

C. I

STRIKES IN ESSENTIAL SERVICES

IN BRITISH COLUMBIA
by

MUHAMMAD MASOUD UZ ZAFER

B.A. (Hons.), LL.B. (Hons.), The Aligarh Muslim University

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES
(The Faculty of Law)

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA
February, 1984

© MUHAMMAD MASOUD UZ ZAFER, 1984

In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of Law

The University of British Columbia
1956 Main Mall
Vancouver, Canada
V6T 1Y3

Date February 29, 1984.

ABSTRACT

One of the most contentious issues within the area of industrial relations is strikes in essential services. This topic has been the subject of much debate in developed and developing countries, and, in British Columbia, it was the subject of amendments to the Labour Code of British Columbia in 1977 and the enactment of the Essential Service Disputes Act.

This study will examine how this problem is dealt with in British Columbia.

The first chapter of the thesis examines the problems confronted by successive governments and the efforts made by them to deal with strikes in essential services.

The second chapter deals with the concept and nature of essential services. An attempt is made to define the term and draw upon the legislative assembly debates and various examples to put the argument in a nutshell. A brief overview of the concept in other countries is also included to put the discussion in context.

The third chapter will deal with the actions taken to contain harm caused by strikes in these areas. The general guidelines regarding the designation of essential employees established by the federal Public Service Staff Relations Act and the notion taken from it and applied to the designation of essential services in British Columbia will be discussed.

Chapter four will focus on impasse resolution machinery mentioned in the Essential Service Disputes Act.

The final chapter of the thesis contains the observations and recommendations.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
1. EFFORTS BY THE GOVERNMENTS IN BRITISH COLUMBIA TO REGULATE STRIKES IN ESSENTIAL SERVICES	5
A. The Mediation Commission Act 1968 - 1972	6
B. The Birth of the Labour Code of British Columbia 1973	11
2. DEFINITION OF ESSENTIAL SERVICES	21
A. Essential Services and the Public Sector - A Brief Look at Different Countries	25
B. The Meaning of "Essential" - A Look at the Meaning of Essential in Different Countries - The International Labour Office Reports	28
C. The Meaning of "Essential" in British Columbia	37
1. Services Mentioned specifically in the Labour Code of British Columbia and the Essential Service Disputes Act	43
2. Concluding Remarks	52
3. METHODS OF CONTAINING HARM CAUSED BY STRIKES IN ESSENTIAL SERVICES	56
A. Designation of Essential Employees - the Federal Public Service Staff Relations Act	56
B. Designation of Essential Services in British Columbia	70
Criteria for Essentiality	76
C. The Non Stoppage and the Graduated Strike	85

	PAGE
4. DISPUTE SETTLEMENT PROCEDURES	93
A. Fact Finding	94
B. Interest Arbitration	98
1. The Arbitration Board	99
2. Delay	100
3. Criteria Relied upon by the Arbitrators	103
i Arbitration Awards Pursuant to Agreement of the Parties	106
ii Arbitration Awards Pursuant to Section 73 of the Labour Code of British Columbia	113
iii Arbitration Awards Pursuant to Section 6 of the Essential Service Disputes Act	120
4. Comments on the Criteria	128
5. Concluding Remarks on Interest Arbitration vis-a-vis Free Collective Bargaining	132
C. Final Offer Arbitration	137
D. Industrial Enquiry Commission	143
CONCLUSION	147
FOOTNOTES	148
LIST OF ARBITRATION AWARDS	161
APPENDICES	
Appendix A	166
Essential Services Continuation Act	
Appendix B	168
Collective Bargaining Continuation Act	

	PAGE
Appendix C	171
Hospital Services Collective Agreement Act	
Appendix D	174
Railway and Ferries Bargaining Assistance Act	
Appendix E	184
Essential Services Disputes Act	
Appendix F	193
West Kootenay Schools Collective Bargaining Assistance Act	
BIBLIOGRAPHY	198

E R R A T A

A computer error was discovered after the thesis had been printed out and submitted. The error consists of the omission of two foot note references. They appear on pages 4 and 55 of the text. They are -

1. Page 4. Paragraph 3. In British Columbia --- ad hoc response to a particular bargaining impasse.

J.M.P. Weiler ed. Interest Arbitration (1981), at 2.

2. Page 55. Paragraph 2. From the point of view of the union ---, at the bargaining table.

Paul Weiler. Reconcilable Differences (1980), at 239.

INTRODUCTION

It is one of the purposes of this thesis to explore the concept of essential services in British Columbia. The concept of "essential services" expresses the idea that certain activities are of fundamental importance to the community, and that their disruption will have particularly harmful consequences. This may then suggest the argument that the public interest in the uninterrupted operation of the service outweighs the consideration that the workers in it should be free to withdraw their labour or that the employer should be free to lockout and that special provisions should apply to them, either preventing industrial action being taken at all or imposing restrictions upon its conduct. The idea that there are such services is one which almost all legal systems recognize, although the mechanisms for identifying and protecting them vary greatly. Predictably there is no consensus on what constitutes an essential service, but a service whose disruption would endanger public health or safety seems to be a "lowest common denominator" definition.

While it is simple for the parties--workers, employers and governments--to agree upon the principle that labour disputes in these areas be subjected to special rules, in order to limit the damage these disputes can cause, it is often difficult for them to see eye to eye on the way the rules should be applied. The main problems consist, first, in defining the activities

which should be governed by special rules and, second, in determining how these rules should differ from the general system. Although these are questions that have been raised since the dawn of industrialization, they still crop up regularly in the debate on industrial relations.

In British Columbia the existing rules, or the way they are applied, are the subject of frequent criticisms either on the part of the workers who consider them too restrictive or on the part of the public which finds them too permissive. As a result the rules are often applied with varying degrees of strictness and sometimes have to be modified.

It is one of the purposes of this thesis to discover how public security and well-being can be preserved while allowing essential employees, whether public or private, the right to participate fully in the process by which their working conditions and wages are determined.

Some suggest that there should be a prohibition on industrial conflict in the essential services sectors. This rather draconian response is naive, ineffective, and palpably shortsighted. Such solutions are in fact inimical to the very public and government interests which such measures on their face purport to protect. This general rejection of such simplistic solutions stems in part from the realization that some degree of industrial conflict is inevitable and simply cannot be denied legislatively. Apart from threatening and undermining the community's respect for the law, such general

prohibitions fail to recognize and take account of the very real political pressures which are inextricably interwoven in any bargaining model in these sectors. In many instances these pressures would result in the mere threat of an unlawful strike being politically more destructive of the legitimate interests and security of the public by providing the employees with a powerful tool of coercion which is not available to those employees who are permitted to strike.¹

The point of the system of collective bargaining is to provide the employees with a means through which they can freely and meaningfully deal with their employer in setting their own terms and conditions of employment. Section 27 of the Labour Code of British Columbia,² while having regard to the public interests as well as to the rights and obligations of parties before it, provides restraints to ensure that collective bargaining is conducted in an orderly manner. Sometimes the parties find the restraints onerous and this generates tension. This thesis proposes to show how the tension can be reduced, though not eliminated, by carefully administering the law.

Later, a discussion on the designation of essential employees will follow. The provisions of the federal Public Service Staff Relations Act on the designation of essential employees will be examined in order to show how the labour relations legislation of British Columbia stands to gain from

its experience. Immediately preceding will be a discussion on the designation of essential services in British Columbia.

Lastly this work will deal with dispute resolution techniques in essential services in British Columbia. Fact finding, interest arbitration and final offer arbitration will be discussed. This work will deal solely with "interest" disputes (i.e., those which arise in the course of collective bargaining prior to the signing of the agreement relating to the content of the agreement to be concluded) and not with "rights" disputes (those concerning the application or interpretation of existing legal provisions or clauses in collective agreements). The reason for this is that strikes and lockouts are prohibited during collective agreement and rights disputes are in any event subject to the binding decision of a third party.

The demand for interest arbitration is strongest where services are regarded as essential. In British Columbia the legislature is frequently under public pressure to expand the reach of the interest arbitration system, either as part of a general policy or as an ad hoc response to a particular bargaining impasse. Thus, in British Columbia, interest arbitration may be available where the service is of such a strategic position that a work stoppage may pose an "immediate and serious danger to life, health or safety" or "an immediate and substantial threat to the economy and welfare of the Province and its citizens".³

CHAPTER 1
EFFORTS BY THE GOVERNMENT IN BRITISH COLUMBIA TO
REGULATE STRIKES ESSENTIAL SERVICES

In British Columbia, limits on the right to strike do not depend solely on whether a worker is employed in the public or in the private sector. Rather, what is considered is the "essentiality" of the employer's job not the legal personality of the employer. For example, health care workers become no more or no less essential when they begin working at a public institution.

In British Columbia, essential service employees bargain collectively and have been given the right to strike. However, the legislature has indicated a preference against work stoppages by essential service employees, there being statutory provisions for resolution of bargaining impasses by conventional interest arbitration.

This part will examine British Columbia legislation, since 1968, governing essential service employees with emphasis being placed on provisions for the resolution of essential service bargaining disputes through interest arbitration. When considering these events, attention should be given to the way in which successive governments sought to introduce changes in provincial laws.

A. The Mediation Commission Act 1968-1972

The Mediation Commission Act,⁴ was introduced in British Columbia Legislature in December 1968.⁵ From its very inception the Act was destined to an uncertain existence. Almost every major labour leader in the province spoke out against it. Labour leaders called the Bill "punitive", protest demonstrations were organized, and a "Beat Bill 33" fund was created. In contrast, employers were overwhelmingly in favour of the statute, and it was generally regarded by the media as a positive step. It is not clear whether employers contributed to the drafting of the legislation, but it can be stated with certainty that labour had not been consulted. Nor was the provincial government's Labour-Management Commission informed of the Bill before it was introduced.

Central to the Mediation Commission Act was the establishment of a "Mediation Commission".⁶ The Act contained a variety of provisions for the regulation of industrial relations. A major part of the scheme was the administration of independent research and the availability of mediation services.⁷ These latter functions were to be carried out by mediation officers, however, not by the Mediation Commission itself. The controversial aspect of the legislation was the jurisdiction given the Commission to resolve any labour disputes referred to it by the Cabinet through the process of

compulsory arbitration. With respect to private essential service disputes, this power was contained in section 18:

18.(1) Where a dispute between any employer or employers and his or their employees or a trade union is not resolved, and in the opinion of the Lieutenant Governor in Council it is necessary in order to protect the public interest and welfare, that

- (a) no employee shall strike, and no employer shall lockout his employees, or
- (b) an existing strike or lockout shall immediately cease, the Lieutenant Governor in Council may
 - (i) refer the dispute to the Commission;
 - (ii) order that the decision of the Commission with respect to the dispute, whether such decision is given on a reference pursuant to paragraph (i) or otherwise, is final and binding upon the parties except to the extent that the parties agree to vary the same.

(2) An order given under this section expires on all parties to the dispute signing and executing a collective agreement.

As can be seen, all that was required was that the Lieutenant Governor in Council be of the opinion that a dispute was contrary to the "public interest and welfare". There were also provisions for voluntary referral of disputes to the Commission by the parties to a collective agreement.⁸ Municipal workers and hospital employees were "employees" within the meaning of the Act, and for the first time restrictions on their right to strike were removed. Prior to that they had limited bargaining rights and strikes by them were illegal. It was likely contemplated by the government

that health care employees, firemen and policemen would not exercise their right to strike but would, instead, have any contract differences settled by the Commission.

With respect to public sector employees, section 19 of the Act provided that the government could refer any labour relations matter regarding the civil service to the Commission for a hearing. The government was free to decide, either before or after the hearing, whether or not it would be bound by the Commission's decision. This unusual discretion has been explained by the fact that, in 1968, civil service employees had only limited bargaining rights and were prohibited from striking.⁹

Organized labour's initial attack on the Act shook greatly public confidence in its ability to fulfil its legislative mandates. Subsequent events did little, if anything at all, to allay these misgivings. The first person to be appointed as chairman of the Commission was a Supreme Court judge who had only minimal experience in labour arbitration and mediation. The appointment further emphasized the judicial role which it was intended that the Commission should play.¹⁰ Shortly, thereafter, the management representative and the director of research resigned without publicly stating their reasons, but leaving the impression that the relatively unknown chairman did not have their confidence.¹¹

It had previously been suggested that a permanent labour-court affording an accumulation of knowledge and experience

would prove to be a major improvement over the often haphazard process of ad hoc arbitration.¹² Unfortunately, the permanency of the Commission proved instead to be a major obstacle to its success. For example, the Commission decided against municipal police forces on certain issues of principle such as parity with the forces in Vancouver and Victoria. It seemed inevitable that the same result would follow should the union take the issue to arbitration in future years. Under the old system of ad hoc arbitration, to which the police had adhered, there was always the possibility that the selection of a different nominee or chairman would result in reversal of previous awards.¹³

The actual decisions handed down by the Commission proved to be no less controversial. The first decision rendered arose out of a dispute involving psychiatric nurses employed by the provincial government.¹⁴ On the issue of salaries, the Commission refused the employees any increase in pay. Then, later, the government failed to implement portions of the award which were favourable to the nurses. A boycott of the Commission had been ordered by the British Columbia Federation of Labour as part of its protest against this Act.

Because of the record established by the Commission a pattern developed whereby parties, forced with the prospect of government intervention, would choose to settle their differences by private, ad hoc arbitration. The lack of confidence in the ability of the Commission to provide satisfactory solutions to the matters

referred to it became so widespread that, in 1971, the government avoided its own creation and appointed an independent arbitrator for the British Columbia Hydro dispute.¹⁵

The British Columbia experience with the Act has been summarized thus:

The experiment with a strike control tribunal on the model of the Mediation Commission Act in British Columbia must be viewed with great misgiving. The Mediation Commission failed miserably to generate confidence in compulsory arbitration of public interest disputes, and it alienated even those groups that had previously supported ad hoc compulsory arbitration.

The Mediation Commission acted like a labour court and as a result political confrontation with the trade union movement increased and the incidence of strikes increased also. Because the Commission lacked credibility, important disputes were referred to ad hoc arbitration. The back-to-work orders by the cabinet were ill-timed and treated with open defiance by employees. Eventually the failure of the Mediation Commission Act contributed to the defeat of the Social Credit Government at the polls.¹⁶

Without a doubt the Commission failed to alter the trend of lengthy and bitter labour disputes in the province.

B. The Birth of the Labour Code of British Columbia 1973

Following the defeat of the Social Credit government in 1972, the Mediation Commission Act was substantially amended, and renamed the Mediation Services Act.¹⁷ Sections 18 to 22 of the old Act, which had dealt with compulsory arbitration were omitted entirely from the amended version. These changes were only part of a new system of labour law which was being designed for the province.

To assist in reform, the Minister of Labour appointed a task force of three special advisers from outside government. The Special Advisers first set up an office, solicited briefs from all interested parties, and held meetings at which recommendations were sought. Hearings were also convened throughout the province and the advisers travelled across Canada to compare relevant experiences in other jurisdictions. The report of the task force was submitted to the Minister and in 1973 the Labour Code of British Columbia Act¹⁸ was introduced. This new statute continued the right of essential service employees to strike, but this time there was no threat of possible compulsory binding arbitration. "The basic approach of the new law was to reduce legalism in response to labour-management controversies, follow a policy of non-compulsion, and to rely on mediative devices to protect the public interest."¹⁹

Section 73²⁰ of the Labor Code made provision for a firefighter's union, policemen's union, or hospital union, as defined in this section, to elect to resolve a bargaining dispute by binding arbitration at the union's options where both parties had negotiated in good faith but had failed to conclude a collective agreement. It was hoped that the union would take advantage of this alternative. This option did not deprive them of the right to strike. The right to elect binding arbitration under section 73 was given to the trade-unions alone. This was thought appropriate as it was the unions who would be giving up the right to withdraw their services:

The only people who are relinquishing a meaningful course of action, a meaningful weapon, here, are the employees who if they opt for compulsory arbitration do relinquish the right to strike.²¹

As already stated, under the new Labour Code, employees in the three designated areas were not denied the right to strike. Presumably it was hoped that the option of binding arbitration would be sufficient incentive for the resolution of bargaining impasses without work stoppages. However, the ability of "essential" unions to strike, and the lack of legislative provisions to deal with such a strike raised the fear of ad hoc legislation:

The absence of any standing prohibitions against strikes obviously does not prevent a government from introducing ad hoc legislation specifically designed to deal with individual emergent situations. But ad hoc legislation is a dangerous business: it invites politicization of disputes; it changes the rules in the middle of the game and is thus liable to be

challenged on the grounds of basic fairness;
and it does not afford the parties or the
government any long-term basis for resolution
of difficult, structural problems.²²

In the mid-70's ad hoc legislative reactions to disputes in essential services became well known. For instance, in 1974, the fire fighters in Lower Mainland went on strike and refused to perform any firefighting duties. A special session of the Assembly was called to legislate them back to work. The N.D.P. government passed the Essential Services Continuation Act.²³, varied the certificates of five firefighters' locals to create a council of trade unions out of the separate bargaining certificates held by firefighters in various municipalities, imposed a collective agreement, and gave jurisdiction to the Labour Relations Board to make such orders as it considered necessary in respect of the agreement.

In addition, section 73 of the Labour Code was amended by adding subsections (7) and (8) by authorizing the Cabinet to impose a 21-day cooling-off period during which strikes and lockouts would be prohibited.²⁴

The next ad hoc legislation was passed in 1975 in the form of Collective Bargaining Continuation Act.²⁵ The Bill was directed primarily at labour disputes in the food and forest industries and required, inter alia, all employees to resume business "...to the extent and scope it was on the date the strike or lockout first occurred,"²⁶ and required all employees to "...immediately resume the duties of their employment..."²⁷ By its terms the Act imposed a 90-day cooling off period, with

the possibility of a further 14 day extension should the Lieutenant Governor in Council so order.²⁸ Not unexpectedly, the legislation evoked a strong negative response from the British Columbia Federation of Labour and for a short time there was speculation whether complete defiance of the Act would be encouraged. In the end, however, no concerted action was taken. Only some bargaining units (notably the bakers and butchers) continued picketing.

In 1975, realizing the difficulty in dealing with serious work stoppages in essential services, the government made several key amendments to section 73 of the Labour Code.²⁹

Sub-section 73(7) was amended by striking out all the words after "continuing to occur" and substituting this:

"the minister may either

(a) recommend that the Lieutenant Governor in Council, by order, prescribe a cooling-off period not exceeding 21 days during which no employee or trade union shall strike and no employer shall lockout his employees or during which an existing strike or lockout shall be suspended, or
(b) request the board to designate those facilities, productions, and services that it considers necessary or essential to prevent immediate and serious danger to life, health or safety and the board may order the employer and the trade union described in subsection (6) to continue to supply, provide, or maintain in full measure those facilities, productions, and services and not to restrict or limit any facility, production, or service so designated,
or may do both."

This new provision added a measure of flexibility. The original version of subsection 73(7) required all striking

employees to return to work once the Lieutenant Governor in Council prescribed a cooling-off period. As amended the subsection prima facie permitted job action, albeit in a limited form, while at the same time ensuring that a minimum standard of service, satisfactory to the public interest, would be continued.

Using the example of the federal Public Service Staff Relations Act, the government, in this Amendment Act, gave the Labour Relations Board the power to designate facilities and services as essential and to ensure the performance of these services during a strike in order to avoid "immediate and serious danger to life, health or safety".

In 1976, this authority was exercised in the strike by the Hospital Employees Union against the Vancouver General Hospital.³⁰ The Hospital Employees Union and the Health Labour Relations Association were unable to settle negotiations for the renewal of a collective agreement covering components in the hospitals throughout British Columbia. The report of the Blair Industrial Inquiry Commission was rejected by the Health Labor Relations Association and a strike seemed inevitable. On April 30, the Minister of Labour ordered the Labour Relations Board, pursuant to section 73(7) of the Labour Code, to ensure that essential services would be maintained at the hospital in the event of a work stoppage by the Union. This was the first time that the "designation" provision of subsection 73(7) had been brought into use, and many questioned the ability of the

Board properly to judge the "life and death" issues involved when determining which positions would be "essential".

On May 4, the hospital employees struck and in the ensuing weeks work stoppages were initiated at seven other hospitals. In each case, the Labor Relations Board designated which positions would have to be staffed during the strike.

With no evidence of a break in the bargaining impasse, the government passed the Hospital Services Collective Agreement Act³¹ which brought an end to the work stoppage and resulted in an imposed contract.

The Labor Code was soon amended to expand the scope of section 73(7).³² Section 3 of the amending legislation provided:

Section 73(7) is amended
(a) by striking out "fire fighters' union, hospital union, or policemen's union" and substituting "trade union",

(b) in paragraph (a), by striking out "21" and substituting "40", and

(c) in paragraph (b), by striking out "described in subsection (6)"

Previously, the maximum cooling-off period, which might be imposed, was 21 days; it was not extended to a total of 40 days. More importantly, the range of employees who could be the subject of a cooling-off order was broadened. Section 73(7) had initially applied only to firefighters', health care and policemen's unions. The new wording referred to a "trade union". The net effect of the amendments, therefore, was to extend mechanisms of "cooling-off" and "designation," originally

implemented for three essential services, to any other area where an immediate and serious danger to life, health or safety was likely to occur.

In mid-1976 another ad hoc legislation was enacted. The Railway and Ferries Bargaining Assistance Act³³ was passed to bring an end to shutdown of the British Columbia Railway by the United Transportation Union. What distinguishes this piece of legislation³⁴ from its predecessors is that it provides a far more comprehensive approach to disputes in these two essential services. According to the Minister of Labour, the Act was designed to achieve two distinct purposes.³⁵ First, it employed binding arbitration to bring an end to the then existing dispute between the British Columbia Railway and the United Transportation Union. Second, it provided "...some new legislative measures that (would) assist collective bargaining --free collective bargaining--in these two paramount public transportation services of provincial significance, the railway and the ferry system."³⁶ The Act contains provisions for the appointment of special commissions to inquire into all matters pertaining to the relationship between an employer and its employees or their trade unions and the disputes or differences arising between them.³⁷ Part II of the Act is applicable only to British Columbia Railway. It provides, inter alia, for the appointment of one or more persons as a Board of Arbitration where the employer and a trade union are unable to conclude a new or revised collective agreement. Under section 11(5) the

Board of Arbitration is empowered to use (a) fact finding, (b) final offer selection, or (c) mediation to finality or a combination of these methods. In 1976, the Board of Arbitration, chaired by Owen B. Shime, Q.C., was appointed pursuant to the Act to resolve matters still in dispute between the employer and the United Transportation Union.³⁸

Part III of the Act provides that where an employer and trade union are unable to conclude a collective agreement and the Lieutenant Governor in Council is of the opinion that an immediate and a substantial threat to the economy and welfare of the Province exists, or is likely to occur, he may prescribe a 90 day cooling-off period.³⁹ Where such an order is made, the Minister of Labour shall forthwith appoint a special mediator to confer with the parties and assist them in negotiations. Where the special mediator so recommends, the Minister may also appoint a fact-finder.⁴⁰ It was these provisions which the government used to unsuccessfully intervene in the 1977 Ferries dispute.

On October 6, 1977, the British Columbia Ferry and Marine Workers Union announced its intention to strike after the efforts of a mediator failed to resolve contract differences with the Ferry Corporation. The next day, the Provincial Government imposed a 90 day cooling-off period under the Railway and Ferries Bargaining Assistance Act. Despite this order, and the possibility of monetary penalties, the union membership voted to continue with its intended strike. Not

only was the ensuing work stoppage illegal, but the workers defied a Labour Relations Board back-to-work order, issued in October at the Corporations' request. An end to the strike was eventually negotiated by the Board in a closed door meeting with the parties. The agreement reached provided for the appointment of a new mediator, and contained an undertaking by the Ferry Corporation not to take disciplinary action against its employees. A few days later, the Union voted overwhelmingly in favour of a return to work.

On October 20, 1977 in the immediate aftermath of the British Columbia Ferries dispute, a special session of the Provincial Legislature was held to introduce the Essential Service Disputes Act.⁴¹ There was, in fact, little in the Essential Service Disputes Act which had not been enacted in similar form in earlier pieces of ad hoc legislation. The important provisions to note here are that by virtue of section 19 of the Act, section 73(1) to (6) of the Labour Code was repealed; all but one of these subsections were re-enacted with minor amendments as section 6(1) to (5) of the new Essential Service Disputes Act; and further provisions in respect of arbitrations were added including for the first time the criteria to which any arbitrator should have regard.

The final enactment relevant here is the West Kootenay Schools Collective Bargaining Assistance Act.⁴² The Act was introduced in late 1978 to permit intervention in labour disputes at Selkirk College and various school districts in

West Kootenays area of the Province. Collective agreements were eventually imposed under binding arbitration pursuant to the statute.⁴³ Certain significant changes were made in the Essential Service Disputes Act.⁴⁴

Section 11 was proclaimed to be in force as of January 15, 1978.⁴⁵ This means that Part III of the Essential Service Dispute Act may now be invoked where the Lieutenant Governor in Council is of the opinion that a bargaining dispute is causing a substantial disruption of educational services.

CHAPTER 2

DEFINITION OF ESSENTIAL SERVICES

A definition of the concept of essential services has become important as strikes in these areas continue to alarm the public and make the governments feel uneasy. Disputes in essential services have become matters for public debate. To conduct itself responsibly in that debate, the public should try to understand and accept the fact that strikes and the threat of strikes are an integral part of the dynamics of a democratic collective bargaining system. It is equally important that the public be assured that effective measures are available, and will be used whenever necessary to prevent dislocation caused by emergencies.⁴⁶

There is a complex of public interests which should be safeguarded. There is no single public interest with respect to collective bargaining and strike and lockout but rather a series of competing public interests. For instance, there is a public interest in the preservation of the freedom of association and to act collectively. But, at the same time, against this must be weighed the public interest in the continuation of essential services in the face of a labour and management impasse.⁴⁷

The law seeks to strike a balance between the freedom of association and other public interests. This freedom is in

many ways the cornerstone upon which any democratic society is built. In Canada this freedom has been enshrined in the Constitution in the Canadian Charter of Rights and Freedoms.⁴⁸

The right to join a trade union and to strike at common law was recognized by the Supreme Court of Canada in CPR v. Zambri.⁴⁹ In that decision, Locke J. stated at pp. 656-657:

"I do not agree with the contention of the respondent that the right to strike is expressly given to employees by s. 3 of the Labour Relations Act. That section, saying that every person is free to join a trade union and to participate in its lawful activities, and s. 4 giving a similar right to persons to join an employer's organization, are equally meaningless. No statutory permission is necessary to participate in the lawful activities of any organization. Furthermore, it is not the union that strikes but the employees. The statute, however, implicitly recognizes that employees may lawfully strike by restricting the undoubted right during the currency of collective agreements, during the period in which conciliation proceedings are being carried on and for a defined period after an award.

The freedom of association is the fundamental premise upon which the Labour Codes of Canada and British Columbia are written. The labour statutes must be read with this freedom clearly in mind. The labour codes protect the freedom in three ways:

- (1) They require that the parties bargain collectively.
- (2) They uphold the right of the workers to join the trade union of their choice.
- (3) They ensure the workers their right to strike.

The labour codes also impose a number of restrictions upon an employer to prevent him from unfair labour practices. For example, an employer cannot lockout his employees without meeting the statutory requirements. He must negotiate a clause in the collective agreement for the settlement of grievances. These are only some of the restrictions but they are sufficient to demonstrate that the law has guaranteed the freedom of association.

Freedom of association has been recognized by the International Labour Organization. In Article 2 of its 87th Convention, it is explicitly set out that workers and employers "shall have the right to establish ... and join organizations of their own choosing ..."⁵⁰

Thus far it has been a brief discussion on the freedom of association in general. But, how does the freedom fare when it comes to strikes in essential services? In a recent case⁵¹ it was stated:

"The fact that it is almost universally accepted and in particular that it is accepted by the ILO that those working in essential services may be denied the right to strike if such denial is accompanied by, adequate alternative safeguards for workers rights, such as impartial and speedy conciliation and arbitration procedures, is no indication that the right to strike is less than essential to the right to organize and bargain collectively. Rather, it confirms that the right to strike is so essential to the interest of workers that if it is removed then the state must replace it with a state-given right that will adequately protect these interests"

Where union and management cannot resolve their differences, there is bound to be hardship for the public which depends upon those services. Where the length of the stoppage or the type of product or service involved is such that it causes hardship then serious problems can confront individuals, groups and the public at large.

The definition of the concept of essential services is a very important factor in any industrial relations system. Where the rules applicable to these services impose major limitations on the freedom of workers and employers, the effect of a relatively broad definition of the concept could be to give the entire labour relations system a somewhat restrictive character.

A. Essential Services and the Public Sector - A Brief Look
at Different Countries.

The first notable development in this field has been in the public sector.⁵² By this it is meant all branches of wage employment in which the State is the employer or the sole or main proprietor. In some countries it includes the civil service itself, parastatal bodies providing a public service (such as the railways, the postal, telegraph and telephone services) and state owned agricultural, industrial or commercial undertakings.

Formerly industrial relations throughout the civil service and sometimes other parts of the public sector as well were often governed by extremely restrictive regulations, which were frequently justified--in part if not exclusively--by the argument that all the services provided were, by definition, essential. Regulations of this type are still fairly widespread. In many countries, both industrialized and developing, the entire civil service is still governed by dispute settlement machinery based on a prohibition of strikes and on compulsory arbitration. Sometimes these restrictions apply also to other parts of the public sector. Countries in this category include Colombia, where they extend to almost all state undertakings, and Japan, where they cover all "public corporations and national enterprises" (which are responsible, among other things, for running the railways, the postal, telegraph and telephone services and the production and retailing of salt, tobacco and alcohol).

The notion that the services provided by the public sector are all essential has, however, never met with universal acceptance. For some years now it has been noted more and more frequently that when the whole civil service, or even the whole public sector is governed by special industrial relations rules the criterion applied is not the essential nature of the activities concerned but the legal nature of the employment relationship (under private or public law) or the identity of the employer (State or private person). It is in fact difficult to maintain that lower-level public servants working in a service of secondary importance--still less certain state undertakings--are performing really essential tasks. Hence, it is not surprising that such countries as the United Kingdom, Norway, Malaysia and several French-speaking African countries have long since established distinctions between employees in the public sector according to the nature of their functions, or that a number of others--particularly among the industrialized countries--have recently adopted a similar approach. For example, in Italy, where the 1931 Penal Code provides for penalties in the event of any strike in the civil service, decisions of the Constitutional Court in 1962 and 1969 had the effect of limiting the scope of that particular provision to strikes affecting activities considered to be truly indispensable.

The situation in the public sector has thus become much more akin to that in the private sector, where it is very widely accepted--at least as a matter of principle--that a

special dispute settlement procedure should only be established in respect of services that are of a genuinely essential nature. What then is a "genuinely essential" service?

B. The Meaning of "Essential"-A Look at the Meaning
of Essential in Different Countries-
The International Labour Office Reports

It would be worthwhile to have a brief glimpse at how essential services are defined and how the concept is looked at in developed and developing countries around the world. This will yield useful insight into the problem of definition and will be of help later when the concept in British Columbia is explored. In

seeking to define the essential nature of a service one is confronted with two basic questions which are very closely linked and which for this reason may be dealt with together.⁵³ The first, a question of form, is whether it is preferable to adopt a definition formulated in general and abstract terms or to enumerate the actual services it is intended to treat as essential. The second, a question of substance, is to determine which activities should be regarded, explicitly or implicitly, as essential.

The enumeration method is used in a great many countries in Asia, Africa, Latin America and the Caribbean, but it is less widespread in the other regions of the world. Countries using this system include Belgium, Brazil, Colombia, India, Jamaica, Kenya, Malaysia, New Zealand, Nigeria, Pakistan, Panama, the Philippines, Sierra Leone, Sri Lanka, Trinidad and Tobago, Venezuela and Zambia.

Although there are a number of differences in the composition of the lists drawn up in these countries, it is possible to make three general observations about them.

First, the majority of the services listed are concerned either with safeguarding industrial plant-by avoiding, for example, any stoppage of continuous process equipment-or with protecting health and safety of the population. This second category mainly includes the armed forces and the police; the fire brigade; the public health and sanitation services; the production and distribution of basic foodstuffs, water, gas, electricity and some other sources of energy, such as petroleum products; transport and communications; and docks. Obviously there are cases where a stoppage of these activities, especially if it is not a complete one, does not strictly speaking effect the health and safety of the population but causes purely economic damage or hardships. Nonetheless, labour disputes in these services are, as a rule, apt to cause disruption in the life of the community that can rapidly become dangerous.

Secondly, more and more countries have in recent years included in their list of essential services certain activities which are not concerned with safeguarding industrial plant or protecting the health and safety of the population but in which a prolonged interruption can cause very serious damage to the national economy. This trend is particularly noticeable within developing countries. In Zambia, for instance, mining activities have been listed as essential services since 1971. The same applies to the cultivation,

manufacture and refining of sugar in Trinidad and Tobago since 1972. In the Phillipines, essential services include the production of sugar, textiles, clothing, certain articles classified as essential by the National Economic Development Agency and many goods destined for export. There has also been a move along the same lines in some industrialized countries. For example, in New Zealand (where meat exports play a major role in the economy) slaughterhouses operating for the export trade have been treated as essential services since 1976 whereas previously only those operating for domestic consumption were so regarded. It should be noted also that various countries, both industrialized and developing, have recently included in their list of essential services certain financial operations such as those carried out by banks and foreign exchange offices.

Thirdly, and contrary to what one might think, an enumeration of essential services does not necessarily impose a straightjacket on the authorities' freedom to manoeuvre. In quite a few countries which had adopted this system the government has in fact been empowered from the outset to expand these lists by means of highly expeditious procedures. In addition, besides the provisions applicable to the services listed as essential, many of these countries have other provisions of a very general nature enabling the government to intervene in any dispute which it sees as endangering the national economy or the national interest in general. In some countries possibilities of this type have existed for many years while in others they have only been introduced more recently. In Colombia, for example, the list contained in the Labour Code, which

was limitative until 1956 but has since become merely illustrative, was supplemented in 1968 by a provision empowering the President of the Republic, following a favourable opinion of the Supreme Court, to put an end to any dispute "seriously affecting the interests of the national economy"⁵⁴ Similar provisions were introduced in Pakistan in 1974, and in Panama in 1976. The degree to which the authorities have in practice added to the list of essential services or intervened in disputes arising in activities not included in this list varies from country to country. While some governments have availed themselves of these powers extensively, others have never used them.

Concern for flexibility has of course always been particularly pronounced in countries which have rejected any enumeration of essential services and have confined themselves to a general definition. This is true, for example, of the United States, a number of European countries and several French-speaking African nations. Sometimes the legislature, despite its desire for a flexible system, has taken care to define essential services in a relatively narrow fashion. In the United States, for instance, the Taft Hartley Act of 1947, which applies to all sections of the economy with the exception of agriculture, the railways and air transport, provides that the special system governing the settlement of labour disputes in the case of "national emergencies" can only be applied when a dispute affecting "an entire industry or a substantial part thereof" will imperil "the national health or safety"⁵⁵ In many other countries the definitions are founded, however, on much less precise notions such as the "far-reaching social importance" of the dispute

(in Denmark), "the public interest"(in Sweden) or "public law and order" and "the general interest" (in the Ivory Coast). One cannot really say that these are true definitions.

When a country has not defined what is meant by an essential service or has done so only in very general terms it is important to know how this notion is interpreted in practice. The tendency to interpret it broadly, which has already been noted in the countries which use lists, is also found in those which have opted for general definitions. In the United States, for example, the emergency procedure provided in the Taft-Hartley Act has often been applied to disputes which did not really imperil "the national health or safety". An instance often cited in this regard is the application of this procedure to the steel strike of 1959 even though only 1 percent of steel production was needed for purposes of national defence. In Denmark too, where Parliament has intervened on various occasions over the past 50 years to put a stop to certain disputes deemed dangerous for the community (generally by transforming the conciliator's final proposals into law), it should be noted that the purpose of several of the interventions made during the 1970s has been to impose wage settlements where central negotiations had reached deadlock. It seems clear that these initiatives of the legislature were motivated more by economic considerations than by a desire to protect the health and safety of the population.

The above remarks enable one to make two series of comments concerning, respectively, the question of substance and the question of form raised by the definition of "essential".

As regards the question of substance, it might be asked whether it is a good thing that emergency procedures originally devised to safeguard industrial plant and protect the health and safety of individuals should now also be applied, in a growing number of countries, to disputes which seriously affect the national economy. To pose this question is not of course in any way to minimize the gravity of the problems caused by the latter type of dispute; it seems in fact that the question of the influence the authorities should (or should not) exert in the field of collective bargaining, and the settlement of industrial disputes in order to help preserve or restore the major microeconomic balances, is currently one of the most important in the whole field of industrial relations. It is currently a question which has preoccupied the majority of developing countries since they gained independence and which the recession has brought to the forefront in many industrial nations. While law can be laid down on how to resolve labour disputes that are likely to cause serious damage to the national economy, it should be noted that a dispute of this nature differs too greatly from one in a hospital or power-station to be dealt with in the same fashion. At the very least, before resorting to a procedure designed for other situations, an effort should be made to ascertain that there are no better alternatives. Has the question really been gone into sufficiently deeply to know for certain that such alternatives do not exist?

As regards the question of form--and whatever the answer found for the question of substance--it seems that the problem of choosing between a list of essential services and a general and abstract

definition of them is largely a false one. The fact is that many countries which originally opted for the listing procedure have subsequently taken powers that give them almost as much room for manoeuvre as the countries without lists.

These developments seem to indicate clearly that a modicum of flexibility is indispensable in defining essential services. There are two reasons for this.

First of all, it is not certain that "essential" can be defined adequately through the enumeration of certain "activities". In the preamble to the Basic Agreement applicable in Sweden to the private sector the signatories declare that "a certain activity is rarely in itself of such fundamental importance to the community as to warrant its protection against any conflict" and that the repercussions of the conflict on the community depend as much on the extent of the conflict as on the nature of the activities affected. They conclude that "no other solution appears to offer itself than to permit the balancing of conflicting interests to assert itself in each individual conflict."⁵⁶

Even if one is not prepared to push the argument as far as that, one can scarcely deny the validity of the considerations on which it is based.

The second reason militating in favour of flexibility is that it should be possible to take into account, in the application of the rules, a number of extrinsic factors which willy-nilly play a very important part. Is there any need to recall that the attitude adopted by the authorities to a labour dispute often largely depends on the limits to the public's patience or even on purely political

considerations? It is these factors which explain why it has frequently happened in almost all countries that the disputes procedure established for essential services has been applied in the case of relatively harmless disputes while it has not been applied in the case of other much more serious ones.

It might be feared that the more imprecise the definition of "essential" the easier it would be to invoke this procedure. While this danger is not an imaginary one, it seems nevertheless that the frequency with which this procedure is used does not depend primarily on the precision with which essential services are defined. In Sweden, where there is no definition, the discussions held in the Labour Market Council in connection with major disputes have only once resulted in a real decision (in 1953 on the occasion of a dispute in a privately owned electric power-station). In the United States, on the other hand, the emergency procedure provided for in the 1926 Railway Labour Act (also applicable since 1936 to air transport) has been invoked more than 200 times, even though this Act applies to only two sectors of activity and contains a definition (of sorts) since it states that this procedure can be used only if a dispute should "threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service."⁵⁷ It seems therefore that the frequency with which recourse is had to the emergency procedures depends more on certain other factors and more particularly on the degree to which industrial relations in general are strained, since the less tense they are the fewer disputes there will

be and the greater the number of those that can be settled through the ordinary procedure.

C. The Meaning of Essential in British Columbia

In British Columbia there have been at one time or another certain quieting trends which affected the maintenance of essential services in some vital sectors of the economy.

The expression of the public interest in being protected from the hardships of work stoppages takes many forms. Generally, the public interest refers to protection of life and health, maintenance of public safety and order, and preservation of the state. The Report of the Task Force On Labour Relations made seven observations which were fundamental to the determination of a scheme for containing these disputes.⁵⁸

First, it is very difficult to say with certainty in advance of actual events in what industry or service and at which time a strike may cause such inconvenience and hardship and thereby bring about a life threatening situation. By way of illustration, in London, England, burned-out traffic lights were not replaced, and traffic ground to a halt. The reason? The light bulb changers were on strike. Would anyone, before that event, have defined light bulb changing as an "essential industry"? Or, here in Canada, who would have defined elevator construction as an "essential industry"? Nevertheless, a national strike in that industry tied up an estimated \$800,000,000 worth of construction across the country, created serious problems in hospitals and nursing homes and caused great inconvenience for many people.⁵⁹ Second, the length of a strike or lockout frequently is a critical factor. A short duration

may make no difference at all, whereas a long duration in the industry or service may create big problems. Third, there can be no one policy or procedure that works with uniform success. Fourth, flexibility of approach is essential lest the parties should build the existing policy or procedure into their strategies. Fifth, a determination that a given stoppage of work ought to be terminated in the public interest is essentially a political decision. Sixth, the political element in a potential emergency dispute is an inducement to the parties to drive the dispute beyond any procedural device of settlement and into the political arena. Seventh, circumstances may be expected to arise in the eventual course of industrial conflict in which disobedience to and defiance of the law will not be forestalled by that law. For instance, in October of 1977, the Government of British Columbia decided to impose a cooling-off period in an attempt to avoid a work stoppage on the ferries. The ferry workers refused to abide by the order to continue working during the "cooling-off period". The illegal work stoppage lasted eight days. The public was inconvenienced and alarmed at the defiant attitude of the ferry workers against the government and the Labour Relations Board.⁶⁰

These observations should suffice to demonstrate that before one can settle on a definition of "essential industry" or "service" one must take into account a number of variables. If one tries to define what industries are essential, where does the list end? It is difficult to determine in advance, in what industry, or at what stage of events, a strike should be prohibited or terminated. The length of

a strike, the extent of disruption, the public interest--these are all critical factors.⁶¹

In the laws of British Columbia and particularly in the Labour Code of British Columbia there are provisions which deal with a limited definition of essential services. It is limited to aspects of health and safety. In a limited way, there is in section 8(b) of the Essential Service Disputes Act,⁶² and the Railway and Ferries Bargaining Assistance Act⁶³ another parameter of essential services--that of threatened harm to the economy and welfare of the province and its citizens. What does "economy" of the province mean? The word "economy" mentioned in the Bill generated much debate. Mr. Wallace queried:

"What for example, will happen, after this Bill is passed, if the employees in our liquor stores would wish to go on strike again? Just how do we define impact on the economy, Mr. Speaker? The 1976-77 figure for revenue derived from the sale of liquor in this province was \$162.5 million. If the employees in the liquor stores of British Columbia strike, with the obvious loss of revenue to the government, the government should consider that to be sufficient economic impact to invoke the appropriate provisions of the Bill for a cooling-off period or for the Labour Relations Board to designate it an essential service."⁶⁴

There is no essential nature in providing liquor for the citizens, but indeed there is a vital impact if the government loses a large amount of revenue. That service which disrupts the economy of the province and the country is essential.

Mr. Gibson, the then leader of the opposition, proposed that in a literal reading of the legislation British Columbia Railway was essential to the economic well being and welfare of the province.

So the Labour Relations Board might well find in interpreting this section that all of the running trades on the British Columbia Railway had to keep going, which in essence was an elimination of the strike weapon. Similar findings could be made in British Columbia Hydro, in the electricity supply, in the natural gas supply, and in transit operations, all of which are clearly necessary to the economy and welfare of the province and citizens of the province. The British Columbia Ferries clearly fell within this category, the British Columbia Systems Corporation probably and any area of government related to health and and welfare.⁶⁵

The Honourable Mr. Hewitt emphasized upon the importance of British Columbia Railway and British Columbia Ferries. He explained:

"As Minister of Agriculture I can tell you that there are two areas which affect agriculture in this province when you deal with essential services, one being B.C. Rail and the other being B.C. Ferries. For the movement of produce, materials and supplies, which are needed in the economy, and, of course, which are needed by the agriculture industry in this province, it is important that railway lines be kept open. On Vancouver Island, we have poultry that has to be moved from there to the mainland for processing. We have feed supplies that come on to this island from the mainland--molasses, grain and alfalfa, which are needed, of course, in our dairy industry. We ship cattle to the mainland for slaughter, and, of course, we import, if you want to use that term, from the mainland, fruits, vegetables, meats and milk, to go to market on the island."⁶⁶

He quoted from the resolution of the Federation of Agriculture:

"As the B.C. Ferry system is an integral part of the highway, it is of real concern to all when this vital link is closed down due to strike action. When such action occurs, movement of perishable and other produce comes to a standstill, thereby jeopardizing the economy

and the livelihood of those people directly and indirectly involved in the production and marketing of such products. To this end the Federation of Agriculture respectfully requests that the provincial government declare the B.C. Ferry services as an essential service."⁶⁷

Referring to the ferry strike Mr. L. Bawtree observed:

"It could take months or even years to overcome the economic effects caused by the suspension of the ferry services for just a very few days earlier this month. The people of Vancouver Island surely are entitled to know that a service so essential to their welfare will not be discontinued again in the future. The government has a responsibility to make sure that no part of this province suffers great economic hardship and deprivation because of illegal acts by labour and management."⁶⁸

At the other extreme, apart from fire, hospital and police services, is the view of the Honourable Mr. Phillips. He said during the debate:

"The workers are well paid, and outside of their jobs they have an abundance of other services provided by the taxpayers of this province. The workers of this province, along with the other population, enjoy hospital insurance today. They enjoy medical insurance. Those who are unemployed enjoy unemployment insurance. The majority of the people enjoy pharmacare, and we have guaranteed income for the elderly citizens of this province. Indeed for the less fortunate ones we have social welfare programmes. These are services that are very essential to those who are receiving them. They are services that must not be interrupted and indeed they are services that are being paid for by the very workers of this province that Bill 92 would seek to serve by creating a better climate in which to work ...

I refer not only to those essential services that are rendered by the Province of British Columbia but I refer also to essential services that are rendered by our federal government, such as mail delivery".⁶⁹

Still another extreme is brought into view when the educational system is considered. In British Columbia the Essential Service Disputes Act⁷⁰ provisions were extended to include colleges and schools in 1978 because of lengthy work stoppages involving Canadian Union of Public Employees at Selkirk College and the West Kootenay School District. In the West Kootenay Schools Collective Bargaining Assistance Act⁷¹ the strike was brought to an end, collective agreements were eventually imposed and the scope of essential service disputes legislation was extended to municipal employees and to non-teaching personnel of educational institutions⁷²

1. Services Specifically mentioned in the Labour Code of British Columbia and the Essential Service Disputes Act

What industries and services, whether public or private have sufficient impact on the public interest to warrant their being termed as essential?

There is little doubt that the truly essential category of fire, hospital and police employees meets the tests of protection of the public set out in section 73(1) of the Labour Code and section 8(a) of the Essential Service Disputes Act.

The problem in British Columbia derives from the the necessary determination of whether a particular union meets the definition of "fire fighter's union", "health-care union" and "policemens' union" under section 1 of the Essential Service Disputes Act. Taking the position that these three categories of unions should be denied the right to strike, the definitions of them in section 1 of Essential Service Disputes Act become particularly meaningful. The definitions merit examination.

What is a fire fighter's union? The definition has been included in the Essential Service Disputes Act exactly as it was in the now repealed section 73(6) of the Labour Code:

Fire fighters union means a trade union certified for a unit in which the majority of employees has as its principal duties the fighting of fires and the carrying-out of rescue operations.⁷³

This definition does not present problems. Large corporations can conceivably employ their own fire departments for certain purposes,

and local fire departments can be publicly employed by the municipalities and fit easily into the definition. However, the case of provincially employed fire fighters at the University of British Columbia, Riverview Hospital and Tranquille School presents an interesting problem.⁷⁴ These fire fighters were members of the British Columbia Government Employees Union and were organized under a separate occupational group for fire fighters. When the Essential Service Continuation Act⁷⁵ was passed in 1974, the fire fighters argued that it served to amend the Labour Code of British Columbia in such a way as to confer a special status on them. It was argued that there should be a special component for the fire fighters and further that it was excluded from the British Columbia Government Employees Union by virtue of the definition of fire fighter's union quoted above and then set out in section 73 of the Labour Code. The Board rejected this argument and determined that these fire fighters were not a fire fighter's union under that definition for these reasons:

In the first place this group of fire fighters does not constitute a trade union. There was no evidence of any organizational structure. Secondly, no certification has been issued for any organization to represent a unit of employees of the Crown in which the majority of employees has as its principal duties the fighting of fires and carrying out of rescue operations. In fact, this Board has no authority to certify any such unit. The Public Service Labour Relations Act expressly designates the bargaining units in the Public Service, and these are the three set out in section 4 of that Act. No unit that could satisfy section 73(6) of the Code can be certified under the Public Service Labour Relations Act. In short, I find that the 85 fire fighters employed by the Government of the Province of British Columbia at the University of British Columbia, Riverview

Hospital and Tranquille School do not constitute a fire fighter's union within the meaning of that expression as it appears in section 73(6) of the Code.

As to the policy argument advanced by Counsel for the employees, I agree that a very logical case may be made for treating these fire-fighting employees as a group separate and distinct from the majority of employees in the public service of British Columbia. They are engaged in essential services of a kind that would need to be maintained in the event of a strike. However, I observe in this case that such services were maintained, within certain limits, and that by Counsel's own admission every fire was fought, and life supporting services were rendered. It is quite conceivable that the example offered in this case might well be emulated in the event of a lawful strike by members of the British Columbia Employees Union. On the other hand, there is no doubt that these employers have had the right to strike conferred upon them, given appropriate circumstances, and are therefore entitled to exercise that right. Presumably, the Legislature has already considered this possibility, and notwithstanding the ramifications included the fire fighters in the same bargaining unit as other employees."⁷⁶

At the present time, this bargaining unit may be dealt with under section 73 of the Code which does not have the pre-requisite definition of fire fighters' union. But it is submitted that the decision quoted was made in error, and that there should indeed be a separate bargaining unit for these fire fighters and it should be subject to the Essential Service Disputes Act. While there have been procedural barriers to granting separate status in this action, the policy argument should have been accepted and a recommendation made for application and certification as a fire fighter's union.

What constitutes a health care union? The definition is
Essential Service Disputes Act provides:

"Health care union" means a trade union
certified for a unit in which the majority of
employees has as its principal duties the
health care of patients or operation and
maintenance of a hospital.⁷⁷

Jurisdiction to determine the question rests with the Labour
Relations Board. It has been exercised in the cases of Medical
Associates Clinic and the Hospital Employees Union Local 180,⁷⁸
Medical Associate Clinic and the Hospital Employees Union Local 180,⁷⁹
and Jubilee Home Society (Noric House)⁸⁰

In the Medical Associate Clinic case 52, of 1978 the issue was
whether persons in a medical clinic were covered by the Essential
Service Disputes Act. Had the Board the jurisdiction to determine
whether the persons were covered by the Act? The Board ruled it could
hear the case.

In the Medical Associate Clinic case 60, of 1978 the issue was
whether clinic workers were included in the definition of health
care union. The Board reviewed the principal duties of each of the
employee classifications. It held that the housekeeper, caretakers,
receptionists, billing clerks, medical stenographers, and medical
records clerks were not involved in the examination, diagnosis,
treatment or active care of patients. They did not have as their
principal duties the "health-care of patients". There were fifteen
employees within those classifications. Since the entire unit consists
of twenty-two employees and the definition under consideration was a

majority rule provision, it was held that the Hospital Employees Union was not a "health-care union" in the circumstances of that case. It was held that a clinic to which people came to visit doctors and nurses was not operated by a health care union. The decision of the Board was that the clinic workers were not represented by a health care union and that those negotiations fell under the Labour Code.

Similarly in the City of Vancouver and Registered Nurses Association of British Columbia (Labour Relations Division)⁸¹, the union sought for a declaration that the union consisting of nurses, employed by the city, was within the definition of a "health-care union" under the Essential Service Disputes Act. The employer opposed the application. The Board determined that the duties of the nurses in question did constitute providing care to patients for the purposes of the Act and thus, the arbitration provisions of the Act were available to the union.

In Windemere Central Park Lodge and Hospital Employees Union, Local 180 and British Columbia Association of Non-Profit Community Care Facilities,⁸² there was an application for reconsideration of a previous Board decision which held that the employer and the union were not governed by the provision of the Essential Service Disputes Act. The Board, after analyzing the definitions of "hospital" and "health-care union", dismissed the application and upheld the previous Board decision. It was a matter of agreement between counsel that a finding that a facility was a hospital under the Hospital Act, did not necessarily make it a hospital under the Essential Service Disputes Act.

In the Jubilee case 62, of 1979 the Board determined that a hospital for the care of persons whose average age exceeded eighty years was operated by a bargaining unit that was a "health care union" under the definition in the Act.

The Medical Associate Clinic case and the Jubilee case approach the problem by examining the definition of health care union and comparing it with the definition of "hospital union" in the now repealed section 73(6) of the Labour Code which read:

hospital union means a trade union certified for a unit in which the majority of employees has as its principal duties the care of patients in, or operation and maintenance of a hospital.⁸³

Even a quick glance reveals a number of differences between the two definitions. In the first place, the term "hospital union" has been replaced by the term "health care union". As well, the phrase "care of patients" has now been modified by the adjective "health" to produce the phrase "health care of patients". Finally, and of particular significance, the health care of patients is no longer exclusively referable to employees in a hospital. By removing the word "in" from the phrase "care of patients in" and retaining the disjunctive "or", the legislature has quite obviously made an adjustment to the scope of the definition. At the same time, however, a sharp distinction seems to have been drawn between employees engaged in the "health care of patients" and those engaged in the "operation and maintenance of a hospital".

It is clear that the new definition in common with the old one, embraces all bargaining unit employees at hospitals. Those

employees must necessarily be engaged in either the delivery of health care or in operating or maintaining the hospital facility. It is equally clear that the new definition was intended to reach beyond hospitals and to cover at least some groups of employees at other kinds of health care facilities. Having said that, another problem is presented. When one goes beyond hospitals, what is the significance to be attached to the distinction which has seemingly been drawn between the "health care of patients" and the "operation or maintenance of a hospital".⁸⁴

If one assumes that all employees of hospitals belong to health care unions, then the next question to be asked is what is a hospital?

Neither Essential Service Disputes Act nor the Labour Code include a definition of 'hospital'. The Board in the Jubilee case refers to the Hospitals Act⁸⁵ and concludes that the institution in that case fits into none of the applicable definitions. Nor would the clinic in the Medical Associate Clinic case meet the criteria. Here is where the distinction between those who work in the operation and maintenance of the hospital and those whose duties are principally the health care of patients is significant. Once it is determined that the institution is not a hospital then those involved in the operation and maintenance of it will not be members of a health care union unless the majority of members of the bargaining unit offer health care to patients. In the Medical Associate Clinic case it was first determined that the clinic was not a hospital and then it was determined that those persons who offered health care were doctors and nurses outside the membership.

The bargaining unit did not qualify as a health care union because the membership neither operated a hospital nor were their principal duties health care. But in the Jubilee case, while the institution was determined not to be a hospital, the employees' duties, in tending to the needs of persons of varying degrees of dependency due to old age, were found to be health care duties. Additionally the Board found, in that case, that it did not make sense to say that employees who assisted the patients in dressing were health care workers while those who did the laundry were not. Thus the support staff engaged in cooking, dietary and housekeeping functions were included in the bargaining unit as health care workers. As a consequence the majority of the workers were found to have health care duties and consequently, the bargaining unit became a health care union despite the fact that it did not operate a hospital.

The new definition of health care union in Essential Service Disputes Act is indicative of the policy in the new Act to expand the bounds of essentiality. The Board was prepared assuming the appropriate criteria were met (and they were not) to designate a privately owned medical clinic to be essential. Certain other private hospitals might also come under this extension but they are largely funded by the provincial government and therefore are distinct from a wholly private medical clinic which, despite sources of funding from the medical insurance plans, is privately operated. Also, the removal of the requirement that an institution meet the definition of hospital allows the Board to find that any association of employees which supplies medical services to the public meets the definition of health

care union. The larger general hospital staff would be found to be essential without doubt but there are other large community care facilities⁸⁶ whose patients would suffer in the event of a work stoppage and no determination has as yet been made as to whether these institutions are operated by health care unions. It does not seem likely that these institutions will meet the definition of hospital under the Hospitals Act so the second part of the test must be satisfied.

What is a 'policemen's union'? The definition in the Essential Service Disputes Act does not appear to have been challenged. The section reads:

A trade union certified for a unit in which the majority of employees is engaged in police duties.⁸⁷

From a policy standpoint it would appear that all police employees should be included in the definition as long as they are recognized peace keeping forces.

2. Concluding Remarks

To conclude the discussion on the definition of essential services it can be said the services can not be enumerated exhaustively because to the list of services, designated as essential services, can be added still a few more services. The list grows longer as services not essential under a given time and condition become so as circumstances change. Even more important, the shift from the limited, self-contained notion of public safety to the broad concept of public welfare having no determinate form, poses intractable, qualitative problems. The concept of public welfare reveals the vast array of government services and the distinctive types of harm that might flow from essential service strikes whether public or private. Some of these have been mentioned before. In summary, they are:

1. The public safety employees--particularly fire, hospital workers, and fire fighters. If these workers go on strike, individuals in the community are immediately threatened with injury, illness, even death.
2. Governments minister to the profound human needs such as education of the young, social assistance of the weak and unfortunate, legal justice for all citizens⁸⁸ These, therefore, should be treated as essential services.
3. A great deal of government activity is intended to provide the infrastructure upon which Canadian economic activity depends. Extensive harm will be caused by a lengthy railway strike, especially where railway is an integral part of the industrial set up. For

instance, the forest industry will suffer if there is a strike by the railway workers. Rail transportation is the critical link in Canadian interdependent economy providing delivery of raw materials to factories and mills, and shipment of finished goods to the market. A railway strike quickly ripples throughout the economy, triggering cutbacks in the primary resource and secondary manufacturing industries, and layoffs of employees who work in them.

4. The vast majority of government services are designed to provide the amenities of life, ranging from garbage collection to public transit like bus service, and, in British Columbia, the ferry service. By referring to these as "amenities" it should not be taken that they are being depreciated. They may well be the major ingredient in the quality of life in the community and the mark of how civilized a society is.

Among the services provided by the federal government, air traffic and postal services need to be mentioned first in order of priority. An air traffic controllers' strike not only deprives the community of the amenity of vacation travel, but it also generates economic losses to the tourist industry. It may even create the risk of physical injury to remote communities relying on air transport for fuel, food and medical services. Shutdown of the post office threatens communication. Alternatives like telex, telegram and telephone are available but they are expensive. Postal services provide a fast and cheap mode of communication. The notion of "public welfare" is certainly capable of bringing these kinds of services under the umbrella of "essential" public service legislation. Sorting out these

qualitatively different services, and distinguishing the variety of kinds of harm inflicted by a single strike of a single integrated operation, is still indispensable in deciding when and to what extent the government should intervene.

The theme which has unfolded in British Columbia labour relations legislation is that while with one hand the law holds out to essential service, employees public or private, the promise of the right to strike, with the other hand it must protect the general public from any significant harm to its welfare resulting from such a strike.

A hypothetical illustration will show how the public is affected when the essential service employees go on strike. One has heard the rhetoric many times: the ordinary citizen is just an "innocent victim" trapped in the midst of a battle between a remote government and a powerful union, and he should be insulated from any such painful fallout.

Surely this is an illusion. For instance, imagine a school board dispute in which negotiations between the board and the union have reached an impasse. It is up to the union to take the initiative to break one logjam by calling a strike. When the union members stop working, they feel the immediate brunt of that action. Their pay cheques stop coming, and they must make do on meagre strike benefits. The union is now told that it must not disrupt delivery of educational services to the innocent school children and their parents. Presumably it is only the employer, the school board, which is the legitimate target of the union's action. But what does it mean

to say that a government entity is the target of a strike? Will the elected members of a school board really feel any tangible incentive to compromise in their bargaining posture if the schools are continuing to operate even though their employees are out on strike?

From the point of view of the union, the general public is not an innocent, uninvolved bystander in the dispute between the government employer and its union. The public is the employer to an even greater extent than are the shareholders of private corporate employers. It is the interests of the public that are being advanced at the other side of the table, either as consumers of the services who want to maximize employee production, or as taxpayers who want to minimize labour costs. (It is this inherent conflict of interest between public employee and ordinary citizen which is the rationale for collective bargaining in a political democracy). The general public elects the officials responsible for settling the disputes. Thus, it is these voters who must feel the pain from the loss of services that they really miss--which they really consider essential to their welfare--if the politicians are to be made a little more accommodating, a little more malleable, at the bargaining table.

CHAPTER 3
METHODS OF CONTAINING HARM CAUSED BY
STRIKES IN ESSENTIAL SERVICES

There are various methods of containing harm caused by strikes by essential employees and those running essential services. The first method is to designate the employees as essential and thus restrict their right to go on strike. One example of this is found in the federal sphere.

A. Designation of Essential Employees - The Federal Public Service Staff Relations Act

The idea of designating essential employees and thereby taking away or restricting their right to strike was mentioned, for the first time in the federal Public Service Staff Relations Act.⁸⁹ It is a less drastic method of limiting the effect of strikes than legislative prohibition of strikes. It would be worthwhile to examine briefly the provisions of this Act. It would show how far its provisions can be of help in the field of designation of essential services in British Columbia.

Early Canadian industrial relations legislation, enacted during the first decade of this century, dealt specifically with strike situations in which the community had either a direct proprietary interest or a special concern arising out of the essential nature of the industries affected. Public utilities, railways, and coal mines were early identified as industries worthy of legislative intervention which during these formative years took the relatively innocuous form of compulsory strike postponement and conciliation.⁹⁰ It is

particularly relevant, in the present context, that employees of both private firms and government-owned railways and municipally-owned public utilities had and have up until now full freedom to engage in collective bargaining. The Public Service Staff Relations Act requires both the employing agency and the bargaining agent, upon timely notice, "to bargain collectively in good faith and make reasonable effort to conclude a collective agreement".⁹¹

The failure to announce affirmatively the existence of a right to strike is hardly surprising. In the first place, no Canadian court has ever clearly held that strikes by public servants are per se illegal;⁹² thus there was no need for Parliament to reserve an existing legal norm. Second, while it is true that Canadian labour relations statutes have seldom contained an express reference to the right to strike, the courts have recognized that such legislation impliedly incorporates the common-law right to strike.⁹³

The Act does not, however, entirely abandon the public interest in the continued operation of government to the whim of negotiations. If a union has elected to resolve its collective bargaining impasse by a process of conciliation - and, impliedly, by a strike - rather than by arbitration, the Act forbids certain "designated employees" within the bargaining unit from striking because their duties "consist in whole or in part of duties the performance of which at any particular time or after any specified period of time, is or will be necessary in the interest of the safety or security of the public."⁹⁴ But, it should be noted that the definition of "designated employees" is very circumscribed. The Act denies the right to strike only to those

persons whose absence from work would imperil interests which are absolutely vital; employees whose absence would merely imperil the "public interest", "convenience", or "welfare" are still permitted to strike.⁹⁵

The procedure for identifying "designated employees" is designed to avoid controversy over this issue during the course of a strike when the pressures of conflict would make resolution of the matter especially difficult. Within 20 days after either party has served a notice to bargain, the employing agency must establish a list of essential employees. If the union does not object to the employer's list, all of the persons so identified are to be taken as "designated employees". However, in the event that the bargaining agent files an objection, the Public Service Staff Relations Board must hold a hearing to determine whether the listed employees are really essential to the "safety and security of the public".

In practice, the various government employers have exercised great self-restraint in designating critical employees. The union often accepts the employer's unilateral judgment. Thus the Board has not had occasion to determine authoritatively the meaning of the statutory phrase "safety and security of the public". Nevertheless, some clue to the meaning of this standard may be gleaned from the Air Traffic Controllers case,⁹⁶ where the only "designated" employees were those controllers thought necessary to provide emergency assistance to overflying and non commercial aircraft at various airports throughout the country. Obviously such a small number of "designated" controllers would be inadequate to service regular domestic commercial air traffic,

which would necessarily be suspended for the duration of a strike within this particular bargaining unit.

The Act does not expressly provide for the designation of additional employees during a strike if the employing agency or the Board initially misjudged the number or type of employees necessary to protect the public interest. The Board would undoubtedly mobilize its full statutory resources to cope with such a crisis, including its power to "review, rescind, amend, alter or vary any decision or order made by it."⁹⁷ It might well be argued that the employer and the Board should have anticipated all contingencies in making the choice of designated employees but this argument might have the unfortunate effect of prompting the employer to exaggerate at the outset the number of designated employees on the basis of remote contingencies.

A second series of problems concerns the relationship between striking employees and designated employees in the same bargaining unit. If a government employer determines that a skeleton staff is necessary during a strike in order to provide services essential to the "safety and security of the public", how is such a staff to be selected from among the employees in the bargaining unit? What happens if some of the designated employers resign or become ill? Must the same individuals continue to work throughout the strike, or can the strikers serve in rotation? What of the risks of sabotage, deliberate slow-downs, or "work-to-rule" campaigns by designated employees? And what of the wages paid to designated employees: if the remuneration for continuing on the job exceeds strike pay, should the designated employees be required to turn surplus over to the union strike fund?

Although these as yet unanswered questions are troublesome, the statutory procedure for designating employees in advance of an actual strike situation is fundamentally sound. The fact that the parties are not locked in conflict makes it more likely that they will agree upon the list of designated employees. If there is disagreement, the Board can undertake the difficult adjudicative problems of defining and identifying employees in essential services without the extra pressure of a strike situation. Finally, if a large proportion of employees in a bargaining unit must be designated as essential, thus impairing the union's ability to strike, that fact is made obvious so that the union can opt for arbitration at an early stage in the proceedings.

Section 79 of the Act raises a number of issues. The analysis, here, springs from three cases which will be assessed in turn:

International Brotherhood of Electrical Workers and Treasury Board⁹⁸ (Electronics Group - Technical Category), hereinafter called the Electronics case, Public Service Alliance of Canada and Treasury Board (Heating Power and Stationary Plant Operation Bargaining Units),⁹⁹ hereinafter called the Heating Power case and The Canadian Air Traffic Control Association and Treasury Board (Air Traffic Control Group Designation case),¹⁰⁰ hereinafter called The Air Traffic Controllers case.

The Electronics Case

Under subsection 2 of section 79 of the Public Service Staff Relations Act, the employer is required to furnish to the Board and to the bargaining agent a statement of employees who he considers to be essential for the purposes of safety and security of the public.

In this case the bargaining agent filed an objection to the statement and the matter was listed for hearing.

Following the hearing, the parties met on several occasions and in due course informed the Board that they had reached agreement with regard to certain designations proposed by the employer and that they had failed to reach agreement with regard to others.

The employer had agreed that, in the event of a strike, the duties of the technicians concerned would be restricted to those involving the investigation and elimination of radio interference which affects essential transmission of emergency messages in support of police, ambulance, fire fighting and similar activities.

Several considerations were put before the Board. Counsel for the bargaining agent submitted that the Act granted full collective bargaining rights to Canadian public servants, including the right to strike and that the Board ought to do its utmost to preserve that right and should not permit the employer to destroy it through the process of designation.

In the Board's view, the statement that public servants have been granted full collective bargaining rights was true in the general sense but, like many generalizations, it was subject to qualifications and could be applied in specific cases only by reference to the qualifications as well as the general principle. The qualifications on the right to strike are related to both time and function. The Board said it was concerned there only with the limitations that came from functions, and more particularly those functions, that were referred to in section 79(1), i.e., those functions that were related to public

safety and security. Persons who are engaged in the functions defined in section 79(1) are not permitted to strike at any time. It is not that collective bargaining rights are denied to such persons. The subsidiary principle is that one of the collective bargaining rights that may normally be exercised by employees cannot be exercised by specified persons if its exercise would jeopardize public safety and security as distinct from interfering with the capacity of the employer - as an employer - to carry on its day-to-day business. The role of the strike in North America is generally accepted to be purely economic. The traditional and normal raison d'etre of a strike is to interfere with, or bring to a stop, the normal operation of the employer - as an employer - with a view to reducing the employer's bargaining power and increasing that of the employees.

The strike has been tolerated, accepted and even encouraged by society itself as a means of balancing the bargaining power of the employer and the employees with a view to an eventual settlement. By-products of the strike are the inconvenience or hardship that may be suffered by the employer's customers. But the prime target is the employer, not the public. If the exercise of the right to strike does effect the safety and security of the public, rather than the profitability or convenience of the employer, the role of the strike is transformed by a change in kind and not merely a change of degree or effectiveness. The Act does not contemplate that public convenience should remain unaffected. "Public convenience and necessity" is a well know legislative term, but it does not appear in the Act. The Act does

not draw the line at "convenience of the public" but at "safety or security of the public"

This does not mean that the public would always necessarily suffer if the employees to whom the section applies withdraw their services. It does mean that where there are reasonable grounds for accepting the probability, or even perhaps only a possibility, that human life or public safety and security would suffer, section 79(1) comes into play.

One of the questions raised at the very outset of the proceedings was whether the employer, in its designation of the persons and positions in the list it furnished to the bargaining agent in this case, contemplated a "business as usual" situation in the event of a strike or whether it contemplated a level of operations that would not permit affairs to operate in the normal fashion. Counsel for the bargaining agent contended that the employer's proposals were made in the expectation, as he put it, that all ships would sail and planes would fly. Counsel for the employer on the other hand submitted that the employer did not seek to carry on business as usual in the sense described by counsel for the bargaining agent.

In the opinion of the Board the need for preserving the "safety or security of the public" should have been based on the premise that there would be no "business as usual" during a strike of electronics technicians. Air and water transportation should cease except for emergency purposes. This would undoubtedly result in inconvenience, possibly some hardships, but it would in the chairman's opinion, satisfy the objective of preserving the "safety or security of the

public" in that particular set of circumstances. The Board, therefore, stated that it would have designated more narrowly on the basis of an entirely different set of circumstances.¹⁰¹

The Heating Power Case

This case stands for the proposition that duties and not employees should be "designated". In essence, the Board held that during a strike an employer could only use "designated" employees to perform "designated" tasks. In the words of Mr. Roy Gauthier, the Vice-Chairman of the Board:

"The employer could not assign [designated employees] to [duties not normally performed by those employees] if that [work] was not required for the safety and security of the public".

The Supreme Court of Canada rejected this proposition in the Air Traffic Controller's case.

The Air Traffic Controller's Case

The Board followed the Heating Power case in its assessment of Air Traffic Controllers. The issue in this case was simple: how many airport personnel are necessary, within the meaning of section 79, to maintain the "safety and security" of the public. Following the logic of the Heating Power case the majority found that they must adopt that approach to the problem:

1. Determine what level of air service was necessary for public safety.
2. Decide which duties must be performed to maintain that level of service.

3. Decide how many employees were necessary to perform those duties.

The majority decided that "safety and security" of the public meant something equivalent to bodily security. They held that the only air services which were essential were those which prevented physical disasters, i.e., emergency evacuation flights, medical flights, forest-fire fighting flights, and so on. Most importantly, they held that the protection of economic interests, and public "convenience", were not part of "safety and security". Accordingly, they found that the maintenance of regularly scheduled air services was not "essential".

A minority of the Board disagreed. They argued that any interruption of air service would threaten public safety. In the words of the dissenting members (Pyle, Steward concurring):

"Air transportation is critical in this far-flung country --A paralysis of the commercial air traffic would deny public access to aviation and oblige them to remain wherever they may be regardless of the consequences."

Implicit in this position is the acceptance of economic factors as having a bearing upon "safety and security". The harm caused by being stranded without air service is an economic harm.

The minority went on to assert that since the only purpose of air traffic control was to make air traffic safe, they all must be "designated" as necessary for public safety. This position is particularly vacuous since it begs the question of the level of service which is necessary for "safety".

The Federal Court of Appeal and the Supreme Court of Canada reversed the Board's decision, following different reasoning.

Martland, J. for the Supreme Court, found the Board's decision with regard to section 79 to be to determine, at the time of designation, which employees were performing functions necessary to public safety. Once the designation has been made, he said, the designated employees could be employed during a strike in whatever manner the employer saw it to be fit, regardless of their former duties, regardless of the reason for their "designation".

These words by Urie, J. of the Federal Court of Appeal found favour with Martland, J.:

Section 79... does not impose on the Board the duty of determining which services rendered by the controllers must be maintained in the event of strike...

The sole duty of the Board pursuant to section 79(1) is to determine, before a conciliation board has been established, what employees or class of employees in the bargaining unit are, at the time at which the matter is being determined, performing duties which are necessary for the safety and security of the public.

Following this reasoning the Board must simply ask: What employees, if they were to be removed one by one at this time, are necessary to the immediate safety of the public? This method renders all employees "designated", because at the time of designation, i.e., during full air service, all air traffic controllers are necessary to the safety of air travellers.

These judgments leave one feeling unsettled. I think that the result of the Supreme Court decision is that economic interest, and convenience, are protected in the name of "public safety". I would like to see these issues clearly resolved:

- 1) What interests are to be included in the concept "safety and security" of the public?
- 2) Is the designation process designed to protect "employees" or "duties" and "services"?
- 3) If it is "employees" that are designated, and not their functions, what limits are placed upon an employer's assignment of employees to duties during strikes?

In conclusion it can be said that in the federal context, the parties are allowed to agree between themselves as to what employees are essential.¹⁰² If the parties do not agree, the Board accepts a list of the employees or class of employees in the bargaining unit who are considered by the employer to be designated employees.¹⁰³ The bargaining agent receives a copy of the list and he is free to file an objection with the Board. If he does not do so, the Board adopts the designation of the employer. If he does file an objection, the Board after considering the objection and affording each of the parties an opportunity to make representations determines which of the employees shall be designated.¹⁰⁴

A designation by the Board is final and conclusive for all purposes of the Act.¹⁰⁵ However, the Board in one case¹⁰⁶ re-opened a designation already determined pursuant to its general power of review over its own decisions in the Act.¹⁰⁷ In that case, twenty-four employees had not been included on the designation list of the employer because they were expected to be excluded from the bargaining unit under a managerial and confidential exclusion. However, the employees were subsequently included in the bargaining unit after the parties

had agreed upon the designation list. The employer made application to the Board to amend the list to include the twenty-four additional employees. The union opposed the application on the ground that the Board had no jurisdiction to alter the designation list once the parties had agreed to it or the Board had determined it.¹⁰⁸ Where the parties have agreed the Board has no authority to intervene on its own initiative. It is one thing for the Board to designate employees as essential but it is quite another thing for the Board to substitute its opinion for the agreement of the parties.

However, one might argue, that the agreement was made by the employees under a mistake of fact. It believed the employees in question to be excluded as management. Additionally, the policy of essential employees designation leans toward flexibility so that the number of employees found to be essential may be varied from time to time to accommodate changes in circumstances. And finally, as was argued in the case, the Board, under its general powers of administration:

shall exercise such powers and perform such duties not only as are conferred or imposed upon it but also as may be incidental to the attainment of the objectives of the Act.¹⁰⁹

The Board decided that sections 18 and 25 of the Act allowed it to reject its own policy decision into the process as circumstances changed. It justified the action:

The situation under section 79 goes beyond the involvement of the parties only. The purpose of that section is essentially to protect the safety and security of the public, i.e., people who have no direct part to play in the relationship between the parties.

In this case where, because of an omission, whether caused by inadvertence or negligence on the part of

the employer, certain employees were not proposed for designation as provided for by section 79(2), to hold that such a neglect on the part of the employer is fatal to the application now before the Board would jeopardize the safety and security of the public and would defeat the very purpose for which the matter of safety and security is included in the Act.

Additionally, the reasoning behind sections 18 and 25 would apply a fortiori to a situation where the parties could not agree and the Board determined the designation of essential employees. In that case the decision would be appealable without any doubt but just to the Board itself. There is no appeal to any other body within the statute. Appeal under the Federal Court Act¹¹⁰ would not generally allow the court to substitute its opinion for that of the Board. Instead the Board's decision may be quashed or a mandamus order issued to require the Board to exercise its discretion.

B. Designation of Essential Services in British Columbia

As noted earlier the notion of "designation" was first mooted in the federal Public Service Staff Relations Act. The Labour Code of British Columbia was the first in which the procedure was utilized in the case of fully fledged, public safety bargaining units. But, section 73 of the Code¹¹¹ has brought to the forefront the complexities in the right to strike in essential services area.

To strike is a legitimate tactic in a system of free collective bargaining. At some point of time, if an employer is not willing to offer to its employees what they deserve to be paid, employees must be entitled to refuse to continue working. The assumption of the Labour Code is that such a collective stoppage of work would impose sufficient harm on both sides - by reason of the loss of production to the employer and the loss of wages to the employees - that each party has sufficient incentive either to avoid the strike or to end it as quickly as possible. This shows why the law has tradititonally taken a restrictive attitude towards strikes by public safety employees. It seems intolerable to allow the parties to try to break the logjam in their own economic dispute by using a tactic which might produce physical harm - even death - for innocent individuals. But there is a growing realization that the effort to impose unduly broad bans on strike action may overreach itself and eventually become self-defeating.

For that reason, there is considerable interest in the concept of intermediate strike action: A work stoppage which imposes a disciplining influence on the parties in order to move them towards a

contract settlement; but does so without inflicting intolerable risks on the personal safety of citizens. Section 73(7) of the old Labour Code was one response to that quest. It had one full-fledged test in the strike at the Vancouver General Hospital in 1976.¹¹²

When the strike started in May 1976, the British Columbia Labour Relations Board designated certain critical, life-preserving facilities and services to be maintained during the strike.

The Minister of Labour requested that the Board exercise its powers under section 73(7)(b) of the old Labour Code to designate those services which must be offered by the hospital (through union members, if necessary) to prevent "immediate danger to life, health, or public safety". The Board held sessions, making the judgments and issuing the directives which were required. There was strike vote, strike notice, Board designation of essential services, and finally, the strike on May 4. Briefly stated these were the facts of the case:

The Hospital Employees Union (H.E.U.) represents nonprofessional employees in the acute care hospitals in British Columbia. The Health Labour Relations Association (H.L.R.A.) is the accredited bargaining agent for these hospitals, which number slightly over a hundred in the province. Their existing master agreement had expired on December 31, 1975. Negotiations for renewal began in September 1975. Mr. Bert Blair was appointed Industrial Inquiry Commisisoner by the provincial government in December 1975. After extensive meetings and discussions, he issued a report in April 1976 recommending a settlement of a one-year agreement, which would provide for an 8% across-the-board wage increase plus a C.O.L.A. clause and other changes in fringe benefits,

amounting to a total compensation package of somewhere between 13%-15%, depending on the basis of calculation. The Union executive favoured accepting that package. However, H.L.R.A. rejected it for two reasons. First of all, the monetary increase exceeded the anti-inflation guidelines, which had come into existence on October 14, 1975, and which, in the absence of some special consideration, would limit British Columbia hospital employees to an 8% increase. Second, the Provincial Ministry of Health had decreed that 8% was to be the maximum increase that the province would grant in operating funds for the hospitals, and employee compensation amounted to just about 80% of that operating budget. From the Union's point of view, once it had received the neutral's recommendation in its favour, the Executive could not politically see its way clear to settling for a penny less. Certainly, there was a deep impasse between these firmly embedded positions of the H.E.U. and the H.L.R.A.

As a result, the Union decided that it would exercise its right to strike. Strike votes were conducted in individual hospitals. The first vote was held at the Vancouver General Hospital on April 29 and 30. The margin in favour of striking was 87%, and the Union delivered 72-hour strike notice forthwith, to expire on Monday, May 3.

Was the entire operation of the hospital not indispensable for public health and safety? Certainly the administrators of the Vancouver General thought so. This is the largest general hospital not only in British Columbia but in the entire British Commonwealth as well. Its population amounts to about 10,000 people a day. The hospital has nearly 1800 beds, of which 1500 are for acute

care patients and 300 for extended care. As the major teaching hospital in the province, offering the entire range of specialized medical services, techniques and equipment (many of them unavailable anywhere else in the province) the Vancouver General asked the Board to deem the operation of the entire hospital necessary to prevent a "serious and immediate danger to life, health and public safety", and to direct all of the nonprofessional employees in the H.E.U. bargaining unit to work during their proposed strike. The Board declined to do so.

The Board listened to the arguments of the Vancouver General doctors; talked to the senior members of the paramedical and professional staff (who were represented by other trade unions), as well as to the people in the Ministry of Health; probed into the ebb and flow in the use of hospital beds throughout the year. Eventually it did agree that the 300 beds in the extended care wing must continue to be filled, but that the community could make do with just 700 of the 1500 of the acute care beds. Patients in need of immediate and truly important hospital care could have it, but wide range of less critical and elective work would have to be postponed. The medical committee of the hospital would make the decisions about how this smaller number of beds would be allocated among patients referred by the medical staff, and would make sure that any such patients vacated their beds as expeditiously as possible.

The Board having decided that the hospital (the employer) must maintain that level of serious acute care service, it was to be decided which facility or service would be maintained during the strike.

The position of the Union was as extreme as that of the hospital. In its view, none of its members should be directed to "scab on their own union's strike". The Board rejected that as well. There are over 5,000 employees at the Vancouver General. About 2,200 were nonprofessional employees represented by the H.E.U. The remainder include administrators, supervisors, professional nurses (represented by the R.N.A.B.C.), paramedical professionals (represented by the H.S.A.), and the house staff (represented by P.A.R.I.). There is also a sizeable contingent of student nurses, and over 800 medical associates of the hospital. In the Board's judgment, the basic labour in running the hospital -- cleaning, cooking, laundry, practical nursing, and administration -- would have to be performed by these other staff members, not the workers who were exercising their legal right to strike. At the same time there were a number of H.E.U. members who had the skills or experience to perform specialized tasks or operate equipment which were indispensable for patient safety, and who, as a practical matter, were irreplaceable during the strike: renal technicians, operators of respiratory machines or hyperbaric chambers, medical records staff, a few switchboard operators, and so on. The Board concluded that a total of 100 members of the H.E.U. bargaining unit should be directed to work during the strike. In this area, the Board's policy was to err on the side of safety, to ensure that there would be someone in the hospital to operate any equipment or perform any functions that were needed. But the instructions to the union members were that they were to work only on those vital tasks which

required their designation, not to fill in their time by performing labour that other people could be conscripted to do.

What was actually happening? First of all while the bargaining unit did go on strike, all of the designated workers went to work as directed. While it is not easy, it is feasible to maintain a carefully modulated strike of public safety employees.

What was the impact of the work stoppage on the bargaining impasse itself? Certainly the strike generated a great deal of pressure for settlement. Interestingly, this pressure had its most immediate impact on the Union. The members of the H.E.U. saw that a strike was not just an idle threat. It was an unattractive reality when it was actually experienced, with regular earnings replaced by meager strike benefits. As each hospital unit saw that its sister hospitals would be out of work for a period of time without a settlement, the strike vote margin at other hospitals dropped steadily. The Union leadership quickly went to Victoria to seek ways and means of ending the strike in the dispute as quickly as possible, to minimize the damage to its members and to avoid the political impact upon the Union itself. The executive looked eagerly for some means of compromise, some route out of the impasses.

On the employer side, the impact of the strike was much more complex, if only because the effective exercise of employer authority is splintered in the hospital industry. The hospital administration, which actually operates the Vancouver General Hospital, was terribly anxious to see the dispute settled and the strike ended, because it was experiencing directly the impact on its normal operation and the drain on the rest of its staff. But H.L.R.A., the professional bargaining

arm of all the hospitals, was not prepared to sign a long-term agreement to resolve this short-term crisis until it could see where the money was coming from. Eventually, the pressure had to build on the Ministry of Health, which pays the bills for hospital care. After a great deal of scrambling behind the scenes, the Health Minister conceded that he would have to fund a contract settlement even if it did exceed the anti-inflation guidelines. The Union acquiesced in the statutory appointment of an arbitrator to review once more the recommendations of the Industrial Inquiry Commission, although it had already embraced the later. The arbitrator largely ratified the Blair Report for the contract year, but also decided that this should be extended into a two-year agreement with a reopener only on wages for the second year. Several months later the Anti-Inflation Board ruled that the H.E.U. had no claim for special consideration under the anti-inflation guidelines, and that this settlement must be held to the strict 8% guideline level.

The impact of the limited strike did play a major role in breaking the logjam.

Criteria for Essentiality

What criteria should be satisfied before the Labour Relations Board may be requested¹¹³ or directed¹¹⁴ to designate particular services to be essential? What facilities, productions and services, whether public or private, have sufficient impact on the public interest to warrant government intervention in the collective bargaining process?

Section 73(1)(b) of the Labour Code employs a solitary test of the seriousness of the withdrawal of services. It must result in an "immediate and serious danger to life or health".¹¹⁵ A similar test is required by section 8(a) of Essential Service Disputes Act which requires that "an immediate and serious danger to life, health or safety exists or is likely to occur." In addition, section 8 includes two other reasons for the Board to designate essential services. Section 8(b) requires "an immediate and substantial threat to the economy and welfare of the Province and its citizens" and section 8(c) requires a "substantial disruption in the delivery of educational services". Section 8, therefore, permits a much broader discretion.

It will be helpful in examining these criteria to categorize the services provided by public employees:

- Category 1) essential services - fire, hospitals and police - where a strike immediately endangers public health and safety;
- Category 2) intermediate services - transit, education, sanitation, water and sewage - where short strikes may be tolerated;
- Category 3) non-essential services - streets, parks, housing, welfare and administration - where strikes of indefinite duration could be tolerated.¹¹⁶

It should be noted that all these functions are potentially under the Essential Service Disputes Act by virtue of the schedule which includes all provincially employed services.

There is little doubt that the truly essential category of fire, hospital and police employees meets the tests of protection of the public set out in section 73(1) of the Labour Code and section 8(a) of

the Essential Service Disputes Act.¹¹⁷ The problem in British Columbia derives from the necessary determination of whether a particular union meets the definition of "fire fighters union", "health care union" and "policemen's union" under s. 1 of the Essential Service Disputes Act. These definitions are particularly important to the determination of whether a union can request binding arbitration under section 6 of Essential Service Disputes Act because a union which does not fall within the definition does not have the option of requesting arbitration. My thesis is that in truly essential services the right to strike should be denied and arbitration should be the available process for impasse resolution, assuming that cooling-off periods and mediation have been unsuccessful. This is particularly true of the fire and police unions where a higher percentage of the employees are essential. The hospital unions support staff may be permitted to strike in certain circumstances¹¹⁸ but health care unions generally have been included in this category because of the possibility of strike by nurses associations.

To a lesser extent the services included in the second category - transit, education, sanitation, water and sewage, have an impact on the public welfare. Generally a strike in these areas if it continues long enough to become serious would lead to a designation under section 8(b) and (c) of the Essential Service Disputes Act:

an immediate and substantial threat to the economy and welfare of the Province and its citizens; or

a substantial disruption in the delivery of educational services...

The criteria set down in clauses (b) and (c) have not yet been tested. Nor are there any British Columbia cases where essentiality of these intermediate services has been determined.

Some American jurisdictions, notably Pennsylvania, have tested the essentiality of intermediate services but because the statute of that state does not include the economy and public welfare test as a ground, the essentiality of intermediate services was tested on the basis of criteria similar to those in section 8(a) of the Essential Service Disputes Act. The Pennsylvania Public Employee Relations Act requires that in the event of a work stoppage the state should seek injunctive relief if there exists:

a clear and present danger to the health, safety or welfare of the public¹¹⁹

"Clear and present" has been found to mean that the threat is real or actual and that a strong likelihood exists that it will occur. It is submitted that the wording in section 73(1) of the Labour Code or in section 8(a) of the Essential Service Disputes Act is not markedly different. The phrase, "danger to the health, safety or welfare of the public" was examined in Armstrong School District v. Armstrong Educational Association.¹²⁰ In this case the court supported the notion that the public should be expected to bear some inconvenience as a result of the strike:

... it seems to [the court] that the 'danger' or threat concerned must not be one which is normally incident to a strike by public employees. By enacting [Para. 1003] which authorizes such strikes the legislature may be understood to have indicated its willingness to accept certain inconvenience, for such are inevitable, but it obviously intended to draw the line at those which pose a danger to the public health, safety and welfare.

In New Brighton Borough Sanitary Authority v. Plumbers Local 115,¹²¹ a struck sewage plant had been discharging untreated raw affluent into a river used for purposes of recreation and as a source of drinking water. Scientific evidence tendered, indicated that there was a "good possibility" that the pollutants would cause disease. The strike having lasted for forty-five days, the court held that there was a clear and present danger to the health, safety or welfare of the public.

In response to the argument by the defendant union that there had been no complaint by the public about the drinking water, the court indicated that the test should be used for prevention of such dangerous circumstances:

we do not believe that the legislation intended that the danger must become a reality before action can be taken to protect the health and safety of the public.

On the other hand, in the Armstrong case,¹²² the court was concerned about interpreting the test too freely:

The proper purpose of an injunction is to avert present danger, not to prevent danger which may never occur at all or which can only occur if it does occur at some future time before which the grievances concerned can reasonably be expected to be settled.

Certainly the difference between the two is to be found in the nature of the work stoppage and its impact on the public welfare. In the New Brighton case the threat of disease from the sewage was immediate and real. By contrast the threat in the Armstrong case derived from the fact that if the strike continued another twenty days, approximately, the school board would not be able to schedule enough instructional days to qualify for a state subsidy. This is not

immediate inasmuch as it is a predictable occurrence on a precise date in the future and it is not a danger in the same sense as the threat of disease because it is a purely, economic consequence and a strike rightly administered is designed to be an economic weapon. It should be added that the court indicated that if the strike continued through the twenty days necessary to lose the subsidy that would constitute a threat substantial enough to meet the test and qualify for injunctive relief. This is an example of the American courts applying the test of a serious danger to health, safety and welfare of the public to an intermediate service. It is submitted that this test should be used for only the most real threats to society, and a mere economic damage done to a school board should not fall into that category.

The reasoning in Hazelton Area School District v. Hazelton Education Association¹²³ is to be preferred. There the court determined that the legislature must have contemplated a cessation of educational services and school closure when it allowed the teachers to strike. Therefore they must have anticipated greater inconvenience than that associated with a strike. One can go in further. The legislature must have known that in granting the right to strike to teachers, it opened up the possibility that too few instructional days would be scheduled to qualify for the subsidy. Therefore, such consequences were within the legislative intent and need not be found to create a real danger to the public. To decide otherwise would open up the opportunity to characterize, any discomfort rested on the public as a result of a strike in the public sector to be a threat or danger to the public and therefore subject to injunction in Pennsylvania or to

designation as essential in British Columbia. This renders the grant of the right to strike an empty tool in the hands of the union because every time the strike hurts, the remedial legislation is employed to return the union to work.

This atrophy of the right to strike in the public sector is attenuated by the addition of two new tests which may be used to invoke the Essential Service Disputes Act. "A substantial disruption in the delivery of educational services" should not be classified as an essential service. By setting the standard of essentiality too low one will run the risk of having all public sector employees found to be essential, thereby effectively removing their right to strike. But on the face of the Essential Service Disputes Act, that appears to be its intent. Virtually all public employees are included in the schedule and consequently provide their services after they have been designated essential. It is difficult to envision a work stoppage of any kind which would not result in a threat to the economy and welfare of the Province and its citizens, the criteria required in section 8(b) of the Essential Service Disputes Act. The threat could be defined as immediate and substantial in a prolonged strike and the Act might be invoked.

It is within the intermediate service category that abuse of the designation process may arise. In the truly essential services right to strike is not very expansive. But in this category no one assumes that employment in services such as transport or sewage will deny him the right to strike. If a service does indeed appear to be an essential part of the community the tests in section 8 of the Essential

Service Disputes Act will allow its designation as essential. It is submitted that the test should not be treated lightly so as to include services which are beneficial but not essential.

Category three, the non-essential services requires little treatment here. It would only be in the most extreme cases that a cessation of work by one of these unions would threaten the community. However, in the event of such an occurrence the same tests might be applied as those applied to intermediate services. In general, however, the right to strike should be unqualified.

The designation of essential services is only a means of restricting a bargaining unit's right to strike in order to assure basic standards of safety. However, there is no indication that it speeds or aids the resolution of the dispute, and in the final analysis it may have a negative influence on the relationship between the parties. But it does ease the burden on the general public during a strike.

The designation process where it has been used has been satisfactory. But there are still some imperfections to be dealt with. It interjects another agreement to be negotiated between the parties before the contract issues are dealt with. There are difficulties in deciding whether to designate persons or functions.

Additionally there is the problem of determining the appropriate measure of inconvenience so the employer does not complain of threats to the public safety and the union does not complain of over designation. Caution should be exercised that the designation process is not overused. The result would be a degeneration of the process

into a form of quasi-injunction. To the employee, a back-to-work order has the same force whether it is issued by way of designation under the Essential Service Disputes Act or by way of injunction.

It is difficult to apply the designation process to truly essential services like fire and police unions and to a lesser extent the hospital unions because of the homogenous nature of the employers and because of the seriousness of a work stoppage. The greatest potential for the application of designation is in the intermediate services where the right to strike should be readily granted but where some aspects of the functions, if interrupted, would work a real hardship on the general public.

C. The Nonstoppage Strike and the Graduated Strike

The nonstoppage strike and the graduated strike¹²⁴ can be two methods of containing harm caused by strikes. Unlike the designation of essential employees and essential services, these two methods have not been adopted so far. However, it would be worthwhile to discuss them in order to see what possibilities they have to offer.¹²⁵

It is reasonably clear that in public employment, barring strikes altogether in order to solve problems created by work stoppages does not work, yet in most jurisdictions legislation of the strike is not a real possibility. The strike as it is known in the private sector would not function in the same way in the public sector and does not fit the peculiarities of public collective bargaining - diffuse responsibility and the consequent need for longer periods of time to reach settlements than in the private sector.

In a nonstoppage strike operations would continue as usual, but both the employees and the employer would pay to a special fund an amount equal to a specified percentage of total cash wages. Thus, while both parties would be under pressure to settle, there would be no disruption of service. In a graduated strike, employees would stop working during portions of their usual work week and would suffer comparable reductions of wages. Here, there would be pressure not only on employees and employer but also on the community; however, the decrease in public service would not be as sudden or complete as in the conventional strike.

The Nonstoppage Strike

Under Professor Bernstein's proposal, a public employee union would be free to declare a nonstoppage strike after all other bargaining procedures have failed to produce a settlement. Employees would be obliged to continue to work full time but would forego a portion of their take-home pay. He suggests that, initially, ten percent would suffice. This money would be paid by the public employer directly into a special fund. In addition to paying the equivalent of regular wages, the employer would also put into the fund an extra amount equal to what the employees have given up; this latter sum would constitute a loss to the employer. The union would have the option periodically to increase the amount of foregone wages and employer payment, perhaps by increments of ten percent every two weeks. The public employer would have the option to require the union to switch to a graduated strike. If the employer did this, the employees would continue to lose the same rate of pay, but the employer would forego services rather than pay out additional funds.

That exercise of the option to initiate the nonstoppage strike and increase the percentage can be limited to the union. The union has little other leverage, since the conventional strike would still be prohibited. Also, were the public employer able to initiate a procedure under which employees would work without pay, questions of involuntary servitude might arise. In any event, the employer would still have the strategic bargaining advantage of instituting, after a deadlock in negotiations, certain changes in pay or other terms of employment which have been offered to the union and rejected.

The nonstoppage strike would accommodate the peculiarities of public labour relations. It would attract the attention of and put pressure on both the public officials who deal directly with the union involved and other members of the executive branch whose own budgets might be affected, the local legislature, and state officials. And while a nonstoppage strike would not precipitate a crisis, its pressure would be steady and increaseable. Thus, it may provide the necessary incentive for the various bodies of government to act, while allowing them the time they need to do so effectively. Moreover, it does not disturb consideration of the merits of the dispute with the hysteria now typical of illegal strikes.

While nonstoppage strikes would create additional expense for public employers - many of whom are hard pressed as it is - they should also put an end to the present practice of paying the employees at overtime rates when a strike ends to reduce the backlog of work accumulated during the strike. Also, hopefully, the expense should be only temporary, and, the money will not go to waste. In any event, the price does not seem too high to pay for a substantially improved process of bargaining.

Nonstoppage strikes offer significant advantages to employees, perhaps even more than would legalization of conventional strikes. In the first place, their rate of loss of pay would be lower at any given time if there were an all out strike. For employees with mortgage and other installment obligations to meet, this continuity of income is highly desirable. And, to the extent that the nonstoppage strike encourages more responsive bargaining without any stoppages, the total

loss of pay may be less. In addition, in a full scale strike, especially one of long duration, the employer is not liable for fringe benefit payments. Thus, life insurance policies may lapse or require payments by employees at a time when their income is interrupted, and group medical care insurance may have to be kept in force at the higher-cost individual rates. In a nonstoppage strike these benefits should continue.

Second, in actual strikes employees run the risk of losing their jobs. A common sanction in illegal strikes is to fire strikers. In the private strike, too, replacement of economic strikers has long been permitted, and while there is no data on public employer activity of this sort, it is highly probable that permanent, nondiscriminatory replacement of strikers will become a feature of the legal public employee strike. In nonstoppage strikes, of course, jobs would be secure. Moreover, the absence of even temporary replacements would eliminate a traditionally potent source of violence, which everyone has a stake in averting.

Third, long-run employee and union interests are best served by a method that is legal and discomforts the community as little as possible. Union leadership knows that unpopular strikes lead to distasteful legislation. And, the strikers, even if they feel their conduct justified, often must incur the disapproval of the community. A peaceful method of pursuing demands seem clearly preferable.

The public employer would need some means of assuring union and employee compliance with ground rules. Obviously, working full time for less than full pay might encourage some employees to slow down - a

favoured device in strike-ban jurisdictions. Two procedures would minimize violations. First, the unions must see that it is to their advantage to persuade members that it is to their advantage to abide by the rules. That is, all must be made aware that the "struck" employer is indeed under strike-like pressure. Second, the statute should provide for an expedited unfair labour practice procedure to bear and determine charges of a slowdown or improper absence. However, these areas are so sensitive and have such a potential for emotional overreaction that employer discipline of employees should be limited to those cases where impartial hearing officers make a finding that the improper action has taken place.

One serious problem with the nonstoppage strike is finding a suitable use for the special fund to which the public employer and employees have contributed. In order to insure that the loss will actually discipline the parties conduct in bargaining, the fund would have to be placed effectively beyond their recapture. Professor Bernstein recommends that the fund be put at the disposal of tripartite Public Purposes Committee in which respected community figures outnumber the total number of union and government members. This committee would be charged with the task of applying the money to publicly desirable, preferably short term projects that are not currently in the public budget - creation of scholarships or construction of public recreation facilities, for example. Certainly public employees would get little direct advantage from such a use of the money. Moreover, since these projects would not be currently funded, the committee's action would not discharge any of the

government's present obligations; and since such contributions would occur irregularly, the government could not count on being relieved of any future burdens. Consequently, given public officialdom's dislike for losing control over money, this use of the funds should also provide an incentive for public employers to bargain.

Although nonstoppage strikes were initially proposed for use in the private sector, they have had little acceptance by private parties. There are a number of reasons for this. First, although strikes have been the subject of some academic disapproval, they remain an acceptable device in the private sector. There has been, therefore, little real pressure for a substitute. Second, for a nonstoppage strike in the private sector to be as effective as the conventional strike, the contributions of the employer to the fund must be geared to the amount of profits it is spared from losing. Because of the obvious difficulty of calculating this figure, achieving a formula for employer contribution which is satisfactory to both parties could easily be more formidable an obstacle than resolving their basic economic differences. Third, any statutory imposition of a nonstoppage plan would, while solving in a crude way the complexities of computing the formula, raise the claim by employers of deprivation of property without the process and the analogous employee claim of involuntary servitude.

The Graduated Strike

A nonstoppage strike may be insufficient to induce responsive bargaining. More direct pressure may be required, and the graduated strike would provide it.

In a graduated strike the union would call work to a halt in stages. During the first week or two of the strike, the employees would not work for half a day; during the next period, if the union so chose, they would not work for one full day per week; and so on, until they reached a stage short of total stoppage. Employees' take home pay would be cut proportionately.

The effect of a graduated strike would be to give the public a taste of reduced service without the shock of total deprivation. This would set in motion the political machinery. Citizens would make complaints about their inconvenience to their elected representatives.

Local officials, both executive and legislative, would, thus be under pressure to do something, but would nevertheless be able to consult with each other and with the officials at higher levels of government. They would therefore be able to negotiate with the union in a reasonably co-ordinated and authoritative manner. Free of resentment and of posturing over illegality, the complicated political process of sorting out preferences between higher costs and fewer services and among competing demands could then work itself out.

To ensure that employees really suffer proportionate loss of wages would require, first, that they be unable, after the strike, to reduce backlogs at overtime rates. This could probably be accomplished simply by a limitation on overtime pay for some period following the strike.

It does not seem necessary to do more to the extent the employees ultimately recoup their lost wages, the public will have the lost service restored; and in any case it is, unlikely that either sides losses will ever be totally recovered. Second, it would be necessary that the shutdown not exceed the announced level. While enforcement of this requirement would not be easy, it would probably be satisfactory for an impartial body with an expedited hearing procedure to determine the actual extent of the employee stoppage and to mete out appropriate penalties, including reduction of wages. In addition, there would be another strong inducement to proper observance of the ground rules: union and employee recognition that they have an effective, fair, and acceptable weapon to encourage good faith bargaining.

The nonstoppage strike and the graduated strike would work best in tandem. Because a nonstoppage strike would cause the public less disruption, it should perhaps be required that unions try it for at least four weeks; they would then have the option of instituting a graduated strike. However, since both types of strikes are certain to put pressure on the public employer, the employer should be given some limited options. If it feels itself financially hard pressed, it can select the graduated strike, which would result in no additional expense. If the employer believes that the service performed by the employees is so essential to the public that cessation is intolerable - for example, fire and police protection - it should have the opportunity to persuade an impartial, preferably expert, tribunal that the services are in reality so indispensable. If successful, it could limit the union to the ever more expensive nonstoppage strike.

CHAPTER IV

DISPUTE SETTLEMENT PROCEDURES

Even more than the definition of essential services, the manner of settling disputes in these services raises some perplexing questions.

Because employers and employees have both common and divergent objectives, conflicts of interest inevitably arise from time to time. When these conflicts occur, labour and management resort to collective bargaining, which is the accepted procedure for resolving such differences.

This part will deal with the analysis of dispute resolution procedures in essential services, against the backdrop of free collective bargaining. The challenges to the procedures are obvious as statutes seek to protect free collective bargaining and partly because this area is characterized by (1) political and economic environments that produce disputes of greater intensity and complexity, (2) highly sophisticated bargaining representatives who are able to pursue aggressively the interests of their organizations through the various stages of dispute resolution, and (3) more assertive union members, management negotiators, politicians, and public interest groups.¹²⁶

Two important assumptions underlie the analysis: (1) the factors causing collective bargaining impasses are diverse, and (2) there is no "one best way" for resolving all types of disputes.¹²⁷

A. Fact Finding

Fact finding is a procedure in which hearings are held and evidence is received by a neutral third party who makes recommendations as to the most equitable resolution of the dispute. The recommendations of the fact finder may either be accepted by the parties as a reasonable solution or be used by them as a basis for further direct negotiations. In a sense, fact finding is little more than mediation with written recommendations. The procedure is usually designed to include publication of the fact finder's report if the parties do not adhere to the recommendations and cease negotiating in good faith. Publication is said to generate compliance and put pressure on the parties to bargain.

There are provisions for fact finding in section 5 of the Essential Service Disputes Act.¹²⁸ Under the terms of the statute, the fact-finder reports to the parties, the agency and the minister. Only the minister may publish or distribute a fact finder's report.

Literature describing the process of fact finding is not to be found in British Columbia. Here fact finding has been discounted as a step in dispute resolution procedure. The main criticism is that later arbitration merely becomes an instant replay, and arbitrators are uncomfortable with having to second guess another neutral.¹²⁹

There may be ways of designing an important role for the technique, however, under alternate arbitration schemes. In the U.S.A., fact finding prior to arbitration has proven to be highly successful in reducing the number of issues going to arbitration. For example, Massachusetts and Iowa legislations provide for mediation,

followed by fact finding and then arbitration. Final offer arbitration is used, but the arbitrator is allowed to select between either party's final proposal as well as the recommendations of the fact finder. In Iowa, results have so far been encouraging. Studies show that where the parties have used fact finding, an average of 3.9 issues go to arbitration. Where fact finding is not used, 6.2 issues are arbitrated.¹³⁰

A 1965 statute which gave Massachusetts' municipal employees the statutory right to bargain was amended in 1973 to provide final offer arbitration by package for police and fire fighters, effective July 1, 1974 for a three year trial period. The period was extended for another two years in June 1977 but included these revisions - the parties could waive fact finding; if fact finding were not waived, the arbitrator could select from either side's final offer or the fact finder's recommendations; the parties could choose a single arbitrator rather than a tribunal and the scope of arbitral issues was reduced.¹³¹

Lipsky and Barocci analyzed the Massachusetts experience over the period 1975 to 1977.¹³² They found that slightly less than 7 percent of negotiations (6.6 percent) ended with an award. Both mediation and fact finding were extensively utilized by the parties prior to arbitration. They ascertained that the fact finder's recommendations heavily influenced the awards and they concluded that, while final offer arbitration may have resulted in reliance on impasse procedures, it did not result in a large number of cases being resolved through an award.

The Iowa legislature passed a comprehensive statute in 1974 which provided the right to organize and bargain collectively for most public sector employees (including teachers) across the state and made provision for issue-by-issue, final offer arbitration. The arbitrator cannot mediate but can select between the parties' final positions or the recommendations of the fact finder. The legislation calls for mediation followed by fact finding followed by arbitration. The latter may be a single arbitrator or a three-man board. The results for the first two years (1975-76 and 1976-77) have been reviewed by Gallagher and Degnetter.¹³³ They found, first, a strong "filtering effect", i.e., the proportion of disputes taken to each successive step decreased substantially. Very few cases went to award - 3.6 percent of negotiations in the first year and 3.9 percent in the second year. Therefore, the Massachusetts and Iowa results are encouraging with respect to the efficacy of final offer arbitration used with fact finding, particularly in comparison to other forms of dispute resolution.

Arbitration usage rates, as do strike rates, depend to a degree on the relationship between the parties and the environment within which they bargain. It is clear that in some relationships, arbitration would be used frequently just as in some cases the strike weapon is used frequently. A distinct disadvantage with regard to arbitration is that negotiations with the strike threat removed tend to be drawn out. This problem is not indigenous to arbitration, however, and can be overcome by placing the parties, including third party neutrals, under a rigid time frame for negotiations. Indeed, there are many

suggestions that could be made to assure that bargaining under arbitration operates effectively. Also, procedures are available now which would result in acceptably low usage rates across a sector. An effectively designed system of final offer arbitration, from the evidence available, would probably lead to all but 5 to 10 percent of all disputes in a sector being resolved by negotiations; an effectively designed system of conventional arbitration would probably lead to all but 10 to 25 percent being resolved short of an arbitration award. These rates are comparable to the frequency of strike usage.¹³⁴

The Iowa procedures bear very close scrutiny in this regard. A possible policy thrust in dispute resolution in the future may be made by bringing fact finding and arbitration together more closely than in the past. Giving the third party (under final offer conventional arbitration) the explicit opportunity to select from the fact finder's recommendations would seem, from the Iowa experience, to put maximum pressure on the parties to negotiate their own agreements.

B. Interest Arbitration

Prolonged conflicts between employers and employees, and strikes and lockouts in areas where services are regarded as essential can cause immense danger to life, health and safety. This fear puts excessive pressure on the collective bargaining system.

If, in the interests of the public, the right to strike and lockout is to be denied in these essential services components of the British Columbia economy, then the law must provide an alternative. The alternative suggested in almost all proposals to end the right to strike is arbitration of industrial disputes.

Anderson contends that interest arbitration is a realistic alternative which "neither impairs the effectiveness of collective bargaining, nor distorts the democratic process"¹³⁵ Moreover, "arbitration balances the relative strength of the parties and places the small union or small employer on an equal footing with a larger bargaining counterpart".¹³⁶

This part presents an analysis of the decisions along a number of dimensions; inter alia, the time within which arbitration occurs and the criteria relied upon by the arbitration boards. Wherever relevant, the differences according to the nature of the award (i.e., according to the mentioned categories) have been noted. The discussion is based almost entirely upon information that could be collected from the awards. Sometimes, the desired information was simply not to be found in the arbitrator's report. However, it was possible to discern a number of trends during the period under examination and useful conclusions were made.

1. The Arbitration Board

The composition of the boards of arbitration varied significantly according to the category of award considered. The options here are, of course, either: 1. a single arbitrator agreed to by the parties, or appointed by the minister; or 2. a tripartite board composed of a nominee of each party and a neutral chairman, the chairman being selected by the nominees or appointed by the minister.¹³⁷

Examination of the "voluntary arbitrations" showed tripartite boards were used to a greater extent, or in approximately 30 percent of the cases. All but three of the "section 73 awards" were decided by single arbitrators; the three exceptions were in matters involving private hospitals. All but one of the "Essential Service Disputes Act awards" were heard by tripartite boards.

In interest arbitration there is a valuable role to be played by the nominees, even more so than in rights arbitration. This was discussed in Hospital Employees Union, Local 180 and Health Labour Relations Association of British Columbia¹³⁸ by Chairman Munroe:

Secondly, the role of the nominee in ensuring relevancy of the finished product is potentially more critical in "interest" arbitrations than in "rights" arbitrations. In both classes of arbitrations, the neutral chairman is brought into a relationship with which he likely has little familiarity and, in a relatively brief period of time, is expected to provide the "correct" answer to a dispute or series of differences. But the arbitrator's task in "rights" arbitrations is generally easier. That task is to take terms and conditions which have already been agreed to - i.e., the collective agreement - and apply them to a particular set of facts. The "interest" arbitrator, however, is actually asked to create the terms and conditions. Depending on the number of issues outstanding that can be an awesome responsibility, especially when one considers that the working conditions to be imposed will govern the parties for a period of one, two or even three years. The neutral chairman can be greatly

assisted, and thus the system has a better chance of working in fact as well as on paper, if his colleagues on the arbitration board know, with some precision, the intricacies of the employment relationship and the actual impact or effect of the parties' respective proposals.

The foregoing comments become even more relevant where the parties rely on different arbitrators to resolve succeeding collective agreements - this seemed to be occurring for all but a few collective bargaining relationships. Also, where nominees sit on the board, there is a greater chance for feedback and accommodation during the course of the arbitration. The chairman can "try out" contemplated solutions on the parties intimately familiar with the industry, and at the same time there can be communication between those presenting the case and their nominee. What the board perceived as unrealistic proposals would hopefully be modified and there would be a greater likelihood of further evidence being presented where the chairman was uncertain about suggested terms of the collective agreement.

Tripartite arbitration boards should therefore be encouraged in interest arbitration, notwithstanding the probable additional expenses involved. The role of the nominee should be limited, however, to participation at the hearing and discussion of the evidence. The decision of the majority should be binding on the parties. This would hopefully eliminate delays resulting from the practice of attaining concurring opinions and from disagreement over the wording of awards.

2. Delay

An inherent characteristic of the interest arbitration process in British Columbia seems to be lengthy time lags between expiry of the

collective agreement, and eventual settlement of the new contract.¹³⁹

(i) Time lags occurred with voluntary arbitrations. Hearings were generally not held until 29 weeks after the collective agreement had expired, and awards were not handed down until 34 weeks subsequent to the expiry date.

(ii) In the case of section 73 awards, the first arbitration hearing was not held until 27 weeks after the previous collective agreement had terminated.¹⁴⁰ There generally ensued a further period of 6 weeks before the arbitrator's report was released,¹⁴¹ resulting in a total delay of 33 weeks.

(iii) The total time period for resolution of Essential Service Disputes Act awards was shorter than either of these, being an average 27 weeks. The delay between expiry of the collective agreement and the date of the first arbitration hearing was "only" 17 weeks - a significant reduction over the earlier two categories. However, it seems that arbitrators in these disputes deliberated for 10 weeks before handing down their awards.

Long delays between expiry of one collective agreement and settlement of the next one are obviously undesirable. The fact that new terms remain unresolved cannot help but breed worker dissatisfaction with the system, and may ultimately lead to illegal strikes. Where a collective agreement is to have a term of only one year (as was the situation in many of the arbitrations) the mentioned figures mean that employees did not have a contract until shortly before the date on which they were legally able to give notice to bargain for the

subsequent contract. It is usually possible to calculate wages and fringes payable from the effective date of a collective agreement. There was not sufficient information in the arbitrators' reports to ascertain reasons for delay, except for a very limited number of disputes. In many cases there had been attempts at mediation subsequent to expiry of the previous contract, and one might reasonably speculate the parties were negotiating to some extent. Part of the reason for delay might be unavailability of preferred arbitrators or inability of all persons involved to arrange mutually acceptable dates for the hearings. The difference between the voluntary arbitrations and section 73 awards and Essential Service Disputes Act awards is noteworthy. When one considers as well the number of issues involved, prima facie it would seem there is an increasing tendency, especially among health care unions, to rely on arbitration. They are negotiating fewer issues to the point of settlement and going to arbitration sooner. Perhaps, the arbitration boards in these disputes are requiring more time to make their awards.

In their study of arbitrations under the British Columbia Public Schools Act, Thompson and Cairnie maintain that the cumulative effect of imposing a series of strict deadlines on the parties appears to encourage bilateral settlement.¹⁴² Deadlines are seen as a source of pressure on the parties to settle their differences. There are many aspects of public schools arbitrations which are unique, however, and it is here suggested that time limitations may only encourage bargaining when the parties seek to avoid their party settlements. In the context of essential service disputes, where there does not appear

to be a high distaste for arbitrated agreements, it is difficult to predict the result of the time limit on bargaining. The effect might be to stifle bargaining and eliminate attempts at eleventh hour settlement as the parties prepare for arbitration. On the other hand, there is no doubt that a maximum time period within which arbitration awards must be handed down could be prescribed. A provision similar to section 100 of the Labour Code of British Columbia should be introduced as part of the Essential Service Disputes Act setting a specific time limitation.

3. Criteria Relied Upon by Arbitrators

Interest arbitration has developed as an adjudicative process. This assumes that there will be standards upon which a decision will be based, and that evidence and arguments will be prepared in anticipation of those standards being applied. The development and application of objective standards, generally referred to as criteria, prima facie would seem to be a relatively straight forward exercise. In practice, it becomes one of the most nebulous aspects of the arbitration process. One industrial relations specialist has said:

" . . . the forlorn search for an elusive set of criteria that are supposed to provide the unchallenged basis for acceptable awards decreed by a third party."¹⁴³

There is a question which must be answered before selecting the criteria. The question is, what is the role of arbitration and what should it achieve? This question must be answered where no criteria have been specified in the governing legislation. Even where the legislature gives some indication of the appropriate criteria, the

statutory directive is often so general as to be of only limited assistance to both the parties and the board of arbitration. For example, Kenneth P. Swan advocates the need for arbitrators to develop:

" . . . a generally acceptable structure of meaningful criteria which may be applied scientifically and consistently and which will produce in general results perceived to be just and acceptable to both the parties to the dispute and society at large."¹⁴⁴ (emphasis added)

Other arbitrators have rejected concepts of "justice" and "fairness" and attempt to duplicate the market situation thereby reaching an award figure which would have prevailed in the absence of compulsory arbitration by the use of free collective bargaining. Many arbitrators become concerned solely with questions of comparability.

The term "normative" arbitration describes attempts by arbitrators to impose a "just" solution on the parties, taking into account the merits of the case rather than economic powers of the parties or the acceptability of the terms to both sides. "Accommodative" arbitration results in an award which embodies substantially the terms which the parties themselves would have reached, bearing in mind their bargaining strengths. The main objective of accommodative arbitration is to find something close to a mutually acceptable solution; the award is a pragmatic attempt to resolve the dispute, to avoid a strike or to induce a return to work.¹⁴⁵

Not all academics are in agreement that criteria are a necessary part of the arbitration process. One critic has argued that the chief purpose of contract arbitration is to resolve a basic and urgent dispute concerning the terms of a future relationship, rather than to

"offer clear guides for future arbitration decision". He asserts there are some situations in which objective standards are not evident, and the fact the arbitrator was not provided with satisfactory criteria to demonstrate, he decided correctly does not mean that he failed to exercise sound judgment - or rationality.¹⁴⁶ Others argue that there are limits to be placed on the use of criteria:¹⁴⁷

I believe there are limitations to providing a rationale for the money decision. Clearly the arbitration board should specify that mandatory criteria have been considered when such are part of the legislative mandate. Indeed, it is not unreasonable to indicate the stronger factors at work in shaping the board's decision. Beyond that point, analysis is foolhardy. The exact outcome is a complex determination representing a mire of customary criteria plus trade-offs of contractual components made in the executive session. Detailed analysis, then, is extremely difficult. Further, it can be counterproductive. Detailing of the trade-offs can result in honourable positions becoming ammunition for political attacks on one or both parties. It is important for arbitration boards and the courts to recognize the distinction between adherence to criteria and the potential damage of over exposition.

Most writers seem to be of the opinion, however, that criteria are desirable, and that they should fulfil two key functions: (1) allow the arbitration board to come to the "correct" result; and (2) assist the parties in marshalling the appropriate evidence and presenting their case.

The January 1974 to November 1983 issues of the Labour Research Bulletin¹⁴⁸ contain summaries of 87 interest arbitrations resolving a term or terms of collective agreements between employers and trade unions subject to the Labour Code of British Columbia. From these summaries only those awards were selected, for this study, which

dealt with bargaining disputes in essential service industries. The awards so chosen fall into three separate categories:

- (a) arbitration awards pursuant to agreement of the parties, including terms of the collective agreement (voluntary arbitrations),
- (b) arbitration awards pursuant to section 73 of the Labour Code (section 73 awards), and
- (c) arbitration awards pursuant to section 6 of the Essential Service Disputes Act (Essential Service Disputes Act awards).

Summaries of the reasoning found in the awards examined are mentioned in an attempt to provide an overview of the general criteria which have been relied upon by British Columbia arbitrators. A number of awards decided the question of wages almost exclusively on the basis of comparison with other employer-employee relationships¹⁴⁹ and there was little or no analysis of the appropriate criteria. For many non-monetary issues, the reasons for an award depended upon factors unique to the parties involved.

(i) Arbitration Awards Pursuant to Agreement of the Parties.

Vancouver Police Board and Vancouver Policemen's Union
(Blair)

The arbitrator made his recommendation in respect of wages in light of all ". . . of the evidence brought forward and the submissions made by those representing the negotiations, including the final

positions taken by each on the matter of remuneration" and in the light of this:

The task confronting the arbitrator is by no means an easy one. In making recommendation on wages, he must give cognizance to the fact that the Province of British Columbia is presently passing through a somewhat difficult economic situation and that large segments of the province's private sector are experiencing poor markets, falling earnings, layoffs and shutdowns.

At the same time, the arbitrator has also to be mindful of what has been happening to our cost of living for some time now - a matter of increasingly serious consequence to a very large segment of our society. The highest in Vancouver of any Canadian city, and it seems that the end to this unhappy situation is not yet in sight.

In addition, the arbitrator must bear in mind the trend and pattern of wage settlements in this area in both the private and the public sector and he must also take a look at what has been happening in this respect this year to police forces not only in British Columbia, but elsewhere in Canada as well.

While looking at these various aspects of today's situation, one has also, in the arbitrator's view, to keep before him the principle of maintaining the Vancouver police force where it rightfully belongs, namely, on the top level among Canada's police forces in terms of wages, fringe benefits and working conditions.

Vancouver has a first rate police force charged with policing, as we have pointed out, an area that might even be termed a difficult one. It is essential, therefore, that by all reasonable means available to us, the morale of that force must be maintained at a high level. Moreover, Vancouver's police force has been, and still is, expanding and must attract to it, and keep with it, men of the high calibre required today to properly and creditably fill the role of policemen.

To do the things of which we speak, Vancouver must be prepared to offer its police wages and working conditions which, by all reasonable standards, can be termed attractive. And remember, when defining what is meant by "attractive" - mixed blessing though it may be considered in the eyes of some people - it must be recognized, to start with, that we in Vancouver operate in a high wage area. (pp 7-8)

British Columbia Railway and Teamsters, Local 213 et al.
(Shime)

The arbitrator noted that interest arbitration is in many respects an economic event. Thus, submissions to a board of arbitration should present as facts, carefully analyzed economic data. However, while

. . . there are some who believe that economic data have a certainty that will ultimately lead to a solution, it is obvious that economic facts may prove to be as elusive as ordinary facts and as difficult to assess. Often economic facts may point to opposite conclusions and, therefore, they should be carefully marshalled. (p. 4)

In the arbitrator's opinion, interest arbitration should not be "a sleight of hand process". While reasons may be difficult, they are necessary to enable the parties to understand the basis for decision. Criteria were then enumerated in summary form (p. 5):

1. Public sector employees should not be required to subsidize the community by accepting substandard wages and working conditions
2. Cost of living
3. Productivity
4. Comparisons
 - (a) Internal
 - (b) External
 - i in the same industry
 - ii not in the same industry, but similar work

What followed in the arbitrator's report was an exhaustive elaboration of these individual criteria (pp. 5-24).

The first proposition cited by the arbitrator related to the argument submitted by the employer that the railway was operating at a loss. Mr. Shime rejected this contention and stated that the operation of the industry at a loss does not justify employees receiving substandard wages. The community which requires the services should shoulder the financial loss and not expect the employees to bear an unfair burden by accepting inferior conditions. In this regard he stated:

"Once it is accepted that the public sector employer does not operate with a view to profit and once accepted that it may also operate at a loss, it becomes clear that it may not have the necessary resources required to pay the employees. It must gain this financial support through the taxing power whether directly or indirectly. In almost all cases, the financial means are available through taxation, and more to the point, quite often the differences between the union and the employer are such that if taxes were increased, the financial burden could be readily borne by each member of the community bearing his or her proportionate share of the cost. Thus, each member of the community should bear his or her share of the required public service without the necessity of the employees bearing the unfair burden of substandard wages or working conditions."

Mr. Shime then went on to deal with the cost of living increases. First, he stated that there is no proof that arbitration awards aggravate a rising cost of living and "there is sufficient evidence that the necessity to readjust wages is a result of, rather than the cost of, increased living costs". He stated:

". . . Thus, most arbitrators have given consideration to this factor as a response to the economy and have adopted the position that a particular arbitration involving a limited number of employees is not the place to regulate the national or provincial economy. The arbitration process as an institution is not equipped to be a regulator of the economy. That function is properly the role of Parliament or the Legislature adopting necessary fiscal or monetary policies."

He emphasized that in assessing the cost of living factor, arbitrators should take into account all increases in compensations, such as fringe benefits, and not only wages:

"A consideration of the cost of living standard must take into consideration not only wages, but benefits from all sources, including increments and improvements in working conditions and fringe benefits. An increase in employer contributions to a medical plan would free other financial resources in the hand of the employee to combat inflation. Moreover, gains in working conditions such as reductions in hours of work are a cost to the employer and a benefit to the employee and are matters that must be evaluated when considering cost of living."

He discussed the productivity factors and whether they should apply in the public service. He concluded that productivity increases should be shared by public servants even though no specific measurement can be made of growth as in private service. However, in this regard he noted that automatic increments should be considered when taking into account productivity or cost of living.

Fianlly, the award proceeded to deal with certain comparative wage data in assessing the validity of a claim. The arbitrator stated that boards of arbitration should consider:

- 1) Wages paid in similar classifications or "bench mark" jobs of the employer;
- 2) Wages in jobs in the same industry. In this regard, the arbitator noted that the economic situation in British Columbia had to be taken into account;
- 3) Wages and conditions in similar jobs in the private sector. In this regard the arbitrator said:

"Arbitration of interest disputes in the public sector is a substitute for free collective bargaining and some attention must be paid to what might have evolved had the parties had the opportunity to engage in that process. If the parties know this in advance it may encourage them to resolve their own differences, and at the very least the

free collective bargaining situations provide some objective basis for assessing a particular dispute."

The arbitrator concluded his analysis of criteria with these remarks:

In conclusion, I am of the view that these criteria may be used in whole or in part in interest disputes and that varying weight may be given to each of the criteria as the individual situation demands. The criteria should enable a form of adjudication based on a more scientific analysis and should also permit the parties to properly prepare for interest arbitration. (p. 25)

Vancouver Police Board and Vancouver Policemen's Union
(Larson)

At the outset, the arbitrator commented on the nature of the arbitration process:

Binding arbitration can work in this context only if it does not prejudice the policemen in relation to other groups. It must result in a realization of their legitimate expectations. At the same time, those subject to arbitration must realize that not every expectation can be realized. There will always be unsatisfied demands. The touchstone is a stable relationship with other related bargaining groups. Out of one arbitration, relative improvement may be realized and yet in another, one may not fare as well. It is only over the long run that a judgment can be made as to the efficacy of the process. All in all, it is to be remembered that whatever gains, however modest or great, these have been achieved without a stoppage of work or interruption of service.

In its mechanical aspects, arbitration involves an exercise of judgment by the arbitrator as to what the parties are prepared to accept. He is skilled to the extent that he is able to discern a viable solution. In some cases that solution may be seen by the parties and yet they may find themselves in such a position as to be unable to agree. Negotiations cannot work under those circumstances. Arbitration may be the only path to resolution since the parties are relieved of the responsibility of the choice. This may be such an arbitration. (p. 4)

In this context, the arbitrator made a judgment as to settlement which he felt would "be workable for the time being" (p. 5). In establishing a salary level, the arbitrator had regard to the fact that Vancouver City Police had in 1975 enjoyed the highest salaries of any police force in Canada; to the cost of living; to recent increases achieved by other police forces in Canada; to the A.I.B. guidelines; and to other employment groups, including teachers, construction workers, labourers and Vancouver city employees.

British Columbia Railway and United Transportation Union
(McKee)

The issue before the arbitrator was a demand by the union for daily overtime. The practice for similar employees in the rest of the industry was examined. In none of the cases was the union's request a standard practice. The arbitrator, therefore, stated

No third party, even someone with a long background in the industry should, in my opinion, impose the drastic changes in the collective agreement demanded by the proposals of each party ... such detailed changes in content and structure of a collective agreement can only come by negotiation, not by imposition by a third party. (pp. 17-18)

Earlier in his award the arbitrator had considered the nature of the arbitration process:

There are very few guidelines for the "interest" arbitrator.

Usually the "interest" arbitrator is faced with ruling on differences in a small but important number of working conditions which the parties have been unable to resolve but do not wish to settle by strike.

While it is not always possible, sound labour relations demand that the award imposed by an "interest" arbitrator should have some modicum of acceptability to both parties,

and be achieved with as little disturbance to their basic agreement as possible.

Surely, the most basic are that the arbitrators in making an award do so

- (a) constructively - an award that the parties can live with or by negotiation adapt
- (b) in maintaining sound labour relations - an award that does not damage the ongoing relationship
- (c) with responsibility

- i to the parties in that he does not abuse the power granted to him and does not impose on them solutions that can generate not only serious immediate problems but also endanger their ongoing relationship and so place in jeopardy the service provided by any such organization.
- ii to enable the parties to have full access to him, and his thinking, prior to the finalization of the award such that the award is not made in a "vacuum" and thus cause the parties to lose all faith in third party intervention as one way of impasse resolution.

The best method of resolution is by the parties. However, although one may deplore the tendency to let someone else take the responsibility in those services upon which the public is so dependant, the trend is increasingly toward third party intervention to resolve, or help resolve problems. It is therefore mandatory that the credibility of third party intervention not be tarnished by the imposition of a solution just for the sake of making a decision. (pp. 15-16)

ii Arbitration Awards Pursuant to Section 73 of the Labour Code.

Victoria Policemen's Union and City of Victoria (Barclay):

In deciding the issue of salary scale, the arbitrator had regard to the cost of living, the consumer price index, and the duties of a Victoria policeman as compared to those of policemen in a nearby municipality. It was also stated:

It is apparent that Victoria has an excellent police force and it is important that its effectiveness and morale be maintained at a high level. The crime rate within the city is increasing and it will be necessary to attract to the force men of high calibre required today to properly fill the role of policemen. Certainly in today's society public attitudes do not make a policeman's task an easy one. I believe the Victoria Police Board, recognizing these factors, decided they had little alternative but to settle on the terms of the Saanich agreement although they were aware it was a most generous one. (p. 5)

Richmond Private Hospital and Hospital Employee's Union, Local 180
(Weiler)

The Board was appointed to set the terms and conditions of the first collective agreement between the parties, who had failed to reach agreement on some 140 matters. The principles elucidated in two Ontario arbitrations were adopted.

Professors Arthurs and Weiler believe that arbitration was intended to be an adjudicative mode of decision making, involving the application of accepted national standards to dispose of the issues to be resolved. The difficulty with this adjudicative model of arbitration experiences is to determine the appropriate criteria or standards.

An arbitrator should not look to notions of social justice in setting the terms and conditions of a collective agreement. For example, in setting the wage scales, an arbitrator should not consider what is a fair wage for certain kinds of work. There is no indication in the Labour Code that justice is to replace the law of supply and demand as the pricing mechanism for wages in the hospital industry. This principle is expressed in Welland County General Hospital at p. 5.

"No doubt such standards as a just wage are based

upon praiseworthy moral concepts, but they are simply not relevant in modern collective bargaining where wage gains are won by economic power. Considerations of "justice" are not only irrelevant, they are simply too vague to outweigh the more precise criteria of comparative rates as a factor in setting new contract terms."

Interest-dispute arbitration under section 73 of the Labour Code is intended to provide a procedural substitute for striking within a process of free collective bargaining. An arbitrator must look at labour market realities, i.e., the relative economic and bargaining positions of the parties, in attempting to simulate the agreement which could have been reached by the parties under the sanction of a strike or lockout. The best evidence of this hypothetical agreement is the pattern of development in other comparable hospitals in the community, especially those collective agreements voluntarily concluded. (p. 2)

In answer to the question "which are the 'comparable' hospitals in the content?", the Board was satisfied on the evidence that there was at least a presumption that the private hospitals were the relevant comparable institutions. The union did not refute this presumption.

The Board accepts the overwhelming evidence at the hearing to the effect that the revenues that pay the operating expenses of these private facilities constitute a mere fraction of the amount that funds their public counterparts. Without going into excessive detail as to the mechanisms involved in this funding process, the Board is satisfied there is a huge discrepancy in the ability to pay the cost of collective agreements. The issue as to who is responsible for this phenomena is irrelevant for purposes of determining which hospital collective agreement - private or public are the appropriate or "comparable" institutions that this Board must examine in order to simulate the agreement that the parties to this arbitration would have concluded had they resorted to their economic sanction instead of using the arbitration system available under section 73 of the Labour Code. (p. 3)

Wherever possible, the Board considered the bargaining position of the parties to set clauses of the agreement. Where there was no

evidence whatsoever of willingness to agree, the comparable collective agreements were referred to.

Glen Private Hospital Ltd. and Canadian Union of Public Employees,
Local Union 1731, (Thompson)

The Board considered adjudicative theory which "holds that a decision be based on rational, accepted criteria, principally other settlements arrived at in the same industry"; and, adjustment, which "resolves a dispute in which the members of the arbitration board agree on a compromise position acceptable to both parties". (p. 3)

"with its reference to "objective" or "rational" standards, the adjudicative theory is an appealing one to an arbitration board, seeking a basis for its decisions. Unfortunately, the theory is a difficult one to implement in any circumstances. One problem is the selection of criteria or standards on which to base a decision. The sources cited reject abstract notions of social justice in favour of agreements freely negotiated elsewhere. However, collective agreements even in the same industry, contain many clauses interrelated in their impact on the parties as well as being the result of trade-offs by the parties during negotiations, a phenomenon sometimes called "polycentricity". To identify a small number of clauses as the bases for comparison overlooks this fact. Another problem is the selection of agreements for comparison. Ontario hospitals may be sufficiently homogenous to permit comparisons by arbitrators seeking decision criteria. If so, such a situation is far from common. Moreover, can an arbitration board rely on the results of "free collective bargaining" in a situation where virtually all employer revenues come from government? On balance, adjudication is suitable for a small class of disputes."

It was assured, that, when arbitration takes place in industry segments or firms without a substantial history of collective bargaining, or where meaningful comparisons are precluded, an arbitration board cannot adjudicate the differences between the

parties: "It may adjust these differences or attempt in some to replicate the probable outcome of collective bargaining, realizing there are few, if any, 'rational' standards on which to base its decision". The Board therefore "tried to adjust" the matters in dispute, stating its criteria on each issue.

On the issue of wages, the Board heard extensive evidence of the inability of the employer to pay more than a minimal increase , due to the low level of funding provided by the provincial government to all private hospitals.

The first principle underlying the Board's decision in this case is a desire not to see the hospital close. Although it is a marginal operation economically, it provides an essential service to the community. We read section 73 of the Labour Code to afford the benefits of arbitration to employees in certain industries while protecting the public (in this case the patients and their families) against interruption of an essential service. We would be thwarting the intent of this provision if we knowingly caused the demise of the hospital. Moreover if the employees had wished to close the hospital, at least temporarily, they had the option of doing so through a strike. (p. 5)

At the same time, the Board was anxious to secure for the employees at least minimal protection against increased living costs. A salary scale was devised which the Board believed would permit the hospital to operate.

Police Board of the District of Saanich and Saanich Police Association (Stewart):

The arbitrator did not consider as conclusive, the argument of parity:

My award will have more emphasis on the ability of a community to pay its employees or to provide services which the public requires and on productivity and attitude which I believe to be far

more effective and realistic a basis of wage settlement than on parity by itself. It is clear that I do not believe a first class constable in Saanich should be paid less than his Victoria counterpart. (p. 5)

In arriving at his award, the arbitrator took into account these factors: (pp. 8-9):

1. Historical relationship with employees of the same employer
2. The public interest to be served by making the award relevant to the community involved and the need to make the process work.

The words of Dalton Larson in the Vancouver Award of September 27, 1976 at p. 4 are relevant:

"Binding arbitration can work in this context only if it does not prejudice the policemen in relation to other groups. It must result in a realization of their legitimate expectations. At the same time those subject to arbitration must realize that not every expectation can be realized. There will always be unsatisfied demands. The touchstone is a stable relationship with other related bargaining groups. Out of one arbitration relative improvement may be realized and yet in another one may not fare as well. It is only over the long run that a judgment can be made as to the efficiency of the process. All in all it is to be remembered that whatever gains, however modest or great, these have been achieved without a stoppage of work or interruption of service."

3. The clear uncontradicted evidence of efficiency, high morale, pride, excellent community record, leadership in development of police methods and standards, in short, excellence and proper work attitude placing them second to none in British Columbia.
4. The fact, these employees did not slow down, withdraw services, impede performance or adopt other common methods of influencing the bargaining relationship.
5. The fact, early in negotiations these employees elected to settle by negotiation or arbitration without resorting to strike.

6. This award must refer to wage settlement only and not reflect my opinion of the position of the parties throughout the negotiations.

Kiwanis Senior Citizens' Homes Ltd. and Hospital Employees Union,
Local 180 (Bird)

The employer was a non-profit, long-term care facility. It was characterized by the Board as a public institution. Therefore, "ability to pay" and "budget" considerations did not weigh heavily. Although the affects of a higher award were simply unknown, that did not act as a major inhibitor (p. 13). In resepect of appropriate criteria it was said:

...The Board considered the approach taken in similar circumstances by Professor Weiler in his award in Richmond Private Hospital and Hospital Employees Union, Local 180, Dec. 31, 1975, wherein he cautioned against trying to apply notions of what is a fair wage for certain kinds of work in formulating a collective agreement by arbitration and had regard to labour market realities, i.e., the relative economic and bargaining positions of the parties, in attempting to simulate the agreement which could have been reached by the parties under the sanction of strike or lockout. Professor Weiler stated in his award in Richmond Private Hospital, p. 2:

"The best evidence of this hypothetical agreement is the pattern of development in other comparable hospitals in the community, especially those collective agreements voluntarily concluded."

We do not reject consideration of what would be a fair wage. However, market realities discovered by examining what agreements have been concluded under similar circumstances to those at Kiwanis are the main guide; "fairness" is a consideration as are the "cost of living" and the special problems to the employer including the uncertain state of financial support by the Government. Perhaps even growth in the gross national product could properly be considered...

To find the pattern of collective agreements in other comparable institutions in the community, especially those voluntarily concluded, is the task Professor Weiler set for himself and we set for ourselves. In order to do so we must know the characteristics of the subject institution and identify the community before we try to find comparable institutions. We would waste our time seeking an identical institution. Each is unique. Comparability is a matter of degree. (pp. 13-14)

iii Arbitration Awards Pursuant to Section 6 of the Essential
Service Disputes Act

The Essential Service Disputes Act provided for the first time in British Columbia statutory criteria to which arbitrators shall have regard in making an award. The criteria are in section 7 of the Act:

- 7(1) In an arbitration under this Act, the single arbitrator or the arbitration board shall have regard to
- (a) the interests of the public;
 - (b) the terms and conditions of employment in similar occupations outside the employer's employment, including such geographic, industrial, or other variations as the single arbitrator or arbitration board considers relevant;
 - (c) the need to maintain appropriate relationships in the terms and conditions of employment as between different classification levels within an occupation and as between occupations in the employer's employment;
 - (d) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
 - (e) any other factor that the single arbitrator or the arbitration board considers relevant to the matter in dispute.

All boards of arbitration appointed pursuant to the Essential Service Disputes Act have of necessity considered and interpreted the statutory guidelines in making their awards.¹⁵⁰

Health Labour Relations Association and Registered Nurses
Association of British Columbia (Stewart)

This award resulted from the first arbitration conducted under Essential Service Disputes Act. The Board did not elaborate at great length upon the criteria, nor was the salary increase specifically justified. A general discussion of section 7 was included at the end of the decision. In regard to the public interest it was said:

The interests of the public must not be construed in a narrow context to mean that the public is only concerned with a system for effective collective bargaining for the purposes of the parties themselves. It is clear that the expression of interest of the public embraces not only the continuation of work and employment but also the social and economic results of settlement (p. 58)

Thus, although the interest of the public requires that work stoppages be avoided, this goal is not to be achieved "at any cost". The settlement between the parties must be fair, and the impact on the public must be appropriate, reasonable and just. (p. 60)

The Board also compared wage levels in other components within the industry. Differences on a provincial and geographical basis were recognized. It is difficult to ascertain the standard deemed appropriate. The highest comparable wage was clearly rejected:

... Looking at all agreements, and on balance, we have not seen fit to make major adjustments in the present contract. It is not in the interests of the public that superb select agreements negotiated within the industry between a group of employees and their employer should be copied merely to allow the principle of "highest common denominator" to

prevail. A balance has been sought in this award.
(p. 59)

The internal "pecking order" was an important factor and this conclusion led to inclusion of a provision for re-opening the contract if a later wage increase to lower paid employees disturbed historical internal comparisons.

Health Labour Relations Association and Hospital Employees Union
(Hope)

The award settled the collective agreement between the health care workers and the general hospitals in the province. The Board gave extensive consideration to the principles governing interest arbitration. In relation to criteria, a great deal of time was spent discussing the parties proposals in terms of the public interest. Aside from the fact that both parties agreed that the public interest was served by preventing disruptions in essential services, there was little consensus between them. The employer's arguments regarding economic conditions and ability to pay were rejected:

The combatting of inflation and restructuring of public sector spending are matters that remain to be resolved in the public domain. It would require express language in the Essential Service Disputes Act to impose that jurisdiction upon this Board. The ability of the public to pay wages to hospital workers is a factor to be considered but it is a factor that measures itself in a consideration of prevailing wages and working conditions rather than in an external or collateral consideration of the state of the economy.
(p. 32)

It was said that the usefulness of interest arbitration in the public sector lies in the ability of the process to successfully subordinate the rights of essential service employees to the rights of the general public. This subordination should ideally guarantee to

employees a result that authenticates arbitration as an equitable substitute for the collective bargaining process. Thus, there was an obligation on the Board to demonstrate a fair and equitable result.

The obligation to demonstrate a fair and equitable result does not arise so much as part of the criteria in an interest arbitration as it arises as a means of evaluating the application of the criteria (pp. 27-28)

In determining a fair and equitable wage level the Board stated:

... that the best indicator of fair wages and working conditions in any aspect of the public sector is wages and working conditions enjoyed by persons employed in similar or comparable jobs in the public sector where those wages and working conditions have been established through the traditional collective bargaining mechanisms. (p. 25)

Thus the wages and working conditions enjoyed by health care components of the provincial government were considered to reflect a fair and equitable basis for the determination of wages (p. 9), especially as in both cases the provincial government is the ultimate employer (p. 30).

The Board did not, however, accept the union's submission of parity with the public service. The concept of "parity" was rejected as being too simplistic in favour of the term "comparability":

It is quite possible within the concept "comparability" to achieve a result that acknowledges and reflects both the differences and the similarities between the two groups. (p. 9)

Health Labour Relations Association and Health Sciences

Association of British Columbia (Larson)

At the beginning of the decision, the Board sought to define "the interest of the public", and a number of previously asserted

formulations of the public interest were canvassed. The Board concluded, however, that

... the consequence is that except in terms of a general difference to the concept of public interest, the primary focus of an arbitration board must be market reality. That is why the legislature has stipulated clauses (b), (c) and (d) of section 7 of the Essential Service Disputes Act which call primarily for internal and external comparisons. Under clause (e) a board would properly consider such things as increases in the local cost of living, increased productivity and economic conditions generally.

It was noted that the Essential Service Disputes Act does not indicate which comparisons must be given the greatest weight. The Board decided that the relevant factors had not been arranged in descending order of importance. It was also recognized that clauses (b) and (c) of section 7 might in some circumstances be in effect, "competitive". (p. 8)

The resolution of this seeming conundrum is that the factors set out in section 7 of the Essential Service Disputes Act are not mutually exclusive. Regard is to be had to all the comparisons stipulated. In so doing we have determined that great weight must be given to terms and conditions of employment in the government service since it is a basis for significant relative comparison within the province. This is particularly true where, as here, the terms and conditions of employment within the government service lead the private sector. (p. 9)

Ladner Private Hospital et al and Hospital Employees Union (Owen-Flood)

The first award of the Board, establishing terms of employment between the union and several "private" hospitals, was reviewed by the Supreme Court on application of the employer. In a very short judgment

the Board was directed to "reconsider, determine and clarify" its decision. The reasoning noted here is from the "reconsidered" award.

The Board felt that the interest of the public is a relevant double-edge sword for these reasons:

(i) The common weal of the public good militates against any award that will unduly further burden the already beleaguered economy. Such awards are self defeating.

(ii) On the other hand, the public interest requires:

"... that the settlement between the parties is fair and that the impact of that settlement on the public is appropriate, reasonable and just..."
(pp. 6-7)

In applying the "fair and reasonable" criteria, the Board looked at the history of wages in the private hospitals, and found they had traditionally been below those in the public sector. A gradual trend towards parity, however, was discerned.

"While there is no rhyme or reason in parity for the sake of parity, there is a definite benefit to the public in an award which recognizes that the eventual aim should be towards equal pay for equal work...

... this Board finds that both the private hospitals and the employees would benefit in an award which seeks to recognize the aim of eventual parity or comparability but not instant parity and gives, as this award does, increases which are phased so that the parties can make the necessary adjustments to provide for those increases (p. 8)

Under section 7(1)(e) the Board considered another factor that "... the award must be one which serves the pragmatic needs of both sides" (p. 12)

Registered Nurses Association of British Columbia and Government of British Columbia (MacIntyre)

At the beginning of its award the Board examined in some detail interpretations of the statutory criteria in four previous awards. It then proceeded to apply the criteria to the dispute before it. Each standard was discussed generally and then specifically in relation to the matters in issue, focusing mainly on monetary concerns. The latter part of the Board's reasoning under each heading has been omitted here.

- (a) The interest of the public. This is not a particularly helpful criterion. There is an argument that the public, as taxpayers, should not be burdened with excessive wage payments to government employees, and a further argument that such excessive wage payments will further increase inflation in the general economy. On the other hand, there is the argument that the nurses' wages are low, given their skills and training relative to other persons, whether in the public or private sector, and the further argument that the public is better served by contented rather than discontented employees. All of these are valid arguments but they do not point to a particular wage rate.
- (b) External comparisons - or what we will term "horizontal equity". This criterion suggests that nurses in the government service should receive remuneration and other benefits or conditions which are comparable and relatively equal to nurses doing much the same sort of work in other services. Presumably comparisons with other British Columbia nurses would be the most appropriate, but nurses' absolute and relative positions in other provinces may have some relevance. (p. 9)
- (c) Internal comparisons - or what we will call "vertical equity". This criterion is related to the concept that within the workplace of the same employer, there is a "pecking order" of skills, training, and experience, both within each bargaining unit and as between various bargaining units (or even non - bargaining persons). These relative orders can usually be explained partly in terms of principle, partly in terms of bargaining strength, partly in terms of history, and partly in terms of fortuitous events, of which the Anti-inflation guidelines are the most obvious example.

Whatever their justification the distinctions loom large in importance to those who work in close association and small differences in pay or other benefits (such as hours or vacations) may have considerable influence on employees morale... (p. 10)

The Board's opinion was that it was not required to correct internal anomalies, but nonetheless it could not be blind to historical relationships and was required by statute to consider them.

- (d) "Fair and reasonable wages". One much-discussed concept which might find a place under this criterion is "ability to pay". This concept is difficult to apply to public sector bargaining. In the short run, of course, the government can pay. It has the powers of taxation and of redistribution. It is not subject to competition. Its decisions, though financial in appearance, will be motivated as well by political considerations. Second-guessing the "free market" form of collective bargaining in a forced or optional arbitration system becomes more than artificial. The relatively secure public service has -- especially in this sector -- become less secure. There is a tendency to compensate for the deprivation of curtailment of the right to strike; there is a countervailing tendency to resist the political pressure of an "essential" service. It is not surprising that the public sector bargaining has been more closely linked to the inflation rate; it is a visible and consistent standard in a sea of variables...(p. 12)

The union placed considerable reliance upon the inflation rate as a minimum standard of settlement; the Board took these arguments into consideration "... as of considerable, if not compelling significance". (p. 12).

Under the heading of "other relevant factors" the Board discussed the questions of delay and benefit of hindsight. While it considered these factors relevant, the Board was not entirely sure how it should regard them. It concluded, with some diffidence, that it "... must consider the delay factor and make some attempt to compensate for it, not necessarily with mathematical exactitude". (p. 15) The Board also

concluded that it might consider events which had occurred since the beginning of the contract.

4. Comments on the Criteria

The most obvious question which arises is whether or not the enactment of section 7(1) of the Essential Service Disputes Act has had any effect on interest arbitration in British Columbia. The answer can be yes and no. Generally, in fulfilling their legislative mandate under section 7(1), arbitrators significantly base their award on the factors contained in the legislation and explain the effect which the criteria had on their ultimate decision. Beyond this, it is difficult to see any significant, substantial changes which have been brought about by the Essential Service Disputes Act. The criteria contained therein had been relied upon by British Columbia arbitrators prior to 1977. The criteria were: the public interest; comparison with other collective agreements, preferably freely negotiated; some internal comparisons; labour market realities and the need to establish realistic and "fair" salary levels; economic and market factors, including changes in the cost of living and the projected rate of inflation; and the efficiency and morale of the bargaining unit. This list roughly parallels the provisions of paragraphs (a) to (e) in subsection 7(1) of the Essential Service Disputes Act. The effect of the statutory provisions has been the creation of a useful "checklist" for interest arbitrators. The criteria ensure that a board of arbitration will turn its mind to the public interest, appropriate comparisons, and so on. At the same time, however, paragraph (e) means that the inquiry is virtually open-ended, i.e., any factor not

specifically contemplated as relevant by the legislature may be "regarded" by the arbitrator. As pointed out in the awards, no priority need be given to any particular criterion. The result is that, although there are ostensibly objective statutory criteria, arbitration in British Columbia remains a flexible and subjective process. This observation is further reinforced by the lack of unanimity among arbitrators as to how the statutory guidelines should actually be interpreted - the "public interest" is especially problematic.¹⁵¹ Part of the uncertainty no doubt results from different characteristics as to the very nature and purpose of arbitration.

In many decisions, one gets the feeling that the criteria have not been especially helpful. There is little attempt by the arbitrators to examine each factor in relation to each aspect of the award. (Indeed this may neither be feasible nor practical). Analysis of the criteria is usually isolated either at the beginning or at the end of the report. Express reasoning for a particular term of the collective attempted only in the case of wages. This brings to the fore a point of conjecture. It is relatively easy to conceptualize how traditional, "objective" criteria might be relevant to the establishment of wage and salary levels. It is more difficult to imagine how these criteria can dictate a settlement of non-monetary terms of a contract. Yet, section 7 is applicable to all unresolved issues which go to arbitration. Noel Hall has alluded to this difficulty:¹⁵²

when the (collective bargaining system collapses into total disagreement, I think it highly unlikely that an arbitrator will be successful in finding one or two criteria by which he can pull the whole

relationship back into perspective and some degree of balance. Most disputes that end up with imposed binding arbitration are, in my experience, one in which effective relationships have totally collapsed. In those circumstances the arbitrator must use a wide range of experience and I suppose, insight from many different perspectives if he is to restore some reasonable balance to the collective agreement and the bargaining relationship. He must of necessity try to find an accommodation that may have alluded the direct efforts of the parties.

While few of the arbitrations examined in this study involved relationships which had "totally collapsed", the increasing incidence of disagreement between parties using arbitration has meant that arbitrators are being asked to rule on conditions of employment such as shift rotation, substitution procedures, education committees and job evaluation programs. Outside of external comparisons it is difficult to see how predetermined criteria can be very useful. Contract negotiation is a highly sensitive process, full, of subtle nuances and trade-offs. Where non-monetary terms of a collective agreement must be settled by arbitration (again, the preference is that the parties themselves resolve these terms) a very flexible approach must be adopted, recognizing the requirement of the individual employer and union.

The conclusion, that legislative criteria similar to those in section 7 of the Essential Service Disputes Act do not significantly influence the outcome of arbitration, is not unique. In an American study¹⁵³ comparable decisions under Michigan law (which provides statutory criteria) and under Pennsylvania law (which contains no such provisions) were investigated. Some of the conclusions reached were:

1. Generally, the Michigan statute made little impact upon the informal evolution of a body of "common law" in arbitration of protective service disputes.¹⁵⁴
2. There was no evidence which pointed to the conclusion that the contending parties were any more satisfied with decision rendered under the Michigan law with its criteria section than they were under the Pennsylvania law.¹⁵⁵
3. The listing of criteria in a statute appeared to make no difference in the final resolution of a dispute.¹⁵⁶

Two explanations for this result are plausible, both of which are evident in British Columbia. The first is that experienced arbitrators automatically rely on criteria similar to those prescribed by the legislature. The second explanation is that wage and salary levels are set by some arbitrators primarily on an intuitive basis, and their award is not appreciably affected by the presence or absence of permissive guidelines. Criteria are therefore interpreted not to assist in reaching a decision, but to justify an already determined result. In some arbitrators reports an express or readily implied objective was to fashion an award satisfactory to the parties. Once the arbitrator has discerned the "satisfactory award", appropriate characterization of the criteria becomes one method of promoting acceptance, and explaining the result to the parties. Whether or not this second explanation is a correct interpretation of the decision-making process, it is clear that criteria, used to date in British Columbia arbitrations do not afford certainty of result.

5. Concluding remarks on interest arbitration vis-a-vis
free collective bargaining

A major, challenging question is how to prevent strikes by essential service employees without denying them the right to organize and bargain collectively.

It would be unfair to place upon the legal machinery sole responsibility for these interruptions of critical services on which life, health and welfare of the citizens depends.

There is raised with increasing frequency the suggestion that the proper technique for resolution of impasses in employment relations dealing with essential services is some third-party determination where an outsider to the dispute is given ultimate authority to fix the terms of employment. Most commonly this takes the form of a proposal for arbitration. Critics reject arbitration for two reasons. First, they think it is probably an illegal delegation of the authority of a public agency. Second, they feel it would encourage disputants to resort constantly to arbitration instead of themselves assuming the responsibility of decision making. But proposals for arbitration persist. Moreover, they do succeed in framing the issue properly, for the question seems to be whether there is a viable alternative to collective bargaining for the effective resolution of disputes in essential services, and arbitration in one form or another is the only logical, if not practical, alternative. It does provide, partly in theory and partly in practice, for a "final" resolution of conflicts when an impasse is reached. The neutral third party is designated the final decision maker. The impartial adjudicator hears both sides and makes a decision. Arbitration should not be confused with fact

finding, mediation, or any other form of third-party procedure that does not result in a final decision. In arbitration, the standard of determination can and should be the equity of the claim, whereas in fact finding with recommendations, the standard has to be the acceptability of the recommendations. The arbitrator's decision is final. Since there is no appeal from the decision, the uncertainty may encourage voluntary agreement. Each party runs a risk, so there may in fact be more incentive to agree than is the case when a board makes recommendations which can be turned down.

While arbitration can be a legal and feasible method of settling disputes in certain situations, it does face serious legal obstacles. There are many issues which are proper subjects of bargaining, but which no agency of government can legally submit for decision to a third party.

Arbitration will be effective only if viewed as a last resort after other steps have failed and the dispute has reached a stage where the issues remaining unresolved have been sharply narrowed and can be stated within specific bounds. Framing the issues properly, and providing some standards for determination, if only, the limits of the arbitrator's authority is essential if arbitration is to be of any use. The absence of standards of reference makes arbitration of issues involving wages and other terms of a contract fraught with difficulty. When bargaining has framed the issue with precision, then arbitration may be possible. To enable the board of arbitration to function, the outer limits of the award must effectively be prescribed by the law imposing arbitration.

All said and done about arbitration in the essential services, a wise conclusion is that it is neither legally nor practically feasible. It would be a great mistake to adopt this procedure as the usual method prescribed in advance for all disputes in the expectation that it would signal an end to labour strife in the essential services.

True collective bargaining must be adhered to, even though this must include the possibility of a strike. It must be sought to improve the bargaining process and the skill of the negotiators to prevent strikes. For in the end, the solution to the wide range of labour problems in essential services involving the many aspects of a dynamic and complicated human relationship must depend on the human factor. The most elaborate machinery is no better than the people who man it. It cannot function automatically. With skillful and responsible negotiations, no machinery, no outsiders, and no fixed rules are needed to settle disputes. Authors and academics have focused attention on mechanics and penalties rather than on the participants and the process. It is time to change that, to seek to prevent strikes by encouraging true collective bargaining to the fullest extent possible.

For the strikes that might jeopardize public health or safety, there should be legislation authorizing the province to seek an injunction for a specified period through procedures for disputes under the Labour Code. During the cooling-off period, the parties could continue their search for the basis of accommodation to end the dispute. If these procedures prove unavailing, then the legislature could consider means, but not the specific terms, of settlement, including the possibility of submitting the remaining issues to

arbitration within specific bounds. In a particular situation, with issues sharply limited and defined through bargaining arbitration imposed as a last resort by the legislature can effectively protect the public without leaving them feeling that the collective bargaining process is a hoax. The primary reliance would then be placed, as it must if strikes are to be prevented, on joint determination by parties in a true bargaining atmosphere.

There is no workable substitute for collective bargaining. In an environment conducive to real bargaining, strikes will be fewer and shorter than in a system where employees are in effect invited to defy the law in order to make real the promise of joint determination. In a real bargaining environment, the employee representatives can more effectively meet their dual responsibility to negotiate and to lead. Only if leaders do both can there be constructive labour relationships in place of disorder resulting when agreements reached in negotiations are rejected by an angry rank and file or defied by subterfuge forms of strike such as working to the rule.

These suggestions are not advanced with a guaranty that they will bring a complete end to essential service strikes. It is suggested that reliance on legal prohibitions, penalties, and elaborate third-party recommendations has not worked properly, and that before turning in desperation to third party determination, which cannot serve steadily, collective bargaining should be given a chance. The most effective technique to produce acceptable terms to resolve disputes is voluntary agreement of the parties, and the best system that there is for producing agreements between groups is collective bargaining - even

though it involves conflict and the possibility of a work disruption.
There is no alternative.

C. Final Offer Arbitration

Thus far the paper has examined conventional arbitration, i.e., a system in which the arbitration award may be anywhere between (or, theoretically at least, even outside¹⁵⁷) the positions submitted to the arbitrator by union and management negotiators.

This is in contrast to final offer arbitration (with which the thesis will now deal) in which the arbitrator must select either the union's or management's proposal - the third party is not given the opportunity to split the difference.

The theoretical purpose of this procedure is to limit the adverse effects that arbitration is reputed to exert on collective bargaining system. The premise advanced is that, by compelling union and management to make their bargaining offers reasonable, the likelihood of voluntary settlement is increased. Because the arbitrator's award may neither omit nor change anything in the final offer, the prospect of being hitched up with the other party's offer tends to considerably enhance the reasonableness of the proposals made by both sides and thus enhance the chances of a reasonable settlement.

There are two types of final offer arbitration - total package and issue-by-issue. Under total package final offer arbitration the arbitrator must choose either the union's or the employer's contract proposal in its entirety. When the technique of issue-by-issue final offer arbitration is used a quasi-compromise is reached, with the arbitrator selecting one party's proposal for each issue. This reduces the risk element central to final offer arbitrations and ignores trade-off considerations which go into the formulation of a party's overall

platform. On the other hand, under total package arbitration what is otherwise the "better" proposal may be thrown out merely because the arbitrator perceives one element to be unreasonable. Worse yet, is the prospect of a "sleeper" clause being accepted. That is, either party may include a seemingly innocuous provision which, if accepted by the arbitrator might do substantial damage in the long run, to the collective bargaining relationship.¹⁵⁸

Final offer arbitration will usually work best where the employer and the union are fairly sophisticated in their approach to bargaining and are able to judge the reasonableness of their own position in relation to the standards likely to be applied by the arbitrator.

Although final offer arbitration may promise more than it delivers,¹⁵⁹ it has been shown to overcome the narcotic and chilling effects. Downie explored all the literature available in order to speculate on the probable impact of various types of arbitration. It was clear that resort to arbitration more than once is higher under conventional versus final offer arbitration.¹⁶⁰ Secondly the data suggested that parties come much closer to negotiating a settlement under total package final offer arbitration than under either issue-by-issue final offer arbitration or conventional arbitration,¹⁶¹ and that the former technique definitely provides incentives to bargain. Downie considered any conclusions "tentative"¹⁶² but allowed that

an effectively designed system of final-offer arbitration, from the evidence available, would probably lead to all but 5 to 10 percent of all disputes in a sector being resolved by negotiations; an effectively designed system of conventional arbitration would probably lead to all but 10 to 25 percent being resolved short of

an arbitration award. These rates are comparable to the frequency of strike usage.¹⁶³

However he observed:

... whatever advantages final-offer arbitration may have with respect to the chilling effect may be offset by the notion that final-offer arbitration awards are inevitably worse than awards flowing from conventional arbitration because of the opportunity on the part of the third party in the latter case to shape a compromise.¹⁶⁴

Final offer arbitration technique was used in International Typographical Union and Vancouver Island Publishing Company.¹⁶⁵ It was a first contract arbitration, the arbitrator having been appointed by the Labour Relations Board after a long and bitter conflict between the company and the newly-certified union. Final offer arbitration was chosen by the parties to be the means of settlement.

As with ordinary interest arbitration, the arbitrator was required to formulate some basis or standard for his decision:

While the final-offer selection criteria and the compulsory hospital arbitration criteria in British Columbia and Ontario appear to differ widely, i.e., more reasonable of the two proposals v. simulation of the result of strike or lockout, the actual process in both must involve a consideration of like or nearly like circumstances elsewhere. In order to determine what is more reasonable, one must have a point of reference which surely is what other people have done in similar circumstances. The final-offer selection process is simply a special kind of arbitration of an interest dispute. The arbitration of an interest dispute is a means of trying to substitute reason for economic force. In effect the parties agree that there will be a collective agreement and both parties say to each other that reason can be substituted for force, the obvious stress and waste caused by strike or lockout can be avoided. The more reasonable offer in final-offer selection is the more sensible offer in the circumstances. I conclude the circumstances to be examined are in the main those described already, being the pattern of development of collective

agreements in other comparable places of work. However, because the parties could have resorted to strike or lockout, courses of action not open to the hospitals involved in the mentioned cases, more consideration of economic and bargaining positions of the parties is indicated. (pp. 13-14)

In this case, the arbitrator clearly had difficulty in deciding which of the two proposals were more reasonable. After exhaustive analysis of the two contracts (pp. 15-26), it was his opinion that

... to award the Company's proposal would seriously undermine the security of the craft unit and would probably cause the collapse of the bargaining unit as a craft entity. To award the union's proposals would be to saddle the Company with an onerous craft agreement containing many highly objectionable provisions, at least some of which may contravene the Labour Code. (p. 30).

In the end, the union's contract proposal was selected as being the more reasonable of the two.

The arbitrator found a passage from Cashman, "Current Experiments in Collective Bargaining",¹⁶⁶ to be prophetic:

The simple "final offer" technique is quite unrealistic. In practice it might well make for a totally unacceptable arbitration award and never really serve to narrow the issues at the bargaining table. In real life proposals made by unions at the outset of bargaining frequently contain a number of demands which are therapeutic in nature. That is, such proposals are intended to satisfy the union membership even though the judgment of the union officers is that such proposals are not realizable at this particular set of negotiations. Such demands may be abandoned or substantially modified in the course of bargaining but the abandonment or modification is not highlighted because of the way in which collective bargaining proceeds. Normally management makes a package proposal which may contain no reference to what may be styled as "political proposals" not expected to be achieved. Union leadership is then free to deal with the management proposals without any special spotlight on their abandonment of the "political proposals". The "final offer" technique, however, requires the union to publicly put on the table its "final offer". There will be a number of proposals which

union officials could not, as a practical matter, omit from their "final offer". The acceptability of an award adopting the management offer in such a context would be extremely doubtful. (p. 28).

It was the arbitrator's opinion that the union here was playing a game of "double or nothing" - either it would win a very good agreement, or it would be eliminated.

In British Columbia Railway and United Transportation Union¹⁶⁷ the parties had at their option the alternative of final offer arbitration. In this regard, the arbitrator stated:

Final offer selection is that process in which both parties put forward their best final position and the third party selects the offer that most closely approximates what he considers the desirable solution. The fatal flaw in such a process, particularly when it encompasses matters in the collective agreement other than money, is that the parties are still welded to their prescription for resolution with all their traditional and attitudinal postures built into their offers. The situation is analogous to the patient who goes to the doctor and without drawing upon the doctor's knowledge and expertise demands that the remedy for the patient's headache be aspirin or decapitation. (p. 4)

Quite a few critics are uncomfortable with final-offer arbitration. Proponents of this method of impasse resolution admit this will often be the case, but point to the anticipated virtues of final offer arbitration.¹⁶⁸ One criticism of conventional arbitration is that it may have a negative effect on collective bargaining. The parties may either become dependant upon third party solutions to their disputes (the "narcotic" effect) or they may avoid the trade-offs of good faith bargaining and cling to unrealistic positions in the hope of getting more from the arbitration than from a negotiated settlement (the "chilling" effect). Final offer arbitration attempts to overcome these problems by adding a greater element of unpredictability and risk

to the arbitration process. Each party runs the risk of its whole proposal being thrown out because of the unreasonableness or unacceptability of even one element therein. The parties are thus induced to develop even more reasonable positions in the hope of winning the award, and these mutual attempts to win neutral approval should result in the parties being so close together they will create their own settlements.¹⁶⁹ Studies have shown that under final offer procedures parties do reduce the number of disputed issues and move closer together to a greater extent than under conventional arbitration.¹⁷⁰

D. Industrial Inquiry Commission

Under the Labour Code, an ad hoc device for heading off public interest disputes has been the use of an industrial inquiry commission. This is an extraordinary remedy, and it is only available at the discretion of the Minister. Section 122 of the Labour Code states:

1. The minister may, on application or on his own motion, make or cause to be made the inquiries he considers advisable respecting industrial matters and subject to this Act and regulations, may do the things he considers necessary to maintain or secure industrial peace and promote conditions favourable to settlement of disputes.

2. For any of the purposes of subsection (1), or where in an industry a dispute between employers exists or is likely to arise, the minister may refer the matter to an industrial inquiry commission for investigation and report.

3. The minister shall furnish the industrial inquiry commission with a statement of the matters to be inquired into, and where an inquiry involves particular persons or parties, shall advise them of the appointment.

4. An industrial inquiry commission shall inquire into the matters referred to it by the minister and endeavour to carry out its terms of reference; and if a settlement is not effected in the meantime, shall report the result of its inquiries and its recommendations to the minister within 14 days after its appointment, or within a further time the minister specifies.

5. On receipt of a report of an industrial inquiry commission relating to a dispute between employers and employees, the minister

shall furnish a copy to each of the parties affected, and shall publish it in the manner he considers advisable.

6. An industrial inquiry commission shall consist of one or more members appointed by the minister.

7. An industrial inquiry commission shall, during its period of appointment, have the power and authority of a commissioner under sections 12, 15 and 16 of the Inquiry Act.

8. Where either before or after the report the parties agree in writing to accept the report in respect of the matters referred to the industrial inquiry commission the parties are bound by the report in respect of those matters.

Prior to the passing of the Labour Code of British Columbia, in 1972 the legislative machinery for this kind of intervention existed, but it was never used. Since the making of the Labour Code the industrial inquiry commission has been employed on various occasions.

Despite the history of Mediation Commission Act, and the attack on compulsory arbitration by the unions, a surprising development has been the substantial number of times that labour and management have both agreed to be bound by the decisions of an industrial inquiry commission. In major disputes in 1973 and 1974 both parties agreed in advance to be bound by whatever decision was given by an industrial inquiry commission.¹⁷¹ Voluntary binding arbitration was the result.

Third-party intervention must be flexible if it is to be effective. For this reason a new technique called 'med-arb' has been used by industrial inquiry commissioners in British Columbia. This process basically involves the commission's mediating the dispute and

encouraging the parties to arrive at their own settlement under pressure of knowing that if they do not, then the commission will render an arbitration award.

Clive McKee, who was chairman of six major enquiries, explained:

'In the past year, as an Industrial Inquiry Commissioner, I have experimented with this technique and have found that my experience ranged, all the way from a position where I was left with no alternative but to write a binding award to a position of just keeping the pendulum in motion while the parties settled, in great detail, their own agreement. As a negotiator, mediator, arbitrator this is the system of dispute resolution that I advocate. Voluntary 'med-arb.'¹⁷²

The 'med-arb' technique is an informal administrative process, sharply different from the legalistic procedures which were followed by the Mediation Commission.

The ad hoc approach under the Labour Code has gained the confidence of labour and management where permanent machinery under the Mediation Commission did not. One reason is that the chairman could be selected on the basis of his particular experience in the area of the dispute. The ad hoc choice of commissioner does not allow stultifying precedents to be made. The air of uncertainty that results, gives everyone the feelings that they have a chance. This experience underscores the criticism directed against a permanent mechanism or tribunal - like the Mediation Commission - as a guardian of the public interests.

The method of improving the arbitration system is to build in a structure for 'med-arb'. Mr. Ed Peck used the 'med-arb' technique to reach a voluntary settlement in the Hospital Labour Relations Association v. Hospital Employees Union bargaining dispute in 1979.

The Labour Relations Board has successfully used 'med-arb' in its section 70 cases to cut down the number of issues ultimately requiring adjudication. Indeed, the availability of nominees on tripartite interest arbitration panels is amenable to 'med-arb', as was pointed out by the Labour Relations Board in H.L.R.A. v. H.E.U..¹⁷³ In this case the Board approved of the nominees acting as carriers of information to their respective principals concerning the deliberations of the panel prior to the issuance of the final award. On the basis of this new information, the parties were then allowed to make submissions to the arbitration board. The potential for using the nominees or the entire panel to advise the parties of the panel's view of their respective positions prior to final adjudication would certainly be a powerful incentive to reach a negotiated settlement.

The Board further developed this point in this passage:

Secondly, the role of the nominee in assuming relevancy of the finished product is potentially more critical in "interest" arbitrations than in "rights" arbitrations. In both classes of arbitrations, the neutral chairman is brought into a relationship with which he likely has little familiarity and in a relatively brief period of time, is expected to provide the "correct" answer to a dispute or series of differences. But the arbitrator's task in "rights" arbitration is generally easier. That task is to take terms and conditions which have already been agreed to - i.e. the collective agreement - and apply them to a particular set of facts. The "interest" arbitrator, however, is actually asked to create the terms and conditions. Depending on the number of issues outstanding, that can be an awesome responsibility especially when one considers that the working conditions to be imposed will govern the parties for a period of one, two or even three years. The neutral chairman can be greatly assisted, and thus the system has a better chance of working in fact, as on paper, if his colleagues on the arbitration board know with some precision the intricacies of the employment relationship and the actual impact of effect of the parties' respective proposals".

CONCLUSION

The British Columbia Legislators have realized that strikes in essential services have a dramatic effect on the economy and industrial stability of British Columbia. Accordingly, they have fashioned an approach tailored to the achievement of techniques which will lend themselves to the minimization of conflict in these areas and have made efforts to cultivate public awareness of their policies.

Also the British Columbia Labour Relations Board has recognized that the achievement of harmony in the area will come only with a sustained implementation of the Labour Code and the Essential Service Disputes Act provisions as enacted to date, instead of haphazardly searching a case by case, ad hoc legislation. Their policies represent a significant step in the ethos of labour relations law of British Columbia.

The Board has been acutely aware of the tension between the parties to the conflict and the accompanying harm that the public suffers. It must develop a policy which achieves an equilibrium amongst the various forces that create the tension. For in the end it is the public that suffers. The taxpayers are certainly entitled to the services that they pay for.

FOOTNOTES

1. David M. Beatty, "Preface", in Collective Bargaining in the Essential and Public Service Sectors, Morley Gunderson ed., University of Toronto Press, Toronto, 1975, at viii-ix.
2. R.S.B.C. 1979, c. 212.
3. Essential Service Disputes Act R.S.B.C. 1979, c. 113, s. 8 (hereinafter referred to in the footnotes as E.S.D.A.).
4. S.B.C. 1968, c. 26 (hereinafter referred to in the footnotes as M.C.A.).
5. For a discussion of events prior to the introduction of the M.C.A., see James G. Matkin, "Government Intervention in Labour Disputes in British Columbia", in Collective Bargaining in the Essential and Public Service Sectors, Morley Gunderson ed., supra, note 1 at 75.
6. Section 28(1) of the Act provided:
28(1) There is hereby established a commission to be known as the "Mediation Commission", which shall consist of a chairman and, ... such number of other members as may be so determined.
See further, Part IV of the Act for jurisdiction, procedure etc. of the Commission.
The title, Mediation Commission, was a misnomer as the Commission did not perform a mediation function; it was an adjudicative tribunal.
7. See Part II, sections 11 to 13.
8. Section 16.
9. Matkin, supra, note 5 at 86.
10. In introducing the Bill in the Legislature, the Minister of Labor had referred to the "judicial system" as analogous to the role that the new Commission would perform. B.C. Legislative Assembly Debates, Second Session, 28th Parliament, p. 11.
The Commission was bound to determine its own procedure "for the prompt and judicious disposition of disputes" (section 40(1)) and there was even reference to "the burden of proof" (section 13(c)).
11. Matkin, supra, note 51 at 86.

12. Judge Samuel I. Rosenman, "A Better Way to Handle Strikes", Newsday, July 15, 1967. His idea is explained in Proposals to Deal with National Emergency Strikes, Legislative Analysis No. 3, American Enterprise Institute for Public Policy Research (1969), in Collective Bargaining in the Essential and Public Service Sectors, Morley Gunderson ed., supra, note 1 at 82.
13. Matkin, supra, note 5 at 88.
14. Psychiatric Nurses Association v. Civil Service Commission, November 14, 1968.
15. The Hon. Mr. Justice Nemetz was appointed as an ad hoc arbitrator of the dispute under the research provision of the M.C.A. (Section 34).
16. Matkin, supra, note 5 at 79.
17. See An Act to Amend the Mediation Commission Act, S.B.C. 1972, (second session), c. 8.
18. S.B.C. 1973, (second session), c. 122.
19. Matkin, supra, note 5 at 92.
20. s. 73(1) Where a firefighters union, policemen's union, or hospital union as defined in this section and an employer or a representative authorized by the employer have bargained collectively in good faith and have failed to conclude a collective agreement, or a renewal or revision thereof, the trade union may elect, by giving a notice in writing to the employer and the minister, to resolve the dispute by arbitration.
 - (2) Upon the receipt of a notice under subsection (1), the parties shall make such arrangements as are mutually agreed upon for the appointment of a single arbitrator, or the establishment of an arbitration board, to hear the dispute and resolve it by settling the terms and conditions of a collective agreement.
 - (3) Where the parties fail to agree to a single arbitrator, or an arbitration board is not fully constituted, within ten days after the notice has been given, the minister shall appoint a single arbitrator to hear the dispute and resolve it by settling the terms and conditions of a collective agreement.
 - (4) The terms and conditions settled by the arbitrator or arbitration board shall be deemed to be a collective agreement between the parties, binding upon them and the employees except to the extent to which the parties agree to vary any or all of them.
 - (5) No employer referred to in this section shall lockout his employees, and no employee or trade union referred to in

this section shall strike during a period from the date a notice is given under this section until the date a collective agreement settled under subsection (2) or (3) terminates, and unless he otherwise complies with this Act.

(6) In this section, unless the context otherwise requires,

"fire fighters' union" means a trade union certified for a unit in which the majority of employees has as its principal duties the fighting of fires and the carrying out of rescue operations:

"hospital union" means a trade union certified for a unit in which the majority of employees has as its principal duties the care of patients in, or operation and maintenance of, a hospital;

"policemen's union" means a trade union certified for a unit in which the majority of employees is engaged in police duties.

21. Mr. King, Minister of Labor, B.C. Legislative Assembly Debates, Third Session, 30th Parliament, October 26, 1973, p. 1000.

22. H.W. Arthurs, "The Dullest Bill: Reflections on the Labour Code of British Columbia", (1974) 9 U.B.C. Law Review 280 at 295.

23. S.B.C. 1974, c. 108. (See Appendix A, infra.)

24. S.B.C. 1973, c. 122.

(7) Where a dispute between an employer and a fire fighters' union, policemen's union, or hospital union is not resolved, and as a consequence an immediate and serious danger to life or health is likely to occur or is continuing to occur, the minister may recommend that the Lieutenant Governor in Council, by order, prescribe a cooling-off period of time not exceeding 21 days during which period no employee or trade-union shall strike and no employer shall lock out his employees or during which period any existing strike or lockout shall be suspended.

(8) The Lieutenant-Governor in Council shall not make an order under this section more than once in respect of the same dispute.

25. S.B.C. 1975, c. 83. (See Appendix B, infra.)

26. Collective Bargaining Continuation Act, S.B.C. 1975, c. 83, section I(1)(a).

27. Ibid., section 2(1)(a).

28. Ibid., section 9 clauses (1) and (2).

29. Labour Code of British Columbia (Amendment) Act, 1975, (B.C.), c. 33, section 73(7).
30. Vancouver General Hospital and Hospital Employees Union Local 180. B.C.L.R.B. Decision No. 31/78.
31. S.B.C. 1976, c. 21. (See Appendix C, infra).
32. Labour Code of British Columbia (Amendment) Act, 1976, (B.C.), c. 26.
33. S.B.C. 1976, c. 48. (See Appendix D, infra).
34. The Act has not been repealed, although it is regarded as "obsolete" and has not been included in the latest consolidation: Revised Statutes of British Columbia, 1979.
35. B.C. Legislative Assembly Debates, First Session, 31st Parliament, June 14, 1976, p. 2579.
36. Ibid.
37. See sections 2-5. By virtue of section 7, an "employer", except in Part II, means The British Columbia Railway Company and the British Columbia Ferries Division of the Department of Transport and Communications, or the British Columbia Ferry Corporation.
38. See In the Matter of an Arbitration between the British Columbia Railway Company and the United Transportation Union, Locals 1778 and 1923, September 21, 1976 (Shime) and ibid., July 19, 1977.
39. Section 16(1).
The period may be extended by Order-in-Council for a further period not exceeding 14 days.
40. Sections 17 and 18.
41. S.B.C. 1977d, c. 83 (Bill 92). (See Appendix E, infra).
42. S.B.C. 1978, c. 42. (See Appendix F, infra).
43. See Arbitrator's Report: In the Matter of the West Kootenay Schools Collective Bargaining Assistance Act, June 30, 1979 (Hall).
44. The Essential Service Disputes Act is amended
(a) in section 8 by adding "or" at the end of clause (b) and by adding this clause: (c) a substantial disruption in the delivery of educational services;

- (b) and by adding these employers to the Schedule: Colleges and Boards of School Trustees as defined in the Public Schools Act; Universities as defined in the Universities Act; Institutions as defined in the Colleges and Provincial Institutes Act; Municipalities; Regional Districts and Improvement District Corporations under the Water Act.
45. Order-in-Council.
46. Hon. John Munro, Minister of Labor, "Arbitration in Essential Industries" April 1974 in Labour Gazette at 256.
47. Canadian Industrial Relations - The Report of the Task Force on Labor Relations. Privy Council Office, December 1968, (hereinafter referred to as the Task Force Report) at 32.
48. Section 2(d) Canadian Charter of Rights and Freedoms, Part I, Schedule B, Constitution Act, 1982.
49. (1962) 34 D.L.R. (2d) 654 (S.C.C.).
50. Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize. Adopted by the General Conference of the International Labor Organization at its thirty-first session, San Francisco, July 9, 1948.
51. The Durham Board of Education and Ontario Secondary School Teachers' Federation, District 17 and Education Relations Commission. (unreported, October 24, 1983). O'Leary J. at 61.
52. For further details on this subject see J. Schregle: "Labour Relations in Public Sector" (1974) in International Labor Review 399.
53. See generally A. Pankert "Settlement of Labor Disputes in Essential Services" (1980) 119 International Labor Review 723.
54. Act No. 48 of 1968, section 3, paragraph 4.
55. Section 206. See Legislative Series (Geneva ILO), 1947 - U.S.A. 2.
56. Id., Basic agreements and joint statements... .
57. Section 10. See Legislative Series (Geneva ILO), 1926-U.S.A. 1.
58. Supra, note 47 at 170.
59. Supra, note 46 at 257.

60. J.M.P. Weiler ed. Interest Arbitration (1981), at 103.
61. Supra, note 46 at 257.
62. E.S.D.A., supra, note 3.
63. Supra, note 33.
64. Mr. Wallace, B.C. Legislative Assembly Debates, 1973, p. 5903.
65. Mr. Gibson, B.C. Legislative Assembly Debates, 1973, p. 5885.
66. Hon. Mr. Hewitt, B.C. Legislative Assembly Debates, 1973, p. 5938.
67. Ibid.
68. Mr. L. Bawtree, B.C. Legislative Assembly Debates, 1973, p. 5938.
69. Hon. Mr. Phillips, B.C. Legislative Assembly Debates, 1973, p. 5905.
70. Section 8(c).
71. Supra, note 42.
72. Supra, note 44.
73. Supra, note 3, section 1.
74. See Public Service Commission of the Government of British Columbia and Certain Employees of the Government of British Columbia engaged in Fire Fighting Activities and The British Columbia Government Employees Union. B.C.L.R.B. Decision No. 29/75.
75. Supra, note 23.
76. Supra, note 74.
77. Supra, note 3, section 1.
78. B.C.L.R.B. Decision No. 52/78.
79. B.C.L.R.B. Decision No. 60/78.
80. B.C.L.R.B. Decision No. 62/79.
81. B.C.L.R.B. Decision No. 21/80.

82. B.C.L.R.B. Decision No. 32/81.
83. Labor Code of British Columbia, Section 73(6), now repealed.
84. Supra, note 80.
85. Hospitals Act, R.S.B.C. 1960, c. 78.
86. See Community Care Facilities Act, R.S.B.C. 1979, c. 4.
87. Supra, note 3, section 1.
88. In a recent decision, In the Matter of the British Columbia Government Employees Union of November 1, 1983, Hon. Allan McEachern, C.J., of the Supreme Court of British Columbia made a Restraining Order against pickets at the entrances and within the precincts of Courts of justice. He stated:

"... picketing which may be lawful in many private, commercial or institutional settings, has in this case as its obvious purpose, the limitation and restriction both of the work of the courts,
... such conduct is a contempt of this and every Court. It is in fact a contempt against justice itself...
I must therefore make an Order restraining and enjoining all persons having notice or knowledge of this Order from picketing at or in the vicinity of any Provincial, County, Supreme or Appeal Court in the province ..."
89. R.S.C. 1970, c. P-34 (hereinafter referred to in the footnotes as P.S.S.R.A.).
90. H.W. Arthurs, Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly? (1969) Michigan Law Review 67 at 971.
91. P.S.S.R.A., s. 50.
92. The issue was raised, and avoided, in A.G. British Columbia v. Ellasy and British Columbia Government Employees Association (1959) C.L.L.C. 15, 262 (British Columbia Supreme Court).
93. Regina v. C.P.R. ex rel. Zambri [1962] S.C.R. 609.
94. P.S.S.R.A., s. 79.
95. H.W. Arthurs, supra, note 90 at 988.
96. Infra, note 99.
97. P.S.S.R.A., s. 25.

98. (1969) P.S.S.R.B., File No. 181-2-8.
99. (1974) P.S.S.R.B., File No. 181-1-32.
100. (1981) P.S.S.R.B., File No. 181-2-134.
101. The Electronics case has been followed many times. See Administrative Support Category case (1976) P.S.S.R.B. File No. 181-2-18.
102. P.S.S.R.A., R.S.C., 1966-67, c. 72 s. 79(1).
103. P.S.S.R.A. s. 79(2).
104. P.S.S.R.A. s. 79(3).
105. P.S.S.R.A. s. 79(4).
106. The Canadian Air Traffic Control Association and Treasury Board (1972) P.S.S.R. Reports K 839.
107. P.S.S.R.A. s. 25.
108. P.S.S.R.A. s. 79(1).
109. Supra, note 102.
110. Federal Court Act, R.S.C. 1970, c.F-10.
111. Supra, note 2.
s. 73(1) Where a dispute between an employer and a trade union is not resolved, and as a consequence an immediate and serious danger to life or health is likely to or is continuing to occur, the minister may ...
(b) request the board to designate the facilities, productions and services it considers necessary or essential to prevent immediate and serious danger to life, health, or safety, and the board may order the employer and the trade union to continue to supply, provide or maintain in full measure those facilities, productions and services and not to restrict or limit a facility, production or service so designated.
112. Supra, note 30.
113. Supra, note 2, section 73(1)(b).
114. Supra, note 3, section 8(d).
115. Supra, note 2, section 73(1).

116. John F. Burton and Charles Krider, "The Role and Consequences of Strikes by Public Employees", 79 Yale Law Journal 48.
117. In Ladner Private Hospital et al. and Hospital Employees Union Local 180 B.C.L.R.B. Decision No. 17/79, Counsel for the Hospital Employees Union conceded that the Essential Service Disputes Act applied to the collective bargaining relationship between the Hospital and the Hospital Employees Union.
118. A strike by hospital support staff was successfully managed at the Vancouver General Hospital by the Labor Relations Board in May and June, 1976.
119. Public Employee Relations Act, Pennsylvania, s. 43 paragraph 1003.
120. 68 L.C. p. 52 827; 5 Comm. Ct. 378 (1972).
121. 2 P.B.C., p. 20.0/2 (1973).
122. Armstrong case supra, note 120.
123. 2 C.C.H. State Labor Cases 52, 684 (Pa. Comm. Pleas, 1971).
124. See generally Professor Merton C. Bernstein, "Alternatives to the Strike in Public Labour Relations" Havard Law Review: 442, 469.
125. Several proposals for "nonstoppage" or "statutory" (because imposed by statute) strikes have been made in the private sector. See McCalmont, The Semi-Strike, 15 Industrial and Labor Relations Review 191 (1962); Marshall and Marshall, "Nonstoppage Strike Proposals - A Critique", 7 Labor Law Journal 299 (1956).
These proposals envisioned that employees continue at work ad that the employer lose some income; and most involved a reduction of pay between declaration of the nonstoppage and settlement. All were limited to the private sector.
126. Thomas A. Kochan, "Dynamics of Dispute Resolution in the Public Sector", Public Sector Bargaining ed. Aaron, Grodin and Stein, Industrial Relations Research Association Series, at 150.
127. Ibid.

128. s. 5(1) Where the agency recommends that fact-finding should be a procedure to be followed the minister may appoint a person as the fact-finder.
- (2) The fact finder shall confer with the parties and inquire into, ascertain and make a report setting out the matters agreed on by the parties for inclusion in a collective agreement and all matters remaining in dispute between the parties, and the fact-finder shall, in his report, include his findings in respect of any matter that he considers relevant to the conclusion of a collective agreement, and may recommend terms of settlement of all matters remaining in dispute.
- (3) The fact finder, in carrying out his duties,
- (a) may require an employer or trade union to provide him with information, and the employer or trade union, as the case may be, shall promptly comply with the request;
 - (b) has all the powers, protection and privileges of a commissioner under sections 12, 15 and 16 of the Inquiry Act;
 - (c) may determine his own procedure, but shall give an opportunity to the employer and trade union to present evidence and make representations; and
 - (d) may receive and accept evidence and information on affidavit or otherwise, as in his discretion he considers advisable whether or not it is admissible as evidence in court.
- (4) The fact finder shall submit a report to the parties, the agency and the minister within 20 days following the date of his appointment, or within such longer period of time as the minister directs.
- (5) The report of the fact-finder is not binding on the parties but is made for the advice and guidance of the parties, and on receipt of the report the parties shall endeavour, in good faith, to conclude a collective agreement.
- (6) Except as provided in subsection (5), no person shall publish or distribute the report of the fact-finder; but the minister may publish and distribute the report in any manner he considers advisable.
129. Supra, note 126, at 184.
130. Bryan Downie "Behavioral Economic, and Institutional Effects of Compulsory Interest Arbitration", Discussion Paper No. 147, Economic Council of Canada, Ottawa, 1979, at 40.
131. Id. at 32.
132. David B. Lipsky and Thomas A. Barocci, "Final-Offer Arbitration and Public Safety Employees: The Massachusetts Experience", Industrial Relations Research Association Proceedings of the 30th Annual Meeting, December 1977, New York City (Madison, Wisconsin: The Association, 1978), at 67-75.

133. D.G. Gallagher and R. Pegnetter, "Impasse Resolution under the Iowa Multistep Procedure", (1979) 32 Industrial and Labour Relations Review, at 327-338.
134. Supra, note 130 at 80.
135. Anderson, "Arbitration: The Better Way" (1979) 1 The Rev. 6.
136. Ibid.
137. Predictably, the 'voluntary arbitrations' showed the highest incidence of chairman/single arbitrators being selected by the parties themselves. This happened in 8 of the 10 awards. On the question of ministerial appointment, for 'section 73 awards', 9 chairmen/single arbitrators were agreed to by the parties, 5 were appointed by the minister and 1 was appointed by the Labour Relations Board. In the 'Essential Service Disputes Act awards', 4 chairmen were appointed by the minister, while 3 were agreed to by the parties.
138. B.C.L.R.B. Decision 75/79.
139. For the purposes of examining time lags, first contract arbitrations were ignored. All figures are averages for the awards in the appropriate category.
140. There was indication in most of the awards with respect to the point in time at which the parties had agreed to resort to arbitration.
141. Three awards by Sherlock were excluded from the calculation. In these cases, a memorandum of agreement had been reached between the bargaining representatives but either the employer or the employees had subsequently repudiated the accord. The arbitrator imposed the terms of the memorandum of agreement in each of the disputes, handing down his report in a matter of days.
142. Mark Thompson and James Cairnie, "Compulsory Arbitration: The Case of British Columbia Teachers" (1973-74) 27 Industrial and Labour Relations Review at 3.
143. John Crispo, The Canadian Industrial Relations System, (McGraw-Hill, Ryerson Ltd., Toronto, 1978) at 422.
144. Kenneth P. Swan, "The Search for Meaningful Criteria in Interest Arbitration". Kingston, Industrial Relations Centre. Queen's University, 1978.

145. See Charles J. Morris, "The Role of Interest Arbitration in a Collective Bargaining System", The Future of Labor Arbitration in America, American Arbitration Association 1976, at 197.
146. Peter Seize, "Mandatory Contract Arbitration: A Viable Process or Not, It Works (Sometimes), (1972-73) 26 Industrial and Labour Relations Review, 1009.
147. Walter J. Gershenfeld, "Perceptions of the Arbitrator and the Parties", National Academy of Arbitrators, Proceedings of the Thirty-First Annual Meeting, (1978) 305, at 307.
148. Published by the Research and Planning Branch, Ministry of Labor, Province of British Columbia, Victoria.
149. For example, in the case of fire fighters and policemen's unions, it became widely accepted that the appropriate salary level was parity, or near parity with the Vancouver local: Corporation of the City of Dawson Creek and Dawson Creek Firefighters (Sherlock).
150. A more extensive review of arbitrator's reasons is found in "Criteria Used by Arbitrators in Public Sector Interest Disputes", Reference Report No. 32, Public Employers of British Columbia, September 21, 1979. The Report examines the extent to which arbitrators have considered the criteria (or elaborated upon their use) at 4-6.
151. As noted in the awards, the public interest is a "double-edge sword" (Ladner Private Hospital - Owen Flood) and "not a particularly helpful criterion" (R.N.A.B.C. - McIntyre). One may indeed wonder how the parties themselves can be expected to present an objective view of the public interest. If the legislature is serious in seeing that the public interest is genuinely regarded, this almost of necessity entails submissions from a neutral third party.
152. In The Matter of The West Kootenay Schools Collective Bargaining Assistance Act, June 30, 1979 (Hall), at p. 17. The arbitrator stated that applying criteria required a great deal of judgment, "...particularly if the arbitration of interest disputes is seen to be an alternative to free collective bargaining". It is suggested that this is an incorrect view of interest arbitration; it is an alternative to strike - not to free collective bargaining.
153. Michael J. Klaper, "Legislated Criteria in Arbitration of Public Safety Contract Disputes".

154. Id., at 119.
155. Id., at 116.
156. Id., at 129.
157. Supra, note 130 at 11.
158. To reduce this risk, it might be possible to use final offer arbitration to resolve monetary terms of the collective agreement and rely on conventional arbitration for any remaining issues.
159. Charles Feigenbaum, "Final Offer Arbitration: Better Theory Than Practice", (1975) 14 Industrial Relations, 311.
160. Supra, note 130 at 36.
161. Id., at 40.
162. Id., at 79.
163. Id., at 80.
164. Id., at 81.
165. January 31, 1977 (Bird) A-45/77.
166. Industrial Relations Research Association Series, Proceedings of the Twenty-Sixth Annual Winter Meeting, December 28-29, 1973, New York.
167. June 28, 1978 (McKee).
168. Arnold M. Zack, "Final Offer Selection - Panacea or Pandora's Box?", (1973-74) New York Law Forum 579.
169. Peter Feuille, "Final Offer Arbitration and the Chilling Effect", (1975) 14 Industrial Relations 302, at 305.
170. Id., at 309.
171. These disputes were in the mining industry, railroad, chemical plant, and oil industry.
172. Address by Clive McKee, 'Arbitration of "Rights" and "Interestest" Disputes' at Seminar on Arbitrations, sponsored by British Columbia Department of Labor, December 10, 1974. University of British Columbia.
173. H.L.R.A. v. H.E.U. [1979] Can. L.R.B.R. 409.

LIST OF ARBITRATION AWARDS

This is a list of arbitration awards analyzed in this study. The parties, dates and the names of the arbitrators are given, followed by the Ministry of Labour reference code. For tripartite arbitration boards, only the chairman's name is noted.

Awards pursuant to Agreement of the parties

Dogwood Lodges and Hospital Employee's Union, Local 180, July 17, 1975 (Blair); A-135/75.

Vancouver Police Board and Vancouver Policemen's Union, July 22, 1975 (Blair); A-139/75.

Vancouver Police Board and Vancouver Policemen's Union, January 12, 1976 (Blair); A-14/76.

British Columbia Railway and Teamsters Local 213 et al, June 1, 1976 (Shime); MA-6/76.

Vancouver Police Board and Vancouver Policemen's Union, September 27, 1976 (Larson); A-211/76.

Cariboo College Faculty Association and Cariboo College Council, November 26, 1976 (Bird); A-271/76.

International Typographical Union and Vancouver Island Publishing Company, January 31, 1977 (Bird); A-45/77.

Board of School Trustees No. 45 and West Vancouver Municipal Employee's Association, June 17, 1977 (McKee); A-164/77.

Fraser Valley Areas (1975) Ltd. and Misc. Workers Union, Local 351, May 30, 1978 (Hickling); MA-12/78.

British Columbia Railway and United Transportation Union, June 28, 1978

(McKee); A-144/78.

The Management and Professional Employees Society of British Columbia

Hydro and Power Authority, May 17, 1979 (Thompson); A-161/79.

Awards pursuant to section 73 of the Labour Code.

City of Kelowna and Kelowna Firefighters' Association, Local 953

I.A.F.F., June 16, 1975 (Sherlock); A-105/75.

Corporation of the District of Burnaby and Burnaby Firefighter's

Association, Local 323, I.A.F.F., August 8, 1975 (Sherlock); A-156/75.

City of Prince George and Prince George Firefighters' Association,

Local 1372 I.A.F.F., August 20, 1975 (Sherlock); MA-14/75.

Victoria Policemen's Union and City of Victoria, November 13,

1975(Barclay); MA-24/75.

Richmond Private Hospital and Hospital Employees Union, Local 180,

December 31, 1975 (Weiler).

City of Victoria and Victoria Firefighter's Union, Local 730 I.A.F.F.,

July 20, 1976 (Davie); A-174/76.

Glen Private Hospital and Canadian Union of Public Employees, Local

1731, September 14, 1976 (Thompson).

Corporation of the City of Dawson Creek and Dawson Creek Firefighters,

Local 2136 I.A.F.F. (Sherlock); MA-12/76.

Police Board of the District of Saanich and Saanich Police Association,

December 10, 1976 (Stewart); A-55/77.

Ladner Private Hospital, et al and Hospital Employee's Union, Local

180, December 15, 1976 (McColl); A-10/77.

Health Labour Relations Association and International Union of

Operating Engineers, Local 882, January 31, 1977 (Ladner); MA-22/77.

City of Victoria and Victoria Firefighter's Union, Local 730 I.A.F.F.,

May 5, 1977 (Stewart); MA-13/77.

Corporation of the District of West Vancouver and West Vancouver
Professional Firefighter's Union, Local 1525 I.A.F.F., April 27, 1977
(Larson) MA-24/77.

Kiwanis Hospital Employees Union Senior Citizens' Homes Ltd. and
Hospital Employees Union, Local 180, September 29, 1978 (Bird); A-
221/78.

New Vista Care Society and Hospital Employee's Union, Local 180, May
14, 1979 (Larson) A-123/79.

Awards Pursuant to Section 6 of the Essential Service Disputes Act

Health Labour Relations Association and Hospital Employees Union, Local 180, July 28, 1977 (Hope); A-168/78.

Health Labour Relations Association and Registered Nurses Association of British Columbia, June 12, 1978 (Stewart); MA-7/78.

The Corporation of the District of Burnaby and Burnaby Firefighter's Association, Local 323 I.A.F.F., August 9, 1978 (Ladner); A-184/78.

Health Labour Relations Association and the Health Sciences Association of British Columbia, September 6, 1978 (Larson); MA 17/78.

Health Labour Relations Association and Canadian Union of Public Employees, Local 105, April 20, 1979 (Sherlock); A-96/79.

Ladner Private Hospital et al and Hospital Employees Union, Local 180, June 12, 1979 (Owen-Flood), MA-11/79.

Registered Nurses Association of British Columbia and Government of British Columbia, June 29, 1979 (MacIntyre) MA-38/79.

APPENDIX A

S.B.C. 1974, c. 108

Essential Services Continuation Act

WHEREAS by reason of a strike by the firefighters' unions in the Corporation of the District of North Vancouver, the District of Coquitlam, the Corporation of the Township of Richmond, and the Corporation of Delta, an immediate and serious danger to life and health may occur:

And whereas the firefighters' unions have failed to provide essential life supporting services to the communities affected:

And whereas an Industrial Inquiry Commission appointed by the Minister of Labour has failed to resolve the dispute:

And whereas extensive mediation has also failed to provide a resolution of the dispute:

Now, therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

**Certification
of Council**

1. Notwithstanding the *Labour Code of British Columbia Act* or any other Act or law, the certifications of the

- (a) District of North Vancouver Fire Fighters' Association, Local 1183;
- (b) Coquitlam Fire Fighters' Union, Local 1782;
- (c) Richmond Fire Fighters' Association, Local 1286, International Association of Fire Fighters;
- (d) Delta Fire Fighters' Association, Local 1763; and
- (e) Vancouver Fire Fighters' Union, Local 18, International Association of Fire Fighters

are varied by substituting, in each case, the Greater Vancouver Council of Fire Fighters' Trade Unions as the bargaining agent for those units.

**Constitution
of Council**

2. The Greater Vancouver Council of Fire Fighters' Trade Unions consists of the

- (a) District of North Vancouver Fire Fighters' Association, Local 1183;
- (b) Coquitlam Fire Fighters' Union, Local 1782;
- (c) Richmond Fire Fighters' Association, Local 1286, International Association of Fire Fighters;
- (d) Delta Fire Fighters' Association, Local 1763; and
- (e) Vancouver Fire Fighters' Union, Local 18, International Association of Fire Fighters,

and shall be deemed to be a council of trade-unions within the meaning of the *Labour Code of British Columbia Act*.

**Effect of
certification.**

3. Upon the coming into force of this Act, the collective agreement between the City of Vancouver and the Vancouver Fire Fighters' Union, Local 18, International Association of Fire Fighters and all the terms and conditions thereof in so far as they may be applicable shall be deemed to constitute the collective agreement between the employers, namely the Corporation of the District of North Vancouver, the District of Coquitlam, the Corporation of the Township of Richmond, the Corporation of Delta, and the City of Vancouver, respectively, and the Greater Vancouver Council of Fire Fighters' Trade Unions, and is binding upon the employers and their employees represented by the bargaining agents referred to in section 2, except to the extent to which any of the employers and the Greater Vancouver Council of Fire Fighters' Trade Unions agree in writing to vary any or all of those terms and conditions.

Application.

4. (1) Where, in the opinion of the Labour Relations Board, the provisions of the collective agreement first referred to in section 3 cannot be applied in respect of the employees of all or any of the employers named in that section, the board may make such orders as it considers necessary.

(2) Upon the coming into force of this Act, the collective agreement referred to in section 3 applies to the Corporation of the District of North Vancouver, the District of Coquitlam, the Corporation of the Township of Richmond, the Corporation of Delta, and the City of Vancouver and their respective employees represented by the bargaining agents referred to in section 2, effective on the day following the date of expiry of the last preceding collective agreement of each of them with their respective employees.

**Interpre-
tation.**

5. Unless inconsistent with this Act, the definitions of words contained in the *Labour Code of British Columbia Act* apply to those words used in this Act.

**Amends
Labour
Code of
British
Columbia
Act.**

6. The *Labour Code of British Columbia Act*, being chapter 122 of the Statutes of British Columbia, 1973 (Second Session), is amended

(a) by repealing section 57 (1) and substituting the following:

(1) For the purpose of securing and maintaining industrial peace and promoting conditions favourable to settlement of disputes, the minister may, upon the application of one or more trade-unions, or on his own motion, and after such investigation as he considers necessary or advisable, direct the board to consider whether or not, in a particular case, a council of trade-unions would be an appropriate bargaining agent; and where the board considers it necessary or advisable, it may certify a council of trade-unions as a bargaining agent, or vary a certification by substituting for the trade-union or trade-unions named therein a council of trade-unions as the bargaining agent for that unit; and

(b) in section 73, by adding after subsection (6) the following as subsections (7) and (8):

(7) Where a dispute between an employer and a firefighters' union, policemen's union, or hospital union is not resolved, and as a consequence an immediate and serious danger to life or health is likely to occur or is continuing to occur, the minister may recommend that the Lieutenant-Governor in Council, by order, prescribe a cooling off period of time not exceeding 21 days during which period no employee or trade-union shall strike and no employer shall lock out his employees or during which period any existing strike or lockout shall be suspended.

(8) The Lieutenant-Governor in Council shall not make an order under this section more than once in respect of the same dispute.

APPENDIX B

S.B.C. 1975, c. 83

Collective Bargaining Continuation Act

[Assented to 7th October, 1975.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Basic industries and services to be resumed.

1. (1) Commencing 48 hours after the coming into force of this Act, Act,
- (a) every employer shall immediately in good faith resume and reinstate the operation of his undertaking, plant, industry, or business to the extent and scope that it was on the date the strike or lockout first occurred,
 - (b) no employer shall restrict, limit, reduce, diminish, or slow down the operation of his undertaking, plant, industry, or business or the production or output therefrom by reason of or in contravention of this Act,
 - (c) no employer shall reduce, diminish, or cease the production of any goods or the provision of any services where the reduction, diminution, or cessation would be likely to cause immediate and serious danger to life or health,
 - (d) no employer shall declare, authorize, acquiesce in, or engage in a lockout of his employees,
 - (e) every employer to which this Act applies shall call back to work each of his employees who has been on strike or locked out or has been laid off as a consequence of any strike that has ceased to be valid by reason of the coming into force of this Act, and
 - (f) no employee referred to in paragraph (e) shall be laid off or again be laid off by any such employer as a consequence of any such strike.

(2) Nothing in this section shall be construed as affecting the right of an employer to suspend, transfer, lay off, discharge, or discipline an employee for just and reasonable cause.

Idem.

2. Commencing 48 hours after the coming into force of this Act,
- (a) all employees shall immediately resume the duties of their employment with their respective employer in accordance with the terms and conditions of the last collective agreement in force between the employees and their respective employer prior to the coming into force of this Act, and
 - (b) no person or trade-union shall declare, acquiesce in, or engage in any strike of the operations of their employers or declare,

authorize, acquiesce in, or engage in any picketing of the places of business operation of their respective employers, or the places where they are employed.

Notice of compliance required.

3. Each person who, at the time this Act comes into force, is authorized on behalf of a trade-union to bargain collectively with an employer for the renewal or revision of a collective agreement, shall forthwith give notice to the members of the trade-union on whose behalf he is authorized to bargain that any declaration, authorization, or direction to go on strike, declared, authorized, or given to them before the coming into force of this Act, has become invalid and that any strike and picketing is prohibited by reason of the coming into force of this Act.

Collective agreement deemed in force.

4. The terms and conditions of a collective agreement between the employers and their respective employees or their trade-union in force on January 1, 1975, are deemed to comprise a collective agreement and, notwithstanding anything to the contrary in the collective agreement, the *Labour Code of British Columbia*, the regulations made under it, or any order made under the *Labour Code of British Columbia*, are in full force and effect, commencing 48 hours after this Act comes into force and ending,

- (a) in respect of a particular employer and his employees or their trade-union, on the date on which a new or revised collective agreement has been concluded between that employer and his employees or their trade-union, or
 - (b) on the date this Act expires,
- whichever first occurs.

Bargaining in good faith for new or revised collective agreement.

5. Every employer and his employees or the trade-union representing them shall forthwith enter into negotiations with a view to the settlement of the matters at present in dispute between them as to the terms and conditions of a renewal or revision of the collective agreements to which this Act applies, and shall negotiate in good faith with one another and make every reasonable effort to conclude a settlement and to enter into new collective agreements.

Mandatory terms of new collective agreement.

6. Every collective agreement concluded after 48 hours after this Act comes into force and during the 90-day period that this Act is in force shall, unless the employer and the trade-union otherwise agree, contain provisions that

- (a) the rate of wages payable at the commencement of the collective agreement shall be retroactive to the date the last collective agreement expired in respect of that employer and his employees or their trade-union, and
- (b) if ordered by the Lieutenant-Governor in Council, the employer shall pay to each of his employees interest on the amount of any

increase in wages in respect of the retroactive period determined under paragraph (a) at a rate fixed in the order.

**Application of
Labour
Code.**

7. Unless inconsistent with this Act, the *Labour Code of British Columbia* applies, with the necessary changes and so far as it is applicable.

Regulations.

8. The Lieutenant-Governor in Council may make regulations.

**Commence-
ment.**

9. (1) This Act comes into force on Royal Assent and, subject to subsection (2), expires on a date 90 days after the date upon which it comes into force.

(2) Notwithstanding subsection (1), the Lieutenant-Governor in Council may, by order, extend this Act for a further period not exceeding 14 days after the date referred to in subsection (1), and, in that event, this Act expires on the date set out in the order.

(3) Where an employer and his employees or their trade-union have concluded a collective agreement, including the provisions referred to in section 6, this Act does not apply to that employer and his employees or their trade-union on and after the date on which the collective agreement was concluded.

**Interpre-
tation.**

10. (1) In this Act, unless the context otherwise requires, "collective agreement" means a collective agreement between the employer and his employees or their trade-union that expired on or after January 1, 1975, and has not been renewed or revised prior to the coming into force of this Act;

"employee" means an employee of an employer;

"employer" means an employer involved in a labour-management dispute in the forest, pulp and paper, railway, propane and butane distribution, or food merchandising industries, and includes, without limiting the generality of the foregoing, the employers' organizations representing the employers in each of those industries set out in the Schedule;

"trade-union" means a trade-union representing some or all of the employees of an employer.

(2) Unless inconsistent with this Act, the definitions of words used in this Act have the same meaning as in the *Labour Code of British Columbia*.

APPENDIX C

S.B.C. 1976, c. 21

Hospital Services Collective Agreement Act

[Assented to 9th June, 1976.]

WHEREAS a dispute between the Health Labour Relations Association, representing certain hospitals, and the Hospital Employees' Union, Local 180 exists and has resulted in work stoppages:

And whereas various initiatives have been taken to assist the parties in the resolution of their dispute, including the appointment by Order in Council of a Special Mediator:

And whereas the parties remain unable to achieve settlement and further work stoppages are likely to occur:

And whereas the Special Mediator has recommended the terms and conditions of a collective agreement between the parties:

Now, therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

**Interpre-
tation.**

1. In this Act

"employee" means employees of an employer within a bargaining unit for which the trade-union is certified;

"employer" means those employers set forth in Schedule A to the accreditation, a true copy of which is identified by the signatures of the Clerk of the Legislature and the Provincial Secretary and is on file in the office of the Clerk of the Legislature and the office of the Provincial Secretary, and includes, where the context so requires, H.L.R.A.;

"H.L.R.A." means the Health Labour Relations Association of British Columbia accredited as bargaining agent for the employers;

"minister" means that member of the Executive Council charged by order of the Lieutenant-Governor in Council with the administration of this Act;

"parties" means the employers and the trade-union and includes, where the context so requires, H.L.R.A.;

"report" means the report and recommendations of the Special Mediator appointed by Order in Council No. 1623 approved and ordered May 25, 1976, true copies of which report and recommendations, identified by the signatures of the Clerk of the Legislature and the Provincial Secretary, are on file in the office of the Clerk of the Legislature and the office of the Provincial Secretary;

"trade-union" means the Hospital Employees' Union, Local 180.

Deemed
collective
agreement.

2. (1) Forthwith upon the coming into force of this Act,
- (a) Appendix I of the report shall be deemed to constitute the terms and conditions of a collective agreement between the parties,
 - (b) H.L.R.A. and the trade-union shall forthwith execute documents in the form of Appendix I to the report, and
 - (c) if H.L.R.A. or the trade-union fails to execute documents in the form of Appendix I to the report within 5 days after the date on which this Act comes into force, the party failing to execute the documents shall be deemed to have executed them.
- (2) The collective agreement constituted under subsection (1) (a) may be varied by agreement between H.L.R.A. and the trade-union.

Review and
variation of
collective
agreement.

3. (1) As soon as practicable after the coming into force of this Act, H.L.R.A. and the trade-union, or in the event of their failure, the Special Mediator referred to in the report shall refer the collective agreement constituted under section 2 for review under the *Anti-Inflation Act* (Canada) and the regulations under that Act.

(2) Where

- (a) variations to the collective agreement constituted under section 2 are ordered under the *Anti-Inflation Act* (Canada) or regulations under that Act, those variations shall be deemed to be a part of the collective agreement constituted under section 2, and
- (b) any dispute arises between the parties respecting any such variation, the Special Mediator referred to in the report shall deal with the matters in dispute and shall make an award and the award is final and binding on the parties.

Hospital
services
continued.

4. Forthwith upon the coming into force of this Act and notwithstanding the *Labour Code of British Columbia*,

- (a) no employer shall lock out or declare a lockout of any of its employees,
- (b) the trade-union and the employees shall terminate any strike and shall not strike,
- (c) every employee shall continue or resume the ordinary duties of his employment with his employer,
- (d) the trade-union shall give notice to the employees that any declaration, authorization, or direction to go on strike given before or after the coming into force of this Act has become invalid by reason of this Act,
- (e) no officer or representative of the trade-union shall in any manner impede or prevent, or attempt to impede or prevent, any person to whom paragraphs (a) to (c) apply from complying with those paragraphs, and

- (f) no employer or person acting on behalf of an employer or any of them shall
 - (i) refuse to permit any person to whom paragraphs (a) to (c) apply to continue or resume the ordinary duties of his employment, or
 - (ii) discharge or in any other manner discipline such a person by reason of his having been locked out or on strike prior to the coming into force of this Act.

Limit on
s. 4.

5. Section 4 ceases to apply upon the expiration of the collective agreement constituted under section 2.

Special
fund.

6. The Minister of Finance shall set aside out of the Consolidated Revenue Fund and hold in a special fund until March 31, 1977, the sum of \$6 million, to be paid out on the requisition of the Minister of Health without an appropriation other than this section, for the purpose of implementation of the job evaluation provisions in the collective agreement constituted under section 2, and any further money required for that purpose shall be paid out of money authorized by the Legislature.

Other
Act.

7. (1) Unless inconsistent with this Act, the definitions, provisions and procedures set out in the *Labour Code of British Columbia* and the regulations under that Act apply.

(2) Where there is a conflict or inconsistency between this Act and the *Labour Code of British Columbia*, this Act applies.

(3) Any question or difference between the parties

- (a) as to whether this Act has been complied with, or
- (b) respecting the interpretation or application of this Act

may be referred by the parties or any of them to the Labour Relations Board, and the Labour Relations Board may decide the question or difference and enforce the decision

- (c) in any of the ways, and
- (d) by applying any of the remedies available for the enforcement of a decision or order of the Labour Relations Board under the *Labour Code of British Columbia*.

Regulations.

8. The Lieutenant-Governor in Council may make regulations.

Appropriation.

9. Money required for the administration of this Act shall, until March 31, 1977, be paid out of the Consolidated Revenue Fund and thereafter out of money authorized by the Legislature for that purpose.

APPENDIX D

S.B.C. 1976, c. 48

**Railway and Ferries Bargaining
Assistance Act**

[Assented to 14th June, 1976.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

**Interpre-
tation.**

1. In this Act

"collective agreement", except in Part II, means a collective agreement, as defined in the *Labour Code of British Columbia*, between an employer and its employees or their trade-union, and includes a renewal or revision of a collective agreement;

"employee" means a person who is ordinarily employed by an employer and on whose behalf a trade-union is entitled to bargain with the employer;

"employer", except in Part II, means the British Columbia Railway Company and the British Columbia Ferries Division of the Department of Transport and Communications, or the British Columbia Ferry Corporation, as the case may be;

"minister" means that member of the Executive Council charged by order of the Lieutenant-Governor in Council with the administration of this Act;

"trade-union" means a trade-union representing some or all of the employees of an employer.

PART I

**Special
Commissions.**

2. (1) The minister may, with the approval of the Lieutenant-Governor in Council, appoint Special Commissions consisting of such number of persons and for such terms as he considers necessary or advisable.

(2) The Lieutenant-Governor in Council shall designate a chairman and may designate a vice-chairman from among the members of a Special Commission.

(3) In the case of the absence or inability to act of the chairman or of there being a vacancy in the office of the chairman, the vice-chairman shall act as and have all the powers of the chairman, and in the absence of the chairman and vice-chairman from a meeting of a Special Commission, the members of the Special Commission present at the meeting shall appoint an acting chairman who shall act as and have all the powers of the chairman during the meeting.

(4) Every vacancy on a Special Commission caused by the death, resignation, or incapacity of a member may be filled by the appointment, by the Lieutenant-Governor in Council, of a person to hold office for the remainder of the term of that member.

(5) Each of the members of a Special Commission is eligible for reappointment upon the expiration of his term of office.

(6) The members of a Special Commission shall be paid such remuneration and expenses as are determined by the Lieutenant-Governor in Council.

(7) A Special Commission may, with the approval of the minister, appoint and pay such assistants, advisers and employees as are necessary for the purpose of carrying out its duties.

**Duties of
Special
Commission.**

3. A Special Commission may inquire into all matters pertaining to the relationships between an employer and its employees or their trade-unions and the disputes or differences arising between them, with a view to securing and maintaining industrial peace and furthering harmonious relations between them and

- (a) may report its recommendations to the minister from time to time, and shall report to the minister on request, and
- (b) if directed by the minister, shall publish the report.

**Powers of
Special
Commission.**

4. A Special Commission, in carrying out an inquiry under this Act,

- (a) has all the powers of a Commissioner under sections 7, 10 and 11 of the *Public Inquiries Act*,
- (b) may receive and accept evidence and information on affidavit or otherwise, as in its discretion it considers advisable, whether or not it is admissible as evidence in court, and
- (c) may determine its own procedure, but shall give an opportunity to any interested party to present evidence and make representations.

**Inquiries
of Special
Commission.**

5. (1) Without limiting the generality of section 3, a Special Commission may inquire into and make a report and recommendations respecting

- (a) the procedures to be followed for development and implementation of job evaluation in an employer's operations, and
- (b) any other matter affecting relations between an employer and its employees not included or referred to in a collective agreement.

(2) A report and recommendations of a Special Commission

- (a) made under subsection (1) (a)
 - (i) may include a provision that all or any part of the report and recommendations shall be deemed to be a part of a collective agreement, or, if a collective agreement is not then in force, of a collective agreement thereafter entered into, and
 - (ii) is final and binding on the employer, the trade-union affected and the employees on whose behalf it is entitled to bargain, or

- (b) made under subsection (1) (b) is final and binding, if a Special Commission so recommends, on the employer, the trade-union affected and the employees on whose behalf it is entitled to bargain for a period, not exceeding 90 days, stated in the recommendation, or
- (c) made under this section may be varied by agreement between the employer and the trade-unions affected.

PART II

Interpre-
tation.

6. In this Part

"collective agreement" means a collective agreement between the employer and its employees, or their trade-union, that expired before this Part comes into force and has not been renewed;

"employer" means the British Columbia Railway Company;

"normal operations" means such operations of the employer as require the employment of not less than the normal number of employees employed during a period specified in an order of the Lieutenant-Governor in Council.

Railway
services
to be
resumed.

7. (1) Within 48 hours after the coming into force of this section,

- (a) the employer
 - (i) shall resume its normal operations,
 - (ii) shall re-engage and resume the employment of every employee required for its normal operations, and
 - (iii) shall not declare, authorize, acquiesce in, or engage in a lockout of employees,
- (b) every employee of the employer who was bound by a collective agreement to which this Part applies shall resume the normal duties of his employment with the employer,
- (c) no person or trade-union affected by this Part shall declare, authorize, acquiesce in, or engage in a strike of the operations of the employer, or declare, authorize, acquiesce in, or engage in picketing of the place of business, operations, or employment of the employer, and
- (d) every person who is authorized on behalf of a trade-union affected by this Part to bargain collectively with the employer for the amendment, renewal, or revision of a collective agreement shall give notice to the members of that trade-union on whose behalf he is authorized to bargain that

- (i) a declaration, authorization, or direction to go on strike, declared, authorized, or given to them before or after the coming into force of this section, has become or is invalid, and
 - (ii) any strike and picketing is prohibited by reason of the coming into force of this section, and shall inform those members of their obligations under paragraph (b).
- (2) No person acting on behalf of the employer shall
- (a) refuse to permit, or authorize or direct another person to refuse to permit, an employee of the employer who went on strike before the coming into force of this section to resume the duties of his ordinary employment forthwith, or
 - (b) suspend, discharge, or in any manner discipline, or authorize or direct another person to suspend, discharge, or in any other manner discipline such an employee
- by reason of his having been on strike before the coming into force of this section.
- (3) Nothing in this Part shall be construed as affecting the right of the employer to suspend, discharge, or discipline an employee for just and reasonable cause.

**Extension
of collective
agreements.**

8. (1) The term of every collective agreement to which this Part applies is extended to include the period beginning from its expiry date and ending on the date on which a new or revised collective agreement comes into effect.
- (2) The terms and conditions of every collective agreement to which this Act applies are effective and binding on the parties to it for the period referred to in subsection (1), notwithstanding anything in the *Labour Code of British Columbia* or in the collective agreement.
- (3) During the term during which a collective agreement is extended by subsection (1),
- (a) section 7 applies,
 - (b) subject to section 7 (3), the employer shall not, except with the consent of the trade-unions, alter the rates of wages of the employees or any other term or condition of employment that was in operation on the expiry date referred to in subsection (1), and
 - (c) the trade-unions shall not, except with the consent of the employer, alter any of the terms or conditions of employment that were in operation on the expiry date referred to in subsection (1).

**Board of
Arbitration.**

9. (1) Where the employer and any trade-union are unable to conclude a new or revised collective agreement, the minister may appoint one or more persons as a Board of Arbitration.

(2) Where more than one person is appointed, the Board of Arbitration shall consist of a chairman, and members, equal in number, representing the employer and the employees of the employer.

(3) Where an arbitrator is unable to enter on or complete his duties so as to enable him to render his decision within a reasonable time after his appointment, the minister shall appoint another person to act as arbitrator in his place and the inquiry may begin as a re-hearing or proceed to completion.

(4) The Board of Arbitration shall determine its own procedure, but shall give full opportunity to the employer and the trade-unions affected to present their evidence and make their submissions.

(5) The Board of Arbitration has all the powers of an arbitrator under the *Labour Code of British Columbia*.

**Employer and
trade-unions
to negotiate.**

10. The employer and the trade-unions affected shall, upon the appointment of a Board of Arbitration by the minister, forthwith, with the assistance of the Board of Arbitration, enter into negotiations with a view to the settlement of the matters in dispute, and shall negotiate in good faith and make every reasonable effort to conclude a settlement and to enter into a new or revised collective agreement.

**Duty of
Board of
Arbitration.**

11. (1) The Board of Arbitration shall examine into and decide all matters remaining in dispute between the employer and the trade-unions affected and any other matters that appear to the Board of Arbitration to be necessary to be decided in order to conclude new or revised collective agreements between the parties.

(2) The Board of Arbitration shall remain seized of and may deal with all matters in dispute until new or revised collective agreements between the employer and the trade-unions affected are in full force and effect.

(3) Where, before or during the proceedings before the Board of Arbitration, the employer and a trade-union affected agree upon some matters to be included in a new or revised collective agreement and they so notify the Board of Arbitration in writing, the decision of the Board of Arbitration shall include those matters and, in addition,

- (a) the matters not agreed upon between the employer and the trade-unions affected,
- (b) such other matters as may be agreed upon by the employer and those trade-unions, and
- (c) such other matters as may appear to the Board of Arbitration to be necessary to be decided in order to conclude the new or revised collective agreements.

(4) The Board of Arbitration shall conclude the inquiry and give its decision within 30 days after the commencement of the inquiry; but the minister may extend the inquiry for such period as he considers necessary or advisable, or where all the parties to a particular collective agreement agree in writing, the Board of Arbitration may extend the inquiry for the period agreed upon.

(5) Where, before or during the proceedings before the Board of Arbitration, the employer and the trade-unions agree, the Board of Arbitration may use

- (a) fact-finding, or
- (b) final offer selection, or
- (c) mediation to finality,

or a combination of those methods, in order to make a decision on all matters remaining in dispute.

Decision of
Board of
Arbitration
binding

12. (1) The decision of the Board of Arbitration shall be final and binding upon the employer and the trade-unions affected and the employees on whose behalf the trade-unions are entitled to bargain.

(2) Within 7 days after the date of the decision of the Board of Arbitration or such longer period as may be agreed upon in writing by the parties to a particular collective agreement, the parties shall prepare and execute documents giving effect to the decision of the Board of Arbitration, and the documents so executed constitute new or revised collective agreements.

(3) If the parties fail to prepare and execute documents in the form of new or revised collective agreements giving effect to the decision of the Board of Arbitration within the period referred to in subsection (2), the parties or any of them shall notify the Board of Arbitration in writing forthwith, and the Board of Arbitration shall prepare documents in the form of new or revised collective agreements giving effect to the decision of the Board of Arbitration and any agreement of the parties and submit the documents to the parties for execution.

(4) If the parties or any of them fail to execute the documents prepared by the Board of Arbitration within a period of 7 days after the day of submission of the documents by the Board of Arbitration to them, the documents shall come into effect as though they had been executed by the parties and the documents constitute new or revised collective agreements under the *Labour Code of British Columbia*.

Arbitration
Act not to
apply.

13. (1) The *Arbitration Act* does not apply to proceedings under this Act.

(2) The employer and the trade-unions affected shall assume their own costs of proceedings under this Act, and the remuneration and expenses of the chairman of the Board of Arbitration shall be paid out of the Consolidated Revenue Fund without an appropriation other than this Act.

Application
of Part II.

14. Where a new or revised collective agreement comes into effect pursuant to this Part, this Part ceases to apply to the parties to that collective agreement.

PART III

Interpre-
tation.

15. In this Part, "normal operations" means such operations of an employer as require the employment of not less than the normal number of employees employed during a period specified in an order made under section 16.

Cooling-off
period.

16. (1) Where an employer and a trade-union are unable to conclude a collective agreement and the Lieutenant-Governor in Council is of the opinion that an immediate and substantial threat to the economy and welfare of the Province and its citizens exists or is likely to occur, he may, by order, prescribe a period, not exceeding 90 days, during which

- (a) the employer shall continue or, within 48 hours after the order is made, resume its normal operations, and shall re-engage and resume the employment of every employee required for its normal operations,
- (b) the employer shall not declare, authorize, acquiesce in, or engage in a lockout of employees,
- (c) the employer shall not transfer, lay off, or demote an employee without just and reasonable cause,
- (d) every employee shall continue or, on the call of the employer pursuant to paragraph (a), resume the normal duties of his employment with the employer,
- (e) neither the trade-union nor any person on its behalf, nor any employee of the employer on whose behalf the trade-union is entitled to bargain, shall declare, authorize, acquiesce in, or engage in a strike of the operations of the employer, or declare, authorize, acquiesce in, or engage in picketing of the place of business, operations, or employment of the employer, and
- (f) the terms and conditions of employment shall be those terms and conditions prevailing with respect to the employees of that employer during the period specified under section 15, except to the extent that the employer and the trade-union affected agree to vary them.

(2) Every person, who at the time an order under subsection (1) is made is authorized on behalf of a trade-union to bargain collectively with the employer for a collective agreement, shall

- (a) immediately give notice to the employees on whose behalf he is authorized to bargain

- (i) that a declaration, authorization, or direction to go on strike, declared, authorized, or given to them before or after the time the order is made, is suspended for the period prescribed in the order, and
 - (ii) that any strike and picketing is prohibited by reason of the order, and
 - (b) inform those employees of their obligations under subsection (1) (d).
- (3) No person acting on behalf of the employer shall
- (a) refuse to permit, or authorize or direct another person to refuse to permit, an employee who went on strike before the time of an order under subsection (1) to resume the duties of his ordinary employment, or
 - (b) suspend, discharge, or in any manner discipline, or authorize or direct another person to suspend, discharge, or in any other manner discipline such an employee
- by reason of his having been on strike before the time the order is made.
- (4) Nothing in this Act shall be construed as affecting the right of the employer to suspend, discharge, or discipline an employee for just and reasonable cause.
- (5) The Lieutenant-Governor in Council may, by order, extend the period referred to in subsection (1) for a further period not exceeding 14 days.
- (6) The Lieutenant-Governor in Council shall not make an order under subsection (1) or (5) more than once in respect of the same dispute.

**Special
mediator.**

17. (1) Where the Lieutenant-Governor in Council has made an order under section 16, the minister shall forthwith appoint a special mediator to confer with the parties to assist them in settling the terms of a collective agreement, and where the minister appoints more than one special mediator he shall designate a chairman.

(2) In this section, "special mediator" means one or more special mediators appointed pursuant to this section.

(3) The special mediator may determine his own procedures and both the employer and trade-union shall comply with those procedures, and where the special mediator requests information from the employer or trade-union the employer or trade-union, as the case may be, shall provide the special mediator with full and complete information.

(4) The special mediator shall, no later than a date prescribed in his appointment, make a report to the minister setting out the progress of the mediation.

(5) The special mediator shall not, in his report, recommend the terms and conditions of settlement of the dispute, unless he considers that such recommendations would resolve the dispute between the parties.

(6) Where the dispute is not resolved, the special mediator shall, not later than a date prescribed in his appointment, report to the minister his recommendations as to the procedures that should be followed to achieve a collective agreement.

Fact-
finding.

18. (1) Where the special mediator recommends, pursuant to section 17 (6), that fact-finding should be the procedure to be followed, the minister may appoint a person as the fact-finder.

(2) The fact-finder shall confer with the parties and inquire into, ascertain and make a report setting out the matters agreed upon by the parties for inclusion in a collective agreement and all matters remaining in dispute between the parties, and the fact-finder shall, in his report, include his findings in respect of any matter that he considers relevant to the conclusion of a collective agreement, and may recommend terms of settlement of all matters remaining in dispute.

(3) The fact-finder, in carrying out his duties,

- (a) may require an employer or trade-union to provide him with information, and the employer or trade-union, as the case may be, shall forthwith comply with the request,
- (b) has all the powers of a Commissioner under sections 7, 10 and 11 of the *Public Inquiries Act*,
- (c) may determine his own procedure, but shall give an opportunity to the employer and trade-union to present evidence and make representations, and
- (d) may receive and accept evidence and information on affidavit or otherwise, as in his discretion he considers advisable, whether or not it is admissible as evidence in court.

(4) The fact-finder shall submit a report to the parties within 20 days following the date of his appointment, or within such longer period of time as the minister directs.

(5) The report of the fact-finder is not binding on the parties but is made for the advice and guidance of the parties, and upon receipt of the report the parties shall endeavour, in good faith, to conclude a collective agreement.

(6) Except as provided in subsection (4), no person shall publish or distribute the report of the fact-finder; but if a collective agreement has not been concluded within 10 days after the submission of the report to the parties, the fact-finder shall submit his report to the minister, who may publish and distribute the report in any manner he considers advisable.

PART IV

**Other
Acts.**

19. (1) Unless inconsistent with this Act, the definitions, provisions and procedures set out in the *Labour Code of British Columbia* and the regulations under that Act or the *Public Service Labour Relations Act* and the regulations under that Act, as the case may be, apply.

(2) Where there is a conflict or inconsistency between this Act and the *Labour Code of British Columbia* or the *Public Service Labour Relations Act*, respectively, this Act applies.

(3) Any question or difference between the parties

(a) as to whether this Act or a binding report or recommendation of the Special Commission has been complied with, or

(b) respecting the interpretation or application of this Act or the regulations, or an order made under this Act

may be referred by the parties or any of them to the Labour Relations Board, and the Labour Relations Board may decide the question or difference and enforce the decision

(c) in any of the ways, and

(d) by applying any of the remedies

available for the enforcement of a decision or order of the Labour Relations Board under the *Labour Code of British Columbia* or the *Public Service Labour Relations Act*, as the case may be.

Regulations.

20. The Lieutenant-Governor in Council may make regulations.

Appropriation.

21. Money required for the purpose of this Act shall, until March 31, 1977, be paid out of the Consolidated Revenue Fund and thereafter out of money authorized by the Legislature for that purpose.

Commencement.

22. (1) This Act, except Part II, comes into force on a day to be fixed by Proclamation.

(2) Part II comes into force on June 15, 1976.

APPENDIX E

S.B.C. 1977, c. 83

Essential Services Disputes Act

[Assented to 21st October, 1977.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

**Interpre-
tation.**

1. In this Act

- "agency" means the Essential Services Advisory Agency established under Part I;
- "employer" means an employer in the Schedule or an employer of the members of the fire-fighters' unions, policemen's unions and health care unions;
- "fire-fighters' union" means a trade-union certified for a unit in which the majority of employees has as its principal duties the fighting of fires and the carrying-out of rescue operations;
- "health care union" means a trade-union certified for a unit in which the majority of employees has as its principal duties the health care of patients or operation and maintenance of a hospital;
- "policemen's union" means a trade-union certified for a unit in which the majority of employees is engaged in police duties;
- "minister" means that member of the Executive Council charged by order of the Lieutenant-Governor in Council with the administration of this Act;
- "normal operations" means such operations of the employer as require the employment of not less than the normal number of employees employed during a period specified in an order of the Lieutenant-Governor in Council;
- "special mediator" means a person appointed under section 8 (e).

**Application
of Act.**

2. (1) This Act applies to the employers defined in section 1, their employees and the trade-unions representing them.

(2) Unless inconsistent with this Act, the definitions, provisions and procedures in the *Labour Code of British Columbia* and the regulations under it or the *Public Service Labour Relations Act* and the regulations under it, as the case may be, apply to this Act.

(3) Where there is a conflict or inconsistency between this Act and the regulations under it, and the *Labour Code of British Columbia* or the *Public Service Labour Relations Act* and the regulations under either of them, this Act and the regulations under it applies.

PART I

Essential Services Advisory Agency.

3. (1) The Lieutenant-Governor in Council shall, by order, establish an Essential Services Advisory Agency consisting of such number of members for such terms as is specified in the order.

(2) The members shall be paid such remuneration and expenses as the Lieutenant-Governor in Council determines.

(3) The Lieutenant-Governor in Council may designate one of the members to act as chairman of the agency.

(4) Notwithstanding the *Public Service Act*, the agency may employ such employees, specialists and consultants as it considers necessary to enable it to carry out its duties and may determine their remuneration.

Duties of agency.

4. (1) On the request of the Lieutenant-Governor in Council, the agency shall investigate and report to him with advice and recommendations respecting

- (a) the causes of industrial relations disputes in essential services under this Act,
- (b) the impact on, or extent of danger to, the public or threat to the economy of the Province referred to in section 8,
- (c) the development with employers and employees of strategies and plans for the prevention of interruption of essential services and the resolution of industrial relations disputes,
- (d) special procedures necessary to conclude a collective agreement or a renewal or revision of it, and
- (e) such further and other matters as he may request.

(2) The agency has all the powers, protection and privileges of a Commissioner under sections 7, 10 and 11 of the *Public Inquiries Act*.

(3) A report by the agency under subsection (1) shall be published by the agency forthwith after it is given to the Lieutenant-Governor in Council.

Fact- finding.

5. (1) Where the agency recommends that fact-finding should be a procedure to be followed, the minister may appoint a person as the fact-finder.

(2) The fact-finder shall confer with the parties and inquire into, ascertain and make a report setting out the matters agreed on by the parties for inclusion in a collective agreement and all matters remaining in dispute between the parties, and the fact-finder shall, in his report, include his findings in respect of any matter that he considers relevant to the conclusion of a collective agreement, and may recommend terms of settlement of all matters remaining in dispute.

(3) The fact-finder, in carrying out his duties,

- (a) may require an employer or trade-union to provide him with information, and the employer or trade-union, as the case may be, shall forthwith comply with the request,

- (b) has all the powers, protection and privileges of a Commissioner under sections 7, 10 and 11 of the *Public Inquiries Act*,
 - (c) may determine his own procedure, but shall give an opportunity to the employer and trade-union to present evidence and make representations, and
 - (d) may receive and accept evidence and information on affidavit or otherwise, as in his discretion he considers advisable, whether or not it is admissible as evidence in court.
- (4) The fact-finder shall submit a report to the parties, the agency and the minister within 20 days following the date of his appointment, or within such longer period of time as the minister directs.
- (5) The report of the fact-finder is not binding on the parties but is made for the advice and guidance of the parties, and on receipt of the report the parties shall endeavour, in good faith, to conclude a collective agreement.
- (6) Except as provided in subsection (5), no person shall publish or distribute the report of the fact-finder; but the minister may publish and distribute the report in any manner he considers advisable.

PART II

Settlement
of dispute
by arbitra-
tion.

6. (1) Where a fire-fighters' union, policemen's union, or health care union and an employer or a representative authorized by the employer have bargained collectively in good faith and fail to conclude a collective agreement or a renewal or revision of it, the trade-union may elect, by giving a notice in writing to the employer and the minister, to resolve the dispute by arbitration.
- (2) On the receipt of a notice under subsection (1), the parties shall make such arrangements as are mutually agreed for the appointment of a single arbitrator or the establishment of an arbitration board and the appointment of a chairman to hear the dispute and resolve it by settling the terms and conditions of a collective agreement.
- (3) Where, within 10 days after the notice has been given, the parties fail to agree to a single arbitrator or an arbitration board is not fully constituted, the minister shall appoint a single arbitrator or fully constitute an arbitration board to hear the dispute and resolve it by settling the terms and conditions of a collective agreement.
- (4) The terms and conditions settled by the single arbitrator or arbitration board shall be deemed to be a collective agreement between the parties, binding on them and the employees except to the extent to which the parties agree to vary any or all of them.
- (5) No employer referred to in this section shall lock out his employees, and no employee or trade-union referred to in this section shall strike during

a period from the date a notice is given under this section until the date a collective agreement settled under subsection (2), (3), or (4) terminates and unless he otherwise complies with the *Labour Code of British Columbia*.

Arbitration.

7. (1) In an arbitration under this Act, the single arbitrator or the arbitration board shall have regard to

- (a) the interests of the public,
- (b) the terms and conditions of employment in similar occupations outside the employer's employment, including such geographic, industrial, or other variations as the single arbitrator or arbitration board considers relevant,
- (c) the need to maintain appropriate relationships in the terms and conditions of employment as between different classification levels within an occupation and as between occupations in the employer's employment,
- (d) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered, and
- (e) any other factor that the single arbitrator or the arbitration board considers relevant to the matter in dispute.

(2) The *Arbitration Act* does not apply to an arbitration under this Act.

(3) Sections 99, 101 to 105 and 107 of the *Labour Code of British Columbia* apply to an arbitration under this Act.

(4) Where it is shown to the satisfaction of the single arbitrator or the arbitration board that he or it has failed to deal with any matter in dispute or that an error is apparent on the face of the decision, the single arbitrator or arbitration board may, on application by either party to the dispute within 10 days after the effective date of its decision, and after giving the parties the opportunity to make representations, amend, alter, or vary the decision.

(5) There is no appeal from a decision or award of a single arbitrator or an arbitration board referred to in this Act.

PART III

**Danger to
life, etc.**

8. Where an employer and a trade-union fail to conclude a collective agreement or a renewal or revision of it, or a dispute between them is not resolved, and the Lieutenant-Governor in Council is of the opinion that, as a consequence,

- (a) an immediate and serious danger to life, health, or safety, or
- (b) an immediate and substantial threat to the economy and welfare of the Province and its citizens

exists or is likely to occur, he may, with respect to the employees covered or to be covered by the collective agreement, do one or more of the following:

- (c) direct the Labour Relations Board to designate those facilities, productions and services that it considers necessary or essential to prevent immediate and serious danger to life, health, or safety or an immediate and substantial threat to the economy and welfare of the Province and its citizens, and the Board shall order the employer and the trade-union to continue to supply, provide, or maintain in full measure those facilities, productions and services and not to restrict or limit any facility, production, or service so designated;
- (d) prescribe a period not exceeding 90 days, commencing at the time provided in the order, during which
 - (i) the employer shall continue or resume its normal operations and shall re-engage and resume the employment of every employee required for its normal operations,
 - (ii) the terms and conditions of employment shall be those terms and conditions prevailing with respect to the employees of that employer immediately prior to the prescribed period, except to the extent that the employer and the trade-union affected agree to vary them;
 - (iii) the employer shall not declare, authorize, acquiesce in, or engage in a lockout of employees,
 - (iv) the employer shall not transfer, lay off, demote, suspend, or dismiss an employee without just and reasonable cause,
 - (v) every employee shall continue or, on the call of the employer pursuant to subparagraph (i), resume the normal duties of his employment with the employer,
 - (vi) neither the trade-union nor any person on its behalf, nor any employee of the employer on whose behalf the trade-union is entitled to bargain, shall declare, authorize, acquiesce in, or engage in a strike of the operations of the employer, or declare, authorize, acquiesce in, or engage in picketing of the place of business, operations, or employment of the employer, and
 - (vii) the employer and the trade-union shall continue or commence to bargain collectively in good faith and make every reasonable effort to conclude a collective agreement or a renewal or revision of it;
- (e) appoint one or more special mediators to confer with the parties to assist them in settling the terms of a collective agreement and, where he appoints more than one special mediator, he shall designate a chairman.

Notice
of order.

9. (1) On the making of an order by the Lieutenant-Governor in Council or the Labour Relations Board under section 8 (c) or (d),

(a) every person, who is authorized on behalf of a trade-union to bargain collectively with the employer for a collective agreement, shall

(i) immediately give notice to the employees on whose behalf he is authorized to bargain

(A) that a notice, declaration, authorization, or direction to go on strike, declared, authorized, or given to them before or after the time the order is made, is suspended for the period prescribed in the order, and

(B) that any strike and picketing is prohibited by reason of the order, and

(ii) inform those employees of their obligations under section 8 (d), and

(b) every employer, trade-union, or employee affected by an order under section 8 (c) or (d) shall comply with the order.

(2) No employer or person acting on behalf of the employer shall

(a) refuse to permit, or authorize or direct another person to refuse to permit, an employee who went on strike before the time of an order made by the Lieutenant-Governor in Council or the Labour Relations Board under section 8 to resume the duties of his ordinary employment, or

(b) suspend, discharge, or in any manner discipline, or authorize or direct another person to suspend, discharge, or in any other manner discipline, such an employee

by reason of his having been on strike before the time the order is made; but nothing in this section affects the right of the employer to suspend, discharge, or discipline an employee for just and reasonable cause.

(3) For the purpose of this Act, the failure or refusal by an employee, without lawful excuse, to comply with an order made by the Lieutenant-Governor in Council or the Labour Relations Board under section 8 shall be deemed to be just and reasonable cause for demotion, suspension, or dismissal of the employee, and section 98 (d) and (e) of the *Labour Code of British Columbia* does not apply.

(4) Where an employer or an employee, without lawful excuse, fails or refuses to comply with an order made by the Lieutenant-Governor in Council or an order of the Labour Relations Board in a matter arising under section 8,

(a) in the case of the employer, he shall, in addition to the wages that he is required to pay to his employees, pay an amount equal to the wages of all his employees affected by the non-compliance for every day the employer fails or refuses to comply with the order, and

- (b) in the case of the employee, the employer shall reduce the wages of the employee by an amount equal to the wages of that employee for every day the employee fails or refuses to comply with the order

and the additional amount payable under paragraph (a) or the amount by which the wages of an employee is reduced under paragraph (b) shall forthwith be paid by the employer to a charitable organization qualified as such under the *Income Tax Act* (Canada) for use exclusively within the Province, that is agreed to by the parties or, failing agreement, designated by the Lieutenant-Governor in Council.

(5) Any question or difference between the employer, the employees, or their trade-union with respect to any matter arising under subsection (4), including

- (a) the additional amount to be paid by an employer under subsection (4) (a),
- (b) the amount by which the wages of an employee is to be reduced under subsection (4) (b), and
- (c) the manner and time for the implementation of the payment or reduction,

shall be referred for determination to the Labour Relations Board.

Extension.

10. (1) The Lieutenant-Governor in Council may, by order, extend the period referred to in section 8 for a further period not exceeding 14 days.

(2) The Lieutenant-Governor in Council shall not make an order under subsection (1) or section 8 (d) more than once in respect of the same dispute.

Election to arbitrate.

11. Where an order is made by the Lieutenant-Governor in Council under section 8 (c) or (d), the trade-union named in the order may, by giving notice in writing to the employer and the minister within 14 days after the date of the order, elect to conclude a collective agreement or a renewal or revision of it by arbitration, and section 6 (2) to (5) applies.

Special mediator.

12. (1) The special mediator may determine his own procedures and both the employer and trade-union shall comply with those procedures and, where the special mediator requests information from the employer or trade-union, the employer or trade-union, as the case may be, shall provide the special mediator with full and complete information.

(2) The special mediator has all the powers, protection and privileges of a Commissioner under sections 7, 10 and 11 of the *Public Inquiries Act*.

Report.

13. (1) The special mediator shall, at the request of the minister, report on the progress of the mediation.

(2) Where the dispute is not resolved, the special mediator shall, not later than a date set out in his appointment, report to the minister his recommendations.

PART IV

Filing of
order in
court.

14. (1) The Labour Relations Board may, on the application of any person or on its own motion, and shall, on order of the Lieutenant-Governor in Council, forthwith after it is made, file in a registry of the Supreme Court a copy of every order made by it in a matter arising under this Act, and the order shall be filed as if it were an order of the court and, on being filed, the order shall be deemed for all purposes, except for the purpose of an appeal from it, to be an order of the Supreme Court effective from the date the order was made by the Board.

(2) Notwithstanding the filing of an order under subsection (1), the Labour Relations Board may, at any time by further order, amend, substitute, replace, or withdraw all or part of an order, and shall forthwith file a copy of the subsequent order in accordance with subsection (1).

Reference
to Labour
Relations
Board.

15. Any question or difference between the parties

- (a) as to whether or not this Act or the regulations have been complied with, or
- (b) respecting the interpretation or application of this Act or the regulations, or an order made under this Act

may be referred by the parties or any of them to the Labour Relations Board, and the Labour Relations Board may decide the question or difference and enforce the decision

- (c) in any of the ways, and
- (d) by applying any of the remedies

available for the enforcement of a decision or order of the Labour Relations Board under the *Labour Code of British Columbia* or the *Public Service Labour Relations Act*, as the case may be.

Offence.

16. A person who

- (a) contravenes an order made under section 8, or
- (b) contravenes section 5 (6), 6 (5), or 9,

commits an offence and is liable to the penalties provided in section 138 of the *Labour Code of British Columbia*.

Regulations.

17. The Lieutenant-Governor in Council may make regulations.

Appropriation.

18. Money required for the purposes of this Act shall, until March 31, 1978, be paid out of the Consolidated Revenue Fund without any other appropriation, and thereafter shall be paid out of such money as may be authorized by an Act of the Legislature.

**S.B.C.
1973 (2nd
Sess.)
c. 122
s. 73.**

19. Section 73 (1) to (6) of the *Labour Code of British Columbia* is repealed.

Commencement.

20. This Act comes into force on a day to be fixed by Proclamation.

SCHEDULE

British Columbia Buildings Corporation
British Columbia Ferry Corporation
British Columbia Hydro and Power Authority
British Columbia Railway Company
British Columbia Systems Corporation
Emergency Health Services Commission
Government of British Columbia
Insurance Corporation of British Columbia
Workers' Compensation Board

6

APPENDIX F

S.B.C. 1978, c. 42

West Kootenay Schools Collective
Bargaining Assistance Act

[Assented to December 9, 1978.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Interpretation

1. In this Act

"employee"

means a person who is ordinarily employed by an employer and on whose behalf a union is entitled to bargain with the employer;

"employer"

means Selkirk College and the boards of school trustees of school districts number 7, 9, 11 and 12;

"minister"

means the Minister of Labour;

"parties"

means the unions and the employers and includes, where applicable, the British Columbia School Trustees Association as accredited bargaining agent for the employers;

"union"

means a trade union that, on the coming into force of this Act, is certified under the Labour Code of British Columbia for the employees.

Resumption of services

2. (1) Within 48 hours after this Act receives Royal Assent

(a) each employer shall resume full operations and shall resume the employment of every employee required for its full operations, and

(b) each employee shall resume the ordinary duties of his employment with his employer.

(2) On the coming into force of this Act

(a) every person who is authorized on behalf of a union to bargain collectively with an employer shall

(i) give notice to the employees on whose behalf he is authorized to bargain that a notice, declaration, authorization or direction to go on strike, declared, authorized or given to them before this Act comes into force is cancelled, and

(ii) inform the employees of their obligations under this Act,

(b) every person who is authorized on behalf of an employer to bargain collectively with a union shall

(i) give notice to the employer that a notice, declaration, authorization or direction to lock out employees is cancelled, and

- (ii) inform the employer of its obligations under the Act,
- (c) every collective agreement between an employer and its employees, or their union, that
 - (i) last expired before this Act comes into force, and
 - (ii) has not been renewedis extended and shall be deemed to be in effect for the period from the expiry date of the collective agreement to the date on which a renewed or revised collective agreement between the employer and its employees, or their union, comes into force, and
- (d) no employer or person acting on behalf of the employer shall
 - (i) refuse to permit, or authorize or direct another person to refuse to permit, an employee, who is on strike or locked out on the coming into force of this Act, to resume the duties of his ordinary employment, or
 - (ii) suspend, discharge or in any manner discipline, or authorize or direct another person to suspend, discharge or in another manner discipline an employee described in subparagraph (i)because the employee was on strike or locked out before this Act comes into force.
- (3) Nothing in this section affects the right of an employer to suspend, discharge or discipline an employee for just and reasonable cause.
- (4) Where an employee complies with this Act, his union shall not discipline him for his compliance.

Special mediator

- 3. (1) On the coming into force of the Act,
 - (a) the parties shall continue or commence to bargain collectively in good faith and make every reasonable effort to renew or revise their collective agreements, and
 - (b) the minister shall forthwith appoint a special mediator for a term of 30 days to confer with the parties to assist them in settling the terms of collective agreements.
- (2) Where a person appointed under this section is unable to enter on or complete his duties the minister may appoint another person to act in his place.
- (3) The special mediator may determine his own procedure and the parties shall comply with that procedure, and where the special mediator requests information from a party it shall provide the special mediator with full and complete information.
- (4) The special mediator shall, no later than a date specified in his appointment, make a report to the minister setting out the progress of the mediation including the matters on which agreement has or has not been reached.
- (5) The minister may, on the request of a special mediator, extend the term of his appointment.
- (6) A special mediator shall be paid remuneration and expenses determined by the minister.

Board of arbitration

4. (1) Where the special mediator reports to the minister that the parties are unable to renew or revise their collective agreements, the minister may appoint a board or boards of arbitration each composed of one or more persons.

(2) Where a person appointed to a board is unable to enter on or complete his duties the minister shall appoint another person to act in his place and the inquiry may continue or recommence as the board determines.

(3) A board of arbitration shall determine its own procedure and shall give full opportunity to the parties to present evidence and make submissions.

(4) A board of arbitration has all the powers of an arbitrator under the Labour Code of British Columbia.

(5) A person appointed to a board shall be paid remuneration and expenses determined by the minister.

(6) The minister shall specify the parties for whom a board shall renew or revise collective agreements.

Duty of board of arbitration

5. (1) A board of arbitration shall renew or revise collective agreements for the parties specified under section 4 (6) respecting that board.

(2) The decision of the board shall include provisions agreed to by the parties.

(3) A board shall conclude the arbitration and give its decision within 30 days after appointment of the board but the minister may extend the term.

(4) The decision of the board may provide that the renewed or revised collective agreement takes effect from any date after the expiration of the collective agreement extended under section 2 (2) (c).

Decision of a board of arbitration

6. (1) The decision of a board of arbitration is binding on the parties affected and on the employees on whose behalf a union is entitled to bargain except so far as the parties agree to vary it.

(2) Where it is shown to the satisfaction of a board of arbitration that an error is apparent on the face of the decision, the board may, on application of a party to the dispute within 7 days after the effective date of the decision, amend the decision.

(3) No application for judicial review shall be made under the Judicial Review Procedure Act in respect of the decision of a board of arbitration.

Execution of documents

7. (1) If the parties fail to prepare and execute documents in the form of renewed or revised collective agreements giving effect to the decision of a board of arbitration within 7 days after the board's deci-

sion, the parties or any of them shall notify the board of arbitration in writing forthwith, and the board of arbitration shall prepare documents in the form of renewed or revised collective agreements giving effect to the decision of the board of arbitration and any agreement of the parties and submit the documents to the parties for execution.

(2) If the parties or any of them fail to execute the documents prepared by a board of arbitration within 7 days after the day of submission of the documents to them, the documents come into effect as though they had been executed by the parties and shall constitute renewed or revised collective agreements under the Labour Code of British Columbia.

Costs

8. (1) Each party shall pay its own costs of proceedings under this Act.

(2) The remuneration and expenses of the special mediator and of a board of arbitration and its members shall, on the requisition of the minister, be paid out of the consolidated revenue fund.

Application of this Act and other Acts

9. (1) The Labour Code of British Columbia applies to the interpretation of this Act.

(2) Where there is a conflict or inconsistency between

(a) this Act, and

(b) the Labour Code of British Columbia and its regulations
this Act applies.

(3) The Arbitration Act does not apply to an arbitration under this Act.

(4) Subject to section 6, where as a consequence of

(a) an arbitration under this Act, or

(b) agreement between the parties

renewed or revised collective agreements settle the disputes between all parties, this Act ceases to apply to the parties and their collective agreements.

Reference to Labour Relations Board

10. (1) A question

(a) as to whether or not this Act has been complied with, or

(b) respecting the interpretation or application of this Act, or an order made under this Act

shall be referred by the parties or any of them, and may be referred by any interested person, to the Labour Relations Board, and the Board shall decide the question and may, by order, enforce the decision

(c) in the ways, and

(d) by applying the remedies

available for the enforcement of a decision or order of the Labour Relations Board under the Labour Code of British Columbia.

(2) The Labour Relations Board may, on its own motion, and shall, on receipt of proof that its order has been disobeyed, forthwith file the order in the Supreme Court and the order shall be filed as if it were an order of the court and, on being filed, the order shall be deemed for all purposes, except for the purpose of an appeal from it, to be an order of the Supreme Court effective from the date the order was made by the Board.

(3) Notwithstanding the filing of an order under subsection (1), the Labour Relations Board may, at any time by further order, amend, substitute, replace or withdraw all or part of an order, and shall forthwith file a copy of the subsequent order in accordance with subsection (1).

(4) A person who contravenes section 2 or 3 (1) commits an offence and is liable to the penalties provided in section 138 of the Labour Code of British Columbia.

S.B.C. 1977, c. 83

11. The Essential Services Disputes Act is amended

(a) in section 8 by adding "or" at the end of paragraph (b) and adding the following paragraph:

(b.1) a substantial disruption in the delivery of educational services",

(b) by adding the following employers to the Schedule:

Colleges and Boards of School Trustees as defined in the Public Schools Act;

Universities as defined in the Universities Act;

Institutions as defined in the Colleges and Provincial Institutes Act;

Municipalities;

Regional Districts; and

Improvement district corporations under the Water Act, and

(c) by adding in section 8 (c) line 5 thereof after the word "citizens" the words "or a substantial disruption in the delivery of educational services in the Province,".

Commencement

12. Section 11 comes into force on a day to be fixed by proclamation.

BIBLIOGRAPHY

BOOKS

- Arthurs, H.W., Carter, D.D., Glasbeek, H.J., Labour Law and Industrial Relations in Canada, Butterworths, 1981.
- Beal, E., The Practise of Collective Bargaining, Richard D. Irwin Inc., 1972, Homewood.
- Carrothers, A.R., Collective Bargaining Law in Canada, Butterworths Ltd., 1965, Toronto.
- Gunderson, Morley, Collective Bargaining in the Essential and Public Service Sectors, University of Toronto Press, 1975, Toronto.
- Loewenberg, J. Joseph, Gershenfeld, Walter J., Glasbeek, H.J., Hepple, B.A., Walker, Kenneth F., Compulsory Arbitration, D.C. Heath and Company, 1976, Toronto.
- Sloane, A. and Whitney, F., Labor Relations, 3rd edition, Prentice-Hall, Inc., Englewood Cliffs, New Jersey.
- Taylor, B.J. and Whitney, F., Labor Relations Law, 2nd edition, Prentice-Hall, Inc., Englewood Cliffs, New Jersey.
- Weiler, J.M.P., Interest Arbitration, The Carswell Company Ltd., 1981, Toronto.
- Weiler, Paul C., Reconcilable Differences, The Carswell Company Ltd., 1980, Toronto.
- Woods, H.D., Canadian Industrial Relations - Report of the Task Force on Labor Relations, 1968.

ARTICLES

- Aaron, B., "National Emergency Disputes", Labor Law Journal, Vol. 22, No. 8., August 1971.
- Anderson, A., "Lessons from Interest Arbitration in the Public Sector: The Experience of Four Jurisdictions," in Arbitration - 1974, Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators, April 1974, Washington, D.C.: Bureau of National Affairs, 1975.
- Anderson, J.C., "Evaluating the Impact of Compulsory Arbitration: What Can We Learn From Alternate Research Designs and Methodologies," (A paper presented at the Thirty-ninth Annual Meeting of the Academy of Management, Atlanta, Georgia, August 7-11, 1979.

- Anderson, J.C. and Kochan, T.A., "Impasse Procedures in the Canadian Federal Service: Effects on the Bargaining Process", Industrial and Labor Relations Review, Vol. 30, No. 3, April 1977.
- Arthurs, H.W., "Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly?", Michigan Law Review, Vol. 67, No. 5, March 1969.
- Bezdek, R.H. and Ripley, D.W., "Compulsory Arbitration versus Negotiations for Public Safety Employees: The Michigan Experience", Journal of Collective Negotiations in the Public Sector, Vol. 3, No. 2, Spring 1974.
- Bigoness, W.J., "The Impact of Initial Bargaining Position and Alternative Modes of Third Party Intervention in Resolving Bargaining Impasses", Organizational Behaviour and Human Performance, Vol. 17, No. 2, 1976.
- Feuille, P., "Final Offer Arbitration and the Chilling Effect", Industrial Relations, Vol. 14, No. 3, October 1975.
- Gallagher, D.G., "Interest Arbitration Under the Iowa Public Employment Relations Act", Arbitration Journal, Vol. 33, No. 3, 1978.
- Gallagher, D.G. and Pegnetter, R., "Impasse Resolution Under the Iowa Multistep Procedure", Industrial and Labour Relations Review, Vol. 32, No. 3, April 1979.
- Morris, Gillian S., "The Regulation of Industrial Action in Essential Services", The Industrial Law Journal, Vol. 12, No. 2, June 1983.
- Pankert, A., "Settlement of Labour Disputes in Essential Services", International Labour Review, Vol. 119, 1980.