 1970, c. 232 as amended by 1975, c. 76

[17] *Industrial Relations Act*, R.S.N.B. 1973, c. 1-4, s. 1 (5) (b).

sion is entitled to a separate barbaining unit unless the members wish to have other employees included.[18]

Another approach adopted by the Federal Government[19] and Manitoba[20] concentrates less on the prototype professions by defining a professional employee as « an employee who (i) is engaged in the application of specialized knowledge ordinarily acquired by a course of institution and study resulting in graduation from a university or similar institution; and (ii) is or is eligible to be a member of a professional organization that is authorized by statute to establish qualifications for membership in the organization. »

Partnering this somewhat more expansive definition of a professional employee, the Federal Government has selected a more flexible approach to professional bargaining unit structures as well. Section 125(3) of the Code reads:

> Where a trade union applies under section 124 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsection (2)
>
> (a) shall determine that the unit appropriate for collective bargaining is a unit comprised of only professional employees, unless such a unit would not otherwise be appropriate for collective bargaining;
> (b) may determine that professional employees of more than one profession be included in the unit; and
>
> (c) may determine that employees performing the functions but lacking the qualifications of a professional employee be included in the unit.

and subsection 2 of section 125 provides:

> In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union.

Finally, neither the *Labour Code of British Columbia*[21] nor the *Saskatchewan Trade Union Act*[27] mentions the inclusion or exclusion

---

[18] Quebec follows this same approach essentially, although many more professions are included (advocates, notaries, physicians and surgeons, inspectors of anatomy, homeopathic physicians, pharmacists and druggists, dental surgeons, engineers, land surveyors, architects, forestry engineers, optometrists and opticians, and dispensing opticians). *Labour Code R.S.Q. c.* 141 as amended s.20.

[19] *Canada Labour Code* R.S. C. 1970 c L-1, Part V, S.C. 1972, c. 18, 5, 107 and s. 125 (3).

[20] *The Labour Relations Act,* C.C.S.M. c L-10 enacted by S.M. 1972, c. 75, s. 1 (t) and s. 28 (3). See also *Organization of Professional Engineers, etc.,* v. Manitoba Labour Relations Board (1976) W.W.R. 723 (Man. C.A.)

[26] *Labour Code of British Columbia* S.B.C. 1973, c. 122

[22] *The Trade Union Act,* 1972, S.S. 1972, c. 137

of professional employees and therefore they are subject to those statutes in the same manner as any other employee. This then represents a third approach.

CHALLENGE FOR PUBLIC POLICY

All salaried professionals should be able to engage in collective bargaining and this principle is gaining widespread acceptance. They face the same employment problems as others and therefore they ought to have the same rights as others in resolving these concerns. However the challenge for public policy relates to the way in which this result is to be effected. Are the prototype professions to be distinguished from other intellectual workers and provided with craft status as is the case in New Brunswick, or should the unwarranted exclusions simply be removed as in British Columbia and bargaining unit structures determined by reference to the traditional principles underpinning the concept of «appropriateness»? On the other hand, the *Canada Labour Code* and the *Manitoba Labour Relations Act* adopt positions somewhere in between these two extremes.

Who is a professional?

What is the rationale for limiting professional employee definitions to the prototype professions? While they can be distinguished from other employees because their non-salaried brethren achieved exclusive authority to regulate «the practising profession», should the existence of licensing, registration and certification statutes be relevant to the granting of a special status to these occupations under modern labour laws. Generally these statutes were enacted to protect an inexpert public from the unqualified or unscrupulous practitioner. However where the consumer is a small number of sophisticated employers of where the occupation does not consult or practise with respect to a broadly based lay clientèle, licensing statutes are less relevant and indeed less likely to exist. For example, Friedson has observed that «licensing is much less likely to occur on behalf of the scholar or the scientist, for they are devoted to exploring intellectual systems primarily for the eyes of their colleagues».[23] Moreover, today it is not unusual to find «accreditation» privately administered. The occupational qualification of the Ph.D. for a psychologist or university professor or the required eligibility for membership in the vast number of paramedical occupational

[23] See FRIEDSON, *Profession of Medicine* (1970) p. 74.

associations imposed by hospital hiring are illustrative of this phenomenon.[24]

This point takes on even greater significance when regard is given to the fact that the explosion of knowledge in modern society has caused the development of a great number of very sophisticated occupations that meet all the characteristics of «salaried professionalism». This being so, it appears unfair to grant a special status to only the prototype professions. Many occupations are now based on systematic knowledge or doctrine acquired through long prescribed training and more often than not those performing such work adhere to a set of moral norms where such norms are relevant.[25] Obvious examples include scientists, dietitians, occupational and speech therapists, social workers, psychologists, economists, nurses, mathematicians and professors. Is each group expected to lobby for special treatment and would special treatment along craft lines be practical?

The *Canada Labour Code* and the *Manitoba Labour Relations Act* have attempted to meet this problem by using a more comprehensive professional employee definition, but by limiting the term to those occupations having a professional organization that is authorized by statute to establish the qualifications for membership in the organization they continue to rely upon an unduly restrictive if not irrelevant condition. Another problem is their mutual requirement that a professional employee must apply specialized knowledge acquired by a course of instruction resulting in graduation from a university or similar institution. In a labour relations context, should a university degree be such a crucial factor in separating professional employees from other workers? For example, many technologists in the fields of health, science an communications are graduates of post-secondary institutions other than universities, i.e. community colleges, institutes. Would they come within the phrase «similar institution» and should they be so characterized as a matter of policy? Many of these occupations possess codes of ethics and their associations often play a vital role in developing the curriculum by which members are educated. Moreover, some of these associations are supported or referred to by private and public statutes.[26]

---

[24] See HALL, *The Paramedical Occupations in Ontario:* A Study for the Committee on the Healing Arts (1970); *Report of the Committee on the Healing* Arts (1970) v. 2.

[25] These are the two basic criteria of distinction suggested by WILENSKY, *The Professionalization of Everyone* (1964) 60 Am. J. of Soc. 137 at p. 139.

[26] For example, *The Radiological Technicians Act,* R.S.O. 1970, c. 399, and see

It is also important to bear in mind that in an area as dynamic as occupational change, many of these occupations are in an evolutionary state. A community college program today may be the basis of a university degree tomorrow. For example, in the United States, laboratory technologists are trained in universities whereas in Ontario they are educated in community colleges. Indeed it can be asked whether the difference between a community college education and a Bachelors program is any more significant than the educational distance between a B.A. (the dietitian), a M.A. (the social worker), and a Ph.D. (the psychologist). In fact some graduates of community colleges, like nurses, have achieved a substantial degree of « professional » recognition.

Another point to be made is that educational requirements are capable of manipulation by an occupation « on the make » and whether or not an occupation is engaged in such deception, educational requirements may not reflect the actual skill exercised in the workplace. While it is easy to identify different levels of education, as a general matter, it is much more difficult to determine whether the work performed by one occupation is any more difficult or deserving of special treatment than another. Who is to say that a physiotherapist performs a more complex function than a respiratory technologist although their levels of educational attainment are clearly distinct? On the other hand a lack of distinction in job duties may be the very reason why the salaried professional wishes to engage in collective bargaining, i.e. the continued conflict between engineers and engineering technicians.[27]

The most prominent legislative attempt to avoid an overly restrictive definition of professional employee and to accommodate these problems is section 2(12) of *The National Labour Relations Act*[28] in the United States. This section defines professional employee to mean:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the attempt produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced

---

generally Elizabeth MACNAB, *A Legal History of Health Professions in Ontario,* a study for *The Committee on the Healing Arts* (1970). See also *Ontario Public Service Employees Union and Stratford General Hospital and Association of Allied Health Professionals* (1976) OLRB Rep. 459.

[27] See *Association of Engineers of Bell Canada and Bell Canada,* Montreal, Quebec (1976) 1 Canadian L.R.B.R. 345 where a lack of distinction in job duties deprived a group of engineers of professional status under the *Canada Labour Code.*

[28] 49 Stat. 449 as amended by 61 Stat. 136 and 73 Stat. 519, 29 U.S.C.A. s. 141 et seg (amended).

type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes;

(b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a) and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

This definition appears much less restrictive than its Canadian counterparts and provides the National Labour Relations Board with a greater capacity to respond to the claims of all intellectual workers. I might also add that the definition appears most consistent with the dynamics of occupational change.

The Appropriateness of Craft Status

The issue of craft status as opposed to some form of broader based bargaining unit structure is a very important one. The principle of craft unionism is maintained when bargaining units are confined to members of a single profession or to specialized categories within a profession. The alternative, sometimes referred to as industrial unionism, combines two or more professional groups or professional and non-professional employees. As we have seen, those jurisdictions that have granted salaried professionals access to collective bargaining laws of general application have not adopted a common formula in this regard.

Ontario and New Brunswick have granted craft status to one or more of the prototype professions while leaving the evolving or « new » professions to the discretion of a labour relations board. (An exception is New Brunswick's treatment of dietitians). As mentioned, the difficulty with this approach is that the prototype professions are thereby treated different from other intellectual workers who cannot be significantly distinguished on the basis of skill, training and responsibility. On the other hand, if all these occupations were granted craft status it would mean an impossible proliferation of bargaining units in many instances. For example, consider the effect on hospital labour relations if pharmacists, physiotherapists, occupational therapists, speech therapists, social workers, psychologists, psychometrists, laboratory technologists, x-ray technologists, respiratory technologists, nuclear medicine technologists, dietitians and medical record librarians were provided with separate bargaining units. Fragmentation on this order would only aggravate counter-productive professional rivalries that already exist (and that tend to veto each other in any event) and meaningful

negotiation would likely be impaired. In fact, it is more than interesting to note that where, as in the construction industry, this fragmented approach was adopted, governments are now gradually moving toward more integrated forms of bargaining and collective agreement administration.[29]

British Columbia, Saskatchewan, and the earlier P.C. 1003 represent a second approach to this problem. This alternative makes no mention of professional exclusions and grants no statutory guarantee of craft status for any intellectual worker. It leaves the treatment of such occupations to the discretion of the labour relations tribunal administering the statute, presumably to be dealt with by reference to general labour law principles that have evolved over the years in defining the «appropriate bargaining unit».[30] Unfortunately, however, professionals did not fare very well at the hands of the Canada Wartime Labour Relations Board and this experience raises questions about the capacity of existing tripartite tribunals to recognize the distinctive interests of intellectual workers. Few, if any, of these tribunals include representation from the occupations with which this essay is concerned and as we have seen it is all too easy to characterize the claims of professionals for separateness as elitist and snobbish. Without their own representation on labour boards, intellectual workers may therefore find bargaining unit determinations unduly preoccupied by fears of work force fragmentation and concerns for the organizational structure of the employer. Accordingly, without building in sufficient institutional sensitivity to the reasons why salaried professionals wish to engage in collective bargaining, this approach may not be very helpful to them.

The provisions found in the *National Labour Relations Act* (NLRA) and the *Canada Labour Code* represent a mid-point between these two alternatives. Section 9 (b) (1) of the NLRA provides that the National Labour Relations Board may not group professional em-

[29] See Province of Ontario, *Report of the Industrial Inquiry Commission into Bargaining Patterns in the Construction Industry*, May 1976; First Report, *Special Commission of Inquiry into British Columbia Construction*, October 1975. However this is not to deny that the viable protection of craft interests is to a significant extent a function of bargaining unit size and large numbers of salaried professionals employed within a single bureaucracy, as is the case with nurses and teachers, may make it feasible to respect professional distinctions. But unless a special statute is enacted for specific industries or institutions, it is difficult to draft statutory language that can guarantee this right and yet provide the flexibility needed to deal with less monolithic work forces.

[30] These principles are summarized in *Usarco Ltd.* (1967) OLRB Report Sept. p. 526 and *Essez Health Assoc.* (1967) OLRB Report Nov. p. 716.

ployees and non-professionals in a single bargaining unit unless the majority of the professional employees vote for inclusion in such a unit. This section has been interpreted to mean that while the Board is required to differentiate professionals from non-professionals for bargaining unit purposes (remember the NLRA's expansive definition of a professional employee) it is not required to differentiate between professionals. However, applying its general principles of appropriateness, the Board has held that professional bargaining units should be confined to professionals having a community of interests.[31] This approach therefore precludes the Canada Wartime Labour Board type of decision and yet provides a tribunal with the flexibility required to tailor bargaining units to the diverse circumstances under which salaried professionals work.

The *Canada Labour Code* contains much more specific language dealing with two prominent work force situations that have caused difficulties in the salaried professional context — (1) a large number of persons with different professional backgrounds working side by side; and (2) the interdependence often found between salaried professionals and so-called para or non-professionals (i.e. the engineer and the engineering technician). By conditioning the grant of a craft-like bargaining unit by reference to these two situations, the legislative draftsman has tried to create a presumption in favour of craft bargaining and at the same time provide a more limited flexibility than that possessed by the National Labour Relations Board. Whether he has been successful or not still remains to be seen.[32]

CONCLUSION

The earliest debates on this topic centered on whether salaried professionals should be permitted to engage in collective bargaining. Many argued that it was «unprofessional» to belong to a trade union or that the collective bargaining process, centering on money, would undermine the professional status of those who engaged in it. But for

[31] See for example *Standard Oil* (1954), 107 N.L.R.B. 1524 and *Ryan Aeronautical Company* (1961), 132 N.L.R.B. 1160.

[32] In the recent *Bell Canada* decision (supra) the Board doubted that it could limit the application of section 125 (3) (c) to only those situations where the non-professionals would not outnumber the professionals. And in the *Professional Engineers* case (supra) the Manitoba Board refused to include engineers who were not employed in a professional capacity.

the large part, these arguments have been overcome. It is now generally understood that salaried professionals have turned to collective bargaining for many of the same reasons as other employees, indeed for many of the same reasons their non-salaried colleagues established professional associations and sought licencing statutes.[33] There is therefore nothing «unprofessional» about collective bargaining. In fact, it is through collective bargaining that an accomodation of the often conflicting cultures of professionalism and a bureaucracy may be achieved. Through the collective bargaining process professionals can achieve a greater say in the decision-making processes of the enterprise; working conditions more consistent with professional standards; as well as salary scales that attract and retain highly qualified members of the profession to salaried positions.

Today then the debate centers not so much on whether salaried professionals should be allowed to engage in collective bargaining but rather how should such rights be accommodated and here I suggest the response has been unduly narrow. The overwhelming reliance on such indicators as the existence of licencing statutes and university degrees ignores the dramatic growth of other intellectual occupations that do not enjoy one or both of these attributes and yet merit the designation «professional».

I accept that not all occupations requiring some form of post-secondary training can be considered to be professional occupations. Lines of demarcation must be drawn even though they are somewhat arbitrary at the boundary. But in drawing them regard must be had to the dynamics of occupational change and, once drawn, labour boards ought to be able to group different «professionals» where a broad community of interest exists or where bargaining unit fragmentation would make labour relations chaotic. However sight must never be lost of the fact that intellectual workers who can be considered to be professional employees have, as a group, a community of interest deserving of special treatment and preferably along the lines adopted in the United States in my opinion. Too often their interests have been resented or misunderstood by both their fellow employees and their employers and labour relations boards, without direction, have not always been sufficiently sensitive to their central needs.

[33] Indeed some might suggest that ethics are merely a form of collective bargaining at the professional level.

La négociation collective chez les professionnels

Plusieurs innovations législatives récentes des législateurs canadiens reconnaissent que les membres de nombreuses professions libérales doivent affronter les mêmes forces sociales et économiques que la masse des travailleurs salariés. C'est le cas des architectes, des dentistes, des avocats, des médecins et des ingénieurs professionnels. Ces innovations ont accordé aux membres salariés de l'une ou de plusieurs de ces professions l'accès à la négociation collective, et en ce faisant elles décidaient que ces professionnels devaient faire partie d'unités de négociation spéciales.

Parce que les forces qui ont poussé les professionnels salariés à se tourner vers la négociation collective s'accélèrent, d'autres gouvernements devront s'engager dans la même voie et nombre des régimes déjà existants prendre une plus grande extension.

Le nombre de salariés professionnels s'accroit sans cesse sinon d'une façon dramatique, et les grandes institutions bureaucratiques où ils trouvent à s'embaucher ne s'adaptent pas volontiers aux valeurs du professionalisme. De plus, les associations professionnelles n'ont pas été en mesure de trouver des solutions valables aux problèmes qui se posent aux professionnels en tant que titulaires d'emplois n'offrant guère d'autres mesures à substituer au régime de la négociation collective. Donc, alors que, au cours des premières discussions, on se demandait si l'on devait permettre aux professionnels salariés de négocier collectivement, on en est graduellement venu à comprendre qu'ils devaient avoir le droit de le faire pour les mêmes motifs que les autres employés, à vrai dire pour les mêmes motifs que leurs collègues indépendants ont fondé leurs associations professionnelles et ont défendu leur droit d'exercice de leur profession. La négociation collective peut canaliser leurs réclamations en matière de contrôle des emplois, d'établissement d'échelles de salaire « professionnel » et de meilleures conditions de travail. En fait, c'est au moyen de la négociation collective qu'il est possible d'arriver à concilier les cultures souvent en conflit du professionnalisme et de la bureaucratie.

Cependant, de nouvelles questions ont été soulevées. Les intérêts des professionnels salariés à leur travail sont comparables à ceux d'un nombre de plus en plus grand de travailleurs intellectuels. Ce nombre croissant de travailleurs intellectuels ainsi que leur « professionnalisation » remet en question l'à-propos, en fait la justification de mettre à part les membres salariés des professions-type quant à la façon de considérer leur statut spécial de négociation collective. Par exemple, en Ontario et au Nouveau-Brunswick, la législation concernant la négociation collective ne s'applique qu'aux salariés membres de professions données où l'on accrédite des unités de négociation professionnelle, c'est-à-dire des unités de négociation restreintes à une seule profession. Ceci oblige à se demander si l'accréditation par profession est une politique souhaitable et si les législateurs et les commissions de relations de travail n'auront pas à faire face à des réclamations dans le même sens des membres d'autres occupations intellectuelles qui possèdent pour la plupart, sinon toutes, la forte empreinte du professionnalisme.

Il est évident qu'une pareille attitude de la part des travailleurs intellectuels conduisait à une fragmentation inapplicable de la structure des unités de négociation. Mais s'ensuit-il qu'on ne doive accorder aucune considération particulière à une occupation intellectuelle qu'elle appartienne ou non à une profession type comme c'est le cas en Colombie-Britannique et en Saskatchewan? On a fait un effort véritable pour résoudre ces problèmes dans le Code canadien du travail et dans la Loi des relations de travail du Manitoba, qui contiennent, l'un et l'autre, une définition générale de l'employé profes-

sionnel, et le Code canadien prévoit une façon vraiment nouvelle de fixer les unités de négociation des professionnels salariés. Toutefois, le critère exclusif de l'existence de droit de pratique et de brevets universitaires ne tient pas compte de la croissance de l'accroissement dramatique d'autres occupations intellectuelles qui ne bénéficient pas de l'un ou de l'autre de ces attributs mais méritent tout autant une désignation professionnelle.

D'autre part, cela ne veut pas dire que toutes les occupations de cols blancs exigeant un certain type de formation post-secondaire devraient être considérées comme des professionnels salariés. Il faut tirer des lignes de démarcation même si elles peuvent être à la limite arbitraires. Mais en le faisant, on devrait apporter une attention sérieuse aux changements qui se produisent dans les types d'emplois. Une fois tirées ces lignes, les commissions des relations du travail devraient avoir le pouvoir de regrouper différents groupes de professionnels salariés qui possèdent une certaine communauté d'intérêts dans une seule unité de négociation. Le National Labour Board aux États-Unis fournit un excellent exemple de cette approche qui tient compte de l'ensemble de ces considérations.

Enfin, quelle que soit l'approche spécifique que l'on choisisse, certaines considérations spéciales s'imposent. Le fait qu'un groupe de travailleurs intellectuels possède une communauté d'intérêts a souvent été une chose ignorée par leurs employeurs, mal comprise par leurs compagnons de travail et négligée par les commissions des relations de travail. Pour ces motifs, l'attention qu'ont portée le gouvernement canadien et celui du Manitoba aux professionnels salariés constitue un progrès bienvenu.

TAB C

The Report of the

Commission of Inquiry into the Public Service and Public Sector

Volume 1
FINAL REPORT

THE PUBLIC SERVICE IN BRITISH COLUMBIA

June 1993

Judi Korbin, Commissioner

The Province of British Columbia

TAB C

Canadian Cataloguing in Publication Data
British Columbia. Commission of Inquiry into the Public Service and the Public Sector.
The report of the Commission of Inquiry into the Public Service and the Public Sector

"Judi Korbin, Commissioner"
ISBN 0-7718-9372-8

1. Civil Service - British Columbia - Personnel management. 2. Civil service positions - British Columbia. 3. Contracting out - British Columbia. I. Title.

JL432.Z13P44 1993 354.711001 C93-092252-2

Copies of this document are available from:

Crown Publications Inc.
546 Yates Street, Victoria, B.C.
V8W 1K8

Phone: (604) 386-4636
Facsimile: (604) 386-0221

TAB C

Province of
British Columbia

Commission of
Inquiry into the
Public Service and
Public Sector

June 11,1993

Honourable Glen Clark
Minister of Finance and Corporate Relations
Rm. 152, Parliament Buildings
Victoria, BC
V8V 1X4

Dear Minister Clark:

As Commissioner of the Inquiry into the Public Service and Public Sector, I respectfully submit Volume 1 of my final report, 'The Public Service in British Columbia'.

Volume 2 of the final report, 'The Public Sector in British Columbia', is nearing completion and I expect to transmit it to government in the near future.

BC's public service employs almost 40,000 public servants who make a vital contribution to the well being of all British Columbians. I have found a high level of commitment to the public welfare among public service employees at every level. It is the objective of this report to enable those employees to improve the effectiveness of the public service.

In the course of my review, I have also identified significant problems with the current administration of the public service. This report contains recommendations to allow government to address these problems, including a draft, revised Public Service Act. It is my conviction that these recommendations, undertaken in the spirit of a new statutory framework, are in the interests of the public service and the people it serves.

Yours truly,

Judi Korbin
Commissioner

TAB C

Peter Burton .....Commission Counsel

PROJECT DIRECTORS

Stuart Lamb
Jan Mears
Elaine Murray
Bob Whitelaw

Nancy Glass .....Librarian
Sarah Levine .....Research Officer
Irma Mattes .....Administrative Director

ADMINISTRATIVE STAFF

Carol Fleming
Letty Regis
Diana Seehagen
Tina Yano

The commission had the benefit of advice from a volunteer Advisory Committee, consisting of the following individuals:

Wendy Devine .....Harris & Company
George Ford .....Office of the Premier
Ken Georgetti .....BC Federation of Labour
Miriam Gropper .....McTaggart Ellis & Company
Jim Matkin .....Davis & Company
Vince Ready .....Arbitrator/Mediator
Lynn Smith, Q.C. .....University of BC

The Advisory Committee members had the opportunity to review the report and made suggestions and comments. However, the report does not purport to reflect a consensus of their views nor does it necessarily reflect views of any individual member of the Advisory Committee.

EDITOR

Geoff Holter

The commission also had the benefit of assistance from a volunteer editor,

Kelley Korbin-McGregor

TAB C

TERMS OF REFERENCE

1. To inquire into and report on ways to enhance

   (a) the delivery of public services through an independent professional public service, and

   (b) the personnel and labour relations environment within which operate those bodies created, financed or maintained by the Provincial government for public purposes.

2. To review the delivery of personnel and labour relations services relating to the recruitment, hiring and promotion of employees in the public service.

3. To review policies and procedures within the public service relating to the contracting for services outside the public service.

4. To review current structures and practices for the public service relating to collective bargaining, dispute resolution and exclusion from collective bargaining units under the *Public Service Labour Relations Act* and the *Industrial Relations Act*.

5. To recommend the most cost efficient and effective personnel policies and services for the public service and bodies described in section 1(b).

6. To recommend the most appropriate role, if any, for government to

   (a) rationalize compensation levels,

   (b) define collective bargaining structures,

   (c) standardize employee benefits, and

   (d) collect, analyze and distribute information concerning the cost of services by employees or through contracts described in section 3 of these Terms of Reference;

   as these relate to bodies described in section 1(b) or the public service.

THE PUBLIC SERVICE IN BC

Contents

TAB C

INTRODUCTION

On March 6, 1992, the government of the Province of British Columbia established the Commission of Inquiry into the Public Service and Public Sector. Judi Korbin was named as the sole commissioner under Part II of the Inquiry Act and was directed to report to the provincial cabinet through the Minister of Finance and Corporate Relations, the Honourable Glen Clark.

The commission's mandate was deliberately broad in scope, encompassing all areas of human resource management in the public service and the public sectors in British Columbia. The commission's task was outlined by the Premier on March 6, 1992, when he said:

> *In these tough economic times, we must tackle the issues of spending waste and make sure we make the most efficient use of government resources. Ms. Korbin's commission will provide a framework for restoring a better system of checks and balances*

The commission divided its mandate into two broad areas - the public service and the public sector. Each of these areas was subdivided into a number of projects, and the commissioner had the support of the commission staff and a volunteer advisory committee in completing those projects. This first volume of the commission's final report is called, 'The Public Service in British Columbia'. Volume 2, 'The Public Sector in British Columbia', will be finished in the near future and presented to government upon completion.

Human resources are the most costly component in the delivery of services to the public, consuming some $10.9 billion as compensation costs - which represents 60 per cent of the government's annual budget of $19 billion. The commission's challenge was to recommend to government ways to continue to provide an acceptable level of services to the public without unduly burdening the taxpayers.

The Public Service in BC

For the purposes of the commission's work, the public service includes those who work directly for the government of BC and those who provide services to government under commercial, consulting, and information systems contracts.

The public service is composed of the 18 ministries and a number of other agencies of government that provide services to the public. Approximately 40,000 employees work in the public service. The government exerts direct control on compensation expenditures in the public service and these are projected to amount to $1.5 billion or 8 per cent of the total 1993-1994 budget. BC's public service is highly unionized and issues relating to employer/employee relations in government inevitably affect government's relations with the unions representing its employees.

There are two types of employment relationships for public service employees. Employees are either direct employees of government through the public service, or individuals and organizations performing services for government under contract. Employees who have contractual relations with the government can be: personal service contractors, contractors who provide temporary and clerical help, systems contractors, or commercial and consultant contractors. There are approximately 9,000 consulting and commercial contracts in any year employing an unknown number of individuals who, it can be said, work indirectly for the provincial government.

TAB C

The focus of the commission's work in the public service was to identify means to allow government to be a leader in service provision and human resource management. The commission consulted widely with public service employees, managers, unions, deputy ministers and government generally, about the demands placed upon the public service and the nature of the human resources required to meet those demands. In its work, the commission found that there was consensus on four principles. The four principles are as follows:

1. accountability
   - in order to create a well functioning human resource management system, organizations, institutions and individuals with authority and responsibility must be accountable for the decisions they make
   - authority for decision making should be located where accountability for the decision will rest

2. coordination
   - a decentralized system of service delivery requires coordination of activities to ensure that consistency is achieved in the treatment of similar activities

3. effective management of human resources
   - delivery of quality services to the public requires effective human resource management to identify and eliminate duplication and inefficiencies and to ensure that employees have the opportunity to make effective contributions to government operations

4. balancing employer/employee and union/management interests
   - effective delivery of public services demands that representatives of management, labour, employers and employees in the public service strive for cooperation, respect and professionalism in their relationships.

The commission relied upon these four principles in conducting its comprehensive analysis of current public service human resource policies and practices, and in making its recommendations for a new framework for human resource management. Volume 1 of its final report contains findings and recommendations directed toward a renewal and revitalization of the public service. These are based on a proposal for a new Public Service Act which would be the framework for this renewal. The commission did not find any need to propose modifications to the Public Service Labour Relations Act at this time.

The Commission's Review of the Public Service

The commission was asked by the government:

- to inquire into and report on ways to enhance the delivery of public services through an independent professional public service
- to review the delivery of personnel and labour relations services relating to the recruitment, hiring and promotion of employees in the public service
- to review policies and procedures within the public service relating to the contracting for services outside the public service
- to review current structures and practices for the public service relating to collective bargaining, dispute resolution and exclusion from collective bargaining units under the Public Service Labour Relations Act (PSLRA) and the Industrial Relations Act (now the Labour Relations Code)
- to recommend the most cost efficient and effective personnel policies and services for the public service.

The commission divided its review into three areas:

1. a review of human resource management in the public service
2. a review of contracting in the public service
3. a review of the PSLRA

The contracting section was in turn divided into two separate topics:

- the shadow work force
- commercial and consultant contractors.

During the course of its review of the public service, the commission was asked to play a facilitating/adjudicating role in four specific disputes within the public service. These concerned: Crown Counsel (conversion to employment status), BC Nurses' Union (BCNU) and Union of Psychiatric Nurses (UPN) classification disputes, a resolution to the employment status of nurses in certain correctional facilities, and an issue regarding rights to challenge exclusions under the PSLRA. In all cases, the commission worked with the parties to reach an acceptable conclusion, or adjudicated a result.

TAB C

Historical Context

In order to place current human resource issues in their proper context, a brief history of the events that shaped personnel management over the past 20 years in the BC public service is provided.

Personnel matters of particular concern to government included ensuring that selection of employees was built on fair and impartial processes, that redress systems were in place and working well, and employees were trained.

Previous governments have identified these issues and have attempted to address them in various ways. Despite periodic reviews into public service personnel management practices, the government is still grappling with many of the same issues today.

Pre-1973

Prior to 1973 public service employees in British Columbia had no collective bargaining rights. Personnel management was almost entirely centralized in the Civil Service Commission (CSC), an independent agency. The BC Government Employees' Union (BCGEU), (as it is now called), has existed since 1919, but was not recognized as the bargaining agent for public service employees until the passage of the PSLRA in 1974.

Before that time, there was a 'consultative' practice in place. Discussions were held between the CSC and the BCGEU about compensation and terms and conditions of employment. The CSC then made recommendations to government, which unilaterally imposed whatever conditions it saw fit.

The CSC centrally controlled recruitment, selection, promotion, training, classification, ministry organization, and other human resource management functions. Deputy ministers had limited delegated authority in order to make temporary appointments, but that was constrained by the strict 'establishment control' system which centrally controlled the existence and classification of every position in government.

The CSC was an independent body, appointed by government and subject only to removal by the legislature prior to expiry of the appointment term of incumbent commissioners. Because of its independence, it was its own appeal body. Public service appointments were required to be made according to the 'merit principle', which was generally undefined. However, it was clear that, where possible, promotion of existing employees should take precedence over bringing new employees into government. The commission's analysis shows that the commitment made in the 1970s was no longer shared by the government throughout the 1980s.

Introduction of Collective Bargaining

During the late 1960s and early 1970s government employees were being granted collective bargaining rights in other provinces, as well as at the federal level. In this vein, in October 1972, the newly elected government of BC appointed then chief personnel officer of the CSC, Mr. R.D. Higgins, as chair of a Commission of Inquiry into Employer/ Employee Relations for the Public Service.

Three months later, he submitted his report to the government. Based on this report the government introduced and passed the Public Service Act (PSA) and the PSLRA in the fall 1974 legislative session.

The most significant recommendation of that report was that collective bargaining rights should be introduced for public service employees. The report contained specific recommendations as to how this should be accomplished.

Further, the report recommended that the Treasury Board be the employer's bargaining agent, supported by a personnel policy secretariat. Instead of accepting this, the government decided that the existing Public Service Commission (PSC) should be continued and have added responsibility for labour relations matters.

The report recommended the creation of two bargaining units - one for licensed professionals and one for all other public service employees. A year later, government agreed to the creation of a third bargaining unit for nurses. When the PSLRA was introduced in the legislature in 1974 this structure was formalized. It remains unchanged to this day.

The report recommended the establishment of a Public Service Adjudication Board which was to be responsible for hearing disputes regarding exclusions from union membership, appeals on job competitions and grievances. This too was accepted, but appointments to the board were never made and it never became fully operational.

In his report, Higgins recommended that the scope of bargaining be as broad as possible but that it not include the merit principle or its application. As a result of consultation on these recommendations, the act when introduced, allowed for negotiations between the parties of the procedures to be followed in applying the merit system.

The report recommended that those employees who 'performed managerial or confidential' roles be excluded from union membership with such designation to be agreed upon by the parties. This was accepted and implemented.

Finally, the report contained recommendations regarding training of public service employees, both specifically related to labour relations and generally. This was accepted and implemented, but never vigorously pursued. While several major recommendations of the Higgins Report were enacted, many issues, such as training and the implementation of the Public Service Adjudication Board were not. As a result, there still exists today a need for a fair public service appeal process for appointment decisions.

In many respects the Higgins Report was the starting point for the current labour relations and human resource management structures in place today.

By the mid-1970s the government of the day had commissioned an inquiry into broad public sector labour relations matters. Mr. G. Leslie was appointed to conduct this review. Although the terms of reference included the broad public sector, he reviewed certain issues in the public service and submitted minor recommendations that pertained to the PSA and PSLRA.

These acts were amended in 1976 to establish the Government Employee Relations Bureau (GERB), with responsibility to act for the employer in matters of collective bargaining in the public service. The duties of the PSC were limited to other human resource functions.

The creation of GERB, and other changes, began a new era of human resource management in the public service where the focus was mainly on labour relations issues and not on other human resource issues. The legacy remains in 1993.

TAB C

In 1977, the government asked Mr. Higgins to prepare a progress report on the implementation of his earlier recommendations and to analyze the first few years of collective bargaining experience in the public service. In a report dated March 14, 1977, Higgins' made the following recommendations:

- that the process regarding exclusions be clarified, since this had become an irritant
- that the role of Treasury Board as employer be clarified, and that the quality of bargaining mandates provided to negotiators be improved
- that the three public service employee bargaining units be collapsed into one bargaining unit
- that the application of the merit system be removed from the scope of bargaining
- that the Public Service Adjudication Board be appointed.

With the exceptions that the three employee bargaining units were maintained and the application of the merit system remained subject to negotiation, most of these recommendations were implemented.

Negotiation of the Merit System

From the mid-1970s to 1983, negotiations proceeded between GERB and the BCGEU over the application of the merit system. These continued until agreement in principle was finally reached on most issues. The parties agreed to submit the remaining issues to binding arbitration.

Prior to the arbitration hearing, GERB negotiators discovered that the government was not prepared to accept the agreement they were proposing which included negotiated weights for the factors of merit. The government made it clear that the negotiators had exceeded their mandate. In particular, the government felt that the proposed system was too inflexible to allow effective recruitment and selection. Recruitment and selection issues continue to be a considerable challenge today.

Decentralization of Control

During the restraint period of the early 1980s, ministries found it difficult to comply with government's requirements within the constraints imposed by a centrally and independently administered human resource agency, the PSC. In particular, controls on organizational design and staffing were viewed by management as inflexible. In addition, many ministries did not believe that centralized training adequately met their particular requirements.

At the time, management thinking in general was focused on 'let the managers manage'. The idea was that if managers are to be held accountable for specific results, they must be given authority to manage their area as they see fit, within general constraints.

These ideas led government to take measures to decentralize authority in the public service. In particular, these included:

- the implementation of the Full Time Equivalent (FTE) system
- the creation of the Government Personnel Services Division (GPSD).

Decentralization meant that in 1984, human resource functions were fully delegated to ministries, and GPSD was created. In 1985, a new PSA (which is still in place today) was introduced and passed to legitimize the changes.

GPSD was created in essentially the same form as it exists today. Human resource functions of staffing and training were largely transferred from the PSC to ministries, subject to standards and policies developed by GPSD. The central labour relations and human resource functions of GERB and PSC were amalgamated in GPSD.

The mandate and duties of GPSD when it was established were set out in a '*Statement of Branch Roles and Operating Philosophy*' as follows:

> *government's objective ... is that ministries will ... address and resolve personnel issues on a corporate basis*
>
> *the agency was being created to enable government to ensure its agenda was being implemented*
>
> *the division was responsible for, among other things, developing and communicating policies, establishing monitoring and auditing systems, providing technical expertise and advice, identifying significant trends and issues, and making specific decisions where consistency is critical*
>
> *policies were to be developed with involvement from ministry staff, but with strong central leadership to ensure a corporate perspective*
>
> *the division had clear central authority for labour relations, particularly collective bargaining, to ensure consistency*
>
> *monitoring and auditing were perceived as crucial to ensure that policies were implemented consistently and adhered to across ministries*
>
> *an efficient system for collecting and providing personnel management information was necessary.*

The current perception by people at all levels of the public service is that the philosophy was never fully implemented. GPSD initially focused on developing policies at the expense of committing staff resources to ensuring ministry compliance. Even when serious abuses of delegated classification authority were revealed by GPSD, there was no government will to enforce changes, so auditing was perceived as a waste of effort.

Another problem was that essential human resource information was simply not available centrally. In fact, the lack of data has been a serious impediment to the work of this commission.

In general, GPSD, like GERB before it, is more focused on labour relations issues than on human resource issues. Certainly, from 1984 to 1991, the government of the day put its emphasis on labour relations.

TAB C

Privatization

Throughout the restraint years and the rest of the 1980s, the government followed a policy of privatization. This was an international trend, usually based on a review of whether specific activities needed to be undertaken by government, or whether the activities were more appropriately provided by the private sector.

In BC, a process was put in place to apply objective criteria to identify programs that could be privatized. Compared with many governments, the BC government did not have a lot of direct control over activities that are not usually considered part of core government. However, the political imperative was to reduce the size of the public service. As a result, a number of core government services were privatized. These are generally units that, once privatized, rely completely on government as their sole or primary source of revenue.

While the size of the direct public service has not changed dramatically over the past nine years, the shape of the public service has. The number of service delivery employees has been reduced substantially while the number of management employees has been increased dramatically in part due to the requirement to manage external contracts. Figure 1 illustrates the point:

FIGURE 1
PUBLIC SERVICE ACT EMPLOYEES: 1983 & 1992*

EMPLOYEE GROUP	1983 NUMBER OF EMPLOYEES	1983 % OF PUBLIC SERVICE WORKFORCE	1992 NUMBER OF EMPLOYEES	1992 % OF PUBLIC SERVICE WORKFORCE	% CHANGE
BCGEU	36,072	83.9	29,732	76.1	-17.6
PEA	1,101	2.6	1,501	3.8	+36.3
NURSES	2,666	6.2	2,764	7.1	+3.7
Total Bargaining Unit	39,839	92.7	33,997	87.0	-14.7
Management	2,442	5.7	3,771	9.7	+54.4
Order in Council	240	0.6	227	0.6	-5.4
Physicians	95	0.2	60	0.2	-36.8
Other**	354	0.8	1,003	2.6	+183.3
Total Excluded	3,131	7.3	5,061	13.0	+38.1
Total Government	42,970	100.0	39,058	100.0	-9.1

* Data effective December each year. Includes estimates made for the Liquor Distribution Branch for 1983.

** 'Other' includes primarily statutory and confidential non-management exclusions.

Source: Government Personnel Services Division

But Figure 1 only tells part of the story. Government revenues and expenditures for the same period are as follows:

FIGURE 2 - BC CONSOLIDATED REVENUE AND EXPENDITURE

FISCAL YEAR	REVENUE $(MILLIONS)	EXPENDITURE $(MILLIONS)	SURPLUS/DEFICIT $(MILLIONS)
1992-93 *	16,022.0	17,970.0	-1950.0
1991-92	14,799.0	17,154.4	-2,355.4
1990-91	14,437.1	15,062.8	-625.7
1989-90	13,497.1	13,412.7	+84.4
1988-89	12,261.2	11,990.4	+270.8
1987-88	11,006.6	11,080.1	-73.5
1986-87	9,415.0	10,575.7	-1,160.7
1985-86	9,097.0	10,073.4	-976.4
1984-85**	8,773.5	9,767.4	-993.9
1983-84	7,344.3	8,356.4	-1,012.1

* Forecast per 1993 Budget.

** From 1984-85 onwards, a number of revenue items such as MSP premiums which were previously netted off from expenditures have instead been added to revenues.

Source: Quarterly Financial Reports and 1993 Budget - Ministry of Finance

FIGURE 3 - PUBLIC SERVICE ACT EMPLOYEES

MINISTRY	PSA EMPLOYEES Number of Employees	% of PS Workforce	# FTES 92-93 APPROVED Number of FTE's	% of PS Workforce
DIRECTLY WITHIN MINISTRY				
Aboriginal Affairs	103	0.3%	80	0.3%
Advanced Education	397	1.0%	332	1.1%
Agriculture	501	1.3%	448	1.5%
Attorney General*	9,761	25.0%	5,692	19.3%
Economic Development	636	1.6%	629	2.1%
Education	448	1.1%	406	1.4%
Energy, Mines & Petroleum Resources	462	1.2%	391	1.3%
Environment, Lands & Parks	2,340	6.0%	2,337	7.9%
Finance & Corporate Relations	1,322	3.4%	994	3.4%
Forests	4,391	11.2%	4,205	14.2%
Government Services	852	2.2%	292	1.0%
Health	5,763	14.8%	4,946	16.7%
Labour & Consumer Services	376	1.0%	294	1.0%
Municipal Affairs	610	1.6%	568	1.9%
Premier's Office	69	0.2%	70	0.2%
Social Services	4,985	12.8%	4,579	15.5%
Tourism	354	0.9%	327	1.1%
Transportation & Highways	2,861	7.3%	2,741	9.3%
Women's Equality	75	0.2%	65	0.2%
Total	36,306	93.0%	29,396	99.5%
REPORTING TO LEGISLATURE				
Legislative Library	34	0.1%	N/A	N/A
Auditor General	96	0.2%	90	0.3%
Commission on Resources & Environment	16	0.0%	18	0.1%
Ombudsman	47	0.1%	43	0.1%
Total	193	0.4%	151	0.5%
SOCIETIES WITH PSA EMPLOYEES				
BC Mental Health	1,850	4.8%	N/A	N/A
Glendale Lodge, Tillicum and Veterans' Care Society, Oak Bay Lodge Society	709	1.8%	N/A	N/A
Total	2,559	6.6%	N/A	N/A
TOTAL	39,058	100.0%	29,547	100.0%

Note: Data effective December, 1992.

*Includes Liquor Distribution Branch.

Source: Government Personnel Services Division

Although the direct public service decreased through this nine year period, government expenditure continued to increase steadily.

There is considerable debate about the ultimate extent of privatization, which elements, if any, were justified, and whether the result is more or less costly. However, there is no doubt that one lasting result of the program was the damage it did to morale and employee relations throughout the public service. That is the important point for the purposes of this report.

Description of the Direct Public Service Today

The public service is comprised of those public sector employees who are direct employees of the government. As of December, 1992 there were 39,058 employees in the public service.

The chart shows both approved FTE's and the actual number of public service employees, as of December 1992. An FTE (full-time equivalent) is a measure used to represent the employment of one person for one full year or the equivalent thereof (for example, the employment of two persons for six months each). FTEs do not equate to the number of employees. The FTE System converts the number of part-time employees, including auxiliaries or employees who job share (two employees share one job and equate to one FTE), into full-time equivalents. The number of employees is always greater than the number of FTEs.

TAB C

These employees were organized into 18 ministries and subsidiary organizations providing a broad range of public services in BC. Those services range from the delivery of social and health services, to the public service's role in enhancing, encouraging and coordinating economic development.

The distribution of public service employees across the ministries is shown in Figure 3.

The total public service payroll in the 1992-93 fiscal year was $1.5 billion out of a total government expenditure on compensation in the broad public sector of at least $10.4 billion.

TAB C

HUMAN RESOURCE MANAGEMENT IN THE PUBLIC SERVICE

Project Overview

In the public service, the commission reviewed the following:

- the relationship of the central human resource agency, GPSD to line ministries
- the merit principle and its application in the hiring, recruitment, selection and promotion of public service employees
- the appeal system for those appointments
- relations between the government and its unions
- issues affecting the management/exempt group
- training and development of public service employees
- job classification and responsibility for employment equity in the public service.

Commission Process

Approximately 130 participants from the public service met in Vancouver on March 10-12, 1993 to address the challenges of renewing and revitalizing the public service of BC. The premier, cabinet ministers, leaders of all of the public service unions, representatives of public service managers and public service employees met with the commission to chart new directions for the public service into the twenty-first century. An observer from the official opposition was also present. This was the first such gathering in the history of the public service of the province. Representatives of the deputy ministers, the government managers, and the four unions are continuing a forum through which consultation and action can continue to occur in areas of common concern and interest. The ongoing initiatives sponsored by this group will focus on the improvement of the delivery of public services to British Columbians.

In a letter to public service employees following the forum, the Premier said:

> *I left the Forum on the Revitalization and Renewal of the Public Service impressed with the intelligence and dedication of all who attended. The degree of commitment to improving the conditions and relationships in the workplace was profound. The challenge to all public employees is to reflect these values and goals in the performance of their responsibilities. Clearly, government has a leadership role to play in this regard.*

In the months leading up to the conference, the commission conducted extensive formal and informal consultations on the public service issues listed in the overview.

TAB C

The commission, assisted by staff seconded from GPSD and BCGEU, organized focus group discussions with line managers and with representatives of the four bargaining units. In total, 84 people participated in these half-day sessions in Victoria, Vancouver, Kamloops and Prince George. Public meetings were held in each community — 240 people turned out to make oral and written submissions on public service issues contained in the commission's terms of reference.

GPSD assisted commission staff by providing available data on the public service workforce including demographics, gender, occupational group data, bargaining unit breakdowns, turnover and age profiles. The commission designed and administered a questionnaire to collect the remaining data which GPSD was unable to provide.

Meetings were held between commission staff and the Deputy Ministers' Human Resources Committee, the Council of Directors of Human Resources/Personnel, GPSD staff, personnel staff from the Ministry of Health and the Ministry of the Attorney General, representatives of the opposition parties in the legislature, staff of the Professional Employees Association (PEA), the BC Government Managers' Association (BCGMA), the BCNU and the BCGEU.

More than 100 letters and submissions were received from a number of these groups, as well as from individuals in the public service.

Issues Identified

Submissions to the commission by employees at every level of the public service confirmed that with respect to human resources, each ministry operates in a highly independent fashion. There is little overall government perspective or consistency of application in matters such as recruitment, selection processes and classification. Notwithstanding the myriad policies on various human resource issues, these policies are generally not monitored for compliance. Essential management information on human resource practices is not available. As a result, employees are confused about what the human resource policies are.

The commission's task was to find the proper balance between central resourcing and ministry application to best meet the human resource needs of the public service in the 1990s.

THE MERIT PRINCIPLE

The present PSA was proclaimed in 1987. It requires that all recruitment and promotion decisions in BC's public service must be based on the principle of 'merit'. The act defines the factors to be considered in making selection decisions as: education, skill, past work experience and years of continuous service in the public service.

Most Canadian jurisdictions apply the merit principle to public service appointments. The definition and application in each province and in the federal government vary significantly from each other, but the purpose of the merit principle is consistent. The objective of each, as in BC, is to ensure that the 'best' person is selected for appointment to public service positions.

Each statute contains exceptions to the merit principle. These generally fall into two categories: order-in-council (OIC) appointments which are used for senior executives and political appointments, and direct appointments to address special needs such as lateral transfers for compassionate reasons or demotions.

A number of issues arise that are addressed in a different fashion in each jurisdiction. BC recognizes continuous length of service as a factor, but does not recognize career development needs of existing employees in the statute. Alberta gives preference to in-service applicants. In Nova Scotia, seniority is a tiebreaker for equally qualified candidates. In Manitoba, the following provision is found in the Civil Service Act, s.13(2):

> *Selection for appointment, promotion or transfer to a position shall be based on merit, with a view to developing a civil service comprising well qualified personnel with abilities, skills, training and competence required to advance from the level of initial appointment through a reasonable career consistent with the type of work and the classes of positions pertinent thereto.*

Federally, the merit principle has additional factors such as, language and residence recognizing the greater diversity required of a national system.

In other Canadian jurisdictions, certain aspects of public service appointments are the subject of collective bargaining. However, in BC under section 13 of the PSLRA (1979 RSBC c. 346) certain topics are excluded from the application of collective agreements including:

13(c) the principle of merit and its application in the appointment and promotion of employees, subject to s. 5(3) of the PSA.

The definition of merit is accomplished through a staffing policy directive issued by GPSD. This directive was developed following some limited consultation with the public service unions but did not have their agreement. Currently, the application of the merit principle is delegated by GPSD to the ministries and operating agencies of government for implementation.

It is the commission's view that the concept of the merit principle is sound. What requires examination are the specific factors of merit and the application of the merit principle to the practical business of staffing the public service.

Many employees and potential employees in the public service believe that the merit principle has not been applied in a fair and consistent fashion for a number of years. Both the Council of Directors of Human Resources/Personnel and the BCGEU in their submissions to the commission, were critical of aspects of the application of the merit principle.

The council advised that the current application

> *...results in an extremely rigid application of the selection process which may create operational inefficiency, be incompatible with employment equity objectives, and be costly. In reality there is a considerable amount of entry level and auxiliary recruitment which is not in compliance with the prescribed merit process.*

TAB C

The council suggested that a revised or new act define merit but that it exempt certain types of appointments:

> *Direct appointments - Staffing actions that may be exempt from the normal selection process, including the eligibility to appeal, are proposed as follows:*
>
> - *lateral transfers and demotions (contained in the current PSA)*
> - *appointments expected to be less than seven months (auxiliary and temporary appointments)*
> - *secondments from outside the public service*
> - *in the absence of an eligibility, list qualified candidates from competitions for the same job held within the last six months*
> - *individual(s) are performing jobs of a program or responsibility that is transferred from outside of government to within government - e.g. the need to transfer employees of the BC Trade Development Corporation into the public service*
> - *where it is in the best interests of the public service - e.g. redundant support staff in a minister's office who are OIC appointments; e.g. personal placement program, internship programs for designated groups, co-op program.*

The BCGEU submitted that the problems with the current system could be rectified by acceptance of the following recommendations:

> 1. *administration of the appointment process through an independent public service employment commission*
> 2. *joint determination of the factors comprising merit and posting procedures*
> 3. *development of a proper and consistent policy regarding posting of vacancies.*

Most public service managers acknowledge that the high degree of decentralization has resulted in an uneven application of the merit principle across the public service even for identical or very similar jobs. While designed to be fair, the use of a rigid format for competitions actually creates a deep sense of distrust in the process among public service employees.

Many candidates for competitions, both successful and unsuccessful, told the commission that the process is flawed and does not always select the best candidate for the job. The commission heard details of some competitions that raised real questions of fairness and due process and appeared inconsistent with the merit principle.

The application of the principle of merit raises a number of competing values. These include: seniority and length of service versus principles of employment equity; and, career development and opportunity for existing employees versus opportunity for public service jobs for those outside the public service.

Certain public service employees told the commission that the principles of merit and employment equity are incompatible because of a perception that equity group members may move into those positions which existing employees expected would be exclusively available to them.

The commission does not believe that debate over the relationship between career development and equity goals should be avoided within the public service. Both goals are entirely legitimate. The successful achievement of each is dependent upon the accommodation of both goals in the development of all aspects of employment policies and practices.

There is also a widespread belief that the current process for appeal by unsuccessful applicants on public service competitions has created many of the problems in the application of the merit principle. The commission has concluded that problems surrounding the merit principle are with the application and not the factors. Recommendations regarding the application will be made at the conclusion of this report.

STAFFING AND RECRUITMENT

Recruitment Issues

The commission identified four recruitment issues. These are:

1. hiring of auxiliary employees
2. administrative support staff hiring practices
3. senior management recruitment
4. recruitment, staffing and retention of systems professionals.

1. Hiring of Auxiliary Employees

There are two basic categories of public service employees: regulars and auxiliaries. Auxiliary employees receive fewer benefits than regular employees and have less job security. There are some differences in the treatment of auxiliary employees, dependent upon their excluded or included status.

Auxiliary employees are hired by government to address temporary staffing needs, to replace regular staff who are ill or on an approved leave from their job, to meet demands for seasonal help or on an 'on-call' basis by certain government ministries.

Often, managers hire an auxiliary employee to cover the period that a position is vacant (from the departure of the incumbent to the arrival of the new employee). Since the formal selection process can take up to 100 days, managers will hire an auxiliary employee to cover the period of the recruitment lag. Often the person is kept on for a longer period than planned, and eventually is converted to regular status.

Auxiliary positions are intended to be temporary and as a result selection for them is not always subject to the panelling process. After 1,827 hours (within the same 15-month period), subject to meeting certain criteria and conditions, auxiliary employees are converted to regular status. However, while this approach may successfully get people into jobs quickly, it contravenes, in a very fundamental way, the principle underpinning of the merit system.

TAB C

FIGURE 4 - APPOINTMENT ACTIVITY IN THE BC PUBLIC SERVICE, 1992, BY TYPE

MINISTRY	LATERAL TRANSFER		COMPETITION		AUXILIARY APPOINTMENT				OTHER		TOTAL
					BY COMPETITION		WITHOUT COMPETITION				
	#	% Of Total	#	% Of Total	#	% Of Total	#	% Of Total	#	% Of Total	
Totals	735	6.2	2730	22.8	1471	12.3	3626	30.3	3389	28.4	11,951

Note: Other includes 1,110 seasonal staff hired by the Ministry of Environment, Lands & Parks and 1,097 hired by the Ministry of Health from outside the public service. This hiring in health includes a one time only recruitment of community health staff, consistent with government's objectives to reform health care.

Source: Commission of Inquiry into the Public Service and Public Sector
Human Resource Management Survey 1993

As Figure 4 demonstrates, only 35.1 per cent (22.8 per cent by competition for regular jobs and 12.3 per cent by competition for auxiliary jobs) of the 11,951 appointments made in the public service last year, were made as a result of the competitive process.

A redesigned selection system should have flexibility and simplicity as its guiding principles, so as to minimize widespread and inappropriate recruitment of auxiliaries. Selection of auxiliary employees should be subject to the merit principle, but there should be an expeditious selection process that is less onerous than that used for regular positions.

2. Administrative Support Staff Hiring Practices

The highest volume of staffing activity in government is at the entry-level of the office administrative series. The commission received oral and written submissions suggesting that the public service's present practices regarding the hiring of office administrative support staff needs major revision. Standards need updating and entry-level testing needs to be relevant to the skills needed on the job. As an example, submissions from line managers and administrative support staff complained that entry-level testing is still based upon typing skills instead of basic computer knowledge.

Up-to-date recruitment processes for entry-level office administrative staff should be undertaken on a system-wide basis in government. Centralized recruitment for entry-level administrative support staff would also facilitate better use of government personnel who are engaged in this activity on behalf of ministries, thereby significantly reducing duplication of work.

An inventory of qualified applicants should be established from which line ministries would recruit for either temporary or continuing needs.

3. *Senior Management Recruitment*

Executive and senior management level recruitment, excepting the deputy minister and assistant deputy minister levels, is currently handled by each ministry.

To build a management group that shares an overall government perspective between and among ministries and manage government programs with consistency, executive level and senior management level recruitment should be managed on a system-wide basis. A system of recruiting government managers would facilitate greater interchange of senior personnel between ministries and would allow for the development of a coordinated exchange program with the private sector. Such a program would give senior executives a broader perspective on issues throughout the province. As well, it would reduce similar work currently being undertaken separately and independently by personnel in each ministry.

4. *Recruitment, Staffing and Retention of Systems Professionals*

There is a unique staffing, recruitment and retention issue with respect to employees performing Information System (IS) functions in the public service. For over a decade, employers everywhere have experienced labour market supply shortages of trained systems professionals. In government, this has contributed to a complex staffing situation which is deserving of particular comment.

Government staffs its information systems functions within the public service differently from other functions. Ministries can use their discretion within their budget allocations, to choose from three alternate sources to meet IS staffing needs. These are:

a. ministry employees hired under the BCGEU collective agreement or under the management salary scale

b. i. professional service secondment from BC Systems Corporation (BCSC). A ministry is charged 1.5 times an employee's BCSC salary rate on a secondment. The additional cost is for benefits, recruitment, BCSC's infrastructure costs, training, career development programs, electronic mail hook-ups and miscellaneous costs. A ministry can return a BCSC secondment to the Corporation with short notice if it has no need for the position or the individual

ii. BCSC employees working through mission-based or fixed-term contracts

c. contractors: there are personal service contractors and employees of legitimate companies working in the ministries. The issue of whether many of these contractors are actually true employees of the government will be addressed as part of the contracting review undertaken by government and the BCGEU under the auspices of the commission.

TAB C

Some ministries staff exclusively through BCSC secondment, but no ministry staffs through an exclusive use of ministry employees. Within the IS operations of all ministries there are:

- 213 ministry employees
- approximately 444 mission-based contract employees and professional service secondments from BCSC
- approximately 450 contractors whose positions were a major feature of the contracting review and another 380 whose functions have been agreed by all parties to be bona fide contractors and to be an approriate use of contract staff.

The commission has reviewed this complex environment from the perspective of its terms of reference and has identified the following issues:

- the current multiple option staffing model raises questions about government's ability to achieve the goals of the Deputy Ministers' Committee on Information Management (DMCIM) for good management of the IS functions in government
- consideration of alternative staffing models raises questions regarding the appropriate role of BCSC.

Each ministry is responsible for providing the IS services that its operations require within the budgetary allocations approved by the legislature and within the Financial Administration Act. There are three types of expenditures:

1. equipment (e.g: computer hardware or software)
2. personnel or labour expenditures to maintain information systems in operation
3. development of new applications for technology to government operations (including both labour and technology costs).

History and Description of the BC Government's Information Technology Environment

Before 1977, responsibility for information systems was located in individual ministries. Three ministries had significant computing power and the technology of one of these three, Transportation and Communications, was available to ministries that could not afford the expense of maintaining their own system. Ministries had their own programming and technical staff. As a result there was significant duplication of services and staff movement was restricted.

In 1977, BCSC was formed to rationalize government systems processes. BCSC was originally intended to be the provider of all IS functions for the BC government. BCSC developed staff and human resource capacity to meet the technology needs of ministry business. By 1984, it became clear that completely centralized IS services were not meeting individual needs of ministries. Consequently, systems staff were positioned in the ministry business operations to work directly with the people they serve. This marked the beginning of the use of secondments from BCSC to ministries.

While the role of BCSC has changed a number of times over the intervening years, it remains one of the major fixtures of government's IS environment. BCSC is a crown corporation that in fiscal 1992-93 had unaudited operating revenues of $185.7 million and unaudited expenditures of $173.8 million. BCSC is the largest IS organization in western Canada.

Compensation levels vary significantly for the four IS staffing options currently used by government ministries.

Although employees of BCSC and direct ministry employees are both members of the BCGEU, they operate under separate collective agreements. Human resource management for BCSC is handled independently from that of government ministries. BCSC salaries are, on average, 15.5 per cent higher than government salaries for comparable work. Contractor costs are, in general, higher than the cost of equivalent compensation for the same services paid by either BCSC or direct government employees.

The apparent inequities in the system have encouraged ministries to find 'creative' solutions to compensate their IS employees at higher levels. Some ministry employees who actually perform IS functions are hired within classifications such as 'Research Officer' to allow for higher compensation rates than are available within government IS classifications

The inequities in a multi-staffing option system are not limited to compensation levels. It is widely acknowledged that as an organization, BCSC provides its employees with excellent training and has career development processes that are better developed than those in the rest of government.

There is a debate within government over the best staffing model. The options for improvement of the staffing model are varied and each has strengths and weaknesses.

In July 1992, the Deputy Ministers' Council on Information Management (DMCIM), in a submission to the commission, defined the following objectives of government in human resource management as it relates to information technology functions:

- to create effective government managerial control over the IS functions
- to ensure that government as employer has access to individuals with appropriate skills to staff IS functions
- to ensure fair and equitable human resource practices in compensation, training and career development that are competitive in a national labour market
- to ensure that IS labour and other costs can be justified
- to ensure continuity of information systems support over the long term
- to provide sufficient flexibility to allow adaptation as required by business needs
- to facilitate economic development of the information technology industry in BC.

Following receipt of the DMCIM submission, the commission worked with the advisory committee of IS directors to develop five staffing alternatives:

1. the status quo where ministries can choose between BCSC professional service secondment charged at 150% of salary and government classification scales. Ministry employees would remain where they are as would employees on BCSC secondment. Contract employees would be offered positions in either BCSC or the ministry at the choice of the ministry
2. creation of a 'level playing field' so that ministries could choose between BCSC secondment and ministry staffing with employees receiving relatively equal compensation regardless of the choice of the ministry. Ministry employees and BCSC secondments would remain as they are. Contract employees would be placed in the fashion that ministries determined to be appropriate

TAB C

3. a 'single source' staffing model through BCSC secondment with changes in the role of BCSC necessary to accommodate this change. Under this proposal, existing ministry IS employees and contract employees would all become BCSC employees. New ministry IS employees would be hired through BCSC

4. a 'single source' staffing model through creation of an IS labour force within government supplying labour to ministries

5. elimination of the BCSC secondment option. All ministry IS functions would be staffed in the same manner as any other staffing in government on a ministry basis. There would be no central focus to human resource issues regarding IS except as one existed in relation to other human resource functions.

A single staffing source for information systems work within government may provide improved opportunities for professional development and training of all systems professionals. Further, such a model will bring stability and coordination to the province's IS employees.

If the costs are acceptable, the commission believes a 'single source' staffing model for IS functions may be the best option. The commission understands that the Information Management Group (IMG), under direction of the DMCIM, has undertaken an independent cost analysis of the various staffing options.

Once the cost implications have been identified by the IMG, the commission staff will consider the feasibility of moving to a single source staffing model. The commission staff who have worked on the systems project will submit a complete report to the Minister of Finance and Corporate Relations, of all of the issues identified in the course of the commission's work, by June 30, 1993. This report will include an analysis of the cost implications identified in the independent study.

ADVERTISING VACANCIES

From our review of the present system for advertising vcacancies, three issues emerged:

1. need for a better coordinated system for advertising vacancies

2. need to identify public service office locations where the public can apply for public service employment

3. rate of in-service versus rate of out-of-service postings.

1. System for Advertising Vacancies

Vacant positions are advertised to interested applicants through a newsletter, *'Postings - Province of British Columbia Employment Opportunities'*, published every week by GPSD. Each posting contains a statement about who is eligible to apply for the job in question.

Ministries have the discretionary authority under the current government policy directives, to determine the scope of the competition. They have exercised this authority in ways that vary from one ministry to the next. Some ministries restrict promotional job competitions to internal applicants as a means of promoting career development within their own work force, while others open all job opportunities to include the public at large.

2. Receiving Job Applications From the Public

With the decentralization of the recruitment and staffing function to ministries in 1984, the government lost its ability to receive general applications from the public in any systematic way.

Practices today vary considerably between ministries and from one government office in a community to another. Every member of the public who wishes to work for the BC public service faces the challenge of obtaining information about how and where to apply for jobs. Sometimes the answer is to apply in several different places. This has created confusion and poses significant difficulty for equity group members, such as the physically challenged. Furthermore, in some cases the public service may be deprived of the best candidates because they are not aware of them.

3. In-Service vs. Out-of-Service Postings

One issue raised repeatedly in submissions from employees was that external competitions are frequently conducted even when there are suitably qualified internal candidates.

In 1992-93 there were a total of 3,547 competitions posted for government jobs - 2,660 (75.0%) were posted to the public as well as to internal applicants; and 887 (25.0%) were only to internal applicants.

GPSD does have a policy which sets out criteria to be used by ministries when determining the scope of postings.

FIGURE 5 - POSITIONS POSTED: 1991-92 AND 1992-93

	BARGAINING UNIT								EXCLUDED		TOTAL	
	BCGEU		NURSES		PEA		TOTAL		TOTAL		POSITIONS	
YEAR	IN SERVICE	OUT-OF SERVICE	IN SERVICE	OUT-OF SERVICE	IN SERVICE	OUT-OF SERVICE	IN SERVICE	OUT-OF SERVICE	IN SERVICE	OUT-OF SERVICE	IN SERVICE	OUT-OF SERVICE
1991-92	1,127	1,784	17	244	49	424	1,193	2,452	262	390	1,455	2,842
1992-93*	639	1,628	49	440	20	289	708	2,357	179	303	887	2,660

*Positions posted to March 5, 1993.
Note: The percentage of positions posted out-of-service increased from 66% in 1991-92 to 75% in 1992-93 (to March 5, 1993).

Source: Government Personnel Services Division

TAB C

The criteria cited in *'The Personnel Management Policies and Procedures Manual'* are as follows:

Competitions may be limited:

- *on a geographic basis provided that certain criteria are met, or,*
- *where the nature of the work is short-term or on-call, or,*

Competitions may be expanded:

- *to out-of-service applicants when one or more of the following criteria are met:*
  1. *there is a demonstrated lack of qualified in-service applicants*
  2. *an in-service limitation would perpetuate a systemic barrier*
  3. *the vacant position is at a level at which most people in that occupational group enter the public service (e.g. Office Assistant 1 or 2, Social Worker 1 or 2, Nurse 1, Labourer 1, Forest Technician 1 or 2)*
  4. *management considers that the operation of the work unit would be significantly enhanced*
- *to occupational group, position level or organizational unit*
- *to designated groups for employment equity purposes.*

There is currently little monitoring of the rate of in-service vs. out-of-service postings.

A breakdown of the data for the clerical group reveals that there were 352 (49 per cent) in-service postings as compared to 366 (51 per cent) posted outside in 1992. Two reasons have been cited by managers to support this rate of external postings. The first is that the position may be in a particular geographic location where it is appropriate to recruit locally. The second reason is that outside postings cast a wider net in contemplation of attracting equity group members. However, in the absence of set government targets or monitoring, there is no means available of determining whether or not an equity objective or any other objective noted in the policy is being met by the outside posting or whether it could have been met by internal bridging mechanisms.

In its submission, the BCGEU put forth a persuasive argument for limiting the number of external postings so that internal candidates can achieve more promotions. They told the commission that most job vacancies are posted to allow external applicants to apply. Examples cited by the BCGEU are vacancies for adminstrative support jobs where there are many qualified public service employees to draw from.

On the other hand, a compelling argument was made by managers at all levels that the process should not be made cumbersome by setting out a sequential process (internal first, and then external postings) as a rigid requirement. One suggestion made to resolve this problem was that postings be open to all, but that internal employees be considered first.

These points led the commission to inquire into appointment activity in order to assess the policy options that should be considered.

The commission asked ministries to provide information on appointments to the public service. One aspect that was queried dealt with the appointment/promotion of internal applicants in competitions that were posted to allow for out-of-service applications (75 per cent of the postings in 1992 were open to out-of-service applicants). The data supplied to the commission revealed that 35 per cent of the appointments made on those job competitions were awarded to public service employees.

At present, the public service rate of growth is reducing. Employees are increasingly concerned about employment security. In 1992 attrition shrank to a five-year low at 5.3 per cent. The current directives and resulting practices need review.

Specific regulations for different job classifications and levels are needed to define the scope of the area of postings to ensure that internally qualified candidates have appropriate

opportunities for career advancement. Finding the right balance between the promotion of internal qualified applicants and equity, (building a representative public service) will restore a sense of fairness, thereby promoting motivation, and dedication to all categories of career-interested public servants. Such factors as geography and inter-ministerial career opportunity must also be considered in developing these guidelines.

SELECTION STANDARDS AND TECHNIQUES

Current selection standards and techniques were designed to ensure the objective assessment of all candidates and to identify the best candidate for the job. But certain aspects of the system actually work against these goals.

In order to avoid the inconvenience of an unstaffed position, managers often try to tailor their selection techniques to guard against the possibility of an appeal. The emphasis is on a candidate's credentials and specific knowledge testing rather than the ability to do the job. Many submissions stated the interviews were too formal and structured with little opportunity for an applicant to demonstrate his/her real ability to do the job. While these practices may lessen the chance of an appeal, they do not necessarily identify the best candidate for the job.

Employees, their representatives and line managers all proposed a substantive shift away from the present rigid screening and assessment procedures to a system that recognizes competency, on-the-job learning and skill transference potential.

A wider variety of selection techniques would also enhance the selection process. There is no single technique appropriate to all 40,000 public service jobs. Jobs require very different skills. Selection techniques that are relevant to assessing the skills for the particular job vacancy will undoubtedly assist managers when assessing candidates.

THE APPEALS SYSTEM

An appeals system for public service selection decisions is an integral part of the recruitment process for the public service. The commission received a number of submissions expressing grave concerns regarding the present appeal system and urging that it be replaced with a system that ensures a fair hearing for the appellant.Between 1987 and 1992 there were 918 appeals, representing five per cent of all competitions in the period. The average time elapsed from the date of filing an appeal to its final resolution was 56 days. In the period from February 1992 to February 1993, there were 160 appeals filed. Only 25 hearings have been held and resolved to date with 32 still in process. Most significant in these statistics is the fact that 45 of these appeals were withdrawn. Deputy ministers rescinded competitions in 37 of the appealed cases on the basis that there were technical flaws in the selection process itself. Employees told the commission that the reason for cancellation of competitions by deputy ministers was to avoid the cumbersome process of the current appeal system. When this happens, frustration builds for appellants and confidence in the system diminishes.

Public service employees believe that the only way to access reasons for selection decisions, and feedback on their performance during the interview process, is by launching an appeal.

The structure of the current five-stage appeal process works against its effectiveness. The PSC's general practice is to adjudicate with a three-person panel. There is a view that a single person panel would be more expeditious and would eliminate the administrative difficulty of organizing three adjudicators for a hearing.

TAB C

Under the current PSA, the PSC has limited remedial authority where an appeal panel finds that a competition has violated the merit principle. It can only rescind the appointment and order a new competition. It cannot substitute its decision for that of the original selection panel. This inevitably results in a renewed requirement to fill the vacancy. The time required to fill an appealed position can easily exceed 100 days following the average time lines for the selection and appeal process. Consequently, sometimes after an appeal has been rendered, management works around the system by filling the job on whatever basis they can: by using an auxiliary, contracting out the work, or by a secondment to avoid further delays.

The appeal process in the BC public service is unique among Canadian provinces in that external applicants have the same right of appeal as internal applicants. The commission concluded, based on many submissions, that all applicants should have a general right to inquire into and be furnished with the reasons why they were unsuccessful in a competition, but that the full right of appeal should be extended to eligible employees who are unsuccessful applicants.

In summary, the commission is recommending changes to cure the defects in the current system and to ensure a fair and expeditious hearing of the appeals.

THE EXEMPT JOB CLASSIFICATION SYSTEM

Management jobs classified above level 6 in the public service are monitored for consistency by an inter-ministerial committee. Management levels 1-5 are not. Many submissions to the commission asserted that there is inconsistency in the application of the existing job classification system for exempt jobs in levels 1-5. The methodology used for classifying these jobs, combined with the decentralization of this function to line ministries since 1984, has contributed to inequities in the treatment of these employees.

FIGURE 6 - JOB DESCRIPTIONS FOR THE BC PUBLIC SERVICE WRITTEN BY PUBLIC SERVICE EMPLOYEES AND BY CONTRACTORS IN 1992

	Request Handled Internally		Request Handled with Assistance (by contractors)		TOTAL
MINISTRY	#	% OF Total	#	% OF Total	#
TOTAL	5791	79.8	1463	20.2	7254

Source: Commission of Inquiry into the Public Service and Public Sector Human Resource Management Survey 1993

One contributing factor is that job descriptions are written by personnel officers in some cases and, in other cases, by outside contractors. Exempt employees claimed that there is no visible quality control system in place either within ministries or across ministries to ensure consistency. Figure 6 illustrates the problem.

The commission was given examples of reclassification requests which have gone unanswered for up to two years.

Figure 7 shows the volume of activity related to general public service classification and reclassification requests made of personnel staff in 1992.

FIGURE 7 - CLASSIFICATION/RECLASSIFICATION REQUESTS 1992 BY EMPLOYEE GROUP FOR BC PUBLIC SERVICE

	BCGEU		BCNU		PEA		MGMT 1-5		MGMT 6-11		SCHED. A		
MINISTRY	#	% of Total	#	% of Total	#	% of Total	#	% of Total	#	% of Total	#	% of Total	TOTAL
TOTAL	5576	77.6	615	8.6	308	4.3	465	6.5	160	2.2	61	0.8	7185

Note: Totals provided by the ministries to the commission are not the same for Figures 6 and 7.

Source: Commission of Inquiry into the Public Service and Public Sector - Human Resource Management Survey 1993

The commission has concluded that the methodology used for classifying jobs needs updating and streamlining in order to meet current needs in the public service.

Therefore, the commission endorses a review of the job classification system.

TRAINING AND EMPLOYEE DEVELOPMENT

Submissions confirmed that, with the exception of management training, there is limited government-wide policy regarding training. Ministries carry responsibility for training their employees.

There are examples of ministries offering systematic well designed training programs that are linked to job skills needed and career development. Examples include the programs offered by the Attorney General's Ministry for corrections officers and by the Emergency Health Services Commission for its ambulance staff. Such examples are the exception, and not the norm.

The highly decentralized approach to training results in many problems for the public service:

- corporate policies may flounder in the implementation stages due to a lack of consistency in the training offered to ensure their implementation at the ministry level
- ministries have varying commitments to the training needs of employees
- small ministries simply don't have the staff or the financial resources to train personnel, resulting in employees in small ministries having lesser opportunities than those employed in larger ministries
- uneven access to training in different areas of the province may well require a consistent policy of educating trainers to provide training to personnel at work sites around the province.

There are many ad hoc employee development initiatives underway in the various ministries. These include secondments, bridging programs, mentoring programs (for advancement of women), and movement between line and staff jobs. In some cases, they result in people being moved out of a regular job ostensibly for development purposes, but then being prevented from returning to their regular job when the assignment ends.

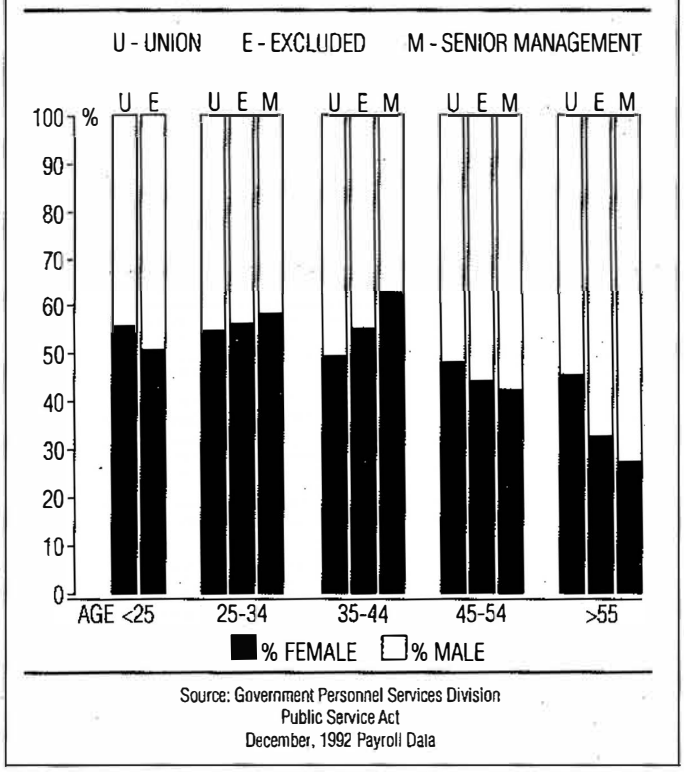
The commission is recommending greater coordination and development of guidelines and standards so as to enhance all government training and development programs.

EMPLOYMENT EQUITY IN THE PUBLIC SERVICE

The public service work force is not representative of the public it serves. The unions and GPSD advised the commission that certain groups, such as women, visible minorities, physically challenged and aboriginal people are either under-represented in the public service generally or they are proportionally over-represented in the lower paying jobs. Data is available that shows the representation of women in the public service, but there is no appropriate data available for the other groups. This is shown in more detail in Figure 8.

TAB C

FIGURE 8 - REPRESENTATION, BY GENDER, AND MAJOR EMPLOYMENT GROUPS, BC PUBLIC SERVICE DECEMBER, 1992



Source: Government Personnel Services Division
Public Service Act
December, 1992 Payroll Data

Currently, responsibility for employment equity is with the Ministry of Women's Equality. For employment equity to work effectively, a revision of current personnel policies and practices will be needed. Any ministry, other than the one that has overriding responsibility for human resource matters in the public service, would have great difficulty in accessing and changing the systems that must change.

The commission believes that a central human resource agency should be responsible for the development of the employment equity policy; and that deputy ministers should be held accountable for its implementation as part of their overall responsibility in managing human resources in their ministries.

As well, this important policy initiative is a priority issue for labour and management. Currently, the unions representing employees of the government are being consulted on this matter.

Clearly, overall government policy is needed to assure ministry compliance with general government policy rather than the present system which leaves each ministry to interpret general policy and then to develop its own programs in isolation.

THE MANAGEMENT / EXEMPT GROUP

There are 5,061 excluded staff in the public service. Of those, 800 are members of the BCGMA, a voluntary association, which attempts to coordinate and represent managers' and other exempt employees' views on employment matters.

There is no central inventory of management positions maintained in the public service. There is no formalized succession planning or systematic development for management employees. Terms and conditions of employment for these employees are usually determined once the negotiated settlements are concluded and are usually based upon those settlements.

Management employees believe that they lack a consistent and effective voice in government decisions that affect their terms and conditions of employment. As well, there is no process for management employees to air concerns about their terms and conditions of employment.

TAB C

Library

COMMISSION OF INQUIRY INTO THE PUBLIC SERVICE AND PUBLIC SECTOR

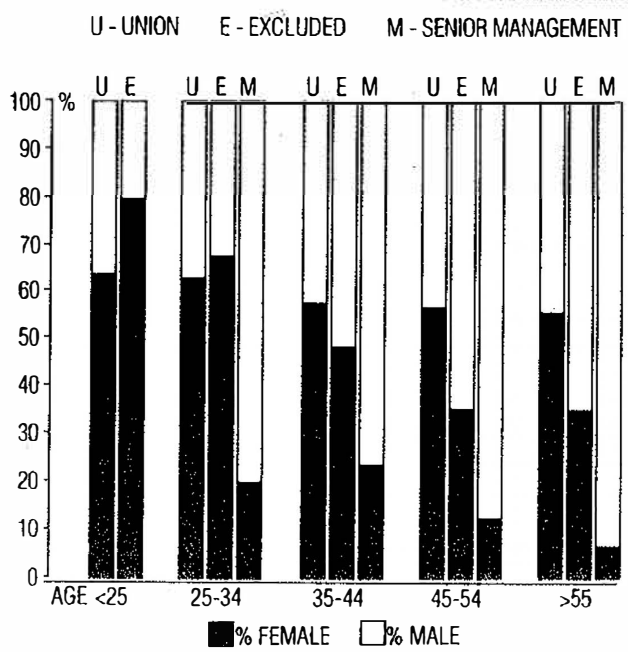
ERRATUM

Correction of Figure 8, Page 26, Volume 1.

FINAL REPORT
VOLUME 1 – THE PUBLIC SERVICE OF BC

(PREVIOUSLY MAILED)

FIGURE 8 - REPRESENTATION, BY GENDER, AND MAJOR EMPLOYMENT GROUPS, BC PUBLIC SERVICE DECEMBER, 1992



Source: Government Personnel Services Division
Public Service Act
December, 1992 Payroll Data

Source data from Government Personnel Services Division

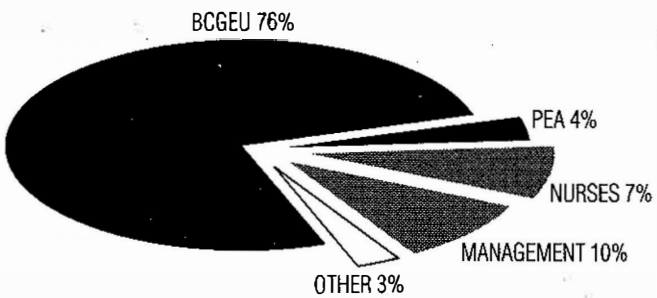
AGE	< 25		25 - 34			35 - 44			45 - 54			> 55		
	U	E	U	E	M	U	E	M	U	E	M	U	E	M
MALE #	760	23	3,410	250	8	5,323	1,084	147	3,506	1,126	222	1,147	309	42
FEMALE #	1,331	88	5,599	519	2	7,135	937	43	4,429	568	29	1,357	157	3
TOTAL #	2,091	111	9,009	769	10	12,458	2,021	190	7,935	1,694	251	2,504	466	45

RELATIONS BETWEEN THE GOVERNMENT AND ITS UNIONS

Public service employees are represented by four unions (in three certifications), and one management organization. The BCNU and the UPN represent, in a single certification, 2,764 nurses who are directly employed by the provincial government. The PEA represents 1,500 licensed professional employees of the government and the BCGEU represents the remaining 29,732 unionized employees in the public service.

The BCGMA represents more than 800 excluded employees out of a total group of 5,071 who are eligible to belong.

FIGURE 9 - PSA EMPLOYEES BY GROUP



Source: Government Personnel Services Division, Payroll Data - December, 1992

The drive to privatize and contract out public service work over the last ten years has undermined the relationship between government and its public service unions. For the BCGEU, it meant a reduction of 6,340 (-17.6%) members between 1983 and 1992.

The president of the BCGEU stated in a submission to the commission in May of 1992, called *'Restoring the Public to Public Services'*:

> *There is an opportunity to re-examine what services the province should provide, and the method by which it delivers services in key sectors. Not all historical services are still relevant to the modern government. New services will be brought on line and older ones revamped to meet contemporary needs.*
>
> *Whatever services the administration decides to provide, it must make a commitment to deliver them effectively and efficiently. Effective services are those which meet the needs of the consumer. Effective and efficient regulation of sectors of the economy are those which achieve the respect and compliance of the sector. Efficient delivery is done within the financial capacity of the provider.*
>
> *While efficiency and effectiveness are sometimes at odds, every effort should be made to empower frontline staff to do the very best job that is in their power to deliver.*
>
> *The government, the union and the staff have to make a fundamental commitment. Don't offer public services in a slipshod or half-hearted fashion. Together we can make a commitment to quality by putting the public first.*

The Public Service Forum revealed that there is an opportunity now for management and unions in the public service to jointly address many human resource issues of common interest. These include the harmonization of work and family, and safety and health issues, among others.

TAB C

The BCGEU, PEA, BCNU, UPN and the current government have all worked together effectively to address the issue of conversion of shadow employees to employment status.

This demonstration of constructive cooperation in resolving longstanding disputes is impressive. The commission is currently sponsoring a process whereby other joint initiatives between the government and its unions will be undertaken.

With Respect to Service Quality

In the late 1980s, the government endorsed an initiative called "Service/ Quality". Some pilot projects that came under the auspices of this initiative were successful, but others floundered. Other political and social events at that time created a climate within which unions were reluctant to participate fully.

The Forum on the Revitalization and Renewal of the Public Service persuaded the commission that this initiative should now be revisited in a forum where representatives of management and labour work together to shape and improve public services.

IMPROVING WORK SYSTEMS AND ORGANIZATIONAL DESIGN

In the course of the commission's review of personnel and labour relations matters, employees and line managers raised concerns about broader management issues.

Submissions were made to the commission to encourage government to review the following:

- greater devolution of decision-making authority to the line employee
- reduction of decision-making levels within government
- identification of redundant work
- duplication of staff work, rules, reports, etc. that contribute to unnecessary administrative work
- appropriate and creative use of information technology to support public service objectives and assist public service employees to do their work effectively.

Such reviews must be systematic and thorough. Unnecessary levels identified are not necessarily all found in the management and excluded groups, but will also include levels within the bargaining units. Unnecessary supervision and monitoring of work as well as unnecessary paperwork must be identified and eliminated if resources are to be reallocated in the delivery of public services.

As an example, one large Canadian private sector employer operated with 11 reporting levels between service delivery and the CEO five years ago. After review and careful planning that entailed devolving responsibility downward and the development of appropriate systems, the employer found that it operated effectively with five levels, and redesigned its entire operation accordingly.

The commission suggests that a simple three-step process, involving all participants, be followed to conduct work system reviews in the public service.

- consideration must be given to whether or not specific work is purposeful
- employees and management should review work processes. Both the flow of the work and the method of work should be reviewed and revised as necessary for efficient and effective delivery
- implementation of improved processes should be undertaken at each work site as appropriate changes are developed.

A continual and ongoing review of the work in consultation with all employees and clients will undoubtedly contribute to more efficient and effective service delivery.

MANAGEMENT OF HUMAN RESOURCES IN THE PUBLIC SERVICE

The Purpose of Human Resource Management

The preceding sections have described the issues that affect the operation of the public service with respect to recruitment, staffing and appeals processes, training and employment equity. To be made meaningful, the changes the commission believes are necessary must be made within a context of structural change to human resource management.

The primary purpose of human resource management is to achieve the most effective use of human resources - employees - in the delivery of services to the public.

The commission has found a high degree of dedication among public service employees but also a considerable degree of frustration.

The Principles of Human Resource Management

The public service of British Columbia faces serious challenges including:

- increasing public demand for services and a growing demand for more involvement of the public as consumers and interest group advocates
- demands from employees for greater involvement and participation
- the fiscal limitations of government and public concern about the size of government debt
- the opportunities and demands created by rapid technological change.

Figure 10 illustrates the contrast between 'old' conceptions of organizations and the emerging values of 'new' public service management:

FIGURE 10 - THE EMERGING GOVERNMENT VALUES

FACTOR	OLD	EMERGING
Mandate	Legislative/fixed	Flexible/visionary/strategic
Environment	Stable	Turbulent
Policy Formulation	Inward looking	Involvement of partners/stakeholders
Program Delivery	Controlled internally	Shared with stakeholders
Customers	Serviced with toleration	Valued assets
Results	Seldom measured	Measured Against Standards
Accountability	Diffuse	Results based
Power/decision making	Centrally controlled	Decentralized
Problem solving	Independent	Interdependent/cross functional
Technology	Desirable	Essential
Organization structure	Stacked	Delayered
Management philosophy	Control based	Values based/learning/service driven
Management style	Directive	Participative/facilitative
Management of change	After the fact	Preemptive/anticipatory
Management/union relations	Confrontation	Consultation
Employees	Tools	Empowered/respected stakeholders
Work Attitudes	Put in your time	Have fun on the job
Achievement	Taken for granted	Recognized and rewarded

Source: Optimum - Journal of Public Sector Management, Summer 1992 Volume 23-1

TAB C

To create a context for the required changes to human resource management, the government must:

- develop a set of principles regarding effective and efficient human resource management that can achieve both public and employee support
- ensure that its structures are capable of meeting these principles.

For the future, much improved relationships between all parts of the public service and among all employee groups will be vital to the government's ability to provide services to the citizens of the province. Building a climate of openness and innovation will occur if employees at all levels are treated with respect and their input on improving public services is sought.

The new human resource agency recommended by the commission, will be responsible for setting a new tone and for establishing the proper means for government to work more closely with its employees as it seeks to meet its objectives.

The Forum on Revitalization and Renewal of the Public Service sponsored by the premier and the commission took one major step towards the development of these principles.

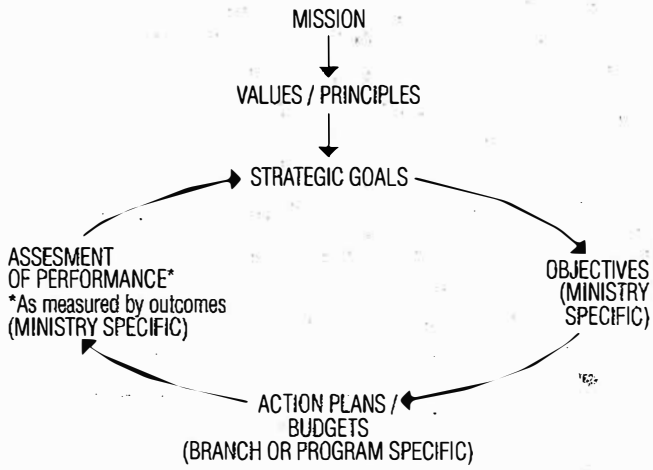
A draft mission statement and set of principles are a priority task assigned by the forum to the working committee which developed from the forum. The commission urges the government to finalize and approve this mission statement and principles in collaboration with public service employees and their representatives.

Upon finalization, they must be taken out to the ministries and operating units of government to be translated into strategies for the effective delivery of government services.

From Principle to Strategy

The commission has developed a straightforward planning model for cohesive human resource management in the public service.

FIGURE 11 - A STRATEGIC PLANNING MODEL FOR EFFECTIVE HUMAN RESOURCE MANAGEMENT IN THE PUBLIC SERVICE



Source: Commission of Inquiry into the Public Service and Public Sector

The mission statement reflects the overall values and direction of the system. Development of principles and strategic goals provides the corporate direction which will in turn guide development of action plans at the ministry level.

The key to effective and successful human resource management is to develop structures that are flexible, effective, embrace open communications and are capable of responding to change.

The Role of a Central Human Resource Agency

The report has earlier described the decentralized structure of government operations. In summary, each of the 18 different ministries has its own management culture and human resource infrastructure. GPSD, as the central agency, handles all collective bargaining, manages grievances at the final stage of the process on behalf of the government, and develops all personnel policies. GPSD has authority to develop and create personnel policies, but its effective responsibility for those policies is limited both by the nature of the mandate and degree of resources that it has to fulfil its responsibilities, particularly with respect to monitoring and compliance. Implementation of government-wide policy is handled independently by each ministry.

The commission identified three basic options for human resource management in the public service:

- retention of the present highly decentralized model
- return to an older, highly centralized PSC model where command of most important decisions is at the centre
- development of a new central agency that seeks to balance the strengths of decentralized service delivery with enhanced central authority for development of policies and enforcement mechanisms regarding compliance.

Figure 12 illustrates the values attached to these options.

The commission has concluded that the establishment of a revised central human resource agency, in keeping with option 2b in Figure 12, provides the best opportunity for effective human resource management in the public service. The agency will balance the current decentralized model with enough of a central focus to promote overall efficiency, effectiveness and equity throughout the public service. This model will ensure that local initiatives to enhance the delivery of services will be supported within a centralized framework.

FIGURE 12 - OPTIONS FOR DESIGN OF THE NEW HUMAN RESOURCE AGENCY

	STRENGTHS	WEAKNESSES
1. Current Public Service • Sets policy but leaves implementation and compliance to ministries	• flexibility • timeliness of action	• lack of consistency • duplication of resources • poor servicing by personnel in regions and in small ministries
2a. Revised Public Service • Central agency with no delegation	• consistency of approach • corporate wide culture	• needs more resources • rigid approach • unresponsive to line ministries • timeliness of action
2b. Revised Public Service • Central agency developing policies and delegating authority for their implementation and application	• brings consistency with flexibility • monitors all personnel activity • gives government the ability to plan • allows the development of a corporate culture • allows for appropriate authorities to be fully delegated within the ministries	• lessens autonomy of line ministry • needs more resources

Source: Commission of Inquiry into the Public Service and Public Sector

TAB C

The model proposed by the commission contains a set of checks and balances which will prevent the agency from frustrating ministry objectives but will ensure that ministries adhere to government-wide objectives. This proposed new central human resource agency must be provided with statutory responsibility for all human resource functions and with the ability to both delegate and revoke this authority to line ministries when appropriate.

Responsibilities of the New Agency

The new agency must be responsible for the following functions:

STRATEGIC HUMAN RESOURCES (SERVICE IMPROVEMENT)

- provide direction to ministries on efficient, effective organizational design and implementation processes
- foster respectful relationships with unions and employee groups throughout government
- consult with employee groups in the developmental stages of new human resource policies and on other matters
- undertake strategic human resource planning at a corporate level
- enhance employee development at all levels
- support government-wide initiatives improving the delivery of public services, which includes direction to joint labour/management ministry committees and specific joint projects
- provide corporate direction and support to all employee development activity. This includes training where new corporate policies or programs are introduced, such as freedom of information or employment equity
- ensure that effective occupational health and safety programs are in place across the government as well as providing policy direction on such important emerging workplace issues as harassment
- employment equity initiatives – build bridges between classifications where appropriate, for equity and career advancement purposes.

CORPORATE SERVICES

- delegate staffing, wholly or in part, to line ministries. For example, if a ministry is the only employer for a particular occupational group, then that ministry should have full delegated authority on behalf of the government for staffing of the group.

  This may still mean that implementation of staffing functions is delegated to the line ministries but greater direction, coordination and accountability are required. Clear policies and delegation instruments that set out the expected standards of performance for line ministries are the responsibility of the central agency

- coordinate certain staffing activities across ministries as appropriate (i.e.: entry level hiring from outside, executive recruitment, target group recruitment and others that may be identified)

- establish a management services support function with specific responsibilities for management development activities

- provide clear direction to ministries with respect to job classification and compensation. In certain cases, a line ministry may have full delegated authority for the classification of jobs in a particular occupational series (for example, where the ministry is the only employer). In other cases, the line ministry will have full delegated authority up to certain levels in a series

- provide benefits administration.

COLLECTIVE BARGAINING

- subject to the direction of Treasury Board, shall negotiate collective agreements on behalf of all government employees and handle directly or coordinate related contract administration matters such as the management of arbitrations with the appropriate ministry. This is to be consistent with the PSLRA

- to conduct labour relations research activities

- to create labour relations training with a view to developing joint problem-solving training programs with the representatives from the labour community.

Designing and Staffing the New Central Human Resource Agency to be Called, 'The Public Service Employee Relations Commission'

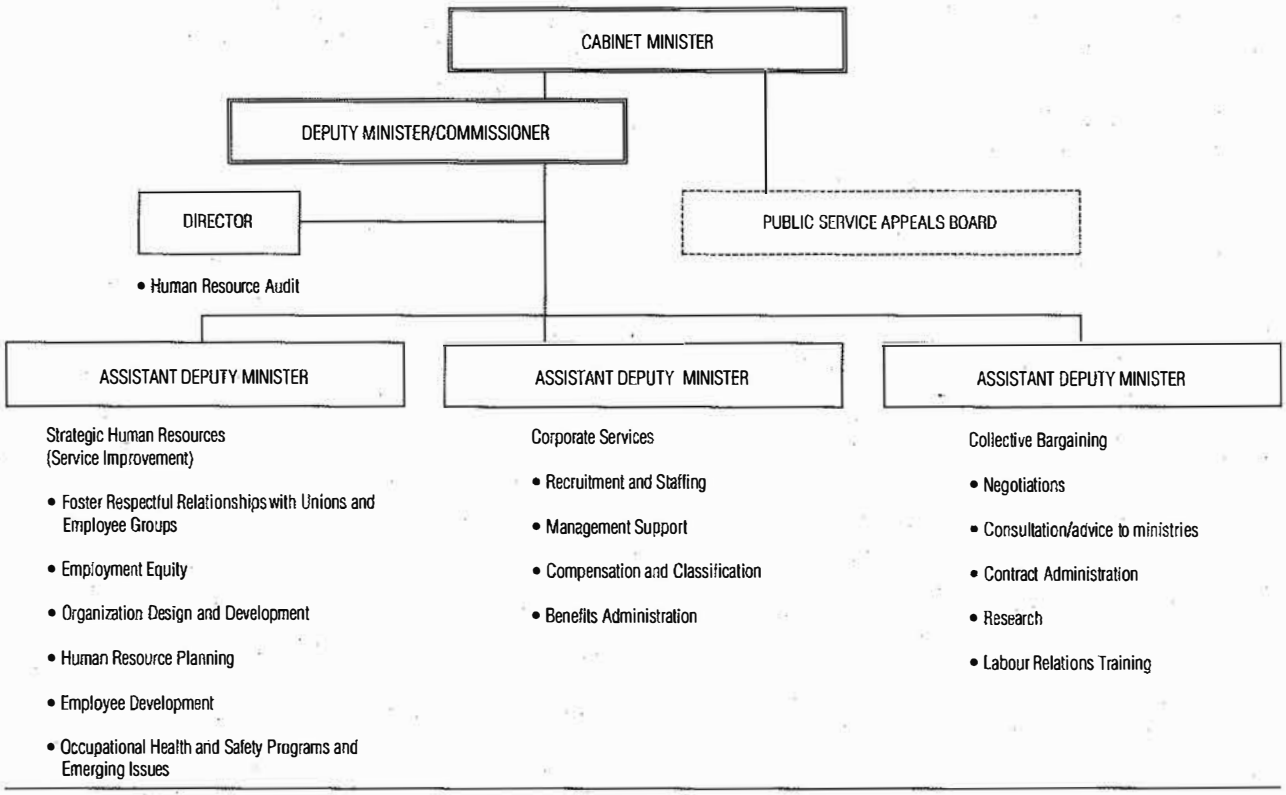
The structure of the new agency should include a commissioner who is able to direct its functioning in a manner that is congruent with progressive and effective organizational principles. Its structure should ensure close links with ministry personnel staff. In working with line ministries and public service unions, a consultative approach on various human resource matters is recommended by the commission. Additionally, the new agency must have the resources to monitor line ministries' compliance with government personnel policy as well as the authority to compel changes to personnel practices should this be warranted.

The suggested organization chart, Figure 13, was developed in consultation with senior management personnel in government.

Detailed draft organization charts are found as appendix ii at the back of this report.

TAB C

FIGURE 13 - PROPOSED MODEL FOR HUMAN RESOURCES MANAGEMENT
THE BRITISH COLUMBIA PUBLIC SERVICE



Source: Commission of Inquiry into the Public Service and Public Sector

The commission's recommendations for a renewed human resource agency include the transfer of existing staff of GPSD to the new agency.

Figure 14 on the following page summarizes the current resources available throughout government that may be reallocated to accommodate the establishment of the agency. The commission believes there may be human resource people in ministries whose skills could be more efficiently used in the new central agency.

An assessment of all human resource personnel in ministries should be undertaken with the objective of ensuring that these resources are not performing duplicate work and they are efficiently deployed across the BC public service.

The creation of a new central agency will have an impact upon existing ministry operations. There will be opportunities for combining existing ministries' personnel offices in small communities.

FIGURE 14 - HUMAN RESOURCES STAFF AND EMPLOYEES BY MINISTRY

MINISTRY	TOTAL HUMAN RESOURCE POSITIONS (FTES)*	TOTAL EMPLOYEES	EMPLOYEES PER HUMAN RESOURCE FTE **
Aboriginal Affairs	4.0	91	22.8
Advanced Education	7.0	370	52.9
Agriculture	7.1	504	71.0
Attorney General	50.7	6,216	122.6
Economic Development	13.2	652	49.4
Education	9.5	441	46.4
Energy, Mines & Petroleum Resources	7.0	463	66.1
Environment, Lands & Parks	27.0	2,304	85.3
Finance & Corporate Relations	16.0	1,319	82.4
Forests	70.2	4,382	62.4
Government Services***	19.6	903	46.1
Health	81.5	5,607	68.8
Labour & Consumer Services	7.0	358	51.1
Liquor Distribution Branch	36.3	3,386	93.3
Municipal Affairs	9.0	609	67.7
Social Services	88.3	4,935	55.9
Tourism	4.5	352	78.2
Transportation & Highways	57.0	2,869	50.3
Women's Equality	4.0	66	16.5
ALL MINISTRIES	518.9	35,827	69.1
Government Personnel Services Division	85.0		
TOTAL	603.9	35,827	59.3

*These are full-time equivalent positions, not necessarily 'approved' Human Resource FTEs.
**Comparison of ministries can be misleading as some ministry Human Resource departments serve additional non PSA employees (e.g., boards, commissions) and the range of human resource services provided varies considerably among ministries.
***Government Services includes Premier's Office.

Notes: Several organizations not included.
(BC Mental Health Society, Glendale, Auditor General, Ombudsman, Legislative Assembly, Commission on Resources and Environment)

Data effective November, 1992.

Source: Commission of Inquiry into the Public Service and Public Sector

The ratio of employees to human resource positions in an enterprise vary, depending on the industry. In the resource sector, the ratio is higher than in the service sector. The commission was not able to obtain any data on human resource versus operational employee ratios for other public services.

The above figures are provided for information purposes only. Figure 14 demonstrates the difference between providing human resource personnel in a small ministry versus a large ministry. The new PSERC should review this issue with all ministries in an effort to ensure efficient utilization of all human resource personnel.

Human Resource Information Systems

One of the greatest weaknesses of present human resource management in government is the absence of accessible information to guide strategic decision making and resource allocation. The commission experienced this first hand during the course of its inquiry when it sought data on such specific issues as appointment activity by ministry, classification information, grievance arbitration activity and employee health statistics.

One of the major responsibilities of the new central agency is to work with the line ministries to develop a service-wide information system that enhances the ability of line managers to do productive human resource planning. Basic information such as turnover rates, sick leave statistics, the training profiles of employees, the monitoring of employment and other equity related initiatives must all be captured by a state-of-the-art information management system. This information will enable line managers to make informed decisions regarding new employment initiatives and progressive personnel practices.

Routine personnel information on such matters as pension and benefit entitlement can also be made accessible to all public service employees through proper systems design.

Government and Treasury Board also require accurate information on public service work force activities for budget planning purposes.

TAB C

TAB C

THE PUBLIC SERVICE ACT

The commission has prepared a draft of a revised and renewed Public Service Act for the consideration of government. This proposed act is found as Appendix i.

This draft bill has been prepared with the assistance of Legislative Counsel in the Ministry of the Attorney-General and after extensive discussion on its principles with government, public service unions and GPSD.

The draft act has several features which distinguish it from its predecessor, PSA but it also continues many of its basic principles. It attempts to put the issues addressed by the commission's findings in legislative form where it is appropriate to do so.

Part one of the draft act establishes its purposes and sets out a framework for consultation on the application of matters that determine merit and on the new regulations.

Part two establishes a new Public Service Employee Relations Commission (PSERC) to replace the existing GPSD. The commission would have a broad range of responsibilities beyond those contained in the present PSA and explicit statutory authority to ensure that it could meet those responsibilities.

Part three reforms the process of appointment to the public service and endeavours to correct some of the existing problems as identified in the commission's report.

The merit principle and the factors of merit are confirmed. Regulations, policies and procedures will facilitate promotion of employment equity and career development.

Part four of the draft act creates a new Public Service Appeal Board to replace the existing PSC. Notably, the draft act gives the appeal board authority to directly appoint a candidate where a competition has violated the application of the merit principle.

Part five contains a number of miscellaneous provisions of which the most important is the power to make regulations on a broad range of issues affecting human resource management in the public service.

The current act allows the minister responsible for GPSD to issue 'directives' which are, in effect, employer policies. The commission has found that these directives are not always adhered to within the public service and it is our view that the government needs the capacity to ensure that certain central human resource policies have enhanced legal authority.

In the draft act, the regulations cannot override a valid and legal provision in a public service collective agreement, a protection that is also contained in the present PSA in respect of directives.

There was a high level of agreement among all of the parties - government, deputy ministers and personnel directors, unions, management representatives - on most of the elements of the proposed act. The commission believes that the proposed act meets the test of reform and revitalization of the public service.

TAB C

Therefore, the commission recommends that:

1 *The government adopt the draft Public Service Act prepared by the commission.*

The purposes of the draft act are to:

a. facilitate the provision of service to the public in a manner that is responsive to changing public requirements

b. recruit and develop a well qualified and efficient public service, representative of the diversity of the people of BC

c. encourage the training and development of employees to foster career development and advancement

d. encourage creativity and initiative among employees

e. promote harmonious relations with the government and employees within the public service.

2 *The responsibilities of the proposed PSERC for personnel management in the public service include, but not be limited to, the following:*

a. facilitate the provision of service to the public in a manner that is responsive to changing public requirements

b. providing direction, advice or assistance to ministries in the conduct of personnel policies, standards, regulations and procedures

c. recruiting, selecting and appointing, or providing for the recruitment, selection and appointment of persons to or within the public service

d. developing, providing, assisting with or coordinating, staff training, educational and career development programs

e. developing, establishing and maintaining evaluation and classification plans

f. acting as bargaining agent for the government in accordance with section 3 of the PSLRA

g. developing, establishing and maintaining occupational health and safety programs

h. developing and implementing employment equity policies and programs

i. conducting studies and investigations respecting staff utilization

j. carrying out research on compensation and working conditions

k. developing and implementing mechanisms to ensure effective human resource planning and organizational structures

l. developing, implementing and maintaining a process to monitor, audit and evaluate delegations under section 6 to ensure compliance with this act and the regulations

m. establishing and maintaining a personnel management information system.

3 *The government develop central core regulations subsequent to the adoption of the proposed Public Service Act.*

The matters to be developed by regulation include:

- recruitment, selection and appointment of staff including standards and procedures respecting advertising vacancies and selecting who may apply for those vacancies
- probation periods for employees who are appointed to positions in the public service
- health and safety standards for employees
- terms and conditions of employment
- job evaluation and classification
- standards of employee conduct
- all matters respecting discipline, suspension and dismissal of employees
- monitoring and auditing of all personnel functions.

However, flexibility is required to develop certain policies and administrative procedures by ministerial directive.

4 *The factors of merit contained in the present PSA be continued in the proposed new Public Service Act and appointments to the public service be based on the principle of merit.*

5 *Regulations, policies and procedures with respect to recruitment, selection and promotion shall facilitate:*

a. opportunities for external recruitment and internal advancement to develop a public service representative of the diversity of the people of BC, and

b. the long term career development and advancement of employees appointed under this act.

TAB C

6 *The working group comprised of representatives from government, public service unions and management employees, established following the Public Service Forum, develop a permanent Joint Council for ongoing consultation on public service policy issues, the application of matters that determine merit and on the new regulations. When the Joint Council consultation process is developed, it should be recommended to government as a replacement for Section 4 of the proposed act.*

7 *The government implement the revised system for appeal of public service job competitions described in the proposed new Public Service Act.*

The commission suggests the following features be included in the design of the new appeal system:

a. *it shall be renamed the Public Service Appeal Board*

b. *it shall be comprised of members appointed by the Lieutenant Governor in Council (LGIC)*

c. *regulations governing the workings of the appeal board shall be set by the LGIC*

d. *the appeal board shall have the following powers:*
   i. *to dismiss an appeal*
   ii. *to direct that an appointment or proposed appointment be rescinded or reconsidered*
   iii. *direct that an appellant be appointed to position.*

e. *appointments to auxiliary positions will not be subject to appeal*

f. *auxiliary employees should have full appeal rights for regular positions in the public service for which they have applied*

g. *decisions of the appeal board will be final and binding*

8 *Members of the Public Service Appeal Board should be appointed following consultation with the parties to be affected by the decisions of the new appeal board.*

COMMENT

Confidence in the new appeal procedure and the outcomes will be enhanced by support of the parties for respected neutral members.

9 *Appointments to and from within the public service be the product of a fair and equitable selection process applied consistently across ministries, designed to evaluate eligible applicants.*

All applicants will have the right to inquire and to receive information regarding their performance at an interview from the chair of the selection panel.

10 *The government adopt a competency-based approach to selection of staff that places greater emphasis on recognition of an applicants' potential skill development and on the real tasks to be performed in jobs, rather than placing undue emphasis on credentials.*

11 *A task force comprised of representatives of the line ministries, the proposed PSERC and the BCGEU be formed forthwith to develop a comprehensive recruitment and employment strategy for administrative support staff.*

12 *Primary responsibility for executive and senior management level recruitment be assigned to the proposed PSERC working in conjunction with line ministries.*

13 *The proposed PSERC, in conjunction with line ministries, develop a provincewide system for the advertisement of job vacancies and for the receipt of applications from employees as well as from the public for non-specific government employment.*

TAB C

14 *The proposed PSERC establish a management services support function with specific responsibility for management development including:*

a. *consultation with representatives of management employees on terms and conditions of employment*

b. *career planning*

c. *development of programs that facilitate career movement of these employees, particularly between staff and line functions*

d. *leadership and management development training in cooperation with the Centre for Executive and Management Development.*

15 *The government, in consultation with excluded employees, develop a confidential redress process for hearing and resolution of complaints and disputes concerning terms and conditions of employment for employees excluded from all bargaining units or from the application of collective agreements.*

TAB C

CONTRACTING IN THE PUBLIC SERVICE

Introduction

The commission's review focused primarily on the human resource management implications of contracting for the provision of services. The review of contracts is divided into two areas: the use of personal and service contracts including systems contracting, and commercial and consultant contracting.

Between the years 1985 and 1993 government's use of 'consultant' contracted services grew by 322 per cent from $120 million to $507 million. At the same time, public service salary expenditures grew by about 36 per cent, or from $1.1 billion to $1.5 billion. As a proportion of total provincial expenditure, this form of contracting grew from 1.5 per cent in 1985 to almost 3 per cent in 1993. Salaries, on the other hand, declined from 17 per cent of the provincial expenditure in 1985 to 9.5 per cent in 1993.

A true representation of total government expenditure on services requires combining monies spent on salaries with those spent on contracted services. The result, between 1985 and 1993, shows that total government expenditure on consultant contracting plus employee compensation in the period increased by more than 70 per cent even though the salary proportion of that total shrank.

The growth in the number of consultant and personal service contracts in the public service is primarily a result of the following factors:

- successive provincial governments have held an ideological preference for the use of private contracting over provision of services by employees
- the FTE control mechanism established by the Financial Administration Act has meant that ministries had money in their budgets but no authorization to hire staff even when it was the most cost effective means of providing the service
- recruitment procedures within the public service are time consuming, with the result that hiring a public service employee often is not a realistic option for responding to a public service initiative in a timely manner
- in the systems field, an additional issue was raised by the availability of three different staffing models.

One issue that emerged from the commission's review on contracting was the existence of contractors who were, in fact and in law, actual employees of the provincial government. The commission's review concluded that there were potentially 1,100 such individuals under 'contract' to the government in general government operations (including information systems). Aside from masking the actual size of the public service, the creation and maintenance of such contract relationships are violations of the PSA, the PSLRA and several collective agreements.

TAB C

With respect to commercial and consultant contractors, the commission identified a weakness in policies, standards and procedures governing questions of whether or not to contract, how to award a contract and the subsequent administration of contracts. Although the Government Management Operating Manual (GMOP) contains policies which call for cost/benefit analyses when making certain contracting decisions, these policies are seldom followed. Consequently, for the majority of contract decisions, there is no assessment of value earned for money paid.

The commission has concluded that there are some instances where lawful contracting does represent the best method to deliver public services. In others, the recruitment and/or retention of direct government employees is best. In both cases the most important factor is that the decision be made in the public interest and measured against sound standards. Such decisions should be non-ideological and should permit an informed assessment of the effectiveness and efficiency of the alternate service delivery models of contracting and employment.

The Shadow Work Force

Project Overview

The commission established a process to review the status of individuals in a contractual relationship with the provincial government, the BC Buildings Corporation (BCBC), BC Systems Corporation (BCSC) and the BC Housing Management Corporation (BCHMC) in order to determine whether the contractual relationships were legitimate or whether, in fact and in law, the relationships were employment relationships.

Description of the Contracting Issue

In its independent financial review for the Ministry of Finance and Corporate Relations in 1992, Peat Marwick identified an estimated 1,446 FTE contractors who were, in fact and in law, actually employees of the government. One of the reasons that the government uses contractors instead of employees is because the FTE system established under the Financial Administration Act controls the number of employees that a ministry can hire. The process for increasing the allowable number of employees is cumbersome, requiring approval by Treasury Board and then the Lieutenant-Governor in Council. In contrast, there are no limits placed on the number of contractors a ministry can hire. In its interim report, the commission recommended altering the FTE control system to remove the incentive to create illegal contract relationships.

Determination of the appropriate status of contractors is a question of law. Some of the tests used to evaluate bona fide employee status include:

- being compensated through the government's payroll
- having the use of a government office
- having the use of government equipment
- using government business cards.

Commission Process

In March 1992, the commission entered into an agreement with the BCGEU and the government to have the commission adjudicate disputes regarding the status of contractors alleged to be, legally, government employees. Similar agreements were later entered into with the government and other public service unions, namely the PEA and BCNU; and with the BCGEU and each of BCBC, BCHMC and

BCSC. The commission also reviewed contractors in excluded positions.

Representatives from the unions and GPSD formed teams to investigate all contracts where there were questions about the legal status of a worker. The teams met with the commission approximately 50 times and the commission facilitated approximately 250 resolutions to date. Most of these resolutions related to employee status, but some related to issues of exclusion from the collective agreement under section 12 of PSLRA. The commission also received over 80 inquiries from individual contractors regarding their status.

Where the parties agreed on the future employee status of an individual, but disagreed on the bargaining unit status, the commission resolved the disputes (at least on a temporary basis). Contractors who were to become employees were offered positions in govern ment consistent with the duration of their contract term on a continuous or consecutive basis. The offer usually designated regular status for individuals who had been on contract for over three years and auxiliary status for individuals who had been on contract for less than three years. The resolution also included agreement on the appropriate payment of back dues to the BCGEU by the government, consistent with arbitral jurisprudence in this area.

The commission's review process is almost complete in the non-systems operations of government. All ministries have been reviewed except Agriculture and Fisheries, district operations in the Ministry of Forests, and parts of the Ministry of Finance (Office of the Controller General, Financial Institutions Commission and Treasury Board Secretariat). The government and the BCGEU have agreed to complete these reviews.

A review process for the contractors working in the Information Systems (IS) field in government was undertaken in parallel to the general review process that covered all contractors working for the BC public service.

From July, 1992 to the end of April, 1993, the commission held more than 120 meetings with government IS managers and employees, BCSC managers, employees and board members, private sector systems companies, employees of contractors and representatives of the Treasury Board and Crown Corporations Secretariat and of the BC Trade and Development Corporation to discuss the range of IS issues that had been identified. It held public meetings in Victoria and Vancouver attended by more than 360 people from the IS community.

The commission established a working committee comprised of: David Hughes, Vice President of Sierra Systems Ltd. and Secretary of the Information Technology Association of Canada - BC; Bill Palm, Vice President of Canadian Airlines International; and Bob Lees, Director of Information Systems and Services of MacMillan Bloedel and certain government and BCSC managers. The purpose of this committee was to provide the commission with insight into the significant information systems management issues that affect large enterprises in both the public and private sectors.

The commission worked with a committee of directors from ministry information systems operations and with the BCGEU, as bargaining agent for both BCSC and ministry systems employees, to establish a process for reviewing the use of contractors within ministry IS operations. This review had two purposes: to examine IS contracts that raised questions of employee status; and, to review the effectiveness of the use of contractors for some operations of government where contractors performed the same work as employees - regardless of their legal status.

The commission received about 40 submissions on this issue.

TAB C

Commission Findings

The commission found that many contractors are, probably, legally employees of government or the other public sector organizations to which they are under contract. Their contracts are for successive periods of up to seven years. Many have ministry business cards, are listed in the government phone directories, use government equipment and work out of government offices.

The use of contractors sometimes circumvents normal hiring practices and procedures. In some instances contractors respond to advertisements, are later converted to auxiliary status and are then successful for a posting under the PSA, all for the same job.

Contracted employees are often denied unemployment insurance benefits when their contracts are terminated although Revenue Canada treats their earnings as employment earnings for purposes of assessing income tax and Canada Pension Plan contributions. These facts have persuaded the commission that many contractors to government are, in all likelihood, 'shadow' employees.

The commission was not required to finally adjudicate any disputes. The parties approached the issue on the basis of the best operational impact. Of all the non-systems contracts reviewed by the commission, approximately 13.4 per cent were found to be employment relationships. Government's use of contractors has caused considerable conflict with two of its unions, the BCGEU and the PEA. That conflict has led to a number of grievance and arbitration proceedings at great cost to the government (and to the public) for legal counsel, staff time and arbitrators fees.

Many public service contractors have flexible working arrangements like at-home offices, part-time and flex time. The commission's research indicated that despite the many costs and conflicts associated with government's use of contractors, the practice has proved that progressive flexible working arrangements are viable for public service workers and these practices should be reviewed by the new PSERC.

A detailed summary of the contracts reviewed by the commission are detailed in Figure 15.

Government's use of these contracts reveals deficiencies in its staffing procedures, difficulties in resolving disputes on the application of Section 12* of the PSLRA, problems arising from the FTE control mechanism and weaknesses in its overall salary structure where that structure does not reflect prevailing rates in the private sector.

Section 12 of the PSLRA requires the unions and government, as employer, to bargain exclusion of management employees from the application of collective agreements. Over the last several years, the government has sought an increasing number of exclusions. To some degree, the unions have resisted. The government, in some cases, has acted unilaterally to exclude employees in contravention of the PSLRA and collective agreements. The result has been a debilitating and frustrating process for all parties. The frustration has increased the incentive for management to use contract employees to avoid a legal confrontation with unions.

FIGURE 15 - PUBLIC SERVICE ACT EMPLOYEES AND SERVICE CONTRACT REVIEW - NON SYSTEMS[1]

MINISTRY	PSA EMPLOYEES[6] #	%	#FTEs 92-93 APPROVED #	%	SERVICE CONTRACT REVIEW OUTCOME TOTAL	EMPLOYEE	OTHER[2]
DIRECTLY WITHIN MINISTRY							
Aboriginal Affairs	103	0.3%	80	0.3%	48	21	27
Advanced Education	397	1.0%	332	1.1%	61	45	16
Agriculture	501	1.3%	448	1.5%	20	review in progress	
Attorney General[5]	9,761	25.0%	5,692	19.3%	962	232	730
Economic Development	636	1.6%	629	2.1%	228	53	175
Education	448	1.1%	406	1.4%	1,143	13	1,130
Energy, Mines & Petroleum	462	1.2%	391	1.3%	108	25	83
Environ, Lands & Parks	2,340	6.0%	2,337	7.9%	292	16	276
Finance & Corporate Relations	1,322	3.4%	994	3.4%	33	0	33
Forests[4]	4,391	11.2%	4,205	14.2%	1,020	80	940
Government Services	852	2.2%	292	1.0%	110	6	104
Health	5,763	14.8%	4,946	16.7%	167	63	104
Labour & Consumer Services	376	1.0%	294	1.0%	35	1	34
Municipal Affairs	610	1.6%	568	1.9%	48	2	46
Premier's Office	69	0.2%	70	0.2%	8	7	1
Social Services	4,985	12.8%	4,579	15.5%	34	11	23
Tourism	354	0.9%	327	1.1%	54	11	43
Transportation & Highways	2,861	7.3%	2,741	9.3%	210	34	176
Women's Equality	75	0.2%	65	0.2%	43	13	30
Total	36,306	93.0%	29,396	99.5%	4,624	633	3,971
REPORTING TO LEGISLATURE							
Legislative Library	34	0.1%	N/A	N/A	0	0	0
Auditor General	96	0.2%	90	0.3%	0	0	0
Commission on Resources and Environment	16	0.0%	18	0.1%	0	0	0
Ombudsman	47	0.1%	43	0.1%	0	0	0
Total	193	0.4%	151	0.5%	0	0	0
SOCIETIES WITH PSA EMPLOYEES							
BC Mental Health	1,850	4.8%	N/A	N/A	0	0	0
Glendale Lodge, Tillicum and Veterans' Care Society, Oak Bay Lodge Society	709	1.8%	N/A	N/A	28	13	15
Total	2,559	6.6%	N/A	N/A	28	13	15
TOTAL	39,058	100.0%	29,547	100.0%	4,652	646[3]	3,986

1 The investigation of contractor status is not complete. Data re actual conversions from contractor to employee are not available. The table indicates cases in which employee status has been or will be offered, but not necessarily accepted by contractor.
2 'Other' includes bona fide contractor, not BCGEU jurisdiction, or to be reviewed by another ministry.
3 This does not include an estimated 450 contractors in information systems.
4 900 reviews underway.
5 Attorney General includes Liquor Distribution Branch.
6 PSA employees as of December, 1992.
7 Data for the service contract review effective May 6, 1993.

An 'FTE' is not the same as an 'employee'. The term Full Time Equivalent (FTE) is a measurement of the equivalent of one person working full time for one year. Two persons each working six months would be one FTE.
The number of FTEs is always lower than the number of actual persons employed during a fiscal year because of part-time, seasonal and workload variations.

Source: Government Personnel Services Division

The use of contractors createsinequities. It denies promotional opportunities to exist ing public service employees and access to government jobs to members of the public. Contractors receive levels of compensation for the same work that vary - either higher or lower - from those of regular public service employees. The existence of contractors who are legally employees undermines the basic structures that make up the human resource policies of the public service. These include: the PSA, the merit principle, collective bargaining rights under PSLRA and entitlements under the Pension (Public Service) Act. All these structures were designed to ensure fairness in public service human resource practices.

TAB C

The Systems Contracting Workforce

Earlier in this report, the commission identified the unique staffing challenges for IS employees. The extensive use of contractors to provide information services developed as the result of a number of features including:

- the FTE system of staffing controls established under the Financial Administration Act
- the preference of former governments for contractors over employees
- the existence of at least three alternative staffing models for staffing identical functions within ministry systems operations.

The government pays approximately $5.2 million more for IS contract employees than it would pay if the same people were employed on the government classification scale (this includes the cost of benefits). In many cases, contractors have been trained and supervised by government employees who received lower rates of pay. In some instances, contractors supervised government employees or BCSC secondments, including providing performance reviews and other management functions.

Some companies have been established that do nothing more than supply staff to government on personal service agreements. Other larger enterprises which engage in bona fide contracting, also provide 'bodies' for government staffing needs.

Some contractors faced with conversion to government or BCSC employee status would prefer to remain contractors. Reasons for this vary, from questions of compensation and income tax status to perceptions of flexibility and independence. Other contractors believe that they are really employees and look forward to the rectification of their employee status. Contractors generally prefer the option of becoming BCSC employees over becoming government employees. This is not surprising given differences in compensation, training, and association with a systems-based organization.

The government's IS directors believe that some use of bona fide contractors to staff ministry systems operations is not as effective a use of resources as would be achieved using employees to perform those functions. In some instances, the use of contractors detracts from operational flexibility. It is difficult for managers to reassign a contractor to other work that is more pressing or more important to the particular ministry's priorities.

Approximately 940 systems contractors working in government ministries were reviewed. The government and BCGEU tentatively agree that 380 of these systems contractors are bona fide contractors, and that this is an appropriate use of contract staff.

The government and the union also agree that approximately 200 contractors are legally employees of government on application of conventional legal tests.

The BCGEU asserts that approximately 250 more contractors or employees of contractors, are legally employees. The government does not agree with this assertion; but the government's IS directors do believe that the use of these 250 contractors provides government with lower value for money relative to the use of crown employees to perform the same functions.

The government has advised the commission that it intends to complete the contractor review with BCGEU. Agreement on a review process has been reached by GPSD and BCGEU and this work will continue on after the commission has completed its work. This review process has led government, for the first time, to formally consider the circumstances under which it receives better value from either systems staff or from the use of contractors.

The conversion of contract employees to regular employee status is an important correction of a dysfunctional system but it must fit in with the longer term staffing model chosen for IS personnel. As well, transitional issues must be dealt with if contract employees are to be converted to regular employee status without disruption of government IS operations.

Therefore, the commission recommends that:

16 ***The responsibility for ensuring that ministry contracting practices be consistent with government policy and the law, and monitoring of this issue be assigned to PSERC.***

17 ***An expedited process be established to resolve any disputes concerning the issue of employee status resulting from contracting.***

18 ***Government complete the review process started by the commission in March 1992 with respect to the conversion of information systems and other contract employees who are deemed to be legal employees of the crown***

- ***a. the conversion should be completed in the same manner as the shadow work force conversions***
- ***b. the process should be expedited***
- ***c. the costs of the process should be shared equally between the government and the BCGEU (or other union where relevant).***

TAB C

Commercial and Consultant Contracting

Project Overview

The commission reviewed the policies and practices of the government in its use of commercial and consultant contracts to meet requirements for the delivery of public services.

For the government to ensure cost effective delivery of services, it must create comprehensive contracting guidelines that outline consistent standards for selecting contractors, contain methods to evaluate value for money and ensure compliance on the part of all ministries. The commission found that such guidelines do not currently exist. This has contributed to an inefficient use of some contracted services.

Issues Arising from Commercial and Consultant Contracting by Government

When it decides to undertake an activity, government has to determine whether to perform the functions through use of its own employees or through the purchase of services provided by others on contract. This project focused on how government makes the decision whether to use its own employees under the PSA or to use contractors.

The range of direct services to the public provided by government include: the maintenance of government revenue and expenditure functions; the provision of road and bridge maintenance; public access to government information; operation and maintenance of the provincial parks; family maintenance enforcement services; forest fire fighting; computer graphic mapping of the province and the provision of professional services by lawyers, accountants, architects and engineers.

Some of these services are provided by employees while others are provided by non-employees working under contract. Over time, there has been a tendency for government to become more of a financial and administrative organization and less of a direct provider of services. At various times, nearly all of the functions now performed under contract were performed directly by government employees.

Most commercial contracting is undertaken on a ministry by ministry basis within a policy framework established by the 1987 Government Management Operating Policy (GMOP). There is no overall coordination of contracting. Of a total of $2.7 billion in payments spent on contracting in fiscal 1991-92, only $444 million came under some form of central control (through the Purchasing Commission). The remaining $2.2 billion is spent by ministries within their statutory and delegated authorities.

The commission's review found that government's administration of contracts, once they had been let, was generally conducted in a responsible manner and there were good training programs for contract administrators. The primary issue for the commission was focused on the decision whether to perform work using government resources or through contract.

Government contracting policy is found in Chapter 6 of GMOP. Section 6.1 states:

> *Contract management is the efficient use of outside contractors to provide works or services to the government or on its behalf.*
>
> *The management decision to let a contract is made by contrasting the contracting alternative to the use of in-house resources in terms of:*
>
> - *which is the least costly alternative*
> - *which way promises greater value for money*
> - *which option provides the equipment, expertise etc. to do the task.*
>
> *The policies and guidelines contained in this section provide a framework for managers in:*
>
> - *letting contracts*
> - *ensuring protection of the government through performance or security bonds*
> - *gaining the requisite approvals for contracts*
> - *monitoring contractor performance*
> - *arranging contractor payment*
> - *maintaining proper contract documentation.*

The current GMOP is silent on values or criteria that should be used in implementing the requirement to evaluate contracting costs on a comparative basis with in-house costs.

In practice, the requirements of GMOP to evaluate the least costly alternative are seldom, if ever, followed. The commission was advised of one instance where a comprehensive comparison was undertaken prior to February, 1992. No other examples were provided that pre-dated that one instance.

When a ministry enters into a contract for services, it is spending money that has already been approved for expenditure by the legislature in the annual estimates. Additionally, GMOP requires that contracts in excess of $100,000 annually must be specifically approved by Treasury Board after a review and recommendation by the Treasury Board Secretariat. However, there is no standard format for ministries to follow in any aspect of contracting, including submissions to Treasury Board.

The commission estimates that between 9,000 and 10,000 commercial and consultant contracts are signed each year. There is no central registry of these contracts. Many are of brief duration but it is not uncommon to find multi-year contracts or contracts that are essentially continuous with the same supplier. Occasionally, government capitalizes new programs through contracts and the contractor ends up as the owner of the equipment and technology necessary to provide the service.

Government commercial and consulting contracting has increased dramatically since 1985. The primary category for government commercial and consultant service contracting is Standard Object of Expenditure (STOB) 20. Review of 1985 to 1993 financial information clearly shows the increased use of professional services. Contract expenditures increased from $120 million in 1985 to $507 million in 1993 (a 322 per cent increase).

No framework exists within government to determine whether or not contracting generally, or specific contracts, provided good value for public expenditure.

TAB C

The commission found no evidence of conflict of interest in contract administration but notes that the current policies on conflict of interest and contracting provide no guidance to those involved in the contracting process. The commission believes that contracting policy must be free of potential for public concern about possible conflicts.

With such a magnitude of expenditure on contracted services, there must be a set of standards and procedures for ministries to follow when they are deciding whether to contract.

In April 1990, an inter-ministry task force on contract management completed a report that recommended a contract management council. A council was formed in the spring of 1991. Membership included ministry and agency representatives at the assistant deputy minister level. The council is awaiting the findings of the commission to assist with its current work.

Commission Process

The commission canvassed the views of deputy ministers and senior government staff, representatives of BCGEU and PEA, the Comptroller General, staff of the Office of the Auditor General, the Purchasing Commission, the Risk Management Branch, the Economic and Revenue Policy Division of the Ministry of Finance and a number of contractors on the issue of commercial and consultant contracting.

The commission also reviewed contracting practices in other Canadian jurisdictions. No jurisdiction has a significant policy framework that was of assistance to the commission.

The commission reviewed a number of government decisions to purchase services through contract or to contract government programs through the privatization initiative. Our purpose was to use existing contracts to develop a set of criteria to guide government's future actions.

The major issue identified by these reviews was a difficulty in determining whether contracted service provided good value for money because of the absence of significant comparative standards at the time that contracts were let. Some of the decisions to contract appear to have been sound but others did not.

There was a consensus among government managers that the process for deciding whether to provide a service using government employees or through the use of contractors required elaboration and clarity. But government managers also impressed upon the commission that any process had to be one that was capable of being applied effectively to meet the demands placed upon government to provide the service. Any process that was overly rigid or complicated in its application would serve to create a new set of problems in the name of solving older ones.

In total, the commission participated in 70 meetings and received more than 100 submissions and letters on the topic of commercial and consultant contracting by government.

Commission Findings

The commission concluded that current government policy, in place since 1987, does not adequately ensure that government receives good value for its expenditure on contracted services.

There are three principal defects in the current policy:

- the current policy is not sufficiently broad. It focuses on costs but does not address economic development, personnel and service delivery issues
- there is a lack of standards to guide ministry managers in the decision process on when to contract
- there are no mechanisms in place to ensure compliance with GMOP, 6.1.

The fact that there is no clearly understood government policy about when or how to make a decision to contract work results in variation in ministries practices in the use of contracted services.

The absence of an effective policy creates a number of negative results. If it is unclear within government as to the standards in relation to contracting, it is nearly impossible for bidders or potential bidders seeking government business to be sure of the nature of the decision making process. Given the lack of clarity to the users of contracts and to vendors under contract, it is not surprising that it is not clear to the public whether or not they are receiving good value for public services that are privately provided.

The commission found that cost/benefit analyses were rarely performed for several reasons. A primary reason was the effect of the FTE control system as established in the Financial Administration Act. The FTE system was the subject of comment in our interim report of December, 1992. Under the FTE control system, there was often money available to meet service requirements without the capacity to hire staff even where hiring was the best alternative. The commission has dealt with this problem through its recommendation for an amendment to the Financial Administration Act.

Underlying the growth of contracting was a philosophical conviction that the private sector could perform any function on behalf of government in a more cost effective manner than government could perform on its own behalf. In some instances, in the commission's review, contracting was the most cost effective method of providing services. In other instances, however, it was not the best value for taxpayer money. A simplistic preference for either contracting or direct public service provision for functions is inherently flawed.

The commission found a high level of agreement on the need for a clear, business set of contracting guidelines and standards based upon: public interest, cost effectiveness, economic development opportunities and the quality of service to the public.

The commission found that contracting has made a significant contribution to improvements in government performance in an indirect fashion. One of the features necessary for successful contracting practice is the development of 'deliverables', the definition of the goods and services that the contractor is expected to provide.

The effort required to develop 'deliverables' is, in essence, the effort to develop performance measurements. Government can use its experience with contracting to develop performance measurement standards where government services are provided directly by government employees.

CASE STUDIES

The commission has chosen four examples that are typical of the wide range of issues faced in contracting.

Example A - The Highway Sign Shop

Until 1988, the Ministry of Transportation and Highways produced its own highway traffic signs. The sign shop, located in Langford, was privatized through sale to an employee group for a five-year contract. The ministry agreed to purchase signs in declining volumes and had to pay for the signs whether it actually ordered them or not - a 'take or pay' contract.

In December 1988 (about nine months after privatization) Trans Sign Limited faced serious financial difficulties and indicated the ministry had failed to meet its obligations for orders during the first year. Steps were taken by the ministry to provide the company with additional funds. These actions became the focus of a report and recommendations by the Auditor General which identified inefficiencies resulting from the contract.

During early 1993, as the five-year contract approached an end, the ministry reviewed the cost effectiveness of the private production of signs and concluded that it was more cost effective to resume direct sign production and to locate the facility in the interior.

TAB C

Example B -
Forest Fire Attack Program

This program provides the initial attack force on forest fire outbreaks in the province. Since 1986, the forest service has contracted about half of the initial attack crews. The decision complied with the former government's privatization policy.

The ministry's experience revealed that contracting this work is not an appropriate way to meet the requirements of the forest service. Contractors acted as labour brokers. Wages paid to contract fire fighters are significantly lower than the wages paid to forest service employees doing the same job.

Contract fire fighters have been paid at the rate of $8.00 per hour with few benefits except those required by statute. The hourly rate paid by government to contractors who were effectively labour brokers was considerably higher. In some cases, contractors failed to comply with the Employment Standards Act, particularly in respect of overtime payments. Forest protection work during fire season requires a great amount of overtime.

In contrast, the average starting wage for initial attack fire fighters who are directly employed by government in BC, Alberta, Ontario and the Yukon is $14.10 per hour.

The consequence of the low wages paid by contractors has been higher overall costs to government than the cost of providing the service with its own employees. Contractor productivity, work experience and employee morale is lower; employee turnover and ministry supervision costs are higher.

The ministry concluded that the continued use of contractors undermined its accountability under the Forest Act for forest management and fire suppression operations. The ministry is seeking to increase the number of ministry staff employed on initial attack crews.

Example C -
Photo Lab Contracting

In mid-1991, the Survey and Resource Mapping Branch of the Ministry of the Environment, Lands and Parks proposed to contract out photo production. When concerns were raised about the contracting, the ministry undertook a comparison within the framework of GMOP. It estimated that the cost of contracting the necessary work was less expensive than performing the work through the five government FTEs who would be affected. There was other work for each of these employees and the ministry concluded that there was no violation of the collective agreement involved.

This proposal was reviewed by Treasury Board staff who did a comprehensive analysis. The Treasury Board staff analysis disagreed with the ministry's conclusions. The contracting would have cost more than continuing to do the work through the use of government employees. The proposed contracting would also have violated the collective agreement with BCGEU. On the other hand, the proposed contract had some economic development potential that could not be achieved except through contracting. On balance, the lower cost and effectiveness of direct service provision and the relatively short time frame for making the decision led to a conclusion to retain the work within the public service.

Example D -
Geographic Information Systems (GIS)

Commencing in 1981, the Survey and Resource Mapping Branch of what is now the Ministry of Environment, Lands and Parks began contracting out the production of mapping work required by the government. At the time, there was no significant private sector industry in BC capable of doing this work.

Government employees were seconded to private sector firms to train their staff, and government gave contracts to consortiums of small firms.

By 1991-92, there was a viable private sector in BC that provided mapping and related geographic information services to other users in BC and Canada and was competitive on a worldwide basis. The continued contractual relationship between these private sector firms and the government demonstrates that the BC government has confidence in the performance of these private firms.

The government itself has retained sufficient staff resources of its own to ensure that it receives quality production for value under these contracts and to be a leader in the technological advancements in geographic information technology.

Therefore, the commission recommends that:

19 ***The government expand the current Government Management Operating Policy to incorporate considerations of economic development, human resource, and personnel and service delivery quality into decisions regarding contracting.***

20 ***The government establish standards for comparison of proposed contracting costs to costs of providing services using direct government resources and include these standards in section 6.1 of the Government Management Operating Policy. Standards should include consideration of the following:***

a. ***public safety and the public interest - an evaluation of the nature of service being reviewed, the nature of the public interest being considered and any issues affecting the safety and security of the public***

b. ***cost - a comparison of the fully allocated cost of performing the service through the use of government employees versus the cost of performing the service through contracting***

If the assumptions regarding cost are based on assumptions of lower labour costs, the analysis should include the impact of increased labour costs that may be associated with unionization or other factors that change labour rates

TAB C

c. *service quality - a comparative evaluation of the quality of service provided by government as direct provider and by contracted services. This should include an analysis of the projected change in demand over the length of the contract and any reasonable likely renewal*

d. *human resource impact - does the proposed contracting create any potential violations of the collective agreements between government and the bargaining agents representing its employees. A collective agreement violation can be a significant additional cost. Consideration shall also be given to the employment practices of the relevant contractor community to ensure that they are consistent with law and government policy*

e. *organizational integrity - i.e.: the potential impact of contracting on the ability of the government as an organization to continue to provide cost effective services. This is particularly important where entire categories of activity are proposed to be contracted out of government and there is the potential loss of government expertise*

f. *economic development issues - government procurement policy can make a significant contribution to the development in BC of private sector industries which add value to the BC economy beyond the value of the contracts from government. An example of this is the use of government contracting to facilitate development of a private sector mapping industry*

g. *economic stabilization issues - i.e., the impact of government decisions to alter the way it has previously done business in communities, particularly in the non-metropolitan areas of the province*

h. *labour market and private suppliers - does government have the ability to recruit and retain the necessary skills; do those skills exist in the private sector; is there an existing private sector that can supply the service*

i. *the cost of management - i.e., the cost associated with managing employees versus the cost of managing contractors.*

COMMENT

The commission believes that use of these standards as a check list for contracts of relatively low dollar value will improve decision making and will reduce the subsequent costs associated with contract administration without impeding the effective operation of government. For more expensive contracts, or for categories of contracts within a ministry or across ministries, government should undertake a more rigorous cost comparison to ensure that the decision to contract is the best business decision.

21 *The government apply these guidelines as a standard for evaluation of all contracts in excess of $100,000 in value before submission to Treasury Board and that they be applied as a checklist for all contracts under $100,000 in value.*

22 *The government require performance measurments that are capable of being monitored during the life of each contract. A format for the application of these standards and procedures for their implementation be developed within six months from the date of this report and be publicly available to potential contractors and other parties.*

23 *The government adopt a flexible range of options for selection of contractors ranging from open tendering to the use of eligibility lists and pre-qualification and that the criteria for selection be a part of any contracting proposal.*

24 *Each ministry be required to outline in its own annual report the contracting policies that it followed, the names of successful contractors, the amount paid to the contractor within the fiscal year and the total value and duration of the contract, the nature of the services provided and the nature of the selection process undertaken.*

TAB C

TAB C

PUBLIC SERVICE LABOUR RELATIONS ACT

Project Overview

The commission reviewed current structures and practices for collective bargaining, dispute resolution and exclusion from collective bargaining under the Public Service Labour Relations Act (PSLRA) and the Labour Relations Code.

Description - The Public Service Labour Relations Act

As noted earlier, the PSLRA was adopted in 1974 as the governing statute for labour relations in the BC public service. It resulted from a review of labour relations in the public service, called '*Making Bargaining Work in British Columbia's Public Service*', conducted by a commission of inquiry which was chaired by Richard Higgins and which had representation from BCGEU and the PSC. Its most significant result was the introduction of collective bargaining into the public service of BC.

At the time, collective bargaining for the private sector and for the indirect government employees in the broad public sector was (and still is today) regulated by the Labour Relations Code. However, when collective bargaining rights were first granted in the public service, the government determined that it needed separate legislation to regulate some aspects of the collective bargaining process. Those aspects, in which the PSLRA differs from the Labour Relations Code, are described below.

Under general labour law, bargaining units are not specified in the code. However, the PSLRA divides the public service into four separate bargaining units. Nurses who are directly employed by the government are included in two bargaining units; one comprised of general nurses and one of psychiatric nurses. They are covered by a joint certification shared by the BCNU and UPN. Most licensed professionals are included in a licensed professional bargaining unit represented by the PEA and all other employees are in a residual bargaining unit represented by the BCGEU. This latter unit is, by far, the largest of the four bargaining units.

TAB C

In another departure from the general labour law, the PSLRA exempts five areas from collective bargaining, as follows:

- the merit principle and its application
- all matters under the Pension (Public Service) Act
- the organization of government, ministries etc. except the effect of reductions in the size of the public service
- the application of the system of classifications or job evaluation
- procedures and methods of training.

The PSLRA also differs from the Labour Relations Code regarding the requirements necessary for job action. Under the Labour Relations Code a legal strike authorization requires a supportive vote of 50%, plus one, of voting employees. Under the PSLRA, such an authorization requires a supportive vote of 50%, plus one, of all members of the affected bargaining unit. In other words, in the public service an employee who elects not to vote at all in a strike vote is essentially voting against a strike.

The process for determining exempt positions also differs for public service organizations. The exclusion of employees from collective bargaining under the PSLRA occurs in two ways. The first method of exclusion occurs under section 12 of the act which allows for exclusions based upon the performance of confidential labour relations functions. This is similar to provisions in the general labour law.

The process for that exclusion, however, differs significantly from most other procedures under the Labour Relations Code. Instead of management deciding to exclude personnel, subject to challenge before the Labour Relations Board (LRB) by the unions, under the PSLRA, management must go before the LRB to get certain positions excluded from the agreement. Even upon exclusion, employees are still considered part of a bargaining unit, although not covered by the collective agreement.

The second type of exclusion from collective bargaining occurs under section 1(1) of the PSLRA. Section 1(1) is the definition of 'employee' under the act and specifically excludes from that definition, 31 categories of employees. In addition, one further category of employee in the elections branch is excluded from the definition of 'employee'. A number of these exclusions were contained in the original PSLRA but that list has grown considerably over the years as successive governments have added to the list. Individuals employed under the PSA, but excluded from the definition of 'employee' under the PSLRA, do not have access to collective bargaining rights. Approximately 5,000 employees of the public service fall into this category.

Commission Process

The commission commenced an extensive review of the PSLRA concurrently with its general review of the public service. The commission had over 20 meetings and received over 15 letters and submissions regarding the PSLRA.

Commission Findings

The process for dealing with exclusions has been frustrated for the last several years because of the poor relationship between the government and its unions. This has created problems in the administration of the public service. However, the BCGEU and GPSD have recently agreed upon a process for the expeditious review of differences on issues relating to exclusion from the BCGEU bargaining unit. The commission believes that this process will resolve many of the outstanding problems relating to exclusions from bargaining units.

There are only two issues that require specific comment:

Exclusions under Section 1(1)

The public service unions question the validity of the exclusions under section one of the PSLRA of certain categories of employees. They are not persuaded that there is any viable public policy reason for the continuation of certain of these statutory exclusions. However, there is an acceptance that this issue is not so pressing that it needs to be addressed before the process of public service reform is completed and before government has the benefit of advice from the new PSERC.

The commission compared the proportion of public service employees excluded from collective bargaining under the PSLRA from those excluded in other Canadian jurisdictions:

FIGURE 16 - PROVINCIAL PUBLIC SERVICE: BARGAINING UNIT & EXCLUDED

PROVINCE	BARGAINING UNIT NUMBERS	%	EXCLUDED NUMBERS	%	TOTAL NUMBERS
British Columbia	**33,997**	**87.0%**	**5,061**	**13.0%**	**39,058**
Alberta	23,800	80.4%	5,800	19.6%	29,600
Saskatchewan	8,450	79.6%	2,170	20.4%	10,620
Manitoba	16,300	91.1%	1,600	8.9%	17,900
Ontario	60,000	81.6%	13,500	18.4%	73,500
Quebec	67,325	90.4%	7,175	9.6%	74,500
New Brunswick	11,425	81.3%	2,625	18.7%	14,050
Nova Scotia	9,800	84.5%	1,800	15.5%	11,600
P.E.I.	3,200	97.0%	100	3.0%	3,300
Newfoundland	32,800	93.7%	2,200	6.3%	35,000
Average other Province		86.6%		13.4%	

Notes: BC data effective Dec., 1992. Data for other provinces generally effective summer 1992. Attempts have been made to obtain comparable data from other provinces regarding the number of exclusions. However, definitions do vary among provinces and the data may not be directly comparable.

The respective sizes of the direct public services vary from one province to another depending upon which employee groups are included or are found in the broad public sector.

Source: Government Personnel Services Division

TAB C

Definition of Bargaining Units

The line of demarcation between the bargaining units established under section four of the PSLRA is not always clear. Since the PSLRA was introduced in 1974, there have been occasional differences between the government, the BCGEU and the PEA over the appropriate bargaining unit for certain classifications of employees. Those differences have required determination by the LRB.

Recently, government has recognized the 'professional' nature of increasing categories of work through the extension of self-regulation. The Health Professions Act and the Social Workers Act are but two examples.

These enactments are laws of general application but they raise issues for the allocation of classifications of public service employees to bargaining units under the PSLRA. For example, prior to 1978, psychologists employed by the government were all members of the BCGEU. In 1978, the government passed the Psychologists Act and the immediate effect was that all government employed psychologists, who became licensed, fell under the certification of the PEA.

Currently, the BCGEU and the PEA are in disagreement over which bargaining unit is appropriate for certain classes of accounting employees. This dispute is at the LRB for adjudication.

The commission recognizes that the results of the LRB's decision could have broad implications for the two unions, for government and for any newly recognized professionals employed in the public service.

The commission has held several meetings with the PEA and the BCGEU in an effort to assist them to resolve this matter. The parties were unable to come to an agreed solution.

The commission has determined that it would be inappropriate to interfere with the jurisdiction of the LRB.

The PSLRA establishes limitations on bargaining rights on the one hand, but has also created bargaining structures that have endured with a high degree of stability for almost 20 years.

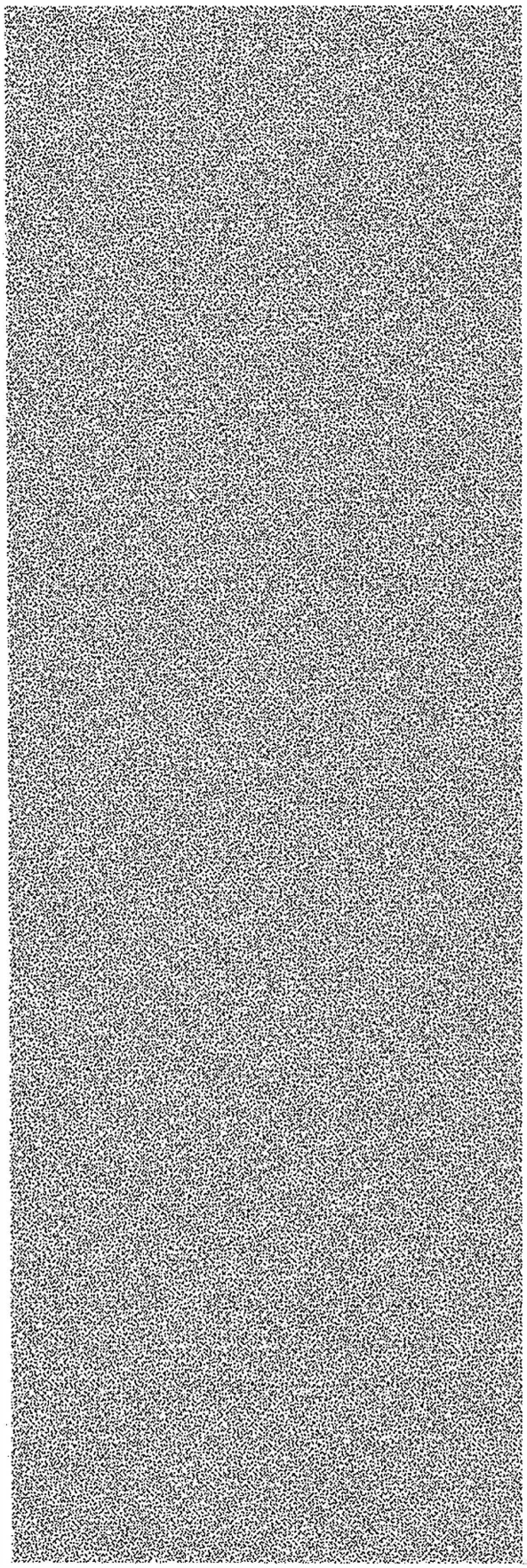
During the course of this review, it became clear that the government, the public service unions and representatives of management employees agreed that there are some problems with the PSLRA but no problem was so serious as to require a fundamental review of the act at this time.

Therefore, the commission recommends that:

25 The PSLRA should not be amended.

TAB C

APPENDICES

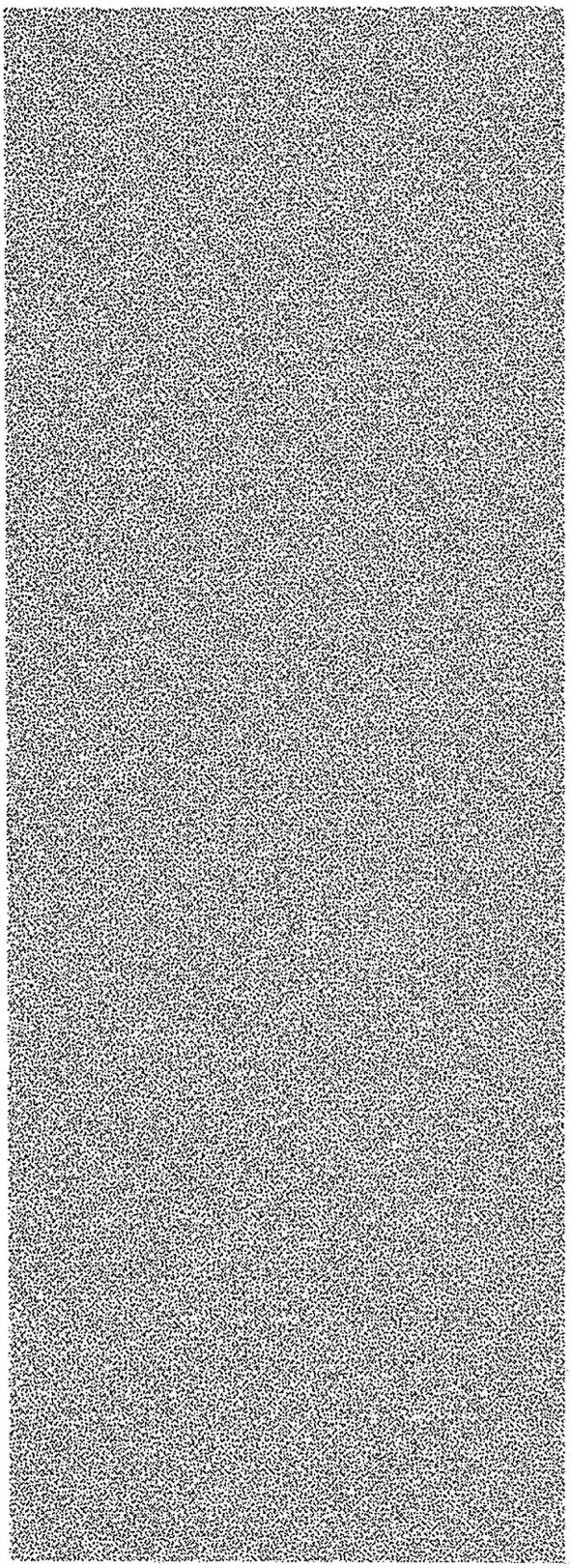


CONTENTS

TAB C

APPENDIX i

DRAFT PUBLIC SERVICE ACT



TAB C

DRAFT PUBLIC SERVICE ACT

Contents

PART 1

INTRODUCTORY PROVISIONS

Definitions

1. (1) In this Act

"appeal board" means the Public Service Appeal Board established under section 16;

"auxiliary employee" means an auxiliary employee as defined in the regulations;

"commission" means the Public Service Employee Relations Commission established under section 5 (1);

"commissioner" means the commissioner appointed under section 5 (2);

"deputy minister" means

(a) a person appointed as a deputy minister under section 12, or

(b) subject to section 14, a person who by an Act or by an order in council under that section is declared to have the status of a deputy minister;

"employee" means a person appointed under this Act other than a person appointed under section 15.

Purpose of Act

2. The purposes of this Act are to

(a) facilitate the provision of service to the public in a manner that is responsive to changing public requirements,

(b) recruit and develop a well qualified and efficient public service that is representative of the diversity of the people of British Columbia,

(c) encourage the training and development of employees to foster career development and advancement,

(d) encourage creativity and initiative among employees, and

(e) promote harmonious relations of the government and employees and bargaining agents that represent employees in the public service.

Application of Act

3. Except as otherwise provided in this Act or in another Act, this Act applies

(a) to all ministries of the government, and

(b) to any board, commission, agency or organization of the government and its members or employees, to which the Lieutenant Governor in Council declares this Act, or a provision of this Act, to apply.

Consultation process

4. (1) The commission must consult with representatives of the employees' bargaining agents certified under the *Public Service Labour Relations Act* with respect to

(a) the application of the matters that determine merit under section 8 (2), and

(b) regulations that may affect the employees represented by the bargaining agents that the minister intends to recommend to the Lieutenant Governor in Council under section 25.

(2) In addition, the commission may consult with employees who are not represented by the bargaining agents referred to in subsection (1) with respect to the matters referred to in that subsection that affect members of those groups.

(3) In this section "consult" means seeking advice or an exchange of views or concerns prior to the making of a decision respecting the matters that determine merit under section 8 (2) or the making of regulations under section 25.

PART 2

PUBLIC SERVICE EMPLOYEE RELATIONS COMMISSION

Public Service Employee Relations Commission established

5. (1) A division of the government to be known as the Public Service Employee Relations Commission is established under the administration of the minister.

(2) The Lieutenant Governor in Council must appoint a commissioner as the deputy minister responsible for the commission.

(3) The commissioner is responsible for personnel management in the public service including but not limited to the following:

(a) advising the minister respecting personnel policies, standards, regulations and procedures;

(b) providing direction, advice or assistance to ministries in the conduct of personnel policies, standards, regulations and procedures;

(c) recruiting, selecting and appointing, or providing for the recruitment, selection and appointment of, persons to or within the public service;

(d) developing, providing, assisting in or coordinating staff training, educational and career development programs;

(e) developing, establishing and maintaining evaluation and classification plans;

(f) acting as bargaining agent for the government in accordance with section 3 of the *Public Service Labour Relations Act;*

(g) developing, establishing and maintaining occupational health and safety programs;

(h) developing and implementing employment equity policies and programs;

(i) conducting studies and investigations respecting staff utilization;

(j) carrying out research on compensation and working conditions;

(k) developing and implementing mechanisms to ensure effective human resource planning and organizational structures;

(l) developing, implementing and maintaining a process to monitor, audit and evaluate delegations under section 6, to ensure compliance with this Act and the regulations;

(m) establishing and maintaining a personnel management information system;

(n) performing other duties assigned by the minister respecting personnel, consistent with this Act and the regulations.

(4) Subject to this Act and the regulations and on the recommendation of the commissioner, the minister may issue policies respecting the matters referred to in subsection (3).

Delegation

6. Subject to the regulations, the commissioner may

(a) delegate any of his or her powers, duties or functions under this Act or the regulations to an employee of the commission,

(b) with respect to employees of a ministry or a board, commission, agency or organization to which this Act applies, delegate any of his or her powers, duties or functions under this Act or the regulations to a deputy minister or other employee of the ministry or to a member, officer or employee of the board, commission, agency or organization,

(c) delegate dismissal authority under section 22 (2)

(i) to an assistant deputy minister or an employee who has an equivalent classification level to an assistant deputy minister, and

(ii) to a member or officer of a board, commission, agency or organization to which this Act applies,

(d) establish conditions, standards or requirements for any delegation, and

(e) amend, replace or revoke any delegation made under this section.

Access to facilities and records

7. The commissioner is entitled to access to ministries and to boards, commissions, agencies and organizations that are declared to be subject to this section under section 3 and to their records relating to personnel matters or containing information required by the commissioner to carry out his or her duties under the Act or regulations.

PART 3

APPOINTMENTS TO THE PUBLIC SERVICE

Appointments on merit

8. (1) Subject to section 10, appointments to and from within the public service must

(a) be based on the principle of merit, and

(b) be the result of a process designed to appraise the knowledge, skills and abilities of eligible applicants.

(2) The matters to be considered in determining merit shall, having regard to the nature of the duties to be performed, include the applicant's education, skills, knowledge, experience, past work performance and years of continuous service in the public service.

(3) Regulations, policies and procedures with respect to recruitment, selection and promotion shall facilitate

(a) opportunities for external recruitment and internal advancement to develop a public service that is representative of the diversity of the people of British Columbia, and

(b) the long term career development and advancement of employees appointed under this Act.

(4) Subject to the regulations, the commissioner may direct in respect of a vacancy or class of vacancies in the public service, that applicants be

(a) limited or given preference in a manner intended to achieve employment equity objectives,

(b) limited to employees to encourage career development and advancement,

(c) limited to employees of a stated occupational group, position level or organizational unit, or

(d) limited to a stated geographical area or locale.

Probation

9. (1) If a person who is not an employee is appointed to a position in the public service, the person shall be on probation until he or she has worked the equivalent of 6 months' full time employment.

(2) Where the appointment is made from within the public service, a probation period in the new position not exceeding the equivalent of 6 months' full time employment may be imposed.

(3) A deputy minister or the commissioner may reject an employee during the probation period if the deputy minister or commissioner considers that the employee is unsuitable for employment in the position to which he or she was appointed.

Exceptions to section 8

10. Subject to the regulations

(a) section 8 (1) does not apply to an appointment that is a lateral transfer or a demotion, and

(b) section 8 (1) (b) does not apply to the following:

(i) a temporary appointment of not more than 7 months in duration;

(ii) an appointment of an auxiliary employee;

(iii) a direct appointment by the commissioner in unusual or exceptional circumstances.

Inquiries

11. (1) An unsuccessful applicant for appointment to the public service may apply in writing to the chair of the selection panel for the competition with respect to that appointment for a statement of the reasons why he or she has not been appointed.

(2) The chair of the selection panel must provide the unsuccessful applicant with the statement referred to in subsection (1) as soon as possible but in any case not later than 30 days after the date on which the chair received the application of the unsuccessful applicant.

Deputy ministers

12. (1) The Lieutenant Governor in Council may appoint deputy ministers, associate deputy ministers and assistant deputy ministers.

(2) An associate deputy minister has all the powers of a deputy minister.

Deputy ministers' pension

13. (1) When calculating the amount of a superannuation allowance under the *Pension (Public Service) Act* each year of service as a deputy minister must be counted as 1 1/2 years of pensionable service.

(2) Subsection (1) does not apply

(a) to the calculation under section 6 (5) of the *Pension (Public Service) Act*, or

(b) to a person holding the position of acting deputy minister.

Declaration of deputy minister status

14. The Lieutenant Governor in Council may declare that a person has the status of a deputy minister and may set terms and conditions of employment, including remuneration, for that person and specify which sections of this Act or the regulations apply to that person.

Appointment by Lieutenant Governor in Council

15. (1) The Lieutenant Governor in Council may appoint persons the Lieutenant Governor in Council considers

(a) will be acting in a confidential capacity to the Lieutenant Governor, Executive Council or a member of the Executive Council, or

(b) will be appointed to a position that requires special professional, technical or administrative qualifications.

(2) A person referred to in subsection (1) (a) or (b) may be appointed by the Lieutenant Governor in Council on terms and conditions, including remuneration, authorized by the Lieutenant Governor in Council or set out in the regulations.

(3) This Act, other than subsections (1) and (2) and sections 21 and 25 (3), does not apply to a person employed or appointed under this section.

PART 4

PUBLIC SERVICE APPEAL BOARD

Public Service Appeal Board established

16. (1) A board to be called the Public Service Appeal Board is established to hear appeals under section 18.

(2) The appeal board shall consist of at least 3 members appointed by the Lieutenant Governor in Council, one of whom shall be designated as chair.

(3) A member of the appeal board appointed under subsection (2) shall hold office during good behaviour for a term not exceeding 3 years and shall serve on a full or part time basis as the Lieutenant Governor in Council may order.

(4) Where there is a tie vote on any matter before the appeal board, the decision of the chair shall be the decision of the board.

(5) In addition to the members of the appeal board appointed under subsection (2), the chair may appoint persons as members of the appeal board for the purpose of one or more appeals.

(6) A member of the appeal board shall be reimbursed for reasonable expenses necessarily incurred by the member in the performance of his or her duties and be paid remuneration authorized by the Lieutenant Governor in Council.

Staff

17. (1) The board may appoint a registrar and other employees it considers necessary for the purposes of the appeal board and may set terms and conditions of employment including remuneration for those employees.

(2) The other provisions of this Act and the *Public Service Labour Relations Act* do not apply to the registrar or other employees appointed under subsection (1).

Appeals

18. (1) An employee who is an unsuccessful applicant for appointment to a vacancy in a position in the public service may appeal to the appeal board on the ground that section 8 (1) has not been complied with.

(2) Subject to the regulations, the appeal board shall establish its own procedure for the expeditious hearing of appeals under subsection (1).

(3) If an applicant commences an appeal under subsection (1), the appeal board shall, before hearing the appeal, inform the commissioner and the appropriate deputy minister of the particulars of it.

(4) The appeal board may, after hearing an appeal,

(a) dismiss the appeal,

(b) direct that the appointment or the proposed appointment be rescinded and reconsidered, or

(c) direct that an appellant be appointed to the position taking into account the matters referred to in section 8 (1).

(5) The appeal board may summarily dismiss an appeal under subsection (1) if it considers that the appeal is frivolous or vexatious.

(6) A member of the appeal board may sit alone or the chair may appoint a panel consisting of 3 members to hear and decide an appeal.

(7) This section does not apply with respect to an appointment to the public service that is made under section 10.

Inquiry Act

19. For the purpose of an appeal under section 18, the members of the appeal board have the protection, privileges and powers of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.

Appeal board's decision final

20. A decision or direction of the appeal board is final and binding.

PART 5

MISCELLANEOUS

Oaths

21. A person appointed to the public service and a person appointed or employed under section 15 shall swear or affirm, and sign an oath in the prescribed form.

Dismissal and suspension of employees

22. (1) The commissioner, a deputy minister or an employee authorized by a deputy minister may suspend an employee for just cause from the performance of his or her duties.

(2) The commissioner, a deputy minister or an individual delegated authority under section 6 (c) may dismiss an employee for just cause.

Retirement

23. Unless otherwise provided by the Lieutenant Governor in Council, retirement is compulsory for all employees who attain the age of 65 years, and the effective date of retirement shall be the first day of the month next following that in which the anniversary of the date of birth occurs.

Annual report

24. The minister shall lay before the Legislative Assembly as soon as practicable, a report for the fiscal year ending March 31 respecting the work of the commission.

Regulations

25. (1) On the recommendation of the minister, the Lieutenant Governor in Council may make regulations respecting government personnel management, including regulations respecting the following:

(a) the definition of "auxiliary employee" in section 1;

(b) recruitment, selection and appointment of staff including standards and procedures respecting advertising vacancies and who may apply for those vacancies;

(c) probation periods for employees who are appointed to positions in the public service;

(d) health and safety of employees;

(e) terms and conditions of employment;

(f) job evaluation and classification;

(g) standards of employee conduct;

(h) all matters respecting discipline, suspension and dismissal of employees;

(i) monitoring and auditing of all personnel functions.

(2) Regulations under subsection (1) may be different for different categories of employees.

(3) The Lieutenant Governor in Council may make regulations respecting the terms and conditions of employment of persons appointed under section 15.

(4) The Lieutenant Governor in Council may make regulations respecting appeals and inquiries to the appeal board including regulations respecting

(a) the manner of bringing appeals and the time limits within which they may be brought,

(b) time limits within which appeals must be heard and concluded, and

(c) all matters respecting practice, procedure and costs on appeals.

(5) If there is a conflict between a provision of a regulation under subsection (1) or (4) and a provision in a collective agreement between the government and a bargaining agent certified under the *Public Service Labour Relations Act*, the provision in the collective agreement prevails with respect to employees covered by the collective agreement.

Transitional - deputy ministers' pensions

26. Despite section 13, section 4.1 of the *Public Service Act,* S.B.C. 1985, c. 15, continues to apply with respect to a person who became a deputy minister before November 5, 1991 and to whom the section would otherwise have applied.

Repeal

27. (1) Subject to subsection (2), the *Public Service Act,* S.B.C. 1985, c. 15, is repealed by regulation of the Lieutenant Governor in Council.

(2) Section 4.1 of the *Public Service Act,* S.B.C. 1985, c. 15, shall be deemed to have been repealed on November 5, 1991.

Consequential Amendments

28. *The following provisions are amended by striking out* "Government Personnel Services Division" *wherever it appears and substituting* "Public Service Employee Relations Commission":

(a) *Auditor General Act*, R.S.B.C. 1979, c. 24, section 5 (5) (b);

(b) *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, c. 61, section 41 (4) (b);

(c) *Ombudsman Act*, R.S.B.C. 1979, c. 306, section 8 (4) (b);

(d) *Public Service Bonding Act*, R.S.B.C. 1979, c. 345, section 4 (1);

(e) *Public Service Labour Relations Act*, R.S.B.C. 1979, c. 346, section 1 in the definition of "division" and section 3;

(f) *System Act*, R.S.B.C. 1979, c. 399, section 15 (2) and (3).

29. *The following provisions are amended by striking out* "Public Service Commission" *wherever it appears and substituting* "Public Service Appeal Board":

(a) *British Columbia Transit Act*, R.S.B.C. 1979, c. 421, sections 6 (5) (a) and 7 (2) and (3);

(b) *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, c. 61, Schedule 2;

(c) *Public Service Bonding Act*, R.S.B.C. 1979, c. 345, section 3.

Pension (Public Service) Act

30. *Section 2 (1) (c.1) of the Pension (Public Service) Act, R.S.B.C. 1979, c. 318, is repealed and the following is substituted:*

(c.1) notwithstanding paragraph (c), an assistant deputy minister and an associate deputy minister;

(c.2) notwithstanding paragraph (c), a deputy minister unless the order appointing the deputy minister provides that this Act does not apply to that deputy minister.

Public Service Labour Relations Act

31. *Section 1 of the Public Service Labour Relations Act, R.S.B.C. 1979, c. 346, is amended in the definition of* "division" *by striking out* "section 3 of the *Public Service Act*" *and substituting* "section 5 of the *Public Service Act*".

Commencement

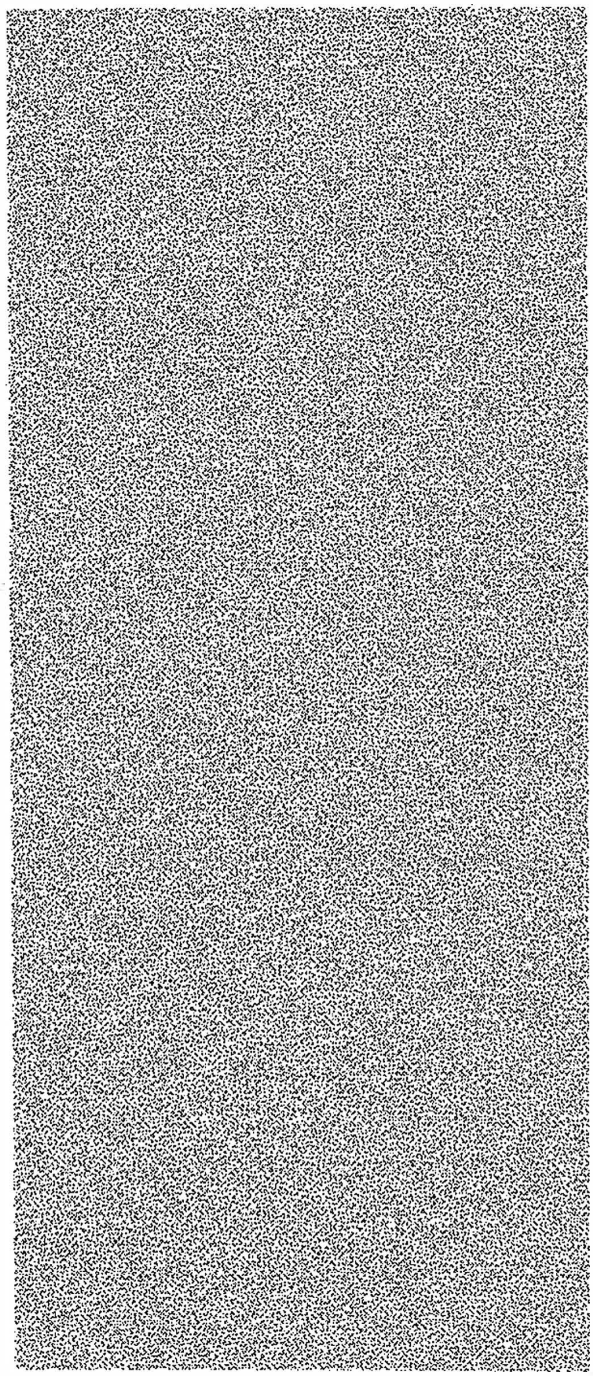
32. (1) Subject to subsection (2), this Act comes into force by regulation of the Lieutenant Governor in Council.

(2) Sections 13 and 26 shall be deemed to have come into force on November 5, 1991 and are retroactive to the extent necessary to give them effect on and after that date.

TAB C

APPENDIX ii

PROPOSED ORGANIZATIONAL CHARTS FOR THE PUBLIC SERVICE EMPLOYEE RELATIONS COMMISSION



THE PUBLIC SERVICE EMPLOYEE RELATIONS COMMISSION
STRATEGIC HUMAN RESOURCES BRANCH

ASSISTANT DEPUTY MINISTER

HUMAN RESOURCES PLANNING

1. Policy Development and Research
   - employment equity
   - workforce profiles
   - succession planning
   - career pathing
   - workforce adjustment
2. Corporate Wide Human Resource Planning
3. Consulting Services to Ministries on Human Resource Planning

ORGANIZATION DESIGN AND DEVELOPMENT

1. Corporate Organization Design
   - designing organizational structures
   - designing work structures and workflow (new program initiatives)
   - reorganizing work (downsizing programs and service delivery)
2. Partner in Innovation
   - joint labour-management
   - improved service and quality
   - developing improved labour management relationships
   - introducing new technologies
   - telecommuting
3. Consulting and advising line ministries on organizational design

EMPLOYEE DEVELOPMENT

1. On-The-Job Development Initiatives
   - transfer
   - secondment
   - developmental programs and bridging programs
   - job sharing and part-time work
2. Corporate Employee Development
   - professional development of the personnel community
   - leadership training
   - corporate initiatives (training support)
3. Consulting to Line Ministries
   - training needs identification
   - curriculum design

OCCUPATIONAL HEALTH & SAFETY PROGRAMS & EMERGING ISSUES

- occupational health and safety
- workers' compensation
- ergonomics
- employee assistance program
- rehabilitation programs
- short term indemnity plan and long term disability
- harassment

Source: Commission of Inquiry into the Public Service and Public Sector

THE PUBLIC SERVICE EMPLOYEE RELATIONS COMMISSION
CORPORATE SERVICES BRANCH

ASSISTANT DEPUTY MINISTER

STAFFING AND RECRUITMENT

- policy development
- entry level recruitment
- promotion and internal movement
- external recruitment
- selection
- selection standards

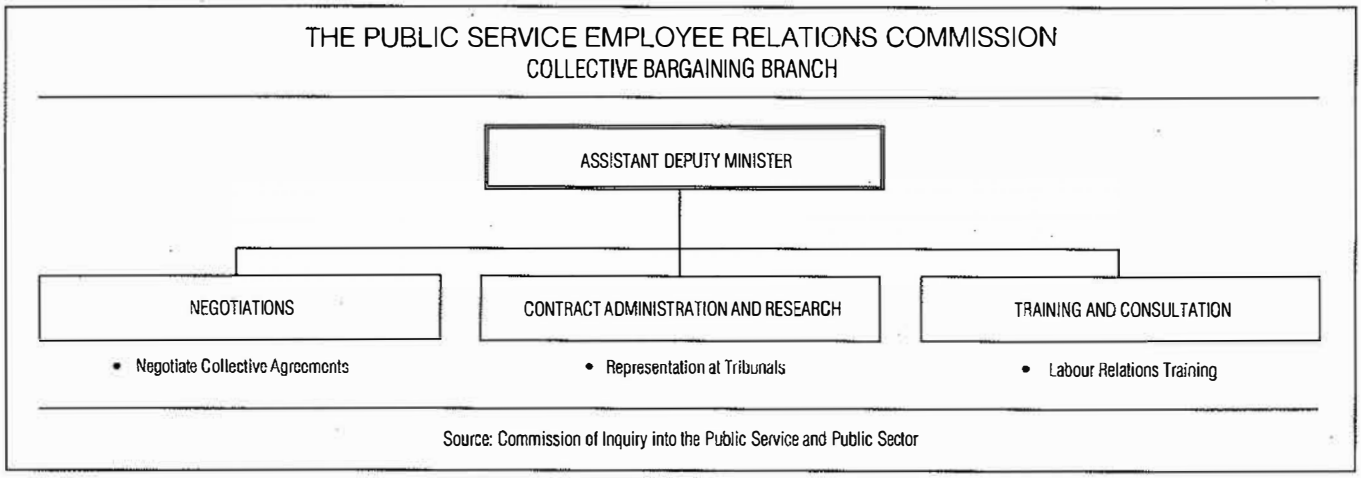
MANAGEMENT SUPPORT SERVICES

- succession planning
- executive recruitment
- executive development
- career management support

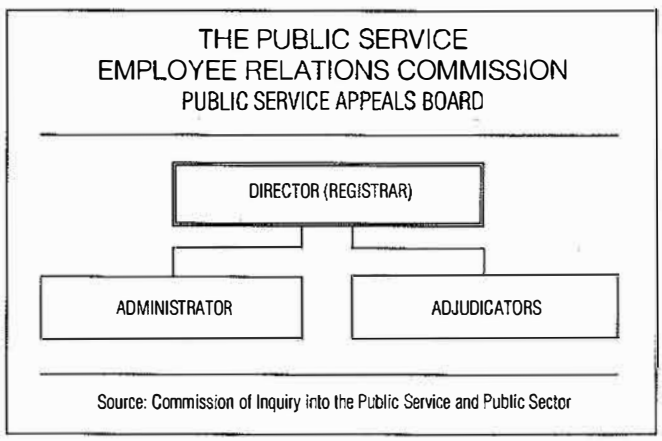
COMPENSATION AND CLASSIFICATION

- classification standards
- terms and conditions of employment
  - OIC appointments
  - excluded staff(including management)
- benefits administration
- pay equity
- job classification training

Source: Commission of Inquiry into the Public Service and Public Sector


THE PUBLIC SERVICE EMPLOYEE RELATIONS COMMISSION
COLLECTIVE BARGAINING BRANCH
ASSISTANT DEPUTY MINISTER
NEGOTIATIONS
CONTRACT ADMINISTRATION AND RESEARCH
TRAINING AND CONSULTATION
• Negotiate Collective Agreements
• Representation at Tribunals
• Labour Relations Training
Source: Commission of Inquiry into the Public Service and Public Sector

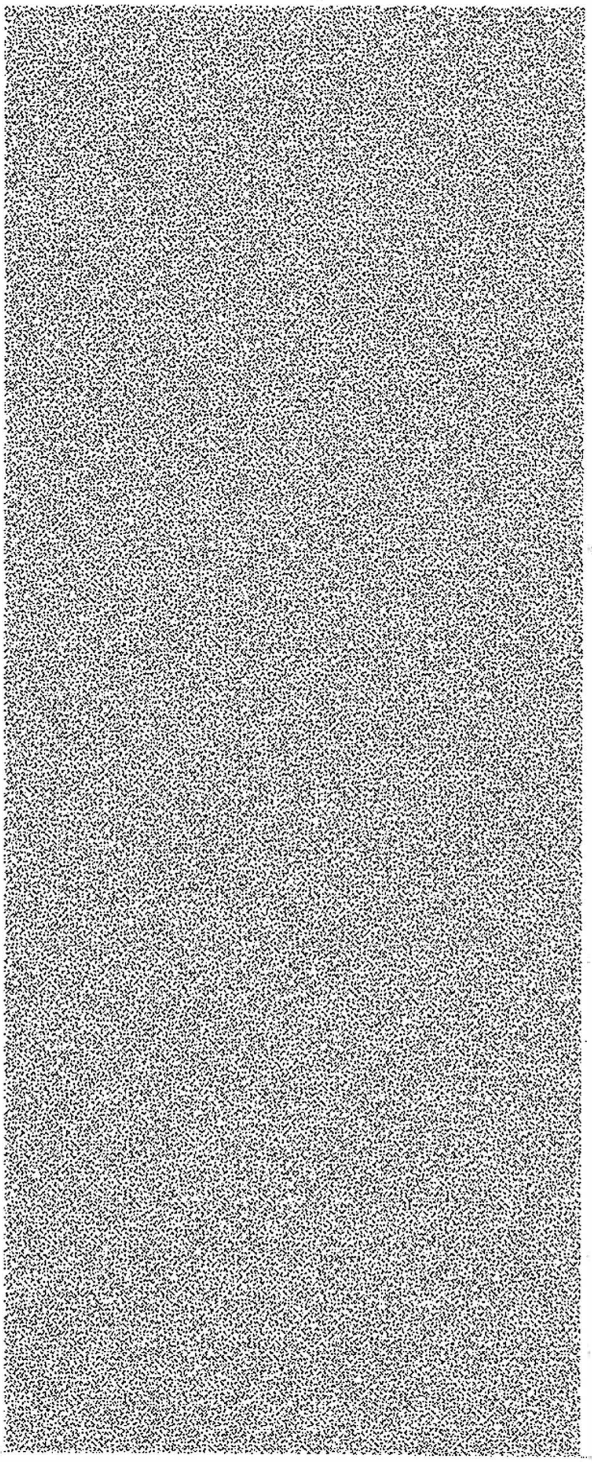

THE PUBLIC SERVICE
EMPLOYEE RELATIONS COMMISSION
HUMAN RESOURCE AUDIT GROUP
DIRECTOR
HR AUDIT TEAM
• 2 staff
• 2 seconded staff from line ministries
STANDARDS, EVALUATION AND AUDIT
• setting standards
• performing comprehensive human resource audits
Source: Commission of Inquiry into the Public Service and Public Sector


THE PUBLIC SERVICE
EMPLOYEE RELATIONS COMMISSION
PUBLIC SERVICE APPEALS BOARD
DIRECTOR (REGISTRAR)
ADMINISTRATOR
ADJUDICATORS
Source: Commission of Inquiry into the Public Service and Public Sector

TAB C

APPENDIX iii

CROSS CANADA SURVEY OF PERSONNEL MANAGEMENT ARRANGEMENTS IN SELECTED PROVINCES



	JURISDICTION								
Function	BC	Alberta	Saskatchewan	Manitoba	Ontario	Quebec	Nova Scotia	New Brunswick	Federal
1 EMPLOYER FOR COLLECTIVE BARGAINING	GPSD	The Personnel Administration Office (PAO) within the Public Service Commission	Public Service Commission (PSC) - also Personnel Policy Secretariat of Dept. of Finance gives mandate to all Public Sector employers	Civil Service Commission (CSC) - Labour Relations Branch Advisory role to other public sectors (ADM Labour Relations)	Management Board (MB)	Treasury Board (Conseil du Tresor)	Civil Service Commission (CSC)	Board of Management (BoM) - Deputy of Finance is also Secretary to BoM - includes Hospital & Education	Branch of Treasury Board
2 CLASSIFICATION AND COMPENSATION	GPSD set standard, however, classification is delegated to ministries.	Classification policy is broadly formulated by PAO but actual classification is delegated to departments & monitored; compensation levels are determined centrally Public Service Commission centrally	Public Service Commission centrally (Classification Division)	Classification & Staffing Branch of CSC held centrally, although looking at delegation - Compensation Services - part of ADM LR	Attempting to overhaul system, delegated to each ministry	Treasury Board	CSC centrally managed	Classification signed off by Chairman of BoM after reviewed centrally - some delegated transactions to Department level who submit monthly reports (formal delegation agreements)	Delegated to departments with central standards
3 BENEFITS POLICY AND ADMINISTRATION	GPSD	Employee Relation Div. of PAO	Public Employees Benefits Agency in Department of Finance	Compensation Services of LR Branch	Policy established centrally; Benefits Policy Branch in MB	Treasury Board	a) Bargaining Unit Labour Relations b) Management Compensation Division of CSC	Pension and Insured Benefit Branch of Dept. of Finance (BoM)	Treasury Board sets policy and it is administered by Supply and Services
4 JOB EVALUATION STANDARDS DEVELOPMENT	GPSD	Classification & Staffing Div. of PAO	Classification Division (PSC)	Classification & Staffing of HR Management Division	Compensation Program Branch of MB	Office of Human Resources (reports to Treasury Board)	Compensation Division of CSC	Compensation Policy Branch (BoM)	Treasury Board

Source: Commission of Inquiry into the Public Service and Public Sector

TAB C

JURISDICTION

Function	BC	Alberta	Saskatchewan	Manitoba	Ontario	Quebec	Nova Scotia	New Brunswick	Federal
5 PAY EQUITY	GPSD	No formal pay equity	Excluded - has gender neutral plan Bargaining unit - no current pay equity	Pay Equity is complete and no ongoing function	Compensation Program Branch of MB		Compensation Division of CSC - Pay Equity Commission in Department of Labour	HR Development Branch	Treasury Board
6 RECRUITMENT AND SELECTION	GPSD establishes policies and guidelines. Recruitment and selection delegated to Ministries.	Delegated to Departments with policy, audit and training function held centrally - executive search division done centrally (2-3 staff)	Public Service Commission centrally	Classification & Staffing Branch has delegated agreements with Departments - Centrally recruit for small departments as well as senior officers (OIC) & Personnel Officers - Executive search & Executive orientation & development (being planned)	Policies established centrally in Workforce Management & Employment Equity Branch of MB - delegated to Ministries	Office of Human Resources (reports to Treasury Board) - recently delegated to Ministries	CSC does all recruitment, develops eligibility lists. Department does selection. Selects #1 candidate from list of 10 (casuals done by Departments)	Recruitment delegated to Departments, Act authority & policy kept with BoM	Public Service Commission does recruitment of external jobs; Selection is delegated to departments.
7 EMPLOYMENT EQUITY	Draft policy; Ministries implement them	No formal employment equity program as such	Employment equity moving back to Public Service Commission from Dept. of Labour	Employment Equity Unit of Civil Service Commission reports to Deputy Minister	Work Force and Management Branch of MB	Treasury Board (must report to the legislature on employment equity each year by statute)	Responsibility within staffing division of CSC - guidelines allow affirmative action appointment	Employee Relations Branch of BoM - $1M to fund jobs (some summer jobs are EE)	Employment Equity Act does not apply to the federal public service although there is a policy in place for employment equity. Under the Employment Equity Act, Federal contractors are required to comply.

Source: Commission of Inquiry into the Public Service and Public Sector

JURISDICTION

Function	BC	Alberta	Saskatchewan	Manitoba	Ontario	Quebec	Nova Scotia	New Brunswick	Federal
8 TRAINING AND DEVELOPMENT	Delegated to Ministries	Staff Development & OHS Division (PAO) (larger departments also have staff) - most contracted out	Centralized to PSC (Combining Staffing & Development)	Organization & Staff Development operates on cost recovery	Done by ministries & no central group except core curriculum for senior management group	Treasury Board set policy but Ministries deliver.	Staffing Division of CSC - small staff and major departments also have staff	HR Development Branch of BoM and buy all training (1 person) - Senior Executive Dev. Program	CCMM for senior and executive managers - departments have capacity as well as SOA delivers on charge back.
9 HUMAN RESOURCE POLICY DEVELOPMENT	GPSD	Each Division does its own policy	New section called Planning and Organizational Services (Employment Equity, consulting services, organization design)	Integrated into operating branches	Each section handles own policy	Treasury Board	No HR policy branch	Policies developed by each area	Each department does work on own with some central policy.
10 REVIEW OF PERSONNEL PRACTICES	GPSD	Audit Division 3 - 4 staff on overall HR programs. Separate monitoring in each division (Class & Staffing) - have authority to remove delegation	Nothing at this time (new re-org)	Audit moving more to a complaint driven system	Ministry of Treasury & Economics handles & has guidelines on how to audit personnel	Treasury Board	Audit only in the staffing area	Ongoing studies as Civil Service Commission has audit function	PSC audits Staffing and on behalf of T.B. it also does pay and classification
11 HEALTH AND SAFETY	GPSD-policy Ministries-Implement	Staff Development & OHS	Function exists, but not major focus in central agency	No central co-ordinating function exists in the central agency	Employee Relations Branch of MB	Treasury Board has new policies	Labour Relations Division of CSC	Delegated to Departments as there is a separate Health & Safety Commission.	Department Level
12 HUMAN RIGHTS ADMINISTRATION (CODE COMPLAINTS)	Labour Relations GPSD	Majority handled by PAO and handled by particular divisions.	Labour Relations Branch in conjunction with each HR Department	Labour relations would handle if needed	Workforce Harassment Unit within Workforce Management & EE Branch of MB as an option to HR complaint.	Training provided only (modelled on Federal)	Each Division would handle their own issue	Handled by responsibility area	Handled by departments

Source: Commission of Inquiry into the Public Service and Public Sector

JURISDICTION

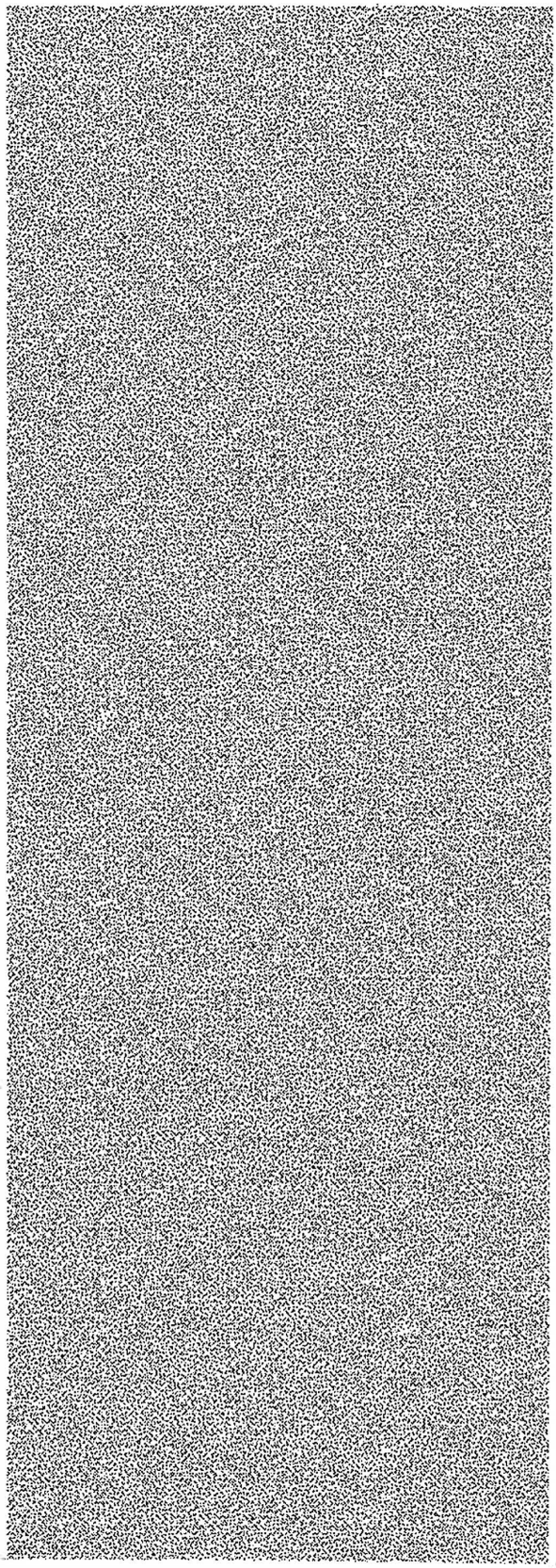
Function	BC	Alberta	Saskatchewan	Manitoba	Ontario	Quebec	Nova Scotia	New Brunswick	Federal
13 FTE MONITORING	GPSD	Treasury Department controls money only	Person year reporting (Dept. of Finance) - currently a control, but under review	Treasury Board	Payroll and Benefits System - monitoring rather than control. Dollars is control.	Treasury Board	Management Board through their computerized HR management system	Budget Branch of BoM.	Person year control. As of April/93 going to dollars only.
14 MANAGEMENT OF PERSONNEL INFORMATION	GPSD	Systems division in PAO and manager of HR planning	Integrated payroll & HR system	Civil Service Commission integrated with payroll function	Payroll & Benefits only system - broader system being considered. Held at individual ministries.	Office of Human Resources	Management Board (same Deputy as CSC)	HR Information Branch developing a system	Public Service Commission and Departments
15 APPEALS	Public Service Commission	The only avenue is to the ombudsman, and there are no grievance provisions for selection or promotion for bargaining unit employees	Bargaining unit employees have appeals through grievance arbitration; management has no appeals on selection	Civil Service Appeals Board handles appeals for employees only.	The public can't appeal; grievance settlement board hears in-service appeals A tribunal exists to hear management appeals but is seldom used	Public Service Commission hears appeals, with the public having the right of enquiry.	Appeals are through grievance arbitration for unionized employees; there is no formal process for the public but they can be interviewed by the Deputy (commissioner) if they have concerns or complaints	Out of service appeals are handled through an inquiry to the Civil Service Commission which can make recommend-ations to the deputy minister but can't overturn a decision; In-service applicants have appeal rights in a system that allows appointments to be revoked	No appeal for out-of-service applicants, but they can complain and have their complaint go to investigation under the direction of the Public Service Commission. The Commission then reviews and makes recommend-ations. In-service applicants appeal to full-time appeals chair

Source: Commission of Inquiry into the Public Service and Public Sector

TAB C

APPENDIX iv

BIBLIOGRAPHY



TAB C

BIBLIOGRAPHY

Auld D. Wage behaviour and wage control in the public service. Ottawa: Economic Council of Canada, 1979.

Auld D, Kitchen H. The supply of government services. Vancouver: Fraser Institute, 1988.

Aucoin P, Bakers H. The centralization -decentralization conundrum: organization and management in the Canadian government. Halifax: Institute for Research on Public Policy, 1988.

Barnes WCS, Kelly LA. Employer - employee relations in the federal public service: a critical evaluation of the Joint Parliamentary Report. Kingston: Industrial Relations Centre, Queen's University, 1976.

Barrett JT. Labour-management co-operation in the public service: an idea whose time has come. Washington, D.C.: International Personnel Management Association, United States, 1985.

Burke JP. Bureaucratic responsibility. Baltimore: The Johns Hopkins University Press, 1986.

Canada. Consulting and Audit Canada. Optimum: The journal of public sector management 1989; 20.

Canada. Consulting and Audit Canada. Optimum: The journal of public sector management 1990; 21.

Canada. Consulting and Audit Canada. Optimum: The journal of public sector management 1991; 22.

Canada. Consulting and Audit Canada. Optimum: The journal of public sector management 1992; 23(1).

Canada. Special committee to review personnel management and the merit principle in the public service. Report of the special committee to review personnel management and the merit principle in the public service. Ottawa, Minister of Supply and Services Canada, 1979.

Canada. Task force on barriers to women in the public service. Beneath the veneer: the report of the task force on barriers to women in the public service. Ottawa: Minister of supply and services, 1990.

Canada. Task Force on Program Review. Introduction to the process of program review. Ottawa: The Task Force, 1986.

Canada Treasury Board. Personnel Policy Branch. Personnel: a manager's handbook. Ottawa: Treasury Board of Canada, 1982.

Clark ID. Improving government service delivery. Business Quarterly 1990; 55(2): 85-89.

Dale B. Why government workers are so deeply alienated. Canadian speeches 1991; 5(6): 11-18.

Gallant E, ed. Options: the future public service (reprints). Halifax: Institute for research on public policy, 1986.

Gamey C. Collective bargaining and the excluded employee in the BC public service. Victoria: University of Victoria, 1983.

Government Employee Relations Bureau. Submission to Higgins' Committee, February 9, 1977.

Herrick NQ. ed. Improving Government: experiments with quality of working life systems. New York, NY: Praeger, 1983.

Higgins, RD. Making bargaining work in British Columbia's public service: report and recommendations of the Commission of Inquiry into employer-employee relations in the public service of British Columbia. December 1972.

Higgins, RD. The Higgins report revisited: report and recommendations of the committee of one appointed to review the recommendations of The Higgins Report (1972) and to inquire into the effectiveness of the legislative action taken thereon. March 1977.

Holzer M, Malachumi A. Public sector productivity: a resource guide. New York: Garland, 1988.

Holzer M, Nagel SS. eds. Productivity & public policy. Beverly Hills: Sage Publications, 1984.

Jabbra JG, Dwivedi OP. eds. Public service accountability: a comparative perspective. West Hartford: Kurmarian Press, 1989.

Kelly RM. ed. Promoting productivity in the public sector: problems, strategies and prospects. London: Macmillan in association with the Policy Studies Organization, 1988.

Kernaghan K, Langford JW. The responsible public servant. Halifax: The institute for research on public policy, 1990.

Kernaghan K, Siegel D. Public Administration in Canada: a text. Toronto: Nelson Canada, 1989.

Langford JW. ed. Fear and ferment: public sector management today: proceedings of the national conference on management in the public sector. Toronto: Institute of public administration of Canada, 1986.

McDavid JC, Marson B. eds. The well-performing government organization. (1990: Victoria, B.C.) The Institute of Public Administration of Canada, 1991.

Management information and reporting projects steering committee. Final report.

Minding the public's business. Economic Council of Canada. Ottawa: Economic Council of Canada, 1986.

Morgan NS. The equality game: women in the federal public service 1908 - 1987. Ottawa: Canadian Advisory Council on the Status of Women, 1988.

Morgan NS. Implosion: an analysis of the growth of the federal public service in Canada, 1945 - 1985. Montreal: Institute for Research on Public Policy, 1986.

TAB C

Morgan NS, Monbarak C. Nowhere to go: possible consequences of the demographic imbalance in decision-making groups of the federal public service. Montreal: Institute for research on public policy, 1981.

Osbaldeston GF. Keeping deputy ministers accountable. Toronto: McGraw-Hill Ryerson, 1989.

Osborne D, Gaebler T. Reinventing government: How the entrepreneurial spirit is transforming the public sector. Don Mills: Addison Wesley Publishing, 1992.

Public employers of British Columbia news. Vancouver: Public Employers of British Columbia, 1978.

Public employers of British Columbia reference report. Vancouver: Public Employers of British Columbia. 1978 - 88.

Public service 2000. Reports and summaries of the task forces. Ottawa: Public Service 2000, 1990.

Report of the task force on the financial administration act. British Columbia. Queens Printer, Victoria, B.C. February 1981.

Rhodes Report. Personnel policy committee. BC Public Service.

Tellier PM. A new Canadian public service. Business Quarterly 1991; 55(4): 93-98.

Weicker DJ. Employee performance appraisal in the government of British Columbia. Victoria: The Government, 1980.

Wholey JS, Newcomer KE. ed. Improving government performance: evaluating strategies for strengthening public agencies and programs. San Francisco: Jossey-Bass, 1989.

Zussman D. The vertical solitude: managing in the public sector. Halifax: Institute for research on public policy, 1989.

TAB D

TREASURY BOARD ORDER NO. 258

Effective April 1, 1992, Treasury Board approves the establishment of the Legal Counsel Classification Series as a group of employees excluded from collective bargaining. This series included Crown Counsel, Contract Crown Counsel and other Legal Counsel employed in the Province of British Columbia approved for inclusion in this series by the Assistant Deputy Minister responsible for Government Personnel Services Division.

Except as modified here in or in the attached schedule or provided for in the Agreement reached with the British Columbia Crown Counsel Association, the terms and conditions of employment for the Legal Counsel Series are those approved for management employees excluded from coverage under a collective agreement and contained in the Public Servic Act Directive, Special Employee Categories. Contract Crown Cousel are not entitled to health and welfare and pension benefits under this Directive. These terms and conditions of employment are effective December 4, 1992 unless otherwise specified.

Salary ranges for the Legal Counsel Series are those contained in the attached schedule and are approved for inclusion in Treasury Board Order Number 208, the salary schedule for employees excluded from coverage under a collective agreement.

Conversion provisions applicable to existing contractors and employees designated for inclusion in the Legal Counsel Series are as follows:

1. (a) Upon written application, Contract Crown Counsel may convert to Crown Counsel. Such conversion shall not require competition under the Public Service Act.

   (b) Upon written application, Part-time Crown Counsel who perform services under personal service contracts may convert to part time positions. Such conversion shall not require competition under the Public Service Act.

   (c) Subject to Section 2 below, Crown Counsel who have performed services for the Province pursuant to personal service contracts shall have all such continuous and contiguous service recognised for all purposes including, but not limited to vacation.

2. (a) Crown Counsel who were members of the Public Service Superannuation Plan will be permitted to reinstate refunded Superannuation contributions by repaying the refunded amount, together with interest at the rate of interest earned by the Superannuation Plan over the same period. The reinstatement right will remain throughout Crown Counsel's Superannuation Plan Membership.

. . ./2

(b) Contract Crown Counsel who have less than five years of service as of October 1, 1992 shall be entitled to acquire past service credits for pension purposes by paying the Employee Contribution (inclusive of interest) with respect to such service. The right to purchase past service shall be exercised within 12 months from December 4, 1992 or such later date as approved by the Assistant Deputy Minister responsible for the Government Personnel Services Division.

(c) Contract Crown Counsel who have five or more years of service as of October 1, 1992 shall be entitled to acquire past service credits for pension purposes by paying the Employee Contribution (inclusive of interest) with respect to such service. The right to purchase past service shall be exercised within 12 months from December 4, 1992 or such later date as approved by the Assistant Deputy Minister responsible for the Government Personnel Services Division. Payments may be made by instalments with the instalments extending no longer than the length of the period of service being purchased, with interest at the rate of interest earned by the Superannuation Plan over the same period.

(d) Contract Crown Counsel who had previously been Crown Counsel and who converted to Contract status and who convert back to Crown Counsel status, shall recieve credit for past contract service by paying the Employee contribution for 50% of the past contract service being acquired. The right to purchase past service shall be exercised within 24 months from December 4, 1992 or such later date as approved by the Assistant Deputy Minister responsible for the Government Personnel Services Division. Payments may be made by instalments with the instalments extending no longer than the length of the period of service being purchased.

(e) The Employee Contribution shall be determined by applying the current employee contribution rate to Contract Crown Counsel's earnings (less the percentage amount paid in lieu of benefits) during the period of service being purchased, adjusted from the time of the service to the time of purchase by the application of the rate of interest earned by the Superannuation Plan during the same period.

(f) Where service is terminated for any reason prior to completion of the instalment payments provided for in 2(c) and (d) above, Crown Cousel may pay the balance of the instalments owing in one lump sum. Alternatively, the amount of service purchased shall be pro-rated on the basis of the amounts still owing.

. . ./3

TAB D

An interim salary adjustment is approved Effective April 1, 1992 as part of the conversion process. Salaries will be adjusted to reflect the mid-point between an individual Legal Counsel's current salary rate and the applicable March 29, 1993 salary rate approved in the attached schedule. This interim salary adjustment will not exceed a maximum of $79,000 prior to August 1, 1992.

Government Personnel Services Division may establish administrative policy and procedure to implement this Order. Assignment of employees and contractors to classification levels in the Legal Counsel Series will be authorized by Government Personnel Services Division upon recommendation of the applicable Agency.

APPROVED FOR TREASURY BOARD

February 26/93
DATE

25/TANDC93/02/11

TAB D

SCHEDULE

1) Definitions (Special Employee Categories Directive) is amended by adding the following:

"Legal Counsel"
employees admitted to the Law Society of British Columbia and appointed as

Crown Counsel:
A barrister and solicitor appointed pursuant to the Public Service Act and employed by the Criminal Justice Branch of the Ministry of Attorney General.

Contract Crown Counsel:
A barrister and solicitor who has entered into an agreement either individually or through the medium of a personal law corporation with the Attorney General to perform services as Crown Counsel on a part-time or full-time basis; but does not include counsel retained by the Attorney General on an ad hoc basis.

Counsel:
A barrister and solicitor designated for coverage under the Legal Counsel Series by the Assistant Deputy Minister responsible for Government Personnel Services Division.

NOT included in the Legal Counsel Series are:
Assistant Deputy Attorney General, Criminal Justice
Director, Operations
Regional Crown Counsel
Director, Policy and Legal Services
Director, Criminal Appeals and Special Prosecutions
Director, Special Programs, Environmental Law and Aboriginal Justice
Director, Programs and Initiatives for Vulnerable Persons
Deputy Regional Crown Counsel

and any other position excluded from the series by the Assistant Deputy Minister responsible for Government Personnel Services Division.

2) Additional Leave of Absence Without Pay is a new section added to the Special Employee Categories Directive, Appendix 7 and numbered as section 96.1 as follows:

96.1 Addition Leave of Absence Without Pay: Legal Counsel

. . ./2

Legal Counsel shall be entitled to additional leave without pay of five days per year. Such leave may be deferred and accumulated over a period not exceeding five years from the date last used. Legal Counsel who elect to take such leave must indicate, in writing to the Employer, the intention to do so no less than six months prior to the end of any year. Legal Counsel may elect to have 2% of salary held back to provide pay for such additional leave when taken. The scheduling of such time off shall be by mutual agreement.

Legal Counsel who take Additional Leave pursuant to this Article may maintain coverage for medical, extended health, dental, group life and long term disability plan coverages by paying the premium for such coverage.

3) Professional Association Membership Fee Reimbursement is a new section added to the Special Employee Categories Directive, Appendix 7 and numbered as section 59.1 as follows:

59.1 Professional Association Membership Fee Reimbursement: Legal Counsel

The employer shall pay the annual Law Society of British Columbia practice fee on behalf of Legal Counsel.

4) Conferences, Seminars, Workshops is a new section added to the Special Employee Categories Directive, Appendix 7 and numbered 89.1 as follows. The existing section 89.1 is renumbered 89.2.

89.1 Conferences, Courses: Legal Counsel

Effective April 1, 1993 each Legal Counsel shall be granted a budget of a minimum of $300.00 for use in any one fiscal year for the purpose of taking continuing legal education courses, or such other courses or conferences which may be relevant to his or her professional development, and incidental expenses attached thereto. Leave with pay shall be granted for attendance at such courses or conferences. The allocated budget will be pro-rated for Part-time Legal Counsel.

5) Dispute Resolution is a new section added to the Special Employee Categories Directive Appendix 7 and numbered 7.1 as follows. The existing section 7.1 is renumbered 7.2.

7.1 Dispute Resolution: Legal Counsel Dispute

Dispute shall mean any difference or dispute arising concerning the interpretation, application, administration, operation, or alleged violation of this agreement, whether between the Employer and Cousel or the Employer and the Association, and "grievor" shall include the Employer and Counsel or the Employer and the Association, and "grievor" shall include the individual Legal Counsel or the Association.

. . ./3

The following steps are to be taken in processing a dispute:

a) an informal discussion between the grievor and his/her supervisor;

b) within sixty days of the incident giving rise to the dispute, the grievor may make a written submission to his/her supervisor outlining the nature of the dispute and the remedy sought;

c) the supervisor will investigate the dispute and make a written report to the grievor within 15 working days of receiving notification of the dispute;

d) if the matter is not resolved to the grievor's satisfaction at the supervisor level, the grievor may within 15 working days of receiving the supervisor's response, present the grievance in writing to the Assistant Deputy Minister responsible who shall issue his or her decision in writing to the grievor within 15 working days following the receipt of such grievance.

e) if the matter is not resolved to the grievor's satisfaction by the Assistant Deputy Minister responsible, the grievor may within 15 working days of receipt of the Assistant Deputy Minister's decision, make a written request to the Deputy Minister responsible who shall issue his or her final decision in writing within 15 working days following the receipt of the request.

f) "supervisor" refers to those positions excluded from the Legal Cousel Series and listed under the definition of Legal Counsel or as subsequently designated as excluded from the application of this Agreement.

6) The Salary Schedule for Employees Excluded from Collective Bargaining (Treasury Board Order Number 208) is amended by adding a new part as follows:

Legal Counsel Salary Levels (biweekly rates)

Level 1

Effective March 29, 1993 the biweekly salary by year of call to the bar is as follows. Subsequent increases to salary levels within level 1 shall be on a lock-step basis by year of call to the bar.

. . ./4

TAB D

Year of Call	Employee	Contract
1993	1,456.54	1,733.28
1992	1,683.03	2,002.82
1991	1,847.66	2,202.36
1990	2,035.09	2,421.77
1989 or earlier	2,179.98	2,594.17

Classification code 044-1001

Level 2

Effective March 29, 1993 the biweekly salary by year of call to the bar is as follows. Subsequent increases to salary levels within level 2 shall be on a lock-step basis by year of call to the bar.

Year of Call	Employee	Contract
1988	2,324.91	2,766.62
1987	2,469.83	2,939.10
1986	2,614.76	3,111.55
1985	2,759.76	3,284.11
1984 or earlier	2,874.75	3,420.95

Classification code 044-1002

Level 3 Effective March 29, 1993

Sublevel	Employee	Contract
3A range	2,759.76 to 3,104.73	3,284.11 to 3,694.63
3B range	3,104.73 to 3,258.05	3,694.63 to 3,877.08

Effective December 1, 1993

Sublevel	Employee	Contract
3A range	3,104.77 to 3,258.05	3,694.66 to 3,877.08
3B range	3,258.09 to 3,430.53	3,877.11 to 4,082.33

Classification codes 044-1103 (3A), 044-1203 (3B)

Level 4 Effective March 29, 1993

	Employee	Contract
Range	3,258.09 to 3,564.69	3,877.11 to 4,241.98

Effective December 1, 1993

	Employee	Contract
Range	3,430.57 to 3,756.34	4,082.37 to 4,470.04

Classification code 044-1004

TAB E

BRITISH COLUMBIA

Ministry of
Attorney General

Legal Services Branch

1001 Douglas Street
Victoria, British Columbia
V8W 1C8
Telephone: (250) 356-8400
Facsimile: (250) 356-5111

March 21, 1997

Memo to: All Lawyers
Legal Services Branch

Re Crown Counsel Agreement - Lockstep Increases and Step Increases for Legal Counsel 3A

The new Crown Counsel Agreement has now been signed by all parties. It is in effect for the period April 1, 1996 - March 31, 1998. I have attached a copy of the agreement for your information. However, it is important to understand that the agreement only applies to Crown Counsel, as that term is defined in the agreement.

The agreement is nevertheless directly relevant to lawyers in the Legal Services Branch because the government has determined that the levels of compensation for Crown Counsel set out in the agreement apply to all lawyers employed by government, including lawyers in the Legal Services Branch. In addition, the quotas established for lawyers in the 3A, 3B and 4 levels apply generally, on a pro rata basis, to the Legal Services Branch. With the exception of pay and classification issues, the terms and conditions of employment for lawyers in this Branch are the terms and conditions of employment for excluded management employees established under the *Public Service Act.* These terms and conditions of employment are published in section 4.5 of the *Government Personnel Mgmt Policies and Procedures Manual, Volume* 1, which is available in the Library.

There is no general pay increase for lawyers in the Crown Counsel Agreement. Nor is there any increase in the number of merit level positions available. However, the new Crown Counsel Agreement will result in lock step increases for all Legal Counsel 1 and 2 who were called after 1986. These lock step increases are retroactive to April 1, 1996. The pay scale, based on year of call, is set out at pages 13 and 14 of the agreement.

The agreement will also result in increases for lawyers who were appointed to level 3A positions in December 1995, under the former agreement, which instituted step increases. The increase to step 2 will be effective one year after appointment as a 3A; i.e., December 1996. A further increase to step 3 will be effective in December 1997. The rates of pay for level 3A are set out at page 15 of the agreement.

"G:\GILLIAN\CCA.DOC"

We have been advised by the Ministry's Human Resources Division that the increases will be reflected on pay cheques commencing on April 4, 1997. However, there will be a delay in processing cheques for retroactive pay. I am attaching a memorandum from Carol MacKillop, Director, Finance and Administration, which explains the reason for the delay. Ms. MacKillop's memo also provides answers to the most frequently asked questions relating to the payment of retro pay. I ask for your patience with respect to the receipt of the retroactive pay, even though I fully appreciate how long overdue it is and how frustrating this process has been for everyone entitled to increases.

I would also like to clarify that retroactive payments will be made to all lawyers in the lock step series who have left the Branch since the expiry of the last Crown Counsel Agreement, including those who took the voluntary severance package.

Finally, I note that even though there is no increase in the number of merit level positions, we are in the process of identifying the number of positions which we have available for promotion because of the increased number of lawyers in the Branch and the departure of some lawyers at the 3A level. We are currently discussing this matter with Human Resources and PSERC. I will let you know when we have further clarification about this matter.

If you have any questions regarding the implementation of the pay increases, please do not hesitate to contact Patricia Kimmitt-Huxley or me. However, I would ask that you not contact the Payroll Division directly, as requested by Carol MacKillop.

Gillian P. Wallace
Assistant Deputy Attorney General

c.c. Patricia Kimmitt-Huxley
D'Arcy Boulton

TAB F

TREASURY BOARD ORDER NO. 329 (2.258)

This order applies to employees covered by the Legal Counsel classification series. Unless otherwise provided for, these terms are effective April 1, 2007. The agreement is for a twelve year term expiring March 31, 2019.

- Pay Increases:
  - Effective April 1, 2007, and on the first of April of each year of the collective agreement thereafter, all salaries shall be adjusted by an amount equal to the increases provided to Provincial Court Judges plus 1.27%.
  - A one time payment of $3,900 per full time employee
  - A one time payment contingent upon the Province's fiscal performance in 2009/2010 based on the Association's share of the budget surplus in excess of $150 million to a maximum of $300 million
  - Recruitment and retention adjustments to the salary grid

- Introduction of an Isolated Communities Allowance to facilitate professional development of Crown in agreed to isolated areas.

- One time payment of $10,000 to identified employees in recognition of past service and training undertaken.

- One-time additional Professional Requirements Allowance, which must be used in the year it is made available, in accordance with the following:
  - 2007 $755
  - 2008 $239
  - 2010 $100
  - 2011 $382

This agreement has been reviewed and approved by PSEC as being within the Negotiating Framework.

Carole Taylor
Approved for Treasury Board

April 23/07.
Date

TAB G

BRITISH COLUMBIA
The Best Place on Earth

December 1, 2006

Ms. Adele Adamic
President, LSB Lawyers Association
Ministry of Attorney General
Province of British Columbia
#1301 - 865 Hornby Street
Vancouver, BC V6Z 2G3

Dear Ms. Adamic:

Re: Input from LSBLA into Negotiations with Crown Counsel

This letter outlines our discussions of November 16, 2006, regarding the LSB Lawyers Association interests in the bargaining process for Crown Counsel. As the present compensation framework for LSB Lawyers is based in large part on the terms of the agreement with the BC Crown Counsel Association, you voiced your members' concerns that they have an input into the bargaining process affecting that portion of their terms and conditions of employment.

As we discussed, we are interested in hearing the LSBLA's view on relevant terms and conditions of your members' work insofar as this may affect our bargaining with Crown Counsel. We discussed the need to protect the integrity and confidentiality of collective bargaining with Crown Counsel and agreed to a process for obtaining your input as outlined below:

1. We will solicit the LSBLA's perspective on important terms and conditions of employment for LSB Lawyers, with a particular focus on matters which distinguish them from those of Crown Counsel. As we are in the process of preparing our own positions for collective bargaining with the BC Crown Counsel Association, we will need this information on or before December 15, 2006. Such information will help us to better understand the broader impact of agreements on such matters with the BC Crown Counsel Association.

2. After bargaining with the BC Crown Counsel Association has concluded, and before a decision is made on applying the new terms and conditions to LSB lawyers, we will share the terms of the agreement with you, and will solicit your input on how these terms may be applied to LSB lawyers.

.../2

BC Public Service Agency Employee Relations Division
Mailing Address:
PO Box 9404 Stn Prov Govt
Victoria BC V8W 9V1
Telephone: 250 387-0497
Facsimile: 250 356-7074
Website: www.bcpublicservice.ca

We have agreed to this process in recognition of your desire to have your members' voices considered in the determination of terms and conditions of work that may affect them, while at the same time respecting the bargaining process in place for a different group of employees with its own representation. I hope that, in doing so, we have demonstrated to you a willingness to recognize the distinct nature of the needs of LSB lawyers.

Yours truly,

Paul Straszak
Assistant Deputy Minister
Employee Relations Division

pc: Allan Seckel, Deputy Attorney General, Ministry of Attorney General
Robert Lapper, Assistant Deputy Attorney General, Ministry of Attorney General
James Gorman, Deputy Minister, BC Public Service Agency

TAB H

Province of
British Columbia

Ministry of
Attorney General

LEGAL SERVICES BRANCH
609 Broughton Street
Victoria, British Columbia.
V8W 1C8
Telephone: (604) 356-8400
Telecopier: 387-1010

File: 32780-20/010
Crown Counsel Association

January 21, 1993

TO: ALL LAWYERS
LEGAL SERVICES BRANCH

FROM: BRIAN M. NEAL

RE: **IMPLEMENTATION OF CROWN COUNSEL AGREEMENT BENEFITS TO LEGAL SERVICES BRANCH**

I have been waiting for an appropriate opportunity to update you on the developments concerning the implementation of the Crown Counsel Agreement. As you know, the Crown Counsel Association and the Province reached an agreement late last Fall touching on a number of issues. I have now obtained a final copy of that Agreement and enclose the same for your information.

Since the signing of the Crown Counsel Agreement, there have been a number of developments on several fronts. Ministry Management staff have been working with Personnel in an attempt to implement the provisions of the Crown Counsel Agreement covering salary, benefits, pension and conversion issues. Needless to say, a lot of issues remain unresolved, however, progress is being made. A Management Implementation Committee has been established with representation from the Criminal Justice Branch, Government Personnel Services Division (GPSD), Management Services, Personnel and Legal Services Branch. This group has been working to identify the various implementation issues and coordinate an appropriate response to the same.

On December 29, 1992, I received formal confirmation from Bob Edwards that the relevant aspects of the Crown Counsel Agreement would be applied to all practicing lawyers in Legal Services Branch. A copy of that memorandum is also attached again for your information in case you didn't receive a copy when it was initially distributed.

Some of the other material developments are as follows:

1. LSB Lawyers Association

A new Association representing 55 of the lawyers within Legal Services Branch has been formed. I will be meeting with executive members of the Association on January 22, 1993 to have a preliminary discussion on the objectives of the Association and to establish a working relationship with the Branch Management. I understand that the Association will also be requesting similar meetings with Bob Edwards and the Attorney General.

2. Salaries and Retroactivity

In the course of working out the implementation details of the Crown Counsel Agreement, a dispute arose between the parties over the interpretation of the words "year of call". This matter was referred to Vince Ready and Judy Korbin by the Crown Counsel Association for arbitration in accordance with the terms of the existing Agreement. I anticipate we will be hearing back on the outcome of this arbitration shortly. Once this has been done, it will then be possible for the appropriate compensation levels to be established for each lawyer. I understand that Personnel are working on the development of a standardized form for all lawyers in both Branches to summarize service history with Government. This form will assist Personnel in making the appropriate calculations for both salaries and pensions.

3. Classification and Merit Levels

The Crown Counsel Agreement established a limit of 42 positions that were eligible in the Criminal Justice Branch for merit promotions to Levels 3 and 4. The Agreement did not, however, detail how the relationship between the existing management classification system would work out, nor did it provide any specifics on who was eligible to be promoted to these higher levels. I am in the process of discussing these issues with GPSD and the Ministry's Personnel Office. Once I have received further guidance on how these parts of the Agreement are intended to apply to Legal Services Branch, I will pass that information on to you. One thing I have been advised is that the working level for lawyers in both Branches will be the top of Level 2 in the new compensation plan.

4. Pension and Conversion Issues

I understand the Superannuation Branch will be holding meetings in late February and early March explaining the details of the various pension options that are

available under the Crown Counsel Agreement. The sessions will apparently address the advantages of purchasing past service, including a discussion of tax and other implications. Once we have further information on the specific time and place for these meetings, I will pass that on to you. In the meantime, I would suggest that you familiarize yourselves with the relevant details set out in the attached Agreement.

I hope that the foregoing and enclosures are of some assistance. Once I have further information, I will be sure to pass it on to you. Thanks for your continuing patience and cooperation.

Brian M. Neal
Assistant Deputy Attorney General
BMN:Shaw

Attachs.

TAB I

1001 Douglas Street, P.O. Box 9280 Stn. Prov Gov't, Victoria, BC V8V 1X4 604-660-3431

February 15, 2013

Mr. Bert Phipps
Assistant Deputy Minister
BC Public Service Agency
1st Floor - 810 Blanshard Street
Victoria, BC V8W 9V1

Dear Mr. Phipps:

Re: Recognition of the LSB Lawyers Association as bargaining agent

We write in advance of our meeting on Monday February 18, 2013 to provide you with some background on our association and materials to review which we believe will assist our discussions.

The LSB Lawyers Association ("LSBLA") was formed in 1992 to represent BC government civil lawyers in matters regarding remuneration, benefits and other terms and conditions of employment, to create, promote and encourage better understanding, unity and cooperation among the members of the association, and to represent the members of the association in matters of professional interest relating to employment. The LSBLA is a member association of the Canadian Association of Crown Counsel, and we have a website with some areas open to public access http://lsbla.org which contains further information on the association. Our membership represents approximately 77% of the Legal Services Branch lawyers eligible for membership (142/185). Membership is voluntary.

LSB Lawyers advise and act for the provincial government on government administrative, legislative, regulatory, and litigation matters. This includes advising on aboriginal treaty negotiations, acting for government in civil forfeiture applications, defending ministries and government employees in damages claims, defending regulatory decisions and enforcing government directives, advising on legislative developments, and drafting and advising on goods and services contracts.

Pressures which may attempt to influence government lawyers come from both within government, and outside. Our members are often the face of government in the eyes of the public. As such we engage with individuals, business, and other jurisdictions in our daily work. We are dedicated public servants who have decided to apply our professional training and skill for the benefit of the British Columbian public.

When the Crown Counsel Association entered into negotiations for collective bargaining agent status in the early 1990's, our association and members were invited by the Crowns to join with them in their efforts. At the time the LSB lawyers declined the invitation. Over the years, as Crown Counsel were recognized and have made gains in their negotiated terms and conditions, many of those terms were applied by government in practice to LSB lawyers, including salary grids and classifications, leave and vacation provisions, creation of a joint committee with branch management, and professional requirements allowance funding.

During the 2006-07 negotiations between the Crowns and government, government offered to transition the Crown Counsel Association into a trade union governed by the *Labour Relations Act* and subject to the auspices of the Labour Relations Board. Our then Deputy Attorney General Alan Seckel and the PSA's ADM Paul Straszak also offered such a transition for the LSBLA if the Crowns voted to accept the transition. The Crowns ultimately rejected the offer.

By 2010 LSB lawyers, with the support of the Crown Counsel Association, started seriously considering taking the next step in the evolution of our association and began the conversation on seeking recognized bargaining agent status. The members have provided us with a mandate (through over 55% of the total lawyers in the branch) to seek collective bargaining agent status. The message we hear is that it is about time we stop relying on the Crowns to do all the work, hoping that it works out for the best, and step up to the table ourselves.

And that is why we have asked for this meeting. Enclosed are some materials which provide an overview of the status of provincial and federal government lawyer associations across the country, what we think recognized status could look like, what items the Crowns have negotiated which has not been incorporated into our terms and conditions, and the Crowns recognition legislation and agreement.

We look forward to meeting with you and Rebecca, Geoff and Fiona on Monday and to many productive discussions going forward.

Yours truly,

Sandra A. Wilkinson
President, LSB Lawyers Association
(604) 660-3431
sandra.wilkinson@gov.bc.ca

c. G. Moyse, A/ADAG
F. St Clair
R. Sober

TAB J

1001 Douglas Street, P.O. Box 9280 Stn. Prov Gov't, Victoria, BC V8V 1X4 604-660-3431

Via email

September 5, 2013

Mr. John Davison
Acting/Assistant Deputy Minister
BC Public Service Agency
1st Floor - 810 Blanshard Street
Victoria, BC V8W 9V1

Dear Mr. Davison:

Re: Recognition of the LSB Lawyers Association as bargaining agent

We understand you have taken over the position previously occupied by Bert Phipps, albeit in an acting role.

We write further to our meeting with Mr. Phipps and Rebecca Sober on February 18, 2013, to follow up on their request for clarification on what the LSB Lawyers Association is seeking. Since 1992, we have had a mandate to obtain parity for LSB Legal Counsel with Crown Counsel on terms and conditions of employment. To date, through our efforts and with the employer's voluntary agreement we have parity with Crown Counsel on the vast majority of the provisions set out in the Crown Counsel Agreement. But that parity is not secured through a collective agreement.

We now have direction to seek parity on another level: obtain the same status with our employer as the Crown Counsel Association has. That is, to be a recognized bargaining agent and put into place an agreement on our terms and conditions of employment. Since the Crown Counsel Agreement has the possibility of reopening on certain items in March 2015, we want to have recognition in place by then with a view to negotiating our first LSB Legal Counsel Agreement during any Crown Counsel Agreement re-opening.

At our meeting in February Mr. Phipps and Ms. Sober indicated that they were not clear what the Agency's mandate was in regard to our request given the upcoming election and summer break. At this time we ask that you please confirm for us what your position is with respect to our request for recognition.

As well, we look forward to our next meeting and the opportunity to further collaboratively discuss these issues. To that end, what is your availability for a meeting later this month?

Yours truly,

Sandra A. Wilkinson
President, LSB Lawyers Association
(604) 660-3431
sandra.wilkinson@gov.bc.ca

c. R. Sober, Senior Labour Relations Specialist, PSA

TAB K

To: Davison, John C PSA:EX[John.Davison@gov.bc.ca]
Cc: Sober, Rebecca PSA:EX[Rebecca.Sober@gov.bc.ca]
From: Wilkinson, Sandra JAG:EX
Sent: Fri 9/27/2013 9:25:42 AM
Subject: LSB Lawyers Association
2013-09-05 LF LSBLA to J Davison (PSA).pdf
Framework Agreement.pdf

Hello John,

Further to our attached letter of September 5, I take it at this point that our proposal to meet at the end of this month won't work.

In order to assist in moving this matter forward we've taken the liberty of asking our counsel Bruce Laughton, Q.C. to prepare a Voluntary Framework Agreement for your consideration. Voluntary recognition was one of the options discussed in our meeting with Bert and Rebecca last February. We mentioned at that time that our colleagues in Ontario bargain under a voluntary recognition framework. We would like the opportunity to discuss this with you. We propose that we would have Bruce with us at the meeting as he can provide more concrete information about how these types of agreements have worked with other associations and its application with respect to the LSB Lawyers Association.

We suggest that we meet sometime in November, either in Victoria or Vancouver. Please get back to us soon as to your availability. We look forward to meeting with you.

Regards,
Sandra.
Sandra A. Wilkinson
President, LSB Lawyers Association
604.660.3431

From: Wilkinson, Sandra JAG:EX
Sent: Thursday, September 5, 2013 1:20 PM
To: Davison, John C PSA:EX
Cc: Sober, Rebecca PSA:EX; Foster, Margo L JAG:EX; Jackson, Stephanie A JAG:EX; Jackson, Veronica JAG:EX; Macallum, Bruce I JAG:EX; Morley, Gareth JAG:EX
Subject: LSB Lawyers Association

Hello John,

Please see the attached letter of today's date from the LSB Lawyers Association.

Regards,
Sandra.
Sandra A. Wilkinson
President
LSB Lawyers Association
http://lsbla.org

TAB K

1001 Douglas Street, P.O. Box 9280 Stn. Prov Gov't, Victoria, BC V8V 1X4 604-660-3431

Via email

September 5, 2013

Mr. John Davison
Acting/Assistant Deputy Minister
BC Public Service Agency
1st Floor - 810 Blanshard Street
Victoria, BC V8W 9V1

Dear Mr. Davison:

Re: Recognition of the LSB Lawyers Association as bargaining agent

We understand you have taken over the position previously occupied by Bert Phipps, albeit in an acting role.

We write further to our meeting with Mr. Phipps and Rebecca Sober on February 18, 2013, to follow up on their request for clarification on what the LSB Lawyers Association is seeking. Since 1992, we have had a mandate to obtain parity for LSB Legal Counsel with Crown Counsel on terms and conditions of employment. To date, through our efforts and with the employer's voluntary agreement we have parity with Crown Counsel on the vast majority of the provisions set out in the Crown Counsel Agreement. But that parity is not secured through a collective agreement.

We now have direction to seek parity on another level: obtain the same status with our employer as the Crown Counsel Association has. That is, to be a recognized bargaining agent and put into place an agreement on our terms and conditions of employment. Since the Crown Counsel Agreement has the possibility of reopening on certain items in March 2015, we want to have recognition in place by then with a view to negotiating our first LSB Legal Counsel Agreement during any Crown Counsel Agreement re-opening.

At our meeting in February Mr. Phipps and Ms. Sober indicated that they were not clear what the Agency's mandate was in regard to our request given the upcoming election and summer break. At this time we ask that you please confirm for us what your position is with respect to our request for recognition.

As well, we look forward to our next meeting and the opportunity to further collaboratively discuss these issues. To that end, what is your availability for a meeting later this month?

Yours truly,

Sandra A. Wilkinson
President, LSB Lawyers Association
(604) 660-3431
sandra.wilkinson@gov.bc.ca

c. R. Sober, Senior Labour Relations Specialist, PSA

TAB K

FRAMEWORK AGREEMENT FOR
COLLECTIVE BARGAINING AND CONSULTATION

BETWEEN:

GOVERNMENT OF THE PROVINCE OF BRITISH COLUMBIA
REPRESENTED BY THE BC PUBLIC SERVICE AGENCY

(the "Employer")

AND:

LSB LAWYERS ASSOCIATION

(the "Association")

(Collectively referred to as the "Parties")

1. RECOGNITION

1.1 The purpose of this Agreement is to establish a framework for discussing and formally negotiating the terms and conditions of employment for members of the Association.

1.2 The Employer recognizes the Association as the exclusive bargaining agent for all "employees" as defined in Section 1 of the *Public Service Act*, employed in the Legal Services Branch and designated as Legal Counsel except the following:

(a) The Assistant Deputy Attorney-General;

(b) Supervising Counsel, including Chief Legislative Counsel.

1.3 The Employer shall not, after the date of accepting this Agreement enter into agreements with any Legal Counsel which supersedes, amends or contravenes the terms of this Agreement.

2. ASSOCIATION DUES

2.1 The Employer shall deduct on a bi-weekly basis from the compensation payable to each Legal Counsel, a sum equivalent to the dues of the Association. The deductions will be remitted to the Association.

2.2 Authorization of the deduction of Association dues shall be a condition of employment for all present and future Legal Counsel.

3. NEGOTIATIONS

3.1 The Parties must bargain collectively and in good faith and make every reasonable effort to conclude agreements which must include all matters affecting wages or salary, hours of work and other working conditions.

3.2 The agreements referred to in Article 3.1 must not include the following:

(a) the principle of merit and its application in the appointment and promotion of employees, subject to section 4 (3) of the *Public Service Act;*

(b) a matter included under the *Public Sector Pension Plans Act;*

(c) the organization, establishment or administration of the ministries and branches of the government, except the effect of reductions in establishment of employees, which must be negotiated by the parties;

(d) the application of the system of classification of positions or job evaluation under the *Public Service Act;*

(e) the procedures and methods of training or, retraining of all employees not affected by section 15 of the *Public Service Labour Relations Act,* other than training programs administered with a branch or ministry that apply to one occupational group only

3.3 Bargaining will commence within 20 days of either party having delivered a request to bargain.

3.4 After a request to bargain has been delivered, the Employer must not alter the rates of pay, the current structure for pay raises and PRA funding or any other term or condition of employment for Legal Counsel until an agreement has been reached, unless the Association consents to the alteration.

3.5 The parties will make best efforts to co-ordinate the bargaining of the first agreement referred to in Article 3.1 with the mid-contract negotiation process, if any, provided for by Clause 2 of Article 3 of the current agreement between the Employer and the Crown Counsel Association.

4. RATIFICATION, AMENDMENTS AND DURATION

4.1 This Agreement will come into force upon ratification by the members of the Association and the Employer's Principals.

4.2 Ratification of the Agreement by Legal Counsel will be through a process determined by the Association.

4.3 This Agreement may be amended by agreement of the Parties which shall be subject to the ratification process described in Article 4.1

4.4 This Agreement shall continue in force unless either Party has given the other six months' notice of its intention to renegotiate.

Dated this ____ day of _____, 2013

For the Government of the Province of British Columbia

_____

_____

For the LSB Lawyers Association

_____

_____

2014/09/29

Government's Response to the LSBLA

Before I get started I want to acknowledge that you have been waiting for this meeting for some time. I appreciate your patience.

Now, as we understand it, the LSBLA (the Association) is requesting essentially the same collective bargaining status with Government as the BC Crown Counsel Association.

At our previous meeting you explained some of the reasons behind your request.

You indicated, among other things, that you wanted the extra certainty that you felt a collective agreement would provide. You also felt that bargaining agent status would provide you with additional standing with the employer.

Finally, you made it clear that you wanted more of a direct say in the determination of your members' terms of employment.

I am now in a position to respond to your request.

Government's Response to the LSBLA

I want to begin by identifying some of the ways in which the Government has already acknowledged the Association's representative character. As examples:

- There are regularly scheduled Joint Committee Meetings between management and the Association to discuss issues that concern the Association and its members.

- Management accepts the role of the Association in assisting individual LSB lawyers on specific employment related issues as they arise.

- The Public Service Agency (PSA), for Government, also consults with the Association before bargaining with the BC Crown Counsel Association, in recognition of the impact that such bargaining can have on LSB lawyers.

You believe that this existing relationship is not sufficient; and, again as we understand it, you are seeking the same status with Government as the BC Crown Counsel Association.

In the Government's view, the role of crown counsel differs from that of LSB lawyers. Crown counsel must have a real and perceived independence from Government, as a result of their prosecutorial role and discretion.

LSB lawyers, on the other hand, act for Government. Many of them provide confidential legal advice to Government on highly sensitive matters. In our view, that is why it is appropriate that LSB lawyers are excluded from collective bargaining under the *Public Service Labour Relations Act*.

We are not prepared to grant your request.

We are willing, however, to grant the Association a more formal representative role in a bargaining process with Government.

Specifically, we envisage a process that includes the following:

- The Association will periodically have the full opportunity to make representations to the PSA regarding changes to its members' terms and conditions of employment.

- The PSA will likewise make representations to the Association about any changes to such terms and conditions of employment that it believes should be addressed.

- The PSA and the Association will commit to consider and discuss those representations in good faith.

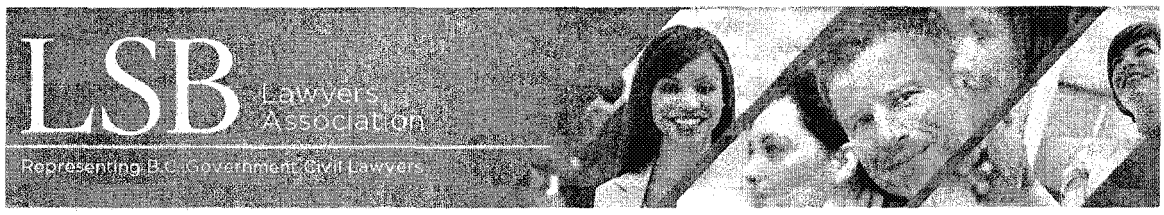
- The objective of such consideration and discussion will be to reach a consensus on the recommendations the PSA will make to the Government respecting the LSB lawyers' terms of employment.

- If consensus cannot be achieved, then the PSA, after full consideration and discussion of the representations made during this process, will make its own recommendation to Government.

We suggest that the first implementation of this process occur shortly upon the conclusion of the mid-contract talks with the BC Crown Counsel Association that will take place this coming Spring.

We are aware that the process we have described to you does not fully satisfy your request. However, we are hoping we can both agree to endeavor in good faith to make the process that we are proposing work.

I wish to add, for clarity, that we see the various ways in which the Government has to this point recognized the Association's representative character continuing. What we are proposing, in addition to our preceding interactions, is the recognition by Government of a bargaining role for the Association in the context of the process we have described to you.



1001 Douglas Street, P.O. Box 9280 Stn. Prov Gov't, Victoria, BC V8V 1X4 604-660-3431

Via email

February 6, 2015

Mr. John Davison
Assistant Deputy Minister
BC Public Service Agency
1st Floor - 810 Blanshard Street
Victoria, BC V8W 9V1

Dear Mr. Davison:

Re: Recognition of the LSB Lawyers Association ("LSBLA") as bargaining agent

We write further to our meeting and your formal mandate response of September 29, 2014, and your subsequent draft MOU provided in furtherance of your proposal set forth in the September meeting and memorandum.

We have met with our membership and legal counsel to discuss your position and proposal.

As we are sure you are aware, the Supreme Court of Canada has recently issued two seminal judgments in labour law cases[1] which are directly relevant to our association's request for recognition as the collective bargaining agent for lawyers in the Legal Services Branch.

Given the clear direction from the Supreme Court of Canada, we take the position that the government's response to our request for recognition fails to satisfy the legal requirement of providing, not only for recognition, but also for a meaningful bargaining process, in which there is collective representation chosen by the employees and independent of the employer. It also fails to provide for an impasse mechanism, other than the unilateral decision of the employer.

Your response provides no justification for refusing recognition other than the position that such recognition would be "inappropriate". The Supreme Court of Canada has rejected this kind of conclusory reasoning in *Mounted Police Association of Ontario*. We have pointed out that our colleague associations across the country, in the federal,

[1] *Mounted Police Association of Ontario v. Canada (Attorney* General), 2015 SCC 1; and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4

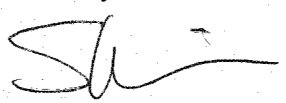
Ontario, Quebec, and Manitoba jurisdictions, have formal recognition and engage in traditional forms of collective bargaining with their employers. Our colleagues in the crown prosecution services in British Columbia also have that recognition. All of these colleagues also have the formalized recognition of the right to strike or to binding third party interest arbitration, or a combination of the two, for resolving their employment related disputes, as well as having the ability to have recourse to grievance procedures with results determined through arbitration. There is no evidence that this impairs, in any way, our colleagues' ability to perform their professional duties as lawyers representing and advising government.

To sum up, it is unconstitutional to deny the LSBLA's request for recognition and to engage in meaningful collective bargaining on behalf of its constituents.

Given the certainty of the law today, we ask that you reconsider your response to our request for recognition and proposed voluntary recognition agreement. We further ask that you provide us with a reply to this request by March 16, 2015.

As always, I would be happy to further discuss this with you.

Yours truly,



Sandra A. Wilkinson
President, LSB Lawyers Association
(604) 660-3431
sandra.wilkinson@gov.bc.ca

c. R. Sober, Senior Labour Relations Specialist, PSA
K. Sandstrom, Q.C., Assistant Deputy Attorney General

Notes of John Davison, PSA
August 4, 2015 meeting
with LSBLA

TAB N

Speaking notes

- You originally requested that the Province recognize the LSBLA as the bargaining agent for your members and enter into a bargaining relationship with the Province that was essentially the same as the BC Crown Counsel Association. In February this year you formally rejected our offer of a more limited bargaining relationship and, citing recent Supreme Court of Canada judgments, requested that we reconsider our response to your original request.

- We recognize that it has taken a while to get back to you but this has not a straightforward matter for us to deal with.

- After careful re-consideration of your request, we can confirm that we will be willing to offer all eligible Legal Counsel employees access a more meaningful process of collective bargaining as determined by the Supreme Court of Canada.

- But while it is clear that the Supreme Court has declared that employees are entitled to a meaningful bargaining process that provides for a dispute resolution mechanism, the Court has been less prescriptive in outlining the types of bargaining structures that are required to satisfy the meaningful bargaining requirement.

- You have requested an independent bargaining relationship with the Province, but we have concerns with creating another stand-alone bargaining unit. We also don't think the recent Supreme Court decisions should be interpreted to go so far as to mean that such a structure is required.

- Our concern with granting your request is that this would add yet another bargaining unit to the public service on top of the 5 that we already have. As a general LR principle, it is not recommended that there be a proliferation of bargaining units with an employer. With additional bargaining units there is greater potential for labour relations unrest, whipsawing, leapfrogging, etc. This is a particular concern for us given the fact that your members currently have parity with Crown Counsel on most terms and conditions of employment.

- There are also less than 250 Legal Counsel employees in the Ministry of Justice. This is a fairly small number of members when it comes to justifying a stand-alone bargaining unit.

- But while we have concerns with your request, we have not ruled it out. Instead, we have spent considerable time trying to determine what would be the most appropriate bargaining structure for all eligible Legal Counsel employees.

- We have looked at a number of different bargaining structure options, but the more we considered the various options the more we began to realize that this decision has the potential to impact more than just the two parties that are represented here today. Ultimately, we came to the conclusion that it would be inappropriate for us to determine the type of bargaining structure that should cover your members without first giving all of the potentially impacted parties the opportunity to provide their input on the options.

- We recognize that you were likely expecting to get a more definitive response from us today, but we see the process of seeking input from potentially impacted parties as being an important step in assisting us in coming up with the most appropriate and informed decision.

- We have narrowed down the list of potential bargaining structure options to three potential choices and there are three groups that we are planning on consulting with: the LSBLA, the BC Crown Counsel Association and the Professional Employees Association.

- After our meeting with you today, our intention is to reach out and set up meetings with the other groups right away.

TAB N

There are three options that the Province is considering for extending collective bargaining rights to eligible Legal Counsel employees in the Legal Services Branch of the Ministry of Justice. The Province is seeking the LSBLA's input in relation to the three options and is asking for your views on the following four questions:

1. What does your organization think the Province should consider in relation to the option of the Province recognizing the Legal Services Branch Lawyers Association (the LSBLA) as the exclusive bargaining agent for all eligible Legal Counsel employees and entering into a direct collective bargaining relationship with the LSBLA over its members' terms and conditions of employment?

2. What does your organization think the Province should consider in relation to the option of the Province including Legal Counsel and Crown Counsel employees in the same bargaining unit? Under this option, a single collective agreement would cover all eligible employees, but the BC Crown Counsel Association (the BCCCA) and LSBLA would serve as the exclusive bargaining agents for their respective members. For the purposes of collective bargaining with the Province, the BCCCA and the LSBLA would be required to form an association responsible for negotiating changes to the current Crown Counsel collective agreement on behalf of the entire bargaining unit.

3. What does your organization think the Province should consider in relation to the option of the Province including all eligible Legal Counsel employees in the existing licensed professional bargaining unit. Under this option, the *Public Service Labour Relations Act* would be amended to include Legal Counsel employees under the definition of "employees" and the Professional Employees Association would serve as the exclusive bargaining agent for Legal Counsel employees.

4. Is there anything else that your organization wants the Province to consider in determining what is the most appropriate method of extending collective bargaining rights to Legal Counsel employees?

TAB O

2016/07/29 Meeting with LSBLA – Speaking Notes

- When we last came to speak to you in August, we indicated that we were prepared to grant eligible LSB lawyers more meaningful bargaining rights as determined by the Supreme Court of Canada and that we had narrowed the potential bargaining unit options down to three.

- We also informed you at that time that we were going to be consulting with the LSBLA, the BC Crown Counsel Association and the PEA on each of the options prior to making a decision.

- The consultation process was completed in January.

- Since that time, we have been assessing the options, based in part on the feedback that had been received, with the intention of briefing decision makers and reaching a final decision.

- We have now had the opportunity to brief senior government officials from the PSA, Justice, PSEC and the DM to the Premier's Office. The briefing included a fulsome discussion of each of the three options.

- One of the issues that was discussed during the briefing was the legal advice we have received regarding the legal framework necessary to enact each of the three bargaining structure options.

- In short, the advice we received is that regardless of the option chosen, the Province would need to enact legislation to provide the governing legal framework for the bargaining unit.

- The problem we are faced with, which was discussed during the briefing, is that it is not expected that there will be another substantive legislative session in the government's current mandate.

- Without the ability to enact the corresponding legislative changes necessary to establish the governing framework for the bargaining unit, we have concluded that it would be inappropriate for us to provide a final response at this time.

- Any decision made now would only be provisional in nature and would be subject to change after the next election. It will be up to the next Cabinet formed after

the 2017 election to approve the legislation establishing the governing framework for the bargaining unit.

- For this reason, the Province has decided to postpone a final decision on the appropriate bargaining unit for LSB lawyers until after the election. We are, however, committed to making a decision well ahead of the 2019 round of bargaining to provide the parties sufficient time to take care of all the transitional arrangements related to the establishment of the new/revised bargaining structure.

- I recognize that you and your members have been waiting for an updated decision on this matter since early 2015 and that our response today will be disappointing as you were expecting a final decision.

- I want to be clear that my intention throughout the consultation process, and in the briefing with senior decision government officials, was always to get to the point where I could give you a more definitive response today.

- Unfortunately, that did not turn out to be the case. But I do believe that this is the most appropriate response given the circumstances we are in.

BRITISH COLUMBIA
BC Public Service

Where ideas work

February 7, 2018 Cliff# 6122

Ms. Sandra Wilkinson
President
BC Government Lawyers Association
P.O. Box 9280 Stn. Provincial Government
Victoria, BC V8V 1X4

Dear Sandra:

Re: Extending collective bargaining rights to members of the BC Government Lawyers Association

After considering the representations of your Association, as well as those of the Professional Employees Association (the PEA) and the BC Crown Counsel Association (the BCCCA), and upon considering the labour relations implications of the three options for the extension of collective bargaining rights to the lawyers your Association represents, the Government has decided that full collective bargaining rights will be made available to your members through their inclusion within the existing PEA bargaining unit under *the Public Service Labour Relations Act* (PSLRA).

As you know, the PSLRA provides for three bargaining units for government employees. One such bargaining unit is for professional employees. Had the government lawyers not been excluded to this point from the definition of "employee" in the PSLRA, they would have been included in that unit. The Government proposes, by amendment(s) to the PSLRA, to delete the exclusion of the government lawyers from the definition of "employee".

The Government decided not to include the government lawyers in the same bargaining unit as Crown Counsel employees, essentially because of the role played by Crown Counsel and the critical necessity of protecting their independence from government. This critical necessity is served by maintaining the Crown Counsel bargaining unit as a stand-alone unit that is an exception to the three-unit structure established by the PSLRA.

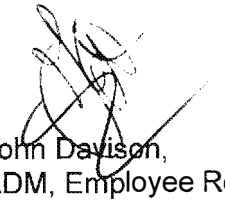
The Government decided against the creation of a separate bargaining unit for government lawyers, because this would create a proliferation of bargaining units (and the potential for an even greater proliferation of bargaining units), with the resulting labour relations implications that the careful crafting of the PSLRA was designed and intended to avoid.

In sum, if your members want to have their exclusion from the definition of "employee" in the PSLRA eliminated, with the result that they are included in the existing professional bargaining unit under that statute, the Government will propose to the Legislature the necessary amending legislation.

BC Public Service Agency
Employee Relations & Workplace Health Division
Mailing Address: PO Box 9404 Stn Prov Govt Victoria, BC V8W 9V1
Telephone: 778-698-7877
Facsimile: 250-387-0527
http://www.bcpublicserviceagency.gov.bc.ca/

We look forward to hearing from you.

Sincerely,



John Davison,
ADM, Employee Relations & Workplace Health

pc: Lori Halls, BC Public Service Agency
Richard Fyfe, Deputy Attorney General
James Harvey, Assistant Deputy Attorney General

TAB Q

British Columbia Government Lawyers Association

1001 Douglas Street, P.O. Box 9280 Stn. Prov Gov't, Victoria, BC V8V 1X4 604-660-3431

Via email: john.davison@gov.bc.ca

July 6, 2018

Mr. John Davison
ADM, Employee Relations and Workplace Health
BC Public Service Agency
PO Box 9404 Stn Prov Gov't
Victoria, BC V8W 9VI

Dear John,

Re: British Columbia Government Lawyers Association (BCGLA) request for recognition as collective bargaining agent

We write further to your letter of February 7, 2018 and our meeting of February 9, 2018 in which you informed the BCGLA of the government's decision to deny our members' their constitutionally protected collective bargaining rights to be recognized through a bargaining relationship with their democratically chosen bargaining agent, the BCGLA.

Our members have overwhelmingly decided that they want the BCGLA to continue to be their bargaining agent. Our members do not accept the government's apparent determination to condition access to their collective bargaining rights by being absorbed into the professional licensee bargaining unit.

We reiterate our members' request to be covered by the legislative labour relations scheme, with the right to be represented by the democratically selected bargaining agent of our choice. This remains our preferred solution to the ongoing denial of our constitutional rights.

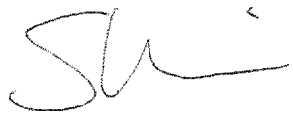
At the same time, we note that if the government is not prepared to legislatively give effect to our constitutional rights, it is, under the Supreme Court of Canada's *Mounted Police* and *Saskatchewan Federal of Labour* decisions, nonetheless constitutionally obligated to bargain with our member through their democratically chosen bargaining agent, and to do so in a manner which provides for meaningful negotiation and a constitutionally mandated dispute resolution process for resolving any collective bargaining impasses.

As a result, insofar as the government appears unwilling to legislatively give effect to our members' constitutional rights, we request a meeting to discuss the next steps and a process for entering into a non-legislative framework agreement that does so.

Please provide us with meeting dates as soon as possible, but in any event, with a response by no later than **Friday, August 3, 2018**. If we cannot make meaningful progress on our request, we have retained legal counsel and have instructed them to take legal action to challenge the government's position.

I look forward to hearing from you.

Regards,



Sandra Wilkinson
President, British Columbia Government Lawyers Association

c. B. Laughton, Laughton & Co.
S. Barrett and L. Lawrence, Goldblatt Partners, LLP.

BRITISH COLUMBIA
BC Public Service

Where ideas work

January 25, 2019 Cliff# 6303

Ms. Sandra Wilkinson
President
BC Government Lawyers Association
P.O. Box 9280 Stn. Provincial Government
Victoria, BC V8V 1X4

Dear Sandra:

Re: British Columbia Government Lawyers Association (BCGLA) Request for Recognition as Collective Bargaining Agent

Thank you for the opportunity to meet with the BCGLA on October 10, 2018 to further discuss your request for recognition as the collective bargaining agent for your members. You had requested the meeting in response to the Government's decision to extend full collective bargaining rights to your members through their inclusion within the existing Professional Employees Association (PEA) bargaining unit under the *Public Service Labour Relations Act*.

You indicated in your July 6, 2018 letter that your members did not accept the Government's decision as they wanted the BCGLA to be recognized, either through legislative or non-legislative means, as their bargaining agent.

While we appreciated the opportunity to further consult with the BCGLA on this issue and have considered the representations you made at our meeting, we stand by our original decision that was communicated to you in a letter dated February 7, 2018. We are prepared to take the legislative actions necessary to extend collective bargaining rights to your members, provided we receive confirmation they want to be included within the existing PEA bargaining unit.

Sincerely,

John Davison
ADM, Employee Relations & Workplace Health

pc: Lori Halls, BC Public Service Agency
Richard Fyfe, Deputy Attorney General
James Harvey, Assistant Deputy Attorney General

BC Public Service Agency
Employee Relations & Workplace Health Division
Mailing Address: PO Box 9404 Stn Prov Govt Victoria, BC V8W 9V1
Telephone: 778-698-7877
Facsimile: 250-387-0527
http://www.bcpublicserviceagency.gov.bc.ca/

- Skip to main content
- Skip to footer

British Columbia News

Single-step certification will protect right to join a union

https://news.gov.bc.ca/26529

Changes that make collective bargaining more accessible will help protect workers who want more say about workplace safety, compensation and benefits.

The new single-step certification process will enable workers to join a union when a clear majority of employees indicate they want to, as is the case in jurisdictions such as Quebec, New Brunswick, Prince Edward Island and federally regulated workplaces.

Collective bargaining helps workers obtain better pay and workplace benefits, supporting an inclusive economy that works for everyone.

“Throughout this pandemic, we’ve seen that many people want to make their workplaces safer, provide more input to their work schedules and negotiate better wages and benefits, and they should be able to this without barriers,” said Harry Bains, Minister of Labour. “The current two-step system can lead to interference in organizing. Under the Charter of Rights and Freedoms, workers who wish to collectively organize must not be impeded in any way.”

The current two-step system requires a minimum of 45% of workers at a job site to sign membership cards and, once that threshold is reached, workers must then restate their preference for a union through an additional vote – even if a clear majority of workers has already chosen to join the union. It’s at this stage, between the certification application and the vote, that interference can often occur.

Under the new amendments:

- If 55% or more of employees in a workplace indicate their intent to unionize by signing union membership cards, a union will be certified and no further vote is required.
- If between 45% and 55% of employees sign union membership cards, a second step consisting of a secret ballot vote is required for certification.

“The nature of work has changed, with growing wealth inequality and new types of precarious and gig work,” Bains said. “Workers want to be valued and they want to have a say. This is about giving workers the choice to speak with a collective voice for fair working conditions.”

The amendments to the Labour Relations Code will also affect construction sector unions by allowing workers annual opportunities to switch unions if they are unhappy with their current representation. Current rules can effectively prevent workers from changing unions for three years. The amendments recognize that individual construction projects may only be one or two years in duration, preventing some workers from ever being able to change unions under the current system.

Quotes:

Izzy Adachi, Worker Solidarity Network director-at-large and former union organizer at Starbucks Victoria –

"Single-step certification is crucial in protecting our right to unionize without employer intimidation. This is a win for all workers, but especially for the essential and front-line workers who have been fighting to be treated and

paid fairly throughout this pandemic."

Tes Estilo, care aide, Hospital Employees' Union –

"My co-workers and I joined the union for better wages, benefits and job security. As a care aide, this means more stability for our residents in seniors' care. Unions create balance and fairness in the workplace. It's important to remove barriers that make it harder to become a union member."

Quick Facts:

- B.C. has alternated several times between the one- and two-step systems.
- The current two-step system has been in place since 2001.
- During 1973-1984 and 1993-2001, when the single-step certification system was in place, B.C. had higher union certification rates.
- The Minister of Labour's November 2020 mandate letter includes a priority to "ensure that every worker has the right to join a union and bargain for fair working conditions."

A backgounder follows.

Ministry of Labour

Media Relations
250 883-2951

Backgrounders

B.C. Ministry of Labour union certification facts

The legal right to join a union in Canada

- The freedom to join a union is guaranteed by the Canadian Charter of Rights and Freedoms.
- Section 2(d) of the charter guarantees Canadian people the freedom of association – this includes the right to organize as workers for the purposes of collective bargaining.

In B.C., the Labour Relations Board (LRB) is the certification authority

- The LRB is an independent administrative tribunal responsible for resolving issues that arise under the Labour Relations Code (LRC).
- LRB roles include adjudicating applications for union certification, managing the process and ruling on allegations of unfair practices.
- Learn more: https://www.lrb.bc.ca/how-apply-union-certification (https://www.lrb.bc.ca/how-apply-union-certification)

2019 Labour Relations Code Review Panel recommendations on B.C.'s certification process

- In 2018 the Ministry of Labour appointed a panel of special advisers to review the LRC and to make recommendations that ensure B.C.'s unionized workplaces are supported by fair laws.
- Learn more: https://news.gov.bc.ca/releases/2018LBR0019-002073 (https://news.gov.bc.ca/releases/2018LBR0019-002073)
- The 2018 report noted concerns with employer interference in the certification process.
- The panel of special advisers concluded that the current certification-vote process can be effective for employee choice only if the LRC properly prevents employer interference.
- One of the panel's recommendations was to shorten the time between the signing of membership cards and the certification vote.
- Changes were made to the LRC in 2019 through Bill 30, including reducing the time from application to vote from 10 calendar days to five business days.
- The panel recommended that single-step certification could be considered if the changes made through Bill 30 do not effectively eliminate interference.

- Despite the 2019 changes, employer interference and unfair labour practices have continued.

Examples of conduct that would be considered unfair practices by the LRB

- Threats to close a workplace if a union is certified
- Threats to fire employees involved in the certification process
- Requiring employees to disclose their position on potential certification
- Encouraging employees to support alternatives to unionizing
- Holding mandatory meetings to influence employees' decisions on voting to join a union

Examples of unfair practices that have occurred under the current two-step certification process

- An electrical contractor improperly interfered with their workers' attempt to certify their workplace by threatening to lay off employees.
- A waste-management company improperly fired an experienced worker with a good performance record for participating in an attempted certification effort in the workplace.
- A food-processing company improperly fired two workers for attempting to certify their workplace.

Translations

- LRC_Amendment_Punjabi.pdf (https://bcgovnews.azureedge.net/translations/releases/2022LBR0006-000485/LRC_Amendment_Punjabi.pdf)
- LRC_amendment_Chinese(traditional).pdf (https://bcgovnews.azureedge.net/translations/releases/2022LBR0006-000485/LRC_amendment_Chinese(traditional).pdf)

Acknowledgment

The B.C. Public Service acknowledges the territories of First Nations around B.C. and is grateful to carry out our work on these lands. We acknowledge the rights, interests, priorities, and concerns of all Indigenous Peoples - First Nations, Métis, and Inuit - respecting and acknowledging their distinct cultures, histories, rights, laws, and governments.

TAB T

From: Parrott, Brianna AG:EX <Brianna.Parrott@gov.bc.ca> **On Behalf Of** Carmichael, Barbara AG:EX
Sent: Monday, October 17, 2022 12:08 PM
To: Morley, Gareth AG:EX <Gareth.Morley@gov.bc.ca>
Cc: Williams, Julie AG:EX <Julie.Williams@gov.bc.ca>; Bennett, David AG:EX <David.Bennett@gov.bc.ca>
Subject: Request re Increased use of government email system and distribution lists

Hi Gareth,

I am following up on your recent request to have increased use of the government e-mail system and distribution lists to send branch-wide messages related to the BC Government Lawyers Association (BCGLA). I indicated to you that I would consult with the PSA and respond. I'm disappointed that you did not wait for me to reply or send a follow up before subsequently sending two messages. Specifically, on Monday, October 3, 2020 during business hours, and again on Monday October 10, 2020 you sent lengthy substantive emails using a distribution list on the government e-mail system.

As you know, we have previously agreed to allow the BCGLA to use the government e-mail system and Branch distribution lists to send an introductory email to each new lawyer, to provide notice of its AGM and an annual email to all lawyers advising of its existence and how to make further contact should employees be interested. We are continuing to agree to allow the BCGLA to only use the government e-mail system and Branch distribution lists for these specific emails and purposes.

I have checked with the PSA and their view as the employer is that further use is not allowed. I understand this is based on a consideration of the expectation in the Core Policy and Procedures Manual that personal use of government IT resources by employees is limited during core business hours and does not interfere with the employee's duties and responsibilities. Further, it is up to the BCGLA to decide how to contact its members and prospective members, but that does not entail the use of government IT resources, as the BCGLA's activities and business should remain separate from employer operations. The BCGLA has many ways to accomplish its communication that do not include the use of the government distribution lists, such as through its website and using the contact information you obtain from your members. The PSA advises that this is consistent with how the employer treats other workplace associations. We are also cognizant that using established distribution lists to all Legal Services Branch lawyers includes employees that may not be members of the BCGLA that do not want to be contacted in that way.

Thanks,

Barbara

TAB T

Barbara Carmichael, KC
Assistant Deputy Attorney General
Legal Services Branch
Ministry of Attorney General
1001 Douglas Street
Victoria, BC V8W 9J7
(250) 356-6451
Pronouns: She/Her/Hers

TAB U

BRITISH COLUMBIA

June 5, 2020

J. Gareth Morley
President, BC Government Lawyers Association

E-mail: Gareth.Morley@gov.bc.ca

Dear Gareth,

I am pleased to confirm that on June 4, 2020 the Provincial Treasury Board has approved general salary increases for LSB lawyers for the three-year April 1, 2019 to March 31, 2022 period. The increases are as follows:

Effective April 1, 2019: 1.51%
Effective April 1, 2020: 2.00%
Effective April 1, 2021: 2.00%

In making the decision to provide the above salary increases, Treasury Board has confirmed that, as of April 1, 2019, Treasury Board Order no. 329 no longer applies to Legal Counsel who are not Crown Counsel and that going forward the two groups will be covered by separate classification series.

Although the link to Crown Counsel compensation is no longer in effect as of April 1, 2020, Treasury Board has also confirmed that the other terms and conditions that were previously linked to Crown Counsel conditions, and not management employees, will remain at the levels that were in place as of March 31, 2019. Thus, the number of earned days off and the amount of the professional requirements allowance, for instance, will remain at their March 31, 2019 levels for the three-year period.

The full list of items that were previously linked to Crown Counsel terms and conditions will be shared with employees in the near future.

A copy of the treasury board order is enclosed for your reference.

We sincerely appreciate the excellent work, dedication and public service of LSB lawyers, especially during these recent challenging times.

Sincerely,

Richard J.M. Fyfe, QC
Deputy Attorney General

Enclosure

Ministry of Attorney General
Office of the Deputy Attorney General
Mailing Address: PO Box 9290 Stn Prov Govt Victoria BC V8W 9J7
Telephone: 250-356-0149
Facsimile: 250-387-6224
Website: www.gov.bc.ca/justice

TAB U

Treasury Board Order No. 2020 - 0603

This Order applies as of April 1, 2019 unless otherwise specified.

As of April 1, 2019, Treasury Board approves the Legal Counsel Classification Series established by Treasury Board Order no. 258 being divided in two:

1) Crown Counsel covered by Treasury Board Order no. 329 shall be covered by the Crown Counsel Classification Series and are no longer part of the Legal Counsel Classification Series; and
2) Legal Counsel who are not Crown Counsel shall be covered by the Legal Counsel Classification Series.

As of April 1, 2019, Treasury Board Order no. 258 applies to the Crown Counsel Classification Series. As a result of the 2019 Hall Arbitration Award, Treasury Board Order no. 329 continues to apply to the Crown Counsel Classification Series.

As of April 1, 2019, Treasury Board Order no. 329 does not apply to the Legal Counsel Classification Series.

The following general salary increases shall be applied to all employees covered by the Legal Counsel Classification Series:

General salary increases

- Effective April 1, 2019: 1.51%
- Effective April 1, 2020: 2.00%
- Effective April 1, 2021: 2.00%

No interest payments shall be applied to any of the salary increases above, regardless of when the salary increases are provided to those in the Legal Counsel Classification Series.

All other terms and conditions for Legal Counsel employees covered by the Legal Counsel Classification Series that were previously linked to the Agreement between the BC Crown Counsel Association and the government in accordance with s. 4.1(2) of the *Crown Counsel Act* (the "Agreement") shall continue as per the specific terms and conditions that were effect on March 31, 2019.

Except as modified by this order, or as negotiated between the employer and any designated bargaining agent for Legal Counsel, there shall be no other changes applied to the terms and conditions specified above during the April 1, 2019 to March 31, 2022 period.

The salary schedules applicable to the Legal Counsel classification series for the April 1, 2019 to March 31, 2022 period are included in the attached appendix.

Carole James

Chair of Treasury Board

June 4, 2020

Date

APPENDIX

Effective April 1, 2019

		Annual	Monthly	Bi-Weekly	Hourly
Legal Counsel Level 1 441001	**Year 1**	88,938.95	7,411.58	3,409.02	48.7003
	Year 2	95,503.27	7,958.61	3,660.63	52.2947
	Year 3	102,068.39	8,505.70	3,912.27	55.8896
	Year 4	108,634.28	9,052.86	4,163.94	59.4849
	Year 5	115,196.78	9,599.73	4,415.48	63.0783
Legal Counsel Level 2 441002	**Year 6**	122,857.64	10,238.14	4,709.12	67.2731
	Year 7	130,516.16	10,876.35	5,002.67	71.4667
	Year 8	138,172.85	11,514.40	5,296.15	75.6593
	Year 9	145,837.36	12,153.11	5,589.93	79.8561
	Year 10	151,913.30	12,659.44	5,822.82	83.1831
	Year 11	159,330.22	13,277.52	6,107.11	87.2444
Legal Counsel Level 3 441003	**Step 1**	164,066.48	13,672.21	6,288.65	89.8379
	Step 2	168,118.67	14,009.89	6,443.97	92.0567
	Step 3	172,167.99	14,347.33	6,599.18	94.2740
	Step 4	176,220.44	14,685.04	6,754.51	96.4930
	Step 5	180,704.93	15,058.74	6,926.40	98.9486
	Step 6	185,192.03	15,432.67	7,098.39	101.4056
	Step 7	188,405.97	15,700.50	7,221.58	103.1654
Legal Counsel Level 3B 441203	**Step 1**	176,221.48	14,685.12	6,754.55	96.4936
	Step 2	180,704.93	15,058.74	6,926.40	98.9486
	Step 3	185,192.03	15,432.67	7,098.39	101.4056
	Step 4	189,676.52	15,806.38	7,270.28	103.8611
	Step 5	196,504.35	16,375.36	7,531.99	107.5999
	Step 6	203,577.42	16,964.79	7,803.10	111.4729
Legal Counsel Level 4 441004	**Step 1**	189,677.82	15,806.49	7,270.33	103.8619
	Step 2	197,581.57	16,465.13	7,573.28	108.1897
	Step 3	205,484.54	17,123.71	7,876.20	112.5171
	Step 4	213,386.99	17,782.25	8,179.10	116.8443
	Step 5	221,290.23	18,440.85	8,482.03	121.1719
	Step 6	229,195.28	19,099.61	8,785.03	125.5004

Effective April 1, 2020

		Annual	Monthly	Biweekly	Hourly
Legal Counsel Level 1 441001	**Year 1**	90,717.71	7,559.81	3,477.20	49.6743
	Year 2	97,413.27	8,117.77	3,733.84	53.3406
	Year 3	104,109.87	8,675.82	3,990.52	57.0074
	Year 4	110,807.00	9,233.92	4,247.22	60.6746
	Year 5	117,500.73	9,791.73	4,503.79	64.3399
Legal Counsel Level 2 441002	**Year 6**	125,314.73	10,442.89	4,803.30	68.6186
	Year 7	133,126.39	11,093.87	5,102.72	72.8960
	Year 8	140,936.22	11,744.69	5,402.07	77.1724
	Year 9	148,754.14	12,396.18	5,701.73	81.4533
	Year 10	154,951.66	12,912.64	5,939.28	84.8469
	Year 11	162,516.77	13,543.06	6,229.25	88.9893
Legal Counsel Level 3 441003	**Step 1**	167,347.73	13,945.64	6,414.42	91.6346
	Step 2	171,481.06	14,290.09	6,572.85	93.8979
	Step 3	175,611.25	14,634.27	6,731.16	96.1594
	Step 4	179,744.84	14,978.74	6,889.60	98.4229
	Step 5	184,319.08	15,359.92	7,064.93	100.9276
	Step 6	188,895.92	15,741.33	7,240.36	103.4337
	Step 7	192,174.04	16,014.50	7,366.01	105.2287
Legal Counsel Level 3B 441203	**Step 1**	179,745.88	14,978.82	6,889.64	98.4234
	Step 2	184,319.08	15,359.92	7,064.93	100.9276
	Step 3	188,895.92	15,741.33	7,240.36	103.4337
	Step 4	193,470.16	16,122.51	7,415.69	105.9384
	Step 5	200,434.44	16,702.87	7,682.63	109.7519
	Step 6	207,648.91	17,304.08	7,959.16	113.7023
Legal Counsel Level 4 441004	**Step 1**	193,471.47	16,122.62	7,415.74	105.9391
	Step 2	201,533.32	16,794.44	7,724.75	110.3536
	Step 3	209,594.13	17,466.18	8,033.72	114.7674
	Step 4	217,654.68	18,137.89	8,342.68	119.1811
	Step 5	225,716.01	18,809.67	8,651.67	123.5953
	Step 6	233,779.17	19,481.60	8,960.73	128.0104

Effective April 1, 2021

		Annual	Monthly	Bi-Weekly	Hourly
Legal Counsel Level 1 441001	**Year 1**	92,531.96	7,711.00	3,546.74	50.6677
	Year 2	99,361.62	8,280.14	3,808.52	54.4074
	Year 3	106,192.06	8,849.34	4,070.33	58.1476
	Year 4	113,023.02	9,418.59	4,332.16	61.8880
	Year 5	119,850.85	9,987.57	4,593.87	65.6267
Legal Counsel Level 2 441002	**Year 6**	127,821.13	10,651.76	4,899.37	69.9910
	Year 7	135,788.81	11,315.73	5,204.77	74.3539
	Year 8	143,754.91	11,979.58	5,510.11	78.7159
	Year 9	151,729.11	12,644.09	5,815.76	83.0823
	Year 10	158,050.81	13,170.90	6,058.07	86.5439
	Year 11	165,767.24	13,813.94	6,353.84	90.7691
Legal Counsel Level 3 441003	**Step 1**	170,694.72	14,224.56	6,542.71	93.4673
	Step 2	174,910.75	14,575.90	6,704.31	95.7759
	Step 3	179,123.39	14,926.95	6,865.78	98.0826
	Step 4	183,339.69	15,278.31	7,027.39	100.3913
	Step 5	188,005.50	15,667.13	7,206.23	102.9461
	Step 6	192,673.92	16,056.16	7,385.17	105.5024
	Step 7	196,017.52	16,334.79	7,513.33	107.3333
Legal Counsel Level 3B 441203	**Step 1**	183,340.73	15,278.39	7,027.43	100.3919
	Step 2	188,005.50	15,667.13	7,206.23	102.9461
	Step 3	192,673.92	16,056.16	7,385.17	105.5024
	Step 4	197,339.47	16,444.96	7,564.00	108.0571
	Step 5	204,443.06	17,036.92	7,836.28	111.9469
	Step 6	211,801.81	17,650.15	8,118.34	115.9763
Legal Counsel Level 4 441004	**Step 1**	197,340.77	16,445.06	7,564.05	108.0579
	Step 2	205,564.12	17,130.34	7,879.25	112.5607
	Step 3	213,785.90	17,815.49	8,194.39	117.0627
	Step 4	222,007.68	18,500.64	8,509.53	121.5647
	Step 5	230,230.25	19,185.85	8,824.70	126.0671
	Step 6	238,454.64	19,871.22	9,139.94	130.5706

TAB V

British Columbia Government Lawyers Association

October 21, 2021

VIA EMAIL

The Honourable Selina Robinson, Minister of Finance and Chair of Treasury Board
The Honourable David Eby, Q.C., Attorney General and Minister Responsible for Housing

Dear Ministers,

Re: The Expiry of Treasury Board Order No. 2020-0603

As you know, Treasury Board Order No. 2020-0603 represented a fundamental change in terms and conditions of employment of Legal Counsel in government. Since 1992, and pursuant to Treasury Board Order No. 329, the Legal Counsel Classification was created for Legal Services Branch lawyers, those in the Criminal Justice Branch (represented by the Crown Counsel Association) and other Legal Counsel working for government. However, this was changed by Treasury Board Order No. 2020-0603, which set a specific Legal Counsel series detached from the Crown Counsel series.

As you also know, we raised our very serious concerns and objections to the unilateral imposition of terms and conditions of employment on government lawyers, who have democratically expressed their desire to be collectively represented by BCGLA for almost a decade. As we noted at the time, any such change to terms and conditions of employment can only be legitimately accomplished *bilaterally,* through a process of free and good faith collective bargaining with a freely chosen bargaining agent, backed up with the right to withdraw services or to a process of fair and independent binding interest arbitration. Indeed, this is the kind of equal bargaining relationship guaranteed to all employees in Canada by section 2(d) of the *Charter of Rights and Freedoms.*

TB Order No. 2020-0603, on its own terms, expires as of March 31, 2022. That is now less than six months away.

By way of this letter, the BCGLA, as the freely-chosen bargaining agent of the majority of Legal Counsel in government, is providing the Government with notice to bargain terms and conditions of employment for Legal Counsel, with a view to replacing TB Order No. 2020-0603 with a collective agreement negotiated in accordance with the requirements of s. 2(d) of the *Charter*.

We await a response setting out who we should bargain with, so we can arrange constructive and productive meetings and negotiations.

Yours truly,

Gareth Morley,

TAB V

President of the BC Government Lawyers Association

cc: Richard Fyfe, Q.C., Deputy Minister, Ministry of Attorney General
Alyson Blackstock, Assistant Deputy Minister, Employee Relations, Public Service Agency

BRITISH COLUMBIA
BC Public Service

Where ideas work

November 10, 2021 Cliff:6781

Mr. Gareth Morley
President, BC Government Lawyers Association

Via email: Gareth.Morley@gov.bc.ca

Dear Mr. Morley:

Thank you for your letter dated October 14, 2021, sent via email to the offices of Selina Robinson, Minister of Finance and Chair of Treasury Board and David Eby, Q.C. Attorney General and Minister Responsible for Housing. I am pleased to respond to you on behalf of both of these offices in my capacity as Assistant Deputy Minister of Employee Relations, BC Public Service Agency.

I acknowledge that you have taken the time to re-raise the issue of collective bargaining for your members. As I am sure you are aware, matters such as this fall within the authority of the BC Public Service Agency.

While I understand you are keen to have the BCGLA represent as a bargaining agent, we stand by our original decision that was communicated to you in our letter dated February 07, 2018 and subsequent letter of January 25, 2019. I reiterate our position that we are prepared to take the legislative actions necessary to extend collective bargaining rights to your members, on the basis of the conditions set out in those previous letters to you.

As your letter notes, Treasury Board Order 220-0603 will expire in the near future. We will be considering the amendments necessary to the Legal Counsel series and, while we are not prepared to negotiate with your organization regarding changes, we would be happy to consider any written suggested changes you provide for Legal Counsel terms and conditions of employment to the BC Public Service Agency.

Sincerely,

Alyson Blackstock
Assistant Deputy Minister
BC Public Service Agency

pc: Selina Robinson, Minister of Finance and Chair of Treasury Board
David Eby, Q.C. Attorney General
Richard Fyfe, Deputy Attorney General

BC Public Service Agency Employee Relations Division
Mailing Address:
PO Box 9404 Stn Prov Govt
Victoria BC V8W 9V1
Telephone: 778-698-7912
Facsimile: 250-387-0527
http://www.bcpublicserviceagency.gov.bc.ca/

TAB X

British Columbia Government Lawyers Association

November 29, 2021

VIA EMAIL

Alyson Blackstock
Assistant Deputy Minister
BC Public Service Agency

Dear Ms. Blackstock:

Re: Your Letter of November 10, 2021

Thank you for your letter of November 10, 2021 on behalf of the Public Service Agency ("PSA"), the Chair of Treasury Board and the Attorney General (collectively, the "Employer").

In it you reiterate the Employer's position that it is only prepared to collectively bargain with lawyers in the Legal Counsel series ("Legal Counsel") if we forego representation by the British Columbia Government Lawyers Association ("BCGLA" or "Association"). As you know the BCGLA and its predecessor have represented Legal Counsel on a voluntary basis since the early 1990s. It is the freely chosen bargaining agent of the majority of Legal Counsel working for government. Nonetheless, the Employer takes the position that it can condition access to collective bargaining to a bargaining agent chosen for Legal Counsel by the Employer.

We reject this position. Independently of any legislative changes, the Government is bound by the *Charter of Rights and Freedoms* and therefore obligated to respect the s. 2(d) rights of its employees, including those who happen to be lawyers. This means that, at a minimum, the Government as Employer is obligated to negotiate in good faith with the BCGLA as the bargaining representative chosen by the majority of Legal Counsel.

In this respect, I note that while your letter does state that "we would be happy to consider any written suggested changes [BCGLA] provide[s] for Legal Counsel terms and conditions of employment to the BC Public Service Agency", this is no substitute for the meaningful collective bargaining guaranteed by s. 2(d) of the *Charter* in which there is bilateral give and take between the employer and the freely chosen representative of a group of employees and a process for resolving impasses, either through strike/lockout or interest arbitration.

It is in that context that I have been authorized by the Annual General Meeting of the BCGLA to provide you with our proposed changes to Legal Counsel terms and conditions of employment, which in our view should be included in a collective agreement, and in the replacement of Treasury Board Order 220-0603. We expect that this letter will be included as an attachment to any Treasury Board submission that the PSA may make regarding the replacement of Treasury Board Order 220-0603.

BCGLA's proposals seek to restore the compensation parity between the Crown Counsel series and the Legal Counsel series that was mandated by government from 1992 to 2019 and address other matters, most of which have been advocated for by the BCGLA and its predecessor for many years.

TAB X

1. As of April 1, 2022, and for the duration of the Order unless otherwise agreed to through a free process of collective bargaining, Legal Counsel salaries shall be equal to those for the Crown Counsel series at the same step, level, and classification.

The only rational way of assessing compensation is by reference to comparators. And our best comparators are Crown Counsel.

In all comparable jurisdictions (federal, Ontario, Alberta and almost all other provinces and territories), salaries for Crown Counsel and for other legal counsel working for government are the same. This was the principle in British Columbia from 1992 until April 1, 2019. If anything, private-sector comparators are compensated better in most of the areas practiced by Legal Counsel as compared to criminal law. There is no rational reason for Legal Counsel at the same level and classification to receive less compensation than Crown Counsel.

2. Legal Counsel employed by the government between April 1, 2019 and March 31, 2022 shall receive compensation for the difference between what Crown Counsel at the same level and classification received with interest as payable by government on money owed. Pensions of Legal Counsel who retired during this period shall be adjusted to reflect the salaries they would have received under the Crown Counsel series with government responsible for any payments required by the BC Pension Corporation.

This simply applies item 1 to the results of deviation from the principle in the previous three fiscal years.

3. No Legal Counsel, other than a probationary employee, may be dismissed or disciplined without cause. In this clause, and elsewhere in this order unless the context indicates otherwise, "Legal Counsel" shall include unexcluded Legal Counsel Managers.

In unionized workplaces, there is universally a requirement that dismissal or discipline be for cause. This has also been extended to some non-unionized employees, especially in the public sector. It is a basic protection for workers against arbitrary treatment and for job security.

There is an additional reason for the importance of this principle in the context of Legal Counsel. The rule of law requires that Government act within its legal authority. Only in a very small number of cases will these issues be adjudicated in court. For the most part, it is the responsibility of Legal Counsel to state what they understand the law to be and to advocate for government in a manner consistent both with lawful instructions and the rule of law. Unless there are requirements that their discipline or dismissal be for cause, there is a real danger that they will be chilled or pressured in this duty. This basic protection for the vast majority of public-sector workers and for Crown Counsel should be extended to Legal Counsel.

As you are aware, the Association has represented its members for many years to ensure that principles of progressive and fair discipline are applied. This has been undermined by dismissal of Legal Counsel without cause. This can only undermine the confidence of the public in the principle that the affairs of government are in accordance with law, as anlayzed by Legal Counsel without fear of reprisal.

4. No Legal Counsel may be laid off as a result of a lack of work unless the Government has taken all reasonable steps to limit the contracting out of legal work. All layoffs must be in reverse order of seniority, calculated as the sum of years at the bar and years working for government. A Legal Counsel whose job has been rendered redundant must be placed in a different position unless the Employer can demonstrate the Legal Counsel would be unsuited for that position.

Layoff in reverse order of seniority is a necessary protection of job security. If there are cuts to legal service budgets in the future, layoffs should occur on an objective basis and the use of external counsel should be limited. We would be pleased to further negotiate the specific provisions that would give effect to this principle consistent with the reasonable needs of the Employer.

5. Regular meetings between Legal Services Branch management and representatives of the Association shall continue. In addition, there shall be regular meetings between Justice Services Branch and Public Guardian and Trustee management with representatives of the Association in a format and at intervals agreed to.

Joint committee meetings have been held regularly between representatives of the Association and management of the Legal Services Branch since 1992. These have by all accounts contributed to the management and working life of that Branch. Justice Services Branch and the Public Guardian and Trustee require similar processes to encourage communication and resolve issues as they come up.

6. The Association shall be voluntarily recognized as the exclusive bargaining agent of Legal Counsel or Legal Counsel Managers below the level of Supervising Counsel in Legal Services Branch, Justice Services Branch and the Public Guardian and Trustee.

As we pointed out when Deputy Supervisors in Legal Services Branch were directed not to be members of our Association, the functions they perform would make them bargaining unit employees in all other parts of the public service. They have no independent disciplinary authority. The precise line for managerial exclusions in Justice Services Branch and the Public Guardian and Trustee may need to be addressed.

Since our members are excluded from the definition of "employee" in the *Public Service Labour Relations Act,* it makes no sense to hold up that *Act* as a reason to deny voluntary recognition of the Association. We continue to take the view that the Employer is constitutionally obliged to voluntarily recognize us as the freely chosen bargaining agent of the majority of Legal Counsel and Legal Counsel Managers working in the Legal Services Branch, Justice Services Branch and Public Guardian and Trustee. In any event, it is consistent with basic principles of labour relations.

7. Every Legal Counsel shall, as a condition of employment, have deducted from their salary the dues of the Association. The Government will notify the Treasurer of the Association of the name and position of all Legal Counsel appointed within thirty days of their appointment.

This "Rand formula" is a standard form of union security across Canada. As a bargaining agent, the Association would have a duty of fair representation to all employees in the bargaining unit, whether they chose to join or not, and should have protection against free riding.

8. Every Legal Counsel shall be given a copy of any document placed on their personnel file. Any written warning or letter of expectation shall be considered discipline. Any letter of expectation must be removed within 18 months of being created.

We have recently discovered that Legal Services Branch management has kept unstructured files on Legal Counsel, sometimes for years. This protection is what is found in the Crown Counsel Agreement.

9. The Government must not discriminate against any Legal Counsel as a result of membership in, or activity with, the Association. The Government shall grant reasonable paid time off to Association representatives for the purposes of bargaining and dispute resolution.

This is a standard principle of union security and has been advanced to the Crown Counsel Association.

10. Discrimination and Sexual Harassment policies and procedures of the Government shall apply to Legal Counsel.

This is found in the Crown Counsel Agreement and would allow discrimination and sexual harassment to be addressed through binding third-party arbitration, rather than raised with management and then not addressed.

11. Maternity, parental and adoption leave and leave allowances applicable to Crown Counsel shall apply to Legal Counsel.

12. Earned Days Off and Earned Time Off applicable to Crown Counsel shall apply to Legal Counsel.

13. The Merit Process applicable to Crown Counsel shall apply to Legal Counsel. A merit competition shall occur in Fiscal Year 2022-23.

14. Legal Counsel preparing for court or tribunal hearings shall be allocated adequate preparation time.

15. The Government shall pay the annual practice fee for the Law Society of British Columbia. For Legal Counsel hired after January 1 of each year, the Government shall pay or reimburse a prorated portion of the practice fee.

16. Each Legal Counsel shall be granted an annual Professional Requirements Allowance in the amount of $1250 or such other increased amount as may be granted to Crown Counsel in the future. For Legal Counsel hired after April 1 of each year, the Government shall grant a prorated Professional Requirements Allowance.

Items 11-16 represent rights in the Crown Counsel Agreement that can be (and some cases have been) extended to Legal Counsel. They should be addressed specifically in this Order so that the grievance procedure will apply to disputes about them.

17. An amount equal to $250 per Legal Counsel shall be allocated for the purposes of Education and Mental Health. Payments shall be approved by an Education and Mental Health Committee, with equal representation from the Government and the Association.

The amount of $100 per Legal Counsel for Education is clearly inadequate, especially if mental health purposes are added.

18. The Legal Services Branch, Justice Services Branch and Public Guardian and Trustee shall organize an annual Legal Counsel conference. The cost of the Conference shall be borne proportionately to the number of Legal Counsel employed. Attendance at the Conference shall be considered legal hours.

Unlike Crown Counsel, Legal Counsel do not have an annual conference. The importance of such an event for professional development and group cohesion cannot be overstated and will become increasingly important as there are more diverse work arrangements.

TAB X

19. Except to the extent it is in conflict with this Order, the Terms and Conditions applicable to Excluded Employees apply to Legal Counsel.

This is the background principle. It should be incorporated in the Oder so that the grievance and arbitration procedure applies to disputes about those Terms and Conditions.

20. A "grievance" means any difference or dispute between the Association and the Government concerning the interpretation, application, operation or alleged violation of this Order, whether between the Government and Legal Counsel or between the Government and the Association. "Legal Counsel" includes

The first step in a grievance is to raise the dispute with Supervising Counsel. If not resolved at this step, Legal Counsel or the Association may submit a grievance, in writing, to the designated representative of the Government and the representative of the Government will reply in writing within 14 days.

If the Legal Counsel or the Association continues to be unsatisfied with the resolution of the grievance, the Association may submit the grievance to the Assistant Deputy Attorney General for Legal Services Branch, the Assistant Deputy Attorney General for Justice Services Branch or the Public Guardian and Trustee, as applicable, and that person must provide a written response to the grievance within 14 days.

21. If a grievance is not resolved under Item 20, the Association may submit the grievance to an Arbitrator under the *Arbitration Act,* SBC 2020, c. 2, and, for that purpose, this Agreement/Order and any terms and conditions incorporated into it are deemed to be or to incorporate an arbitration agreement.

Without the possibility of arbitration by a third party, the terms and conditions of employment are interpreted by the Employer, an obvious problem and one that would make all the provisions, but especially job security provisions, meaningless.

As we have repeatedly indicated, we are open to reasoned negotiation about the above. If the Employer is prepared to turn a page on its past behaviour of unilateralism, a productive relationship is possible.

We await your response.

Yours truly,

Gareth Morley (*he/him*)
President of the BC Government Lawyers Association

I gratefully acknowledge that I live and work on the traditional territory of the Lekwungen Peoples, specifically the Songhees and Esquimalt First Nations.

cc: The Honourable Selena Robinson, Minister of Finance and Chair of Treasury Board
The Honourable David Eby Q.C., Attorney General and Minister Responsible for Housing
Richard Fyfe, Q.C., Deputy Attorney General

TAB Y

BRITISH COLUMBIA
BC Public Service

Where ideas work

March 28, 2022 Cliff: 6951

Mr. Gareth Morley
President, BC Government Lawyers Association

Via email: Gareth.Morley@gov.bc.ca

Dear Mr. Morley:

I am writing to follow-up our exchange of letters in October and November of 2021.

As your letters noted, the renumeration provisions in Treasury Board Order 220-0603 expire on March 31, 2022. We considered your comprehensive suggestions and the issues that are important to you.

We gave due consideration to the amendments necessary to the Legal Counsel series and we are writing to advise you that, at the Treasury Board meeting on March 9, 2022, the attached Treasury Board Order No. 2022-0401-02 was approved and goes into effect on April 1, 2022.

Also attached are some FAQ's that have been prepared and will be made available to those persons to whom Treasury Board Order No. 2022-0401-02 applies.

Sincerely,

Alyson Blackstock
Assistant Deputy Minister
BC Public Service Agency

pc: Shannon Salter, Deputy Attorney General
Bobbi Sadler, Deputy Minister, PSA
Barbara Carmichael, Assistant Deputy Attorney General
Julie Williams, Acting Assistant Deputy Attorney General

BC Public Service Agency Employee Relations Division
Mailing Address:
PO Box 9404 Stn Prov Govt
Victoria BC V8W 9V1
Telephone: 778-698-7912
Facsimile: 250-387-0527
http://www.bcpublicserviceagency.gov.bc.ca/

TAB Y

APPENDIX A:

Treasury Board Order No. 2022-0401-02

Legal Counsel Compensation
Effective April 1, 2022

Pursuant to Treasury Board Orders #258 and 2020-0603, Treasury Board orders that:

- The general salary increases for all employees covered by the Legal Counsel Classification Series will be applied as follows:
    - Salary rates will be adjusted by the same percentage as the adjustments to the Management Classification and Compensation Framework (MCCF) salary ranges for Excluded Managers.
    - Increases are effective April 1st of each year.
- All other terms and conditions for Legal Counsel employees covered by the Legal Counsel Classification Series that were previously linked to the Agreement between the BC Crown Counsel Association and the government in accordance with s. 4.1(2) of the Crown Counsel Act (the "Agreement") shall continue as per the specific terms and conditions that were effect on March 31, 2019.
- Except as modified by this order, or as negotiated between the employer and any designated bargaining agent for Legal Counsel, there shall be no other changes applied to the terms and conditions specified above.

Minister Selina Robinson
Chair of Treasury Board

March 18, 2022

Date

TAB Y

Legal Counsel Salary Update Contact Centre FAQs
March 24, 2022

1. **I am a Legal Counsel employee, will I be receiving the same general wage increase as the Crown Counsel on April 1, 2022?**

   Legal Counsel and Crown Counsel general wage increases are now determined through separate processes. As per the Treasury Board Order 2020-0603, Legal Counsel general wage increases are effective April 1st of each year and will be the same annual percentage increase that is applied to the Management Classification and Compensation Framework (MCCF) salary ranges.

   Excluded employees in positions classified as Bands 1 through 6 are covered under MCCF.

   Legal Counsel are also excluded employees, but they have their own distinct classification series. Legal Counsel employees are not classified under MCCF. Legal Counsel general wage increases will now be the same percentage increase as the adjustments approved for the MCCF salary ranges. For example, if the DM, Public Service Agency approved a 2% adjustment to the MCCF salary ranges, Legal Counsel would receive a 2% general wage increase effective April 1st of the same year the MCCF salary range adjustments were made.

2. **Are the Legal Counsel salaries not linked to Crown Counsel salaries anymore?**

   Legal Counsel and Crown Counsel salaries are no longer linked. Treasury Board Order 2020-0603 established that as of April 1, 2019. Treasury Board Order no. 329 no longer applies to Legal Counsel who are not Crown Counsel. Going forward both groups will be governed by separate classifications, associated salary ranges, and salary adjustment processes.

3. **When did the Legal Counsel salaries delink from those of Crown Counsel?**

   April 1, 2019.

4. **Do other non-wage entitlements from the Crown Counsel Agreement still apply to Legal Counsel?**

   Yes. The terms and conditions of the Crown Counsel Agreement in effect on March 31, 2019 will continue for Legal Counsel except as modified by the TBO or as negotiated between the employer and any designated bargaining agent for Legal Counsel.

5. **Were communications regarding the delinking from Crown Counsel disseminated?**

   An email was sent on June 5, 2020 from A/ADAG Julie Williams to all LSB legal staff with respect to the Treasury Board Order 2020-0603.

6. **How are Legal Counsel salaries determined now?**

   As per Treasury Board Order 2020-0603, Legal Counsel general wage increases will be the same percentage increase that is approved for the MCCF salary ranges each year. The MCCF salary ranges are typically adjusted annually based on the percentage increase the largest bargaining group in the BC public service receives as a general wage increase in that same year. The DM, Public Service Agency must approve the increases to MCCF salary ranges each year.

7. **Can I have a copy of the Treasury Board Order that governs Legal Counsel salaries?**

   Yes. A copy of the TBO has been provided to the ADAG, LSB.

8. **When will Legal Counsel's general wage increase be approved?**

   Legal Counsel general wage increases will be based on MCCF salary range adjustments. MCCF salary range adjustments require approval from the DM, Public Service Agency each year. At this time, no date has been determined for when that approval will be requested.

9. **What will be the effective date of any Legal Counsel 2022 general wage increases?**

   If the DM, Public Service Agency approves MCCF salary range adjustments, Legal Counsel salary adjustments will be made retroactive, effective April 1, 2022.

10. **What will Legal Counsel's general wage increase be?**

    The magnitude of any increase is not known at this time.

11. **I am a Legal Counsel and will be retiring after April 1, 2022, will I still be eligible for the increase?**

    Yes. Any Legal Counsel general wage increases that are approved will be retroactive to April 1, 2022.

12. **I am a Legal Counsel going on maternity leave after April 1, 2022, will my maternity and parental leave be adjusted for any retroactive general wage increases?**

    Yes. Maternity and parental leave compensation will be adjusted based on retroactive general wage increases for Legal Counsel.

13. **Who will contact BC Pension Corporation on my behalf if I am eligible for the Legal Counsel general wage increase after my retirement?**

    Retroactive compensation adjustments are communicated to the BC Pension Corporation as part of the Public Service Agency's normal processes.

14. **Why aren't Legal Counsel and Crown Counsel receiving their general wage increases at the same time?**

    Legal Counsel and Crown Counsel general wage increases are now determined through separate processes. Any general wage increases approved for each group are effective on the same date, April 1, 2022.

15. **What if the MCCF salary ranges do not get adjusted?**

Typically, MCCF salary range adjustments are approved by the DM, Public Service Agency in July of each year. If the DM, Public Service Agency does not approve MCCF salary range adjustments for 2022, Legal Counsel salaries will not be adjusted in 2022.

16. What if I have questions about the tax implications of a retroactive payment for any potential general wage increase for Legal Counsel?

The Public Service Agency cannot provide advice in regards to an employee's personal tax situation. Please contact a registered income tax professional.

Alberta.ca

Government news
Oct 27, 2022

Agreement ratified with Alberta Crown prosecutors

Alberta Crown Attorneys' Association members have ratified an agreement with the Alberta government.

On this page:

The agreement, the first of its kind in Alberta, was ratified on Oct. 21 and is the result of months of discussions and negotiations between the Alberta Crown Attorneys' Association and the departments of Justice and Treasury Board and Finance.

The agreement allows for market adjustments to take place in relation to the association members' pay, commits to a one-year counselling pilot project, and defines the relationship between the association and the Alberta government.

> "This agreement is an important step forward for the stability of Alberta's justice system. It will act as a solid basis for the strong and enduring relationship between Alberta's government and the Alberta Crown Attorneys' Association. I'd like to thank all those who helped us reach this point, from the civil service to the association's representatives."
>
> *Tyler Shandro, Minister of Justice*

> "On behalf of our membership, the Alberta Crown Attorneys' Association executive extends our gratitude to Minister Shandro and other government leaders who have assisted in making this landmark agreement a reality. Sufficient mental health supports, manageable workloads and competitive compensation are the main priorities of our membership. Each of these priorities has been addressed in this agreement.
>
> "Our membership is confident that this agreement will create a solid foundation for a prosecution service that is properly funded and able to attract and retain experienced and qualified prosecutors to ensure just outcomes for Albertans. We look forward to continuing our constructive relationship with the Justice Department in pursuit of our common goal of a properly resourced justice system."
>
> *Dallas Sopko, president, Alberta Crown Attorneys' Association*

Quick facts

- The agreement is in force until March 31, 2024.
- The agreement:
    - Allows for market adjustments to take place to ensure the Alberta Crown Attorneys' Association members' pay is competitive with other provinces and the federal prosecutor service.
    - Commits to a one-year pilot project, which would provide prosecutors with access to one-on-one counselling sessions with a registered psychologist or psychiatrist in recognition of the toll on mental health prosecutors face.
    - Defines the relationship between Crown prosecutors and government, including dispute resolution, addressing occupational health and safety concerns, and education for Alberta Crown Attorneys' Association members.

Related information

- Update on discussions with Alberta's Crown prosecutors