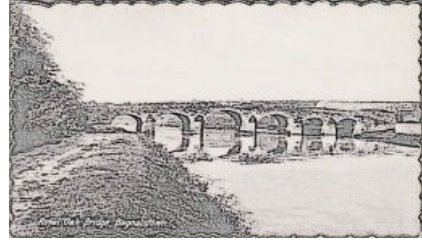


Oakbridges - Labour Relations Strategists

“White Paper Report on Professional Unions in Canada”



A Collective Bargaining Model For Professionals: There Has to Be a Better Way.

By: Hugh Secord and Sue Mackintosh

Summary

There has to be a better way to achieve the multiple goals of maintaining professional standards, societal good and collective “voice” and rights. This article explores the challenges facing professionals such as engineers, teachers and healthcare workers under their current collective agreement arrangements and describes a path to better way.

Introduction

When I was a Grade 13 student in Toronto the Teachers went on strike. The walk-out lasted long enough that at times it appeared to threaten the completion of the school year. Lucky for me it didn't, but for some of my class mates the year was lost and for some their aspirations were permanently sidetracked (they ended up deciding against moving forward with post-secondary education and settling for something else). No doubt the experience shaped some of my views as a labour relations practitioner.

Years later I have had the experience of having to worry on several occasions how labour disputes in the education system have threatened to have an adverse impact on the school experiences for my children. Yet at the same time I have respect for the collective bargaining regime and the right for workers to strike. The dissonance for me occurs because with respect to teachers and other professionals I simply do not see the current systems as being consistent with the notion of being a professional. There has to be a better way.

The solution is not to deny teachers or other professionals the right to a collective voice. Rather, there is a better model that can be built on the unique characteristics of being

professionals first and members of a union second. The current system is not working. The image of professionals “fighting in the streets” and issuing “threats” against each other and their employers does not demonstrate professionalism. I have a great deal of respect for people who answer a calling to teach. Equally one cannot help but admire the people who sacrifice a great deal of time and effort to become lawyers, doctors, nurses, engineers and other professionals. I believe with a little imagination and a lot of hard work, and keeping within the Canadian traditions, we can find a unique arrangement that allows professionals to have a collective voice while at the same time preserving their dignity, decorum and “professionalism”.

I have written the following paper along with my colleague Sue Mackintosh as an exploration of the possibilities professionals in unions could contemplate to make their system of collective bargaining better and to restore their sense of professionalism.

Professionalism

When one thinks of the term “professional” a few concepts come to mind that seem at odds with the norms associated with collective bargaining. This is not to suggest that unions or their members are somehow inferior to others who have chosen to pursue professional fields. However, it is fair to acknowledge that individual professions are governed by unique standards of conduct and performance that are different than the standards expected in industrial settings of the average worker.

While the term “professional” can hold many meanings it typically evokes the notion of well-educated, salaried workers who enjoy considerable work autonomy and are commonly engaged in creative and intellectually challenging work. People are typically attracted to a profession because of the intrinsic value of the work itself - it is a calling.

Doctors are attracted to medicine because they want to heal people or perhaps because they want to find the next important cure. Architects want to design important buildings. Engineers want to be part of creating new machines, processes or structures. Teachers want to teach the next generation. The intrinsic value of the work itself is usually the prime driver that brings people into any given profession.

Typically people are attracted to unions, in part, because they feel a degree of alienation from their work. It seems odd therefore that teachers, health professionals and engineers would be attracted to joining a union. These professions are however uniquely subject to regulations and government imposed restrictions. While some professionals enjoy “free agency”, others operate in industries that are regulated by necessity. Teachers and health professionals work in the public sector so there are restrictions needed to contain costs and accommodate public policy considerations. These directly have an impact on groups of professionals who understandably want a say in how they are treated.

An interesting historical example of professionals joining unions is the Engineers and other “white collar” workers employed by the companies that once formed Ontario Hydro. Despite the general rule that engineers are exempt from belonging to unions the provincial government saw fit to allow these particular groups to form the Society of Energy Professionals. The rationale for this decision seems to be as described above. In the absence of true “free agency” in a regulated environment, the legislators granted certain professionals the right to bargain collectively and in some cases the corresponding right to strike.

So while collective bargaining and “professionalism” seem at odds we can understand where professionals are restricted from enjoying all the rights and privileges they might have in a free market, the right to join a union is a reasonable compromise. However, the collective bargaining system is complex.

The long term impact of belonging to unions on the professionals themselves is very significant and not well understood. Consider that in the vast majority of cases the professionals work in “essential services” and therefore it would be foolhardy to grant them the right to strike. Hence professionals in unions often face the prospect of interest arbitration in lieu of the right to a strike or lockout. While there are not any viable alternatives to this interest arbitration system, it is flawed. We believe there are ways to improve it. The point we are raising here is that the system does not allow for the full expression of a collective voice and in too many instances the actual “agreements” are being imposed by third parties who may not be applying the appropriate rationale or standards the professions ought to be demanding.

We recognize a need to be cautious about how the points to this argument are made. It is not a matter of a teacher being better than a welder or an engineer being more important than a line worker. One distinction is that professionals are governed by their own set of guidelines which include ethical and moral standards. Industrial workers belonging to unions are governed by the rules established by their employers and by the rules of law established through labour jurisprudence. To be clear, where an employer's demands or rules are at odds with a professional's code, the code takes precedence. Otherwise the individual is at risk of losing her status as a professional. If a welder's work fails to live up to an industrial standard he may be subject to discipline in contrast a lawyer who fails to exercise due care in handling a case, may be disbarred and never be able to practice again, anywhere.

Professionals operating in a free agency markets have to compete for work on their merits. The fees they command are solely dependent on their individual skills. This has two potential implications for the consumer of professional services. In the case of teachers in some free markets we see their wages being undervalued compared to other occupations. This may be due to a supply and demand issue or some other systematic market forces. However, in Canada we recognize the value of teachers and fortunately they are able to command respectable salaries. On the other end of the

spectrum, doctors who are specialized and highly skilled can command huge fees in a free market. This puts the best health care out of reach for many people. Again, in Canada we have recognized that this does not serve us well in the aggregate. By regulating these two examples of professions we are attempting to correct market forces to ensure public policy objectives are being met.

As an aside we know that in unregulated professions such as the architecture and law professions there is a wide range of practitioners who charge whatever the market will bear. So individuals can have access to affordable lawyers at one end of the continuum while those who have a lot of money can afford to pay superstar lawyers to defend their interests. Hiring architects or lawyers are not considered essential in the same way doctors and teachers are, so there is less need to regulate these professions.

Where there is a significant public policy concern we have developed a regulatory regime to control market forces. It makes perfect sense that where there is a monopsony (a single buyer of services) controlling prices there should be an allowance for a countervailing force to maintain an appropriate balance of interests. Where the government has unilateral authority to set salaries (example doctors' fees) a bargaining model essentially restores that balance of interests and in theory should yield a fair result. The efficacy of such a system demands a level of maturation in the bargaining relationship and an environment of trust that we have not quite achieved in some cases. This does not mean that we should abandon the system altogether. Rather we need to seek ways to improve it.

While our analysis of what is wrong with collective bargaining amongst certain professions may be inherently biased based on our experiences, we feel it is important to challenge some of the elements in the system in order to spur a dialogue with respect to where solutions may lie. Below we outline some of these areas that in our view are areas of opportunity.

Challenges to the Collective Bargaining Regime Amongst Professional Groups

Seniority vs Merit

In a collective bargaining regime seniority takes precedence and regardless of the structure of the language in a given agreement, merit and skill become secondary or tertiary concerns. Seniority is a basic union tenet but does not have a place in the professional world. The ability to advance the "best and brightest" not only serves the employer of professionals well, it acts as an incentive to others within the profession to strive for the same level of proficiency. Importantly professionals learn from each other. An underlying goal of every professional is, or ought to be, to further the interests and collective knowledge of the profession.

In a setting where advancement is governed in part by a seniority system there is bound to be some impact on the performance of some individuals who will "coast". Moreover, the seniority system can act as a barrier to entry for others from outside a given institution. People who have significant personal achievements are unlikely to want to join any organization where they have to start from the bottom in any respect. On the flip side individuals become increasingly reluctant to leave an organization, even when unhappy, due to benefits tied to seniority. Instead they may "quit and stay". While these observations may be overgeneralized it is clear that seniority based systems can have a negative effect on performance and serve as barriers to entry and flow.

There are some ways to correct for this in the current regimen but they require a significant effort on management's part and also tend to meet with resistance from unions. So in professional settings we are suggesting that eliminating seniority based provisions is a sound solution to some inherent problems. That is not to suggest that other service-based benefits should also be abandoned. Any good employer is going to recognize the value of long service and find ways to reward those people it is able to retain.

This devolution of a merit system is furthered by classification systems that dictate how much an individual will be paid. Unfortunately many of these systems are nothing more than time-in-position progressions that have little relation to merit. Others offer pay increments for the development of a specific skill (i.e. taking additional courses) but these also substitute merit by suggesting the acquisition of credentials is a reflection of applied skills. These skilled-based systems are not good substitutes for merit and rarely, if ever, work.

The counter argument is that in merit-based systems there is a high degree of subjectivity that lends such systems to abuses and favouritism. It is reasonable for people to be apprehensive about the potential for the misuse of a purely merit based system. Unfortunately the reality is that there simply is not enough trust between professional employees and the management of the organizations that employ them. This is not going to be an easy nut to crack. The first challenge is for both sides to realize that they have a common interest in ensuring professionals are rewarded for excellence.

Management and Supervision

The reality is that there are abuses of merit based systems. At the risk of yet another generalization, the essential problem is the lack of sophisticated management practices. Unions and labour relations practitioners share one important thing in common - they both rely on bad management to justify their existence. Kidding aside in order to fix the system there has to not only be active participation from management, there has to be an open acknowledgement that management has contributed to the problems with the current system.

There are several reasons for this. One of the prime reasons is that we simply do not pay enough attention to giving supervisors and managers the requisite skills to do their jobs well. Organizations that do develop strong managers reap tremendous benefits. However, it seems apparent that in the public sector where professionals perpetuate and support union representation there is a deficit in managerial competencies.

Another one of the reasons for this (and it is a reason that is also commonly found in the private sector) is that managers are typically recruited from the rank and file. Rather than having small “p” professional managers we have “Professionals” becoming managers and they are often ill-equipped to handle the responsibilities. The competencies that make someone a very good engineer or a great teacher are not the same as the skills necessary to be a good manager. In fact promoting the best “worker” into the ranks of “boss” is typically a bad decision. The best professionals are self-motivated and hold high standards for themselves and while others may be motivated to follow, they made it on their own so see little need to nurture others.

From another angle, and this is accentuated in the professions, there is a long standing practice of promoting from within which results in teachers managing teachers, faculty managing faculty, engineers managing engineers etc.. Regardless of the affiliation there is a natural tendency to protect one’s own. In the trades (and perhaps now in lore) the apprentice who earns his stripes had to journey to another place of employment (hence “journeyman”) in order to escape the perception that he was a learner. Front line supervisors often go through the difficult transition of no longer being one of the guys or gals. It is no different in the professions. The transition from worker to boss is difficult and requires some separation from the past.

Even when there are “management capable” professionals in the ranks who could overcome these challenges, often there is a barrier to considering promotion due to the fear of giving up seniority rights, union benefits and protections and additionally the decision often requires going against an established culture which openly rejects and disrespects management. You would be seen to be joining “them” in the us and them rhetoric.

When we look at all these factors, and there are many more we have a recipe for distrust. The ultimate solution is complex it requires innovative thinking, investment in management and supervisor training and strong supporting systems.

Resolving Grievances – Rights Arbitration

Professionals are subject to strict codes of conduct enshrining rigorous moral and ethical standards. We place a great deal of trust in professionals. We trust teachers to keep our kids safe, we trust doctors and nurses to make us well, we trust engineers to build things that will last and that will bring no harm. But our trust in these professionals is waning. Recently a Nova Scotia teacher, convicted of indecent acts that are not worth

repeating here, was reinstated by an arbitrator. Public outcry from parents forced the school board to come to a settlement to ensure he never taught again - at a significant cost. Why has the system failed?

It is because in a collective bargaining regime the rights enshrined in the collective agreement take precedence over the codes of conduct of the profession. Unions feel compelled to defend people despite their misdeeds (remember in this case these weren't allegations, the individual was a convicted sex-offender). There is clearly a mismatch in the system here, and again the result is an erosion of the notion of professionalism.

It is in the interests of the professionals to re-examine the current rights arbitration process and a solution is to develop something that mirrors the process and also enshrines the professional code of ethics and moral standards as a core value that must be preserved above all else.

Strike or Lockout or Interest Arbitration?

The biggest problem we have identified is with respect to governance. Who is running the show anyways? Is it the professionals? Is it the employers? Is it the government? In private sector bargaining, 98%+ of negotiations end in a settlement without a hint of work disruption. We have heard arguments that in times of economic difficulty it is easier for private organizations to negotiate because their employees and the unions that represent them understand fiscal responsibility. This is nonsense.

One of the inherent problems with most professional union situations is that there is an overarching political tone that governs the relationship between professionals both due to their public sector employers and or public status as professionals. The actual employers are not always the ones who will call the ultimate shots. Intervention from the political masters is a constant threat to the system and as such the unions play to the politicians and the public to the detriment of the actual employer. Sadly the professional employee's voice is lost.

Many professional collective agreements, especially any essential service, have no right to strike. If bargaining reaches an impasse the matter goes before an arbitrator who will award a binding settlement. This process is called Interest Arbitration. As we mentioned above, the system of third party interest arbitration is flawed. Arbitrators, who fancy themselves as social architects, apply their own thoughts and opinions into the process and can have uniquely powerful impact. From the employer point of view interest arbitration has proven to create agreements that over time are in excess of what might have been achieved in free collective bargaining. While this may appear to therefore favour the unions it in fact devalues the negotiating process. In fact collective bargaining in these professional sectors seems to be prolonged, acrimonious and dissatisfying. Why? Because both sides can abdicate the bargaining process and take the easy route and send matters to an arbitrator. Under the more common strike /

lockout scenario there is constant threat. Yes this does cause tension but it can be harnessed as positive creative tension and can and does result in a deal 98% of the time and often with innovative outcomes. Arbitrated settlements typically cut the money demands down the middle and divide up the outstanding issues with “gives” to each side. The arbitrator is limited to working with only the outstanding issues and cannot re-package or introduce new ideas or approaches. These settlements are therefore not innovative and are often lose-lose outcomes.

Entitlement Cultures

Finally, the proof that the current construct of Professional unions is flawed is the strong evidence of what human resources practitioners call a “culture of entitlement”. The evolution of such a culture is complex. One would expect professionals to be highly engaged workers in their chosen fields. Attitudes of entitlement further denigrate the image of professionalism.

In the 2012 labour dispute between teachers and the Province of Ontario the teachers not only withdrew their discretionary effort (coaching sports teams and supervising other extracurricular activities), they threatened to withhold this work for the term of the collective agreement. This is exactly the type of bargaining behaviour that alienates important stakeholders like the students and parents. In the public’s eye teachers are seen as “labour” rather than as “professionals”. That cannot be in the interests of teachers. Not only should they be concerned about the perceptions of students and parents but they should reflect on their own professional and self-perceptions. Are they participating in extracurricular activities because those activities are part of what defines them as professionals or are they participating in those activities as a bargaining chip?

A Different Model

In any analysis of a particular group of actors there is a necessary tendency to generalize in order to make a point. There is a better way; but first there needs to be a breaking down of some barriers. The most significant one is the lack of trust and that will take effort on both sides to fix. There is a perception that there simply is an unwillingness to change on all sides of the table. From the outside looking in, the perception is that the politics, including interference from people who are not familiar with labour relations but occupy positions of power and influence, are too overwhelming to overcome. Finally even if you can see solutions if there is no will to make the necessary changes, there is a tendency to maintain the status quo. Without the desire to change especially by the professionals themselves, any efforts to suggest alternative models will simply fall on deaf ears.

So how does one change a system that seems so horribly wrong?

Let's start with the premise that we have two rational parties willing to come to an efficient agreement that optimizes their utility (in other words let's ignore the politics for argument sake and assume everyone wants a better system). While professional unionized groups represent a small niche within the overall marketplace it is an important one and it is worth exploring. Solutions may be forthcoming precisely because professionals are capable of potential for out-of-the-box thinking. Additionally it could prove the transactional value of having representation. It is very much in the wider public interest to find a different path.

So, without articulating a full strategic plan, we'd like to introduce some thoughts on how two rational players in this space can develop a different model that will restore professionalism, trust and respect into the equation. It is a big challenge. There is no single solution that will revolutionize how professionals should exercise their collective voices but we believe that lessons can be taken from a variety of sources and merged into a unique solution. Let's look at some specific examples.

In professional sports collective bargaining has become the norm. Recent disputes have been essentially about controlling the behaviour of owners competing for talent rather than what the public perceives as an effort to control greedy players. Regardless of the current dispute in the NHL, what works in professional sports is the fact that the collective agreement ultimately merely establishes certain minimum standards and processes for grievances and appeals. Individuals are free, within the constraints of the collective agreement to negotiate deals based on their individual merits as players.

Shouldn't individual teachers, doctors, nurses and engineers who excel at their profession be afforded the opportunity to negotiate for more than their peers? Shouldn't the stars be permitted to shine? Shouldn't the pay progressions be based on merit regardless of seniority?

The idea is to introduce a system that creates incentives for individuals to excel and advance the profession. Those who want a free ride will need to languish at the lower end of the scale to allow the people who answered a calling and who are exemplary to flourish. While we won't suggest the precise design of such a system here, the challenge to the professional groups is to enter into a dialogue that does not preserve the status quo but challenges the standards of performance while maintaining the right to a collective voice.

If a professional group ever established this type of free agency model then there would need to be a rethinking of other aspects of the collective bargaining model. Seniority provisions would give way to service based protections for pensions, benefits and severance. Classification systems would be stripped down. Compression issues between distinct classes of employees would be corrected. The rework of the system is a tall order but the goal is important, to re-establish the sense of professionalism.

One of the flaws of the sports model is that like other agreements in the “professions” the collective agreements have grown to be large legally complex documents focused on providing prescriptive clauses to meet numerous potential contingencies. This is something that needs to be avoided. In the professions, conduct and behaviour is generally guided by a set of principles and ethical standards and these need to be enshrined as guiding principles. The approach should be used to construct the collective agreements. It should then inform many things such as staffing decisions, performance expectations and dispute resolutions.

In addition to bargaining individual deals the collective bargaining scheme for professionals should preserve the spirit and intent of self-regulation. Third party arbitrators making decisions based on the wider industrial norms do not serve professionals well. Protecting someone who ignores the professional code of conduct or behaves unethically erodes the public perceptions of the group’s professionalism. Surely an alternate system can be established wherein the professional standards become the basis for passing judgments. It does not serve any profession well for the public to perceive “You can’t be fired no matter what you do!” The point being that it is in the profession’s interests to ensure that you can be fired if you do not live up to the core values and ethical standards established by your professional associations and peers.

One can only believe that the image of teachers as a professional group would have been enhanced if they had barred the sex-offender in Nova Scotia from their ranks rather than being forced to do the right thing by public opinion and political pressure.

We need to consider how interest disputes could be resolved in a system that is more descriptive and principled than it is prescriptive. It is very clear that the rights dispute process has to be corrected in order to introduce true professional standards into the equation. The same holds true on the interest disputes side.

Strikes, walkouts, protests, work-to-rule campaigns all reduce the public perception of the professional. Yet the current alternative, systems of interest arbitration, are not favoured by either side. Again part of the problem is the introduction of third parties who apply external standards and norms to circumstances that demand unique and innovative perspectives. Surely given the collective intellectual horsepower of the parties, a better system can be developed. Part of the process in developing a better system should be the establishment of guidelines and principles that govern how interest arbitrators must make determinations. Certain governing rules could be established such as an agreed upon formulaic approach that considers market conditions and other constraints to arrive at a settlement.

Engineers in a given company could work with their employer and their union for example to establish an agreed upon set of market comparators as reference points and agree to the relative position the engineers working for that given employer should

occupy in terms of total compensation. These could then serve as parameters for compensation arrangements.

A Challenge to Professionals

There does not seem to be much concern from the unions or employers about the system. Despite the obvious inherent flaws the parties do not seem to be motivated to change (or perhaps they simply are so distrustful that they are unwilling to engage in a true dialogue with the “other side”, or perhaps they need a strategist to help them figure out the path and build the bridges). We believe that the vast majority of professionals represented by unions, be they teachers, engineers or health professionals want a better way. As members of unions they have the right to voice their displeasure and demand changes. As members of professions they have an obligation to restore their pride in being professional.