ARBITRATION AS A STRIKE SUBSTITUTE IN LABOUR NEGOTIATIONS—PUBLIC POLICY RECONSIDERED

MORDEHAI MIRONI*

The writer examines the legislative framework of the binding arbitration procedure in Alberta. He then describes the practice of arbitration boards, from the impanelling stage to the rendering of the award. Information gathered through a survey of the members of such boards, and of parties who have appeared before them, is set forth and discussed. The article concludes with an assessment of the effectiveness and proper role of compulsory arbitration as an alternative to other methods for the resolution of labour disputes.

I. INTRODUCTION**

How to reconcile the right of employees to organize and bargain collectively with the right of the public to uninterrupted flow of essential goods and services has always been a difficult challenge because of collective bargaining's preoccupation with the right to strike as an integral part of the process. Even those who enthusiastically embrace collective bargaining as the most appropriate means to determine terms and conditions of employment can not avoid the inherent dilemma which derives from the fact that strikes in essential services both in public and private sectors of employment may cause severe damage to the health, safety and well-being of large segments of the society. While several writers have argued that these "damages" are more apparent than real, legislatures in many countries have determined that such work interruptions are intolerable. Hence they designated special schemes for the resolution of labour disputes during emergencies and in sectors of employment which provide essential goods and services. A student of comparative labour law may quickly discover that there are many approaches to the definition of who is essential and what constitutes an emergency and that the above mentioned special procedures designed for dealing with labour disputes in essential industries employ a great variety of techniques.[1] Among these techniques interest arbitration, especially compulsory arbitration, has been the most controversial. As one commentator noted:[2]

> In the case against compulsory arbitration there are distinguished prosecutors galore, and the catalog of inevitable disasters runs the gamut from simple bad decisions to dislocation of the economic foundations of free enterprise. The division is not liberal/conservative, nor labor/management—there is no division. All the authorities are in agreement.

Generally speaking, interest arbitration can be distinguished from the more familiar form of labour arbitration, i.e., right or grievance

---

* LL.B. Hebrew University, Ph.D. Cornell University. Lecturer, Tel-Aviv University, Faculty of Law and the Department of Labour Studies.

** The research for this article was conducted as part of the Labour Management Relations Project under the auspices of the Institute of Law Research and Reform—University of Alberta. The author gratefully acknowledges the valuable research assistance rendered by Mr. R. Shuldice and Mrs. M. Brice.

1. The arsenal includes techniques such as mediation, conciliation, fact-finding, injunction, designation of essential employees, cooling-off period, employees ballot, conventional arbitration, final-offer arbitration.
2. O. Phelps, "Compulsory Arbitration: Some Perspectives" 18 *Ind. Lab. Rel. Rev.* (1964) 81.

arbitration, in that the former is utilized in disputes over contract formation while the latter is used in disputes over contract performance. In interest arbitration a third party is responsible for formulating the terms and conditions of new collective bargaining agreements to govern the employment relationship. Conversely, in grievance or rights arbitration a third party is called in to render a verdict about proper application and interpretation of the existing collective bargaining agreement.

Apart from the subject matter of the dispute, arbitration schemes are further classified into categories along the following two dimensions: (1) The degree to which both parties are compelled by an outside authority besides their mutual consent to submit their dispute to arbitration, and (2) The extent to which the arbitration decision (award) is final and binding upon both parties.

Thus, for example, under compulsory binding arbitration either party or both may be forced to submit to arbitration and the tribunal's award is final and binding on both parties. Conversely, under voluntary binding arbitration, both parties must agree either beforehand or on an *ad hoc* basis to submit their dispute to arbitration. Yet, once they invoke the process, the arbitration award is final and binding on both. Under advisory arbitration (sometimes referred to as conciliation commissioner's recommendations or factfinding), which may be either compulsory or voluntary, the tribunal's decision has no binding authority. The parties are free to dispose of the arbitration award as they choose.

In the province of Alberta, interest arbitration has been used for a long period of time as a mandatory terminal step in the impasse procedure covering firefighters, policemen and provincial employees. In addition, the Alberta Labour Act contains provisions for voluntary interest arbitration and for compulsory interest arbitration by government order as an *ad hoc* emergency procedure. The use of interest arbitration in the province has been rather sporadic. During the last ten years only thirty-six deadlocked negotiations had to be resolved by an arbitration award. In spite of its limited use, the general interest in the practice and effectiveness of interest arbitration has grown steadily. Its main attraction is probably that, like many other institutional techniques of conflict resolution, e.g. courts, administrative tribunals, review boards, etc., interest arbitration is always available as a last resort; yet it is most effective when the parties settle their differences short of invoking it. In addition, the Alberta Union of Provincial Employees recently demanded the right to strike.[3] Naturally part of the political debate focused on the question of whether or not compulsory arbitration had been an adequate substitute for the right to strike. Thus, this study was undertaken to describe, analyze and evaluate the actual performance of interest arbitration in Alberta as a dispute resolution technique and as a strike substitute; to distill the functions, nature and limits of the interest arbitration process and to highlight specific policy implications for the government, the courts, members of arbitration boards and those parties whose interests are activated under the arbitration procedure.

The study covered the interest arbitration activity in Alberta during the period 1966-1976 in both the public and private sectors pursuant to the

3. *See* D. McConachie, "Right to Strike Not Abused" *Edmonton Journal*, November 17, 1976, at 33.

Alberta Labour Act,[4] the Firefighters and Policemen Labour Relations Act,[5] the Public Service Act[6] and the Crown Agencies Employee Relations Act.[7] During this period thirty-six arbitration cases resulted in awards under these four statutory schemes. Eighteen awards were issued in disputes between firemen and policemen and their respective employers in municipal government, ten awards were issued in disputes involving employees of the provincial government and its Crown agencies, and eight awards were rendered under the aegis of the voluntary or public emergency arbitration procedures in the Alberta Labour Act.

While the existing treatises on interest arbitration have tended to be either a normative essay type[8] or an analysis of the process or outcomes of interest arbitration on the basis of the written award and other existing data,[9] this study was designed to portray the interest arbitration process *as it is actually practised in Alberta,* relying primarily on information and empirical data collected through an extensive field study.[10] The idea was that there is much more to interest arbitration than what is captured in the written opinions and that those who actually participated in the process, i.e. arbitration board members and the protaganists, are in the best position to describe and evaluate the process and to act as a source of ideas and as a sounding board for changes that may improve the arbitration procedure's performance.

II. THE LEGAL FRAMEWORK

As noted previously, there are four statutes in Alberta which provide for arbitration as a terminal step for the resolution of impasse in labour contract negotiations. Following is a brief account of the legislative history of the arbitration provisions contained in these statutes and a description of the arbitration models which they utilize.

A. The Alberta Labour Act

The Alberta Labour Act provides for both compulsory and voluntary arbitration. The Act, which governs the employment relationships of the vast majority of employees in the province both in the private and

4. S.A. 1973, c. 33.
5. R.S.A. 1970, c. 33, as am.
6. S.A. 1972, c. 80.
7. S.A. 1972, c. 26.
8. D. Brown, *Interest Arbitration* (1968) Task Force on Labour Relations, Study No. 18; Dunham, "Interest Arbitration in Non-Federal Public Employment" (1976) 31 *Arb. J.* 45; Hines,"Mandatory Contract Arbitration: Is It a Viable Process?" (1972) 25 *Ind. Lab. Rel. Rev.,* 533; H. Northrup, *Compulsory Arbitration and Government Intervention in Labour Disputes: An Analysis of Experience* (1966); Sanderson, "Arbitration Versus the Strike Weapon: A Management View" (1973) 73 *The Lab. Gaz.* 296; Wilson, "Compulsory Arbitration v. Bargaining" (1967) 14 *The Can. Pers. & Ind. Rel. J.* 38; Goldenberg, "Dispute Settlement Legislation in the Public Sector: An Interprovincial Comparison" in *Canadian Labour and Industrial Relations* (H. Jain ed. 1975) 291.
9. I. Berenstein, *Arbitration of Wages* (1954); A. Kuhn, *Arbitration in Transit: An Evaluation of Wage Criteria* (1952); Block, "Criteria in Public Sector Interest Disputes" in *Arbitration and the Public Interest* (G. Somers and B. Dennis eds. 1971); Miller, "Arbitration of New Contract Wage Disputes: Some Recent Trends" (1967) 20 *Ind. Lab. Rel. Rev.* 250; Subbarao and Jain, *Arbitration of Wages in the Public Sector: The Case of the Canadian Federal Public Service* (1976) University of Ottawa—Faculty of Management Science—Working Paper 16-25.
10. The field study included an oral interview with members of arbitration boards and mailed questionnaires, semi-structured, which were administered to union and employer representatives who took part in these arbitration porceedings. Fifty-two members of arbitration boards—22 chairmen, 16 union appointees and 14 employer appointees were interviewed. In addition, 29 union representatives (80%) and 26 employer representatives (72%) completed the questionnaire.

municipal sectors of employment, sanctions the right to strike and lockout during labour contract negotiations. However, this right may be suspended whenever the Lieutenant Governor in Council declares that a state of emergency may result from a labour dispute.[11] Then, the parties are not allowed to strike and lockout. The Minister of Labour may then establish a Public Emergency Tribunal to inquire into the dispute and endeavor to bring the parties to an agreement. If it is unable to do so the tribunal shall make an award that is final and binding upon the parties involved.

1. Legislative History

The provisions for interest arbitration in the Alberta Labour Act can be traced back to the early history of labour legislation in the province. In fact, it appears as if the impetus for comprehensive regulation of labour disputes in Canada came as a result of a labour dispute in Alberta—the Lethbridge coal miners strike in 1906[12] which gave rise to the Industrial Disputes Investigation Act.[13] When it was ruled that labour legislation was to be under the exclusive jurisdiction of the provinces,[14] the Alberta legislature enacted the Labour Dispute Act[15] incorporating many of the provisions in the federal statute. The early versions of impasse procedures in Alberta consisted primarily of conciliation and non-binding arbitration (factfinding).[16]

The more common type of arbitration, i.e. the one in which the arbitration award is final and binding on both parties, had to wait until the late forties to be accepted as a legitimate procedure for interest disputes. The first version of the Alberta Labour Act provided for voluntary binding arbitration as one of the alternatives for resolving labour disputes.[17] This trend toward greater government involvement in

11. A state of public emergency may arise out of a labour dispute when:
    (a) life or property would be in serious jeopardy by reasons of—any breakdown or stoppage or impending breakdown or stoppage of any sewage system or plant, equipment or system for furnishing or supplying water, heat, electricity or gas to the public. Alberta Labour Act, S.A. 1973, c. 33, s. 163.
12. *See* A. W. R. Carrothers, *Collective Bargaining Law in Canada* (1965) 36-37.
13. R.S.C. 1907, c. 20.
14. *Toronto Electric Commissioners* v. *Snider* (1925) 2 D.L.R. 5.
15. The Labour Disputes Act, S.A. 1926, c. 53, which mandated that in case of impasse a Board of Conciliation and Investigation be appointed by the Minister. The Board was empowered to conduct a hearing and to make non-binding recommendations for the resolution of the dispute.
16. The Industrial Conciliation and Arbitration Act, S.A. 1938, c. 57, which repealed the Labour Disputes Act, presented the parties with two alternative routes. In case of deadlock the parties could either take the strike or lockout route, or invoke a two-step impasse procedure consisting of conciliation by a conciliation commissioner and nonbinding arbitration by a tripartite arbitration board. If a dispute could not be settled through conciliation, a tripartite arbitration board was appointed. The board was instructed to conduct a full hearing and to write a non-binding arbitration award. Although the arbitration award was advisory in nature, the parties were required to have a formal vote whether to accept or reject it before they could strike or lockout.
17. The Alberta Labour Act, S.A. 1947, c. 8, which repealed the Industrial Conciliation and Arbitration Act, expanded the battery of procedures. In addition to the strike/lockout route and the conciliation arbitration route, parties to a labour dispute were given two additional alternatives. They could request that the Board of Industrial Relations investigate and attempt to settle the dispute, or they could also agree in writing on *ad hoc* binding arbitration. Because of an ambiguity resulting from the structure of the 1948 legislation it appears as if the choice as to whether to invoke the conciliation-arbitration procedures was taken away from the parties. Under the Alberta Labour Act, S.A. 1948, c. 76, the use of conciliation and arbitration became mandatory. A strike or lockout was declared illegal whenever the disputants failed to comply with the impasse procedures prescribed by the Act.

labour disputes was also manifested in the 1960 amendment[18] which introduced compulsory binding arbitration as part of the public emergency procedures.

2. A Profile of the Arbitration Procedure

(a) Pre-arbitration Procedures

With the exception of those disputes declared under the public emergency procedure, all unresolved labour disputes are subject to compulsory conciliation commissioner and nonbinding arbitration (commonly called factfinding) by a tripartite conciliation board whose recommendations must be brought for a formal vote by the parties as a prerequisite for a strike or a lockout action. However, the parties may opt out of this procedure by a voluntary agreement to submit their dispute to conciliation followed by binding arbitration. Under these provisions the parties may agree in writing to apply to the Minister requesting the appointment of a conciliation commissioner who shall try to effect a settlement. If the commissioner is unable to do so within a specified period the dispute is referred to final and binding arbitration.

(b) The Arbitration Board and its Charter

Under the voluntary arbitration procedure the arbitration board is a tripartite three-man board. It consists of one member appointed by each party and a neutral chairman selected by the two parties' appointees. If the parties fail to select a chairman, the Minister is empowered to appoint a chairman upon the request of either party to the dispute. The only qualification for board members is that they are not directly affected by the dispute or have not been previously involved in an attempt to negotiate or settle the dispute. Under the public emergency arbitration procedures, on the other hand, the structure and makeup of the tribunal was left to the discretion of the Minister of Labour.

Probably because the voluntary arbitration is perceived as an *ad hoc* private machinery and the fact that arbitration is only one possible technique which the Minister may invoke in case of public emergency, the Act does not direct how the arbitration board and the Public Emergency Board are supposed to discharge their duties. It only requires that the panel attempt to mediate the dispute before it assumes the more formal arbitration role. The scope of arbitrable issues, the rules of evidence and procedure which govern the arbitration hearing, and finally the decision-making approach, are all left open. Furthermore, the Arbitration Act does not apply to either the voluntary or the compulsory public emergency procedure.

Section 82(1)(a) provided that: "Any strike or lockout is illegal where the parties to the dispute have not complied with the provisions of sections 68 to 81 inclusive". It is, however, difficult to see how the parties could fail to comply with provisions which prescribe that they *may* advise or apply to the Minister of Labour. Later on, in 1950, the mandatory nonbinding arbitration was removed from the statute—Alberta Labour Act, S.A. 1950, c. 34—and a new provision was introduced so that when the parties voluntarily submitted their dispute to arbitration they could stipulate beforehand that the award would be final and binding upon them. The need for such provision stems from the fact that section 84 of the Alberta Labour Act, S.A. 1947, provided that: "No court shall have power to enforce any award. . . .". The 1954 amendment—Alberta Labour Act, S.A. 1954, c. 51—authorized the Minister of Labour to appoint a conciliation commissioner on his own initiative and removed the Board of Industrial Relations from involvement in interest disputes.

18. Alberta Labour Act, S.A. 1960, c. 54.

(c) Enforcement and Judicial Review

While the Labour Act exempts the arbitration procedures from the provisions of the Arbitration Act, it does not provide any procedural vehicle for enforcement and review of the arbitration award nor does it stipulate the standards of scrutiny that the court may apply in reviewing such awards. It does, however, prescribe special enforcement proceedings for the Public Emergency Tribunal's award.[19] If an award is not complied with by the parties, the Minister may file a copy of the award with the clerk of the court in the judicial district in which the difference arose and thereupon the decision is enforceable as a judgment or order of the court.

(d) Administration

The Minister of Labour through the Conciliation and Mediation Branch administers the arbitration procedures. Costs of the arbitration board and the Public Emergency Tribunal are assumed by the Government of Alberta.[20]

B. The Firefighters and Policemen Labour Relations Act

The Firefighters and Policemen Labour Relations Act establishes the statutory framework for collective labour relations between the municipal governments and their police officers and fire-department employees.[21] The Act explicitly prohibits policemen and firemen from striking[22] and subjects their interest disputes to compulsory binding arbitration as a terminal step in the impasse procedure.

1. Legislative History

The present Act was given form by two separate statutes, the Fire Departments Platoon Act[23] and the Police Act.[24] Since 1953 each of these two Acts has had provisions for arbitration which were very similar to the provisions of the present statute.[25] The most notable differences between the two previous Acts and the present Act are that in the latter the parties are required to go through conciliation prior to arbitration. Also previously the parties had the option of choosing between a five-man and a three-man tripartite arbitration board and they had to bear the costs of the arbitration proceedings, primarily the fee of arbitration board members. In 1956 the Police Act was amended to provide for a conciliation commissioner prior to arbitration. It was not until the merger of the two separate statutes into one in 1970 that such provision was enacted for the firefighters. The only significant change that has taken place since the enactment of the Act in 1970 was in 1971 when the option of choosing a five-man board was removed.

19. Alberta Labour Act, S.A. 1973, c. 33, s. 165(4).
20. Order in Council 192/75.
21. Police officers are excluded from the coverage of the Alberta Labour Act and the firefighters are excluded only from those provisions dealing with collective labour relations. The special statute for policemen and firefighters also establishes two separate bargaining units for policemen, i.e., one for senior officers in the ranks of inspector or higher, excluding the chief constable and one for officers whose rank is lower than inspector. The Act also prohibits the police officers from joining or affiliating with a trade union.
22. Four other provinces outlaw strikes for policemen (Ontario, Prince Edward Island, Newfoundland and Quebec) and provide for compulsory binding arbitration as a substitute. Similar provisions for firefighters exist in six other provinces: Quebec, Prince Edward Island, Manitoba, Saskatchewan, New Brunswick, Newfoundland and Ontario. Even when the right to strike for public safety employees is granted it is rather limited.
23. R.S.A. 1955, c. 114.
24. R.S.A. 1955, c. 236.
25. Fire Department Platoon Act, S.A. 1953, c. 42; Police Act, S.A. 1953, c. 90.

2. A Profile of the Arbitration Procedure

(a) Pre-arbitration Procedures

Much like the Alberta Labour Act, the Firefighters and Policemen Labour Relations Act presents the parties with several alternatives to choose from. Parties may either go directly to binding arbitration or request that conciliation precede the arbitration stage. Furthermore, the arbitration proceedings may be conducted by either a tripartite arbitration board or by a Public Tribunal appointed by the Minister of Labour.

A dispute may be referred to a conciliation commissioner upon request of the parties filed with the Minister of Labour, provided that the Minister decides that the dispute is a "proper" one for conciliation. The conciliation commissioner is empowered to inquire into the dispute, to mediate between the parties, and at his discretion, to make recommendations which are in no way binding on the parties. The commissioner submits a report to the Minister outlining the matters that have been agreed upon and those that still remain in dispute. If there is no application for conciliation or if the conciliation commissioner is unable to bring about a settlement, either party to the dispute may require the matter to be referred to a board of arbitration or the parties may jointly apply to the Minister for the appointment of a public tribunal.

(b) The Arbitration Board and its Charter

The arbitration board is a tripartite board. Each party appoints one member and the parties' appointees select a third member who becomes the chairman. The Minister of Labour is empowered to appoint either a partisan member or a chairman upon the parties' failure to complete the appointment process within the time period prescribed by the Act. The only pronounced qualifications for arbitration board members is that they have to be a resident of Alberta and not associated with the immediate protaganists or the dispute. The Act makes any person who has pecuniary interest in the dispute or has acted as solicitor, counsel, or paid agent for either party or has received any remuneration from either party during a period of 6 months preceding the dispute ineligible to serve as a member of the arbitration board.

The arbitration board's charter is broadly defined. It has all the power of commissioners appointed under the Public Inquiry Act. The arbitration board is required to make an inquiry into the matters in dispute and to attempt to mediate between the parties. Only when these efforts fail may the arbitration board issue its award. The conduct of the arbitration proceedings is left to the complete discretion of the arbitration board. The Act does not stipulate the scope of arbitrable issues nor does it contain rules of procedures for the arbitration hearing nor any guidelines for the decision making. The Act provides, however, that the decision of a majority is the award of the board but if there is no majority the decision of the chairman is the award of the board.

(c) Enforcement and Judicial Review

The award is binding on the parties and the parties must therefore include the terms of the award in the collective agreement. Where there is any question concerning the application of interpretation of the award the Minister of Labour may request the Board to reconvene. The statute is silent on the proper vehicle for enforcement and the appropriate scope of judicial review. In the absence of any specific provisions in the Act

relating to judicial review, one could infer that the Arbitration Act will apply to the arbitration proceedings and that therefore the award of an arbitration board formed under the Act is both enforceable and subject to review by the Court of Queen's Bench of Alberta or by a judge of such court.

(d) Administration

The Minister of Labour through the Conciliation and Mediation Branch administers the arbitration procedures under the Act. The expenses of both the board of arbitration and the conciliation commissioner are paid out of the General Revenue Fund of the Province.[26]

C. The Public Service Act and the Crown Agencies Employee Relations Act

Until 1977 when the Public Service Act and the Crown Agencies Employee Relations Act were repealed by the Public Service Employee Relations Act[27] the two separate statutes governed most of the aspects of labour relations for provincial employees. Generally speaking, these Acts applied, with few exemptions, to all employees of the Government of Alberta and to those employed by Crown Boards, Agencies and Commissioners. The Public Service Act and the Crown Agencies Employee Relations Act did not specifically prohibit strikes by government employees. However, both Acts required that unresolved interest disputes be referred to compulsory binding arbitration under an elaborate machinery stipulated in the statutes.

The recently enacted Public Service Employee Relations Act does not change the basic structure and design of the arbitration model in any significant manner. The major changes, as far as the arbitration scheme is concerned, are in the administration of the procedure and the scope of arbitrable issues. In addition, under the new statute some form of conciliation precedes arbitration. However, since the arbitration activity which was examined in this study was conducted during the period 1966-1976 and thus under the aegis of the Public Service Act and the Crown Agencies Employee Relations Act, throughout this article we will regard the arbitration procedures as provided for in these two statutes as establishing the legal framework of interest arbitration for provincial employees.

1. Legislative History

The laws governing labour relations in the public service of Alberta have undergone several changes since 1906 when the Public Service Act provided that[28]

> . . . any application for increase of salary made by any employee in the Public Service or by other persons on his behalf shall be deemed as a tendering of resignation.

Since then public service employees have made gradual inroads into the domain of management prerogatives with collective bargaining replacing the employer unilateral determination of wages and working conditions of individual civil servants. However, this development was very slow. Until 1965 the legislature experimented with different forms of labour management councils[29] as a means for joint consultation. Only in 1965

26. Order in Council 559/71.
27. S.A. 1977, c. 40.
28. Public Service Act, S.A. 1906, c. 4, s. 27.
29. *See* Public Service Act, S.A. 1938, c. 41, s. 2; S.A. 1954, c. 86, s. 31; S.A. 1962, c. 72, s. 44; S.A. 1965, c. 75, s. 54.

was the concept of collective bargaining introduced into the law and even then unresolved labour negotiations were submitted to legislative determination by the government. Thus, in case of impasse the dispute was removed back from the bilateral negotiation process to a unilateral determination by the employer via the political process.

Under the legislation[30] only Crown agencies' employees had access to some form of impasse procedure. They had the right to take their disputes to conciliation by a mediation board who could also issue nonbinding recommendations. Employees of the provincial government were granted the same right only in 1970.[31] Thus, until 1965 in the case of Crown agencies' employees and 1970 in the case of provincial employees, the government enjoyed full authority to impose a settlement without the aid of a third party opinion. With the introduction of the mediation procedure, a third party was then available, but since its charter was essentially one of a conciliator and its recommendations nonbinding, the government still maintained the ultimate power to determine terms of employment unilaterally. In 1972[32] under the amendments to the Public Service Act and the Crown Agencies Employee Relations Act the name of the mediation board was changed to arbitration board and its award became final and binding upon both parties. The history of the Public Service Act and the Crown Agencies Employee Relations Act came to an end in 1977 when these statutes were repealed by the Public Service Employee Relations Act.[33]

2. A Profile of the Arbitration Procedure

(a) Pre-arbitration Procedure

In contrast to the Alberta Labour Act and the Firefighters and Policemen Labour Relations Act, the impasse procedure under the Public Service Act and the Crown Agencies Employee Relations Act has only one mandatory stage—binding arbitration. Unresolved negotiations are submitted directly to arbitration without any intermediate stage of intervention.[34]

(b) The Arbitration Board and its Charter

The arbitration board is tripartite with a mutually agreed upon chairman and two partisan appointees. The Attorney General is empowered to appoint board members upon the parties' failure to complete the appointment process within the time limit prescribed in the statutes. Similar to the requirements in the Firefighters and Policemen Labour Relations Act, members of the arbitration board must be Canadian citizens or British subjects residing in Alberta. Persons who

30. Public Service Act, S.A. 1965, c. 75, s. 60. Crown agencies employees were brought under separate legislation only in 1968.

31. Public Service Act, S.A. 1970, c. 93, s. 3.

32. Public Service Act, S.A. 1972, c. 80; Crown Agencies Employee Relations Act, S.A. 1972, c. 26.

33. S.A. 1977, c. 40. However, the new statute did not change the basic structure and design of the arbitration model in any significant manner. The major changes, as far as the arbitration scheme is concerned, were in the administration of the procedure and the scope of arbitrable issues. In addition, under the new legislation some form of conciliation precedes arbitration. However, since the arbitration activity which was examined in this study was conducted during the period 1968-1977, throughout this article we will regard the arbitration procedure in the Public Service Act and the Crown Agencies Employee Relations Act as it existed prior to the last amendments as establishing the legal framework of interest arbitration for provincial employees.

34. This aspect of the impasse procedure was modified. Under the amended statute mediation precedes arbitration.

have either pecuniary interest in the dispute or have acted for the parties or received remuneration directly from them during the period preceding the arbitration are ineligible for service as board members. The statutes also require that members of the arbitration board sign an oath that they will perform their duties faithfully and impartially and that they will not, except in the discharge of their duties, disclose to any person any of the evidence or other matter brought before the board.[35]

Much like the other statutory schemes of interest arbitration the Public Service Act and the Crown Agencies Employee Relations Act are silent with regard to the scope of arbitrable issues[36] and do not prescribe any particular way to conduct the arbitration proceedings. They only require that the board make a full inquiry and endeavor to bring about agreement between the parties. However, unlike the other schemes currently operating in Alberta, the Public Service Act and the Crown Agencies Employee Relations Act list a set of criteria which the board shall consider in the conduct of the proceedings and in formulating its award. These criteria are:[37]

1. the interests of the public;
2. the conditions of employment in similar occupations outside the public service of Alberta including such geographic, industrial or other variations as the arbitration board considers relevant;
3. the need to maintain appropriate relationships in the conditions of employment as between different classification levels within an occupation and as between occupations in the public service of Alberta;
4. the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the service rendered;
5. any other factor that appears to be relevant to the matter in dispute.

Another distinctive feature of these Acts is that all members of the arbitration board have equal power and decisions are made by a simple majority.

(c) Enforcement and Review

The Public Service Act and the Crown Agencies Employee Relations Act prescribe an elaborate procedure for the implementation of the arbitration board's award. The parties are required to prepare an agreement to implement the arbitration board's recommendations. If one party fails to participate, the other party may write a labour agreement which gives effect to the recommendations.

The agreement is submitted to the arbitration board for certification. The board may reconvene if there is any question regarding the interpretation or application of the recommendations.

---

35. Public Service Act, S.A. 1972, c. 80, s. 33.6; Crown Agencies Employee Relations Act, S.A. 1972, c. 26, s. 10.6.
36. It can be argued, however, that since the Minister decides on the negotiability of demands he may also determine whether a particular issue is arbitrable. Thus far the practice was to bring these questions before arbitration boards. The new amendments severely restrict the scope of issues that may be brought before arbitration boards.
37. Public Service Act, S.A. 1972, c. 80, s. 35.1; Crown Agencies Employee Relations Act, S.A. 1972, c. 26, s. 12.1.

Although it is required that the parties sign the agreement, once certified it is not a necessary condition, and the agreement is binding even without the signatures. The Lieutenant Governor and the Minister will then make the necessary changes in the regulations and the official pay plan to give effect to such agreement. Both Acts have no provisions for enforcement and review of the arbitration board's recommendations.

(d) Administration

It is unclear who is in charge of the administration of the arbitration procedures in the two statutes. While the Public Service Act is administered by a Public Service Commissioner appointed by the Lieutenant Governor, the Crown Agencies Employee Relations Act does not place the responsibility for administration with any specific body. The parties bear all the costs of the arbitration proceedings. Each party pays the fees and expenses of its own appointees and the two parties share equally the expenses of the chairman and any necessary clerical assistance.

D. Summary

As articulated above the four different statutes which provide for binding interest arbitration as the final step for impasses in contract negotiations differ not only in their coverage but also in many aspects of their arbitration models' structure and design. A close examination of these schemes reveals more differences than similarities. For instance, only the Public Service Act and the Crown Agencies Employee Relations Act delineate a set of criteria for decision making and require members of the arbitration board to take an oath. Similarly, provincial employees share with the government the full cost of arbitration while firefighters and policemen are provided with arbitration free of charge. Also, while one set of disputants, namely policemen and firefighters, are provided with an option to go through mediation prior to arbitration, other groups are deprived of this service. While we may attribute some of these differences to historical and political reasons, we may find it extremely difficult to provide any justification for differences in structure and design on the basis of functional needs.

III. INTEREST ARBITRATION IN ACTION

Having looked at the legal framework of interest arbitration we now turn to the way it is actually practiced. Here we rely primarily on interviews with members of arbitration boards and a survey of employers and union representatives.

A. Impaneling the Arbitration Board

With the exception of the Public Emergency Tribunal, arbitration boards in Alberta are tripartite. Each party appoints one representative to the board and the two appointees select a third member who becomes chairman. The Minister of Labour or the Attorney General in the Public Sector legislation may appoint a board member in case the parties fail to complete the selection process on their own. The arbitration board is formed on an *ad hoc* basis and its existence as well as its authority is limited to the particular dispute for which it is created.

Impaneling an arbitration board is not only the starting point of the arbitration process, it is also the only stage during which the parties are in complete control of the arbitration procedure. In choosing their

appointees and moreover by selecting a particular chairman the parties give a sense of direction and dictate the style of the arbitration proceedings. Thus one may expect the parties to avoid whenever possible appointments by the government and to impanel the board according to their conception of the nature and functions of the process. Furthermore, the tripartite structure raises important questions as to the criteria used by the parties in selecting their appointees and as to the appointees' role *vis-a-vis* the arbitration board on the one hand and their appointors on the other.

While the disputants in Alberta were reluctant to give up their control over the arbitration proceedings via the selection process, in only 55 per cent of the cases could they come up with a mutually agreed upon chairman. The remaining 45 per cent were divided between government appointment (10 per cent) and appointment after consultation with the parties (35 per cent). The prevalence of the second form of appointment reveals an interesting practical compromise. The disputants who were unable to complete the selection process on their own, yet were fearful of the uncertainty involved in an appointment by the government, sought to have some control over the selection by advising the government about their preferences.

The majority of the chairmen came from the legal profession and tended to have long experience in practising law. It has been alleged that experienced chairmen will be more likely to render acceptable awards than those with less familiarity with labour relations and the arbitration process.[38] On the basis of experience, the chairmen in Alberta seemed to be highly qualified to perform their duty. Almost all have had long experience as a third party neutral in labour disputes (average of thirteen years).[39] It should be noted that, in contrast to the United States where there are many professional arbitrators for whom the role of third party neutrals in labour disputes is a principal occupation, the arbitrators in Alberta devote to it only a small part of their time.

Finally, there is a strong belief in the labour relations community of Alberta that there are a handful of people who act interchangeably as either parties' appointees or chairmen in the majority of labour disputes. To test this "common knowledge" the names of chairmen and parties' appointees who took part in the thirty-six interest arbitration cases were listed. This list of members of arbitration boards revealed that the "common knowledge" is baseless. It included forty-seven names. Of these only six persons served on arbitration boards more than four times and, even then, the maximum was eight times. It is interesting to note that six names appeared on both the chairman and parties' appointee lists and that in ten cases either the union or the employer appointed someone who previously represented the other side as their representative to the board.

While the governing statutes require that members of arbitration boards be disassociated from the parties and the dispute, it appears as if being familiar with the dispute and its antecedents as well as with the appointor's priorities and needs is essential for an effective appointee. For

38. L. Barnes and L. Kelly, *Interest Arbitration in the Federal Public Service of Canada* (1975) 28.

39. It should be noted, however, that in several unfortunate cases the government appointed a chairman who had neither training nor experience in labour relations or arbitration. While these charimen were very able lawyers, the unusual setting of a tripartite board and the very nature of the dispute put them in the unpalatable position of being the "wrong people in the wrong place".

instance, in one case a city appointee mistakenly indicated to the board that a substantial "catch-up" would be acceptable. Although he later backed down on his statement the majority of the board felt quite relieved in awarding a relatively large wage increase on the basis of comparability. The results were disastrous. The city appointee filed a strong dissenting opinion, the mayor criticized the chairman of the board in the press, the award became a subject of court proceedings, grievance arbitration and investigation by the Minister of Labour. All this agony and irreparable damage to the acceptability of the arbitration procedure and the bargaining relationships could have been avoided had the city appointee known the parameters of the dispute and the motives and political needs of his constituents.

Both parties seem to expect that their appointees to the arbitration board assume the role of *advocate* rather than neutral arbitrator. Only 5 per cent of the union representatives and 17 per cent of the employers envisioned their nominees as board members who combined the qualities of an advocate and neutral arbitrator. In only two instances did the respondent state that they had expected their delegate to be a neutral member of the board.

The interviews with board members suggested that the parties' nominees were in full cognizance of their role expectations. When the chairmen were asked to describe the partisan members on their boards (and the appointees to describe themselves), the typical union appointee was characterized as being 80 per cent advocate and 20 per cent neutral and the employer appointee slightly more neutral—70 per cent advocate and 30 per cent neutral.

B. Issues in Arbitration

The arbitration boards in Alberta have been presented with issues ranging from the most common one of wages to very novel fringe benefits and wage supplements, such as payment for "gaol duty" and "vacation call back". Altogether fifty different issues were submitted to arbitration. As expected in the majority of cases (80 per cent) salary was one of the issues in dispute. Other issues that were frequently raised: duration of contract, grade differentials, holidays and vacations, definitions of working time, criteria and procedures for selection and promotion.

The number of issues submitted to an arbitration board in a single case ranged from one to thirty-eight with an average of ten. The police and firefighters cases tend to involve a larger number of issues than the cases in the public service which involved very few issues and never more than four in a single case. The comparison between the two categories of cases is interesting primarily in view of the fact that arbitration in police and fire disputes is preceded by conciliation which is supposed to reduce the number of items in dispute. Hence, the difference in the number of issues may indicate a tendency among the police and firefighters units to add many new issues once the dispute moves to the arbitration stage. As one respondent explained, this tactic of flooding the arbitration board with many issues may serve two objectives. If the board deals with the dispute as a package, the trivial issues will be used as "trade-offs". Conversely, if the board decides each issue separately, then it will be possible to win some novel demands that in a regular negotiation would be removed from the table in the initial stage of bargaining.

Since the scope of arbitrable issues is not defined in the statutes, ten

arbitration boards were called upon to determine the arbitrability of demands put forth by the parties. The decisions regarding arbitrability do not reveal any consistent pattern toward either widening or narrowing the scope of arbitrable issues. However, in one case the board rejected the employer's argument that it did not have jurisdiction by asserting that "The powers given to a board under this Act and in fact under any compulsory arbitration proceedings are extremely wide . . .".[40] The arbitration boards seemed to deal with the question of arbitrability by applying rules of statutory interpretation and by examining past practices, the scope of management prerogatives[41] and the history of the dispute.[42]

Thus in the *Edmonton Police 1970* case[43] the board ruled that "pension" was an arbitrable item on the basis of the language of the statute and recent court decisions which declared pensions as a negotiable item. On the other hand, in the *General Services 1973* case[44] the board declined jurisdiction over the issue of classification following the rule under which, where there are two conflicting provisions in the same statute, one of which is particular and the other a general provision, the former is controlling.[45] In the *University of Calgary 1971* case[46] the employer argued that the issue of annual salary increases for certain "special classifications" for the second year of a two year contract was not negotiable at this time. The board, however, found that since this section had been negotiated and re-negotiated and no hardship experience had been alleged or proven the board could indeed make adjustments.

C. The Arbitration Hearing

A formal hearing was conducted in all of the thirty-six cases ranging in length from one to ten days with a median of two days. The hearings tended to be somewhat informal in the sense that although witnesses were sworn and cross-examined the parties enjoyed wide latitude as to the way in which they presented their arguments and evidence. In one case the board went to visit a fire station in order to appreciate the skill and talents which are required in a firefighter's job. According to the union nominee who initiated the "viewing" this was especially important for the employer representative who had never seen the inside of a fire station.

---

40. Town of St. Albert and St. Albert Firefighters 9 (1973).
41. For instance, in City of Calgary and Calgary Police Association (September 29, 1970), the board declined jurisdiction to deal with "Gaol Sergeant duty" because it did not want to interfere in what it regarded as *prima facie* a management prerogative. In contrast, the board in City of Lethbridge and Lethbridge Police Association (January 8, 1971) removed two rules concerning residency and conflict of interest from the Code, although this was clearly a management prerogative.
42. In St. Albert Protestant School District 6 and CUPE Local 1099 (December 8, 1976) the arbitrator decided to rule on the issue of classification of Caretaker/Assistant in spite of the employer argument that the issue was new, it was not part of the submission and it was not dealt with by the conciliator or dealt with during mediation. The arbitrator decided that the matter was before the parties at various stages throughout the dispute and although the issue was not part of the wage issue, it formed part of another issue, which in his opinion was clearly before the board.
43. Board of Police Commissioners of the City of Edmonton and Edmonton Police Association (August 21, 1970).
44. Government of Alberta and CSA—General Services (September 12, 1973).
45. In a similar case the board refused to rule on the persons who should be included in the bargaining unit on the grounds that it did not have proper jurisdiction as a result of section 2(c)(i) of the Public Service Act where it is made plain that the Minister shall make that determination and that therefore the parties cannot confer jurisdiction upon the board by consent where none exists. CSA and Hospital Services Commission (1973).
46. University of Calgary and CSA Branch 36 (1971).

As noted previously, with the exception of the Public Service Act and the Crown Agencies Employee Relations Act the arbitration statutes instruct the arbitration boards to try to mediate the dispute before they assume the more formal arbiter role. In practice, however, the majority of arbitration boards (71 per cent) elected to skip this stage and to proceed directly into the formal hearing.

Although board members stated that they had sufficient material in terms of both quantity and quality to enable them to make an educated decision, they indicate marked differences among the groups of disputants in preparing for arbitration. The following table summarizes the average ratings given by board members to the parties' presentations using a five-point scale in which one stands for poor and five for excellent.

Evaluation of Parties' Presentations

	Firefighters (N = 20)	Police (N = 11)	Public Service (N = 18)	Private Sector (N = 10)
Employer	3.70	4.00	3.80	4.00
Union	4.25	4.36	3.33	3.60

As can be deduced from the ratings, the police and firefighters unions' presentations received the highest scores and the public service unions the lowest score. Surprisingly, the presentations of the public service union (CSA and AUPE) were rated even lower than the private sector units which have had only sporadic experience with the process and for which arbitration is largely voluntary. Furthermore, while in the police and firefighters' case the union's presentation was rated consistently higher than the employer's presentation, in the public service and the private sector the pattern was reversed—the employer's presentation received a higher score than the union's presentation.

These findings are quite revealing since there appear to be strong relationships between parties' attitudes toward compulsory interest arbitration and the amount of effort and resources they devote to preparing their arbitration case as can be judged from their scores. The police and firefighters unions, which are highly committed to arbitration, reached the highest standards in preparing for arbitration. Conversely, the presentation of the public service unions which have objected to compulsory interest arbitration all along was judged by board members to be substantially poorer.

D. The Decision Making Process

As noted previously, the four statutory schemes of interest arbitration in Alberta place very few constraints on the arbitral decision-making process. They require only that the arbitration proceedings be conducted by an *ad hoc* tripartite board and that the board attempts to mediate the dispute before it assumes the arbiter role. With the exception of the Public Service Act and the Crown Agencies Employee Labour Relations Act the chairman of the arbitration board has a reserved power in that whenever the board is unable to form a majority the chairman's decision becomes the award of the board.

The Public Service Act and the Crown Agencies Employee Relations

Act differ from the other acts also in that they contain a set of decision-making criteria which the arbitration board needs to consider in formulating its award. Section 35.1 of the Public Service Act and section 12.1 of the Crown Agencies Employee Relations Act read as follows:

> In the conduct of proceedings before it and in making recommendations in respect of any matter referred to it the arbitration board shall consider:
>
> (a) the interests of the public;
>
> (b) the conditions of employment in similar occupations outside the public service of Alberta including such geographic, industrial, or other variations as the arbitration considers relevant;
>
> (c) the need to maintain appropriate relationships in the conditions of employment as between different classification levels within an occupation and as between occupations in the public service of Alberta;
>
> (d) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered;
>
> (e) any other factor that to it appears to be relevant to the matter in dispute.

It is quite clear that these statutory criteria, especially the last one, leave the arbitration board with a broad latitude to determine how and when to apply these decision-making standards to a particular situation.

A close reading of the thirty-six arbitration awards reveals that not all of the awards are accompanied by written opinions[47] and in those that are, the thinking process and the relative weight attached to the different criteria are not always easy to ascertain. Furthermore, the awards issued under the two schemes which contain statutory criteria for decision making were not different in their reasoning from those issued under the other statutes. While some arbitration boards took notice of the statutory criteria, others did not even mention them. In only one case did the board specifically state the criteria as guiding principles for the award.[48]

The analysis of the written opinions reveals that while arbitration boards tended to deal with all matters in dispute, only a number of key issues were discussed in depth. It would appear as though the remaining issues somehow fall into line without much difficulty. The awards do not contain findings of facts. While the awards make reference to standards and principles[49] such as comparability, historic relationships, economic climate, rising costs, etc., the discussion centers on their overall relevance and proper role in interest arbitration, rather than on their application to a particular dispute. Rarely did the arbitration board explain the way it operationalizes and measures these standards, the relative weight it assigned to them and the "fit" between these standards and the actual facts of the case.

47. Out of 36 awards 5 did not carry any reasoning and 16 contained a very short discussion.

48. Government of Alberta and CSA—General Services (September 12, 1973).

49. Arbitrators in Alberta have gone beyond the core of accepted standards for interest arbitration, i.e., comparability, ability to pay, cost of living, labour market conditions and job content. Other factors which were cited by the arbitration awards were general trends in collective bargaining agreements, the history of the negotiation, general economic conditions, problems encountered in contract administration, employee morale and work efficiency, and in the more recent awards anti-inflation guidelines.

As one might expect, comparison of one sort or another was the single most dominant standard in the decision making process. The prevalence of this standard is evidenced not only by the frequency with which it was cited (85 per cent of the awards) but also by the large space which was allotted in the award for discussing this standard. While arbitrators are in full accord as to the importance of comparability, they find it very difficult to agree on what is a meaningful comparable unit. The factors which are used to identify a comparable unit (such as size, geographic proximity, economic condition and the degree of similarity in the nature of the jobs compared) and the way in which the principle of comparability is applied (e.g., as a package or issue by issue, with or without regard to past history—relative ranking or parity) seem to vary not only from award to award but also from issue to issue.

A central functional component in the arbitral decision-making process is the tripartite structure of the arbitration board. This structure, which is commonly used in grievance arbitration in Alberta as well, has been a subject of criticism in recent years primarily because of additional costs, administrative inefficiency and time delay. Yet even those who utterly reject the concept of tripartitism[50] in grievance arbitration tend to admit that this structure is indispensable for interest disputes. Advocates of the tripartite structure contend that its main contributions to the interest arbitration process are in terms of increased acceptability, improved quality of the award, greater facilitation of settlements during arbitration and a mediatory approach to decision-making, and, finally, the normative value imbedded in a pluralistic decision-making model.[51]

Out of thirty-six interest arbitration cases, thirty-one were conducted by a tripartite board. The interviews with members of arbitration boards indicate that executive sessions were held in all of the cases in which the board was tripartite. The informal and intimate atmosphere in most executive sessions stimulated a free and open discussion during which parties' appointees provided their own assessments as to what would be acceptable and workable to their appointors and furthermore made concrete suggestions for settlement. It is interesting to note that, probably because the presentations and briefs were well prepared, most of the information which was exchanged during the executive session centered on highly subjective and perceptual input regarding priorities, political needs, motives, and levels of acceptability rather than on technical information and clarification of briefs.

While arbitrators, practitioners and students of labour arbitration seem to agree on the many virtues of tripartitism, they disagree as to the desirable decision-making posture which should be adopted by these tripartite boards. The two competing postures have been "adjudication"

50. The concept of tripartitism refers in this context to the presence of employer and union appointees on the arbitration board, rather than to the number of members in the panel. This quality distinguishes the tripartite board from other boards of three or more members in which all the panelists are neutral. Thus, the five-man board under the previous version of the Firefighters and Policemen Labour Relations Act was according to this definition a five-man tripartite board.

51. *See* Sterenstein, "Arbitration of New Contract Terms in Local Transit: The Union View" in *Arbitration of Interest Disputes* (B. Dennis & G. Somers eds. 1947) 19; J. Loewenberg, "Compulsory Binding Arbitration in the Public Sector", paper prepared for the International Symposium on Public Employment Labour Relations, N.Y., May 1971, p. 22; Bernstein, *supra* n. 9 at 42; Northrup, *supra* n. 8 at 15; Dixon, "Tripartitism in the National War Labour Board" 2 *Ind. & Lab. Rel. Rev.* (1949) 374; Kuhn, *supra* n. 9 at 192; Lazar, "Tripartitism in Minnesota" (1973) 2 *Ind. Rel.* 26.

or "normative" approach as against "adjustment" or "compromise negotiation" approach.[52] The parameters of this debate were articulated by Dean Arthurs acting as a chairman in Building Service Employees, Local 204 and Welland County General Hospital.[53]

> A central issue which we faced at the outset was whether this board was to adjust or to adjudicate the differences between the parties. If we were to attempt adjustment, we would seek to reach a result agreeable to both parties. This we might do by proposing a series of compromises to them directly, or to their 'proxies', the two board members nominated by them. By a process of negotiation within the board or between the board and the parties, we would reach an acceptable mid-point. Failing of success, the board would then compel 'consensus' on the basis of a reasonable compromise between the negotiating parties. [Adjudication is a different kind of process.] Here, the board applies evidence to pre-determined and rational standards, as does a court of law or a board of arbitrations in a grievance dispute. The negotiating positions of the parties, and the acceptability of the award to them, is at best a marginal factor in the award. Rather, the board attempts to be 'objective' in measuring the entitlement of the parties to wages and working conditions.

One of the striking findings that came out as a result of the interviews with members of arbitration boards was that, while according to Arthurs' reading, the statutory schemes for interest arbitration in Alberta require "adjudication",[54] in practice the decision-making process followed the "adjustment" negotiation-compromise model. The majority of arbitration awards were negotiated during the executive session by board members. In fact, seventy per cent of the parties' appointees reported that they consulted and communicated with their appointors either during board deliberations or in between sessions. Sixty-eight per cent of the union nominees and fifty-five per cent of the employer nominees felt that in their case the award would have been different had the chairman been a single arbitrator or the only voting member of the board. Thus, to a large extent, the most accurate description of the arbitral decision-making process in Alberta is that it is an extension of the collective bargaining, "adjustment" rather than "adjudication".

The primary function of the tripartite structure and the executive session was to facilitate this negotiation-compromise process and to map out the areas of acceptability and to fashion an award which would be workable and acceptable to both parties. The tripartite boards were relatively successful in performing this function in view of the fact that more than fifty per cent of the awards were unanimous and in several other cases parties' nominees gave a tacit consent yet had to dissent for political reasons. There is a strong conviction in the literature that a unanimous decision by a tripartite arbitration board, although hard to

---

52. *See* A. W. R. Carrothers, "The Cuckoo's Egg in the Mare's Nest—Arbitration of Interest Disputes in Public Service Collective Bargaining: Problems of Principle, Policy and Process". Address, Annual Meeting National Academy of Arbitrators, 21, (April 15, 1977); Kuhn, *supra* n. 9 at 181; Brown, *supra* n. 8; Morris, "The Role of Interest Arbitration in a Collective Bargaining System" in *The Future of Labour Arbitration in America* (J. Correge, V. Huges and M. Stone eds. 1976) 221; Dufty, "Compulsory Conciliation—The Alberta Experience" n. 14 *J. of Ind. Rel.* 33-34 (1972); J. Isaac, *Compulsory Arbitration in Australia*, Task Force on Labour Relations, Study No. 4, 20 (1970).

53. November 9, 1965, 16 L.A.C. 1 at 2.

54. Similar to the Ontario legislation, i.e., the Hospital Labour Disputes Arbitration Act 1965 (Ont.), c. 48, the arbitration proceedings in Alberta are preceded by conciliation, the statutes contain similar requirements as to eligibility of board members, and the charter of the arbitration board is to render an award. Furthermore, with the exception of the legislation in the public service, the chairman's decision may constitute the award in cases where the board fails to formulate a majority award.

come by,[55] is the best guarantee for acceptability and is a sign of a high quality decision.[56] Considering the complexity of the disputes which reached the arbitration stage, such a high rate of unanimous awards may be regarded as a tribute to the success of the tripartite structure and the arbitration procedure in Alberta.

E. The Aftermath of the Arbitration Proceedings

In the majority of arbitration cases the issuance of the arbitration award signaled the end of the dispute and the award was incorporated immediately into the collective bargaining agreement. The provision according to which the arbitration board retains jurisdiction during the implementation stage proved to be very important since on many occasions the board was asked to reconvene in order to interpret and clarify its decision or to translate it into operational language that could be incorporated into the contract.

There were, however, several problematic cases in which the award was followed by a strike, post award litigation or grievance arbitration. On three separate occasions in the public service[57] the employees went on strike or took job action following the issuance of the award. In the *Red Deer Firefighters 1972*[58] case the City, stunned by the large "catch-up" award, laid off eight firemen. The union commenced enforcement proceedings in the court and filed a grievance which it ultimately won in arbitration. Another means which was used by the disputants to express dissatisfaction with the arbitration procedure was to file a complaint about the handling of the case by the chairman with the Minister of Labour.[59]

In addition to the aforementioned Red Deer case, in two other arbitrations the disputants began court litigation to enforce[60] or quash[61] an arbitration award and finally withdrew their applications. The only instance where the Supreme Court of Alberta actually acted upon an interest arbitration award was in *Otis Elevator Co.* v. *International Union of Elevator Constructors, Local 130 (1975).*[62] In this case, a board of arbitration was established by the Lieutenant-Governor in Council pursuant to the emergency proceedings of the Alberta Labour Act in order to bring to an end a prolonged strike of elevator constructors. The board of arbitration undertook to write a complete collective bargaining agreement for the parties. The employers filed an appeal to set aside or remit the majority award in the form of a collective bargaining agreement on the ground that certain provisions were uncertain, ambiguous and illegal.

---

55. Bernstein reported that in wage arbitrations the rate of unanimous awards was 12 per cent. Bernstein, *supra* n. 9 at 24.
56. In an empirical study conducted in Minnesota, Lazar demonstrated that the rate of acceptance of unanimous reports issued by a mediation factfinding commission was twice the rate of acceptance in cases of majority reports. Also the rate of strikes following a majority report was three times higher than in cases of unanimous report. Lazar, *supra* n. 51 at 121.
57. Alberta Liquor Control Board and CSA (1973); Government of the Province of Alberta and CSA (1973); Government of Alberta and CSA, Division 6 (1975).
58. City of Red Deer and International Association of Firefighters, Local 1190 (1972).
59. For example: International Association of Firefighters, Local 237 and City of Lethbridge (1970); City of Red Deer and International Association of Firefighters, Local 1190 (1972).
60. Action No. 87287 CSA and Alberta Hospital Services Commission.
61. City of Edmonton and International Association of Firefighters, Local 209 (1975). When the Anti-Inflation Guidelines were drafted the union withdrew its application to quash the award.
62. 53 D.L.R. (3d) 563.

Recognizing the fact that the board of arbitration adopted a holistic approach in its attempt to resolve a complicated dispute the court was very reluctant to disturb the award. Justice Sinclair reflected the court's attitude in the following statement:[63]

> I am of the opinion that the entire award should not be set aside. The arbitrators were dealing with a complex situation. They were concerned with a great number of difficult problems, and they were searching for new ways to try to solve them. It would have been surprising, it seems to me, if in doing so they had not in some instances taken a view that is different from that of this division.

The court declined to set the award aside and instead remitted a few provisions in the award back to the board of arbitration for further consideration. Particularly noteworthy was the court's attempt to minimize its intervention in the substantive terms of the award. Where articles were uncertain or ambiguous the court only sought clarification; where articles were not clearly ambiguous, the court was prepared to leave the solution of any problem arising in the future to the grievance arbitration procedure; where the court found a provision to be illegal, it refused to delete the particular paragraph from the award and referred it back to the board. The court explained that:[64]

> It may be that the deletion of the paragraph will appeal to the board as the proper solution to the problem. It seems to me, however, that the structure that the board has created in an endeavour to resolve this dispute is so complex that to suggest a simplistic change of this nature might serve to create additional problems. It will be for the board, with its expertise, to reconsider the whole of the article in the light of . . . (elements) that we are drawing to its attention.

IV. THE EFFICACY OF INTEREST ARBITRATION

A. In Search of Criteria

The point of departure for any evaluation of legal processes is the formulation of criteria.[65] In the particular case, this means specifying a set of criteria by which one may judge whether and to what degree compulsory arbitration is operating effectively. However, the basic premise underlying this study is that negotiations, strikes, conciliation, interest arbitration and other techniques for dispute resolution are all alternative mechanisms designed to institutionalize and regulate the conflicts that arise in collective bargaining. Thus the criteria for the efficacy of interest arbitration rest on the normative premise held respecting collective bargaining within a context where strikes and other forms of job action are considered intolerable.

Therefore the first criterion is the extent to which work stoppages and other job actions are avoided. This obvious criterion derives from the underlying reasons for introducing arbitration into particular jurisdictions where public policy does not tolerate any work disruption. A second criterion which again reflects the value of free collective bargaining requires that the determination of substantive terms of labour agreements by a third party should be minimized. This premise is derived from a long-held policy of the legislatures and courts against writing employment contracts for parties. The basis of this policy may be traced to the

63. *Id.* at 566.

64. *Id.* at 581.

65. Summers, "Evaluating and Improving Legal Processes—A Plea for Process Values" (1974) 60 *Cor. L. Rev.* 1; Ziskind, "Standards for Evaluating Labour Legislation" (1966) 51 *Cor. L. Quar.* 502.

doctrines of freedom of contract and the preservation of a system of private decision-making via free collective bargaining, as well as to the practical necessity which stems from the absence of consensus over norms of equity for determining specific conditions of employment. It is feared that the ability of the parties to effectively deal with their own problems may decline once the parties begin to rely and become dependent on third party intervention.

A third important criterion for evaluation is the overall acceptability of the arbitration procedure and its key components to the parties. In the long run the viability of any technique for dispute resolution is dependent on its ability to achieve acceptance and to build a strong commitment on behalf of the disputants to make it work effectively. This is doubly true in collective labour disputes where the use of legal sanctions to force compliance is expensive, problematic, and their effectiveness diminishes rapidly through excessive use. Moreover, unless the parties develop a commitment to the arbitration procedure as an institution, the temptation to ignore a disappointing award and to take direct action outside the system will be impossible to withstand, especially when the stakes involved are large.

To sum up, the efficacy of interest arbitration is to be judged in terms of (a) its success in avoiding or minimizing strikes and/or other sorts of job action, (b) its capability to effectuate the policy of "free collective bargaining", and (c) its acceptability to the parties.

In addition to these major criteria, the experience with interest arbitration in Alberta will be assessed in terms of costs, time delay and ability to innovate. Although these aspects may be subsumed under the general criterion of acceptability, they deserve special attention since students and practitioners tend to regard them as critical to the effectiveness of any institutionalized technique for dispute resolution.

B. Maintaining Labour Peace

Since strikes of policemen, firefighters and public service employees have always been a relatively rare phenomenon,[66] it is difficult to assess the effectiveness of the interest arbitration procedure in avoiding work stoppages. Experience elsewhere indicates that under interest arbitration strikes may occur although they tend to be short in duration, since their underlying objective is to draw attention rather than to impose pressure on the employer in order to increase economic gains.[67]

As far as we could ascertain from interviews with officers in the Department of Labour and employer and union representatives there were only three recorded instances of strike and/or job action involving contract negotiations in those sectors of employment which are subject to compulsory interest arbitration. The three strikes took place in disputes between the Civil Service Association of Alberta (now AUPE) and the Provincial Government.

The first strike broke after the board issued its award in *Alberta Liquor Control Board and CSA (1973).* The union protested against the award by conducting four study session days and calling a strike which

66. Yet, there have been reported illegal strikes by these groups of employees, *see* McAvoy, "Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector" (1972) 72 *Colum. L. Rev.* 1192; A. Aboud & G. Aboud, *The Right to Strike in Public Employment* (1974) 20.

67. Northrup, *supra* n. 8 at 26, 40.

lasted for ten days. Work resumed under court injunction[68] yet the union was successful in negotiating a supplement to the agreement which remedied the deficiency in the award. The second instance of job action was a short rotating strike by tradesmen following the arbitration award in *Alberta Government and CSA, General Services (1973)*. In its decision the board declined jurisdiction over the issue of reclassification. The problem was resolved by the establishment of a joint union-management committee which surveyed the practices in the labour market and by further negotiations over changes in wage rates on the basis of the survey. In the third case employees of Division 6 went on strike for four days during contract negotiations. The strike terminated by a court injunction and interest arbitration proceedings.

While employees may strike or take a job action in defiance of an arbitration award, the extent to which the employers comply with an arbitration award is usually manifested during the implementation stage. Problems with implementation were reported only in one case where the City of Red Deer, which was forced to implement a large three-year catch-up award,[69] laid off eight firemen, alleging that it had no ability to pay. The firemen were finally reinstated by another arbitration board which acted upon a grievance filed by the union.

C. Preserving the Concept of Free Collective Bargaining

Under this criterion the effectiveness of the interest arbitration procedure may be measured by the extent to which the parties become addicted to and dependent upon arbitration to write their collective bargaining agreements. In the arbitration literature this aspect is referred to as the "narcotic effect". Thus under an effective interest arbitration scheme the majority of contract negotiations will be completed by the parties without resort to arbitration.

A second aspect of this criterion is the extent to which the existence of interest arbitration as a terminal step in the impasse procedure had a "chilling effect"[70] on the pre-arbitration negotiations. There is a widely held belief among students and practitioners that on the basis of the assumption that arbitrators tend to "split the difference",[71] parties who expect their dispute to reach the arbitration stage will not bargain in good faith and will hold back concessions in preparation for arbitration.

The history of collective bargaining of employees in the public service, police and fire departments who are subject to compulsory interest arbitration reveals marked differences between these employee groups in the extent to which they repeatedly use the arbitration procedure to resolve their contract negotiation disputes. The firefighters developed the heaviest reliance on arbitration. More than 30 per cent of their settlements resulted from arbitration awards. In contrast, the policemen and Crown agencies employees used arbitration sporadically. Thus, for example, the last police arbitration case in both Edmonton and Calgary took place in 1970 and the University of Lethbridge and the Alberta

68. Alberta Liquor Control Board and CSA (1974).

69. City of Red Deer and International Association of Firefighters, Local 1190 (1972).

70. *See* Stevens, "Is Compulsory Arbitration Compatible with Collective Bargaining?" (1966) 5 *Ind. Rel.* 38. For an empirical test of the "chilling effect" hypothesis using data on movements in bargaining, *see* T. Kochan, R. Ehrenberg, J. Baderschneider, T. Jick, and M. Mironi, *An Evaluation of Impasse Procedures for Police and Firefighters in New York State* (1977) 97.

71. *See* J. Cross, *The Economics of Bargaining* (1969) 178.

Hospital Association completed, respectively, three and eight rounds of negotiations without resort to arbitration. In the civil service twenty per cent of the contract negotiations during the period 1972-1977 were resolved by arbitration. However, during the last two rounds of negotiations only two out of twenty-six contract negotiations were brought to arbitration.

As these figures indicate, the majority of labour agreements were negotiated by the parties on their own without resort to arbitration. Furthermore, the proportion of negotiations culminated by an arbitration award compares favorably with other arbitration schemes.[72] Hence, one may conclude that arbitration has not become the rule of settlement in Alberta and that in some relationships it has been indeed a seldom used emergency measure.

Since data on pre-arbitration negotiations were not available, parties' representatives were asked to provide their own assessment as to whether the existence of arbitration as a terminal step in the impasse procedure had a "chilling effect" on the bargaining. 36 per cent of the employer representatives and 52 per cent of the union representatives felt that in their particular cases parties' expectations that the dispute might eventually end up in arbitration caused them to hold back concessions during pre-arbitration negotiations. These figures need to be interpreted with caution since our sample is skewed toward the troublesome cases, many of them pattern setters which were finally terminated in arbitration. It does not include the majority of cases in which the parties came to agreement without resort to arbitration. Nevertheless, the fact that in a substantial number of cases the disputants, especially the union which was the moving party and the instigator of arbitration, felt that there was no bargaining in good faith prior to arbitration deserves further considerations.

D. The Acceptability of the Arbitration Procedure

Acceptability has emerged as a central criterion for the evaluation of any technique of dispute resolution. In the long run, the stability and usefulness of any system of conflict regulation depends on the commitment and acceptance by the disputants who are affected by its outcomes and who have the power to either make it work or to destroy it. As Dean Arthurs once noted: "If arbitration is to hold its own, it must obviously have both an acceptable structure and acceptable personnel."[73] Furthermore, one may assume that since enforcing compliance within a collective bargaining relationship context is problematic, interest arbitration under a statutory decree, as against voluntary agreement, calls for standards of acceptability of even higher magnitude. Yet the problem has always been one of identifying the determinants of acceptability and the relative

72. In their study of interest arbitration in the federal sector, Barnes and Kelly report that during 1967-74 between 18 and 19 per cent of all negotiations were resolved by arbitration. L. Barnes and L. Kelly, *supra* n. 37 at 13. According to an estimate by the War Labour Board in the United States during the 44 months of its operation 150,000 new agreements were negotiated and about 14 per cent were brought before the board. The National War Labour Board, *The Termination Report of the War Labour Board* (1945) 47. *See also* data from New York, Michigan, Pennsylvania and Wisconsin as reported in M. Mironi, *Compulsory Arbitration of Public Safety Interest Disputes in New York: An Analysis and Performance Evaluation* 1977 (unpublished thesis in Cornell University Library), 193.

73. Arthurs, *Views from the Global Village*, as quoted in Barnes and Kelly, *supra* n. 38 at 31.

contribution of the arbitration procedure's operational features to the overall acceptability.[74]

Union and employer representatives who had experience with interest arbitration were asked to rate the overall acceptability of the arbitration procedure. In addition, they were asked to rate their satisfaction with various qualities and aspects of the chairman of the arbitration board,[75] the arbitration hearing,[76] the award[77] and the administrative aspects of the arbitration procedure.[78]

The responses of the union and employer representatives regarding the overall acceptability of the arbitration procedure reveal that both parties judged their arbitration experience to be quite positive. Also their satisfaction scores indicated a relatively favourable assessment of the operational features of the interest arbitration system.[79] More detailed analyses of the assessment indicate that except for two aspects, i.e., cost and time delays, the employer representatives were consistently more satisfied with the operations of the procedure than were the union representatives. Both parties were the most satisfied with the hearing and the least satisfied with the award.

Union representatives were mainly disappointed by the chairman's lack of confidence or "guts" to lead the board to a decision which will reflect the facts and arguments presented by the union during the hearing and with the failure of the award to terminally resolve the issues in dispute. Furthermore, the nature of the union as a political organization was clearly reflected in the low satisfaction score they assigned to the chairman's sensitivity to the political needs of the parties. The problem of dissatisfaction with the chairmen of arbitration boards was also reflected by the responses given by union representatives as to whether they would select the same chairman again in the future. Forty-six per cent of the union representatives answered negatively and only 28 per cent indicated that they would select the same chairman as their first choice. In contrast, 48 per cent of the employer representatives indicated that the chairman who served in their case would be their first choice and only 24 per cent stated that the particular chairman would not be considered for future appointments.

---

74. As one commentator pointed out: "If there is a most important key to successful arbitration, it must be acceptability . . . how can we recognize the result which will be acceptable? What point of view? What procedure? What magic touchstone is available to enable us to separate the gold from the phoney?" Sterenstein, "Arbitration of New Contract Terms in Local Transit: The Union View", in *Arbitration of Interest Disputes* (B. Dennis and G. Somers eds. 1974) 16.

75. Such as familiarity with the industry, fairness and impartiality, understanding of the issues, expertise in labour relations, confidence, understanding of the economic and political aspects of the dispute.

76. As to the hearing, parties' representatives were asked about the handling of evidence, elicitation of evidence, application of rules of evidence and procedure.

77. Parties' representatives were asked to evaluate the arbitration award in terms of its equity, underlying reasoning, its value in resolving the issues in dispute, the extent to which it was based on all the facts and arguments presented during the hearing and the ease of translating it into practice.

78. The administrative aspects referred to cost, time delay, the assistance of the Department of Labour and the procedure by which board members were selected.

79. On a five-point scale with one standing for highly unacceptable and five for highly acceptable, the mean response of the employer representatives was 3.28 and the mean response for union representatives was somewhat lower, 2.86. Detailed results of parties' representatives' satisfaction with the operational features of the arbitration procedure were included in the original report—M. Mironi, *The Arbitration of Interest Disputes in Alberta—An Analysis and Performance Evaluation* (1977) 93.

In order to understand how the parties form their judgment regarding the acceptability of the arbitration procedure union and employer representatives were asked to rank order four basic components, i.e. the chairman, the fairness and due process of the proceedings, the outcome of the award and the administrative aspects, according to their relative importance for assessing an actual case experience. The responses demonstrate very clearly that what counts in interest arbitration is first and foremost the outcome. Eighty-three per cent of employer representatives and 75 per cent of union representatives ranked the outcome of the award as the most important aspect in the procedure. Parties' representatives were also in full agreement as to the ranking order of the other three components. They ranked the chairman second, the fairness and due process third, and the administrative aspect, i.e. cost, time delay as the least important.[80] However, it should be noted here that at least in the case of union representatives, general attitude and commitment to the concept of compulsory arbitration *per se* had also a substantial impact on the assessment of acceptability. This is probably due to the AUPE's total rejection of compulsory arbitration and their attempt to gain the right to strike.

E. The Costs of the Arbitration Procedure

The increasing cost of arbitration has been in recent years a subject of concern to policy makers, to arbitrators and to the parties. When interest arbitration is a mandatory procedure which is supposed to act as a strike substitute and as a means to instill the essence of collective bargaining without granting the right to strike, the parameter of costs becomes relevant to the evaluation in two ways. On the one hand, it is important that the costs of the procedure be kept low enough to ensure that the procedure is accessible to parties with modest resources. Otherwise the financial ability to stand the burden of a costly procedure may become a bargaining weapon. On the other hand, to the extent that one wished to deter the parties from over-using arbitration, there should be some costs associated with taking a dispute to arbitration.

The statutes which provide for interest arbitration in Alberta employ various schemes of cost allocation. Under the Alberta Labour Act and the Firefighters and Policemen Labour Relations Act, the government pays fees and expenses of arbitration board members. However, since the maximum fees and expenses are stipulated in the regulations the parties are often required to pay the difference between the actual costs and the payments made by the government. By contrast, under the Public Service Act and the Crown Agencies Employee Relations Act, each party pays the fees and expenses of its appointee and both parties share the costs of the chairman. Even when arbitration is subsidized by the government, as is often the case in Alberta, arbitration can be a costly endeavor for the parties. Expenses may include additional payments for board members, attorneys' fees, transcripts, lost time of witnesses and expert testimony and reports. Finally, from a public policy standpoint, when arbitration is subsidized by the public the price of government intervention must also be taken into account as a factor in the evaluation.

80. These findings which characterize interest arbitration as a highly outcome-oriented technique were reinforced by the high correlations (.75 and .79 for the employer and union representatives respectively) between satisfaction with the award and the overall acceptability of the procedure.

Unfortunately, data concerning the fees and administrative costs of the interest arbitration procedure to the government were not available. The picture was not much better as to the cost incurred by parties. Because of the long time lag and the confidential nature of attorney fees, parties' representatives were either unable to recall or reluctant to release detailed information on their costs in going through the arbitration procedure. It was also unclear whether their answers include only their share in the total costs of the procedure or whether the figures they provided pertain only to the additional costs they incurred on top of what was paid by the government.

The major cost item for both parties was the fee for the appointee to the arbitration board. Only six employers and ten union representatives indicated that they paid fees for legal counsel. The police union was the only group which relied to a large extent on attorneys to present their case in arbitration. As a result of this staggering cost the Police Association decided not to utilize the services of legal counsel in future arbitrations. The majority of representatives of parties reported that the third major cost item for their organizations was the fee paid for the services of the chairman. Although the inquiry referred to other cost items the parties rarely recalled any additional expenses outside the fees for board members and counsels.

Although arbitration was perceived by the parties as an expensive undertaking, especially for those who had to incur the full costs of board members or used the service of legal counsel, the vast majority of parties' representatives (90 per cent) did not view the costs as a deterrent to submitting a similar dispute to arbitration in the future.

F. Time Delay

While time delay has been viewed as a severe problem in grievance arbitration,[81] a process once known for its expediency and simplicity, delays in interest arbitration may raise doubts as to the very feasibility of instituting arbitration as a strike substitute and terminal step in contract negotiation impasse procedure. Employee groups are generally the moving party and may not tolerate long time delays which maintain the *status quo* and leave the membership in a stage of uncertainty and detachment while the case winds its way through arbitration procedure. Thus Barnes and Kelly concluded that long time delays were among the reasons which caused many units in the federal public service to prefer the conciliation-strike route over the arbitration route.[82] Also Northrup cites the time delay involved in going through arbitration as a major source of discontent and for the frequent, short, and "quicky" strikes under the compulsory arbitration scheme in Australia.[83]

The arbitration awards and arbitration board members' recollections were the only available sources of data on time span in arbitration. Consequently the analysis of time delay does not encompass the stage of impaneling the board, nor the time lag between the issuance of the award and consummation of labour agreement. The time lapse between panel appointment and award ranged from 10 days to 103 days with an average

81. *See* D. McConachie, "Arbitration Process May Be Streamlined", *Edmonton Journal*, February 10, 1977, at 23; Metropolitan Toronto Labour Council, *Justice Delayed . . . The Arbitration Process* (1974).

82. Barnes and Kelly, *supra* n. 38 at 28.

83. Northrup, *supra* n. 8 at 21, 40.

of 46 days and a median of 38. In only two cases did the time duration between appointment and award exceed 67 days. In the first the selection process was completed at the beginning of July and the parties decided to postpone the first hearing until the end of the summer. In the second, the arbitration board adjourned for 20 days at the employer's request. Scheduling hearings did not appear to be a major problem in Alberta. On average it took 24 days to schedule the first hearing.

These findings are especially interesting when placed within a comparative context. Barnes and Kelly reported that in cases arbitrated by the Public Service Alliance of Canada the time span between request and award ranged from 28 days to 224 days with a median of 98 and in cases arbitrated by the Professional Institute of the Public Service the range was 63 days to 395 with a median duration of 140 days. Even when a period of 20 days is subtracted in order to adjust for the process of referring the case to an arbitration board, the typical board in Alberta completed its hearing and deliberation and rendered the award *twice or three times faster* than the tribunals in the federal public service. Furthermore, the performance of the arbitration boards in Alberta is very impressive in comparison to similarly situated boards in various jurisdictions in the United States. Thus for example in the New York public safety arbitration the time span between appointment and award was 80 days[85] and in the War Labour Board 50 per cent of the cases took more than 90 days and 25 per cent more than 6 months between appointment and award.[86]

Furthermore, it is often argued that the tripartite structure is less efficient and more time consuming than the alternative of having a single arbitrator simply because it takes longer for three busy professionals to convene and to reach a decision.[87] Our data, however, do not support this argument. The study of grievance arbitration in Ontario[88] reported that it took a sole arbitrator an average of 23 days from the date of hearing to rendering the award, while a tripartite board needed an average of 46 days between the hearing and the award. The tripartite interest arbitration boards in Alberta completed their tasks even faster than the sole arbitrators in grievance arbitration in Ontario. In a typical case the board needed only 21 days to schedule its first hearing and 17 additional days to deliberate and to write its award.

Yet, the most striking comparison is between grievance and interest arbitration in Alberta. It has been reported that the grievance arbitration procedure in Alberta consumes an average of 280 days.[88] Although this figure includes the informal steps of the grievance procedure and the stage of selecting board members, the arbitration proceedings *per se* account for a large portion of this delay. Since grievances are arbitrated primarily by a tripartite board part of the delay has been attributed to the structure of the board.[89] The findings of this study suggest that *time-delay is not an inherent quality of tripartism.* When the parties and members of

84. Barnes and Kelly, *supra* n. 38 at 26.
85. Mironi, *supra* n. 72 at 216.
86. The National War Labour Board, *supra* n. 72 at 486.
87. Metropolitan Toronto Labour Council, *supra* n. 81.
88. McConachie, *supra* n. 81.
89. During the recent public hearings concerning the provincial labour laws several briefs argued for the elimination of the tripartite structure as a means to speed up arbitration. *See* McConachie *id.*

arbitration boards develop a sense of urgency and are willing to expedite the proceedings the structure of the board, i.e., being a sole arbitrator or a tripartite board, makes no difference. In contrast when the participants in the procedure do not see a need for expediency the tripartite board may become, sometimes not without intention, a delaying factor.

In conclusion, probably because of the *ad hoc* nature of the board and the willingness of the parties to streamline and expedite the proceedings the interest arbitration boards in Alberta were able to convene, deliberate and issue their awards in substantially less time than the tribunals in the federal public service and grievance arbitration boards in Ontario and Alberta. Thus, on the dimension of promptness and swiftness the performance of interest arbitration in Alberta has been very impressive.

G. Ability to Innovate

Ability to innovate has been considered a severe problem in employment relationships where strike or other types of job action are not permitted and unresolved disputes are subject to arbitration. Union spokesmen have frequently argued that because the concept of comparability is so deeply ingrained in the interest arbitration decision-making process they are unable to get new or breakthrough demands especially when all the potential comparison units are subject to arbitration.

In order to assess the magnitude of this problem in Alberta, board members were asked to indicate whether they have encountered any problem with demands which they considered to be innovative and to describe how these demands were handled. In addition, they were asked their general opinion as to whether innovative or breakthrough issues can be appropriately dealt with in interest arbitration.

Almost half of the chairmen reported that their board was presented with demands that from either the union or the employer standpoint could be perceived as innovative or breakthrough issues. The list of issues which were placed under this category included: preference of employment, a shift from across the board to percentage wage increase, inclusion of employee group in the bargaining unit, job requirement (12th grade), pre-job inspection, removal of conditions of employment from the police code, shift differentials, closed-shop, pension and death and disability benefits. While some of these issues do not appear to be particularly novel today they were perceived as "breaking new grounds" at the time of the arbitration proceedings. Moreover, whether an issue is labeled as innovative or not is a matter of perception. Thus, many items which appeared to be novel to the chairmen were not perceived as such by the parties' appointees.

The interview revealed that in the majority of cases innovative or novel demands were not rejected *ab initio* as inappropriate for arbitration. Instead they were judged "on the merits". This does not mean that the party which raised innovative demands was always successful. In several cases such demands were rejected as being too trivial[90] or simply as not justifiable on the basis of the evidence and arguments. In several instances the board referred such demands back to the parties for further negotiations since it lacked sufficient understanding of the issue and was

90. Minor demands such as refreshment benefits, annual picnic, free transportation, "dog master", etc., were rejected since the board believed them to be unimportant to the parties themselves.

incapable of appreciating the likely impact of awarding a particular demand.[91] In one of the cases the board outlined general principles for the post-arbitration negotiations and stipulated a provision that would go into effect if the parties failed to reach an agreement. In other instances innovative demands were accepted by the boards who often searched for a pragmatic and creative way to accommodate them within the award.[92]

In response to questioning as to the difficulty of innovations in interest arbitration, several arbitrators were of the opinion that if a good argument was made or a general trend was identifiable then there was no reason for denying a certain benefit or demand just because they were considered a breakthrough by either or both parties. Others contended that arbitration was a better place to deal with innovative issues and that the chairman may actually use innovations to solve a problematic dispute. One arbitrator noted that the chairman could use the appointees to convince their constituents to formulate a workable solution together. He admonished, however, that the chairman has to be careful and "play his politics right". One chairman commented that arbitration is the only vehicle by which management can get rid of problematic provisions in the contract and that in the public sector the arbitration award can be used as a "face-saving" device or marketing document for selling the award to the constituency.

Several board members who indicated that innovative issues pose difficulties upon the arbitration board suggested that this was not the fault of the arbitration system but a general characteristic of collective bargaining. As one arbitrator noted: "innovation is *equally* difficult to deal with in the context of conventional bargaining with conventional sanctions as it is in arbitration." Many board members who felt that arbitration boards cannot adequately deal with innovative issues stated that the answer to this problem was within the reach of the parties and the members of the board. According to them the main difference between the routine and innovative issues is that in the case of the latter it takes a combination of a courageous chairman, highly qualified appointees, and well prepared presentations to be successful.

V. SUMMARY AND POLICY RECOMMENDATIONS

Interest arbitration is designed to function as a strike substitute. In order to instill the essence of collective bargaining into a context where strikes are prohibited it must possess elements such as uncertainty and high cost in order to discourage disputants from overusing it and to act as incentive for the parties to settle their disputes on their own, with minimal resort to arbitration. On the other hand, in order to assure labour peace and voluntary compliance it is essential that the immediate disputants and potential users perceive the arbitration procedure as fair and acceptable. The tension which is built into the arbitration procedure

91. Town of St. Albert and St. Albert Firefighters Local 2130, 6 (1973); The Board of Police Commissioners of the City of Edmonton and Edmonton Police Association 18, 23, 33 (1970).

92. For instance, an arbitration board implemented a death and disability benefit although these benefits did not exist in other comparable contracts, City of Red Deer and International Association of Firefighters Local 1190 (1972); other examples are: The Board of Police Commissioners for the City of Lethbridge and Lethbridge Police Association (1971) in which the board implemented an identification clause and eliminated the residency provision from the police code; City Firefighters Union Local 209 and City of Edmonton (1968) in which the board introduced grievance procedure into the labour agreement; University of Calgary and Civil Service Association of Alberta (1968) in which the board implemented the Rand Formula to solve the dispute over union security.

by these two demands is both visible and unavoidable. During the negotiations the arbitration procedure needs to be perceived as being painful and disliked (much like a strike) and as a procedure that ought to be avoided at all costs. Yet, once the parties make a decision to use the arbitration procedure they should find their experience acceptable and satisfactory. Considering this inevitable dilemma, the success of designating an effective arbitration procedure is dependent upon one's ability to carefully strike the right balance between the two seemingly conflicting demands.

The analysis of experience with interest arbitration in Alberta seems to suggest that a reasonable balance between these two somewhat conflicting demands was maintained. The parties have not developed an over reliance on arbitration. Only a minority of negotiations reached the arbitration stage. On the other hand, those parties who were subject to arbitration appeared to be quite satisfied with their arbitration experience and tended to judge the arbitration procedure as an acceptable form of dispute resolution.

There is, however, one important qualification to be made here. It is far too simplistic to conclude that the low rate of resort to arbitration is always healthy and may be attributed solely to the particular design of the arbitration procedure. (There was evidence that at least one union did not utilize arbitration more frequently because of its low trust in the procedure.) To the extent that such attitudes and a low level of acceptability may encourage a disputant to look for remedies outside the system, minimal reliance on arbitration diminishes the overall effectiveness of the arbitration procedure. Furthermore, the fact that in general union representatives were consistently less satisfied with the arbitration procedure and assigned it lower acceptability scores than their employer counterparts may suggest that the arbitration procedure has shifted slightly out-of-balance and that special attention must be given now to improving its acceptability to employees.

In sum, on the basis of this study it is submitted that the interest arbitration process has been working relatively well in Alberta and hence should remain basically intact. Nevertheless, a number of changes in the legislation pertaining to the design and the administration of the interest arbitration procedure are recommended. These recommendations were formulated in order to strengthen several weak points which have been detected during the study and in response to numerous solicited and unsolicited suggestions which were conveyed during the study by union and employer spokesmen, practitioners and arbitrators.

A. The Arbitration Board

It is suggested that the present structure of *ad hoc* tripartite boards be maintained and that all eligibility requirements be removed from the statutes. In addition, a major effort must be undertaken to expand the list of people who are able to serve as chairmen of interest arbitration boards.

Currently, the legislation contains different provisions which make persons who are associated with the dispute or with the disputants ineligible to serve on an arbitration board. These provisions are directed primarily toward the parties' appointees and they are premised on the assumption that the arbitration board should be an impartial adjudicatory body. As was revealed beforehand, such a conception of the interest arbitration process has not been followed by either the parties or

the arbitration boards. Parties' appointees were selected as and assigned the role of advocates. They had frequent contacts with their appointors during board deliberations, and the decision-making process took the form of small-scale negotiation sessions with the chairman as a mediator having a reserved power of decision.

Therefore, while the eligibility requirements do not serve their intended purpose, they unnecessarily restrict the number of people who can serve as board members. Furthermore, it is submitted that since the primary role of the tripartite board was to extend the bargaining process into arbitration and to fashion an acceptable award, those who are closely associated with the parties or the dispute are in the best position to perform this role. Not only are they familiar with the parameters, the expectations and the needs of their constituents, they also have the authority to make a commitment on behalf of their organizations.

The unavailability of qualified and acceptable arbitrators to chair interest arbitration boards has emerged as the single most severe problem of the arbitration procedure in Alberta, especially from the union's standpoint. Almost half of the union representatives indicated that the chairman who served on their board would not be considered for future appointments. Also, in their evaluation the level of satisfaction with the chairmen's qualifications and performance was relatively low. Another symptom of this problem was the relatively frequent resort to an appointment by the government. In retrospect many respondents regretted their decision to give up the right of selection since government appointees tended to lack any appreciation of the labour relations milieu nor did they understand the dynamics of the interest arbitration process. Thus, for those who are unable to select an acceptable chairman from the existing cadre of third party neutrals and yet fear a disastrous government appointment, the situation is without remedy. Therefore, it is recommended that the residency requirement be removed from the legislation and that the government launch a major project of recruiting and training a large panel of interest arbitrators.

Finally, the *ad hoc* tripartite structure appears to be indispensible for the success of interest arbitration. Moreover, even the fears that a tripartite structure may be more time-consuming than sole arbitrator did not materialize. Conversely, the experience with the permanent arbitration tribunal in the federal public service demonstrates that permanency is a major cause of time-delay and that the tendency of a permanent adjudicatory body to build jurisprudence may cause serious problems in interest arbitration. Furthermore, the *ad hoc* board is especially suitable for Alberta because of the sporadic use of arbitration and the diversity of cases which reach the arbitration stage. In addition, the ability of the parties to select the members of an arbitration board for each dispute provides flexibility and may act as a safety valve. Unacceptable chairmen may be replaced without damaging the acceptability of the arbitration system as a whole.

B. The Scope of Arbitrable Issues

Defining the scope of arbitrable issues should remain within the domain of the arbitration board's discretion. The way arbitration boards disposed of this issue in Alberta demonstrated that defining the boundaries of arbitrability is a complex task and that arbitration boards possess the best resources in terms of expertise, input and tools in order

to deal with it. Furthermore, the attempt to establish a category of negotiable items and a narrower category of arbitrable items accompanied by a narrow and a legalistic approach to the scope of arbitration in the federal public service was cited as an important factor in the decision of many units to opt for the conciliation/strike route instead of arbitration.[93]

C. The Decision-Making Process

Several suggestions have been proposed by parties' representatives for changing the framework of decision-making. Specifically, it was suggested that the statutory criteria be refined and extended to the Alberta Labour Act and the Firefighters and Policemen Labour Relations Act; that the arbitration board be required to write detailed reasons to explain its decision, and that the decision-making process be changed from conventional to final-offer.[94] Under this procedure the arbitration board is limited to a choice of adopting either the union position or the employer position, but it may not adopt any compromise terms.

As was disclosed by the analysis of the awards and the interviews with members of the arbitration boards the existence of statutory criteria in the two public sector statutes had very little impact on the decision-making process. Furthermore, for many years practitioners and observers of the interest arbitration process have argued that there are no meaningful decision-making standards and that the existing criteria are vague, that they conflict each other and that they are not capable of application in any uniform or consistent way.[95] The majority of board members indicated that their experience led them to believe that it would be impossible to draft a meaningful set of rational standards which could be applied consistently. Several board members stated that the dispute is not amenable to solution by applying rational standards. They also feared that any attempt to tighten the criteria would bring stagnation to the decision-making process.

As to the requirement for detailed reasoning, the responses of board members indicate that writing a meaningful reasoning is not always desirable or possible and that the decision as to when and how much reasoning will accompany the award should be left to the board. They suggested that often there is no factual dispute and that the whole decision-making process involves value judgment, negotiations, balancing and trade-offs which may not be honestly and meaningfully reflected in the reasoning. They reiterated that interest arbitration is an outcome-oriented process where precedent plays a small role; often the outcome of the decision may be right while a formal statement of the reasoning might invite appeal. However, board members agreed that there are instances when the board owes the disputants a careful and well-formulated reasoning. This will be the case whenever the decision involves an independent ruling by the chairman or the history of the dispute necessitates it, or in cases of innovations.

In recent years many jurisdictions in the United States have

93. Barnes and Kelly, *supra* n. 38 at 37.

94. *See* J. Stern, C. Rehmus, L. Lowenberg, H. Kasper and B. Dennis, *Final Offer Arbitration* (1975); Zack, "Final Offer Selection: Panacea or Pandora's Box?" (1974) 19 *N.Y.L. Form* 567; Stevens, *supra* n. 70.

95. *See* Kuhn, *supra* n. 9 at 123; Brown, *supra* n. 8 at 24.

experimented with different versions of final-offer arbitration as a means to reduce parties' dependency on arbitration and to assure good faith bargaining during the pre-arbitration negotiations. However, the data as to the degree of success are at best dubious. In Alberta we have not encountered serious problems of repeated use of arbitration and it seems that the parties lack the sophistication and commitment which are required for the final-offer arbitration to work effectively. Almost all union and employer representatives as well as board members totally rejected the idea of final-position arbitration by package and only 40 per cent of the board members and 20 per cent of parties' representatives stated that they would like to experiment with the more moderate version of the final position issue-by-issue arbitration.

In conclusion, it is recommended that the framework for the decision-making process stay basically intact. Since our normative framework prefers voluntary settlement by the parties over mandated solutions and emphasis is placed on acceptability and voluntary compliance, the existing decision-making structure which carries the negotiation process into arbitration should be preserved. The relatively high rate of unanimous awards seems to suggest that agreement can be reached during board deliberations where this had not been achieved before.

As to the specific suggestions for changes in the decision-making framework, the experience with decision-making standards in Alberta and elsewhere demonstrates that efforts to develop a well-defined set of standards are doomed to fail because of the polycentric nature of the problem. One may also argue that decision-making criteria must be sufficiently ambiguous to create uncertainty about the outcome and thus to encourage bargaining. With regard to the other suggestions it is recommended that the decision as to whether to accompany the award with a detailed opinion and whether to conduct a "final-position" arbitration should be left for the discretion of the arbitration board.

However, since this study revealed that the statutory criteria in the Public Service Act and the Crown Agencies Employee Relations Act had no significant impact on the decision-making process, for the sake of uniformity the legislature may want to consider whether to extend them to the other statutes or to remove them completely. Also for the sake of uniformity, the provision that the decision of the chairman prevails in case of failure to reach a majority award should be incorporated into the Public Service Act and the Crown Agencies Employee Relations Act. The pressures for a unanimous award may guarantee that this prerogative will not be usurped by the chairman, while on the other hand, providing him with a more effective leverage for the board deliberations and a protection against a situation where both parties' appointees entrench themselves in unreasonable positions.

D. Enforcement and Review

It is recommended that the existing procedures for implementation and enforcement of arbitration awards under the Public Service Act and the Crown Agencies Employee Relations Act be extended to the other statutory schemes. In addition, well-defined and uniform rules to govern court intervention in the interest arbitration process need to be established. Due to the nature of the dispute, the unavailability of meaningful decision-making standards and the "adjustment" negotiation

nature of the decision-making process, rules of review which are premised on a policy of judicial restraints may be the most appropriate.[96]

Broad standards of review may undermine the essential qualities of speed, flexibility, finality and acceptability while making very little contribution in terms of quality. The courts by virtue of their makeup and limited exposure to labour disputes are likely to have very little sensitivity towards an understanding of the complexity of the situations and the underlying problems and needs which come into play in interest arbitration.

Moreover, since the court is not likely to have access to more rational standards than the arbitration board, and, in addition, lacks the informal interaction and input of a tripartite structure, judicial review by the court may not improve the quality of the award or, for that matter, provide effective protection against abuse of discretionary power. Furthermore, given the reality that arbitration awards are largely negotiated during board deliberations and that the opinions accompanying the awards do not capture the process by which decisions are made or the factors which shape the ultimate award, it would be impossible to review the substantive merits of the award under any standard.

E. Cost

It is recommended that existing arrangements in the public sector under which the parties bear all the costs of the arbitration proceedings be extended to cover interest arbitration under the Alberta Labour Act and the Firefighters and Policemen Labour Relations Act. In addition, the arbitration board should be empowered to determine as part of its award how the costs of arbitration can be borne by the parties.

The vast majority of union and employer representatives did not see the element of cost as a deterrent factor. Yet, if arbitration is intended to be a seldom used procedure rather than a comprehensive code for the settlement of labour disputes, the decision to submit to arbitration should entail risk of uncertainty as well as costs.[97] A policy which makes arbitration more costly and introduces uncertainty as to the level of cost each party may have to bear may serve as a more effective deterrent since both the party which petitions for arbitration as well as the respondent may have to calculate and justify to their constituents the risks and costs which a decision to go to arbitration may entail. With the dispute travelling the whole range of impasse procedures the board will have ample information as to financial resources of the parties, movements in bargaining, delays, etc., in order to make an educated decision as to the distribution of costs.

F. The Administration of the Arbitration Procedure

It is recommended that serious consideration be given to the establishment of an independent bureau capable of providing the parties and the arbitration board with information and data analysis and of administering the arbitration procedure. The union and employer

96. A thesis for a narrow judicial review was presented in Mironi, "The Functional Approach to Judicial Oversight of Specialized Tribunals—A Case Study" (1977) 52 *N.Y.U. L. Rev.* 745.

97. Professors Chamberlain and Cullen suggested several extreme methods for increasing the costs and uncertainty which may be associated with invoking the arbitration procedures such as high service charge to be paid for the services of board members and selecting board members at random from the telephone directory. N. Chamberlain and D. Cullen, *The Labour Sector* (2nd ed. 1971) 599.

representatives as well as board members in our sample enthusiastically supported this suggestion. Yet experience with similar units such as the Pay Research Bureau in the Federal Public Service[98] consistently lead to the conclusion that the success of such unit requires a great deal of commitment on the part of the government, strong guarantees of its independence and allocation of sufficient resources. Considering the low level of interest arbitration activity in Alberta one may conclude that the cost of establishing and maintaining a specialized research and administration bureau for interest arbitration may outweigh its benefits.

The above policy recommendations should be read with two caveats. First, despite all the voluminous literature about interest arbitration it is still difficult to establish a reliable cause and effect relationship between changes in the design of the arbitration model and probable impact of such change on the usage of arbitration or on its acceptability. Second, the recommended changes may not be sufficient to effectuate the basic objectives of the interest arbitration procedure unless they are supplemented by broader changes in attitude toward and commitment to the arbitration procedure itself.[99] Compulsory arbitration like any other technique of dispute resolution is as good as the arbitration board and the protagonists want it to be. Its success is effected as much by parties' general attitudes towards and commitment to the arbitration procedure as by its structural design and administration.

98. The Pay Research Bureau's main function is to collect information on rates of pay and working conditions which prevail in the private and public sectors in Canada. The Bureau supplies information to federal public employers and bargaining agents engaged in labour contract negotiations. An advisory board made up of representatives of the Treasury Boards, employers and bargaining agents provide guidance to the Bureau in its data collection and analysis functions. Although the Bureau operates as a separate unit, it is part of the Public Service Staff Relations Board and its director reports directly to the Chairman of the Board. *See* Public Service Staff Relations Board, *The Pay Research Bureau* (1975); Gillespie, "Public Service Staff Relations Board" (1975) 30 *Rel. Ind.* 628.

99. The history of interest arbitration in the public service may serve as a case in point. When arbitration board members were asked to evaluate the presentations put forward by the parties, the Alberta Union of Provincial Employees and its predecessor, Civil Service Association of Alberta, consistently received the lowest score. Their representatives were also the least satisfied with the arbitration procedure operational components and rated the overall procedure as unacceptable. It appears as if the public service unions involved themselves in a "Catch-22" situation. Probably because of their lack of commitment to interest arbitration they were unwilling to invest major effort in preparation for arbitration and consequently were disappointed by the outcome of successive proceedings. In turn, their dissatisfaction with their experience and the feeling that they are unable to achieve their objectives through arbitration further reinforced their convictions and negative attitude toward the impasse procedure as a whole.