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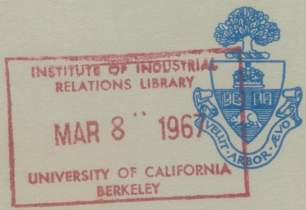
COLLECTIVE BARGAINING AND THE PROFESSIONAL EMPLOYEE

Conference Proceedings
December 15-17, 1965



CENTRE FOR INDUSTRIAL RELATIONS
UNIVERSITY OF TORONTO

Collective Bargaining and the Professional Employee

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JOHN H. G. CRISPO
EDITOR

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FOREWORD

IN its more traditional form collective bargaining in North America has not spread far beyond the blue collar work force. Most white collar workers have shunned the process. Similarly, professionals—whether employed or not—have usually denied any affinity to collective bargaining, even when engaging on their own in some kind of collective economic action, such as fee-setting.

But times are changing. Only recently, for example, the Canadian Medical Association announced a full-scale study of the appropriateness of collective bargaining in the medical profession. Concern about pre-paid medical plans of one kind or another has apparently prompted this interest. In many other professions, such as nursing and engineering, it is the increasing trend towards paid employment which has doubtless provided the spark. Regardless of the cause, more and more professional employees are showing an interest in collective bargaining.

Of course this is not a universal trait. In many professions absolutely no interest has been shown. Lawyers, for example, are quite aloof. In other professions, such as accountancy, only a small minority have revealed any concern. In still other cases the question is being hotly debated within the ranks of the profession. This is especially true in the engineering profession at this time. In a few professions the debate has ended and the right to bargain collectively is being vigorously pursued or practiced. Prominent examples include the nursing and teaching professions.

Collective bargaining by professionals does indeed raise many questions, not the least of which is what we mean by a professional. Central to the issues involved, however, is the question of whether collective bargaining poses an undue threat to the individualism which is so essential to any professional calling.

To explore such issues we convened the Conference of which these Proceedings are a record. Held in December, under the title of "Collective Bargaining and the Professional

Employee", the Conference attracted over 250 participants from a wide range of professional and other groups.

The Proceedings include the addresses of the major speakers and the remarks of the session chairmen and panelists. Allowance must be made for the fact that some of the addresses were prepared in advance, while others were delivered quite informally from notes.

The order of presentation here is the same as it was at the Conference. The opening paper was delivered by Professor A. W. R. Carrothers, Dean of the Faculty of Law at the University of Western Ontario. It provided an overview of the various facets of the subject matter before the Conference, and was fittingly entitled "Collective Bargaining and the Professional Employee."

The next session was devoted to the "Arguments For and Against Collective Bargaining by Professionals", and accordingly featured a review of the pros and cons involved. The session was chaired by Professor Ralph Presgrave of the School of Business at the University of Toronto. On the affirmative side of the issue was Professor M. R. MacGuigan of the Faculty of Law at the University of Toronto, while on the negative side was Mr. John H. Fox, who addressed the Conference in his capacity as a past-president of the Association of Professional Engineers of Ontario. Acting as discussants were Mr. William Dodge, Executive Vice-President of the Canadian Labour Congress, and Mr. D. Alan Page, Director of Personnel for The Goodyear Tire and Rubber Company of Canada, Limited.

The third session dealt with "Current Collective Bargaining Practices in the World of the Professions". It revealed the tremendous range of attitudes and practices which exist among the professions that were represented on the panel, let alone those that were not. The panel members were: Mr. L. W. C. S. Barnes, Executive Director of the Professional Institute of the Public Service of Canada; Mr. E. G. Phillips, Chairman of the Steering Committee for Negotiation Rights for Professional Staff; Mr. I. M. Robb, General Secretary of the Ontario Secondary School Teachers' Federation; Mr. L. C. Sentance, Executive

Director of the Association of Professional Engineers of Ontario; Mr. L. B. Sharpe, Director of Employment Relations of the Registered Nurses Association of Ontario; and Dr. J. Percy Smith, Executive Secretary of the Canadian Association of University Teachers.

The Banquet Speaker was Professor Jean-Réal Cardin, the Director of the Department of Industrial Relations at Laval University. He delivered a paper on "Collective Bargaining and the Professional Employee in Quebec", where the professions are obviously in more of a ferment on this subject than they are anywhere else in North America.

At the final session of the Conference the panel explored the topic: "Problems and Pitfalls from a Legal Point of View" and brought out some of the peculiar legal problems that are associated with bargaining by professional employees. The panelists were: Professor H. W. Arthurs, Professor of Law at the Osgoode Hall Law School; Mr. Pierre Verge, a graduate law student at the University of Toronto; Mr. John H. Osler, Q.C., and Mr. George D. Finlayson, Q.C.

Winding up the proceedings is a concluding statement which was made by myself in my capacity as General Chairman of the Conference. In this statement I endeavoured to summarize the highlights of the Conference without drawing any hard and fast conclusions about the many controversial points which were aired.

I am indebted to those who participated in the Conference for taking the time to edit their remarks for the purpose of these Proceedings.

Their task and mine was made easier by the preliminary editing work that was done by Miss Carol Johnson and Mr. Dan Ondrack. Miss Johnson also bore the burden of the secretarial work that was required.

JOHN H. G. CRISPO,
Director,
Centre for Industrial Relations.

January, 1966.

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Collective Bargaining and the Professional Employee

PROFESSOR A. W. R. CARROTHERS,
Dean of the Faculty of Law, University of Western Ontario.

AMONG Dr. Crispo's many natural gifts is a remarkable talent for devising a simple title for a complicated question. At the Founding Conference of the Centre for Industrial Relations held last October we were invited to consider challenges and responses in industrial relations, and at the end of three days it was the audience, not the subject, that was exhausted. Tonight we are embarking on a similar venture in the direction of collective bargaining and the professional employee. The waters between the point of departure and the point of landing can be treacherous even for the alert sailor, and as aids to navigation I have chosen to break the subject down into four questions. I do not claim that they are beacons of light, but if they sound a bell or two they may at least help more observant navigators than I to tell us over the next two days where we are from time to time.

The ultimate and most interesting question asked of this conference, as implied in the conference title, is whether professionals should engage in collective bargaining. It would seem important to determine at the outset a common meaning for the term "professional". But there is a wide range of interests represented both among the conference participants and in the audience, to whom the word professional has different shades of meaning. I therefore ask myself what is it that concerns people when they raise the

question of collective bargaining for professionals, and I conclude that there are three major issues that come up at some point of time and within some segment of society that claims the privilege of denoting itself by the term professional. First, is it or should it be considered to be unethical from a professional point of view to engage in collective bargaining? Second, is there a moral question respecting the invocation of the sanction of the work stoppage, apart from the specific and sometimes dogmatic question of professional ethics? And third, is collective bargaining for professional employees worth the cost?

To prepare a base for discussing these issues I shall ask three preliminary questions. First, what is collective bargaining? I feel slightly apologetic for raising this question before an audience composed of many persons who can answer the question better than I, but my excuse is that it may be useful to start from a common understanding of concepts and first principles, and some of you at least may be mildly curious to know what I think those concepts and first principles are.

The second preliminary question is what is a professional employee, in the context of the subject matter of collective bargaining? This question is largely a matter of definition, but it cannot be dismissed lightly. I shall try to provide a common ground for the many interests represented in the audience by examining the meaning of professional employee from the point of view first of the status of the professional and second of the public interest in the performance of services.

The third question is what legislative obstacles to collective bargaining face professional employees? This is largely a matter of describing the present law, insofar as it can be set down in a brief and non-technical way.

Ultimately I tender a short conclusion which is designed to offer the subject back to the audience and the participants for care and feeding during the remainder of the conference.

I think I should observe at this point that a number of accidents are involved in the fact that you are obliged to

listen to me tonight. The first I suppose is the fact that I was available. Secondly, regarding myself, as I do, as a buff in the field of industrial relations, as a curious amateur in the observance and analysis of other people's problems, I was happy to acept Dr. Crispo's invitation. But thirdly, and more immediately, I was rash enough to give a paper last June to the Engineering Institute of Canada on Collective Bargaining and the Engineering Profession. Odd parts of this paper are extracted from that address, and I thought I should tell you now that I do not propose to bore you by signaling when I am quoting myself. It is a narcissistic practice that doesn't bear advertising, and I excuse it on the ground that where a formula of words conveys the meaning which I intend there seems to be no gain in changing the formula.

May I turn to the first question, what is collective bargaining?

Historically trade unions have sought to serve the interests of their members by three means. When the modern trade union began to emerge some two hundred years ago, its major function was that of a benevolent society which sought to serve the needs of its members through internal arrangements. It soon sought to tend to the standard of life of its members through a manipulation of the labour market in the form of negotiating as a controlled group with employers over terms and conditions of employment. When the legal framework of this kind of activity proved to be highly restrictive, unions embarked on a program of political activity. This triumvirate of methods has led the labour movement in different directions in different English speaking countries. For instance in the United Kingdom the Trade Union Congress has an obvious political function in respect of the Labour Party, and the unions that compose the Congress have an obvious collective bargaining function as well. This function is as applicable to the fields of nationalized industries and services and the public service in general as it is to private enterprise, although collective bargaining in that country originated in the latter sector. In the United States the process of collective bargaining is

much more specifically tied to the private sector. The rationale of collective bargaining in that country may be described in these terms: a nation that embraces in a general sense the political, economic and social policies of private enterprise and private ownership of property may expect, in the long run, through the force of organized labour countervailing against the prevailing economic power of management of private enterprise, to obtain results most consistent with and favourable to the maintenance of those policies. The Canadian picture is not quite so obvious. The political position of organized labour is somewhat ambivalent, and although the general role of collective bargaining as an instrument of social justice in the context of private enterprise may clearly be asserted as a valid characteristic of the process, the law with respect to the applicability of collective bargaining to the public sector may fairly be described as a dog's breakfast. This quality in the law provides in large measure the reason why it is difficult to be brief in seeking to keynote a conference on collective bargaining and the professional employee.

Basing the concept of collective bargaining on the policy of countervailing power in the fields of both private and public enterprise, certain characteristics can be ascribed to the process in general. From the point of view of employees, an effective system of collective bargaining requires that employees be free to engage in three kinds of activity: to form themselves into associations, to engage employers in bargaining with the associations, and to invoke meaningful economic sanctions in support of the bargaining. Association and negotiation are twin footings on which the structure of collective bargaining is raised. The employee, treating with his employer concerning terms under which he is to sell his services, is, individually, at an incompensable disadvantage. Where the process of production displays a high capacity for substituting one person for another, or one job function for another, and where the economy is operating at a level short of full employment, most individual workmen must take terms offered or go without. The person who possesses talents in short supply and in

high demand is rare. The object of employee combination is to control the supply of and hence the market for labour, with a view to obtaining more favourable terms and conditions of employment. The laws of supply and demand respecting the exchange of labour services do not work with the speed or objectivity that they do, for instance, in areas of securities and exchange and the money market. Negotiation is the procedure by which competing economic forces communicate and arrive at a nexus of settlement.

To establish freedom of association the collective bargaining statutes in Canada declare a right in employees to belong to unions and prohibit employer influence in the organization and operation of employees' associations. The legislation provides also for exclusive bargaining privileges based on the policies of freedom of choice and majority rule. As to the union's claim to engage the employer in bargaining, the legislation imposes a duty to bargain and provides conciliation services to foster agreement. As to the union's freedom to invoke meaningful economic sanctions in support of the bargaining where conciliation fails, the Legislatures leave the field to the common and civil law of striking, picketing and boycotting. The strike is an empty sanction if the employer is able to replace strikers and to continue to produce and market as before: the whole object of controlling the supply of labour is lost. Combinations of employees, therefore, support the sanction of the strike by seeking to halt production and to cut off markets. The process is the picket, which in its essential nature is an act of persuasion. The object is the boycott, which may have basically, three goals: to persuade persons not to go to work for the employer, to persuade persons not to supply goods used in the employer's production, and to persuade persons not to handle, consume or otherwise deal in the product of the employer.

If these, then, are the three freedoms of employees in collective bargaining, what are the reciprocal freedoms of the employer? So far as the employees' freedom of organization is concerned, the employer can do little within the law except prohibit organization on his time and

property and exercise a limited freedom of speech. So far as negotiation is concerned, the employer is free to disagree. And so far as work stoppage is concerned the employer is free to continue in operation provided he can staff his plant. The union has no absolute right to close the operations any more than a striking employee can be prohibited from seeking other employment. Here is the confrontation of the raw forces of countervailing power. It is crude; it can be unpredictable; the results can vary with the nature of the industry, the state of the economy, the season of the year, and even with the climate of public opinion; but it is self-determination, not edict of the state.

That brings me to my second question, what is a professional? This question I have undertaken to examine first from the point of view of status, and second from the point of view of job function and the public interest.

I have chosen the word status partly because it is unspecific and partly because I could not find a better word. I suggest that there are three classes of status into which the term professional may be divided. The first is what is sometimes called the "true" professional, a term to which I shall give a quite specific meaning. The second group are those who meet a kind of dictionary definition of professional but who lack the legal powers and possibly other characteristics that identify the "true" professional. The third division which I have chosen cuts across the first two, and includes others as well. It is the status of public servant. I have tailored this division to the audience and to the topic under discussion, as the best way I could devise of cutting the Gordian knot of analysis presented by the diffusion of interests represented here tonight.

I suggest that there are three ingredients that are characteristic of the "true" profession. First, there must be a body of abstract knowledge to be professed. It is this ingredient which entitled theology, law and medicine to be classified in medieval times as the three learned professions. The profession of this kind of knowledge involves the formulation and application of value judgments, and

distinguishes professions from unskilled and skilled trades where the body of knowledge is not profound or where the application of knowledge is comparatively routine. A second characteristic of a "true" profession is that it be organized into a self-disciplining body concerned with the imposition and maintenance of high standards and a high code of ethics in the public interest. This characteristic distinguishes a "true" profession from vocations where membership in a governing body is not essential to the practice of the vocation. The third characteristic of a "true" profession is that it provides services, and in this respect it may be distinguished from commerce in general.

This analysis tells us nothing about the possible choices of classification the "true" professional may fall into in his relationship with others in the practice of his profession. I suggest that there may be four basic classifications in the employment relationship into which such a professional may fall. First, he may be self-employed, that is, be an independent contractor as the law would call him, such as a professional engineer in private consulting practice. Second, he may be an employer or a member of the managerial class which is identified with the employer, such as a professional engineer in a senior executive post in a corporation. Third, he may be an employee hired in a professional capacity, such as a professional engineer employed to inspect a construction project. And fourth, he may be an employee hired merely in a non-professional capacity, such as a person qualified as a professional engineer but employed as a draftsman or to do other work for which professional standing is not a prerequisite. Any one of these functions, I submit, is compatible with his professional status.

The foregoing analysis is also deficient in that it tells us very little about the nature of a professional association. I suggested a moment ago that a characteristic of a profession is that it is organized into a self-disciplining body concerned with the imposition and maintenance of high standards and a high code of ethics in the public

interest. The public interest is the justification for giving the association monopoly control of the profession. Concern for and protection of the public interest is an active ingredient in professionalism. The association may also have a self-serving function. It is theoretically possible that a profession might wish to regulate recruitment in order to regulate competition. It is more likely to fix minimum fees. The argument may legitimately be made that the maintenance of professional rewards is essential to the maintenance of professional standards in the public interest. But it may also be said that fee fixing constitutes a felicitous coincidence of public and private interests, known to virtually every learned profession except theology, and occasionally even there. This function of serving self interest is particularly likely to manifest itself in professions whose principal vocation is to be found within the employment relationship. This I submit is obviously true of teachers, social workers, nurses and others in the paramedical professional field. It is increasingly true of scientists as well.

The use to which I wish to put the foregoing analysis at the present time is to suggest that professional associations may sometimes confuse the role of professionalism, with which is associated the public interest, with the protection of self-interest. Sometimes a professional group may pursue both objectives through a common activity, and may thereby give the impression that they are engaging in unionist activity in the guise or attempted guise of professionalism. And sometimes the professional role becomes a basis for asserting that unionism is incompatible with professionalism.

The second classification of professional is what may be called the dictionary definition professional. For instance, Webster's Collegiate Dictionary defines a profession as the occupation, if not commercial, mechanical, agricultural or the like, to which one devotes oneself. In similar vein the United States Taft-Hartley Act considers professional employment to be one that is predominantly intellectual and

varied in character as opposed to routine, mental, manual, mechanical or physical work. This concept of profession is much broader than the first classification. Persons of this class are engaged in intellectual pursuits and in the sale of services, but are not specifically charged with a public responsibility which requires monopoly control for its performance. But they also have a professional and a unionist role. A good many of those who meet this definition of professional crave the protection of professional standing in order to protect standards of creative accomplishment. But at the same time they are concerned with protecting their standard of living. Many of them are employed persons, and even those who are independent may be faced with a buyer's monopoly or oligopoly which restricts the market for their services. Not having at law a monopoly control of their profession, they may well seek such control through the process of collective action. Here I would classify members of the performing arts and writers for the mass media of communication—newspapers, radio and television —although this is not an exhaustive list and not all persons who perform these functions are to be found in professional or trade associations. Of these latter I am thinking particularly of sculptors, painters and independent writers. I suggest that those who meet the dictionary definition of professional yet do not seek to protect their professional and self-interests through collective action have four characteristics in common which together may possibly set them apart from those who have formed themselves into associations for purposes of collective bargaining. First, they believe themselves to be creative artists and not either just performers of the creative works of others or not just smithies of their trade. Second, they are highly individualistic in temperament and personality and do not tend to identify themselves with others performing similar roles. Third, their services or the products of their services are not sold in the employment relationship, although they may still provide a patron with an outlet for his beneficence. A fourth possible characteristic of the unorganized creative artist is that he may not rely on his art for his livelihood—although he may create competition for others who do.

The third classification of professional which I offered earlier was that of the person in the public service. I suggested that this classification cuts across that of the "true" professional and of the dictionary definition professional. And I should hasten to add that I do not suggest that all persons in the public service should be defined as professionals. However, the question of the public interest in the performance of services is a major issue in the question of collective action by professionals, and inasmuch as many professionals are to be found in the public service it seems useful in a keynote address to create and discuss this as a classification of professional employee by status.

Much of what I wish to say about the public servant falls later under the meaning of professional employee according to job function and also under the fourth question, should professional employees engage in collective bargaining. For now I wish only to make two observations. First, there is a growing interest in the recognition of collective bargaining in public employment and I suggest that this will increase as government widens its activities and appropriates operating enterprises. Second, the public service embraces many different kinds of employment relationship. For instance, a public employee may be a civil servant in a technical sense, that is, hired by a Civil Service Commission or its equivalent for employment within a government department. A person may be an employee of a crown agency, such as a regulatory commission like a Liquor Control Board, a Provincial Public Utilities Commission, a Milk Board or an Agricultural Products Control Board. An employee may be hired by a Crown corporation, such as the Polymer Corporation or a hydro or other public utility corporation. The person may be employed by a municipality, and within this latter classification he may find himself in the status of a policeman or a fireman. Both these latter classes of person are concerned with the protection of persons and property, and are disciplined forces. Yet a policeman is in a real sense and for certain purposes not an employee at all, although his cousin in the fire department has an employment status of much more uniform application.

It is because of the diversity of status within the class of public employee that it becomes important to make an assessment of professionals in this category according to job function.

That takes me to the second part of my second question, what is a professional employee according to the public interest in the performance of the services in question?

I suggest that the most significant common denominator running through the whole wide subject of collective bargaining for professional employees is the question of the public interest. In terms of straight industrial relations what a man does and the relationship of what he does to the significance to society in general of the total service provided by the enterprise in which he operates is, I submit, of greater relevance than determining the social, economic or legal status into which the individual might fall. Yet the question of status cannot be ignored because it is part of the fabric of our society. I chose to discuss the question of status before the question of job function because the very title of this conference directs our attention to it. Looking then to the question of job function in relation to the public interest, there are two points which I think should be made. The first is that we need to be sure of what we mean by the public interest. The second point is that the significance of a job function to the public interest is a factor not merely of the actual work performed by the individual, nor a factor merely of whether the employer is a public employer or a private employer, but it is a factor of the overriding consideration of the relationship of the job function to the total service involved.

On the first point of what is the public interest, I suggest that what is sometimes called the public interest or the national interest is no more than the agglomeration of private interests in a private sector of society backed by an effective lobby. Sometimes the term public interest is applied to the sum of private interests of sufficient dimension that the interest really is of general public concern. In addition, I am sure there is such a thing as a real national interest that prevails irrespective of the private

interests that may be identified with it. May I give a few illustrations. The rules of a stock exchange may be of real public interest inasmuch as the stock exchange is an integral part of the money market which is in turn an essential facet of the structure of our political economy. On the other hand a particular rule of a stock exchange may relate only to the interests of the private individual investor, and the mere summation of the interests of a number of private investors may not present a total interest of sufficient dimensions to justify describing it as a public interest. Furthermore, our notion of what can affect the public interest is subject to change. For instance, the railway strike of 1950 was regarded by the Federal Parliament as detrimental to the public interest, coming as it did at the time of the harvest season in terms of domestic interest, and coinciding with the Korean conflict in terms of the international interest of the country. With the growth of other forms of transportation today a railway strike may not as such impinge upon the public interest. Another illustration may be taken from the petroleum industry. At one time a large work force was required to operate an oil refinery. A work stoppage in that industry could have serious implications for the operation of industry in general and the transportation industry in particular. Today a handful of managerial staff can if necessary operate a plant. Yet we have the recent illustration from British Columbia which shows that a mass shutdown of the production and distribution of petroleum products can be effected and can seriously affect the public interest. Another illustration, with a slightly different point, may be taken from the field of public utilities. A privately owned hydro-electric corporation is subject to the general law of collective bargaining, including ultimately the right to strike. When such an industry is nationalized, suddenly it appears that a work stoppage is against the public interest. The job function and the significance of the total service to society are exactly the same.

That brings me to my second point that in determining the extent of the public interest in a particular job function, one must look not merely to the nature of the job itself

and not merely to the identity of the employer, but one must look to the relationship of the job function to the total services involved. A stenographer chained to a typewriter is performing the same job function whether she is serving an employer manufacturing a product that is marketed where there is free competition in supply and elasticity of demand, or whether she is working as private secretary to the president of a major privately owned public utility, or whether she is on the staff of a cabinet minister, or whether she is working for a public regulatory agency, or for a publicly owned public utility corporation, or whether she is maintaining essential records in a police department. Yet the public interest in the performance of the services is different in each case. I shall not bore you with illustrations based on differing job functions or differing circumstances.

All this leads me to a point I have already sought to make: that it is extremely difficult if not impossible to generalize about collective bargaining for professional employees, because from an industrial relations point of view it is necessary to distinguish a professional function from the unionist function of combinations of professional employees, and because it is highly relevant to judge a work stoppage not in terms of job function alone but in terms of the relation of the job function to the total services involved and the significance of the total services to the public interest, however that latter term may be defined.

I should like to turn now to the third question, a consideration of legislative obstacles to collective bargaining by professional employees.

"Labour" in economics is quite a different concept from "employee" in law. To the economist the labour factor of production embraces anyone who works irrespective of the nature of the work, the manner of reward, the amount of reward, or the extent to which he may be under the control of others. The position of the law is different, and indeed it differs internally for different purposes. In the common law of master and servant the basic question is whether a person has power of control over what another person

does and the manner in which he does it. If there is such control, the former is regarded as a master or employer and the latter as a servant or employee. But the significance of the common law of master and servant has been supplanted in major areas by important legislation, and each statute may have its own definition of what constitutes an employee. We are particularly concerned tonight with collective bargaining statutes. For the purposes of collective bargaining legislation, which is designed to give a statutory framework to the concept of the countervailing power of organized labour against the prevailing power of management, it is important to separate from the definition of employee those against whom the collective power of labour is to countervail and those who must be assumed to be identified with the prevailing power of management. Thus we find that the federal collective bargaining statute begins by stating that an employee is a person employed to do skilled or unskilled manual, clerical or technical work. It then excludes from the definition management and industrial relations personnel. But then it proceeds on quite a different rationale to exclude classes of persons for which the Parliament of Canada must have considered the framework of collective bargaining was inept. The list includes members of the medical, dental, architectural, engineering and legal professions qualified to practise under the laws of a province and employed in that capacity. The Ontario Act adds to the list of exclusions policemen, firemen, school teachers, domestics and persons engaged in agriculture, horticulture, hunting and trapping. Other provinces have other logs of exceptions. But the generalization can be made that collective bargaining statutes in Canada exclude persons from the definition of employee on three distinct grounds. One is the ground that the person is regarded as a management person. Another is the ground that although the person is an employee, his work is such that the framework of collective bargaining is regarded as inappropriate, and here I am thinking of persons such as domestics and those engaged on the land. And another ground appears to be that the persons are members of professional associations that number amongst their members persons who

range all the way from self employed professionals to those who are employed to do non-professional work. This group it appears are excluded because it is too messy to include them, or because legislators were influenced by lobbies. In addition to these limitations, one finds within the statutes further restraints. These relate particularly to the identification of units that are considered appropriate for collective bargaining. For instance, some statutes require that security personnel such as guards be in separate units. Further, although provision is made for craft certification, craft units tend to be small. It is necessary to organize unit by unit, and it is always within the discretion of the Labour Relations Board to conclude that the particular unit being advocated is not appropriate for collective bargaining. Thus even where a group of professionals can meet the statutory definition of employee they may have to surmount obstacles that are not put before non-professional employees.

Another important question is that of the employee in public employment. For instance an employee of a municipality in Ontario may not be able to claim the benefit of the Ontario Labour Relations Act. In some other jurisdictions special legislation relates to municipal police and fire services, to municipal and school corporations, and to school teachers. Again, the legislation respecting collective bargaining by Civil Servants, employees of Crown agencies and employees of Crown corporations is a long way from being uniform. And lurking behind the question of collective bargaining for employees in the public service is the constitutional question whether subjecting the Crown to the processes of collective bargaining constitutes an impairment of the concept of sovereignty on which the Canadian constitution is founded. This issue seems to be an everlasting phoenix, because no matter how often the issue is flogged to death it seems to manage to rise from the ashes of its own funeral pyre.

It is high time I got on to the fourth question, should professionals engage in collective bargaining?

First, is collective bargaining, or should it be regarded as being, unethical from a professional point of view? My

brief answer to this question is no. There is precedent within the learned professions for collective action to protect the incomes of members in their capacity of self employed persons. Any scale or tariff of fees agreed to by a professional group does just that. It is unrealistic to ask a professionally trained person to forego the reasonable assurance of a standard of living commensurate with his education, ability and service to society merely because he is serving society. If you want professional service you must pay for it; and if you will not pay for it you will not get it. In short, a professional boycott operates against persons who want professional service at cut-rates. The notion of service to society clearly is not regarded by the professions as being incompatible with collective action, albeit diffuse in its application. And if members of a profession can act in concert to protect their income as self employed persons, why should they not act through the medium of collective bargaining to protect their income and other terms of employment as employees? In my opinion, there is no inconsistency from an ethical point of view between the status of professional and the determination by collective action of the terms under which a professional employee works.

Why is the issue of collective bargaining for professional employees put in terms of professional ethics? Is not a significant reason to be found in the fact that people performing non-professional functions have professional status? Individuals in a profession who for the most part are performing non-professional functions, for instance, professionally qualified engineers performing tasks that are merely technical, may feel that their situation is one that needs the protection of collective bargaining. Others in the association who are professionally occupied may feel, quite possibly because of temperament, ability and function, that collective bargaining is incompatible with professionalism, and that those in the association but not professionally occupied must accept that proposition if they wish to claim the status of professional through membership in the association. A person professionally occupied tends to have

a strong sense of individualism, of personal achievement or ambition, and a personal relationship with his employer. He may tend to identify himself with his profession rather than his industry, and at the same time he may very well be management oriented. Those who are non-professionally or marginally professionally occupied tend to have a more egalitarian point of view. The dilemma is made worse by two further facts: the line between professional and non-professional employment is obscure; and people move from one kind of job function to another and possibly back again over a short or long period of time. In addition, some professions may find that their vocation is open to them only or principally as employees.

It is sometimes useful to go abroad for illustrations in areas where conflict of domestic opinion is strong. In the United Kingdom the Royal Institute of British Architects sponsored a trade union — the Association of Official Architects. This Association now has a separate existence, but it has the same address as the parent that sired it. What this profession has done is to perceive as separate functions the professional and the unionist role of the Association and to create two distinct bodies to perform these roles. The British Medical Association has managed to keep the two roles in the one Association, although it has set up a collateral body as its fiscal strike wing, the British Medical Guild. Other professionals in the United Kingdom may be found in separate units for the purpose of collective bargaining.

On the question of collective bargaining for public employees, it may be noted that such a system, buttressed by a remarkably effective system of arbitration, has been known to the public service in the United Kingdom since 1925.

The second part of this fourth question concerns the morality of collective bargaining where a work stoppage is contrary to the public interest. Assuming for present purposes that a given work stoppage would be contrary to the public interest, it seems to me that the question is not whether collective bargaining as such is improper, but

whether a reasonable substitute can be devised for the sanction of the right to strike, which was submitted at the outset to be an essential ingredient of an effective system of collective bargaining.

University professors have found a modus vivendi which perhaps may better be described by the term consultation than collective bargaining. Its efficacy varies from place to place, as do opinions as to the adequacy of the technique. Most associations of university professors premise their position on the concept that a university is a community of scholars and that the citizens of the community have a legitimate claim to participate in its government in one form or another. In addition they assert a claim that they are entitled to have the governing body consider carefully a collective opinion of the association on any matter relating to the welfare of the institution. The issue of collective bargaining as such generally is kept in the background, and I make so bold as to suggest that it should stay there unless associations are prepared to go the full distance of acquiring the necessary legal status under relevant collective bargaining legislation, and all that that means in terms of reconstituting the associations and redefining their objectives.

However, not all professionals are able to invoke the broad communal concept that is available to the hewers of wood and drawers of water in the groves of academe. Although one can talk conceptually of the industrial community and the role of the collective agreement as a constitution for that community, something more specific is required by way of a sanction to make joint negotiation work besides the argument that the governing body should listen carefully to the considered judgment of the citizenry. Some type of lobbying, of political action, may give form to a system of collective bargaining that would otherwise be emasculated by the absence of the right to strike. But the only substitute which seems to have any lasting currency is the technique of arbitration.

May I say at once that I do not like arbitration as a device for resolving conflicts of interest in the negotiation

of a collective agreement. I regard it not as a happy solution to this kind of industrial conflict but only as the least undesirable solution available, imposed by the necessity for protecting interests that in the immediate exigency are judged to take precedence over interests which the device impairs. My objections to arbitration of interests disputes are both ideological and practical.

In terms of ideology, if one accepts as a legitimate object the sharpening in the parties to industrial disputes of their awareness of a moral obligation to consider and defer to the general social interest, gains toward that goal might not be made by converting the moral duty into a legal one; certainly the goal will not be gained merely by making a public or private tribunal the custodian of the public interest: for the protagonists may then proceed to advance their own interests, secure in the knowledge that responsibility for protecting the public welfare reposes elsewhere. Furthermore, to impose machinery of arbitration may well be to induce protagonists ultimately to deliver into the hands of third parties the responsibility which at present rests with the disputants themselves: the responsibility of coming to terms with one another. I suggest that this shift in responsibility has great significance for the kind of relationships of power and obligation which we judge to be desirable for our society; for the shift means a surrender of a measure of personal responsibility, and, to that extent at least, a belittling of the human personality. It is tantamount to saying that the parties either are not mature enough, or are not free enough, to be trusted with such responsibilities, at least insofar as their affairs relate to the public interest. Another ideological argument against arbitration is that if the returns to a large part of the labour factor of production are to be determined by arbitration it may lead to a determination of fair prices and fair profits by similar methods. Another ideological argument against arbitration is that many issues that might ultimately be taken to arbitration are matters of social and economic policy that ought to be settled by Parliament and the Legislatures and not by a quasi-judicial institution.

There are a number of practical obstacles to effective arbitration. First, I am told that in some countries where arbitration is designed by legislative policy to be a substitute for the work stoppage it does not function according to design and even the penalties can be compromised in the terms of settlement. Again, it has been the experience of some countries that use a system of arbitration that the parties to industrial conflict have a tendency to run to court, thereby frustrating the process of negotiation. Again, it is quite possible that the real interests in conflict will not be parties to the arbitration. For instance, an employees' association may find itself before an arbitration tribunal in a contest with an employer whose ability to pay may be subject to the control of some other agency which is not party to the proceedings. Further, I see a number of technical difficulties that may produce discriminatory awards. There are real problems of access to relevant and accurate data, and unless the parties themselves assume responsibility for the production of reliable information, arbitration may have to become more of an inquisitional technique than an adjudicatory process based on the adversary system of justice. Again, there are no clearly recognized criteria for settling issues: there is no real jurisprudence of industrial arbitration of this kind of dispute. The inventive powers of arbitrators may therefore be worked overtime, and it may become only a matter of accident should the rationale of awards coincide with what may eventually emerge as principles of industrial justice. In sum, unless the parties can agree in advance on questions relating to principles for settling issues, and on the reliability, relevance and adequacy of data, arbitration may be merely a clumsy substitute for the sanction of the work stopage. Indeed, it seems to me that if the parties can agree to a set of valid principles and can settle upon the reliability, relevance and adequacy of data, they will have gone a long way to raising collective bargaining as a rational process to the highest possible level of rationality, at which point the question of sanctions should become hypothetical. I suggest that there is a pressing need for clear and effective guidelines for the arbitration of disputes involving conflicts

of economic and social interests if arbitration is to be an acceptable substitute for the sanction of the work stoppage in collective bargaining.

The third and last part of the fourth question is whether collective bargaining for professional employees is worth the cost. I should like to discuss the worth before the cost.

People who know more about these things than I do perceive collective bargaining, as national policy, as converting the Canadian economy from a free market to an oligopolistic or polycentric or bargaining economy. Some economists also assert that the percentage of the gross national income which accrues to the labour factor of production is approximately the same today as it was at the turn of the century when collective bargaining was not a significant governor on market forces. If both these assertions are true, it would seem that professional employees might suffer in the negotiation of rewards if they did not have the advantage of collective action. I think it is relevant to note that the percentage of professionally trained people who are employed in business, industry, and the government service at federal, provincial and municipal levels is increasing, certainly in an absolute sense and very likely as a percentage of the professional group as well. This phenomenon has characterized the engineering profession for many years, and it can increasingly be observed as a characteristic of the legal, medical and architectural professions. Furthermore, as suggested earlier, many professionals find their vocation, with few exceptions, only as employees.

A second consideration in determining the worth of collective bargaining for professionals is that national economic planning is involving the labour movement to an increasing degree. The truth of this statement can be gleaned from the work of the Economic Council and its predecessor the National Productivity Council. For instance the Economic Council has tendered guidelines for a national policy respecting unemployment. If Canada is seriously to adopt and adhere to a policy on unemployment, such a policy will have to embrace a consideration of innovations

which can appreciably alter the employment picture. The interest of organized labour in this area is obvious. Furthermore, there is growing interest in the determination of a national policy respecting incomes, both individual and corporate. Here again organized labour has a direct interest. If professionals in employment are to participate in the formulation of policies as significant as these, an obvious avenue to participation is that of collective bargaining.

This brings me to the question of the cost of collective bargaining and, you will be happy to know, to my conclusion.

I do not think it is my function in a keynote address to propose a specific course of action, for consideration of alternatives surely is the business of the rest of the conference. But may I suggest that the real question over the issue of collective bargaining for professional employees is one of attitude, of personal values and inclinations. First, you cannot have collective action unless you are prepared to surrender a measure of personal independence. The interest of the individual must be subordinated to the interest of the group, or group action will not be meaningful. Second, some professionals may not want to belong to a group that calls itself a trade union and includes in its membership persons who are not professionally trained. But this involves a question not of ethics in any meaningful sense but of status or perceived personal dignity, and the question of potential division of loyalty, but not necessarily of conflict of loyalty, between the union and the professional society. The only realistic question, I submit, is simply whether the gain which you calculate you may make as employees through collective action is worth the price which you estimate you must pay in terms of freedom of individual choice of action, of personal standing or status, and of divided loyalty and whatever implications that may have.

I do not presume to suggest to persons wiser and more observant than I what direction the conference should now take. But perhaps we have now at least left our point of departure, and I shall turn the helm back to Admiral Crispo to check our course.

Arguments For and Against Collective Bargaining by Professionals

PROFESSOR RALPH PRESGRAVE,
School of Business, University of Toronto.

A CHAIRMAN, when opposite views are expressed, is supposed to be neutral. Here I have to confess certain prejudices, both academic and personal, so that neutrality is not quite the word. I will settle for ambivalence, though I am not quite sure that that is the word either. It means that any comments I am able to squeeze in might have rather a more personal flavour than protocol would normally admit.

I have a diletantish interest in semantics and I am aware that professionalism has many meanings and even more connotations, and is virtually impossible to pin down with a definition. In spite of my revulsion against the current academic jargon, I am convinced that we need new words. I am ringing some changes on Dr. Carrothers' rather scholarly analysis of what is a professional.

Contemplate a few of the many ways in which you may earn the name professional. Also contemplate that while some of these confer status and pay you a compliment, others imply derision and disparagement. For instance, you can become a professional by merely saying you are, as the doctors once did, and as the management consultants are still able to do. You can assemble a congregation of the faithful and preach sermons, and you are a professional.

You can make a career out of politics or crime and be a professional. You can join the army when there is no war on, or you can do for money what others do for fun. You can also be called a professional manager without you or anyone else knowing what it means, or even whether it is possible to be a professional manager. To cut it all short, you can persuade a licensing body, with the aid of the government, to issue a document which officially says you are a professional. And that by no means makes you a professional, because professionalism requires qualities which no diploma can confer—qualities of integrity and style.

I should disclose a more direct personal interest, because I have been closely involved with collective bargaining for a quarter of a century. I am mainly tarred with the management brush, but not entirely so because I have acted as an independent arbitrator for the past fifteen years in one form or another, and specifically for the past six years as Chairman of the Public Service Grievance Board, which arbitrates the grievances of employees in the provincial government. This is a relevant topic, mainly because I consider that organized grievance procedures accompanied by independent arbitration to have done more than any one thing to get labour-management relationships out of the gutter. I regard it as an indispensable process and a major step in man's quest for the rule of law as against the edict of the individual.

The structure of the Public Service Grievance Board is a little unusual, and some of you may find it interesting. It was not set up in the customary manner prescribed by the Ontario Labour Relations Act and as set out in most union agreements. In the first instance it is a unilateral appointment by one of the parties. This might be considered highly improper. As far as I am concerned it is completely irrelevant, for so also are our highest courts set up by unilateral appointment. The members of the Grievance Board are a mixture of senior government officials and outsiders. At the moment there are five members. We usually sit with three, we may not sit with fewer than two.

We do sit frequently with two, and, since the Chairman is also an outsider, it is a little easier to sit with two outsiders than with two government appointees or officials. It therefore occasionally happens that contrary to the practice in industry grievances are settled by two complete outsiders, one of whom may be considered to have a bias in favour of the grievor. It is also possible to sit with two government members, but I do not think we have ever done this largely as a matter of tact. However, we have gone so far as to have one of the government members chair the Grievance Board in my absence. This again is contrary to the kind of thing you would expect in industrial arbitration. I was conditioned to standard bi-partisan boards and I found this rather a strange atmosphere at first. All it really means is that the Board has to be entirely judicial. Between three and four hundred cases, long and short, have been heard by the Board. There have been only two dissents, and these were more in the nature of comments on the conflict between what some would regard as justice and some as legalism. I may say that as a result of this long experience I have become fairly disenchanted with the conventional bi-partisan arbitration board.

There is another point I should perhaps raise. Dr. Carrothers' remarks reminded me that there is also an unusual element in the operation of the Grievance Board. While certain high-ranking people are not permitted to grieve except on dismissal, there is no rigid line of demarcation between the sheep and the goats. (I leave you to decide who is which). There is no rigid union - management line of demarcation. Indeed, it is not unusual to have people pleading management's case one week and a little later having a grievance themselves. This again appeared strange but seems to raise no particular problems. However, it does mean that the Board hears the grievances of management people and professionals—doctors, engineers, ministers, architects and so on.

I am relating all this because it opens an area of speculation which may or may not be relevant to our discussion. I conceive our deliberations to be only part of

a much greater issue. Peter Drucker, the eminent writer on management affairs, claims that the greatest problem that business will have to face in the future is the management of managers and the management of professionals. Harold Koontz, the eminent scholar at UCLA, has made a similar statement. He says the most serious problem that management faces is the integration of behavioural and technological sciences with administration.

DR. MARK R. MacGUIGAN,
Associate Professor of Law, University of Toronto.

A SUBJECT such as this morning's which is substantially identical in description with the subject matter of the whole Conference poses certain problems of delineation, but as I studied the program for the Conference it seemed to me that since the more concrete aspects of collective bargaining by professional employees will be covered in the following sessions—the behavioural aspect this afternoon and the legal tomorrow morning—I should therefore concentrate in this paper on the more abstract—or what I might call the philosophical—aspects of the subject.

Let me say at the outset a few words about collective bargaining. I have not thought it necessary at this late date to indulge in any general justification of collective bargaining in itself: unequal economic power between employer and individual employee is an observable fact, and history has amply demonstrated the illusory freedom of the employee in individual bargaining. Generally speaking, the rights of individual employees depend initially on the institution and on the effectiveness of the collective bargaining process. I have therefore devoted my attention principally to what in the professional character of the professional employee might make it inappropriate—or appropriate—for such an employee to have similar rights of collective action to non-professional employees. I might

also add that I do not take the position that the work stoppage or strike is the inevitable sanction in the collective bargaining process but am open at least to the possibility that compulsory arbitration might achieve as good results in some circumstances.

Before beginning my analysis in detail, perhaps I might first of all state my conclusions: to my mind collective bargaining for professionals is in their own interest as employees and in the interest of their professions (and for both these reasons indirectly in the public interest), and that it is also directly in the public interest. I hope that the analysis which follows will substantiate each of these conclusions.

The first point which I should like to emphasize is the analogous nature of the notion of profession: there is no single meaning of the word 'profession' which can do justice to the multiplicity of professions and professional life. Perhaps there is no better indication of the folly of attempting to establish a conceptual strait-jacket than a recognition of the number of possible classifications of occupations. The traditional division of professions was into divinity, law and medicine, and it could be argued from this historical fact that no other callings should be recognized as professions today. But the original recognition of these three callings as professions was based on their university origin and their identification with the scholarship of the university community, whereas the subsequent connection of all three with the university has been nebulous. At the turn of this century, for example, physicians were being turned out by non-university "diploma mills" in the United States. The law that was taught at the University of Bologna in the twelfth century was a far cry from the "wilderness of single instances" which Tennyson poetically but not so inaccurately saw as the essence of the English common law; the law was divorced from the university for many centuries in common-law lands, and indeed in Ontario it will not be for several years yet that the final reunion of legal education and university community will occur. And as for divinity, many seminaries

have no university connections, and of those that have, many are noted more for their pastoral concern than for the speculative thought associated with a university, and most are looked down upon by the university community as intellectual weak sisters. What claim could the traditional professions have to exclusivity as professions when they have been able to maintain so inconstantly the university membership from which their dignity originally arose?

Another possible classification of occupations is with regard to legal status: that is, those callings are to have status as professions which are granted by legislation the exclusive right to practise in a particular field, along with the privilege of self-government and the right to determine fee structure. Certainly many callings generally recognized as professions do have such legal status, and usually continue to exercise the powers legislatively conferred without any public control—though when there is evidence of misuse of licensing powers, as for example in the recent controversy over licensing of physicians trained in Indian medical schools, there is always the possibility of a legislative curbing of monopolistic practices. But, on the one hand, there are callings generally considered professions, such as teaching and preaching, which do not have legal status; and on the other hand there are many callings not generally considered professions which are granted self-governing powers by legislation. In the United States over 200 occupations are subject to licensing requirements, though in some cases the regulation is from outside rather than from within the occupation itself. The interesting thing is that in most cases licensing is welcomed by the members of the licensed group as a form of public recognition and sometimes as a guarantee of economic security free from competition. Vance Packard comments in *The Status Seekers* (1959, at p. 97): "The nation's 25,000 undertakers have undertaken a campaign to become known as 'funeral directors', a title that conveys more dignity. They are striving to become accepted as professional men 'on the same level as a doctor or lawyer'. To this end, their academic requirements have been raised to include attend-

ance at one of the nation's twenty-four mortuary colleges." And only a year ago this month the Toronto *Star* protested editorially against attempts by Ontario funeral directors to obtain a more complete monopoly through new legislation (December 2, 1964). Obviously any attempt to classify professions solely in terms of a special status conferred by legislation cannot be satisfactory.

Other bases of classification would prove equally inadequate. For example, it is comforting to professionals to indulge the belief that a spirit of public service is a characteristic peculiar to professions, but in fact many callings regard the rendering of service as their main object and the receiving of reward as incidental. The truth is that 'profession' is not an unequivocal term, signifying a number of callings with the same nature and differing only in their matter and in their manner of practice. Indeed many characteristics are generally predicated of professions—university origin, learning, tradition, a fiduciary relationship to a client, a spirit of public service, a moral code, organization, legal status, self-government, social importance, prestige—and few professions possess all of these characteristics, whereas all of those callings we should be likely to denominate as professions possess some of them. In other words, the notion of profession is not unequivocal, but analogous; it does not mean the same thing in every case, but all the professions have a certain resemblance, while differing in some characteristics.

While we can formulate a definition of profession, we cannot therefore expect to find it verified in all respects in every profession. A good contemporary definition is that "a profession is a self-selected, self-disciplined group of individuals who hold themselves out to the public as possessing a special skill derived from education and training and who are prepared to exercise that skill primarily in the interests of others." [Peter Wright (1951), 29 Can. Bar Rev. 748, 757]. Such a definition will apply to some but not to all professions.

I refrain from entering into a detailed discussion of the hierarchy of professions, if only because of the embarrass-

ment we might each feel at the discovery of our own profession's place in the pyramid. But we must draw the conclusion that there are certainly professions and segments of professions which must be acknowledged to be attenuated or diminished professions, and their members professionals in something less than a complete way. Such are the professional employees who are the subject of this Conference.

The attributes which are common both to complete and to diminished professions seem to be those of learning and of public service, and these would therefore seem to be deepest characteristics of professionalism, though at least one writer has maintained that "the most important test of professional status is the test of independence." [Smyth, "The Criteria for Professional Status" (1951), 58 Can. Chartered Accountant 271, 280]. Of the professional attributes listed above, it is that of self-discipline and self-government which necessitates a group membership characterized by independence of organization and operation, members who are independent practitioners—in law, independent contractors. Traditionally even in large firms of professional people, where some professionals are employees, there has been a large partnership or independent practitioner group, and the employed professionals have been junior men with reasonable expectations of advancement to membership in the firm .

Professional employees, on the other hand, are by definition professionals who have given up the status of independent practitioners to become salaried employees of business or of government. I take it that among government employees we are not here concerned with civil servants in the strict sense but only with those employed by emanations of the Crown, though a good argument could be made for applying the same considerations to civil servants proper.

Professional employees, even if they retain membership in their general professional organization, will share only to a small extent the professional independence and self-direction characteristic of the independent practitioner,

since they will be submerged in a business organization as subordinate units, perhaps with little contact with the upper administration. Such a state of affairs poses many problems for the professional involved. First, it raises issues of remuneration, since normally the amount he can earn in any year is limited by his contract, which he has had to negotiate as an unequal party with his employer, and also raises the question of working conditions. Second, at a subtler level it raises problems of professional and moral integrity, which the employee, unaided, may find it difficult to solve. We have all seen the engineer employed by an automobile manufacturer ineffectually and sometimes dishonestly attempt to defend the absence of safety features in automobiles on scientific grounds, in the face of scientific evidence to the contrary, when it is clear that the only real explanation for their absence is a commercial one. In the legal field we can hardly refrain from questioning the integrity of the battery of lawyers employed by an entrepreneur, on either management's or labour's side, for the sole purpose of staging every possible legal move to keep him out of jail. These are undoubtedly the more dramatic cases, but it is easy to visualize other less extreme cases of disagreement between management and the professional employee as to the quality of service or of product.

The argument which I am making essentially boils down to this: the creation of a staff association for the purpose of collective bargaining will make professional employees more rather than less fully professional, for it will restore to them in some measure the independence and self-control of which they have been deprived by their status as employees.

I have already referred to the importance of the attribute of public service in the notion of professionalism. Putting it another way I might describe it as the subordination of the economic factor to the ethical factor. But we must keep in mind that subordination is not elimination.

Taking the example of the law, the profession with which I am most familiar, the conventional wisdom is that the lawyer should only last of all make a living, for his first

duty is to the public, primarily through selfless service to his client. Shrewder commentators have noted that although "the professions generally define a type of behaviour which by lay standards seems high-minded . . . the professional community so structures professional practice that in fact the man who conforms to these ethical standards may very well profit in the long run from an apparent idealism." [Goode, Book Review (1957), 57 Col. L. Rev. 746, 747]. And one hard-bitten observer of the law has commented: "No amount of preaching can alter the cold, indisputable fact that the law has ceased to be a sacrosanct profession and has become a highly competitive business."* However clear the Bar's position as something more than a business organization may be from the fact that the Bar accepts responsibility for citizens defrauded by lawyers, there is no denying the fact that the commercial element looms large in contemporary law.

That this is generally true of professions is illustrated by the abandonment of the traditional mode of payment. Historically the professional received neither fee nor salary but only an honorarium. Indeed until early in this century physicians in England were paid by their patients not on a fee-for-service basis but on the basis of their ability to pay. Today the fee for service is considered the standard method of remuneration for professionals, to such an extent that many physicians, for instance, are willing to fight to the death to retain it. The professional man today is perhaps best described in the telling phrase of the late C. Wright Mills as the "entrepreneurial professional."

I do not suggest that this is in itself wrong, but merely that it does not square with all of the traditional professional cant about the nobility of service for its own sake. In my opinion it is a realistic view of the contemporary professional, recognizing as it does the practical importance of the economic factor.

If this is an accurate depiction of the independent professional practitioner today, it must be, a fortiori, a

*Argument of counsel in Barton v. The State Bar of California (1930), 209 Cal. 677, 681; 289 p. 818; quoted in Cheatham, Cases and Materials on the Legal Profession (2nd ed. 1955), p. 74.

meaningful description of the professional employee, who in relation to his employer is nothing other than another employee, and for whom the economic aspect is therefore vital. In other words, the very factors which make for the diminished professionalism of the professional employee as contrasted with the independent practitioner also make him a man inherently more involved with the economic factor. A professional staff association with the purpose of collective bargaining can render efficacious the interest which the professional employee has, in common with all other employees, in the economic factor. Of equal importance, it can advance the ethical factor at the same time: as observed earlier, the attitude of the professional employee and his employer towards adequate standards of service or adequate products may not coincide, since the employee is likely to have a greater loyalty to quality and the employer to profits. Without the support of his fellow employees the professional employee will be able to uphold his position only at the expense of his own economic welfare. But interestingly enough, where this support is assured through collective action, there is no opposition between the economic factor and the ethical factor, and in this respect it is dissimilar to the case of the professional practitioner; the opposition is rather between the employee's economic and ethical factors on the on e side and the employer's economic factor on the other. That is, both the professional employee and the profession stand to gain from the formation of professional staff associations. It is the employer who stands to lose, through increased costs resulting from better salaries and working conditions and through loss of traditional management prerogatives.

The remaining question, then, is whether such interference with the employer's freedom is in the public interest. We should first of all be clear on which freedom of the employer is in issue. It is not his freedom to contract which is at stake. With respect to freedom of contract the effect of collective bargaining is not to interfere with the employer's freedom but merely to create freedom of contract for the employee; as Mr. Justice Holmes put it some fifty years ago, collective bargaining establishes that

equality of position in which liberty of contract begins. No, the freedom of the employer which is in question is the freedom to make production decisions on his own and the freedom to remunerate employees in his own discretion, which both reduce I think to the freedom to run his plant so as to maximize profits.

This is a freedom which has not been recognized as unlimited in our society since the establishment of collective bargaining and the introduction of large-scale governmental regulation of business activity some decades ago. We recognize that economic freedom is rightly subjected to human freedom (the ethical factor writ large) and the economic freedom of the few justly subordinated to the economic freedom of the many (the economic factor writ socially).

You will note that I have ignored the question of cost as posed by Dean Carrothers in the form of the cost to the individual professional employee and have instead raised the question of cost to the employer, and therefore the larger question of whether such a cost can be justified in the public interest. I suppose the reason for this is that I regard the potential individual losses as negligible in comparison with the potential gains, since the freedom of action and status allegedly abandoned by the choice of collective bargaining seems to me illusory. In my view, professional employees will in any event be treated collectively, and the only choice they have is whether it will be with or without representation. On the other hand, I regard more seriously the potential detriment to the business organization from collective bargaining, but on reflection conclude that the public interest would be better served by the establishment of collective bargaining than by its absence. This is no doubt a personal value judgment which may or may not be shared by others here.

I must hasten to acknowledge in conclusion, before someone points it out from the floor, that I have failed to take into account the rich particularity of professional life and the many distinctions that should be made among professions and professional situations before a general

conclusion in favour of collective bargaining for professionals can be properly established. But here I may claim the advantage of the philosophic pose I have struck this morning, which has enabled me to deal with the subject in generalities. The rest of the conference, I would anticipate, will fill in the detail.

MR. JOHN H. FOX,
Past President of the Association of Professional Engineers of Ontario.

BACK in the days when haircuts were in style and before the phrase "going to his eternal rest" meant getting a job with the government, Mark Twain arrived in a town where he was scheduled to make a talk. Noticing that his lecture was poorly billed, he stepped into a store and said, "Good morning friend, any entertainment here tonight to help a stranger while away his evening?" The storekeeper said, "I expect there is going to be a lecture. I've been selling eggs all day". There have been many changes since that day. Although the price of eggs today may prohibit their use as indoor guided missiles, we have become so well organized as a nation that we have a guilt complex about it.

Conformity and group activity seems to be sweeping the country. More and more people want to get into the seats in the grandstand, and fewer and fewer want to sweat it out down on the field. More and more youngsters looking for jobs are asking: "What can you do for me?" rather than "What can I do for you?" They want to discuss the extras they are going to get rather than those they are going to give. They want to know how cool it will be in summer and how warm in winter, how safe at all times of the year. When they go to work they hasten to hide their light in the security of a committee, where there is safety in numbers. The progress may be slow and the glory small, but the work is steady. Their eyes are on the clock rather than the calendar. The coffee break is more important than the big break.

We have always had our share of conformists in this country. As Charlie Pollock once said, "Every generation produces its squad of moderns who march with peashooters against Gibraltar". Only in the last quarter century, it seems to me, has unquestioned personal non-involvement become an accepted way of life. For when we were poor we had to sweat it out. We could not afford detachment from life and the fate of our country. One of the great dangers of affluence is that it permits such detachment.

When I address myself more directly to the subject of "Collective Bargaining and the Professional Employee", I first try to analyze its meaning and then, as one trained in engineering, look for any associated problems. It seems to me that many of the sentiments I have already expressed are pertinent to this analysis. The first two words of the subject conjure up in my mind two or more employees, probably working within the terms of a Labour Relations Act or some other formalized approach, discussing wages, hours of work, overtime, statutory holidays, vacations, sick leave, insurance—life, health and accident—both contributory and non-contributory, working conditions, grievances, etc.; in other words, all conditions of employment which have an economic over and undertone.

Experience has proven that an appeal or demand by a group in many instances has been more effective than individual action. This type of activity has certainly been effective and has provided a uniform and standardized return for numerous groups. But the individual of outstanding talent has been submerged to the level of the individual of lower capability, while the latter has been given benefits beyond his normal expectation. Uniformity and conformity has often been the result. The growth and effectiveness of craft and/or industrial unions cannot be denied and the reasons underlying their success are well known. Group activities have increased with the growth and expension of industry, the technologies and the professions.

The next step I make in analyzing the subject matter before us is to explore the term "professional employee".

Who are they? When do they become professional? What are they? Where are they to be found? As is not unusual in such cases I turn to one of the recognized dictionaries—the Concise Oxford—as against Webster which Dean Carrothers used. The word employee presents no problem. I find that a profession is "a vocation, a calling, especially one that involves some branch of learning or science, a learned profession—divinity, law, medicine, the military professions—a carpenter by profession or even a professional mourner". A professional is defined as "one who professes as of belonging to, connected with a profession, as professional men, etiquette, jealousy; politician, agitator (making a trade of politics, etc.). Professionalism is the "quality, stamp, etc. of a professional". I don't know how much clearer it is in your mind than in my own.

Many stories surround the oldest profession but it must be eliminated from this discussion. However, I believe that there are certain problems of job security and seniority in it too. Originally in primitive times the priesthood of our various religions provided a learned man who influenced the community as a law maker and teacher. Then came mathematicians and astronomers. As we moved into more civilized times the barbers—precursors of the doctor—and the military came to the fore as professionals. The emergence of medicine as a more exact science and profession was a phenomenon of the last century.

I direct myself particularly to my own profession — engineering — because I feel that this is one of the professions that is particularly under scrutiny this morning. It followed after some of the earlier learned professions and involved the application of science or applied science, first to military engineering and then in the late nineteenth century to civil engineering. Since then there has been a proliferation of specialities in the engineering profession. There will always remain this background of specialization in science and technology in my particular profession.

We have witnessed too the emergence of the apothecary, the druggist and the pharmacologist, and the alchemist and the chemist. Nursing has risen from a lowly regarded

vocation to an honourable profession. Teachers and the clergy both continue to serve mankind. These are just a few of the professions one could cite.

Today too we have the professional manager, the professional salesman, the professional football player and the professional hockey player. So where do we draw the line?

Throughout history, when a person has won the title of professional, it has been almost axiomatic that such an individual was one apart who emerged from a large group of humanity to practice the discipline of a science, craft or art. What sets a true professional apart? He is well qualified in the practices and techniques of his chosen profession. He has a code of ethics and voluntarily accepts the disciplines and ethics imposed upon him. He has an independence of thought and action, a self reliance, and an abhorrence of being cast in a common and uniform mould.

It is not my intention in this discussion to endeavour to confuse the issue as to just who is a professional nor to discredit the term. However, I do submit that it is a most difficult task to determine in easily recognizable terms just who is covered under the present-day use of the term "professional employee". Is a professional employee one who has had the advantage of what we term an advanced education? Usually he has obtained recognition for certain academic and practical training, has capabilities, and has obtained registration in a licensing body. That body is usually concerned with the qualifications of its membership and is self-regulatory and self-disciplinary.

I submit that there should be a clear distinction made between registration and professionalism. In my own profession there is a decided movement in the direction of recognizing a smaller group yet to be identified by a name as "true" professionals. Out of the basic or original registered group should emerge the smaller group, more select, more highly qualified, more assuredly individualistic than the primary group. This is not an original idea. As just one example the medical profession has special classi-

fications—fellows, senior fellows, etc., all of which follow from the basic qualification of original registration. Today it seems to me it is most difficult to isolate and clearly define the aims and objectives of a professional group without involving other non-professional groups, engineers with draughtsmen and technicians; doctors with medical and medical laboratory technicians; and so on.

It is clear that the drive for collective bargaining among professionals is most evident when there is no direct contact or relationship with those for whom they work or are retained. In contrast I would point out the relationship between the individual doctor and his patient. I would rather have an individual doctor look after my appendix than a whole group. The same applies in regard to the lawyer and his relationship with his client.

When a large group is involved in more or less repetitive activities, particularly when working within the well defined boundaries of a technology or discipline, the professional attitude may be altered. Within this classification I would put teachers working to prescribed texts, lawyers working with established case histories or precedents, engineers working within the terms of published data and handbooks, all of them somewhat remote from their employers. Part of the problem springs from the fact that managements in many instances have lost by default their direct contact with an appreciation of the professional people they are employing. Yet the originators, the independents and the trail-blazers have always emerged from the larger group and have become more and more individualistic and in turn have progressed to be the "true professionals."

It is recognized that not always have those charged with the administration and welfare of professionally trained employees been alert to the needs of such employees. Such needs are not always in the economic sphere, but sooner or later economic concerns become paramount and original needs become submerged. The result has been more and more group action in order to impress the minimum professional demand of the group on the employer.

However at some point in the life of a professionally trained man, a personal decision is often made to break with the group approach and to rely on individual initiative. This decision may be a conscious one, but more frequently emerges as part of the growth or development of the individual. I once posed the question to a man very senior in our profession: "Which Saturday morning did you become a professional rather than an employee?" I asked. He said, "I really don't know". I said, "I'll tell you when I became one—when the chief draughtsman told me I was in charge of the blue-print boy". The transition was just as easy as that. Many of the people in my acquaintance cannot clearly state when the step was taken in their own life. However, they made the decision and they had to weigh the cost and the value to them when they did. This facet of the question was discussed by Dean Carrothers in his opening address.

I have come to the conclusion that for some of the persons we today call professional employees it may be desirable to have collective bargaining, but not through the registration body. For those persons who wish to remain and always will be independent from the demands of a group, they should always be free to be individuals apart. Their demands and their attitudes are different and the rewards expected by them will seldom be satisfied by the group approach. Likewise they have to be administered and treated differently.

We must redefine who are professional employees, and not glibly accept the term and apply the title to all who have secured the benefits of qualification in an association or regulatory body through the educational process. Employers and industry can and do accept groups of persons who qualify today as professional employees. Some methods will have to be evolved to encompass the sizeable number who will always reject group action, who will be the independents, and who will feel that any compulsory membership in such a group will be a violation of their personal rights and restrictive to their professional development.

I would like to quote from a booklet that has been issued by my Association. You may take the word engineer out if you will and apply the name of any other professional. It is a directive that has gone out on behalf of the engineering profession to employers and is intended to be a guide to the relationship between those engineers who are employed and those employers who in turn are dealing with engineers. The first paragraph is addressed to the employer:

"It is essential that the company management recognize each employed engineer for what he is, namely a man who has been professionally trained, normally of better than average intellect and usually of higher than average individuality. The engineer in spite of his technical background cannot be considered as a thinking machine, but as a man who has a career and job satisfaction goals which his employer must help him reach. Goals which include the need for personal achievement, a satisfactory salary level based on experience and responsibility, the necessity to be considered a man of stature among his fellows, to have a job which will keep him happy and interested. It is the definite responsibility of the employer to show that he is prepared to recognize professionalism in his engineer employee and that he can supply a career which will give adequate challenge to each individual engineer."

That is the challenge to the employer.

To the engineer in turn:

"It is the responsibility of each engineer to recognize very clearly that his employer also has certain goals which must be reached, whether these goals be profitability, efficient operation, personal satisfaction, good employee relationships, etc. The employee must realize the professional is not just a title which is automatically earned by graduation from a university or the granting of a certificate, but a personal characteristic which must be demonstrated through enthusiasm, ability, leadership, willingness to accept responsibility. The fact that he is talented and well educated will earn him no recognition unless his education and abilities are satisfactorily applied

to the good of the company for which he works. Recognition as an engineer can come to him only through his own personal achievement."

I subscribe to that one hundred per cent.

I am convinced that that is a proper approach and it leads me to conclude that there are two recognizable groups of professional employees. The first is made up of people who have the advantage of education and maybe basic registration, but who require for some reason of their own to be part of an organized group. They are still what we today call "professionals". Collective bargaining may be necessary for them.

In the other, and I hope always unfettered, group will be the independents. A name or title has yet to be developed for them. I am convinced that this group will never ask for, nor will it be required, that they have collective bargaining, because they will be recognized on their own merits. This group will not seek refuge in nor fall back on group action and abrogate their personal decision-making to a committee or to other persons. They will always be individuals.

MR. WILLIAM DODGE,
Vice-President, Canadian Labour Congress.

THANK you for your kind introduction. I should have had that little blurb my secretary sent out amended to show that for the last ten years at any rate my service to the labour movement has been in a "professional" capacity —as a "professional" trade union leader.

I am not too sure what role Mr. Page and I should play this morning, whether we should make comments on our own account or primarily comment upon the remarks of the two speakers. I think discussants are supposed to confine themselves to the latter as a rule, and I shall try to do so.

However, I do want to say that I get a strong feeling that there is an atmosphere of evasion about this whole

discussion. You are talking about professionals, but you don't like to think about them as having jobs—they have callings, vocations, intellectual pursuits. You don't think of yourselves as employees, but as professionals. And you seem to be constantly searching for a euphemism for the word "work". Why don't we get down to brass tacks about this. A professional person working for a corporation or a hospital or any other institution is nothing more than what John Lennon calls a "cruddy working clog". The professional is paid a wage, he has specific hours of work, he works under supervision—some of it good and some bad—and he is subject to discipline and to the same misgivings and fears as any other worker in any other occupation.

Somebody referred to a TV programme about safety in the automobile industry. I don't know what impression other viewers had but I had one of a man—an engineer—absolutely petrified with fear that he would say something that his employer would take exception to. I don't regard this man as a free individual, professional or otherwise. I don't think he had any sense of being able to express himself freely. I thought of him as being a slave to his profession, perhaps a slave to his employer. He was a man of undoubted intelligence, undoubted experience, but not a free man, not at all.

As I see it the professional has no more voice than any other worker in institutional policy. He doesn't participate in the managerial decisions in the organizations he works for. Consequently, I think that all this stress upon the differences between professionals as employees of corporations and institutions and other classes of workers is phony. It is not very intelligent either, and certainly not likely to be very productive of a better deal for the classes of people that we are talking about at this Conference.

Professor MacGuigan stressed this in somewhat esoteric language. He said that the problems of the professional can be handled most effectively by some form of collective action. In this I thoroughly agree with him. I thought he was going to get down to cases about compulsory arbitration

and the right to strike but I'm not too sure what his conclusions were on those points. This, I assume will be enlarged upon as your discussion gets down more to basic issues relating to collective bargaining. I would just say this, that nobody wants to go on strike. Nobody wants to preserve the strike as an exercise in professional tactics or in self-indulgence of some kind. This is not what unions are interested in. Unions are interested in settling problems, and if problems are insoluble except through the instrumentality of a strike, then it doesn't matter what kind of people you are—teachers, nurses or engineers—the final and inescapable answer is that there will be strikes. There have been strikes of nurses and doctors, and there will be more.

When Mr. Fox was introduced there was some reference to a ten cent piece of costume jewellery. This can be a very dangerous weapon too. Something that cost two cents was responsible for the failure of a projectile to take off the other day and has caused the American government some millions of dollars in losses. So let us not underestimate in the scheme of things, the importance of this piece of jewellery which, I gather, is the emblem of the engineering profession. Mr. Fox says it has value far beyond price. It also happens to be, in the context in which we are discussing the problems of professionals, a lethal weapon against the non-conformist professional worker.

Mr. Fox talked about the tendency of people today to want to have steady employment, security, safety. This is, he seems to be arguing, a trend against a spirit of adventure and the spirit of individualism. But I wonder if this is really the right way to consider the question. I think this desire for security, the sense of insecurity to begin with, the problems which the worker on the job is confronted with and his tendency to conform, are all a product of the total industrial environment. It seems to me that the pressure against the expression of individuality and in favour of conforming is exerted on individuals by the powerful corporations for whom they work. The decision of the workers of industry to form themselves into groups for collective action is an attempt to express themselves, to

break out of this conformity that started with the assembly line and has now permeated the whole of our industrial society.

Let me give you an example. Some years ago, as a union organizer in Montreal, I was assigned the task of checking on the possibility of organization in the accounting department of the CNR. The CNR is a big organization and the accounting department naturally is also big. With the highly routine nature of mass accountancy of that time, the office consisted of a sea of desks stretching as far as the eye could see. All the desks were the same with the same kinds of people sitting at them. Thousands of people were in this great assembly line of accountancy. Most of the people we met there were just part of the machinery, cogs in this great wheel, but after we had organized them into a union and certain of them became officers of the local and members of the bargaining committee, suddenly the employer began to notice them. To the employer they weren't individuals until they became active members of the union. At this point a strange phenomenon became noticeable. The way to get promoted in the accountancy department of the CNR was first to get elected as president, vice-president or secretary of the union. That was the only way to get noticed, and since then we have had very little difficulty in keeping a very solid and interested group of officers in this particular local.

Perhaps, as Mr. Fox says, it is true that managements have lost by default the contact which they should have been maintaining with not only professional but all other groups of employees. But they have lost it and I think that unless great changes of attitude take place within management, it is lost irretrievably. The only answer left for the 'cruddy working clog' is to assert himself through collective action, through organization, through the principles of collective bargaining. I don't think collective bargaining suppresses individuality, or an individual approach to problems, policy or anything else. I think it is the only way he can re-assert himself as an individual in the society in which we live.

Any descriptions of professionals we have been given today by either of the speakers apply to all workers, even garbage collectors, to a great extent. I would like to refer again to the particular paragraph in this pamphlet "Standards of Professional Employment Relationships" which Mr. Fox read. Let me read it again, with a slight change of wording. I shall use the word "plumber" where he used the word "engineer". "It is essential that company managements recognize each employed plumber for what he is—namely a man who has been professionally trained, normally of better than average intellect and usually of higher than average individuality. The plumber, in spite of his technical background, cannot be considered as a thinking machine but as a man who has career and job satisfaction goals which his employer must help him to reach. Goals which include the need for personal achievement, a satisfactory salary level based on experience and responsibility, a necessity to be considered a man of stature among his fellows, and to have a job which will keep him happy and interested. It is the definite responsibility of the employer to show that he is prepared to recognize professionalism in his plumber employee and that he can supply a career which will give adequate challenge to each individual plumber."

Plumbers have worked this out for themselves. They have a union. And they bargain collectively.

MR. D. ALAN PAGE,
Director of Personnel,
The Goodyear Tire and Rubber Company of Canada, Limited.

INASMUCH as the program differentiates between speakers and discussants, I have assumed that my function is to comment on what has been said by the speakers rather than to deliver another address.

Because there appears still to be some doubt as to an acceptable definition of a professional, I should like first to outline the context in which I shall make my remarks. I

believe that for the purposes of our discussions today, a professional could be described as a graduate engineer, a registered nurse or a teacher who holds a university degree. I must acknowledge that my definition is neither precise nor valid. However, it does possess the virtue of directing your attention towards those groups of "white collar" employees which have demonstrated the most militant interest in the bargaining process.

It is interesting to observe that the groups which have generated the greatest impetus for collective action have one significant thing in common. Generally speaking, the individuals are employed in what has been described by one writer as a "civil service atmosphere"; that is, they are part of a large group in which a fairly rigid "caste" system prevails and in which promotion depends to a considerable extent on their relative length of service within the group. The technical requirements of the job are such as to leave little room for the exercise of individual initiative. In some respects it could be said that certain of their functions bear at least a faint resemblance to an assembly line operation. The novelty of the prospect of being able to bargain with their employers provides a form of escapism from the humdrum of the daily routine.

As you will expect, I agree with most of the views presented by Mr. Fox as to the arguments against collective bargaining for professionals. It is inevitable that the rigidities which are imposed by a formalized relationship will only add to the dissatisfactions and the frustrations which have impelled some professional bodies to seek an outlet in union organization. But I am convinced that, while collective bargaining may improve the economic lot of the professional, it will serve only to add to the frustrations of those who are striving to assert their individualism.

Turning to Dr. MacGuigan's address, there are three major comments which I should like to make.

I do not think that anyone can object on moral or legal grounds if any group of employees, be they professional or laymen, decide that it is in their personal interest to band

together and use their collective power to attain objectives which they are unable to achieve as individuals.

While I agree with the right of employees to engage in collective bargaining, I would also like to point out that it is fallacious to assume that the ultimate object of establishing social justice in our society will be achieved by the mere device of universal collective bargaining. I take it from what Dr. MacGuigan has said that it is his view that collective bargaining restores the economic balance between the two parties. Much of our legislation is said to be designed to establish and maintain such a balance. Those of us who are faced with the daily practicalities of bargaining are aware that this is a myth which does not stand up in practice. It is a physical impossibility to establish, let alone maintain, a balance of power between two economic groups. To suggest that such a balance can be established or maintained is to ignore the fact that collective bargaining is not performed against a background of economic criteria. The history of collective bargaining will prove the validity of this statement and anyone who is engaged in union negotiations will confirm the truth of this statement.

I may have misunderstood Dr. MacGuigan's statement, but I took it that he was making the point that if a contractual relationship with the employer was established by professional employees covering such items as wages and working conditions, seniority and grievance procedures, a professional would be in a position to concentrate on the advancement of the ethical concept. While I do not in any sense belittle the emphasis which the professional attaches to the ethical concept, it has been my experience that the individual's primary concern is for his economic well-being. The more prominent items appear to be such matters as wages, working conditions, pensions and the other material aspects of the working environment. I believe that the average professional worker has a firm concept of ethics and he is aware that he must conduct himself in an ethical manner, but I am unable to accept the suggestion that all his energies will be concentrated on the ethical aspects of his job because of the fact that the other elements have

been put to one side. One has only to read the newspapers to be made aware that ethics are not the primary consideration of some professional groups, but this fact appears to be submerged in the more spectacular areas of difference.

In summary, I would reiterate that no reasonable person can object to collective bargaining for professionals; however the loss of his identity as an individual would, in my opinion, outweigh all of the other advantages.

Current 'Collective Bargaining' Practices in the World of the Professions

PROFESSOR L. W. C. S. BARNES,
Executive Director,
Professional Institute of the Public Service of Canada.

WHEN Professor Crispo asked me to join this panel he suggested that I should address the conference "on the activities in which your organization is engaged that might be construed in any way, shape or form as collective bargaining". If I take his request quite literally the result will be a very short address for, as I am sure you are aware, the Government of Canada has not yet broken sufficiently far through into the twentieth century to give any form of collective bargaining rights either to the professional civil servants of this country or, in fact, to any other federal civil servants. Nevertheless, the fact that we are perhaps closer to the promised land than we have ever been before might perhaps justify my risking some extrapolation of the facts, even to the extent of prophesy.

The Professional Institute was founded in 1920 with the main objective, as stated in its Letter's Patent of "enhancing the value of the service to the public, maintaining high professional standards and promoting the welfare of its members". The Institute presently has some 9,000 members or roughly 70% of the professional strength of the service. The basic requirements for membership are graduation from a university of recognized standing together with the active practice of a profession within the federal public

service. The Institute is organized on the basis of professional groups ranging from Archivists to Veterinarians which are supported by a regional structure of branches which spread from the Yukon to Europe.

During the forty-six years of its existence the Institute has utilized all the acceptable channels which were available to it for the furtherance of its objectives. These channels have varied from informal contacts with Deputy Ministers to formal briefs to the Civil Service Commission and, when matters of major importance were concerned or when the occasional situation had reached crisis proportion, with members or committees of the Cabinet.

The successes which the Institute has been able to achieve have varied from case to case and from time to time but, in total, they can probably be described as very reasonable when viewed against the largely unofficial structure of staff relations within which it was operating.

Until very recent years virtually the only official recognition enjoyed by the main Civil Service staff associations was through membership on the National Joint Council of the Public Service. This body was formed in 1944, as an emasculated version of the British Civil Service Whitley Council. Partly by design, and partly by administrative custom, the NJC does not operate in the area of pay and, furthermore, its role is advisory and not executive. Nevertheless, in the twenty years of its existence it has made useful contributions in a number of peripheral areas of staff relations and conditions of employment.

For the last decade the Professional Institute has been a strong advocate of negotiation and arbitration for professionals in the public service and this objective has been sought with unremitting vigour. The revision of the Civil Service Act, which was undertaken in 1961, appeared to provide an excellent opportunity for some effective breakaway from the basic system of unilateral management decisions, interspersed with unofficial discussions which have been the traditional pattern of staff relations for many

years. The Institute presented a brief to the House of Commons committee recommending the establishment of negotiating machinery and an arbitration tribunal. Our practical thinking in this regard was influenced quite strongly by the experience of our professional colleagues in the Civil Services of various Commonwealth countries and more particularly of the British experience with the Whitley Council system.

The 1962 Act, as it eventually reached the statute book, fell short of our expectations but it did at least provide a legal right for consultation between the staff associations and the Civil Service Commission and the Treasury Board. We were even optimistic enough to believe that a de facto system of collective bargaining could be built up around the provisions of the new Act, using the pragmatic and non-legislative approach which had been developed so effectively in the U.K. The eventual facts of the case did not justify this early optimism. While consultation with the Civil Service Commission tended quite often to result in the development of mutually acceptable positions, our experience with the Treasury Board normally left us with little doubt as to the fact that consultation was essentially a legal ritual which was carried out in advance of the announcement of pre-determined decisions.

In the light of this situation it became clear that nothing short of a system of collective bargaining established and defined by law would be viable in the prevailing atmosphere. Nearly three years ago both major political parties were blessed, almost simultaneously, with a revelation of the truth in this regard. Whether this was due to the effectiveness of our presentations or to the imminence of a general election it might be both difficult and embarrassing to determine but the fact is that they fell over themselves to support the new found virtue of the case.

As it happened, of course, it was Mr. Pearson who was given the opportunity to put the newly discovered truths into legislative form and, as I am sure you are well aware, he approached this chilly brink by the time honoured

procedure of setting up a committee. The Preparatory Committee on Collective Bargaining in the Public Service under the chairmanship of A. D. P. Heeney reported to the Government during the past summer that the public service should in fact have a system of collective bargaining based on negotiation and arbitration. The cycle of official discovery of the facts of mid-twentieth century life was now complete, or, at least, almost complete.

The Heeney proposals envisage the service being divided into six main occupational categories namely the Executive, the Scientific and Professional, the Administrative, the Technical, the Clerical and Operational categories. These will in turn be divided into some 66 or so bargaining groups, nearly half of which fall in the direct field of interest of the Professional Institute. The groups within our area of concern are based on either common functions or academic disciplines with typical examples being the Dentistry group and the Geology group on the one hand and the Foreign Service group and the Scientific Research group on the other.

The Heeney Committee recommends a system under which staff associations having a membership of more than 50% in any particular bargaining group may apply to a Public Service Staff Relations Board for certification as the sole bargaining agent for that group. The firm policy of the Professional Institute is to seek certification in respect of all those bargaining groups which consist essentially of professional personnel. In this policy we believe that we have the firm support not only of the vast majority of professionals in the service but also of many of the Provincial professional licensing bodies. The target date for the introduction of the first series of collective agreements in the professional sector of the Public Service is July 1st, 1967. We in the Institute believe that this date will define not only a major watershed in staff relations in the service but also the beginning of a new era in the welfare of our members and in the well-being of the service.

MR. E. G. PHILLIPS,
Chairman of the Steering Committee for Negotiation Rights for Professional Staff.

As many of you are no doubt aware the Steering Committee is not engaged in any form of collective bargaining. Nor does it expect to be so engaged in the future. Recently, however, we did circulate a copy of a brief on "Negotiation Rights for Professional Staff" to all professional associations in Ontario. If you have had a chance to read that brief you will perhaps know what I plan to report on today.

Our activities are almost entirely devoted to seeking a consensus among the professions and among professionals who are employed in industry and other institutions about a desirable way of representing professional employees in their relations with their employers. We have had in this Conference since last night a fairly extensive analysis of the problems to be faced by a group of professionals entering into collective bargaining. But all of these problems are based on the assumption that if they do in fact move in that direction they must do so under the Labour Relations Act. The only exception that has been mentioned are the teachers, who have their own form of collective bargaining under separate legislation.

The Steering Committee orginally represented a number of engineering groups identifiable by the company with which they are associated. The professional librarians have now joined and a few other groups are coming in as observers to examine the possibility of having special legislation peculiar to the needs of professionals brought in to solve some of the problems that are being discussed here. We are of the opinion that neither a slavish adherence to one mechanism or another or a perpetual debate about the defects of existing alternatives would be very fruitful. We put forward this brief in the hope that it will start some discussion on new ideas and on new techniques.

We feel that it is inevitable that a professional who is a part of a large institution or large corporation must be administered as an employee. The employer cannot undertake, as has been suggested in other sessions, to treat his professionals individually when he is, in fact, employing thousands of them. To maintain a personal contact between the general manager of a corporation and thousands of individuals would, I think, be quite impractical. Companies have been forced to introduce various administrative techniques—rules, regulations, job evaluation plans and so forth—which affect the economic welfare of their professional employees. In this sense above there is a need for collective action in order to represent the professional in establishing these rules. The alternative is not one between free action on the part of the individual and collective negotiation, but rather between collective treatment without representation and collective treatment with it.

It has also been mentioned that there is considerable interest on the part of the professions in going beyond the economic area to deal with such things as professional status and professional prerogatives within the corporate setting. At present you have a relationship of master and servant. The employer has the right to set the work rules, the methods of conducting work and, in fact, he can dictate to a professional within his employ the standards of professional service and activity he expects. We do need some way of bringing the professional attitude to the attention of corporate management. I am not trying to maintain that this is a black and white picture or that all corporations are indifferent to this problem; however, when you have people—human beings—who have different motivations, they are bound to have differences of opinion, and a mechanism for resolving these conflicting opinions is necessary.

In the rather short time given to me I cannot go into detail about what we are proposing. Moreover, I do not think it is that firmly established. What we would like to see is a debate among the professions about the possibility of securing special legislation designed for professional

needs. We have all heard that we must maintain membership in negotiating bodies on a voluntary basis when dealing with professionals. There are individuals who want to go it alone and they have to be accommodated. What is more, the professional merits individual treatment in some areas. But certainly they all must observe the standard rules of a corporate structure. Within it, however, there must be an area for individuality and it should be spelled out. Perhaps this cannot be done under a standard collective contract which must apply universally. So we are suggesting the possibility that the professions should look at a system of individual contracts, such as the teachers have, within a framework of collective action and even of collective agreements. The collective agreement would delineate where group negotiations would finish and individual negotiations would start. Within its overall framework the group contract would empower the individual to negotiate a contract with his employer on his own with respect to certain terms and conditions of employment.

When looking at the problem of resolving disputes, and I think this is always the area which is most difficult, the professional is confronted with the standard practice in unions of the resort to strike action. I think it is impractical to argue the feasibility and practicability of strikes by professionals. It has been my experience from talking to professional people that the strike does not appeal to this type of employee. For one thing he is often so deeply involved in the administration of an organization that he does not wish to be put in the position of withdrawing his services. This is probably one of the biggest deterrents to using the present mechanisms available. Labour-management relations in Ontario, and this is a personal view, are predicated on the assumption that the ultimate sanction is a strike. We believe that if you start off from a different position, and look at arbitration as a more rational way to resolve disputes among human beings, then you might come to the point of looking at other ways of getting around that ultimate sanction—other mechanisms or ways of handling the disputes before going to arbitration. No one, I think,

from the discussion I have heard so far at this Conference, would maintain that arbitration is a good thing. It is a very poor way of resolving disputes. It is by its very nature arbitrary: but I think it is to most professionals a far better way than any other method that has been proposed to date. This is its main advantage.

Within these broad terms of reference we have been trying to encourage as much discussion as possible among professional groups. We have not been trying to promote a particular concept but rather to promote the idea of a solution being developed by the people whom it affects before the situation becomes so critical that solutions will be imposed on us. We are getting to a situation where more and more professionals are going to be working as employees and not as private practitioners. Not only are the new emerging professions almost entirely employed or salaried, but even the old traditional ones are gradually facing new circumstances which are going to put a growing number in the salaried category. If we can in the interim, while this process is going along, come up with a mechanism that we like and that would be fair to all concerned, including employers and the public at large, then I think we will have done everybody a good service. If we maintain that the problem should be ignored and will go away—which has perhaps been done too often in the past—then we may pay the penalty of emergency measures being imposed without adequate consideration.

This in summary is the activity of the Steering Committee. We are endeavouring to promote the discussion of new ideas and concepts in the hope that professionals can arrive at a consensus about the way in which they should approach the problem of collective bargaining. We seek no single solution. Instead we would like to see a general framework which would permit those professional employees who might care to take advantage of it to engage in negotiations in keeping with their circumstances. The alternative is a continuing and futile debate on the inadequacies of existing legislation.

MR. I. M. ROBB,
General Secretary,
Ontario Secondary School Teachers' Federation.

MY approach to this problem of collective bargaining will of necessity be somewhat different from that of the two previous speakers. The organization that I represent has been in the business of collective bargaining for quite some time now and what is more we have not been bargaining for rules or procedures, we have been bargaining for money.

Before getting into a discussion of the techniques that we have used, I think some indication of the type of organization with which I am associated and a little historical background is necessary. The Ontario Secondary School Teachers' Federation was founded in 1919 as a voluntary organization and continued as such, membership being available to any high school teacher in the province, up until the year 1944. By then we had enrolled in our ranks some 94% of all the high school teachers in the province. At that time, along with other teaching groups, we were instrumental in having the Legislature pass the Teaching Profession Act which governs and gives legal status to all teacher organizations within the province.

Without going into the details, I think three provisions under the Act are pertinent to our discussions here. The first is that membership in the organization became mandatory. I am frequently asked, "What do I do if I don't want to belong to your Federation?" My answer is a very simple one: "Stop teaching in the publicly supported high schools. As long as you teach in the publicly supported high schools you are required by law to belong to the OSSTF." The second important feature in the Act is the fact that we have what in union parlance is called the check-off. We do not have to collect our own fees from members. These are deducted at the source by the employing school board which is required by law to do so and to remit the fees to the organization. The third feature of this Act which is pertinent to our discussion is the fact that it gives the governing body

of the Ontario Teachers' Federation, which is the controlling body of all teacher groups, quite broad disciplinary powers over the members. So we have a rather unique situation. Teachers must belong, must pay fees, and must obey regulations—by law.

Perhaps I should point out at this point that what I say from here on applies only to the OSSTF. Much of what I say will have implications and application to other teacher groups, but I do not know these at first hand and I propose only to talk about things I do know first hand.

Prior to the advent of this Act, collective bargaining had been conducted by the Association on a somewhat sporadic, hit and miss basis with the employing bodies, which are the school boards that operate the secondary schools of this province. In our organization itself we have at the present time 23,000 members. The organization operates at three levels—the provincial level, the district or regional level, and the branch level. The branch in the main is made up of the teacher employees of one particular school board. There are some variations to this but these are not important. The organization includes in its ranks all persons who work in the schools as teachers and the term teacher is interpreted broadly. It includes principals, vice-principals, heads of departments and so on. If, as a teacher or supervisor, your normal place of employment is in the school building, you are a member of the OSSTF. We do not include in our ranks people who work in this (Education) building in Toronto, the top brass, superintendents, directors of education and so on, although, interestingly enough, we have in our constitution a provision which enables them to become voluntary members of the organization, and since most of them achieve their exalted position after a period within the profession, they elect to belong on a voluntary basis and subject themselves voluntarily to such discipline as may be imposed by the organization.

At the provincial level, the organization's role in the collective bargaining process can be outlined as follows: First of all at the provincial level we formulate what we

call a salary policy. This involves setting out general principles which we believe should govern the payment of teachers and which are applicable on a province-wide basis. It involves the enunciating of such principles as that a teacher should be paid in terms of the qualification she holds, the number of years of successful experience she has had, and the degree of responsibility which she assumes. Our provincial policy stays clear of attaching dollar values to any of the factors which we feel should be a basis for remuneration for teachers. We say, for example, that if you assume responsibility as a head of a department, this should be recognized in the salary scale. We do not say, however, whether you should get a hundred or a thousand or two thousand dollars for it.

Second, the provincial organization disseminates information about salaries and salary negotiations all across the province. We publish and put in the hands of each member a list which shows the exact salary being paid every member. We publish our salaries so that any teacher can find out at any time what any other teacher is being paid. This has been a very valuable tool in what is perhaps the most difficult task confronting people who are trying to get a group of professionals to bargain collectively. We broke through the barrier whereby our members said, "What I am paid is my own personal business and nobody else's", and were successful in selling the concept that what you are paid is important to everybody else in the profession and the idea that the salaries of the profession are a professional responsibility, just as much as is competence in the classroom or mastering the academic discipline you propose to teach. You have a professional obligation to see to it that the profession is free from want and the pressures of economic difficulty, and so on. Once we were able to sell that, and one of the ways of selling it was the device of having everybody's salary published, we had come a long way. Second we publish and distribute to all teachers annually the actual salary scale in effect in every municipality in Ontario. As a result, if a teacher is proposing to move from town A to town B he can find out well in advance

exactly what he will be paid if he goes to town B, in terms of his qualifications, experience and the degree of responsibility he is to assume.

A third function of the provincial office is to devise and to control what I suppose would be called our ultimate weapon in the collective bargaining process. As Dr. Carrothers mentioned last night, I think we are only kidding ourselves if we go to the bargaining table with nothing but fair words. There frequently comes a point of time when you have to have a weapon. I think you have to have one at all times although, interestingly enough, if you have a weapon you almost never have to use it. If you have not got a weapon you are going to be in a position where you wished you had one many times. This is a rather trite observation but it is very true. So in devising this ultimate weapon the provincial organization has tried to do two things. First of all it had to provide money, because behind any bargaining weapon lurks money in some shape or form. The provincial organization has established a fund of substantial proportion which is earmarked as the kitty supporting the use of the ultimate weapon in salary negotiations, and nobody dare lay a finger on it except for that purpose. And so, like the weapon itself, once you have the kitty you never have to use it. But if you have not got it you certainly do need it. We have built up a sizeable fund. Secondly, we have a weapon which is not a strike—our people tend to react against strikes because they are just as high and noble in their thinking as are the engineers or the lawyers and just as conscious of their service and obligation to the public as these other groups. We have devised a type of boycott which is particularly effective in our special situation but probably would not work as well for other professional groups. As you know, in this country schools start on the first of September and stop at the end of June, and the educational year is cut up into a package. The boycott simply means that at the conclusion of an academic year teachers will withdraw their services and refuse to work for a school board that the Federation cannot negotiate with successfully. It is not quite that simple but that is the essence of the thing.

A fifth function of the central organization is the training of negotiating teams who will serve at the local level. We spend quite a lot of time, effort and energy in the process of training the people who are going to do the actual bargaining with the employing school board.

A sixth function is the conduct of a continuous programme of educating the members to accepting the fact that there is nothing inherently immoral in asking for as much money as they think they are worth. This takes a bit of doing: we have been at it now for twenty years and will continue to be until the end of time. You have to persuade your members that they are not being bad when they say 'I want more money'. We say to them that they are being bad if they do not ask for more money, because in so doing they are holding down the profession rather than building it up, are failing in their obligation to attract to the profession the best people available, and so on.

At the local level the actual negotiations take place, and I mentioned earlier that one of the functions of the provincial organization is to train teams of negotiators. We find that most people who are new to the game think of negotiation as a process whereby people talk about things for a while and then get what they are asking for. If this does not happen it has not been negotiation. This is a fairly common interpretation. We have to combat this, and point out to our members that they should make up their minds before starting whether they are going to sell something or whether they are going to fight for something, because it is very difficult to sell a man if you walk into a room and start off by saying 'Look you, pay attention to me.' If you are going to fight don't speak to him. Hit him.

In the process of our experience in collective bargaining we have evolved some principles. These are not unique, they are not original, they are not very profound. Some of them we arrived at by that flash of intuition which comes to philosophers about once every twenty-four months. Some were arrived at by trial and error, and some of them were arrived at by getting caught in a jam and having to wriggle our way out of it, a process which taught us some things.

I would lay these down as being the principles which we feel are essential to our collective bargaining process. The first one I mentioned incidentally — successful collective bargaining depends on the unqualified support of the rank and file of the membership in the organization. If I can be pardoned a reference to a personal experience — on one occasion I addressed a meeting of teachers and one of them came up to me at the end of the meeting and said 'I want you to know that every person in this room is right behind you. The trouble is we're about twenty years behind you.' You must make sure that in leading your membership you stay in sight of them, because you cannot lead if they cannot see you. You stay just ahead of them, not ten miles ahead, and you make sure before you enter any bargaining situation that you do have the support of the membership. I think it would be fair to say that of the time and energy we devote to salary negotiations, 90% of it is spent in working on our own members and 10% is spent on working on school boards and the so-called 'other side'.

The second thing I think we have learned is that you cannot bargain successfully unless you have a face to face confrontation between the employer and the employee. You cannot bargain through agents. We refuse to talk to directors of education or so-called management people about salary. We are employed by an elected board of trustees. We will talk to the trustees, and the people who will do the talking will be the teachers who are working for those trustees.

I will mention two other things that I think are important —one I have already mentioned, that selling and fighting do not mix, and the other, if you are going to fight it is not much of a fight unless somebody gets hurt. So you had better warn your members that if they are going into a fight they are going to get hurt. And if they are not going into a fight then do not mix fighting tactics in your selling tactics, because this does not work.

Finally, one further brief comment. We are now experimenting with some measure of success with a new approach to negotiating teachers' salaries. We are saying to trustees,

"Why do we sit down on opposite sides of the table and argue? Why don't we sit down on the same side of the table and say a good salary schedule is just as important to good education as any other single thing? Let's work it out jointly instead of arguing about it". We have had some success. I hope we will have more.

MR. L. C. SENTANCE,
Executive Director, Association of Professional Engineers of Ontario.

WHEN asked to take part in this discussion, my terms of reference were: "Describe all the activities of your Association which could be related to collective bargaining, no matter how remotely—you have 10 minutes to do so."

This is really an encapsulation process for an expert—one that is beyond my capabilities. But I shall go ahead anyhow with confidence, which, by the way, is the feeling most of us have before we fully understand a situation. A little history, a little philosophy, a few specifics, and a bit of speculation—these I can give you.

HISTORY

I don't suppose that any single topic of discussion has occupied the Association and its members so exclusively, continuously, and for such a long duration, as has 'compulsory collective bargaining under law'. It all began in 1943 when Ontario began to write its first collective bargaining legislation, it was 'fixed' by the advent of PC 1003. "If engineers are to be forced into collective bargaining by government, then steps must be taken to see that such bargaining *for* engineers is done *by* engineers". This was the A.P.E.O. reasoning which gave support to the formation of the Federation of Employee Professional Engineers and Assistants—an organization whose units organized for certification and for formal bargaining with their employers.

A number of units were formed, and in 1947 the Ontario Hydro Unit was certified, and began formal bargaining with its employer. Altogether 17 units came into being prior to

1948, but only eight actually became certified. In 1948 the Federal Government relinquished its wartime labour legislation powers and the Ontario Legislature promptly passed its own Labour Relations Law which excluded certain professionals, and the 'company groups' status changed. This change in status resulted in the formation of an Employee Members Committee—an official standing committee—whose members were accredited representatives from the various company groups. E.M.C., as it became known, thus gained access to Council, and authority therefrom to establish other groups, to achieve information exchanges between the groups, and to endeavour to achieve and maintain adequate and satisfactory communication between members of an established group, and their employers.

The various company groups continued for some time to negotiate collectively with their employers, with 'information service' from the Association. This proceeded until 1958 when S.O.H.P.E. (Society of Ontario Hydro Professional Engineers) presented a brief to the Select Committee on Labour Law recommending the removal of the exclusion clause, which was directly opposed to the Association's point of view, and the 'Third Way' approach.

Through many years, E.M.C. members in one form or another have supported in varying degrees the drive to achieve compulsory collective bargaining under law—culminating in the declaration of solidarity and the presentation of the brief 'Negotiation Rights for Professional Staffs' to which Mr. E. G. Phillips has already spoken.

THE PRESENT—ONTARIO

E.M.C. now consists of nine groups which all continue to maintain collective negotiations and discussions with their management. The active groups are: Ontario Civil Service, Canadian General Electric (Guelph), Canadian General Electric (Peterborough), CSA Testing Laboratories, Toronto Hydro-Electric System, Ontario Water Resources Commission, Canadian National Telecommunications, Hawker-Siddeley (Toronto), Society of Ontario Hydro Professional Engineers. Of these, S.O.H.P.E.A. is the largest, with some

700 members, with many years of experience in collective relationships, and with a very sophisticated procedure involving written agreements and arbitration arrangements—everything now being sought, in fact, *except* the force of government to compel the employer to continue this relationship. Under present voluntary procedures, it is understood that relationships have been excellent, that benefits have been exceptional. In fact, this relationship indicates the most successful application of the voluntary and amicable collective relationship, with all the detailed aspects of formal or legal collective bargaining, except the law itself.

The second largest group, Canadian General Electric Professional Engineers Group, preaches and practises the "collective enlightenment" approach, which seeks to combine a 'sounding board' relationship with the employer, and to supplement this with a much closer relationship between group and professional association, the professional association being expected to undertake such works as will foster greater understanding and closer co-operation between employer and employee.

Other company groups continue collective discussion with their respective companies under a variety of voluntary procedures.

But as of today, only C.G.E. and O.W.R.C. groups have continued to support actively a philosophy of voluntary amicable relationships—all other groups subscribe (currently) to the philosophy expressed in the brief "Negotiation Rights for Professional Staffs."

The Association continues to support a philosophy which is a simple one: "It is indeed our responsibility to build a reputation for integrity with both management and the professional employee on all matters of professional employment". It still feels that a single, undivided profession is best for the members, and that maintenance of the individual's responsibilities to the public, to employer and to other professionals is *not* possible when obligations to a bargaining unit exist.

It reads and understands the current pressures of government to grant collective bargaining rights to *all* its employees, not excluding professionals. It reads and understands the movements to 'get on the bandwagon' which seem to be occurring in other provinces. It does not consider, however, that anything has developed to change its principle stand, and it feels no requirement to agree *with* government on a contrary position, even though it may be forced to agree *to* what it considers an undesirable event.

Dean Carrothers has frequently stated that compulsory collective bargaining under law is *not* incompatible with professional ethics, that it is simply a question of status, of personal dignity, of potential division of loyalty between union and professional society. Surely this is almost beside the point. The division or conflict of loyalty is between union and public, employer, or other members of the profession—*not* the professional association.

THE SITUATION IN QUEBEC

In Quebec, the situation is in considerable contrast with Ontario in particular, and the other Provinces in Canada. Here, at the present time (since late 1964), Quebec law provides two avenues by which the professional may engage in legalized collective bargaining. The Professional Syndicates' Act now makes it possible for groups of like professionals to band together and to seek recognition from the employer as a bargaining unit. If this recognition is given, then the bargaining unit becomes official, and operates under the aegis of the Labour Code. The second avenue open to the Quebec engineer—or other professional —is certification under the Labour Code, which no longer excludes or exempts professionals from its terms.

Engineering unions have chosen the Syndicate approach, it having the advantage of potentially larger membership, determined by negotiation with the employer, rather than by the definitions of the Labour Code.

Several unions are now operating, all dealing with governments of one level or another. Strikes and threats of strikes have been heard and seen, and full-scale industrial union type contracts have been signed, and immediate economic gains have been made in some cases, and affiliations with trade unions accomplished.

The professional body has not been supported by its members, and has been forced to contract itself very substantially. This in part is due to the active fight against it waged by the engineering unions.

SITUATION IN THE UNITED STATES

Since the passage of the Taft-Hartley amendments to the National Labour Relations Act in 1947, engineers in the United States have had free choice in their relations with managements. Professional employees have an absolute right to a separate vote apart from production or clerical employees, and may make their own decision as to the bargaining unit in which they are to be included. They have had all of the legal force of the law for many years, and they *have* formed unions.

A few of these unions still exist. By most liberal estimates however, they represent less than 5% of the employed engineers in the U.S.A.

The history has not been a particularly happy one, but it does seem that given a choice between 'professionalism' and 'unionization' most engineers did not support the union approach, and many of those who did have since dropped out. No major group of engineers has voted for unionization since 1952, and many large units voted out their unions, and the E.S.A., the federation of engineering unions, has become defunct.

For the engineer in government, a choice of relationships is available ranging from individual through informal collective bargaining to formal certification, under President Kennedy's Presidential Executive Order 10988.

SUMMARY

In Ontario, a small portion—estimated at 6%—of engineers are engaged in voluntary collective negotiations with their employers, in practices ranging from highly informal to sophisticated and highly formal.

In Quebec, a somewhat larger proportion of engineers have or are in the process of forming syndicates, and seeking recognition which will give them the force of law. Strikes have taken place and contracts have been signed.

In the United States, engineers have had for some 20 years the right to a variety of union approaches. Less than 5% are now said to be in such unions, and many have withdrawn because of unhappy experiences.

This being the case one wonders at the continuing desire of Ontario engineers to participate in these legal procedures. Perhaps there is a little of the Mae West philosophy here—"When confronted with two evils I always choose the one I never tried before."

Perhaps, too, in the current rationalizations, including Dean Carrothers', there's just a bit of the situation described in the old squib where the doctor, giving a prescription to the patient, says: "Let me know if this stuff works, I'm having the same trouble myself!"

MR. L. B. SHARPE,
Director of Employment Relations,
Registered Nurses Association of Ontario.

THE topic is "Current Collective Bargaining Practices in the World of the Professions". Given the limited time which is available I propose to give you only a thumb-nail sketch of what is happening within the nursing profession in various provinces as well as elsewhere. Nurses in British Columbia, Alberta, Manitoba and Quebec are bargaining collectively under their respective provincial labour acts. A similar program on a pilot basis is under way in Ontario.

British Columbia nurses began a collective program under the Labour Relations Act of that province some twenty years ago and orders of certification and collective agreements now cover nurses employed in 57 hospitals. At the moment, negotiations take place centrally, i.e., on a province-wide basis, and the agreements are then individually signed by participating hospitals. Similar arrangements exist for nurses employed in other fields of nursing.

There is similarity between the Labour Relations Act of British Columbia and the Labour Relations Act of Ontario with respect to the definition of 'employee'. Collective bargaining under provincial acts is available only to employees covered by the legislation. In nursing this raises the interesting problem of determining what position levels or professional categories should be included in certified bargaining units. In British Columbia orders of certification include and exclude the under-noted position levels or professional categories in hospitals:

Included	*Excluded*
General Staff Nurses	Director of Nursing
Assistant Head Nurses	Assistant Directors of Nursing
Head Nurses	
Supervisors	

The definition of 'supervisor' in the standard hospital agreement in British Columbia reads: "including those who are supervisors in hospitals of 200 beds or more and who are in sole charge during the afternoon and night shifts or in charge of five or more units, that are in charge of head nurses."

In Alberta, teachers employed in the Alberta Public School System, to mention the experience of another profession, started a collective bargaining program in the 1940's under The Alberta Labour Act. Orders of certification include all teachers in classifications described by the Alberta School Act. This collective bargaining program includes and excludes the following professional categories:

Included	*Excluded*
Teachers	School Superintendent
Department Heads	
Assistant Principals	
Principals	
Directors and Supervisors	
Assistant Superintendents	

Nurses in the Lethbridge Municipal Hospital formed a bargaining unit shortly afterwards and the following professional categories were included and excluded:

Included	*Excluded*
General Staff Nurses	Administrative Supervisors
Assistant Head Nurses	Assistant Directors
Head Nurses	Director of Nursing
Clinical Supervisors	

Nurses in Edmonton then began to take similar action. The bargaining unit formed in the Royal Alexandra Hospital covered the following professional categories: General Staff Nurses, Assistant Head Nurses, Head Nurses and First Level Supervisors.

Nurses in the Misericordia and St. Joseph's Auxiliary Hospital have also formed bargaining units which include the professional category of Head Nurses. Collective bargaining has evolved rapidly in Alberta and the nurses of that province are to be commended for their program.

In Manitoba a most interesting development occurred recently. The nurses employed by the City of Winnipeg in hospitals and health units were members of a trade union. They became disenchanted with this arrangement, obtained an order of decertification, and became certified as a separate bargaining unit. While negotiating their first contract their employers took the position that nurses classed as supervisors should not be included in the unit. However, the Board administering the Labour Relations Act of that province included them in the order of certification.

In Quebec there are between 5,000 and 7,000 nurses who have formed syndicates which are affiliated with the CNTU. These syndicates have negotiated agreements covering nurses employed in about 40 hospitals. Such units are certified under the Quebec Labour Code. It is interesting to note that the 'horizontal line' has been drawn at a lower level in Quebec than in western provinces. Nurses included in the bargaining units are those employed at the General Staff level and as Assistant Head Nurses. Nurses in higher professional categories are attempting to form 'cadres' and enter into collective bargaining on a voluntary recognition basis with their employers. Quebec experience at the moment appears divisive to the profession.

In the United States, to mention experience south of the border, nurses are involved in collective bargaining programs in a number of states. We have examined collective agreements covering nurses employed in 51 hospitals and can make the statement that 35 of them, that is a majority, included Head Nurses or higher categories in the bargaining units.

In Sweden and Denmark, to go further abroad, nurses have been involved in collective bargaining programs for a number of years and, like the teachers in the school systems of Ontario and Alberta, all nurses regardless of their position level are included in the bargaining units. Collective agreements in Denmark cover Matrons of hospitals and nurses employed at less senior levels.

The Registered Nurses' Association of Ontario, a voluntary incorporated association, has been studying collective bargaining for several years and has found from experience that informal approaches to employers simply do not work. They are ineffectual. One of the first actions the Association took after it came to this conclusion was to draft a proposal for the Provincial Legislature to enact a special statute providing collective bargaining rights for nurses. The Act would be entitled "The Nurses' Collective Bargaining Act, 1965". In essence the Association suggests three things:

First—collective bargaining for all registered nurses regardless of professional categories or position level.

Second—the settlement of negotiation disputes by arbitration.

Third—the naming of the Registered Nurses' Association of Ontario as the bargaining agent.

Nurses have supported their proposal by a number of actions. They have written letters to their provincial members of Parliament requesting passage of the proposed legislation. As a means of demonstrating to the government their seriousness, the 1965 Annual Meeting of the Association was adjourned so that the delegates could proceed en masse to Queen's Park.

What has happened to the proposed special legislation? We gather that the government is interested in the plight of nurses and is studying the matter. So far the government has taken no action. We know that the Department of Labour is fully aware that the nurses of Ontario are starting to use the Province's Labour Relations Act and realizes that this Act has deficiencies in terms of applicability to professional employees. We are sure that they will watch our experiences for the purpose of identifying such deficiencies and hope that they will give consideration to appropriate corrective measures.

What sort of corrective steps could be taken? Possibly as a start the name of the Act could be changed—it could be entitled the Labour and Professional Relations Act. The Board administering the Act could include persons who are professionally oriented. We were pleased that on the two occasions to date when nurses have been before the Labour Relations Board, Mr. J. Finkelman chaired the hearings. Hearings to date have been a learning experience for nurses and, we trust, for the government.

One of the problems for nurses working within the Ontario Labour Relations Act is the question of determining which professional categories or position levels can be included in bargaining units within the terms of the Act. Nurses generally, like the professional engineers employed by Quebec Hydro, wish to have included as many position levels as possible in their bargaining units. This is why we

are interested in the experience of other provinces and express the hope that the Ontario Labour Relations Board may see things through western rather than Quebec eyes.

Another deficiency in the Labour Relations Act of Ontario is Section 89 which allows a municipality to remove itself from the Act's coverage. It is truly an archaic provision, especially when bearing in mind the likelihood of federal legislation which will provide collective bargaining rights for federally employed persons.

A further word about events in Ontario. At the 1965 Annual Meeting of the Registered Nurses' Association of Ontario, a resolution was passed which authorized the paid staff of the Association to assist nurses to form bargaining units and initiate a collective bargaining program in any way deemed advisable. We are beginning slowly in order to learn from experience. If that experience is satisfactory we shall proceed at a faster pace. The first nurses to form a bargaining unit were the public health nurses employed by the Halton County Health Unit. We are proud of them. Their application for certification was frustrated by a declaration under Section 89. The next group of nurses to form a bargaining unit were those employed in Windsor's Riverview Hospital. This case is still before the Labour Relations Board.

The nurses of Ontario are beginning to implement an active program of collective bargaining. The time for talk is past and they generally feel that they wish to proceed with a positive collective bargaining program.

DR. J. PERCY SMITH,
Executive Secretary, Canadian Association of University Teachers.

IN some ways I feel out of place at this Conference, where the concern is with the activities of professional associations in collective bargaining; for the Canadian

Association of University Teachers is unlike the other professional bodies represented here, in its structure and its way of functioning.

This is so mainly because of the special nature of universities themselves. A university is not a business corporation, and indeed not a very homogeneous institution. It comprises a number of widely disparate groups, with widely varying interests. What holds them together is of course their common concern with the extension and dissemination of knowledge. Since the thing most essential to the life of an institution with such an objective is liberty of speech and of thought, it follows that the relation of the faculty member to his university is not the normal employee - management relation.

Further, the individual faculty member may well be in a curiously ambivalent situation with respect to his profession. What is the real profession of a man who is trained as an engineer, lawyer, doctor, agronomist—or whatever—and becomes a university professor? It is clear that he has two professions, and that he must take both of them seriously if he is to play his proper role in the university. The ambivalence is revealed when one deals with the question of professional fees. Although the situation is changing, it was true for many years that professional people in medicine, architecture, engineering, and so on, teaching at universities and counting themselves an integral part of them, paid very substantial fees to the institutes and associations of those professions, yet objected to giving even the most modest support to the professional body that was most closely concerned with the conditions under which they worked. There is still a residuum of such people; perhaps there always will be. They like to think of themselves as true individualists, and, ironically, the C.A.U.T. has the function of protecting this grandiose illusion.

It is against the background of the university as a special kind of institution—the word community is commonly and I think rightly used—in which members of many professions

are joined in a second profession, that one must view the organization of university teachers. A brief explanation of its structure may be helpful.

Early in the 1950's the financial plight of universities, and particularly the level of salaries, was such that faculty members were forced to organize themselves. As a result local faculty associations came into existence on many campuses, initially to do something about salaries, pensions and the like. They soon found that they could function a great deal more effectively if they joined with their counterparts on other campuses, and so there emerged the Canadian Association of University Teachers, which is still fundamentally a federation of local organizations. No two local associations are alike: they set their own terms of membership and have their own constitutions, programs, and fees. In its fifteen years of existence the Association has grown to have a membership of well over eight thousand, on more than forty campuses.

The national association through its officers and secretariat serves two main purposes. One of these is to collect, analyze and disseminate information for the benefit of the local associations. The other is to act on behalf of Canadian university teachers in any matter, local or national, where it is important that their professional voice should be heard.

Let me now list briefly four out of many areas of concern, not in their order of importance, but in the chronological order in which they arose:

First, salaries. Every local association has its own salary committee, and in addition there is a national salary committee which maintains a constant study of salary patterns and problems, and relays information to the local associations. The concern of salary committees tends to be with floors rather than ceilings, and a great deal of attention is given to the merit increases to which previous speakers have referred. The very important questions arise, especially in so subtle a profession as teaching: what is merit, and who is to decide who has it?

Second, pensions and other benefits. As with salaries, these are studied both locally and nationally, even though specific action is likely to be a local matter. The C.A.U.T. is at present co-sponsoring, with two other national university associations, a study of university pension schemes across the country, in the hope not only of improving them but of increasing the mobility of faculty members.

Third, academic freedom. Academic freedom is, as I have indicated earlier, a condition of life for the university and for its faculty members: it is not simply a fringe benefit. Its protection is a matter of the greatest importance to the entire community, both on and off the campus.

Fourth, university government. It has become clear to many persons outside the universities as well as those within them that a central element in all the problems confronting universities is the way in which they are organized and run. There is not time for me to launch into a discourse on the subject. Let me say only that because of the nature of the university, it is of the greatest importance that the faculty members be involved in the making of decisions that affect its life. It was assumed, when universities were first established in Canada, that because universities were certain to be spending large sums of money, it was essential to have the oversight of businessmen. So the establishment of lay boards of governors consisting largely of businessmen, with some representation from the professions but no faculty members, became the pattern. The pattern implied a distinction between financial and academic decisions, and faculty members inevitably have come to recognize that this is a spurious distinction. All financial decisions are in some sense academic decisions; it is folly to bar faculty members from participating in them, instead of seeking their advice.

There is no question that the devising of a more rational form of university government is felt by many faculty members to be the thing that would do more than anything else to fit the universities for their role in Canadian society. Let me close, therefore, with a further reference. A year

ago, under the joint sponsorship of the Canadian Association of University Teachers and the Canadian Universities Foundation, with the help of the Ford Foundation, a study of university government in Canada was instituted and carried out by a commission consisting of two distinguished scholars from outside Canada. Their report is expected to be released in March and the entire university community of Canada is looking forward to its appearance.

Collective Bargaining and the Professional Employee in Quebec

PROFESSOR JEAN-RÉAL CARDIN,
Director, Department of Industrial Relations, Laval University.

WHEN Professor Crispo asked me to deliver this address and to express a few comments about collective bargaining and the professional employee in Quebec, I was not only highly honoured, but also very interested because the theme of this Conference is directly related to the revolution which is going on presently in the field of labour relations in my province.

When we speak of professional employees in Quebec, we have to distinguish rather sharply between the various groups of persons to which this expression may apply. I make this observation because I think that nowhere in North America, as in Quebec, has the notion of "profession" been fully clarified, either in the popular mind or in the reality of law.

The notion of "profession" in Quebec has been historically linked to that of the "corporation", i.e., a corporate body endowed by a special act of the Legislature with a civil personality and having the authority and power to represent, govern and control those who are members of it, at least in terms of their professional conduct. The professional corporation in Quebec is a quasi-public body to which must necessarily belong the practitioners who exercise a given profession, generally after having obtained a university

degree, and to the exclusion of any other groups of persons. This is the predominant form of organization in what we call the "liberal professions". One of their main characteristics is the monopolistic powers they exercise with respect both to their members and the general public.

So, in Quebec, we have to distinguish between those professionals who are members of a liberal profession governed by a professional corporation (which we call a "closed corporation"), and those who are not members of nor governed by such a corporation.

For the latter category of professionals there is no obligation to become a member of any association which may exist in their field of activity, even if they are characterized by a given competence, generally acquired through special studies and evidenced by an academic degree.

In Quebec, presently, we have no less than sixteen professional corporations in the full meaning of the term, i.e., "closed corporations". Some of them are in what one would call the "old liberal professions"; like doctors, lawyers, notaries, etc., but a certain number of relatively "new" ones have been added over the years; for instance accountants, "agronomists", and forestry engineers.

What further complicates the matter is the fact that a certain additional number of "corporations" have been granted certain attributes of corporate status in recent years but fall short of being "full corporations". This applies, for example, in the case of teachers and nurses. In the case of teachers in Quebec they must initially be members of the teaching corporation, but each member is free, having officially notified the corporation within a given time period, to withdraw from its ranks. This "contracting out" possibility does not exist, to my knowledge, in the case of the nursing corporation.

However, in both cases members have been free for many years to belong to unions of teachers or nurses, with exactly the same rights as any other category of workers. Until the

enactment of the present Labour Code, such a possibility did not exist at all for members of "full corporations."

We have kept so vivid in Quebec the notion of "corporation", and the prestige it carries with it in our society has been so high, that nearly every professional group has sought from the state the recognition of a corporate status in order to enhance the social position of its members and safeguard their economic interests, collectively and individually.

So through the years many groups to which the corporate status should not normally have applied have in fact received at least some attributes of the old "corporations". We may partly explain this situation if we recall that during the thirties in Quebec, because of the depression and the evidence of the failure of the liberal organization of the economy, a strong ideological movement took place which proposed to reorganize the social order through some kind of corporate structure to be applied to the whole field of economic and professional activities. This movement drew its principles and basic organizational features from the papal encyclical "Quadragesimo Anno". Published in 1931 this encyclical called for a reorganization of society along the lines of a corporate structure for the professions and for autonomous action on the part of what we then called "les corps intermediaires" (functional economic and social bodies or industry councils).

In response to this ideology, strongly advocated by certain clerical and social elites, many professional groups took advantage of their corporate status rather than organizing themselves in free associations. And this despite the fact that in many cases the latter form of organization would have been much more profitable to their members who were in large proportion as much employees as any other workers in the world of industry.

Because, on the other hand, our labour legislation as enacted in 1944 specifically excluded members of professional corporations from its definition of "employee", large numbers of professional workers were refused the right of

association as protected under the Labour Relations Act and consequently could not take part in the collective bargaining process authorized under the law. Being "professionals" they could not become members of an "association of employees" (a union) in accordance with the terms of the Labour Relations Act, nor could they force management to bargain collectively with them.

Yet, even among the older professionals like doctors, lawyers, engineers, etc., conditions of practice were changing rapidly and a growing proportion of their members were practicing as "employees" for hospitals, governments, public authorities, private firms, etc.

The net result of this situation was that a constantly growing proportion of professional employees were caught between their necessary allegiance to their professional body on the one hand, and the desire to protect their economic status through adequate wages and satisfactory working conditions on the other.

En résumé, what was the picture among professional employees in Quebec up to the enactment of the New Labour Code in September, 1964? It was the following: employees who were members of one of the fourteen "corporations" contemplated by the Labour Relations Act of 1944 were not considered to be "employees" under the terms of that Act. They were specifically excluded from the definition of "employee".

You have, I think, similar exceptions in the federal statute (the Industrial Relations Disputes Investigation Act) and in the Ontario Labour Relations Act, but the number of "professions" whose members are specifically excluded from the collective bargaining process was much larger in Quebec than in either the federal or Ontario statutes due to the favor which surrounded the notion of the "corporation".

Is this to say that members of those "closed corporations" were barred from any kind of collective bargaining under the labour laws? The answer is no, at least according to legal theory.

You have in Quebec an old statute dating from 1924 which is called the "Professional Syndicates Act" (Loi des Syndicats Professionnels) whose general purpose is to permit the association, under certain conditions, of persons "engaged in the same profession, the same employment, or in similar trades, or doing correlated work having as an object the establishment of a determined product".

This statute provides a mode of "incorporation" for the groups to be created under its terms, i.e., a civil personality endowing such groups with all the attributes of a corporate body, and spells out certain special powers of collective action and representation for their members and the group itself. The syndicates so incorporated are truly "legal entities". And one of their main objects until the passage of the New Labour Code was to enter into collective bargaining and sign collective contracts which "gave rise to all the rights and resources established by the law for the enforcement of obligations".

Note that this statute, even though it had been enacted mainly for unions of industrial workers, was in fact a general text allowing for the association and the incorporation of any class or group of persons, be they individual employers, firms, non-professional workers, professionals, etc. This was, however, only a voluntary or permissive statute stating no obligation of any kind for an employer to bargain collectively with such a "syndicate" of his workers.

Professional employees, whether members of "closed corporations" or not, could generally organize under that statute and try to negotiate collectively with an employer. This interpretation, however, was not held without dissent emanating from legal experts, government officials, and above all from representatives of professional corporations.

One question was, for instance, the following: do these incorporated unions have the right to strike in order to obtain "de facto" recognition by an employer? Another question was: do members of a "corporation" which in its charter, regulations or code of ethics prohibits unioniza-

tion of its members, have the right to form a group incorporated under the Professional Syndicates Act, even if by doing so they could not force an employer to negotiate? Which prescription superseded the other: the general principle of association recognized under the statute of 1924 or the prohibition to join a union in the professional corporation's code of ethics or regulations?

I mention these few points because they were at the center of much legal discussion in the years preceding the adoption of the New Labour Code and during the debates surrounding the events at the time of its enactment.

However, the fact remains that in practice there was no collective bargaining among those professional workers who were members of corporations in Quebec. We must mention, though, that a certain number of "professional syndicates" were incorporated under the statute of 1924 during these years, as was the case among certain groups of specialists in the medical profession. But these groups did not bargain collectively as we know this process under the labour laws; they merely made representations to their respective employers.

That was the situation for members of the "closed corporations" until the New Labour Code was enacted.

As for other classes of professionals, we have already mentioned the case of the nurses and the teachers who, though being organized in a "corporation", had the full right to join a union and were on exactly the same footing as any other group of "employees" as to the right to bargain collectively, affiliate to a central body, strike, etc. They were and remain covered as any other group by the labour laws of Quebec.

The same situation prevailed for other professional employees not mentioned above: university graduates in general, economists, sociologists, geologists, geographers, auditors, psychologists, town-planners, guidance counsellors, etc., as long as they complied with the definition of "employee" under the Labour Relations Act of 1944, i.e., were not part of management.

It is safe to say, however, that none of these groups of "professionals" has yet tried to form and join unions in order to bargain collectively. Most of them, on the contrary, have tried to enhance their social and economic status through some kind of professional society, seeking in numerous cases to attain the full status of a closed corporation as was the case in the older professions.

Starting with the election of the Liberal Government in 1960, a movement towards the revision of these old positions in the field of the professions took place. This eventually led the legislature to enact important changes concerning the status of professional employees under the labour laws.

The Superior Labour Council had been revived by Premier Barrette during his short reign following the sudden death of Premier Paul Sauvé in 1959. The first mandate of the Council was to prepare a new piece of labour legislation called the Labour Code which had been left pending since 1953 when the original Council broke up over this very issue. Premier Duplessis had not approved of the draft presented by the Council and the Council had been disbanded.

By the same time certain events were happening which revealed some maladjustments in the world of the professions in Quebec. Some serious discussions were going on within the Teachers' Corporation, as to the relative emphasis this organization should place on "corporate" or "professional" action on the one hand and the unionist or negotiating action on the other.

The Liberal Government, under the pressures of some professional groups, was granting new corporate charters to some of these groups. The labour movement in Quebec became critical about the situation and its central bodies (the Quebec Federation of Labour and the Confederation of National Trade Unions) manifested overt criticism over the proliferation of so-called corporations. They attacked the separation of the employee members of professional corporations from employees in general for collective bargaining purposes.

Inside the old corporations questions arose as to the need for "employee" members to form and join unions as "employees" in order to protect and promote their economic interests on the labour market.

As you undoubtedly know, the movement in that direction developed very strongly in the engineering profession. A virtual revolution took place about the year 1962 inside the Corporation of Professional Engineers of Quebec. More than 90% of its membership were "employees" whilst the directorship was largely dominated by management-minded engineers recruited from the boards of directors or managers of large firms, consulting firms, etc. Working conditions of salaried engineers were generally poor; their remuneration was also low compared with other groups of professionals or even compared with the technicians or skilled workers with whom they were often identified in their work.

A bitter struggle went on between the governing body of the corporation and the spokesmen of unionism inside the profession. The matter was brought to a climax during the discussions which surrounded the study of the new Quebec Engineers Act and the new Labour Code which took place at about the same time.

The engineering partisans of unionism, efficiently supported by the C.N.T.U., protested against Article 3.05 in the Code of Ethics of the Engineering Corporation, which purported to prohibit unionization of engineers under the pretext that such participation would lead them to uphold a philosophy and certain methods, like the use of strikes, incompatible with true professionalism. They undertook a campaign to have the restrictions in the Labour Relations Act struck out of the New Code as being discriminatory and unduly limitative of the right of employee professionals to organize and bargain collectively. And without waiting any longer, i.e., even before the enactment of the New Labour Code and the consequent withdrawal of Article 3.05 of the Code of Ethics of their Corporation, they began, with the technical help of the C.N.T.U., to organize unions of salaried engineers by taking advantage of the Professional

Syndicates Act in order to acquire a legal status and a representative character. They did so, first in the City of Montreal, then in Hydro-Quebec, and afterwards in the Government itself. These unions are now joined together in a Federation of Professional Engineers which is affiliated to the C.N.T.U., and the movement is likely to expand to the whole "employee" membership of the profession in whatever concern, private or public, they practice their profession.

Under these pressures, and some others emanating from academic circles, the Government enacted the New Labour Code which came into effect in September, 1964.

What is, legally speaking, the status of professional employees under the present state of Quebec labour laws? We may summarize it as follows: first, there is no longer any restriction in the definition of "employee" in the Labour Code concerning members of professional corporations. As long as they comply with the general criteria defined in the Code with respect to the term "employee", they are on exactly the same footing as any other kind of "employees" and they may form unions, receive certification, bargain collectively, strike, etc., under the general prescriptions of law. The only restriction the Code contains as regards professional employees, i.e., members of "full or closed corporations", is that the members of each of these corporations must constitute a separate unit for bargaining purposes. This goes a little farther in the way of restriction than what the Taft-Hartley Act in the U.S. provides for similar classes of employees. The American Act leaves to professional employees a certain element of choice between inclusion in a larger unit of employees and in a unit for themselves.

But what has just been said reveals only a small part of what is going on in Quebec in the field of labour relations for professional employees. When the engineers won incorporation of their syndicates under the Professional Syndicates' Act over the staunch opposition of their professional corporation, and when they succeeded in convincing the government to forego excluding employee-

professionals under the New Labour Code, they won the battle of North American unionism for professionals. But they did not thereby win the kind of unionism which they advocated from the start of their action and which is known in Quebec as "syndicalisme de cadres".

The expression "cadres" is a French one covering those employees in industry, commerce, or any other sector, who are not pure executants but who, because of academic skills (technical, administrative or commercial) or because of a certain degree of participation in the management process, are located somewhere between the board of directors and the ordinary workers. This would be similar to what we call here lower, middle or upper management, falling short of reaching the Board of Directors. In Europe and in France there exist unions for those salaried people called "les cadres".

In Canada and the United States management is treated monolithically and no distinction is made by level of management for collective bargaining purposes. As soon as an employee begins to participate in the management process, be his part big or small, he is considered part of management and is deprived of the right to organize under the labour laws.

Our New Labour Code in Quebec respects this notion of monolithic authority in management as the Labour Relations Act did after 1944. Thus, when the Code permits professionals to form unions and bargain collectively, this new liberty is available only to those who are pure "employees" according to the North American definition of the term.

The result of this is that in the case of engineers, for instance, and also in the case of other professions, the large proportion of them which participate technically or otherwise in management are still deprived of the right to unionize as is the case for any other group of "managers". That leaves the real possibility of forming large, homogeneous, strong and effective unions, quite remote for these professionals. They are stripped of their better elements, the more experienced and the more able amongst their profession being generally higher in rank than mere

executants, and often the sheer strength of numbers does not even exist for those who would qualify as "employees" under the law.

Moreover, if we remember that Section 20 of the Code prescribes that members of each of the sixteen professional corporations mentioned in the law must form an independent unit of their own, you may have an idea of the fragmented way in which they are going to be in the face of management and the collective bargaining process.

The engineers who fought to obtain for employee-professional groups the right to certification under the Labour Code are the very first to disregard completely the application for certification and to go on developing the "syndicalisme de cadres". They merely sought to obtain their incorporation under the Professional Syndicates' Act and to bring into their ranks all the engineers of a given employer, whether they be part of "management" or not according to the Labour Code criteria or terminology. The only criterion of exception that they seek to develop and to have accepted by the employers they negotiate with is for those engineers who according to their duties have the power to hire, fire, or promote other engineers. That is, those who really represent management in its relations with its employee-engineers. Even if an engineer is in charge of non-professional personnel, let us say in a hydro-electric project (construction, etc.), as long as he does not have the kind of authority mentioned above over other engineers he should be part of the syndicate of his calling according to the engineers' viewpoint.

If they work as engineers with others of the same calling and they only assume scientific or technical responsibility for the group work, even if they have reports to sign as to the quality of work, etc., they should be part of the engineering union because they have no authority to take any final decision as to firing or promotion.

The means to achieve this kind of a bargaining unit is direct action, direct discussion with the employer, and direct recognition by the latter. Of course the employer is free

to recognize such a syndicate or not. Nothing, I repeat, in the Professional Syndicates' Act forces him to enter into negotiation with a group created under that statute.

If the employer accepts the union there is no problem. If he resists, direct action may be used and the strike weapon may be resorted to (which is called in such instances, "journée d'études" or study sessions). All this is carried on without having recourse to the provisions of the Labour Code. This may be held illegal under the Code which clearly specifies at Section 94 that it is forbidden to strike so long as an association of the employees concerned has not been certified or recognized and has not obtained the right to strike under the provisions of the Code. But as we are dealing here with an association not made up wholly of "employees" as defined under the Code, there are legal opinions to the effect that the Code does not apply at all to this kind of association, thus leaving it free to engage in an organizational strike if it is deemed necessary to the group.

Whatever the answer to this controversial question, that is exactly the course of action the engineers followed in Quebec. They succeeded in obtaining recognition from the City of Montreal and in signing a very valuable contract in May of this year after threatening to go on strike. They applied the same pattern with the Quebec Hydro during the same month but there they had to go on strike (study sessions) for more than a month in order to arrive at a settlement with management. The reason is that Quebec-Hydro authorities wanted the provisions of the Code to be respected and had refused to bargain with a non-certified union. Of the 555 engineers employed at Quebec-Hydro, 440 were finally recognized as being acceptable for representation through the syndicate, whereas, if certification under the Code had been required, only about 280 would have been in fact covered by the eventual agreement. This was a true victory for "cadre" unionism.

The engineers by their action are really breaking new ground in Quebec labour relations. They are creating through a sociological process new juridical dimensions to

the traditional labour law concepts that we have known up to now in my province and, I think, elsewhere in North America. The first impetus to that movement had been given by the producers (réalisateurs) of Radio-Canada in Montreal some years ago, but this was a limited and a particular case. Now the movement is tending to spread to all civil and public service professional staffs and even to those in private industry.

We must remember here that the new Civil Service Act of Quebec (Bill 55) enacted in August, 1965, recognizes the right of the employees of the civil service to organize into unions and to bargain collectively with the government. This new statute allows that government employees are covered by the Labour Code while stipulating certain limitations of its own which, by and large, do not destroy the substance of the rights recognized in the Labour Code.

Members of professional corporations mentioned in the Labour Code who are "employees" of the government within the meaning of this Code may be granted a certification, either for each group of them or if a majority in the group so wishes, they may join in a more general association including other groups of professionals in order to bargain collectively for them all. They may even join with other groups of professionals, not members of a full corporation (i.e., economists, biologists, etc.) to form a multi-professional association negotiating with the provincial government.

You will notice that this last possibility of having multi-professional units is not recognized in the Labour Code for professionals in the private sectors of industry.

But here again the big problem appears to be that of delineating the frontier between those professional civil employees who are "employees" under the Code and those who are not. When we know that the unit of certification, including the decision as to who is an "employee" is to be made by the Labour Relations Board we may suspect that the traditional criteria developed by the Board in the private services will fall short of giving any satisfaction to unions of professionals in the civil service.

The same attitude that was adopted by the engineers at the Quebec-Hydro with respect to "syndicalisme de cadres" is, I think, being adopted by their civil service employee group and we may anticipate that other classes of professionals in the civil service will follow the same pattern.

In government staffs, particularly where the meshing of functions, classes and grades is so high, it would, in my opinion, be totally inadequate to use the old criteria of the traditional labour law. The legislator seems to have foreseen this difficulty in saying in Section 71 of Bill 55 that the certification in the case of professional groups will be granted initially by the Lieutenant-Governor in Council and "only upon the recommendation of a joint committee constituted for such purpose by the Lieutenant-Governor in Council and one-half of the members of which are representatives of the group concerned".

But even in the private sectors of industry where technological change and automation alter the traditional structure of employment and bring into industry new classes of technical and professional specialists working as employees at the intermediary levels of management, it is inevitable that "cadre" unionism will tend to spread to members of these new and ever increasing groups of employee-professionals. Obviously, we recognize in Quebec that such a trend is not going along without creating serious juridical and sociological problems, at least for a certain time to come.

I would like before terminating to give you a brief "aperçu" of the employee-professional movement in Quebec towards collective bargaining. Besides lay and religious teachers at the elementary, secondary and technical levels in private and public institutions, who are generally well organized and who have negotiated for many years in certain cases and besides the nurses and other professional categories who are unionized and negotiate with hospital associations and the Ministry of Health; there are many other specialized groups which have recently formed associations devoted to collective bargaining. Among these

are school inspectors, school principals, fine arts professors, normal school professors, etc. You will notice that in the case of the school principals who recently signed a collective agreement with the Montreal Catholic School Board, it is another example of "cadre" unionism which has been recognized by the most important school authority in Quebec. Of course, all that has been done without having recourse to the Labour Code procedures, i.e., by way of voluntary recognition.

In the medical world, you have no less than twenty-three "syndicates" of various specialist categories, most of them being incorporated under the Professional Syndicates' Act and recently formed into a "federation". There exists also a federation of general practitioners made up of eleven regional units. Both federations are, to my knowledge, to give birth to a "confederation" of doctors whose main objective will be to serve as bargaining agent for doctors to negotiate the terms of the forthcoming medicare plan in Quebec.

On the civil service scene the movement towards unionization of professionals is widespread. Besides the engineers, who number 375 members in their union group, there are unions of forestry engineers, arpenteurs-géomètres, and an interprofessional union made up of biologists, chemists, accountants, geographers, geologists, specialists in finance, veterinary doctors, economists, physicists, dietitians, actuaries, etc. Recently a lawyers' union has been created in the civil service in spite of the objections of the Bar.

Since March of this year all these have become part of the "Conseil syndical des professionnels du gouvernement du Québec" representing nearly 800 members from about 1,600 individuals eligible to be covered by an agreement out of a total of 2,100 professionals in the civil service.

The syndicate of engineers of the Government of Quebec is setting the pattern which the negotiations between governmental authorities and the professional unions council may eventually follow. It is composed of three

sections: one concerning specifically the engineers, the second concerning more generally the professional interests "at large" and susceptible of application to all professionals in the civil service, and the third being even more general and applying to the civil service employees in general.

So that with time a union cartel of all government employees, professionals and ordinary functionaries as well, might be formed in order to discuss the questions of general interest to all, and to go on, afterwards, to more specific problems concerning each class in particular.

Finally, it is worth remembering that the prototype engineers' contract signed with the City of Montreal has brought very impressive improvements in salary increases, hours of work, overtime premiums, promotion rules, fringe benefits and professional privileges. The Federation of Quebec Engineers is affiliated to the C.N.T.U. and it would not be surprising, with the new possibilities offered by Bill 55, if the professional syndicates of civil employees joined that central body, as the other functionaries have already done recently.

All this is but one aspect of the "quiet revolution" in Quebec.

Problems and Pitfalls from the Legal Point of View

PROFESSOR H. W. ARTHURS,
Professor of Law, Osgoode Hall Law School.

THERE has been a good deal of debate over the last day and a half about whether or not there ought to be collective bargaining for professionals, but it seems to me that a lawyer has to start from some kind of policy assumption. If we were to start from the assumption that there would be no collective bargaining for professionals then we could all go out for coffee. I assume that this was not what the planners of the program had in mind, so I will start on the assumption that there will be a form of collective bargaining for professionals. It will be on that basis that I will approach certain lawyers' jobs that flow from that policy decision. I make no comment on it one way or the other except to say that I am assuming the existence of such a decision.

As our Chairman has already indicated, under the Ontario Labour Relations Act certain groups of professionals are expressly excluded from securing bargaining rights, even though they may otherwise be employees for the purposes of the Act. One approach to the entire problem would simply be to remove the few words of the Act that exclude professionals. We would then be in the position of treating professionals as we treat all other employees and the draftsman's job would be a simple one indeed. It would merely involve the removal of those words in the statute which deny status under the Act to members of the architectural,

dental, engineering, land surveying, legal and medical professions. However, I take it that neither those that oppose nor those that favour collective bargaining for professionals would be completely content with a solution that left the professional in precisely the situation of other employees.

Again I am obliged to make an assumption. At this stage my assumption is that in some way professionals are to be singled out for special treatment under whatever form of statute they have to live with. This means immediately that we come up against a task of definition. Over the past couple of days there has been a good deal of talk about defining the professional. I think we need only remember what is after all the world's oldest profession to realize that there is a danger in giving too much to the name, because I don't really visualize that a National Association of Prostitutes would be first candidate for certification under such legislation. Assuming then that we are not going to accept self-definition as the only criterion, nor indeed popular usage of the word professional as the only criterion, it seems to me that we have to pass on to a rather more functional definition.

One route that we could pursue is what might be termed the route of the closed professions—the senior professions or the professions properly so-called—groups that have the ability to admit people to the practice of the professions, to discipline them for malpractice, or to expel them from practice. We could say that the true profession is one which is covered by special legislative arrangements, and has the power of self government. That is not very satisfactory because it simply does not reach a large number of people who are anxious to identify themselves as professionals. For instance, in my capacity as a lawyer I am a professional, but in my capacity as a teacher, there being no licensing body for teachers, I would have to say to myself "I am not a professional". I suppose, then, I would have to plump for the broader definition so that any definition of professional must extend beyond those that have powers of self government.

Do we want to take it to the other extreme so that any group that chooses to so identify itself is to be termed a professional group? There are of course professional hockey players. There is even a Professional Models' Association. Do we wish to say that any group that wishes to identify itself as one is to be termed a professional group? I suppose that this might be opening the doors somewhat too broadly. We may require some greater showing of self identification in order to single out a professional group for purposes of any special legislative arrangements. One is driven as I see it to some such definition as we find in the American legislation. I will read it in full merely to show you how complex and how unsatisfactory any definitional attempt is bound to be. Here is the working definition that the Americans have adopted under their National Labour Relations Act:

> "The term 'professional employee' means any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine, mental, manual or physical processes; or (i) an employee who has completed the courses of specialized intellectual instruction and study described above and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined."

This definition runs to some 15 lines of fairly small type and I am sure has been a reasonably fertile source of litigation. As a lawyer of course I applaud any fertile source of litigation, but as someone who is considering how we might

draft a statute which is helpful, I cannot really say that it completely meets the test. Yet the American statute does strike a mid-point between the very strict definition of professionals in a traditional sense, and the open-ended definition which would drag in everyone who wanted to call themselves professional. It is along those lines, I predict, that some definition will have to be formulated.

This immediately raises the problem: suppose we formulate a definition, what then? Generally we have two routes. Either we can put professional employees under the labour relations statute with some special arrangements to suit their problems, or alternatively we can create a new structure entirely for professional employees. The former solution has by and large been adopted in Quebec and in the United States. The latter solution, with special provision for collective bargaining for professionals outside the labour relations statute, has been formulated by the Steering Committee for Negotiation Rights for Professional Employees, for which Mr. Phillips was an outspoken advocate.

That is a problem we will have to pursue but I just want to say a few words now about another problem and show you how it would work itself out in those two situations. The problem is not only to define the professions as such, but to identify the bargaining agent for the profession. As you can appreciate, a union at the moment acts as a bargaining agent for employees, so somebody must act as the counterpart of the union. Assuming first of all that bargaining is to be conducted profession-by-profession as it is in Quebec, that there is to be no mixing of several professions, or of professionals and non-professionals, then two possible alternatives reveal themselves.

First of all we can have the professional governing body or the professional association itself act as the bargaining agent, the counterpart to the union. Alternatively we can insist that a special negotiating body be formed for that purpose. I urge strongly that we should not utilize existing

professional bodies as bargaining agents for a variety of reasons. Firstly, where they do enjoy power to license people to practice the profession, there is a danger from the public's point of view. If we give them functions in the area of economic activity, this may result in restrictions on the numbers admitted to practice, in order to enhance economic opportunities for those in practice, rather than to ensure a skilled profession. The latter basis seems to me as a member of the public the only reasonable one on which people should be admitted or denied admission to practice. Once they begin to dabble in this area of regulating the economic destiny of their members I think that the temptation would be strong to violate that tenet.

Beyond that there is a problem that experience has demonsrated in the engineers' and perhaps other professional groups. If there is some difference of opinion between those that favour and those that oppose collective bargaining within the professional association, and if one faction or the other gains control of the executive machinery of the profession, there is certainly a real risk that the control of the professional association will be used to enhance the ideology of the controlling group in respect of collective bargaining. Let us assume that those that favour collective bargaining get control of the professional association. People who do not practise collective bargaining could be termed guilty of some form of unprofessional conduct in selling their services at less than the collectively-bargained rate, and for that reason could be denied the right to practise their profession. Conversely, if those that oppose collective bargaining are in control of the professional association, there is the opposite danger, that they will view collective bargaining as unprofessional conduct, and will put pressure on people to abandon collective bargaining because they have the power to control the practice of the profession. But even beyond this there are real dangers in giving to the existing professional bodies the right to engage in collective bargaining.

Collective bargaining assumes several things, though not all are always present. First, it assumes a reasonably high degree of membership democracy in the ratification of the collective bargaining agreement, which is not always possible in a professional association. Certainly none of the professional associations with which I am closely familiar are notorious for being rabidly democratic. I speak of my own profession here. There is a real danger that the flow of decision-making from the grassroots to the leaders, however that may take place in other unions, is less likely to take place in professional bodies. Secondly, of course, there is the need for decentralized decision-making as we presently practise collective bargaining. Decision-making has to be practised on a plant-by-plant basis or on an employer-by-employer basis. Generally speaking, the professional bodies are not organized on a local basis. Primarily they are province-wide in their scope and providing local decision-making machinery is somewhat difficult. Here again I think the change required in the structure of many existing professional bodies would be too large a strain for them to withstand.

Finally, assuming that we choose not to have a separate professional bargaining statute but that we choose to put professionals at least partially under the Labour Relations Act, the existing professional bodies with which I am familiar simply do not meet the definition of a "trade union" which would be required in order to enjoy rights and privileges under the Labour Relations Act. In the first place a trade union is required to be an organization of employees. As you know, these professional bodies embrace employed professionals, self-employed professionals and those who might be termed employer professionals. We have indications from a rather learned gentleman, Mr. Justice Roach, that an organization which extends beyond employees to people who might be termed employers, cannot be a trade union within the meaning of the statute. If he is right none of the existing professional bodies that I

am familiar with could enjoy that privilege under the statute. Secondly, the statute requires that the purposes of the organization must include the regulation of relations between employers and employees. Again I am not aware of any of the existing professional bodies—I put aside those that are formed expressly to negotiate—which specifically make provision for that kind of activity. Here again a professional organization might well fall short of the definition of the trade union within the meaning of the statute, and would therefore be unable to enjoy privileges under the Act.

Assuming that we do not take the route of having all professionals of a single profession negotiate together, assuming instead that we have professionals negotiating with other professionals or with non-professionals as a sort of mixed bag, of course the existing professional bodies would not be suitable. They exist to benefit a rather homogeneous group, those who practise the same profession, and they simply cannot accommodate people from other professions, non-professionals, learners who are not yet eligible to practise the profession, assistants who will never be eligible but who are closely related in function to the professionals, or those who are perhaps practising but doing so illegally. None of these people can participate in the bargaining process if it is handed over to the professional association together with the professionals from that particular group. This may point us in the direction of allowing groups other than the existing professional associations to undertake the role of collective bargaining agent, because it certainly leaves us with much more flexibility in the process, and diminishes a lot of conflicts which are bound to arise if we take the other route. Again, I do warn you that if the membership of this new special negotiating body for professional employees is formed, and is open to non-employees, as the present Labour Relations Act stands, there is a reasonable chance—even if its purposes include collective bargaining—that it will be denied status under the legislation.

MR. PIERRE VERGE,
Graduate Student, Faculty of Law, University of Toronto.

LET us assume for the purpose of this discussion that the Legislature has already decided to confer negotiation rights on professional employees. I will attempt to indicate possible ways of determining appropriate bargaining units in the case of these employees.

From the outset of these meetings, we have realized that the major difficulty, with respect to negotiating rights of professional employees, comes from the lack of precise meaning of the very expression "professional employees". Certain of you may still have a very narrow meaning in mind, others a very broad meaning. Professor Arthurs has just gone over this and has given us some very good insights into definitions of professional employees.

I would like, for my purpose, to retain a definition close to the one found currently in the American National Labour Relations Act, which Professor Arthurs has just mentioned. Here the expression "professional employee" will be used to cover the greatest number of professions. As is done in the United States, I would like here to define professional employees in terms of the work that is actually being performed by such employees. A professional employee will therefore be defined as an employee whose work usually requires possession of high and specialized knowledge, usually obtained in an institution of higher learning, whose work is varied and intellectual in character, involves persistent use of discretion or judgment and is not standardized in terms of time. We shall then be speaking of professions whose employee members cannot be deemed "employees" for the purposes of other Labour Relations Acts in Canada, with the exception of those in Saskatchewan and Quebec. We shall at the same time be covering other professions whose employee members could presently avail themselves of the provisions of the relevant Labour Relations Act, such as librarians or economists.

As Professor Cardin so completely explained to us last night, social pressures in Quebec have recently led to the granting of negotiation rights to associations formed by employee members of what he termed the "closed" or the "full" professions. But this is not tantamount to saying that all difficulties in defining the bargaining units for these groups have been settled under the present Quebec Labour Code. What we shall have to say here about some of the difficulties in defining bargaining units in the case of professional employees would thus apply as well in Quebec, even taking into account the changes made in the Labour Code.

One of the first difficulties arises from the usual definition of "employee" given in Labour Relations Acts. This definition determines who may and who may not be included in bargaining units.

If professional employees were to negotiate under the present Labour Relations Acts, or if a similar definition of employees were to be inserted in a separate act regulating collective bargaining by professionals, it would mean that all professionals exercising managerial functions could not enjoy the same right to collective negotiations as their confrères who do not form part of management. This suggests the necessity of using a more comprehensive definition of "employee."

Indeed, the proportion of professional employees exercising management functions is usually high. To the extent that they could not be included in units of other professional employees, they would not be affected by the negotiations that would be carried on. Also, as a collateral effect, such an exclusion might result in a weakening of the bargaining agent. In this respect, I would say that the new provisions in the Quebec Labour Code can only be of limited effect, since only non-managerial professionals can be included in units for each of the professions that are listed in Section 20 of the Labour Code. The same applies, of course, to all other professionals that are not specifically mentioned in the Code, that is to say, nurses, librarians, economists and so forth.

As mentioned last night, the experience of the professional engineers employed by Quebec Hydro and by the City of Montreal illustrates this difficulty. If the bargaining units had been defined according to the strict meaning of the term "employee" as currently found in Labour Acts in Canada, the result would have been too restrictive. In both these cases the engineers forced the employer to go beyond the text of the law and to agree to recognize not only the engineers who could be termed "employees" under the terms of the Labour Code, but also a great number of engineers, who, according to the normal interpretation given by Boards were engaged in managerial functions. The bargaining unit was described very carefully to establish the principle that only those having final power to hire, promote or discharge other engineers were excluded from the units.

It is submitted that attention should be paid to this approach when drafting legislative provisions that would regulate collective bargaining by professional employees. It could then be provided that only professionals having authority to make final decisions affecting the conditions of work of other professionals would be excluded from bargaining units. (Or, if it were necessary to speak of but one profession at a time, it could be stated in terms of that profession.) The Board would be left in each case with the task of interpreting this provision. It would mean coming closer to granting negotiation rights to "cadres", as used in the French-European terminology, to cover both scientific and managerial personnel, while still eliminating undue employer influence within professionals' bargaining agents.

Defining bargaining units in the case of professional employees raises other difficulties. Are these units to include only the latter, or are they to be conceived in a wider manner?

The community of work and similar interests that would probably exist within the ranks of professionals might be a reason to confine them to bargaining units of their own. The main reason for this, however, would result from the

definition of "professional employee" being widened. Since this definition might result in the inclusion in the bargaining units of professionals supervising non-professional personnel, it would appear advisable to set up completely separate professional units. This would avoid including professionals who exercise authority over non-professional employees and those employees in the same bargaining group.

In the United States, where non-managerial professionals are never included in professional units, the law also forbids the Board from declaring appropriate a unit which would include professional employees in other employee units, unless the professional employees have indicated, by a majority vote, their approval to be so included. This amendment in the Taft-Hartley Act perpetuated a situation that had prevailed fairly widely during the prior Wagner Act period. Then, the Board used to give much weight to professionals' desires to form separate units, although the law itself had not imposed on it an obligation to do so.

In our context, to retain a certain degree of flexibility, it could be provided in the legislation that in exceptional situations non-managerial professionals might form part of a wider unit (including, for instance all office employees), thus confining only managerial professionals to strictly professionals' units. This exception could apply subject to a vote to this effect taken among the non-managerial professionals and subject to the further requirement that the Board be satisfied as to the appropriateness of the resulting units.

Finally, would it be necessary to stipulate that the members of each of the principal professions shall necessarily constitute a separate unit?

Such a restriction presently exists under Section 20 of the Quebec Labour Code. Although restricting the Board to constituting separate groups in such cases might be historically justifiable, it can only result in imposing artificial uniformity in situations that differ greatly. It would appear advisable in this respect to confer greater

discretion on the Board, as is presently the case in the United States and Saskatchewan. The Board could then decide, when such would appear to be the solution appropriate to the situation under consideration, to form a unit grouping members of more than one profession.

It may be of interest to note that the formation of such "interprofessional units", while still impossible under the Quebec Labour Code in the case of the professions listed in Section 20, is contemplated in the more recent Quebec Civil Service Act.

MR. JOHN OSLER, Q.C.

PERHAPS I should begin by saying that lawyers may be part of the problem we are discussing. As somebody once said: "The thing about lawyers is that they have a difficulty for every solution". I ran into difficulty at the very opening of this Conference because of its title — "Collective Bargaining and the Professional Employee". Lawyers have a tendency to categorize and to think in fairly rigid classifications, and to many a lawyer the words professional and employee are almost total opposites. So we have to make a fairly radical shift in our thinking in this field when we begin to contemplate any kind of collective bargaining by professional persons.

Everybody has made an attempt at defining what he means by professionals. I am not going to try to take it too far, but for my purposes I see professionals as those who practise some skill or art involving both learning and training and who use that skill or art to serve others, usually for a fee. The client can set the objective but he cannot direct in detail how it is to be carried out.

The traditional employee works under conditions quite different from those I have just outlined. He makes an agreement to work for someone else, supplying a technical competence or skill in return for compensation on a fixed

basis, with the employer having the final say about the details as well as the broad aim of the work. It is for this last group, the traditional employees, that most of our legislation in the collective bargaining field was designed, and particularly the Labour Relations Act of Ontario. I say this with diffidence, conscious that I am sitting beside the man who, if anyone can, must be called the author of this legislation. But I think that when it was drafted, the draftsman was not very conscious of the possibility of collective bargaining by professional employees. He was thinking of employees largely, if not exclusively, in the traditional sense, and it is obvious that a legal framework designed primarily for these employees may not necessarily serve too well as a vehicle for collective action or collective bargaining by professional employees.

All that I am going to try to do is raise some of the difficulties that I see in the hope that we will be able to go into them further during the question period. Section 37 of the Labour Relations Act in Ontario provides that a collective agreement, which is the ultimate objective of collective bargaining, is binding upon the employer, the trade union, and all the employees in the bargaining unit. In other words, once the bargaining agent has signed the document, the wishes of the minority—it may be a substantial minority—no longer have any bearing on the situation. For better or worse, collective bargaining is set up to function on the basis of majority rule and that rule really is absolute. It is reinforced by statute and an agreement, presumably made with the consent of the majority, is binding upon all, whether they agree with all its terms or not.

One can see difficulties in the professional field because we professionals are inclined to be a stiff-necked lot, and sometimes we are a little reluctant to go along with the majority. We have our own peculiar little views and we may put a great deal of emphasis on some minor thing that does not appeal to the majority. Is this business of compulsory majority rule likely to be satisfactory in the collective

bargaining field for professionals? I do not see how anything less can succeed, but when you are considering vehicles for collective bargaining by professional employees, this is one of the problems that is bound to loom very large.

An alternative of course would be an agreement binding only the members of the organization that made it, or who ratified it. But it does not seem to me that an agreement made with that much flexibility is going to be a very strong weapon when dealing with an employer.

Looking at another aspect of the problem for a moment, you will note that the professions excluded from the Act are members of the architectural, dental, engineering, land surveying, legal and medical professions. I think we would all agree that in every case, except possibly the land surveyors, these groups have very strong professional organizations with disciplinary power over their members and with certain statutory powers and privileges under the Acts that set them up. The philosophical justification usually given for excluding these groups from the Labour Relations Act is that they can establish their own conditions with the help of their professional organizations. They are thought not to need the assistance of the Labour Relations Act.

In these days of professionals as employees rather than as practitioners or consultants out on their own, perhaps those assumptions must be challenged. I think the collective bargaining route is probably appropriate for these types of professional employees, and perhaps all professional employees. But whatever the vehicle, some bargaining agent must be developed comparable in strength and coherence to the strong professional organizations with their effective lobbies and statutory power. An organization that is little more than a social association is not going to cut any ice in the collective bargaining field.

To many professionals the phrase "trade union" is a combination of dirty words, but if there is to be effective collective bargaining in the professional field, this emotional reaction will have to be forgotten for two reasons. First—a

purely legal reason that was touched on by Professor Arthurs—there are certain privileges accorded to trade unions as defined in legislation that are simply not going to be given to other associations unless they are specifically defined as having those powers in some statute. For instance, the objectives of a trade union are not considered to be in restraint of trade. I am generalizing, of course, but any other kind of organization that gets together for the purpose of setting rates, or establishing working conditions on a monopolistic basis, etc., runs the danger of being in restraint of trade and its objectives would be illegal. So the professions will have to become trade unions or create some new creature recognized by statute in a manner similar to trade unions. Second, whether you call it a trade union or not, collective bargaining must be backed up in the end by the iron fist. I am not necessarily talking of the strike weapon, but there must be steel in you somewhere if you are going to bargain collectively. Again an organization or association that has grown out of a social context, and has not perhaps become very much more, will find it extremely difficult to exert the will and the degree of strength that is required for effective collective bargaining.

For those reasons I feel that we must try to overcome this rather emotional reaction to the idea that collective bargaining is only carried out by trade unions. A trade union does not have to mean a group of fellows in overalls simply working with their hands. A trade union is a legal organization of a certain kind, and collective bargaining, if it is to be effective, must be carried out by an organization with comparable strength of purpose and will to carry out that purpose.

Professor Arthurs' view was that some organization other than the present type of professional organization might be the best vehicle for carrying out this bargaining. I think also that effective bargaining will probably have to cut across strictly professional or jurisdictional lines. I am certain that it will also have to cut across, and perhaps

eliminate, the conditions now set out in the Labour Relations Act which exclude persons who exercise managerial functions or who are employed in a confidential capacity in matters relating to labour relations.

I will give you an example of the difficulty I see in the present practice of a person being excluded if he exercises managerial functions. The Labour Relations Board here, followed by the Board in Quebec, refused to certify, or to make part of a bargaining unit, groups of people known as circulation supervisors on newspapers. Those fellows were not very high in the hierarchy of the newspapers, but they did have ultimate control over the destinies of the little fellow you see delivering the papers. These supervisors control the activities of the sub-teens that bring your paper to you, therefore they were said to exercise a managerial function in relation to labour relations.

As Mr. Verge points out, in the Hydro case in Quebec only engineers who had final power with respect to the discipline of other engineers were excluded. It may be reasonable for one who has power over the other members of his own profession to be excluded for collective bargaining purposes. But most people at the professional level and all people at the managerial level have some power over other people. As the Act now stands, if they exercise that power over other people, they are excluded from any bargaining unit.

It seems to me that one of the things we will have to do is to redefine the limits of the bargaining unit when it comes to professional personnel. Unless a professional is supervising fellow professionals it is hard to see why he should not be allowed to join with them for collective bargaining purposes, even if he is supervising other types of employees.

These are the difficulties I associate with some of the possible solutions to the problems before us. Mr. Finlayson will doubtless want to add some more.

MR. G. D. FINLAYSON, Q.C.

FOR my contribution to this panel on the legal pitfalls of collective bargaining by professional employees, I have been asked to discuss the question of the strike. Although we have been requested to discuss the matter on the assumption that collective bargaining is desirable for professional employees, I wish to make it clear at the outset that I am opposed to any such concept. Assuming, for the purposes of this panel that collective bargaining is desirable, I find that I am unable to discuss this issue without first doing that which everyone else appears to have done during this seminar, and that is to define a professional person. Once I have done this, and if you accept my definition, then the consequences of collective bargaining and the question of the right to strike versus compulsory arbitration seem to me to fall into line.

In defining "professional" the members of this panel have made reference to the Ontario Labour Relations Act and the professions which are listed in it. I would suggest that the common characteristic of the professions mentioned in this Act, such as architects, lawyers, dentists and doctors, is that these persons not only possess and are recognized as possessing special skills and knowledge, but they have imposed upon them by virtue of their profession a duty to the public, whether they are self-employed or otherwise. Mr. Osler has suggested, as I understood it, that what these persons have in common are strong professional organizations. That may well be the case, but I do not think that that common denominator is at all significant. The important feature in my view is that professionals possess characteristic special skills that of necessity command a degree of trust from the public. The public trust them, not because they are merely honest and will do what they are asked to do, but because they possess qualifications and are imbued with a sense of duty to the public making them worthy of their profession. The public thus take their skills in trust.

The complexity of their work is also important. You are forced to trust architects, lawyers and doctors because you are unable to determine whether they are doing a good job as you can, for example, in dealing with a carpenter. You must accept their special skills and knowledge on trust. I would suggest that it is due to this trust that persons who exercise these professions have a wider duty to the public which distinguishes them from other members of our society.

There are many persons qualified in the professions that I have mentioned who are employed in capacities requiring the skills of their respective professions but who do not have any duty to the public. An example of this might be a lawyer who is employed by a corporation solely as a corporate secretary. He requires his training as a lawyer in order to perform his secretarial duties, but the nature of his job does not involve any duty to the public. People do not deal with him as a professional person. Again when an engineer is employed as a salesman for a manufacturing concern, his knowledge as an engineer may make him a more efficient salesman, but people deal with him as a salesman and not as an engineer. A further example would be a nurse acting as a receptionist in a doctor's office.

As this distinction between acting as a professional and merely making use of professional skills affects the conclusions which I have reached, I should perhaps give you some further examples.

An architect who has the responsibility on a construction site for certifying the progress of the job has in law but one person to whom he is responsible and that is the owner who has employed him. In fact, however, there are other persons with whom he has no contractual relationship who make use of those certificates and trust his skill, honesty and ethics in handing out progress certificates. An obvious example is the mortgager who advances money for the construction of the project on the face of these certificates. The contractors and sub-contractors who accept payment for the work they have done do so on the basis of these certificates. Similarly, the banker who is advancing money

to these contractors and sub-contractors accepts these certificates at their face value. Thus, such an individual, whether self-employed or the employee of some corporation, is in a position where he has a duty to someone other than his employer. As he has this duty to others I would suggest that he is a person who should be regarded as a professional for labour relations purposes. My definition would immediately exclude, of course, a lot of people such as economists and other highly trained and experienced people who do not have others relying on their judgment.

In order to apply this distinction it is necessary to re-examine the duties of any employee regardless of the label that he bears; so that a determination may be made of his exact functions and role. The test of a professional from a labour relations point of view may then be applied to these functions to determine whether the employee in question has a duty to anybody other than his employer.

You must assume throughout, of course, that such employees have special knowledge and skill in a particular field, but this should not affect your conclusion. If the duty of this employee is to his employer alone, then surely he is entitled to withdraw his services arbitrarily if the employer refuses to grant him concessions which he regards as rightfully his.

However, if in applying the test it is found that the employee has a duty not only to his employer, but also to the public or to any other employees, his right to withdraw his services is a penalty not only to his employer but also to persons with whom he has no bona fide dispute. I give you the example of nurses in a hospital who are clearly employees possessing special qualifications and skills and who are generally regarded as being professional people. If they were to strike they would not only be withdrawing their services from their employer, but they would be leaving without necessary services patients who are depending upon them and their skills. I would draw the conclusion that a strike or a right to strike under such circumstances is clearly improper. My conclusion here has now, of course, been recognized by the Legislature.

Although other members of the panel have drawn a distinction between people who are self-employed as opposed to being employed in a larger undertaking in defining the role of a professional, I would suggest that this distinction is meaningless when one is talking about collective bargaining. I would suggest that the test of duty to the public should apply whether or not an employee is self-employed.

Although the test which I have proposed may at first blush appear to enlarge the field of what is conventionally regarded as a professional group, I emphasize that this duty towards the public must be combined with a professional skill before my definition would apply. It is the professional mystique requiring the trust of the public which results in the status of professional in the sense in which I have been using it. Many groups, for instance, policemen and firemen, perform an essential public service and in that sense have a duty towards the public, but these employees do not have the necessary specialized knowledge to qualify as professionals within my definition.

Assuming this definition of professionalism, should a professional permit himself to belong to a group which bargains collectively on his behalf? As a general rule, any professional person who can see the necessity for collective bargaining on his behalf admits a lack of independence in his position and runs the risk of having his area of duty to the public restricted through the limitation of a collective agreement. Such a limitation is undesirable but having stated this it must be frankly admitted that many professionals could not practically bargain individually. I am thinking for instance of lawyers who are civil servants, nurses in large hospitals, firemen and policemen (if they are professionals), and persons in that kind of category. Due to their numbers they have to bargain collectively because their employer classifies them collectively.

There is no point in one nurse out of one hundred asking for a raise in pay. She will simply be told that she is of the class of 1953 and that that class gets paid X dollars and that would be the end of it. The necessity of collective bargaining under these circumstances results from the numbers of employees involved and the attitude of their employer.

Having conceded this right to bargain collectively, does it follow that such employees have the right to strike? In my view, absolutely not. To admit that a person has a right to arbitrarily withdraw his personal services is to admit that he exercises no professional responsibilities within my definition. The core of my test of professionalism is the duty to persons other than the employer, and to bring about a withdrawal of such service to the public as well as to the employer is to bring injury to a group which has no direct interest in the dispute. More than that, the public has no way of being represented in the dispute if the sole remedy is strike action on the part of the employee.

My conclusion therefore is that if feasible there should be no collective bargaining. But if there is collective bargaining because it is necessary under the circumstances, then the only solution to an unresolved dispute is arbitration.

An allied question to the two issues which I have been discussing is the question whether professionals should be segregated from other employees where they do bargain collectively. My submission is that the answer again is clearly yes. The labour movement generally has recognized the desirability of special skills bargaining separately through craft unions, whose officers recognize the special skills and problems of the group and who usually have acquired those skills and the sense of responsibility that goes with them.

Having concluded that professionals who must bargain collectively should bargain as a group of their own kind, is it desirable therefore, that they bargain under individual statutes created for this purpose or under the present Labour Relations Act? Due to the distinctive considerations that are involved with each of the professions, I would think that a special statute or provision designed to cover each profession which wishes to form a unit appropriate for collective bargaining would be the wisest approach. The unique training and unique duty to the public which is generally characteristic of a professional requires separate treatment from employees who are merely exercising the varying degrees of skill characteristic of other non-professional people now covered by the Labour Relations Act.

In conclusion, I suggest to you that the label that a person carries is not the sole standard of a professional for labour relations purposes, any more than you can make a sports car by simply having wire wheels on it. If you accept my definition then I suggest that the conclusions which I have put forward follow as a matter of course. Those who call themselves professionals and yet advocate the strike as a legitimate weapon are persons who merely wear the badge of a professional without exercising the calling.

Summary

PROFESSOR JOHN H. G. CRISPO

THE Centre's intention in sponsoring this Conference was to provide an opportunity for sharing information about current developments in what we consider an increasingly contentious area in the field of industrial relations. Judging by the turn-out I doubt that we could have timed it better. It remains for me to try to summarize the basic substance of our deliberations over the past two days.

I think the first thing worth noting is the fact that none of us are very clear about the meaning of professionalism. The word has become so woolly that it no longer has, if it ever did have, a very precise meaning. I am inclined to believe that the status, pride and prestige now assumed by those who consider themselves to be professionals will be won away by the first group to come up with a substitute term. I have tried to dream up such a term but have thus far failed. The point I am trying to make is that the way the term professional is bandied about these days it may soon lose its traditional connotation and association with status, pride, prestige and certain other attributes.

The second observation I would make is that, describe them as you will, the number of professionals is increasing rapidly. This is true not only in an absolute sense but also in proportion to the labour force as a whole.

A third and doubtless more significant fact is that an increasing percentage of professionals find themselves not self-employed. More and more of us—and I have suddenly assumed that I am a professional—find ourselves employed by someone or some institution in one capacity or another.

Another pronounced feature is that a growing number of professionals are engaging in one form or another of collective bargaining. This ranges from subtle and none-too-subtle forms of fee-setting—which some might term collective bludgeoning as opposed to collective bargaining—to straightforward and unabashed collective bargaining—à la some of the developments in Quebec and in certain groups such as the Ontario Secondary School Teachers' Federation in this Province.

Most important of all, these trends raise a number of issues that yield no easy solutions. I will only touch on these issues in this summary, in part because I do not pretend to know what the answers are.

About six problems have come to light and, of course, there may be more. First of all there is the question of the compatibility of professionalism and collective bargaining. It seems to me that there is no profession worth calling a profession which does not depend heavily upon individual effort and initiative. If these qualities do not make a great deal of difference, I would agree with those who hold that it is not really a profession. So individualism is not a characteristic to be treated lightly. This means that the problem of enhancing group interest while preserving recognition for individual merit of one kind or another should not be minimized. It is a problem that professional groups engaging in collective bargaining will have to grapple with much more effectively than they have to date. Only if they succeed in this endeavour will they be able to engage in collective bargaining without jeopardizing some of their professionalism.

A second and related problem is the question of whether or not there should be a separation of the licensing or public-interest function from the collective bargaining or self-interest function. From society's point of view it seems to me that it would be intolerable to permit a combination of these two functions under one body. It would then be too tempting for a group to use licensing, in the name of the public interest, to restrict numbers and improve self-interest. I do not think this is a risk the public should be asked to accept.

The determination of the appropriate bargaining unit poses another problem in a professional setting. This is a real dilemma now in Quebec because they have been the first to face up to it. It will become just as much a dilemma here if we decide to come to grips with it. Again I am afraid there is no easy answer. No one here has claimed that all professionals working for a given institution should be allowed in the same bargaining unit. There has to be a dividing line at some point between those who supervise and those who are supervised. It may have to be at a higher managerial level than is the case under the standards spelled out in the present Labour Relations Act, but there will have to be such a line at some point. At least those professionals exercising effective supervision over individuals in the same profession should be excluded from a unit of the latter.

I would add that this need not split a profession wide open. I have heard some professionals say, "If we are to be divided into managers and employees, what is going to happen to our profession?" If the licensing and collective bargaining functions are separated, as I have suggested above, a profession can at least remain united in the body which handles the former function. But it has to be conceded that if a profession chooses to bargain collectively it will risk some division in relation to the negotiation function.

The fourth problem is that of dispute setlement. I am not naive enough to think—and I trust that none of you are—that professional employees engaged in collective bargaining will never reach an impasse with their employer. If collective bargaining is to have any real meaning, the two parties will eventually have to deal with issues that can lead to fundamental disagreements. This is inevitable, however sophisticated or mature you may think the parties are.

In the event of such a disagreement, there might be cases where professionals could strike without doing any harm to the public. This is not to say, however, that it would ever be professional for such employees to withdraw their services. I have very mixed feelings about this question, as I am sure you have. If a group of professional employees decides that it wants collective bargaining with ultimate

recourse to arbitration, and is denied the same, then I would say that it might have no choice but to withdraw its services. On the other hand, where such a group of professionals has voluntarily accepted bargaining and arbitration rights, or has had them imposed, it is doubtful whether they should engage in strike action. Such a tactic would be especially distasteful in the case of a profession that was offering an important service to the public.

On the general subject of arbitration I would subscribe to everything that Dean Carrothers said.

The final observation I would like to make concerns the kind of legal framework within which professional employees should be allowed to bargain. There are really three alternatives. There could be a separate act for each profession, there could be a separate act covering all the professions, or professional employees could be dealt with in the same manner as other employees under the Labour Relations Act. My impression is that the Government would be wise to steer clear of the first alternative. The Government has enacted special legislation in the case of the teachers in this Province and may well be regretting it at this point. To do the same for all other professions would only lead to many complications, such as exposing the Government to a form of whip-sawing by the different professions as each vied for a more effective statutory position. Having expressed grave doubts about the first alternative, let me leave it at that. When it comes to the second and third possibilities I do not have any strong views either way.

To conclude, may I say that during the last two days we have aired many issues without arriving at any hard and fast conclusions. This was not our intention. I trust that the Conference has fulfilled its primary purpose—that of sharing information—and has been as worthwhile for you as it has been for us.