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Public Sector Industrial Relations in Canada: Does It Threaten or Sustain Democracy?

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PUBLIC SECTOR INDUSTRIAL RELATIONS IN CANADA: DOES IT THREATEN OR SUSTAIN DEMOCRACY?

Mark Thompson† and Sara Slinn††

INTRODUCTION

Public sector industrial relations inevitably involve the intersection of public policy and the conditions of employment of persons employed in the public agency. Does the interplay of conflicting interests limit democracy, or does it provide for the exercise of democratic rights by citizens whose direct participation in the formulation of public policy may be limited? An examination of the structures of public sector industrial relations, the parties’ experience with the procedures of industrial relations and the consequences of labor-management relations may answer this question.

This Article provides a brief introduction to the background (Part I), legislative framework (Part II), structure of collective bargaining (Part III), and restrictions on labor relations (Part IV) in Canada's public sector, focusing on key subsectors. Part V addresses the mechanisms used by governments to maintain control over public sector labor relations. Direct government intervention into collective bargaining through wage control legislation, wage control policies, and ad hoc back to work legislation and emergency no-strike legislation are important elements of the system.

Part VI discusses the effect on selected public policies, specifically, public-private compensation differentials, the effect of wage control efforts, and privatization, are examined.

I. BACKGROUND

Canada is a mixed economy, with a traditionally robust public sector providing basic services and supporting a market economy. Beginning in the 1980s, governments have intermittently attempted to restrain the growth of the public sector or reduce its absolute size. By the mid-2000s, the public sector accounted for about 40% of the total economy and 22% of

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total employment, levels that put Canada in the mid-range of developed nations.\(^1\) In addition to basic government services, these data include virtually all of the education and health sectors, as well as government enterprises. (In this Article, government enterprises, such as electric utilities, postal service, etc. are excluded.)

Collective bargaining became an important institution in the Canadian public sector in the 1960s with the passage of comprehensive labor statutes in Saskatchewan, Quebec and by the federal government. By the mid-1970s, all provinces had enacted similar legislation. Public sector unions, however, predated these legal changes. Prior to gaining positive collective bargaining rights they had relied on consultation, lobbying, and other limited forms of political action to advance the interests of their members.

After enabling legislation was passed, public sector unionism and collective bargaining grew rapidly. Currently, the public sector is the most unionized segment of the Canadian economy. Union density is about 70% overall, ranging from 60% in local government to 75% in health and social services. National unions exist for local, federal, and provincial employees, and these are among the largest unions in the country.\(^2\)

Although collective agreement negotiation and administration remain public sector union’s principal activity, elected officials’ budget decisions and efforts to reduce the size of the public sector draw unions into political action. Union actions at the senior levels of government (federal and provincial) is limited to lobbying and advertising, a function of the parliamentary system of government, while in municipal elections, unions frequently endorse candidates and contribute campaign funds. At various times, teachers’ and nurses’ unions have been especially politically active at the provincial level.\(^3\) However, no data exist on the effectiveness of these efforts. Some public sector unions affiliate with political parties, in particular the New Democratic Party (NDP), a historically pro-labor social democratic party.

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2. Id. at 409–10.
Traditionally, the NDP was a third party federally, although it attained the status of official opposition in the 2011 national election. The NDP also has governed in five provinces. A pro-labor party has governed in Quebec and regained power in 2012. The advantages of political affiliation provincially to public sector unions are not obvious. At times the NDP has enacted harsh restrictions on public sector bargaining when it has governed, and the pro-labor party in Quebec generally followed the pattern in dealing with labor issues set by their more conservative opponents. However, the NDP supports a strong public sector and has never embraced neoliberal policies aimed at shrinking the size of the state.

II. LEGISLATIVE FRAMEWORK

A. Constitutional Environment

The Canadian Constitution grants the ten provinces exclusive jurisdiction over labor policies for most industries and about 90% of the workforce. Consequently, the federal government has authority over labor relations only in specified industries, and in relation to its own employees and those of federal Crown corporations, with the majority of industries and employees falling under provincial jurisdiction.

The Constitution's Charter of Rights and Freedoms (the Charter) protects certain fundamental rights and freedoms from restriction by state action, i.e., all levels of government. For three decades before the Supreme Court of Canada's (SCC) Health Services decision in 2007, the freedom of association (FOA) guaranteed by § 2(d) of the Charter was interpreted by a "Trilogy" of cases as excluding any protection for collective bargaining or strike activity. The Health Services decision, however, expressly overturned that line of jurisprudence, with the majority redefining the FOA as including a right to the process of collective

4. Pursuant to the property and civil rights power under § 92(13) of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, ch.11 (U.K.). Canada's three territorial governments (Yukon, Northwest Territories, and Nunavut) currently adopt other jurisdictions' employment relations legislation although they hold delegated jurisdiction over employment relations. Therefore, this Article addresses only provincial and federal labor legislation.

5. Federally regulated industries include: aeronautics, air transport and airports, atomic energy, banking, customs, grain elevators, inter-provincial transportation, most railways, postal services, shipping and navigation, telecommunications, and television and radio broadcasting.


bargaining, including good faith bargaining and consultation. Nonetheless, the majority emphasized that it is a highly qualified right protecting only a general process of collective bargaining rather than a particular labor relations model and that does not guarantee bargaining outcomes. The SCC Fraser decision of April 2011 both affirmed Health Services and established firm limits on the application of Charter FOA protection for collective bargaining. The scope and effect of application of the FOA to collective bargaining continues to develop through large volume of case law on this issue that is currently before the courts. As discussed later in this Article, this new Constitutional environment caused governments to reconsider their approaches to regulating and intervening in public sector labor relations.

B. Different Legislative Approaches

Canadian jurisdictions have enacted an array of legislative approaches to regulating public sector labor relations. Each province is free to regulate the conduct of public sector industrial relations within its jurisdiction, subject to the overriding provisions of the Charter. Consequently, statutory regulation and organization of public sector labor relations vary considerably across jurisdictions, even in the regulation of the same sector.

Nonetheless, a general model of labor relations legislation has developed. The basic elements include workers' right to choose to join a union and engage in collective bargaining. Negotiations can encompass a wide variety of subjects (though more limited than private sector bargaining); unions in most bargaining units can strike, and employers can lockout workers. Collective agreements regulate the workplace in detail. Enforcement of these agreements is through private arbitration. A separate administrative agency (commonly called a "labor relations board") regulates the system.

1. Federal

As noted above, the federal government passed a comprehensive law establishing a collective bargaining regime, the Public Service Staff Relations Act (PSSRA), in the 1960s, which stimulated growth in unionism and collective bargaining across the country. In many ways the PSSRA mirrored the traditional pattern of Canadian labor legislation. The most

9. Id. at paras. 91, 92, 101, 114.
11. Public Service Staff Relations Act, S.C. 1966-67, ch. 72 (Can.).
innovative feature of the statute was the “choice of procedures,” a provision that gave unions the right to choose to bargain with conciliation and the right to strike in case of an impasse or to negotiate under a regime of arbitration. The federal system has evolved, in part, through the actions of the parties and in other areas through judicial rulings. Currently, bargaining occurs in a small number of broad units composed of several occupational groups. Bargaining units whose strikes impose inconvenience on the public or threaten the health or welfare of the public effectively are denied the right to strike, but normally have recourse to interest arbitration. Weaker bargaining units normally choose arbitration.

2. Provincial Governments

At the provincial level public sector labor relations vary substantially in both the forms of statutory regulation and degree of centralization of bargaining. First, three general approaches to statutory regulation can be discerned. These range from simply including public sector workers under the general collective bargaining legislation applying to the private sector, to regulating bargaining through special, sub-sector specific legislation, or to a situation where both the general labor relations legislation and special legislation apply. The content of this legislation also varies considerably, as discussed below.

3. Municipal

The pattern for regulation of municipal public workers is similar to that at the provincial level. Civic and transportation workers usually are regulated by the general collective bargaining legislation, a practice that has existed for decades. Meanwhile, municipal firefighters and police tend to be regulated by special legislation that bans strikes in favor of interest arbitration.

III. STRUCTURE OF BARGAINING

A. Senior Levels of Government

While Canadian collective bargaining is usually decentralized and fragmented, bargaining units in senior levels of government tend to be large and comprehensive. In some cases, centralized bargaining structures are the result of negotiations to combine smaller units, while in others bargaining units are established by statute. In the 1980s and 1990s, bargaining structures in healthcare and education, which are provincially funded, also became more centralized in most provinces. At the municipal level,
bargaining is highly decentralized, with smaller bargaining units within municipal boundaries.

Inevitably, industrial relations issues become part of the political discourse in provinces where labor is relatively militant, such as Quebec, Ontario and British Columbia. In the 1980s and 1990s, the ability of Quebec governments to manage labor conflict was an important electoral issue. In general, however, electoral results do not turn on labor issues. The political Right typically urges repressive action against public sector unions, while the Left or progressive parties advocate more conciliatory approaches to labor issues. The presence of a pro-labor party in provincial legislatures moderates the anti-labor positions of conservative parties, even when a pro-labor party is unlikely to gain power.12

B. Education

Constitutionally, education at the primary and secondary levels falls under provincial authority. A variety of statutory regimes govern the labor relations between the parties. Through the 1980s, reliance on provincial funding increased, as governments wished to ensure that all pupils had access to comparable educational services, independent of the tax base of the locality in which they lived. As the importance of provincial funding grew, so did provincial influence over bargaining outcomes. By 2010, these influences produced local bargaining in three provinces (including two of the larger provinces), provincial structures in three smaller provinces, and “two-tier” structures in the remaining four provinces.

In five provinces the parties are free to strike or lockout; two have partial strikes, and strikes are banned at least at the local level in the remaining five provinces. Despite varying legal regimes, province-wide strikes by teachers are effectively banned in all provinces, either by fragmented bargaining structures or political realities.13 Nonetheless, local strikes do occur in the provinces where they are permitted. As the proportion of working mothers in the population has grown, so has the political and social significance of any strike that closes schools. Teacher strikes are major political events, 16% of the back-to-work laws outlined below applied to schools. Typically, education is included in provincial wage restraint programs described below.

C. Healthcare

Collective bargaining in the health sector is one of the most contentious areas of Canadian industrial relations. Healthcare is administered by the provinces. Provincial governments fund virtually all hospital services with assistance from federal grants. No significant private sector exists for the provision of most healthcare services. As in other countries, healthcare costs increase faster than prices generally, creating perpetual funding pressures on governments. Hospital services are labor intensive, and multiple unions represent workers in the sector. (Physicians negotiate fee schedules with governments, but these processes are excluded from this Article.) The results are negotiations under the supervision of provincial governments involving large proportions of their budgets. Strikes, or the threats of strikes, raise public concerns and attract legislative action.

Structures and legislation regulating collective bargaining in the healthcare sector vary across provinces, but a number of general statements cover the essential elements of the systems. In hospitals, separate bargaining units exist for professionals and nonprofessionals. Employers' associations generally represent management. Government is not the employer, but it exercises the final authority over costs arising from collective agreements. Strikes do occur, but are never total. All three legal regimes exist for strikes, total bans (with interest arbitration), regulated strikes (with essential services required), and unregulated right to strike (essential services negotiated) described above. Strikes are not frequent, but do attract back-to-work legislation—eleven laws passed between 1992 and 2012.14

D. Municipal Government

In law, municipal governments are corporations and are treated as equivalent to private corporations in many respects. The permissible scope of bargaining is broad, but normally does not include basic pensions, which are set by statute. Although the law does not permit bargaining over pensions, informal negotiations do occur. Any changes in contributions must be approved by trustees who normally represent employers, employees, and the public. Provincial legislation generally regulates pension plans to ensure their financial viability.

Municipal governments in Canada have several characteristics that are relevant to collective bargaining. City councils depend heavily on the technical expertise of individual departments and seldom reject staff recommendations on operational matters. Municipal governments are not permitted to incur deficits in their operating budgets. The taxation authority of these governments is limited. Most importantly, they do not levy sales or income taxes. Thus, their sources of income are property taxes, grants from provincial governments, and fees.\textsuperscript{15}

Despite these limitations on the authority of local governments, unions representing their employees are often active politically. Civic politics are dominated by locally based parties, not affiliated directly with provincial or national organizations.

Local governments realize the power of labor organizations to influence bargaining in this environment and have developed various structures to prevent undue interference over bargaining outcomes. Industrial relations staff wields the authority common to other municipal departments.

IV. RESTRICTIONS ON LABOR RELATIONS

Relative to the private sector, public sector labor relations are subject to significant restrictions

\textit{A. Scope of Bargaining}

The scope of private sector collective bargaining in Canada is restricted only by the statutory, common law or constitutional requirement to bargain in good faith. No topics receive special treatment by law or labor board rulings. Under Canadian law a duty to bargain in good faith attaches to all matters.\textsuperscript{16} Nonetheless, this duty can be breached where a party takes to impasse a term that the other party could not reasonably be expected to accept.\textsuperscript{17}

In contrast with the virtually unlimited scope of private sector negotiations, public sector bargaining legislation commonly removes certain matters from the scope of bargaining, and this is seen at all levels of government. Similarly, certain terms and conditions of work are statutorily

\begin{footnotesize}
\begin{enumerate}
\item Royal Oak Mines Inc. \textit{v.} Canada (Labour Relations Board), [1996] 1 S.C.R. 369 (Can.).
\end{enumerate}
\end{footnotesize}
prescribed and, therefore, not negotiable. For example, at the federal level the Public Service Labour Relations Act (formerly the PSSRA) precludes bargaining over pensions; classifications; technological change; and, criteria for promotion, transfer or layoff.\textsuperscript{18} Bargaining by provincial civil servant tends to be subject to similar restrictions.\textsuperscript{19}

Within the realm of provincial jurisdiction, certain matters are expressly excluded by statute or regulation from bargaining, and other matters are prescribed by statute or regulation. For instance, in the primary and secondary education sector teachers’ responsibilities, class size, limits on instructional and noninstructional days, holidays and vacations, and pensions are also commonly treated as a matter for government policy and prescribed by legislation rather than negotiated.\textsuperscript{20} The paramilitary character of police and firefighter employment tends to be associated with statutory restrictions on bargaining issues such as discipline and superior-subordinate relations.\textsuperscript{21}

\textbf{B. Bargaining Impasse and Work Stoppage}

1. Access to Strike

Canadian labor law takes a relatively restrictive approach to strike activity. First, strikes are lawful in very limited circumstances.\textsuperscript{22} For example, recognition or unfair labor practice strikes are prohibited in all circumstances as these disputes are resolved by a labor relations board or similar tribunal. Strikes and lockouts are unlawful unless a collective agreement has expired, and substantial statutory prerequisites must often be satisfied. These commonly include exhausting conciliation or mediation process, a successful strike vote and, in some jurisdictions, statutory advance notice of a strike.

Second, statutory definitions of “strike” generally contain no purposive element.\textsuperscript{23} That is, no requirement exists that the purpose of the activity must be related to bargaining or to compelling an employer to settle. Strike activity therefore captures any concerted action disrupting production and,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{18} Public Service Labour Relations Act, S.C. 2003, ch. 22, § 2 (Can.).
\item \textsuperscript{19} Public-Sector Collective Bargaining, supra note 1, at 415.
\item \textsuperscript{20} See, e.g., School Act, RSBC 1996, c. 412, ss. 17, 76.1; B.C. Reg. 114/2002, Sch. 1 and Sch. 1 (supplement); Public Sector Pension Plans Act, 1999 S.B.C., ch. 44 (Can. B.C.).
\item \textsuperscript{21} Public-Sector Collective Bargaining, supra note 1, at 415–16.
\item \textsuperscript{22} Although collective bargaining is now recognized as enjoying some limited protection by the Charter FOA, the question of whether the FOA extends to protecting the right to strike has not yet been revisited by the Supreme Court of Canada. The majority in the B.C. Health Services decision emphasized that it was not addressing the question of strikes.
\item \textsuperscript{23} See, e.g., s.1(1) “Strike,” Labour Relations Act, 1995 S.O., ch. 1, Sch. A (Can.).
\end{itemize}
\end{footnotesize}
so, restrictions on strikes often extend to political protests and other nonbargaining related activity.

Finally, much of the public sector has very limited or no access to strikes. Three general legislative approaches to regulating public sector work stoppages exist: (1) the unfettered strike model, under which the typical preconditions described above apply; (2) the no-strike or compulsory arbitration model, under which work stoppages are prohibited, and unresolved disputes must go to interest arbitration; and, (3) the designation or limited strike model, under which a proportion of workers in the unit are determined to be essential and therefore required to continue to provide services during any work stoppage. Where strikes are prohibited, compulsory interest arbitration is generally substituted and interest arbitration is commonly—but not always—available in sectors subject to essential service limits on work stoppages.

The dispute resolution mechanism available to different groups of public workers in several representative jurisdictions is set out in Table 1.

Table 1: Dispute Resolution in Selected Public Sectors and Jurisdictions

<table>
<thead>
<tr>
<th>Public Servants</th>
<th>Hospital Employees</th>
<th>Public School Teachers</th>
<th>Municipal Police</th>
<th>Municipal Firefighters</th>
</tr>
</thead>
<tbody>
<tr>
<td>Work stoppage ban</td>
<td>ON 1</td>
<td></td>
<td>ON 1, QU</td>
<td>ON 1, QU 2</td>
</tr>
<tr>
<td>Work stoppage permitted</td>
<td></td>
<td>FED, ON</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Work stoppage subject to essential service limits</td>
<td>BC, ON, QU</td>
<td>BC, ON (municipal ambulance workers), QU</td>
<td>BC, QU 3</td>
<td>BC 4</td>
</tr>
<tr>
<td>Union may select strike or arbitration</td>
<td>FED</td>
<td>FED</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Notes:
1. Either party can request arbitration once conciliation exhausted.
2. Arbitration available after report of unsuccessful mediation or at either party's request.
3. Work stoppages not permitted for issues negotiated locally.
4. At request of either party Minister may order arbitration if certain conditions met.

24. Adell, Ponak & Grant labeled these categories in reference to approaches to public sector essential service dispute resolution. However, these three categories equally describe approaches to dispute resolution across the Canadian public sector. BERNARD ADELL, ALLEN PONAK & MICHEL GRANT, STRIKES IN ESSENTIAL SERVICES (2001).

As is evident from Table 1 (presenting information for four representative jurisdictions: Federal, BC, Ontario and Quebec), public servants generally fall within the limited strike model, except for the federal public service, where the union has the option of choosing whether to strike or have the dispute resolved by interest arbitration. Hospital employees are also commonly subject to the limited strike, although once again the federal unions may opt to strike or go to arbitration, and Ontario hospital workers fall under the no-strike and compulsory conciliation approach. Municipal ambulance workers in that province may strike subject to essential service designations. Public school teachers in some jurisdictions have unrestricted access to striking (e.g., Federal and Ontario), while those in other provinces are subject to essential service limits on work stoppages (e.g., British Columbia and Quebec).

Municipal police and firefighters have the most limited—if any—access to the strike mechanism. For instance in Ontario and Quebec, these workers are banned from striking, while in British Columbia, firefighter and police strike activity is limited by essential service requirements.

2. Use of Interest Arbitration

As a corollary to the widespread restriction or ban on work stoppages, mandatory or voluntary interest arbitration is a common feature of Canadian public sector labor relations and is generally in the form of conventional arbitration rather than alternatives, such as final offer selection.

Although compulsory arbitration avoids work stoppages, research demonstrates that it also tends to have some negative consequences: settlements are delayed, and, rather than being expressed through strikes, conflict generally reappears in different forms, such as grievances. There is also some evidence that arbitration is associated with a small wage settlement premium.

Use of interest arbitration to resolve impasse in public sector negotiations poses a dilemma for governments, especially at senior levels. While these governments are often reluctant or unwilling to permit work


28. See, e.g., M. Gunderson & D. Hyatt, Canadian Public Sector Employment Relations in Transition, in PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 1, 1–20 (Dale Belman et al. eds., 1996). Note that a more recent study using data from a longer time period (1978–2006) finds no wage premium, but suggests that the wage control legislation of the 1990s may be responsible for this finding. Campolieti et al., supra note 27.
stoppages in sectors such as health or education, they are also distrustful of intervention by an independent third party arbitrator and unwilling to relinquish control over what may be a very costly collective settlement. One response has been for governments to impose legislative limits on the range of settlements in bargaining, which are set out below. Another strategy has been to statutorily restrain interest arbitrators’ discretion by requiring awards to take account of such factors as the public sector employer’s “ability to pay,” and the effect of the award on service levels if funding and taxes are not increased. This approach is criticized for intruding on arbitrators’ independence and evidence suggests that arbitrators resist limiting awards based on this criterion.

3. Essential Services

Governments’ discomfort with strikes has also prompted them to restrict work stoppage activity short of imposing a ban by legislating essential service limits. This approach is common in the health sector and public service. Essential service designation legislation tends to require parties to reach an agreement, in advance of collective agreement expiry, on the level of service that will continue to be provided in event of a strike or a lockout. Where parties cannot agree, the labor relations board issues an essential services order. Although the essential services designation model is common in some sectors, this approach has also been introduced in an ad hoc manner in response to frustration over specific disputes or longstanding labor relations disruption in a sector.

A key concern with this model is that the service levels agreed to or imposed may be such that any work stoppage is rendered ineffective, leading to a protracted dispute. A further concern is the effect a limited strike will have on bargaining power and outcomes of negotiations. A recent study employing data for all public sector negotiations involving 500 or more employees, occurring between 1976 and 2006, considered the effect on wage settlements of the presence of the essential service designation model in the sector during the initial year of a wage settlement. The study concludes that it is associated with higher annual average wage

29. See, e.g., Schedule Q of the Savings and Restructuring Act, 1996 S.O. 1996, ch. 1 (Can. Ont.) amending the Hospital Labour Disputes Arbitration Act, 1990 R.S.O., ch. H. 14 (Can. Ont.) to require arbitrators in the compulsory arbitration system to consider the following criteria when reaching their decision or award, and additional criteria were added subsequently. Public Sector Dispute Resolution Act, 1997 S.O., ch. 21, Sch. A, s. 1 (Can. Ont).


31. See supra Tab. 1.

increases, ranging from 0.28 to 0.41 percentage points, and with increases up to 0.8% in the average hourly wage. Similarly, another recent study found that, compared to full access to strikes, the essential service model is associated with reduced wages.

V. DIRECT GOVERNMENT INTERVENTION IN COLLECTIVE BARGAINING

The early years of collective bargaining occurred during periods of high inflation. In addition, public sector wages had fallen behind the private sector in many areas. These factors combined to produce a relatively high number of strikes and generous settlements. This period also saw the entrenchment of wage control legislation, back-to-work legislation, or invoking existing emergency provisions suspending the right to strike or lockout as routine tools for senior governments to control public sector bargaining and its outcomes.

A. Wage Control Legislation

Public sector wage control legislation has become a commonly applied tool for governments. The first post-World War II wage control legislation was introduced in 1975. Waves of public sector wage restraint legislation were passed by senior governments in the mid-1970s, the 1980s, and 1990s. The 2008 financial crisis has prompted Canadian governments to, once again, impose statutory restrictions on wage settlements of public workers.

Initially, governments justified wage controls by the need to restrain inflation. During the 1980s, however, a number of provinces rationalized wage restraint as a part of necessary, extensive public service restructuring. These policies provoked protests by labor and legislation to suppress strikes and protests. Over time, the appeal of government restructuring waned,

34. Campolieti et al., supra note 27.
35. For instance, the Federal government has employed this type of legislation four times since the 1970s: (1) The Anti-Inflation Act, 1974-75-76, ch. 75 (Can.), in force from 1975 to 1978, technically restrained wages and prices in both public and private sectors and in both federal and provincially regulated industries in order to curb inflation, but was really only applied to the public sector; (2) The Public Sector Compensation Restraint Act, S.C. 1980-81-82-83, ch. 122 (Can.) limited all forms of compensation for federal public service workers and extended existing agreements for two years, effectively preventing bargaining or work stoppages for two years. A Charter challenge failed, and the SCC's decision formed one of the Trilogy decisions; (3) The Public Sector Compensation Act, 1991 S.C., ch. 30 (Can.) imposed what was ultimately a five-year extension of collective agreements and compensation plans, prohibited any form of compensation increase; (4) The Expenditure Restraint Act, 2009 S.C., ch. 2 (Can.) [hereinafter ERA] limited compensation for a broad group of public sector workers.
although governments did shrink in size. Gradually, governments abandoned statutory controls in favor of controlling compensation through budgets.

The 2008 financial crisis has prompted Canadian governments to once again turn their minds to statutorily restricting public sector compensation. The most recent effort is the Expenditure Restraint Act (ERA) in force since March 2009. It limits compensation for a broad group of federal public sector workers. The ERA is the first federal public sector wage restraint legislation passed since the Health Services decision and is the subject of several currently ongoing legal challenges contending that such unilateral determination of compensation is an unjustifiable violation of the Charter-protected FOA. Currently, it is not certain how much of a restriction the newly defined Charter FOA will be on governments’ ability to employ wage control legislation and whether this remains a readily available tool for Canadian governments to resort to constrain public sector collective bargaining.

B. Wage Restraint Policies

As a less intrusive alternative to wage control legislation, senior governments have invoked wage restraint policies. By the beginning of 2000, governments had developed a pattern of announcing an acceptable limit for compensation increases and then binding public sector employer bargaining agents to that figure. This system is sustained by frequent back-to-work legislation (discussed below). The effects of the back-to-work legislation and nonstatutory controls have been profound. Unions realize that the alternative to accepting offers based on the announced guidelines is likely to be a legislated settlement. Labor has resisted with

36. ERA, supra note 35.
38. Another, nonstatutory approach governments some provincial governments (Ontario and British Columbia) have adopted to curb public sector wage costs is to publicly disclose public sector salaries. However, researchers have found that simple disclosure is unlikely to be effective and may have an unintended, inflationary effect. R. Gomez & S. Wald, When Public Sector Salaries Become Public Knowledge: Academic Salaries and Ontario’s Public Sector Salary Disclosure Act, 53 CAN. PUB. ADM. 107, 117 (2010).
39. See, e.g., the recent experience of primary and secondary school teachers in Ontario. The provincial government announced its expectation for zero compensation increases for two year. Finding most teachers’ unions unwilling to agree, the government promptly passed legislation prohibiting strikes and imposing a default collective agreement incorporating the compensation limit, if parties were unable to settle acceptable collective agreements within a specified deadline. The legislation also granted
demonstrations, illegal strikes and other forms of job action. Generally, the immediate results of labor resistance were failures. However, these efforts appear to have imposed political costs on governments, discouraging legislation in favor of less formal controls.

C. Back-to-Work and Emergency No-Strike Legislation

Direct government intervention to curtail labor disputes, through ad hoc legislation or exercising emergency provisions in existing legislation, is another long-standing feature of labor relations in Canada. Though these tools are also occasionally used in private sector bargaining disputes, they are more commonly employed against public sector workers.

In these instances governments end a work stoppage by means of back-to-work legislation that typically orders employees to resume work and employers to permit employees to resume work, and imposes interest arbitration (sometimes with limits on arbitrators’ discretion on monetary elements of the award), or extends an expired collective agreement or a modified version of the expired agreement.

Between 1982 and April of 2012, Canadian governments, federal and provincial, enacted a total of 144 laws ending strikes or imposing collective agreement provisions on the parties in public sector disputes. These laws cover all levels of government, including municipal workers, as well as the education and health sectors. Historically, back-to-work legislation referred unresolved issues to arbitration for final resolution. By the 1990s, the majority of laws imposed a settlement, usually the employer’s last offer, on the unionized workers. A recent study concluded that use of back-to-work legislation is associated with reduced wage settlements, and this effect continues into future rounds and is greater for higher wages.

At various times, several jurisdictions have also had the power to suspend the right to strike or lock-out, pursuant to emergency provisions in their labor legislation. These mechanisms are very rarely used, although the Federal government has utilized the Ministerial Referral power repeatedly in the last year to end work stoppages: in one case in the public sector and the other in a private sector dispute.

Such interventions are way around creating an effective, functioning labor relations system, yet have virtually become the norm for public sector disputes in some jurisdictions and sectors. This is all the more striking...
given the context: work stoppages are at relatively low rates, and Canada has experienced a long-running substantial decline dating from the mid-1970s in number of work stoppages and number of person days lost to work stoppages.\textsuperscript{43}

Table 2: Public Sector Work Stoppages 1980-2012, Annual Averages\textsuperscript{44}

<table>
<thead>
<tr>
<th></th>
<th>Number of Work Stoppage</th>
<th>Public Sector Percent of Total</th>
<th>Person days lost</th>
<th>Public Sector Percent of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980-89</td>
<td>120</td>
<td>19.1</td>
<td>1,533,000</td>
<td>27.6</td>
</tr>
<tr>
<td>1990-99</td>
<td>88</td>
<td>22.4</td>
<td>789,000</td>
<td>30.6</td>
</tr>
<tr>
<td>2000-12</td>
<td>56</td>
<td>21.2</td>
<td>759,000</td>
<td>34.7</td>
</tr>
</tbody>
</table>

Against these general trends, there have been some exceptional, discrete disputes that have contributed to short-lived high levels of strike activity. Declines in work stoppages have been more rapid in the private sector; consequently, public sector disputes represent an increasing proportion of strike activity.\textsuperscript{45} As some commentators point out, this is occurring at the same time as public sector workers face greater restrictions on striking.\textsuperscript{46}

\section*{VI. IMPACT ON PUBLIC POLICY}

Perhaps the most salient criticism of collective bargaining in the public sector is that the system enables unions to distort democracy when they can combine political and economic pressures on employers. Verification of this assertion is difficult given the complexity of political decisions and public policy formulation. Nonetheless, data are available on several categories of public policies in Canada.

\subsection*{A. Compensation: Public-Private Sector Comparisons}

Comparisons of public sector compensation with the private sector are a continuing issue in public sector industrial relations. Private sector employer organizations frequently complain that public sector employees receive higher pay than their private sector counterparts, thereby creating

\textsuperscript{43} Harvey J. Krah, Graham S. Lowe & Karen D. Hughes, Work, Industry & Canadian Society 391 (5th ed. 2007).

\textsuperscript{44} Based on data supplied by Workplace Information Directorate, Human Resources and Social Development in Canada, Thompson & Jalatte, supra note 1, at 419.


\textsuperscript{46} Krah, supra note 43, at 91.
Although Canadian governments have regularly resorted to wage control legislation (as discussed above) evidence suggests that it does not substantially affect public compensation costs nor does it significantly constrain private sector wage inflation. Public sector unions attack these assertions on methodological grounds.

Broad comparisons of public and private sector compensation usually are misleading. Difficulties in comparing the two groups include establishing appropriate comparators in the private sector, accounting for union premiums in the highly unionized public sector and calculating total compensation given that benefits and deferred compensation are more significant in the public sector. The most accurate comparisons rely on human capital models, but these studies are difficult and expensive to conduct.

In fact, the scholarly literature on the subject in Canada is slight and dated. Nonetheless, studies based on data from the mid-1990s found a “pure government pay premium” of about 5 to 10%, though this differential is not constant across types of workers or across the sector. It is greater for women and low-wage workers (and may be negative at the highest end of the wage scale). The public sector advantage to women is attributed to political pressure on employers to avoid replicating the results of discrimination against women or other vulnerable groups in the private sector. Although the differences in the premium among levels of government are not great, to the extent that the difference exists it may be greater in local and provincial compared to federal government. There appears to be no significant public sector premium in education or health sectors, two sectors accounting for the great majority of overall provincial budgets.

Another means of comparing compensation is by comparing collective bargaining settlements in the two sectors. Gunderson’s study of aggregate wage changes for the public and private sectors for the 1978–2007 period
found little evidence of an overall substantial difference between them, with a slight advantage to the private sector, despite volatility in public sector compensation settlements.\textsuperscript{55}

\textbf{B. Privatization}

During the 1980s and 1990s, all levels of government in Canada examined the possibilities of privatizing government operations. Virtually without exception, public sector unions opposed these initiatives, using political pressure, litigation and collective bargaining to resist government initiatives.

In broad terms, labor was seldom successful in blocking privatization when a senior level of government was focused on the objective. Federally, the government privatized the national airline, a railroad, an aircraft manufacturer and a large petroleum company. Provincial governments sold a major mining company, telephone service providers, a gas utility, a liquor distribution system, etc., in addition to contracting out highway maintenance and other functions. The postal service contracted out virtually all of its retail facilities. A few municipalities contracted out services, especially solid waste disposal.\textsuperscript{56}

Perhaps the notable example of the impact of privatization in the twenty-first century was the contracting out of all hospital work in British Columbia that did not involve patient care in 2002. Thousands of workers were affected. Wages fell by 30\%, and healthcare unions challenged the government's actions in court. The outcome was the \textit{B. C. Health Services} decision of the Supreme Court of Canada.\textsuperscript{57} The settlement agreements arising from that decision included the requirement that the government repeal that impugned legislation, and monetary compensation. In one agreement, covering facilities bargaining, the \$75 million paid in compensation included \$68 million in payments to individual workers negatively affected by the unconstitutional legislation. Presumably, that decision has made other provinces more cautious about large-scale contracting out of unionized functions without consultation or negotiation.

By the turn of the twenty-first century, the push for privatization had waned. After disposing of major public enterprises, the rewards of privatization seemed less appealing. The current federal government has announced that it wishes to sell atomic energy and research facilities,

\textsuperscript{55} \textit{Id.} at 209–12.


\textsuperscript{57} \textit{Health Services}, supra note 8.
although the number of potential buyers is limited. Since 2000, governments have preferred so-called “P3” projects, public-private partnerships. Again, public sector unions have opposed these policies. These arrangements, the terms of which are not available to the public, usually involve private firms constructing infrastructure projects with a long-term contract with the government to operate them. The federal government provides modest subsidies for some of these projects. For some projects, such as hospitals or airports, the operational contracts involve no change in government functions. That is, health authorities continued to operate the facility as before. Private firms are available to operate water and sewage systems, but the number of such arrangements is limited.

Overall, the gains from P3 projects have been difficult to measure, in part, because of the secrecy surrounding them. Some conservative governments continue to espouse P3 projects, but the pace of their adoption appears to have slowed. Nonetheless, the privatization that has occurred, and the threat of further privatization, has been an effective threat for muting public sector bargaining power and opposition, particularly in periods of austerity.

CONCLUSION

We return now to the question posed in the title of this Article—whether public sector industrial relations threaten or sustain democracy in Canada. This question was inspired by Wellington and Winters’ 1969 article assessing municipal bargaining in the United States.58 Those authors’ thesis was that public sector labor relations threatened democracy because the irresistible strength of these unions in bargaining resulted in elected governments settling agreements contrary to the mandate from, and best interests of, the electorate. This Article’s survey of the Canadian experience suggests there is little evidence that such a phenomenon exists in public sector labor relations in this country, or that public sector bargaining threatens democracy.

In general, Canadian governments have accepted the basic structures of industrial relations systems in a democratic society. However, they have not accepted the outcomes of bargaining and utilize an array of legislative and policy tools to control the parties’ behaviors and bargaining outcomes. Available evidence shows that those results have not caused distortion of labor markets or government spending.

Canada’s Supreme Court has spoken in strong terms of the value of collective bargaining, directly linking it to the array of values underlying the Charter of Rights and Freedoms, and specifically linking it to enhancing democracy. The Court clearly regards workplace democracy as valuable as other forms of democracy, and a value that is inherent in the Charter. The majority of the Court in Health Services, a decision striking down government interference with public sector collective bargaining rights, stated:

Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the Charter... All of these values are complemented and indeed, promoted, by the protection of collective bargaining in § s.2(d) of the Charter.

The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives namely work.

Finally, a constitutional right to collective bargaining is supported by the Charter value of enhancing democracy. Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace.

We conclude that the protection of collective bargaining under s.2(d) of the Charter is consistent with and supportive of the values underlying the Charter and the purposes of the Charter as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the Charter.

Clearly, public sector collective bargaining promotes workplace democracy, and in Canada our Charter appears to recognize that as a form of democracy worthy of constitutional protection.

In addition, collective bargaining introduces elements of transparency in human resource decisions in the public sector. The legalistic nature of the process in Canada limits the abilities of employers, interest groups and even unions to shape decisions without at least some public scrutiny.

Our review of the experiences and evidence of public sector industrial relations and bargaining outcomes suggest that although public sector workers are often targeted as either the cause or a convenient solution for governments’ problems, these perceptions are not grounded on strong
evidence. Therefore, government interference in public sector collective bargaining is founded on shaky ground. Rather than protecting democracy, such government efforts may, themselves, be threatening Canadian democracy.

The model of public sector industrial relations we have presented has been the norm for over fifteen years. A tense equilibrium between the parties prevails. Governments' large stick and small carrot has proven effective in restraining collective bargaining, subject to the constraints imposed by the courts. By early 2013, prospects for fundamental change were not evident. However, Canadian industrial relations is subject to influences from other English-speaking countries. At various times, right-wing governments in the United States, the United Kingdom, New Zealand, and Australia have influenced Canadian politicians and business leaders. If a politician such as Ronald Reagan, Margaret, or Roger Douglas (from New Zealand) appears to challenge collective bargaining in his or her own country, the status quo in Canada may be threatened. Corporate interests funding attacks on public sector industrial relations in U.S. states are important members of the Canadian business community. They could import the principles of deunionization of the public sector if the political climate becomes favorable. However, the decentralized Canadian industrial relations system impedes major changes nationally.