nomic hardship at the state and local levels in contrast to more prosperous periods.[24] Disputants now have a difficult time anticipating under what circumstances arbitrators are likely to give substantial weight to ability to pay arguments, and what data are likely to persuade the arbitrator. Arbitrators could probably benefit from such knowledge since they may not know how their analyses and decisions in the ability to pay area compare with those of other arbitrators.

As economic pressures on state and local governments become more acute, there may be pressures put on legislators to change interest arbitration statutes and to circumscribe the role of arbitrators by more clearly defining the statutory criteria and attaching specific weights to those criteria which arbitrators must follow in their decision making. Whether or not such changes are made, arbitrators will be called upon more and more to make difficult judgments about the financial condition of local government units. Whether or not this results in more frequent findings of inability to pay than occur today, arbitrators will be asked to evaluate whether the public's interests are served by ordering higher wages and benefits sought by public employee unions under increasingly adverse financial conditions faced by local government. Arbitrators will have to make decisions about the appropriate balance between fairness to public employees versus fairness to the public at large. As long as interest arbitration systems substitute for allowing public employees to strike, arbitrators will make value judgments about society's spending and taxation levels and priorities. Whether this is what they should be called upon to do is a philosophical question for others to answer.

II. CANADIAN EXPERIENCE: A UNION VIEWPOINT

FELICITY D. BRIGGS*

This paper is presented by a trade unionist who has been involved in collective bargaining by way of interest arbitration

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[24]Richard Lester states that in the period 1981–1983, "in some states there were complaints that, in making awards, insufficient weight was given to the criteria of ability to pay and the interests and welfare of the public. . . ." These were years of relative economic hardship for local government. The complaints cited were from New Jersey and Wisconsin. *See* Lester, *Lessons From Experience With Interest Arbitration in Nine Jurisdictions*, 41 Arb. J. 2, 33 (1986). *See also* Lester's complete study, *Labor Arbitration in State and Local Government* (Princeton: Princeton Univ. Indus. Rel. Sec., 1984).

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for almost 15 years. With respect to the issue of ability to pay, my views are based on that lengthy history and its direct impact on the bargaining units which I represent.

Background

Prior to considering the issue of ability to pay, we must contemplate the impact of interest arbitration on collective bargaining. When a government removes the right to strike from union members, those employees have been denied their most powerful and fundamental right. They no longer have access to the traditional method of dispute resolution. They are barred from the right to force their employer and the consumers of their services to realize the impact of a strike. It is hoped that elected officials take this step only after much deliberation and debate. Notwithstanding all good legislative intentions, the impact on the collective bargaining relationship is severe. The parties will never again (or indeed may never have had) the opportunity to settle their contract on the basis of their bargaining strength. Direct consequences of the marketplace on the parties will never truly be realized.

In the traditional strike/lockout situation, the parties are the real authors of their own destiny. As such, each party has a multitude of considerations to take into account. Employers look to their customers, clients, shareholders, or other constituents, and deliberate how long, if at all, they can withstand a shutdown of services. Unions also have considerations, such as their own financial resources, the possible damage to their public image, and their ability to orchestrate a successful strike.

To force the parties into a situation wherein none of the foregoing is important, let alone contemplated, is to seriously skew the usual collective bargaining relationship. To further tip the scales by legislatively imposing criteria upon which a neutral third party must base a decision is to further disadvantage the process. The legislation that bars strikes for the 45,000 members whom I represent was enacted in the late 1960s.[1] Immediately thereafter the unions' experience was that arbitral jurisprudence leaned heavily in favour of employers to the serious detriment of union members.

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[1]Hospital Labour Disputes Arbitrations Act, R.S.O. 1980 c. 205.

As a result, an industrial inquiry commission, chaired by D.L. Johnston (hereinafter referred to as the "Johnston Commission"), was established to examine the wages, salaries, and other benefits of hospital employees in Ontario. One of the Commission's objectives was to report to the Minister of Labour upon "the appropriate criteria which may be applied in the determination of compensation for employees engaged by Hospitals."[2]

An important conclusion and recommendation of the Johnston Commission was that: "Neither 'Government Guidelines' nor 'ability to pay' should be used by arbitrators as criteria for settling public hospital compensation."[3]

The Commission's conclusion and recommendations were based on the following reasoning:

> In our view, "Government guidelines" or "ability to pay" have no place as criteria for settling hospital compensation. Supporters of such criteria argue that, as ability to pay is a factor in private sector bargaining, it is also relevant in the (quasi) public sector. We consider the comparison invalid because the absence of "product" market forces of supply and demand in the public hospital sector and of the strike and lockout sanctions strips the ability to pay concept of any meaning it may have in the private sector.
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> We do not deny that public hospital expenditures in Ontario are subject to some upper limit. Furthermore, it is quite appropriate for the Ministry of Health to inform hospitals and their contract negotiators of estimated total government expenditures on public hospitals. However, such estimates should not be made public, should not be admissible as evidence to an arbitration tribunal and in no way should influence any settlement made by such a tribunal. Clearly, such influence might undermine application of the "external comparability" criterion. Furthermore, as long as employees have no access to the strike weapon to "test" ability to pay pressures, ceilings should not be imposed on them.[4]

Subsequent to the report of the Johnston Commission in 1974, Canadian arbitrators have placed little, if any, weight on the issue of ability to pay.

Arbitration Awards

One Ontario arbitrator in deciding a dispute regarding a nursing home stated:

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[2]Report of the Hospital Inquiry Commission (Ottawa: Ontario Ministry of Labour, 1974), at (c).
[3]*Id.* at 9.
[4]*Id.* at 34.

> The ability to pay criterion appears to be a test peculiar to the marketplace. It has little or no applicability in other areas. In regulated industries at least one of the main determinants of ability to pay—price—is not controlled by the laws of supply and demand but by regulatory agencies or boards. The machinery exists for the entire industry to pass on to the public cost increases occasioned by increases in wages and benefits. Take, for example, the case of railways . . . . As long as railway rates and services are controlled, there is no way to equate the appropriateness of the market for transportation services, because no such unfettered market exists. The same is true in the public sector of the economy.[5]

Another arbitrator determining an award at a general hospital which at the time set the provincial rates for nurses in the Province of Ontario stated:

> Public sector arbitrators have never paid much attention to arguments based upon "the ability to pay" of the public purse, not because they do not think that the public purse needs to be protected from excessive wage demands, but because the other factors which fashion the outcome of an arbitration are so much more trustworthy than the notional constraints of "ability to pay."
>
> The extraneous influences which may be applied to the resources available to the industrial hospital bound by the present arbitration are such that, either by manipulation or by sheer happenstance, those forces could render meaningless the entire negotiation and arbitration process if they were to be used as a significant basis for the outcome of collective bargaining. The decision as to whether a specific service should be offered in the public sector or not is an essentially political one, as is the provision of resources to pay for that service. Arbitrators have no part in that political process, but have a fundamentally different role to play, that of ensuring [that] the terms and conditions of employment in the public service are just and equitable.[6]

The rejection of the ability to pay argument is not peculiar to the health care industry or the province of Ontario. In an award involving the University of Toronto an arbitrator stated:

> Interest arbitrators in the Canadian public sector have, apparently, universally rejected the legitimacy of an "ability to pay" argument. They have not allowed governments as employers to hide behind their own skirts in their role as the source of funds, to escape pay increases indicated by other criteria. This has been so, even where, as in the Ontario hospital sector, the employing body and the funding body are legally and formally different. The accepted view is that to

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[5]*Komoka Nursing Home Ltd. & London & Dist. Bldg. Serv. Workers' Local 220* (Gorsky, 1975).

[6]*Kingston General Hosp. & Ontario Nurses' Ass'n* (Swan, 1979).

> allow government underfunding to justify the payment of substandard wages is to ask public sector employees to subsidize the rest of the community.[7]

In another dispute involving the education sector, it was stated by the arbitrator:

> The Government which supplies the greatest part of the income for this institution cannot expect it to continue a loss and to hold that out as a barrier to justifiable increases for the employees of the institution. While the ability to pay is a factor to be considered in many situations, it does not have the same force or effect in public institutions and is not a proper basis to restrict an arbitration which must be made on objective facts.[8]

Probably the most in-depth and analytical consideration of the issue of ability to pay was made by Owen Shime in the *B.C. Rail Company* award of 1976.[9] I understand he is also addressing this session. No doubt he will discuss his views in his paper and, assuming they have not changed, I concur.

There can be no doubt that Canadian jurisprudence supports the proposition that to allow ability to pay to be a relevant criterion virtually allows the government to determine the terms and conditions which will govern public sector employees by way of their own budgeting process. There is some American support for this approach to the issue. In *How Arbitration Works*,[10] it is stated that ability to pay is "a rather abstract if not academic concept, of little use as a standard in adjudication."

Need for Additional Criteria

I believe that one of the dangers in considering ability to pay as a determinant of wages for public sector employees is that arbitrators do not go deeply enough in considering the matter. The employer puts forward a financial statement showing the lack of available funds. Assuming that the statement is audited and supported by documentation, it is accepted and considered. However, in making a proper assessment, the board of arbitration must, in my view, go much further. It should have evidence of other factors, including the following:

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[7]*University of Toronto* (Innis, 1981).
[8]*Ryerson Polytechnical Inst.*, 4 L.A.C. (2d) 9 (Anderson).
[9]*British Columbia Rail Co.* (Shime, 1976).
[10]Elkouri and Elkouri, How Arbitration Works, 4th ed. (Washington: BNA Books, 1985).

1. a complete picture of the employer's tax base and other sources of revenue;
2. fiscal responsibility including spending, budgeting, revenue raising, and investing;
3. a filtering of the political elements contained in the financial agenda of the government; and
4. a comprehensive analysis of the existing managerial practices, both short term and long term.

An employer must provide a convincing case on all these factors in order to make an initial case on ability to pay. Although unions have the right to challenge the employer's evidence, they are effectively prevented from doing so because they are not privy to the information needed on such broad and confidential questions. Even if an initial case has been made by the employer, the onus does not necessarily shift to the union. The question remains whether ability to pay is an appropriate criterion.

No Flip Side

The most visible inequity to the ability to pay argument from the union point of view is that there is no "flip side." In periods of solid economic growth and budgetary surplus, the union rarely succeeds in more substantive wage increases. A review by an arbitrator of historical increases in times of economic growth would confirm this.

To illustrate my point, consider another criterion that is often relied upon by the parties and boards of arbitration in deciding wage increases, that is, comparability with other workers in similar or identical jobs. Where workers can show that they have been unable to maintain or achieve a wage level comparable to their appropriate counterparts, boards of arbitration have been persuaded that significant increases are needed to correct the imbalance. However, where workers have not been able to rely on comparisons with other workers to buttress their arguments for wage increases, boards of arbitration have been reluctant to award increases which would have the effect of making this group of workers leaders in the industry.

Comparability as a criterion is a two-way street. Not so with the issue of ability to pay. It is a one-way street used exclusively by the employer to the detriment of the union.

The Ability to Pay Bargain

Proponents of the ability to pay issue argue that this criterion is taken into account in the private sector and therefore is prop-

erly to be considered in the public sector. I do not disagree that ability to pay is a component of private sector collective bargaining. There are occasions in the private sector where the financial position of a business may be the only relevant consideration. The impact of hard times is apparent and is reflected at the negotiating table. In those situations, unions have agreed to wage freezes and even concessions.

There are several possible reasons for these agreements, including the following:

1. A short-term comprehensive plan is developed between the union and the employer to ensure survival through the difficult period. If the business does not survive, it will be apparent in a relatively short period of time.
2. The agreement is voluntary and is undoubtedly based on the promise that when good times return, so will the employees' lost wages.
3. The same parties will negotiate the next collective agreement, and if the employer does not remember the promise, the union has the ability to strike in an effort to remind the employer of its obligations.

Now let's consider the public sector. The employer who puts ability to pay forward as an issue reminds those of us in public sector unions of that great negotiator of all times—Wimpey. He is, of course, Popeye's friend who states, "I'll gladly pay you Tuesday for a hamburger today." Even children see through Wimpey's intentions. He'll never pay. Based on the "Wimpey philosophy," I would urge a board of arbitration to reject ability to pay as a criterion because:

1. "Tuesday," if it ever arrives, is in all likelihood past the period for which the board has a mandate; therefore the board is not capable of fulfilling both sides of the bargain.
2. Prior to the arrival of "Tuesday," there could easily be a change in government so that the new government may not be prepared to honour a promise of "Tuesday" that was made by someone else.
3. There may be different budgetary priorities, ensuring that "Tuesday" must be postponed for an indefinite period.
4. There is never consideration—legal, moral, or otherwise—given by the employer that when "Tuesday" does indeed arrive, the employees will be paid what is owing.

The short period of the board's mandate is a matter which should be considered in more depth. Most boards of arbitration

have jurisdiction to deal with a two or three year period. In the total scheme of things this is a very short period of time. The board can look to the past history of the parties, if presented, but has no way of knowing what the future holds. Boards have frequently lamented their short-term involvement in addressing changes to a long-term relationship.

Do people use ability to pay in their most important financial decision? To illustrate this, consider a matter that we all deal with at some point. Most people in this room have probably bought, or at least considered buying, their own principal residence. Inevitably, people purchase houses which cost many times more than their yearly incomes. Looking at this logically and in the short term, it does not make economic sense. The large down payment is followed by monthly payments which are, to a great extent, just covering the interest. In addition, there are taxes and maintenance. It is far cheaper to rent the same house.

Given the foregoing, why do we all participate? The answer is simple—because we know it's one of the best investments we can make. However, in order to appreciate that fully, we have to look past the short term. Arbitrators deciding the wages of public sector employees don't have that luxury.

Conclusion

I am delighted to report, as a trade unionist who has seen literally hundreds of interest arbitration awards for the members I represent, that the overwhelming majority of arbitrators are of one mind. Ability to pay is not a relevant criterion to be applied in interest arbitration.