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# Time to Tweak or Re-boot? Assessing the Interest Arbitration Process in Canadian Industrial Relations

*Under the current system, there appear to be few, if any, incentives for employers and unions to internalize the public interest in their negotiations process. There is, however, a direct public interest in such issues as ability to pay, the financial sustainability of the provision of public services and government debt loads.*

Richard P. Chaykowski

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## THE STUDY IN BRIEF

Interest arbitration, or third-party arbitration, is an essential element of the Canadian industrial relations system, with considerable impact on the public interest, particularly in relation to public-sector industries. As an instrument of labour relations policy, interest arbitration has become the primary alternative to costly work stoppages. By and large, most stakeholders appear to hold the view that the arbitration system functions fairly well, judged at least by the overall satisfaction of unions and employers.

As arbitration's significance in terms of usage and potential economic effect increases, however, several aspects are of concern. In particular, there are questions about (i) whether the design of the interest arbitration model – and, indeed, the broader system of interest arbitration – yields efficient and equitable labour relations and economic outcomes, (ii) whether the use of interest arbitration leads to higher wage outcomes than governments would otherwise pay, and (iii) whether, in crafting decisions, interest arbitrators apply criteria that serve the public interest.

This *Commentary* assesses the current state of the interest arbitration system, and shows that, regarding the overall question of what model and what features might best serve interest arbitration in Canada, there are four areas in which governments should undertake reviews and take steps to strengthen the system and its outcomes:

- introduce certain criteria that arbitrators should consider as serving the best interests of the public;
- identify the skills that mediators and interest arbitrators need, set competency standards and develop training to enhance skills;
- establish an independent roster of mediators and arbitrators; and
- assess the need to further strengthen the role of mediation and/or, more formally, follow a two-stage mediation-arbitration process.

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## Interest arbitration, more commonly known as third-party arbitration, is an integral part of the contemporary Canadian labour relations system.

It has had a prominent role in resolving major disputes since the post-war system of collective bargaining was first established in the private sector – for example, for high-stakes disputes in the transportation sector. Interest arbitration became a much more prevalent alternative dispute mechanism once collective bargaining rights were established for employees in the broader public sector because of the potential effect of work stoppages on the delivery of services deemed essential to the public welfare.

Arbitration is now commonly used at the municipal, provincial and federal levels and across industries in the broader public sector. In the private sector, although it is less commonly relied upon, arbitration remains a significant feature of dispute resolution. In turn, arbitration settlements are influential because they may serve as guideposts in other contract negotiations that are settled.

Arbitration, as a form of dispute resolution, is widely used in a variety of workplace contexts, both unionized and nonunionized. In labour relations, arbitration is used to resolve disputes between employers and their employees (and their union) over the terms and conditions of employment as they relate to an existing collective agreement – referred to as rights arbitration. Arbitration is also used to resolve impasses in disputes over the substantive terms and conditions of employment that are normally determined through collective bargaining as the collective agreement expires –

referred to as interest arbitration, the focus of this *Commentary*. (Hereafter, “arbitration” refers to interest arbitration.)

The significance of arbitration in industrial relations and, indeed, in terms of determining labour market outcomes – including wages – is amply exemplified by its use to resolve high-profile disputes in key sectors. For example, arbitration was used in 2017 to settle a dispute between Ontario colleges and the Ontario Public Service Employees Union, ending a strike that affected 12,000 employees across 24 colleges and disrupted the studies of approximately half a million students (see Kaplan 2017; Pelley 2017). In Ontario healthcare, negotiations between the province and the Ontario Medical Association (OMA) over compensation began in 2017 and, for the first time, the process included both mediation and binding arbitration in the event of an impasse.

The high stakes and public interest in resolving impasses in public-sector industries have also created incentives for governments to limit unions’ right to strike and, in some instances, create a no-strike regime; in these cases, arbitration is a primary option. In other cases, governments have chosen to create a regime in which some portion of the bargaining unit is deemed “essential” and not permitted to strike, while allowing the remainder to strike, but often with little prospect of exerting economic leverage.

Arbitration, as a mechanism to resolve disputes where strikes are seen as either too costly or not an option, has increasing appeal beyond the standard labour relations framework. The recent agreement between the Ontario government and the OMA to use arbitration as the final dispute resolution mechanism in their compensation negotiations brings arbitration to one of the most complex and, arguably, most high-stakes set of economic negotiations in the province. The approach to pay negotiations with physicians is notable because it has evolved over time without particular attention to the efficacy of the negotiating framework, including whether or not the recent move to experiment with arbitration is suitable. Yet, any outcome of the arbitration process likely will affect the public interest through the impact on healthcare costs across the entire Ontario health sector.

This set of negotiations is noteworthy, as well, because the OMA does not formally function as a trade union. Observing that an interest arbitration model continues to be applied to contexts where workers are not formally unionized – or might not even be employees – is not entirely surprising. In such cases, the immediate negative effect of a disruption of services on public health and safety can be perceived by the public to be especially high, creating the impetus to adopt a decisive resolution process such as arbitration (Adell, Grant, and Ponak 2001, 194) – even though it may not be in the public interest to do so.

Whether or not arbitration is the best approach to resolving disputes that are as complex – by virtue of the scope and complexity of the economic, social and political considerations – as health sector physician compensation is unclear, precisely

because of the multidimensionality and breadth of the economic, social and political factors at play in these types of negotiations. This points to the need to assess carefully the limits to relying upon arbitration.

Several aspects of interest arbitration are of concern. There are questions about whether the design of the arbitration model and, indeed, the broader system of interest arbitration, yields efficient and equitable labour relations and economic outcomes, whether the use of arbitration leads to higher wage outcomes than governments would otherwise pay and whether, in crafting decisions, arbitrators apply criteria that serve the public interest.

There are many different potential models of how to conduct arbitration and many parameters that can shape the process as well as the outcomes, such as the scope of arbitrator decision-making, the criteria arbitrators take into consideration and how the process is conducted – for example, whether mediation processes are combined with arbitration or whether the arbitrator decides all outcomes. Regarding the overall question of what model and what features might best serve interest arbitration in Canada, there are four areas in which governments should support reviews (including research) with a view to strengthening the system and its outcomes.<sup>1</sup>

- To ensure that arbitration clearly serves the public interest, governments should consider updating the system by introducing certain criteria that arbitrators should consider – including the need to explain how each factor, whether judged relevant or not, was considered – and increasing the accountability of arbitrators by requiring that they explicitly consider and assess the submissions of the parties.

1 These conclusions are subject to the important caveat that the outcomes of ongoing jurisprudence could constrain the possibilities and choices regarding the arbitration model and process. For example, regarding the composition and use of rosters versus other practices for the appointment of arbitrators, in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 SCR 539, 2003 SCC 29, the Supreme Court of Canada confirmed – in the particular context of the *Hospital Labour Disputes Arbitration Act* – that arbitrators should be impartial, have the requisite expertise and have “general acceptance in the labour relations community” (542).

- To ensure that, where required, third parties have the skill set to perform the roles of mediator and arbitrator and are accountable to the stakeholders in the industrial relations system, governments should support a review of the competencies and skills that mediators and interest arbitrators need, with a view to setting competency standards and developing (formal) training to enhance their skills.
- To minimize the systemic risk of the parties “capturing” arbitrators and of incentives to engage in the simple patterning of awards, as well as to maintain a degree of uncertainty in the system, governments should examine formally whether or not to establish an independent roster of mediators and arbitrators.
- Finally, governments should assess whether the arbitration system needs to be modified to further strengthen the role of mediation and/or more formally follow a two-stage mediation-arbitration (med-arb) process.

## TRENDS IN ARBITRATION AS A SETTLEMENT TOOL

Over the period between 2001 and 2014, among large bargaining units – agreements covering 500 or more employees – across Canada, 5.6 percent of settlements in the private sector and 7.9 percent of those in the public sector were determined by arbitration (Canada 2015). During this period, there were no discernable relationships between the size of the jurisdiction or unionization rates and the share of settlements determined through arbitration. Of course, the use of arbitration depends, in the first instance, on whether or not legislation provides for it. Across jurisdictions, usage of arbitration was highest in transportation, public administration, construction, education, health and social services – all industries in which certain work stoppages stand to have a significant effect on the economy or on public health and well-being.

It is instructive to examine the experience of Ontario, the Canadian jurisdiction with the largest number of arbitrated settlements. Considering the 2001–17 period across sectors, the percentage

of settlements achieved through arbitration was higher between 2010 and 2017 than in the earlier period (Figure 1). Moreover, the share of arbitrated settlements and the percentage of employees affected by arbitration in Ontario over the 2001–17 period are quite higher in the (broader) public sector (Table 1). This is partly because arbitration is viewed as a somewhat indispensable alternative to strikes in broader public-sector industries that provide essential services, such as healthcare, policing or firefighting, or industries in which a wide segment of the public could be adversely affected by a prolonged work stoppage, such as education. Indeed, key industries are subject to compulsory arbitration.

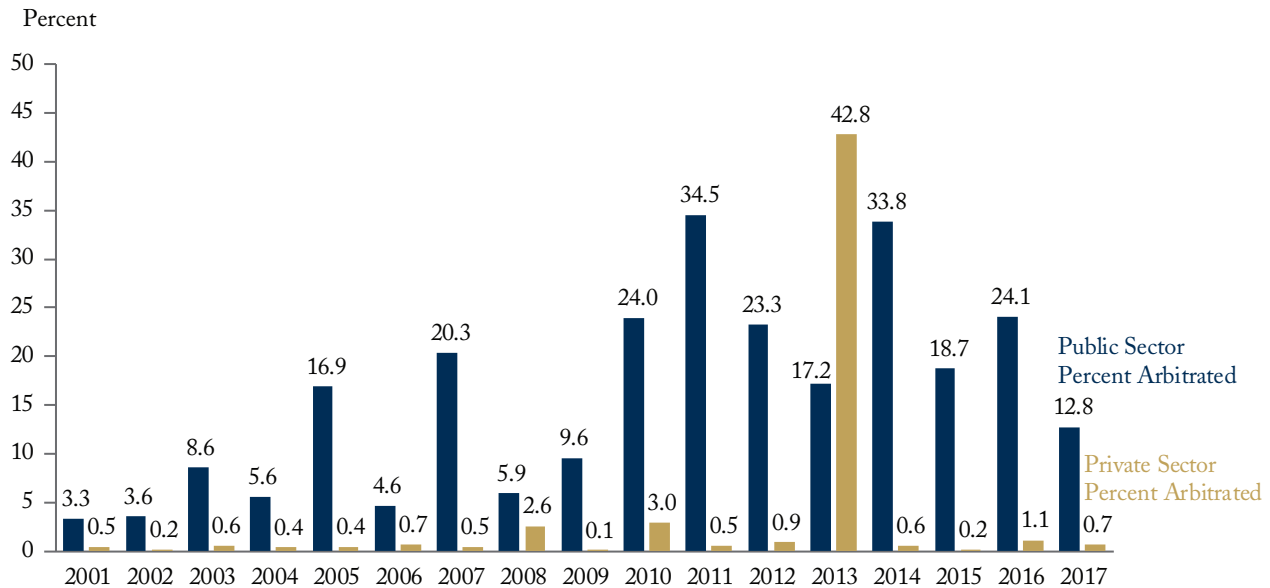
## THE GOALS OF INTEREST ARBITRATION

Beginning in the late 1960s, the federal government and the provinces enacted statutes granting public-sector workers – other than some municipal employees who were already covered by provincial labour relations acts – the right to bargain collectively. These statutes largely adopted the collective bargaining model used in the private sector. Many aspects of that private-sector model had straightforward implications in the public sector, but critical dissimilarities in the two sectors led to some incompatibilities, particularly with respect to the resolution of collective bargaining impasses.

### Concerns with Public-Sector Strikes

Many governments have taken steps to prohibit or circumscribe the use of the strike in parts of the public sector because of two broad concerns. The first concern raised is the harm that public-sector strikes inflict on the public. In the private sector, the costs of a strike are primarily borne by the parties to the dispute. Those who want to obtain the goods or services provided by the parties to the dispute often have other available options. In the public

**Figure 1: Proportion of Settlements Achieved through Interest Arbitration, Private and Public Sectors, Ontario, 2001–17**



Notes: Data for 2017 cover only the period from January to August.

The result for the percentage of settlements arbitrated in the private sector for 2013 reflects the manner in which construction settlements were resolved in that particular year, with arbitration being applied across the construction sector.

Source: Data provided by the Ontario Ministry of Labour upon request.

sector, consumers of government services often do not have the option to obtain them elsewhere if government is their sole provider. This, it is argued, imposes greater costs on the public, which will have to cope without those services, or their availability at a diminished level, for the duration of the dispute. This concern is heightened if services are deemed essential, such as those in the area of public safety.

The second concern raised with public-sector strikes is that since such strikes might deprive the public of vital governmental services, government officials will feel immense public pressure to end the dispute by agreeing to the union's demands (Adell, Grant, and Ponak 2001; Wellington and Winter 1971). Even the threat of a strike might

lead politicians, who depend on the public for their re-election, to capitulate to union demands in collective bargaining (see Malin 2013). This provides public-sector unions with immense bargaining power, the effect of which is the disproportionate allocation of public resources to the compensation and employment of public-sector workers. Further, to pay for the outsized settlements necessary to avoid public-sector work stoppages and maintain services, the level of taxes might need to be increased and those tax dollars increasingly (re) allocated to the compensation of unionized public-sector employees.

The question then becomes: do these concerns warrant the prohibition of strikes in the public

sector?<sup>2</sup> With regard to the first concern, there are questions as to the severity of harm that is inflicted on the public through public-sector strikes, particularly depending on the type of workers involved (Malin 2013; Weiler 1980). For example, in their study of strikes involving nurses, municipal workers and transit workers, Adell, Grant, and Ponak (2001, 194) find that, generally, disputes involving these workers rarely immediately endangered public health and safety,<sup>3</sup> although they note that the prospect of such a dispute can provoke considerable public anxiety.

The second concern regarding excessive union power also has not substantially materialized (Keefe 2013). Although there was some initial support for the idea (see Edwards and Edwards 1982), recent empirical evidence for Canada is consistent with the argument that public-sector unions have been able to leverage wage premiums that are broadly comparable to those of their private-sector counterparts, even as their fringe benefits such as pensions, insurance and leaves are greater (see Gunderson 2010; Gunderson and Hyatt 2009; Keefe 2013; Thompson and Slinn 2013). Further, although estimates place a government wage premium of about 5–10 percent for public-sector workers over comparable private-sector workers, the premium varies for workers based on gender, the level of government and where the worker is situated in the occupational/wage distribution. In fact, some estimates show that there might be

**Table 1: Proportion of Settlements Determined by Interest Arbitration, and Employees Covered, in Ontario, 2001-2017, by Sector**

Sector	Share of All Settlements Determined through Arbitration	Share of Employees Covered under Arbitration Awards
	(percent)	
Private	5.5	4.4
Public	33.1	37.6
<b>Total</b>	9.7	12.5

Note: The 2017 data only include the period from January to August.  
Source: Data provided by the Ontario Ministry of Labour upon request.

a wage penalty for certain workers in the public sector, including some managers and executives (Gunderson 2010; Mueller 1998, 2000).

The use of interest arbitration as the primary substitute for the right to strike has been entrenched by the Supreme Court of Canada’s decision in *Saskatchewan Federation of Labour v. Saskatchewan*. In this recent decision, the Court ruled that “the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations” and was, therefore,

2 Since one *raison d'être* of unions is to raise wages, and given that this necessarily involves the allocation of public resources to unionized public-sector employees – where there are alternative public uses for the resources and taxes might need to be raised – the policy issue is how to determine appropriate proportionality in limiting the application of strike activity.

3 Adell, Grant, and Ponak note that this outcome holds because “one or both of the parties will almost invariably take steps to ensure that a certain level of essential services is maintained” (2001, 188). Provision of essential services has been achieved, for example, through the use of “exempt” employees – that is, employees who are not permitted to be part of a bargaining unit, such as supervisors and certain professionals; and where a certain number of bargaining unit members are categorized as “designated” and therefore required to work in order to provide a minimal service level, while all others may engage in a work stoppage. This is not to suggest, however, that a risk of public harm does not exist; as examples, in transit and healthcare, in certain circumstances, the level of acceptable risk associated with a strike has been judged unacceptable (Adell, Grant, and Ponak 2001).



protected.<sup>4</sup> Although the Court did not preclude restrictions on the right to strike in certain circumstances, such as situations where essential services are provided, there must be some other meaningful dispute resolution mechanism – and interest arbitration has been and remains the “go to” mechanism used to “offset” limits on the right to strike (Chaykowski 2016, 498).

## LABOUR RELATIONS AND THE POLICY GOALS OF INTEREST ARBITRATION

### Industrial Peace

In the private sector, work stoppages impose costs on the parties that induce them to compromise to end the dispute. As well, the maintenance of industrial peace is generally equated with minimizing economic losses.

In the broader public sector, in contrast, the pre-eminent goal of a system of interest arbitration is the maintenance of the provision of essential services by ensuring industrial peace through avoiding strikes that are considered to pose too high a risk to the health and safety of the public. With regard to this goal, the use of compulsory arbitration, in lieu of the right to strike, does appear to reduce strike frequency when compared to other legal structures (Campolieti, Hebdon, and Dachis 2016; Currie and McConnell 1991, 1994).

If industrial peace is defined more broadly than simply work stoppages to include other types of job actions that can interrupt the delivery of essential services, then arbitration might not be as successful. Hebdon and Stern (1998) found that laws prohibiting strikes were associated with greater numbers of grievance filings and grievance arbitrations in Ontario’s government and healthcare subsectors than was the case for other public-sector workers with the right to strike. While maintaining

industrial peace, compulsory arbitration also might divert some of the conflict from the process of negotiating a collective agreement to its administration.

### Voluntarism

One main tenet of the labour relations model found in Canada and the United States is voluntarism (see Chaykowski and Hickey 2013, 380–1), whereby labour law provides the framework within which the parties craft their own agreements voluntarily through direct negotiations. This is viewed as a positive policy objective because it is believed that the parties are more likely to adhere to the agreement if they craft the settlement themselves, rather than have it imposed upon them by a neutral third party. The superior outcome flows from the fact that the parties have a better understanding of their own needs and concerns, and can make more informed and, therefore, better compromises that advance their interests and that fit their circumstances than can someone external to the relationship (Farber and Katz 1979). In fact, the process of negotiations itself serves to reveal information about the priorities of the parties (Hicks 1966). Thus, having a third party impose an agreement might avoid a dispute, but it also might lead to a settlement that does not accord with the parties’ expectations (Chaykowski et al. 2001).

The strike (or lockout), or the threat of one, is the main pressure tactic that forces the parties to make the compromises and tradeoffs necessary to achieve a settlement. Where strikes are prohibited, though, a good dispute resolution mechanism should encourage voluntary settlement; arbitration seeks to do this through the uncertainty over what the arbitrator’s award will be. That is, the parties might be more willing to compromise in order to have a say in the terms of the final agreement, rather than assume the risk associated with having

4 *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245, at para. 3.

the final agreement determined by an external party.<sup>5</sup> It is generally believed that steps to reduce the predictability of interest arbitration outcomes for the parties will further this goal of inducing voluntary settlement. With regard to this goal, current arbitration again appears to fall short, as compulsory arbitration legal structures have been shown to produce greater rates of impasse (fewer bargaining settlements) than do legal structures that specify other dispute resolution procedures as the terminal step (Anderson and Kochan 1977; Campolieti, Hebdon, and Dachis 2016; Currie 1989; Hebdon and Mazerolle 2003; Rose and Piczak 1996).

## Procedural Justice

Procedural justice requires that the parties view the process of arbitration as being fair. Several factors can affect the perceptions of procedural fairness and, therefore, the legitimacy of arbitration:

- *Bias*: Arbitration might break down when the process is perceived to be either biased in favour of one side or unable to produce suitable outcomes (Adell, Grant, and Ponak 2001; Rose 2015). For example, the importance of the “general acceptance” of the arbitrator was highlighted in *C.U.P.E. v. Ontario (Minister of Labour)*, where the union challenged the legitimacy of arbitrator appointments on various grounds, including “apprehension of bias.”<sup>6</sup>
- *Transparency*: A lack of transparency in the rationale for arbitration awards also might inhibit perceptions of procedural justice. Specifying the

arbitral criteria that need to be considered in fashioning an award might increase transparency, but if the criteria are viewed as privileging one side over the other, this might reduce the acceptability of arbitration by the parties (Archibald 2003; Rose 2015).

- *Institutional differences*: The effectiveness of arbitration at providing procedural justice might be highly variable across jurisdictions or between even the parties to a bargaining relationship. To illustrate, Adell, Grant, and Ponak (2001) found that compulsory arbitration worked relatively well for nurses in the Ontario healthcare sector, but failed to prevent work stoppages among nurses in Alberta. The reason behind these divergent outcomes was the union’s acceptance of the system in Ontario and its rejection in Alberta.

## Balance

The policy goal of ensuring “balance” represents the principle that the interests of both parties to collective bargaining should be reflected in the process and outcome. In the private sector, the two main stakeholders are the employer and the union, and arbitration is required to ensure the interests of both are considered. In the broader public sector, however, the principle also includes the public interest.<sup>7</sup>

In replacing the right to strike, arbitration should strive to “safeguard employee interests” (Rose 2015). Similarly, it should also not overly disadvantage employers – for example, by restricting the employer’s operational efficiency or by

5 Of course, differences in the degree of risk aversion between the parties would be expected to result in variations in the types and extent of any concessions that either side is prepared to make. For that reason, mechanisms that are designed to increase uncertainty might lead to different – but not necessarily better – outcomes where there is underlying asymmetry in risk aversion between the parties.

6 In particular, the decision noted: “In early 1998, the Minister appointed four retired judges to chair several arbitration boards.... The unions sought declarations that the Minister’s actions denied natural justice and lacked institutional independence and impartiality”; see *C.U.P.E. v. Ontario (Minister of Labour)*, at 540–1.

7 In the private sector, there is a public interest in achieving lower strike activity, but cases, such as that of the rail industry, in which a private sector activity is deemed “essential” to the point where government imposes arbitration as an alternative to a strike – or legislates an end to a work stoppage – are quite unusual.

imposing labour costs that place the employer at a competitive disadvantage. Safeguarding the public interest is primarily associated with arbitration outcomes that do not, for example, place undue strain on public finances or burden the public with frequent work stoppages. What features of interest arbitration operate to advance the public interest?

### **Efficiency**

The goal of efficiency requires that arbitration settle disputes quickly and at less cost than other systems of dispute resolution. With respect to costs, judging how well arbitration meets the goal of efficiency might depend on how costs are defined. If the focus is on dispute costs, as measured by the cost of arbitration hearings versus the cost of forgone wages in a strike (as a proxy for economic rent) and lost output, then compulsory arbitration does meet this goal, as the cost of strikes dwarfs that of arbitration, even when more disputes go to arbitration than lead to strikes.

However, although the lesser cost of arbitration is often highlighted as an advantage of the process, in the context of public-sector labour relations an arbitration regime might inhibit bargaining efficiency by slowing the speed of the process. Not only are compulsory arbitration regimes associated with higher rates of impasse or dispute, but arbitration hearings – with the requisite time and resources devoted to preparation, hearings, and the arbitrator’s issuing of the award – are likely to take much longer than the average public-sector strike duration, over the 1978–2008 period, of 32.5 days (Campolieti, Hebdon, and Dachis 2016). Arbitration, therefore, appears to fulfill the goal of efficiency with respect to cost, but falls short when it comes to enhancing the time to produce a settlement.

## **SYSTEMS OF ARBITRATION AND THE USE OF DESIGNATION OF EMPLOYEES**

A number of different types, or systems, of interest arbitration exist, some of which might accomplish the goals of arbitration more effectively than others.

### **Conventional Arbitration**

In the predominant type of arbitration used in the settlement of interest disputes, known as conventional or traditional arbitration, the parties submit their proposals on each issue in dispute to the arbitrator, who is free to choose from either party’s proposals or craft an original award. The flexibility afforded the arbitrator in this type of arbitration is one of its strengths. As noted above, however, using arbitration as a terminal step in a dispute resolution procedure results in higher rates of impasse. This is theorized to be due to the “chilling effect,” whereby the belief of the parties that the arbitrator simply “splits the difference” between the two proposals inhibits concessions during the negotiations, since concessions will reduce the favourability of the award for the conceding party (Anderson and Kochan 1977). The chilling effect emanates from the perception of predictability in the creation of the arbitration award. The response to this shortcoming of arbitration has been to introduce more uncertainty into the process in order to elicit greater concessions.

### **Final Offer Arbitration**

The best-known example of a modification to conventional arbitration in order to mitigate the chilling effect is final offer arbitration (FOA). This form of arbitration requires the arbitrator to select either of the “final offers” presented by the parties

(see Feuille 1975; Stevens 1966). It is theorized that this will lead each of the parties to create more reasonable proposals in order to increase the likelihood that the arbitrator will select their final proposal/offer. FOA raises the stakes of going to arbitration because the parties risk losing on every issue if the arbitrator does not select their proposal. This heightened risk is expected to lead to greater concessionary behaviour and more voluntarily negotiated settlements. As well, it is possible to combine the conventional and FOA forms of arbitration such that, as is the case in Michigan, one is used to determine economic issues and the other is used for non-economic issues (Block 2013).<sup>8</sup> The evidence as to whether FOA is more successful than conventional arbitration at inducing more negotiated settlements is, however, mixed; see Devinatz and Budd (1997); Gunderson, Hebdon, and Hyatt (2009); Hebdon (1996).<sup>9</sup>

Conventional arbitration is used more often than FOA, perhaps, because there are many potential problems associated with FOA, including:

- the risk that the arbitrator will be forced to choose between two unreasonable proposals;
- the possibility that FOA might be harmful to

relationships, as only one party emerges the winner (Gunderson, Hebdon, and Hyatt 2009),<sup>10</sup> a win/lose scenario that might reduce the likelihood that the party whose proposal was not selected will adhere to the settlement;<sup>11</sup> and

- the risk that the parties might be less likely to submit proposals that include innovations, a problem that emanates from the adherence of arbitrators to the conservatism principle – that is, where arbitrators avoid conferring breakthroughs in their awards since they believe that fundamental changes to the bargaining relationship should come from the parties (Rootham 2017, 278). This aspect of arbitrator decision-making, which leads to criticisms that arbitration stifles innovation, is exacerbated in FOA, as parties will be less likely to submit proposals that include innovations since this might lead the arbitrator to select the other party’s proposal (Malin 2013, 156).

### **Arbitration Boards/Panels and Hybrid Arbitration Systems**

Either conventional arbitration or FOA may be undertaken with a board (or panel)<sup>12</sup> of three arbitrators or a single arbitrator. With a board, the

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8 FOA may be practised on either a total-package or an issue-by-issue basis. However, the more discretion the arbitrator has, such as the ability to choose among issues rather than packages, the less the procedure moderates arbitration’s chilling effect on negotiations.

9 Based largely upon research on the use of arbitration in policing and firefighting in the United States, Lipsky and Katz (2006, 267) conclude: “It appears, however, that final offer arbitration does provide a greater incentive for the parties to settle on their own than does conventional arbitration: arbitration usage rates are significantly lower in states with final offer arbitration than they are in states with conventional arbitration.” See also Katz and Kochan (1988, 283–4).

10 The concern is that a damaged relationship might affect efficiency negatively. Mas (2006) investigates the performance of police in relation to FOS arbitration outcomes in a regime where the parties were required to engage in collective bargaining for a specified period and strikes were prohibited – if a settlement was not achieved, then FOS arbitration was imposed – and finds a negative efficiency outcome: “Police performance declines sharply when officers lose arbitrations” (785).

11 This outcome might be mitigated, however, through another variant of FOA known as “double FOA.” Here, each of the parties submits two roughly equal final offers to the arbitrator, who then selects between the union and management proposals. The side not chosen then gets to select from the two proposals of the side chosen by the arbitrator. This process might help the “losing” party feel as though it had some say in the outcome, and thereby aid in the award’s acceptance.

12 In Canada, the term “board” is common, and typically refers to a slate of three, with a neutral and one member representing each of the two parties. In the United States, the term “panel” is commonly used, and can refer to a slate that includes a neutral with one or more representatives from either party (a “tripartite panel”) or three neutrals; see Katz and Kochan (1988, 280).

union and management typically each appoints a nominee who serves to advance its interests. The neutral chair of the board is selected by mutual agreement of the parties, or by the minister of labour or the Labour Relations Board in the event of disagreement;<sup>13</sup> the chair needs to be someone acceptable to both parties and is qualified to serve in that role (Rootham 2017, 277). A board might be preferred because nominees appointed by the parties might bring more relevant labour relations and arbitration experience to the process (Barnes and Kelley 1975); moreover, a board might encourage the bargaining process, particularly where the panel members negotiate the issues among themselves (Block 2013).

On the other hand, concerns about the use of a tripartite board or panel, rather than a single arbitrator, include the potential for greater direct costs as well as delays in rendering awards.<sup>14</sup> There is, however, a dearth of research that compares arbitration outcomes with a board to those under a single arbitrator; also insufficiently examined is the effect on outcomes of a board of appointed neutrals versus a board consisting of two nominees and a neutral chair.<sup>15</sup>

There are also “hybrid” types of arbitration that combine mediation with arbitration, the most common form being the aforementioned mediation-arbitration. In med-arb, the parties undertake mediation with the aim of achieving a voluntary agreement, but if they are unsuccessful

within a given period, the parties then undertake arbitration.<sup>16</sup> The expectation is that the uncertainty surrounding the outcome of arbitration, if mediation fails, will facilitate the mediation stage of this process. Within this procedure, the roles of mediator and arbitrator may be performed by the same person (a one-stage med-arb) or two individuals (a two-stage med-arb).

Some analysts maintain that the information the individual obtains in the mediation phase of a one-stage med-arb could facilitate the individual’s role in the arbitration phase (if necessary) by allowing the arbitrator to gain a deeper understanding of the cause of the impasse. Others argue that, if one person plays both roles, then the individual might receive confidential information in his or her role as mediator that would be inappropriate to use in his or her subsequent role as arbitrator. Thus, a chilling effect might take place insofar as the parties might not divulge certain information in the mediation phase for fear that it might be used against them in the arbitration phase in a one-stage med-arb (Campolieti and Riddell 2018; Devinatz and Budd 1997). Further, in a one-stage med-arb, the parties might be able to obtain information on the third party’s thinking, which might reduce the uncertainty surrounding both the award and the incentive to bargain (Farber and Katz 1979). In Ontario, whether conducted formally or informally as a part of an arbitration process, some form of mediation is quite common. There is concern,

13 For example, under the *Ontario Police Services Act*, the neutral chair is selected by an arbitration commission.

14 Delays could arise, for example, because scheduling of three board members might take longer than for a single person. Banks, Chaykowski, and Slotsve (2019) find that tripartite boards are associated with longer delays in the arbitration of rights disputes.

15 Highlighting the differences in the process under the two types of panel composition, Lipsky and Katz (2006, 269) point out: “A tripartite panel consisting of an impartial chairperson and an arbitrator appointed by each of the party’s function in a measurably different fashion from a panel consisting of three impartial arbitrators. The former more closely approximates the negotiation approach to interest arbitration and the latter the judicial approach.”

16 In practice, experienced arbitrators typically attempt to settle as many issues as possible at the outset of an arbitration proceeding; although not formally a med-arb process, this approach is expected to have some of the same effect. Conciliation is also a feature of most Canadian statutes, but as well as adds time to the process, it is sometimes viewed as ineffective (see, for example, Campolieti and Riddell 2018, 19).

however, about whether one individual has the skill set to play both roles effectively in either of these hybrid processes.

### Alternative Models for Dealing with Essential Services

Many jurisdictions have been moving away from compulsory arbitration for public-sector workers (outside of public safety) and toward a designation model with a limited right to strike. Under the designation model, the parties negotiate an essential services agreement that determines the type and number of workers that are chosen as essential. In Ontario, for example, this includes corrections officers (from 1994 to 2016),<sup>17</sup> provincial employees (since 1994) and paramedics (since 2000) (Dachis and Hebdon 2010, table A1). These workers must remain on the job in the event of a work stoppage to maintain a level of service that ensures public health and safety. In circumstances where the parties are in disagreement, an independent administrative agency, usually the jurisdiction's labour relations board, may issue an order determining the number of designated workers (Doorey 2017, 173; Rootham 2017, 273–4).

In their study of essential service strikes, Adell, Grant, and Ponak (2001) ultimately conclude that the designation model is better than either the no-strike/compulsory arbitration model or unrestricted strike model in maintaining essential services, inducing voluntary settlements and producing outcomes acceptable to both parties.<sup>18</sup> There are, however, some issues of concern with the essential services designation model. Campolieti,

Hebdon, and Dachis (2016) find that this model is associated with reduced wages, while Adell, Grant, and Ponak (2001) suggest that it could increase both the frequency and duration of strikes. Strikes might occur more often as unions adapt to the model by substituting tactics such as rotating strikes or work-to-rule in place of a full strike. Thus, similar to the case of interest arbitration, the conflict could manifest itself in other ways if disputes that produced the impasse are not resolved. Strikes also might last longer since services would continue, albeit at a diminished level, which would lessen public pressure for the work stoppage to end. Despite such concerns, however, Campolieti, Hebdon, and Dachis (2016) find that the essential service designation model is not (statistically) associated with either a greater likelihood of strikes or the increased duration of strikes relative to the unrestricted strike model.

The most serious issue with the essential services designation model is the need to get the level of essential services that must be maintained “correct.” As Adell, Grant, and Ponak (2001, 192) note, if the percentage of the bargaining unit that is designated is too low, a work stoppage is likely to result in a significant disruption of essential services that could adversely affect public health and safety, but if the percentage is set too high, the union essentially loses its ability to apply economic pressure to the employer through a strike. With respect to this need for balance, some have advocated that, if the percentage of the bargaining unit that is designated as essential is above a certain threshold – beyond which the union would be deprived of its bargaining

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17 The *Ontario Crown Employees Collective Bargaining Act* was amended in 2016 to establish a separate bargaining unit for corrections officers; the parties are subject to interest arbitration to determine unresolved matters in dispute.

18 In Adell, Grant, and Ponak (2001), the only criterion on which the designation model falls short, compared to the other two models, is in the efficiency of collective bargaining, as the essential services agreement prolongs the negotiation by adding it to the issue mix.

power – then the employees should have access to arbitration (Weiler 1980).<sup>19</sup>

There is also concern about the tendency, over time, for employers in the broader public sector to ratchet up the proportion of employees designated as essential, presumably with the intention of ensuring the provision of an adequate level of essential services. This has had the side effect, however – one that favours the employer – of diminishing the effectiveness of strikes (Rose 2016). This outcome creates a grey area in which strikes are not prohibited, but nonetheless are rendered a hollow option. Such erosion of the efficacy of strikes runs counter to the protections the Supreme Court of Canada placed, in its decision in *Saskatchewan Federation of Labour v. Saskatchewan*, on the right to engage in strike activity or, in the absence of the right to strike, the right to interest arbitration (or a similarly meaningful mechanism). Even under a designation model, the Court's decision in that case suggests that reliance upon arbitration might increase.

## LEGISLATED CRITERIA FOR ARBITRATION AWARDS

In the Ontario broader public sector, legislation establishing the process of interest arbitration specifies a number of arbitral criteria, including ability to pay; the economic situation; the terms and conditions of employment for comparators; and the ability to attract/retain employees. These criteria reflect, variously, the interests of employers and employees (the union). From a labour relations policy perspective, arbitral criteria serve to guide arbitrators in crafting an award that supports

the goals of achieving efficiency and a balance of interests. However, there is also a significant overarching public interest in the terms and conditions of public-sector collective agreements – and interest arbitration awards – including with respect to achieving the goals of procedural justice, balancing the parties' interests and supporting efficiency, as well as in the economic outcomes of the process.

Unlike those in some other jurisdictions, arbitrators in Ontario are instructed to consider these criteria only if they are deemed relevant. Further, the criteria are not intended to restrict the arbitrator's discretion – indeed, the legislation explicitly states that the section which enumerates the criteria does not affect the power of the arbitrator(s). Thus, how strictly an arbitrator adheres to these criteria depends on the arbitrator's assessment of their relevance. The criteria enumerated in legislation that have received the most attention are the terms and conditions of employment of comparison groups in the public and private sectors, and the employer's ability to pay in light of its fiscal situation.

### Comparability

Theoretically, to achieve an outcome that provides the benefits associated with voluntarism, arbitrators should try to make a determination that best approximates the agreement that the parties would have produced in a system of free collective bargaining with the right to resort to economic sanction. Referred to as the replication principle, this presents a decisive difficulty in that it is an unobserved counterfactual. In practice, a guiding

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19 In fact, this is the approach that Ontario has taken with its ambulance services collective bargaining legislation. Under the *Ambulance Services Collective Bargaining Act*, a party may apply to the Ontario Labour Relations Board for a declaration if it believes that the essential services agreement deprives the party of a meaningful right to strike/lockout. The board is restricted, however, from issuing a declaration if at least 75 percent of the bargaining unit is not designated as essential. This order could be that the portion of the bargaining unit containing ambulance workers be directed to final and binding arbitration.

principle in arbitrator decision-making is the notion of comparability; this principle involves making comparisons with the terms and conditions of other workers performing similar work, which is empirically possible to observe (Adams 1981).

In striving to approximate the outcome that would result from applying the replication principle, arbitrators may turn to the comparability principle to infer what the contract outcome might have been had it been settled by the parties; that is, as based upon the “market” rate for that type of public work – notionally, “external comparability,” as established through the voluntary settlements of other workers (Rootham 2017; Slater 2013).<sup>20</sup> Application of the comparability principle is also consistent with achieving other objectives, such as satisfying the arbitral criterion concerning the ability of the public employer to attract and retain qualified employees, including from the private sector, or arbitral objectives regarding horizontal equity – that is, related to “internal” comparability.<sup>21</sup>

A couple of major shortcomings, however, are associated with the use of the comparability principle. First, the use of comparisons to justify awards could result in an overall patterning of awards – sometimes referred to as the “parasitic effect” of interest arbitration (Adams 1981). This effect arises when an arbitrator’s award forms the basis for subsequent awards (or even voluntary settlements), where the lead award is not one that would have prevailed in a dispute resolution system based on the right to strike and might be divorced from the “market.” There are also concerns that the parasitic effect could lead to wage escalation in the

broader public sector (Chaykowski and Hickey 2012), especially where arbitrators fail to give appropriate weight to individual circumstances. The fact that wage escalation in the public sector does not appear to have outstripped that in the private sector in the decades since interest arbitration was first introduced might moderate this concern.

Second, many public-sector occupations do not have a natural comparator in the private sector. This might lead the arbitrator to use a variety of approaches to determine comparability when deciding an award (Slater 2013). These could include external comparability, where the characteristics of the bargaining unit or workers are compared to those of “similar” workers under a different employer (for example, a different municipality); internal comparability, where the terms and conditions of employment are compared across different types of workers under the same employer; or comparability in relation to previous collective agreements settled in the relationship.

### **Ability to Pay**

Ability to pay is a critical criterion because it relates directly to an individual employer’s financial viability and, where the employer is publicly funded, to government fiscal sustainability. Ability to pay is therefore directly related to the broader public interest. Arbitrators, however, have largely rejected meaningful consideration of the public employer’s ability to pay, despite the enumeration of ability to pay in legislation. Arbitrators’ refusal to apply this principle might be due to a number of reasons (Rose 2015, 178):

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- 20 A fundamental challenge is that, in practice, employers would be expected to take the position that arbitrators ought to take into account terms and conditions of employment that prevail for comparable workers performing similar work in both the unionized and the non-unionized segments of their industry; in contrast, unions are expected to advocate for unionized comparator groups.
- 21 Slater (2013, 406) describes internal comparability: “For municipal employees, this usually means employees of other cities of a similar size, often within the same state. ‘Internal’ comparables involve arguably similar employees of the same employer. This issue is often labeled ‘internal consistency.’”



- Arbitrators might view public employers' purported *inability* to pay as "unwillingness to pay," since governments can redirect budgetary funds from other expenditures, increase taxes or reduce certain service levels in order to offset labour costs. Thus, although governments might be unwilling to exercise these options, public-sector employees should not be expected to "subsidize" public services through inferior terms and conditions of employment.<sup>22</sup>
- Arbitrators might view the inclusion of this criterion in legislation as public officials simply seeking to avoid accountability associated with making hard decisions regarding raising taxes or curtailing service levels in order to support public-sector compensation levels.
- Arbitrators might perceive elevating the importance of the public employer's ability to pay as infringing upon their independence, leading employees/unions to view the arbitrator more as an instrument of government fiscal policy than as an impartial umpire with the ability to protect their interests.

The various Ontario statutes that govern the use of interest arbitration in public-sector labour relations do not currently require certain criteria to be applied and assigned definite relative weights in arbitral decision-making.<sup>23</sup> Some other governments in Canada and some US states, in contrast, have been willing to place greater restrictions on arbitral discretion in ways that advantage the employer in the process (Block 2013; Rose 2000, 2015). Available evidence suggests, however, that legislative changes in Canada to emphasize the ability-to-pay criterion have had no effect on the size of arbitrated wage settlements (Campolieti, Hebdon, and Dachis 2016). If the goal of increasing the emphasis on ability to pay

was to reduce the size of settlements produced from arbitration, it appears to have been unsuccessful.

## KEY CONCERNS ABOUT INTEREST ARBITRATION

### Ability to Mitigate Conflict

One key concern about interest arbitration is whether it is effective at resolving disputes that brought parties to an impasse or merely suppresses conflicts temporarily or redirects them to other forms of conflict, at other times. There is some evidence that arbitration results in the latter.<sup>24</sup> Compulsory arbitration legal structures are associated with lower strike frequency (see Campolieti, Hebdon, and Dachis 2016; Currie and McConnell 1991), although Adell, Grant, and Ponak (2001) found that compulsory arbitration might not reduce the frequency of strikes if the parties – the union, in particular – do not accept the system as a legitimate mechanism for the settlement of interest disputes. On balance, the available evidence does not permit one to discern clearly the effects of arbitration in alleviating conflict versus diverting it.

### Chilling Effects

Another key concern is the "chilling effect" that arbitration might have on collective bargaining. Numerous studies have found that rates of impasse/dispute under legal structures that require arbitration are higher than under legal structures that have other dispute resolution procedures as the terminal step (Anderson and Kochan 1977; Campolieti, Hebdon, and Dachis

22 See Chaykowski and Hickey (2012) and the arbitration awards cited therein.

23 In contrast, Slater (2013, 404) notes that, in the United States, "some statutes specifically instruct arbitrators to give certain criteria the most weight."

24 Hebdon and Stern (1998) found that strike bans/compulsory interest arbitration were associated with increases in mid-contract grievance activity and job actions (for example, slowdowns), and that this was exacerbated under final offer arbitration. See also Hebdon and Mazerolle (2003, 670–1) for a discussion of potential for the redirection of conflict.

2016; Currie 1989; Hebdon and Mazerolle 2003; Rose and Piczak 1996). The chilling effect is mainly concerned with the effect of arbitration on the current round of bargaining, but it is also hypothesized that arbitration can affect future rounds of bargaining.

There are several reasons why the parties might have a dependence on arbitration – referred to as a “narcotic effect.”<sup>25</sup> First, the parties learn over time that it is easier and less costly to have an arbitrator settle their differences than to do so themselves through difficult collective bargaining, resulting in greater rates of impasse and reliance on arbitration (Anderson 1981, 131). Second, with each use, the parties develop a better understanding of the process and the arbitrator’s reasoning; this reduces the uncertainty surrounding the process that is supposed to induce voluntary settlements (Farber and Katz 1979). Third, the ability to “save face” by placing the blame of a “bad result” on the arbitrator might induce union elected officials to use arbitration to avoid political accountability for the difficult decisions that might best be made in collective bargaining (McCall 1990).

### **Substantive Outcomes: Wages**

There is also concern over whether wage increases in arbitration awards are more generous than those found in voluntarily negotiated agreements – and in

the public sector more generally. For comparisons within legal structures – for example, where there is a choice between striking or resorting to arbitration – there is some, albeit limited, evidence from the Canadian federal level that arbitrated settlements (in the years just following the introduction of bargaining rights) became comparable, over time, to voluntarily negotiated ones (see Anderson and Kochan 1977).<sup>26</sup>

Looking across different legal structures (with different dispute resolution regimes), evidence suggests that systems with arbitration as the final step in the procedure are associated with a small wage premium (approximately 1.0–2.5 percent) as compared to systems that have a strike as the final step (Currie and McConnell 1991; Gunderson, Hebdon, and Hyatt 1996). Campolieti, Hebdon, and Dachis (2016, 20), examining a more recent period than previous Canadian studies, find wage gains under compulsory arbitration statutes not to be statistically significantly different from those produced under right-to-strike statutes, but they attribute this finding to the public-sector wage restraint of the early 1990s. When they control for this period, they find that a compulsory arbitration legal structure is associated with a statistically significant wage premium that is comparable to findings of previous studies (18). Thus, in Canada, it appears that there might be a price to pay for

25 The empirical literature in Canada has found evidence of the existence of a narcotic effect (see, for example, Anderson and Kochan 1977; Currie 1989). US studies have produced more mixed results (see, for example, Butler and Ehrenberg 1981; Champlin, Bognanno, and Schumann 1997; Kochan et al. 2010). Although Campolieti, Hebdon, and Dachis (2016, 13–14) find evidence for Canada consistent with a narcotic effect, they note that their findings are also consistent with the persistence of conflict.

26 The authors attribute these findings to arbitrators’ conservative decision-making and to the use of comparability, whereby weaker bargaining units that were unable to exercise significant economic or political leverage used arbitration to achieve the gains that were won by bargaining units that were able to use such leverage. Thus, access to arbitration aided weaker bargaining units in following a pattern, but did not produce any gains beyond those negotiated voluntarily.

substituting interest arbitration for the right to strike.<sup>27</sup>

## CONCLUSIONS AND RECOMMENDATIONS

There is a wide range of potential models for an interest arbitration system. Studies that have examined the effects of certain models – for example, final offer arbitration versus conventional arbitration – are not definitive, however, for two reasons. First, evidence on all aspects of arbitration models – such as the extent of “arbitrator capturing” by the parties – is simply not available. Second, much of the extant research applies to the United States, where aspects of public-sector labour relations and law can be quite different than in Canada – and in industrial relations, institutional factors can matter a great deal. Consequently, the results of these US studies might not necessarily be conclusively applied to the Canadian context. The available research nonetheless provides some important guidance. With these caveats in mind, four areas of potential reform to the arbitration system would be applicable across many Canadian jurisdictions.

### Change the Process and Parameters of Arbitration

If mediation plays a prominent role in the

arbitration process, and the arbitrator first attempts to mediate a settlement before adjudicating, then the threat of an imposed outcome stands to increase the likelihood of a voluntary settlement. The push toward voluntary settlements, therefore, would be expected to allow for innovative solutions, to alleviate conflict instead of diverting it and to increase the parties’ accountability to their constituents (Chaykowski et al. 2001; Malin 2013). The use of mediation prior to the arbitration process permits another round of tradeoffs in order to craft a voluntary settlement and avoid the prospect of an adverse arbitration outcome (see Campolieti and Riddell 2018; Malin 2013). These considerations suggest that a mediation-arbitration model should deliver superior outcomes, and this points to encouraging the use of some form of that model.

With a med-arb process, several further challenges would need to be addressed. For example, the parties might withhold information at the mediation stage in order to gain a later advantage in arbitration, or they might be reluctant to share information with the mediator, knowing that it could be used later in the crafting of an arbitration award (Campolieti and Riddell 2018, 5). Indeed, unwillingness to share information could *increase* the likelihood of going to arbitration (5–6). As well, the parties might perceive the mediation process as “coercive” (5). There is, in fact, a dearth of empirical evidence on the efficacy of med-arb,<sup>28</sup> although Campolieti and Riddell, examining

27 Although there have been relatively few studies in Canada regarding arbitration and wage outcomes, those that exist have been able to make use of large databases that cover a broad range of occupations. In contrast, the greater number of US studies have a narrower focus (primarily on police and firefighting) and the evidence from these studies is somewhat mixed, with some finding arbitration associated with higher wages and others finding no discernable effect on wages. See, for example, Ashenfelter and Hyslop (2001); Bloom (1981); Feuille, Delaney, and Hendricks (1985); Kochan et al. (2010); Kochan and Wheeler (1975); and Olson (1980).

It is worthwhile noting that the emphasis in US research on arbitration among police and firefighters has reflected, at least historically, the fact that, “[i]n most of the states, the driving power behind the enactment of an arbitration statute has come primarily from police and firefighter unions” (Lester 1984, 1). In Canada, the demand for arbitration in the public sector has tended to extend well beyond police and firefighting.

28 The available US evidence is limited, somewhat mixed in its results and subject to some methodological limitations. For example, widely cited papers by Lester (1984) and Stern (1984) regarding med-arb reach somewhat opposite conclusions.

its use and arbitration rates in Ontario policing and firefighting, find that “the introduction of mediation-arbitration is significantly associated with increased use of arbitration by firefighters relative to the police” (2018, 1).

Although some problems (such as the chilling effect) associated with one-stage med-arb, where the same person conducts both processes, could be addressed through the use of two-stage med-arb, whereby different experts conduct the two processes, other potential problems remain. As examples, where the parties have developed a narcotic effect, they might be less likely to take the mediation phase seriously because they have come to depend upon the arbitration process. Or the parties, once in mediation, might behave strategically – for example, with regard to information sharing – which also would increase the likelihood of going to arbitration. In these circumstances, the parties would need to be incentivized to vest more fully in the mediation stage. Therefore, taken altogether,

- *governments should assess whether the arbitration system should be modified so that it follows a two-stage process, monitor whether the modified system yields improved outcomes (for example, decreased use of arbitration)<sup>29</sup> and assess whether the mediation phase can be modified to incentivize the parties to vest more fully in the process.*

## Ensure the Public Interest Is Addressed

Although collective bargaining, or interest arbitration, might advance the interests of

employers and unions, the settlements and outcomes might not always be in the public interest.<sup>30</sup> In fact, under the current system, there appear to be few, if any, incentives for employers and unions to internalize the public interest in their negotiations process.<sup>31</sup> There is, however, a direct public interest in such issues as ability to pay, the financial sustainability of the provision of public services and government debt loads. These issues also intersect with factors such as the application of the “replication principle” and the “comparability” criterion.

The main way in which the public interest is internalized in the arbitration process is by appealing in legislation for arbitrators to take account of such factors. Yet, in Ontario, the legislation permits arbitrators full discretion in their focus and weighting of the criteria they choose to apply. Perhaps not surprisingly, arbitrators routinely decline to take account of certain criteria (notably, ability to pay) despite the fact that legislation highlights the criteria deemed to be important (see Chaykowski and Hickey 2012, 40–54; Rose 2000), while governments seem reluctant to stipulate that certain key criteria must be applied.<sup>32</sup>

As a result, the current model appears to create a wedge between the private interests of the parties and the public interest. This also has the unintended side-effect of pressuring governments to act in an ad hoc – and sometimes unilateral – fashion to end disputes, which can yield poor outcomes as a matter of labour relations and labour policy. These considerations point to the need to ensure that

29 The available research regarding the efficacy of alternative approaches to med-arb is not definitive, so it does not assist in informing us whether changes necessarily would lead to better or worse outcomes.

30 As examples, widespread high wage outcomes in the private sector could lead to increases in the aggregate costs of labour inputs, which could lead to cost-push inflation, while high wage settlements in the public sector could place pressure on government budgets.

31 There appears to be little, if any, research in Canada on the issue of the degree of alignment between the public interest and the interests of employers and unions in public-sector bargaining or arbitration outcomes.

32 It is worthwhile noting that more work needs to be done to clarify certain potential criteria – ability to pay would be one such candidate. In addition, a key issue that should be carefully addressed is that of the best approach to enforcement – especially in light of arbitrators’ established track record of ignoring certain criteria that have been stipulated in legislation.

the public interest is embodied in the outcomes of interest arbitrations by establishing key criteria and increasing arbitrator accountability. Accordingly,

- *governments should demand that arbitrators consider certain arbitral criteria,<sup>33</sup> including an explanation of how each factor was considered, even those judged irrelevant; enumerated criteria should include those that have a substantive public interest component, but any changes should not otherwise restrict arbitrators' discretion, so as to maintain a level of unpredictability in the process.*

In addition,

- *governments should strengthen the accountability of arbitrators by explicitly requiring them to consider and assess the parties' submissions;<sup>34</sup> one potentially important effect of this would be to encourage the parties to increase, over time, the quality of the substantive evidence they provide arbitrators.*

These changes would explicitly address the need to take account of the public interest and be expected to increase the uncertainty that the parties experience in interest arbitration, creating greater incentives for the parties to reach a settlement through bargaining and, failing that, serving to incentivize the parties to reach a settlement at the mediation stage. Finally, the changes would directly increase the accountability of the arbitrator to the

parties and the public.

### **Develop the Human Capital and Skills of Arbitrators and Mediators**

One major concern is whether third parties have the skill set to perform the role of mediator, arbitrator or both.<sup>35</sup> Arbitrators in industrial relations historically have also practised facilitative mediation aimed at aiding in the resolution of disputes. An analytical review of the skills that mediators and arbitrators, respectively, need would benefit the system, including in the context of two-stage med-arb, where both a mediator and an arbitrator are required.<sup>36</sup>

Increasing the accountability of arbitrators – for example, by requiring them to consider and assess the parties' submissions – requires that their skills be sufficient to the task. Some of the factors that arbitrators could be required to consider would necessitate a sound basis of understanding in economics, accounting and statistics, as examples. Therefore,

- *government should conduct a review of the competencies and skills that mediators and arbitrators need, respectively, with a view to identifying skill requirements, setting competency standards and*

33 It is worth emphasizing that this recommendation is not meant to imply that simply specifying more criteria is necessarily an improvement; rather, the emphasis should be on identifying significant criteria that have a vital bearing on the public interest, including the interests of the parties. In a similar vein, it is not necessarily the case that placing any limits on arbitral discretion – by mandating certain criteria – necessarily has negative consequences.

34 The Ontario government attempted to introduce reforms to the arbitration process in the broader public sector through Bill 55, the *Strong Action for Ontario Act (Budget Measures)*, 2012, which included requirements for written submissions as well as arbitrator rationales, but these changes were never given effect.

35 The need to engage in training and development and to establish competency standards is not a new idea. For more information, see Horton (1975). Yet the mediation and arbitration professions remain one of the few areas where formal training and competency-based standards are not required. See also Zack (1978).

36 As Campolieti and Riddell (2018, 17) emphasize, “the general point that arbitration (a process of evaluation) and mediation (a process of participation and self-determination) involve very different skill sets has been raised many times in the literature.”

*developing (formal) training to enhance skills.<sup>37</sup>*

### **Avoid Arbitrator Capturing, Incentives to Pattern and Predictability**

In the current adversarial labour relations system, there is a concern about the parties' having an influence on the choice of arbitrator;<sup>38</sup> in turn, arbitrators have a predictable self-interest in being selected by the parties over time.<sup>39</sup> Several potential problems are attendant to this system that could create a wedge between the private interests of the parties and the public interest:<sup>40</sup>

- arbitrator “capturing,” where the arbitrator has an incentive to “split the difference” in crafting the award in order to achieve a middle ground that does not alienate either party;
- increased patterning of awards, where the arbitrator has an incentive to craft a settlement

that patterns – that is, avoids significantly diverging from recent settlement patterns – hence the heavy weight often placed on the comparability criterion, with the risk of an upward bias in monetary awards over time; and

- predictability, where repeat usage leads the parties to develop a better understanding of the process, expectations and reasoning of a particular arbitrator, a dynamic that reduces the uncertainty surrounding the process that operates to induce higher settlement rates.

A common argument for having the parties agree on the arbitrator and for appointing the same arbitrator in subsequent arbitrations is that the arbitrator comes to “best know” institutional characteristics about the parties that “matter” in industrial relations – for example, issues that preoccupy the parties, their labour relations history, the labour relations dynamic in play or

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37 One anecdotal observation is that there appears to be no “obvious” competency/skills deficit among arbitrators; unfortunately, there is no research on the subject of the skill sets of mediators and arbitrators to guide our understanding of whether or not such a deficit exists. The fundamental principle, however, is that there should be an objective indicator that key competencies have been mastered, just as in other professions such as engineering, urban planning, medicine, nursing or law. The central issues are, first, whether mediators and arbitrators currently have the necessary set of competencies and whether their capabilities in each competency are sufficient; and, second, where current skill sets meet an agreed-upon standard, whether skills can be further enhanced, thereby supporting better mediation and arbitration outcomes. Although the mediation and arbitration professions do not have a tradition of formal professional standards reviews, a review focused on competency and skill requirements would bring the mediation/arbitration professions in line with every other profession that has significant responsibilities (Horton 1975, 507). Finally, anecdotally, in Ontario concerns have been expressed about ensuring there is an adequate “next generation” supply of skilled, high-quality arbitrators. This recommendation accordingly represents yet another reason to invest in training and development and simultaneously would provide an opportunity to advance standards in the profession.

38 In the Ontario police and fire sectors, there are fairly well-established practices for the assignment of arbitrators; in police, the choice of arbitrators tends to be the next available person drawn from a list established by the independent Ontario Police Arbitration Commission; for fire, the parties regularly (overwhelmingly) rely upon a select group of arbitrators to handle most cases (Campolieti and Riddell 2018, 3–4, 17).

39 One observation is that “capturing” is more likely to be an issue for arbitrators who undertake rights arbitration. In many jurisdictions, however, arbitrators may undertake both rights and interest arbitration in their practices. A further observation that, in some jurisdictions, the pool of interest arbitrators is small and that they are highly used, is quite consistent with arbitrators behaving so as not to alienate either party (for example, by splitting the difference), as well as with other factors, including an inadequate supply of skilled arbitrators.

40 There is no Canadian empirical research evidence regarding the extent of capturing or the extent to which arbitrators split the difference in their awards; anecdotally, however, this has been identified as a concern. Similarly, there is no empirical research evidence regarding the predictability issue. Patterning, however, is a common outcome by virtue of the fact that arbitrators use the comparability principle and industry norms.

the nature of the workplaces.<sup>41</sup> In fact, these are sound reasons to appoint the same mediator (not arbitrator) in a two-step med-arb process, since the mediator is attempting to bring the parties together on an agreement. The parties can and do place comprehensive submissions before interest arbitrators, and the scope of these submissions could be readily broadened, as required, to include discussion of any institutional considerations deemed appropriate. Arbitrators thus could be assigned in a manner that reduces the potential for capturing, the incentives simply to pattern awards, and predictability. A straightforward approach to addressing these concerns would be to

- *establish an independent roster of mediators and arbitrators,<sup>42</sup> with substantial and meaningful input from unions and employers in a manner consistent with any requirements set out by the courts<sup>43</sup> and administered from government in a manner that did not create a conflict of interest with its role as employer (for example, at arm's length through a board).*<sup>44</sup>

Interest arbitration is central to the Canadian industrial relations system, especially in broader public-sector industries where many services are either essential to the well-being of the public or no ready substitutes for the services exist in the event of a strike or lockout. Overall, although the current system of arbitration appears to serve the stakeholders fairly well, there remain concerns about how well it serves the public interest. In determining the balance between promoting collectively bargained settlements, permitting strikes, taking measures to limit costly strikes and relying upon arbitration, it is incumbent upon policymakers to be mindful of the central role that collective bargaining and work stoppages play, and to ensure that interest arbitration is an effective, albeit last resort, mechanism.<sup>45</sup>

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- 41 These factors arguably are much more relevant in the context of *rights arbitration*, not interest arbitration.
- 42 An important implementation issue is whether the arbitration process should rely upon a single arbitrator, a board consisting of two nominees (from the union and employer sides, respectively) and a neutral or a panel of three neutrals. One anecdotal criticism of the use of a single neutral (with nominees) is that the nominees, unsurprisingly, tend to “take sides” on key issues, leaving these issues to be decided by the neutral. Taken together, either a single neutral arbitrator or a panel of neutral arbitrators (in conjunction with the roster) likely would be better able to avoid the problems associated with the current approaches.
- 43 For example, the legal considerations identified in *C.U.P.E. v. Ontario (Minister of Labour)*. In operationalizing the allocation of arbitrators from the roster, the objective would be to avoid having a mechanism that permitted the parties repeatedly to choose the same arbitrator; one approach to avoiding this outcome is random selection for each case (subject to availability). Such an approach also would underscore the need for a sufficiently large roster of arbitrators, all of whom would be acceptable to the parties.
- 44 In following this recommendation, it would be useful to examine current practices regarding the use of arbitrator rosters across jurisdictions.
- 45 Other factors, including reforms to institutional arrangements such as bargaining structures or government funding arrangements with service providers would be expected to affect the parties’ overall reliance on arbitration.

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