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COLLECTIVE BARGAINING VERSUS SELF-REGULATION FOR EMPLOYED PROFESSIONALS

by

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and
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(WORKING PAPER 79-02)

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COLLECTIVE BARGAINING VERSUS SELF-REGULATION FOR EMPLOYED PROFESSIONALS

INTRODUCTION

Employed professionals are attracting increased attention, in part because they are a large and growing group in most labour forces,[1] and in part because there is considerable debate over the appropriate technique of occupational control, those techniques[2] being self-regulation as traditionally utilized by self-employed professionals, and collective bargaining as often utilized by employees. The debate occurs largely because many of the defining characteristics of employed professionals -- high education and skill, independence, and responsibility -- puts them somewhere in between their self-employed counterparts and their co-workers in the employment environment.

The purpose of this paper is to compare and contrast self-regulation and collective bargaining as alternative schemes for balancing the legitimate interests of professional employees,

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[1] In Canada, for example, since 1931 the professions grew three times as fast as the average growth in the labour force, and since 1951 they have been the fastest growing occupational group. Within almost every profession, the number of employed professionals increased relative to the self-employed, until currently over 90 per cent of all professionals are salaried. For a discussion of this growth see Gunderson, M., "Economic Aspects of the Unionization of Salaried Professionals", in The Professions and Public Policy. Edited by M. Trebilcock and P. Slayton (Toronto; University of Toronto Press, 1978).

[2] Throughout the paper we will discuss various specific techniques of occupational control such as education and training requirements and delineation of work jurisdictions.

their employers and the general public. In our analysis of self-regulation we conclude that while it may be acceptable for self-employed professionals it is neither necessary nor desirable in the case of salaried professionals. It is unnecessary because employers can serve as an effective check between the customer and the professional employee, and where they do not, alternative policies are available to ensure the public interest. It is undesirable because it can lead to costly restrictions, the loss of credibility of the professional association, and the possible debasement of the licence itself.

Collective bargaining, on the other hand, provides a time-tested process that has evolved to balance the legitimate needs of employees, employers and the general public. In addition, the current legal structure can easily be adapted to accommodate professional employees with respect to such issues as the appropriate scope of bargaining, bargaining unit and bargaining agent.

In essence, self-regulation and collective bargaining have evolved to meet different, legitimate needs. Our argument is simply that collective bargaining, its own problems notwithstanding, is more appropriate in the employment environment.

This preference for collective bargaining over self-regulation leads to the policy conclusion that the scope of professional self-regulating charters should not extend automatically[1] to the employment context. In addition, any unnecessary impediments to collective bargaining for professiona

[1] That is, application of such legislation would have to be by mutual consent of employees and employers rather than by legislative fiat. This does not preclude professional societies from having salaried employees as members, nor employers from utilizing licenced professionals, nor salaried professionals from acquiring a licence.

employees should be removed so that they have a reasonable choice between collective bargaining or individual bargaining.[1]

Although our analysis was made with market-oriented economies -- in particular, Canada -- in mind, the general principles apply to all economies that entertain self-regulation and collective bargaining as viable techniques of occupational control. That the problems of the employed professional are international in scope, is evidenced by the continuing effort of the International Labour Organization in this area.[2]

OCCUPATIONAL SELF GOVERNMENT

Rationale for Self Government of Self-Employed Professionals

In theory, at least, the underlying premise for occupational self-government is that it is justified only when it is in the public interest to grant such powers. The interests of the particular self-governing occupation are distinctly subservient to the overall public interest: they merit consideration only in-so-far as they are consistent with the public interest.

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[1] This does not preclude the use of complementary policies such as public inspection, civil liability or standards legislation to safeguard the public interest when salaried professionals are involved.

[2] See, for example, the introduction in ILO: Conditions of Work and Employment of Professional Workers (Geneva: International Labour Office, 1977).

Schemes of occupational self-regulation are appropriate when the services rendered and tasks performed by a particular occupational group are sufficiently specialized and complex that members of the lay public could neither perform them themselves nor accurately assess their quality when rendered by someone else. In those circumstances, and most particularly if the costs of error are potentially high, such that serious harm could be occasioned to the public in the event of deficient performance, occupational self-government could be warranted.

Historically these premises, upon which occupational self-government has been justified, were seen to be satisfied in the case of the traditional, prototype professions such as law or medicine. Predominantly, the members of these disciplines rendered their professional services in the context of an autonomous, independent, private practice into which individual members of the public would have occasion to enter on only the most sporadic and occasional basis. In these circumstances, the professionals' complete independence and unfettered autonomy usually connoted a resulting ability to completely control their working environment and to dominate their client relationships. Accordingly, in the absence of any other readily available means of administrative supervision, professional self-regulation could properly be regarded as a legitimate, if not entirely satisfactory, means of safeguarding the public interest.

Under the auspices of the professional association, some standardization in competence of the profession and in the quality of services could be assured to the public.

Admissions standards, educational requirements, codes of ethics, and delineations of exclusive work jurisdiction could all be put forward as devices by which the interests of the lay client could be safeguarded. These devices were seen as techniques to minimize, if not preempt, the possible abuses which could be practised in a relationship, the irreducible character of which was the predominance of the professional. In this archetypal environment of autonomous, independent practitioners, occupational self-government could be supported as a method to regulate and control an occupational activity in a manner which was consistent with the public interest.

Even in the situation of the self-employed professional, it should be obvious that self-government can lead to abuses, not the least of which involve placing the self-interest of the profession above the public interest. This may occur if incumbents in a self-regulated profession seek increasingly stringent licencing requirements, thereby reducing competition and creating economic rents[1] for those in the occupation. Reducing competition at the port-of-entry into the occupation through licencing technique ensures that those rents go to incumbents in the profession since they do not have to bear the cost of the new licencing requirements. New entrants into the profession bear those costs: and their opportunity to secure larger rents occurs only if they are able, in turn, to add even more stringent licencing requirements. The possibility of incentives for entrance requirements to escalate to excessive levels is obvious.

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[1] The term economic rents is used to denote a surplus payment over and above that which would result if entry into the profession were not restricted.

In spite of the obvious potential for the abuse of self-government, such powers were often bestowed upon certain professions as being the lesser of various evils. As noted, the problem of inadequate consumer information and protection made the laissez-faire market situation unacceptable and self-government was regarded as one viable alternative.

Inapplicability of Self-Regulation for Salaried Professionals

While there may be an "uneasy case for self-regulation" in the situation where self-employed professionals sell their services directly to the public, the premises supporting that conclusion are simply inapplicable to the circumstances of employed professionals. In this context, the employer -- be it a private sector firm, a public sector institution, or even a professional firm -- can be expected to possess the requisite knowledge concerning the required quantity and quality of professional services and the price it should pay. If it does not possess the information internally, it has the resources and incentive to acquire the information.[1] The hierarchical system of controls and supervisory authority that lies at the root of the employment relationship serves exactly the same function, and at the very least thereby renders superfluous, the role of the professional society in safeguarding the public interest. Moreover, unlike the professional society, whose self-interest may colour its role as

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[1] Garbarino, J.W. "Professional Negotiations in Education", Industrial Relations, Vol. 7 (February 1968) p. 93.

defender of the public interest, the employer can generally be expected to have a more immediate and compelling incentive to effectively monitor both his professional needs and the quality of the services that he eventually receives. In fact, it has already been observed that even in the absence of licensing legislation, employers of various professional and scientific disciplines, such as paramedical personnel, will privately construct and administer their own schemes of occupational accreditation with various educational and admissions criteria, when it is in their interest to do so.[1]

Indeed, whenever a large proportion of its members are employed as salaried professionals in corporate institutions and governmental agencies, the professional associations themselves have recognized the redundancy of their own efforts and the difficulties that they will encounter in any attempt to monitor and regulate the practice of those members. Thus, in summarizing its findings of interviews conducted with various employers, unions and professional societies, L'Office des Professions du Quebec has reported:[2]

> "Employers, unions, and even corporations [the term used to denote the governing professional body in Quebec] believe that, when most of the members of a corporation are salaried employees of companies, organizations or institutions it is difficult for that corporation to exercise its control over the practice of its members. In general, the employers interviewed consider that the existing quality controls in companies, organizations or institutions

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[1] Adams, G.W. "Collective Bargaining by Salaried Professionals", The Professions and Public Policy edited by M. Trebilcock and P. Slayton (Toronto; University of Toronto Press, 1978).

[2] The Evolution of Professionalism in Quebec (Quebec; L'Office des Professions due Quebec, 1976) p. 43.

> are perfectly adequate to ensure the protection of the public. They also mentioned that they themselves ensure the continuing education of their professional personnel and that this meets their requirements. As for the unions, some consider the controls exercised by corporations whose members are for the most part employed by companies, organizations or institutions to be useless and quite unnecessary. In practice, unions and employers stated that they have little contact with the corporations. The unions in particular consider that in any structured working environment the professional acts of a salaried employee are always the responsibility of his employer who, accordingly, becomes responsible for the protection of the public.
>
> In this sense, several corporation representatives during their interview explained the inactivity of their corporation by the fact that possible action by them would merely duplicate that of other responsible organizations such as the Government, universities, employers and the courts which assume the major responsibility for client information, continuing education formulating standards of practice and discipline."

Employer's Professional Employment Decisions and the Public Interest

Even if employers can be expected to be adequately informed users of professionals, the question remains whether their employment decisions, with respect to salaried professionals, can be expected to be consistent with the public interests. In other words, if professional self-government is replaced by the employment decisions of employers, are there mechanisms which can adequately ensure that the public interest is effectively secured in these decisions? Answers to these questions depend, in part, upon whether the employer operates in the private market sector, the nonmarket sector, or if the employer is a professional firm selling professional services directly to the public. Each of these cases will be examined

in turn.

If the employer is in the market sector then the forces of competition should ensure that the employer makes optimal decisions[1] with respect to the utilization of its salaried professionals. The public need not be informed of the worth of the professional input -- nor any other input for that matter. The public simply buys or does not buy the final output, leaving the complicated input decisions up to the firm. If the forces of competition do not prevail then the correct policy response is one of competition policy: granting self-government to salaried professionals simply would compound the problem.

If the employer is in the nonmarket sector (e.g. government, not-for-profit institution or regulated utility) it may not face the same competitive pressures. Nevertheless, even in this sector, employers will be under some constraints to act in the public interest with respect to their decision to employ professionals. Governments are ultimately beholden to taxpayers who vote; not-for-profit institutions are under budgetary constraints; and regulated utilities are scrutinized in rate hearings. Although the public may not be able to exert its influence as directly as it can in the market economy, these mechanisms should ensure that its interests will be felt. Hence there is pressure for employers in the nonmarket sector to utilize their professional inputs in a fashion that reflects the public interest. If the public interest is not adequately felt, then again this is part of a larger problem of ensuring that the nonmarket sector is responsive to public needs:

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[1] Where their decisions deviate from the public interest, corrective policies are available, as discussed in the next section.

granting self-governing power to salaried professionals would not guarantee that responsiveness. In fact it would only compound the problem by dissipating responsibility.

If the employer is a professional firm, whether it sells its services in the market or nonmarket economy or both, it will also be under pressure to utilize its professional employees in a manner that is consistent with the public interest. If it sells its services to other firms or institutions, then they can be expected to be reasonably sophisticated purchasers of that service. Even if the professional firm sells its services directly to an uninformed public it would have an incentive to act in the public interest because it would want to preserve its brand name affiliation. The client may not be able to judge the quality of the professional input that it purchases, but it does know the success or failure of these services, and these successes and failures have a direct impact on the marketability of the brand name of the professional firm.

Alternative Policies to Protect Public Interest

Concern may arise over the possibility that since professional employees must defer to the dictates of their employer or risk losing their job, decisions may be affected in the interest of the enterprise which may compromise professional standards thereby jeopardizing the safety and welfare of the public.

This suggestion makes the assumption, erroneously in

our view, that the profession itself will be more sensitive to the public well-being than would the employer. In fact, we would suggest that precisely the opposite assumption is more likely to reflect the realities of the respective postures struck by professional societies and employers. Unlike the legally recognized professional society, which can be sheltered from competitive forces, the constraints of the market are more likely to induce the employer to act in the public's best interest. Moreover, where these market forces cannot be expected to influence the employer's decision-making, systems of public inspection, standards legislation and schemes of civil liability and consumer protection legislation properly applied can be expected to safeguard the public's safety and security. As a general bias we have more confidence in such schemes of public regulation which, unlike systems of self-regulation, are not as susceptible to being diverted to one's own self-interest.

Other Disadvantages of Self-Government in the Employment Context

Not only is self-government unnecessary in the context of salaried professionals, but it also suffers from chronic disabilities that make it undesirable as a policy choice. These disadvantages stem from the results of restricted competition, the loss of credibility of the professional association, and the possible debasement of the value of the licence itself.

Restricting competition through the control of entry results in artificially high salaries for the profession and

hence higher costs to the consumer, even if that cost may be hidden because it is paid out of public funds through the tax system. In addition, occupational mobility is reduced for those who are excluded from the profession, and the danger is raised that such exclusions may involve discrimination or nepotism or other factors not related to ability.

The credibility of the professional association itself is also weakened if it maintains self-governing powers for its salaried members. Such powers, rightly or wrongly, can be interpreted as self-serving, and the desire to maintain them would weaken the already uneasy case for self-government for its self-employed members. Since professional organizations are already under public scrutiny, they would do well to divest themselves of any powers that are not entirely consistent with the public interest.

Debasement of the licence or certificate may also occur to the extent that professional associations try to maintain self-governing powers for their salaried members. We have already noted how professional associations have used admission standards, educational requirements, and codes of professional behaviour to ensure some minimum uniform standard of competence of the practioners and, derivatively, the quality of service rendered. From this perspective the certification that is bestowed by a professional self-governing society in its grant of a licence to practice,[1] is intended as a representation to the public that its holders possess some basic level of skill, ability and qualifications.

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[1] Even if the professional associations themselves do not have the licencing function, they tend to have a preponderant influence on licencing boards.

In the absence of any formal system by which the continuing skills and qualifications of the members of a self-governing profession can be tested and updated, the value of the profession's certification of competence will be diluted over time. In any vocation, the relentless expansion of knowledge, refinement of technique and development of skills forming the base of its discipline and expertise will erode and undermine the relevance and validity of the original certification.

This dilemma, which confronts any regulatory agency charged with supervising and ratifying the competence and qualifications of its practitioners, is compounded in the case of a profession whose membership includes persons whose services are rendered exclusively in a single employment relationship. Because of the increasing specialization and division of work activities in the labour market, it is even less likely that the professional employee whose services are utilized exclusively by a single employer can maintain the qualifications and expertise that are represented by the certificate or licensure. By restricting the practice of his profession to a unique employment context, the employed professional may be denied the opportunity to maintain his qualifications in the full range of skills embraced by the profession. While not crucial so long as the professional remains in the employ of that enterprise, to allow such persons to retain their certification if they begin to offer their services directly to the public is misleading and potentially injurious to the

public interest.

However, to require all persons, who are desirous of practising any aspect of work falling within the exclusive jurisdiction of the profession, to attain some minimum level of competence in all aspects of that profession would also impose considerable expenditures on employer and employee alike. In such circumstances, where the work of an occupation can be broken down into a wide variety of specialized tasks performed in unique and disparate working environments, considerations of efficiency would dictate that the educational and training functions should be tailored to the particular ambition and needs of employee and employer alike. To do otherwise, and require persons to become certified in all aspects of work falling within the jurisdiction of the profession, regardless of their employment situation, is a socially inefficient allocation of human resources.

Exclusive-Right-to-Practice Versus Reserve-of-Title

Under an exclusive-right-to-practice licensure only the licenced professional can do the specific work, while under a reserve-of-title certification, only the certified professional can use the title, but others can perform the same tasks. The argument against self-government for salaried professionals applies most strongly when it involves granting the exclusive-right-to-practice licensure since this is the device that most effectively excludes competition, and, in the employment context, restricts the use of alternative inputs for that particular job. Employers may be able to redesign the job or utilize different productive processes, but this can be a costly and inefficient way of bypassing the exclusive-right-to-practice.

When salaried employees are granted only the reserve-of-title certification by their professional association then competition is not as restricted and the use of alternative inputs is possible. However, while the reserve-of-title may provide considerable information to an unsophisticated client dealing with a private practitioner, it would be of limited use in the employment context, since employers can be expected to be much better informed in their decisions to hire professionals. Even here, however, it may have some information value, especially to small employers or for salaried professionals who deal directly with the public. In the latter circumstances the public may feel more confident of the services knowing not only the reputation of the firm or institution, but also that the firm employs professionals with certain recognizable credentials. This would be the case especially in the nonmarket sector because the absence of the ultimate market test may mean that there is less incentive for the institution to monitor the quality of service of its professional staff.

However, the reserve-of-title certification carries with it certain disadvantages even in the employment context. It can lead to "credentialism" and a factionalization of the workforce based on titles. In addition, a reserve-of-title is

usually the first step towards obtaining the more powerful exclusive-right-to-practice. Once a powerful interest group is created, political realities are such that it may be able to gather even more power. To the extent that policy makers sanction the reserve-of-title designation they may be encouraging the proliferation of exclusive-right-to-practice, with all of its more serious adverse consequences when professionals are employed on a salary basis.

From the perspective of public policy, as is so often the case, a trade-off is involved. The key question is whether the social benefits of the information value of the reserve-of-title, outweigh its social costs in terms of "credentialism" and the possibility that it leads to more restrictive practices. To the extent that it is feasible, a flexible approach may be warranted in the granting of reserve-of-title to professionals who work mainly in an employment context. If they tend to work for smaller firms, or if they are in the nonmarket sector, or if they deal directly with the public, the information value secured by the reserve-of-title may warrant its utilization. However, if they work for large, well-informed employers or if they tend to deal mainly with fellow professionals then even the reserve-of-title as given by the professional association would not be warranted. All that may be necessary in such circumstances is the application of the existing laws against misrepresentation to ensure the authenticity of the professionals' qualifications.

Interests of the Salaried Professional

We have argued that, for salaried professionals in an employment context, there is no justification for an exclusive-right-to-practice licence, and at most an equivocal case for the limited use of the reserve-of-title certification. This conclusion is based on the premise that the granting of such powers is justified only when it serves the public interest. However, in all such decisions the interests of employees, themselves, must also be considered.

We have argued that incumbent professional employees themselves would gain from the barriers-to-entry created by restrictive admissions policies, rigorous educational requirements and regulations limiting the right-to-practice. Their gain, however, would come at the expense of the public interest as it reflects the concerns of consumers, taxpayers, and other workers including those who could otherwise do the tasks reserved for the salaried professionals. In our opinion the gains to the salaried professionals are far outweighed by the losses to the general public even if these losses are subtle and may be dispersedover a large populace.

In addition, however, there are adverse consequences for employed professionals themselves that can occur when self-regulation is extended to an environment that is alien to its methods of occupational control. New entrants into the profession may be compelled to meet a variety of requirements

that are unnecessary for their objectives in an employment environment. The employability of the professionals themselves may be jeopardized if employers are required to accept a host of unnecessary and rigid constraining influences on how they utilize their professional workforce.[1] In addition, the privileges granted to professionals may create discord in the rest of the workforce, and this may be considered by employers in their decision to hire professionals.

Most important, professionals in the employment environment may be subject to severe conflicts if they are compelled to adhere to professional licencing requirements that were designed with the self-employed and not salaried professional in mind. This could occur, for example, with respect to provisions in professional codes of ethics involving such matters as jurisdictional issues with paraprofessionals and other professionals, the right to engage in strikes, the obligation to the "client" of the salaried professional, or the right of a disciplinary committee to have access to company records. In essence, the interests of salaried professionals themselves can be jeopardized by the potential conflict that may occur if licencing requirements are extended to the employment environment.

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[1] In general, even in the face of statutory enactments delineating exclusive-rights-to-practice, employers have retained their right to assign work. See, for example, Goldenberg, S. Professional Workers and Collective Bargaining, Woods Task Force Labour Relations Study No. 2 (Ottawa: Information Canada, 1967) p. 255.

COLLECTIVE BARGAINING BY EMPLOYED PROFESSIONALS

Our previous conclusion as to the inappropriateness of self-regulation for salaried professionals is reinforced by the fact that alternative means do exist which are capable of safeguarding their legitimate employment concerns. They have an individual bargaining power that usually surpasses that of most workers. In addition, the option of collective bargaining can be made available to them.

Reasons for Collective Bargaining Response

Clearly, collective bargaining by some employed professionals is an established fact. In many cases such a response can result from peculiar situations relevant to a particular employment context. Nevertheless, it is also clear that the collective bargaining response can also emanate from conditions that tend to be prevalent for employed professionals in general.

In that regard, professional employees, who render their services exclusively in the context of a formal employment relationship, as a group face a fundamental, irreducible tension which serves to distinguish them from their counterparts in private practice. The source of this tension lies in the segregation of professional responsibility from supervisory or monitorial authority. The manifestation of that tension is revealed in the conflicting allegiances that are owed by professional employees to their own professional standards, ethical norms, goals and beliefs and to their employer's instructions. In short, it is the employed professionals'

inability to retain a large measure of control over their working environment which serves to differentiate them from the private practitioner and which has been seen to threaten their very professional status. As one observer has noted, the employed professionals, unlike their self-employed colleagues, must serve the community through an organization which will synthesize and co-ordinate all of the professional and non-professional efforts that are required.[1]

In assessing the consequences for employed professionals that flow from the fact that they are unable to control their working environment, it is important to underscore the fact that this is not an issue peculiar to the professional employee. Most workers share the desire of professional employees to perform some socially useful service, to decide how their talents are to be exercised, and to preserve some occupational identity and integrity. Rather than being unique to professional occupations, such goals manifest a common desire on the part of all employees to retain the maximum control in the direction and content of this central aspect of their lives. Indeed, it is that same sense of dissatisfaction that has generated much of the present debate on the desirability of enhancing the quality of working life generally by means of job enrichment schemes, and by the democratization of the work place.

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[1] Chartier, A. The Management of Professional Employees (Kingston: Queen's University Industrial Relations Centre, 1968).

While not unique to the professional employee, problems of self-actualization, career development, autonomy, and occupational integrity may be more immediate and profound for professional employees because of their greater education qualifications, more intense work orientation, and higher career aspirations. For them, the inability to control their professional lives and their work environment may be more profound or at least more felt. Thus, as Kleingartner[1] has written:

> "It was suggested that individual satisfaction and career development, autonomy, occupational integrity and identification, and economic security and enhancement are the major work-related values of professionalism. These values are not unique to any occupation or category of occupations. In a very real sense they are nothing more than what all workers seek to achieve from their work careers. Yet, we can distinguish professionals from non-professionals in this regard, in terms of the level at which they expect these values to be realized and the importance attached to them. For example, by the very nature of their work, autonomy will be valued more highly by professionals than by most non-professionals."

These characteristics of professionals tend to create conflict situations especially when they are employed in large bureaucratic organizations with their emphasis on seniority, rigid work schedules, formal salary structures and hierarchial decision-making. Employed professionals often find themselves treated much like production and other white-collar workers. Consequently, they have increasingly turned toward emulating the successful unionization response of such workers.

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[1] Kleingartner, A., Professionalism and the Salaried Worker Organization (Madison: University of Wisconsin Industrial Relations Institute, 1967). See also Fraser, D. and Goldenberg, S., "Collective Bargaining for Professional Workers", McGill Law Journal, Vol. 20 (1974) 456-79.

Historically, unionization can be viewed as a response to the job insecurity associated with the development of a market economy, and as a response to the whims of managerial decisions associated with hierarchial control. As employed professionals find themselves in a position of job insecurity and subject to managerial directives, they too have increasingly turned toward a unionization response.

This is especially the case when salaried professionals have no organized power base from which to operate, as may be the case if their professional association is dominated by self-employed professionals. This is reinforced by the success of other competing interest groups -- blue and white collar unions, community groups, consumers' and employers' associations -- who have successfully presented a united front. In such circumstances the only way to be heard is often through collective action.

As well, resort to collective action by professionals has been facilitated by the fact that in general the lofty image of "professionalism" no longer prevails. Their social and economic position has been diluted by the increased education and training of the whole workforce, as well as by the large influx of persons into the existing professions and the proliferation of a variety of new professions and quasi-professions. In addition, especially amongst younger professionals, militant, collective action may no longer be regarded as conflicting with notions of professionalism. Consequently, professional groups are more willing to engage in unionization,

strikes, and picketing ... especially if they can be labelled associations, mass resignations and public information campaigns. Clearly, when treated like other employees, salaried professionals have been willing to emulate their collective response.

The observation that the plight and response of the employed professional is not unique to persons who have attained given educational levels or employment strata is an important one. It suggests that the collective bargaining procedures successfully invoked by employees in industry are amenable for use by professional employees as well. The attractiveness of collective bargaining is heightened when it is compared to self-government as a device to adequately represent the interests of salaried professionals.

Advantages of Collective Bargaining Over Self Regulation in Employment Context

As a basic and enveloping hypothesis, we will advance the proposition that, as techniques of job control, occupational self-government and collective bargaining are uniquely suited to distinct and particular forms of economic organization. In our view, self-regulation is especially suited to the circumstances of persons who practice their vocations privately and independently, while collective bargaining evolved to address the aspirations and ambitions of the salaried, employed workforce. It is our contention that the critical distinction between independent practice and salaried employment strongly argues for unique procedures to be struck through which each sector can secure and maintain their legitimate

aspirations in a manner which is consistent with the public interest.

That occupational self-regulation and collective bargaining are simply parallel instruments designed to address and advance the interests of distinct and disparate sectors of the workforce is revealed in the basic techniques of occupational control that are synonymous with each scheme. The classic tools utilized by virtually all professional self-regulating societies to maintain the professional and economic integrity of their members correspond to the economic organization of that membership. Reflecting the predominance of the private practitioner in most professions, these devices primarily are directed to regulating the relationships between the members of the profession and their clients. For example, admissions criteria, educational requirements, definitions of unprofessional conduct, all are directed toward the relations that exist between members of the profession and between members of the profession and the client. None of these devices of occupational control take account of the fact that some third party may intervene between the profession and the public. These tools were designed without reference to the employment context and were intended to remedy deficiencies and abuses alien to that environment.

By way of contrast, collective bargaining is a bilateral device which inherently recognizes, and indeed is premised upon, the existence of an employer whose organizational constraints and operative requirements may not wholly coincide

with the occupational ambitions of the employees. It is a method by which employees, whether professional or otherwise, together with their employer can fashion agreements to accommodate their often competing interests. For example, collective agreements can and in fact do contain provisions which simultaneously assure the employer that its staff will possess and maintain a level of skill and qualifications that is commensurate with its needs, while offering to the employees opportunities to develop and further their own occupational potential. Thus, provisions can be drafted which stipulate basic entry-level qualifications for certain jobs, or job training for others, which guarantee attendance at educational conferences and vocation seminars, and which secure the right to paid educational leave.[1] Such negotiated provisions can reconcile, within the context of a particular employment setting, the operational needs of the employer with the vocational aspirations of the staff. Moreover, rather than imposing uniform educational or vocational requirements, with their attendant costs, such agreements permit the parties to determine the level of training, education and skill that is consistent with the productive requirements of the enterprise and the occupational ambitions of the staff.

In contrast, then, with the emphasis placed by self-governing professions on uniformity and universality in their

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[1] See, for example, Bairstow, F. and Sayles, C. "Bargaining over Work Standards by Professional Unions", in Collective Bargaining and Productivity, (Madison: Industrial Relations Research Association, 1975).

efforts of occupational control, collective bargaining responds to a more heterogeneous environment, permits flexibility, and encourages pluralistic solutions. It induces each employee group to direct their energies to securing whatever guarantees are thought to be most crucial to their specific occupational goals within the constraints of a particular employment relationship. While necessarily lacking the unilateral character of directives and regulations issued by self-governing societies, collective bargaining nevertheless does foster the direct and meaningful participation by employees in the construction and administration of their work environment. Moreover, it does so in a way that enhances the efficient allocation of human resources by requiring the manifestos of occupational control to be negotiated within the context of the institutional constraints and productive requirements of particular organizational settings. As these constraints and requirements differ across sectors or over time, so may the degrees of occupational control.

In essence, collective bargaining is more likely to ensure that the occupational self-interest to monopolize and preserve the value of a proprietary interest in an occupation, is set against the equally compelling determination of the public to utilize resources and acquire services in the most efficient manner. Collective bargaining ensures that a check is provided against each of these powerful interests. In sharp contrast, schemes of self-regulation assume that fair and appropriate resolutions of these competing interests can be

made unilaterally, or with only the most modest supervision, by one of the interested parties.

To be sure, in the collective bargaining process, there may be times when the public interest is not adequately represented in bilateral negotiations between employees and employers. As we have earlier noted, the potential for this neglect is greatest in the public sector where market constraints may not put adequate pressure on the parties to settle. Yet this is a more general phenomenon which applies not only to salaried professionals, and for which new mechanisms of dispute resolution are presently being sought. At the very least, we are suggesting that the public interest has more of an opportunity to be considered in bilateral collective bargaining, than in unilateral occupational control through self-government.

Adaptability of the Collective Bargaining Structure

In addition to the fact that the process of collective bargaining is well-suited to reconcile the interests of salaried professionals with those of employers and the public interest as well, it is also true that current legal structures, with few changes, can usually accommodate salaried professionals. This capacity to accommodate widely divergent occupational ambitions springs from the fact that the central features of the collective bargaining process are so pliable as to be capable of being molded to suit widely disparate employment contexts.

This is not contradicted by the fact that many professionals are currently excluded from coverage under some current

labour relations legislation. This situation is a changing one, and it is not one that is applied consistently across all jurisdictions and with respect to all professions. The possibility that the current legislation can accommodate salaried professionals is evident when one examines the situation of the employed professional, for example, with respect to the scope of bargaining, the appropriate bargaining agent and the appropriate bargaining unit. Each of these will be examined in turn.

With respect to the scope of bargaining, employed professionals have been able to enhance their professional status by bargaining over such things as continuing education, sabbaticals, attendance at conferences, authorship, patents and royalties. In fact, many of their concerns with respect to autonomy and independence are ones which are shared by most workers and hence which are being bargained over under the rubric of the "democratization of the work place." Similarly, issues of individual merit can be accommodated within the current scope of collective bargaining, as can issues which traditionally have been regarded as unbargainable because they are considered to be management rights or issues of public policy. To be sure, checks may be needed to ensure that professional employees do not control issues of public policy for which they are not ultimately accountable. Nevertheless, this applies to all employees, and in fact to all interest groups. In addition, because issues of public policy and employee job rights are not always easy to delineate, it may not be desirable to do so where it would result in denying the employees a meaningful

participation on matters which are integral to their professional lives.

With respect to the appropriate bargaining unit, the fact that some professional employees may exercise managerial authority does not preclude their being able to engage in collective bargaining. Legislative pronouncements in this area have been flexible and adaptable to changing circumstances. Recent trends suggest the limitation of managerial responsibility only to those who make decisions that materially affect the economic lives of subordinates. This would allow most professionals, who have a supervisory but not managerial function, to engage in collective bargaining.

The managerial issue is simply one of many involved in determining the appropriate bargaining unit. Others involve the inclusion of related professions, paraprofessionals, or of other workers in general. These are all issues, however, that are being resolved in various fashions within the current legislative framework in North America. The trend away from separate craft status and towards bargaining units based on a "community of interests" (of which one's profession is but one aspect), suggests that separate bargaining units for a specific profession will not be prominent. In our view, this trend away from separate bargaining units based on a single profession is desirable since it is a move towards equality of treatment irrespective of skill level, it encourages a stable employment relationship by minimizing jurisdictional disputes based on skill levels, and it encourages the various skill groups

to internally trade off their competing demands.

On the final legal issue -- the appropriate bargaining agent -- our belief is that professional associations ought not to be allowed to bargain for their salaried members, at the same time as they have the power of occupational licencing. On legal grounds they could often be excluded from acting as the bargaining agent by virtue of the fact that their membership includes those who clearly act in a managerial capacity, or that their societies received financial support from employers. The power of occupational licencing would simply give salaried professionals, who are already a privileged group economically, an excessive measure of power in any bargaining relationship.

Hopefully professional societies that represent both salaried and self-employed members would voluntarily exclude themselves from any collective bargaining function. Only then could they concentrate on the single legitimate function for which they were granted self-governing power -- that function being the occupational licencing or certification of its self-employed members, when such occupational control is in the public interest. To try to retain both collective bargaining and occupational licencing functions would be to reveal that the prime function of professional associations is to further

the self-interest of the profession, at the expense of the public interest.

SUMMARY AND CONCLUSIONS

Collective bargaining and self-regulation have both been suggested as methods of occupational control for professionals who work in an employment capacity. After comparing and contrasting the two schemes, we conclude that collective bargaining is the more appropriate technique since it better balances the interests of the professionals, the employers and the general public.

While self-regulation with its accompanying licencing procedures may be acceptable to protect the public interest in the case of self-employed professionals, it is neither necessary nor desirable for salaried professionals. It is not necessary because employers can serve as an effective quality monitor to guarantee the public interest, and where they do not, alternative policies are available to ensure the public interest. It is undesirable because it can lead to costly restrictions, the loss of credibility of the professional association and the possible debasement of the licence itself.

Collective bargaining, on the other hand, is a process that evolved in the employment environment to balance-off the legitimate needs of employees, employers, and the general public. In addition, the basic legal structure can accommodate employed professionals. In essence, because collective bargaining

evolved within the employment environment, it can adapt to deal with the issues of professional employment. Self-regulation, on the other hand, evolved to handle the problems associated with self-employment: it is simply not applicable to the employment environment.

At the policy level, our belief in the advantages of collective bargaining over self-regulation in the case of employed professionals leads to two general recommendations. First, professional charters should not be automatically applicable to the employment environment. They may become applicable through the process of collective bargaining, but this is for the parties themselves to decide. This does not prevent salaried professionals from joining such societies: they may do so if they also engage in self-employment or if they want the professional designation even though they do not automatically need it for their employment. In effect, for employed professionals the exclusive-right-to-practice licence would become a reserve-of-title-certification, since the employer could utilize others in place of professionals.

Second, where necessary, collective bargaining legislation should be modified to accommodate salaried professionals. Such modifications could range from removing professionals from the list of those excluded, to including professional representation on labour relations boards. Only then could employed professionals have the viable choice that must be available to them: individual bargaining or collective bargaining ... but not self-regulation in the employment context.