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Les relations entre employeurs et employés dans la fonction publique au Canada

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Résumé de l'article

Au Canada, le temps est bien passé où l'on s'opposait à la négociation collective pour les employés des services publics, ce qui ne signifie pas qu'il n'existe plus de poches de résistance. Il n'en reste pas moins que l'adoption, en 1967, de la*Loi sur les relations de travail dans la fonction publique* fut un événement de la plus haute importance. Le gouvernement qui se propose d'adopter une loi sur les relations de travail dans le secteur privé peut agir avec objectivité, se placer au-dessus des parties, puisqu'il n'est pas l'employeur. La situation est bien différente lorsqu'il s'agit de lois qui vont s'appliquer à ses propres employés; il se trouve alors ainsi à limiter ses propres intérêts et ses propres privilèges. Aussi, fallait-il une bonne dose de courage politique pour présenter une telle mesure.

La Commission Heeney, instituée pour étudier la question, avait à tenir compte de ce qui existait antérieurement et à voir quels nouveaux droits et quelles nouvelles obligations elle pouvait accorder. D'autre part, personne ne savait comment le nouveau mécanisme allait fonctionner. Ni l'employeur ni les associations n'avaient la moindre expérience dans le domaine de la négociation collective. La Commission de la fonction publique avait autorité en matière de nomination et de promotion, mais elle ne pouvait que faire des recommandations en matière d'incompétence et d'insuffisance professionnelle. Enfin, tant le gouvernement que les groupements existants hésitaient à se départir des pouvoirs et des avantages dont ils jouissaient sous la législation antérieure. Ils redoutaient donc l'implantation d'un régime nouveau et inconnu.

Les auteurs de la nouvelle législation s'en faisaient également au sujet de la nature de la collectivité à laquelle elle allait s'appliquer et de la dispersion de sesmembres. Cette collectivité s'étendait à 230,000 personnes qui appartenaient à différentes associations lesquelles formeraient autant de groupes distincts. Les négociations avec autant de groupes à peu près en même temps pesaient lourd sur les épaules des représentants du gouvernement. Il fallait encore tenir compte de la complexité de cet ensemble : cols bleus qui, dans le secteur privé, bénéficiaient depuis longtemps du droit de négociation collective; cols blancs qui, à l'extérieur de la fonction publique, depuis quelques années, adhéraient aux syndicats en nombre considérable sans compter les membres des professions libérales traditionnelles et aussi d'autres professions qui considéraient l'avènement du syndicalisme comme incompatible avec leurs véritables intérêts. Enfin, cette communauté de travailleurs était dispersée à travers un pays extrêmement vaste.

Comment, en pareille conjoncture, assurer un minimum d'uniformité dans l'établissement des conditions de travail ? Il y avait aussi la question du droit de grève. Beaucoup de fonctionnaires la trouvait impensable et il fallait trouver un moyen de résoudre cette question.

Le rapport de la Commission Heeney évita toute approche théorique de ces problèmes. C'est pourquoi la loi de 1967 fut, sur plusieurs points, fort différente de ce qui existait dans le secteur privé.

Nous voici maintenant en 1973. On a décelé certaines faiblesses dans le mécanisme mis en place. Les agents de négociation ont goûté aux fruits de la participation aux décisions sur des sujets qui relevaient autrefois de la discrétion de l'employeur. Tout cela faisait partie d'un processus normal d'évolution. Il importait de faire le point. On a confié la tâche de réexaminer la loi à l'auteur même s'il était président de la Commission qui avait assuré le fonctionnement de la législation initiale et qu'il l'avait vantée tant et plus. Il a accepté parce que tout le monde, gouvernement et agents de négociation, lui ont fait confiance. Il fallait faire vite à cause de la période des renouvellements de conventions collectives qui approchaient. Dans ce nouvel examen de la situation, il importait de tenir compte de plusieurs facteurs : nature et organisation de la fonction publique; capacité des agents de négociation et de l'employeur de traiter certains sujets dans un contexte de négociation, possibilité pour la Commission d'agir efficacement dans des cadres très élargis, désir de garder une bonne mesure d'uniformité entre la législation applicable au secteur privé et au service public.

Dans la deuxième partie de son travail, l'auteur considère brièvement quelques-uns de ces points. Le premier point qui a été retenu fut de viser au maintien des conditions uniformes pour tous les groupes et tout le territoire en vue d'empêcher la balkanisation du service public par la signature de conventions collectives qui tendraient à établir tout un réseau de droits acquis difficiles à briser plus tard sous un régime de négociation concertée.

En ce qui concerne le contenu des conventions collectives, il s'agissait de savoir si les parties étaient assez bien équipées pour s'engager dans certains domaines nouveaux. Il n'en fallait pas trop. Il faut du temps à un organisme pour obtenir la crédibilité et il lui en faut peut-être davantage pour digérer une nouvelle pièceélégislative. C'est pourquoi, dans cette tâche de rénovation de la loi, l'auteur dit avoir visé à être concret, pratique. La qualité maîtresse d'un rapport d'une commission d'enquête, c'est de rendre hommage à « l'art du possible ».

Parmi les recommandations, l'auteur en discute deux : le problème de l'ancienneté et celui du classement des emplois. Sur le premier point, la Commission n'a pas cru devoir recommander l'application des principes d'ancienneté aux promotions parce que le système bien établi de l'avancement au mérite dans la fonction publique a assuré une protection valable aux fonctionnaires. Les mises à pied et les rappels au travail posaient un problème différent. Cependant, la Commission n'a pas cru devoir recommander qu'ils soient négociables, du moins dans l'immédiat. Elle a plutôt suggéré que la Commission de la fonction publique fasse un règlement qui permette aux employés mis à pied d'être rappelés au travail lorsqu'il y a des positions vacantes pour lesquelles ils possèdent les qualifications minimales requises.

En ce qui a trait à la classification, étant donné l'impossibilité pratique d'arriver à des accords rapides sur des sujets aussi complexes, il a été recommandé de mettre sur pied des mécanismes de consultation obligatoire qui pourraient éventuellement conduire à l'insertion de cette matière dans le processus de négociation collective. On ne guérit pas tous les maux d'une société du soir au matin et il fallait éviter de faire pire en voulant faire trop bien, et cela d'autant plus que la Commission a le pouvoir d'agir en ce qui concerne le traitement des griefs de classification.

Report on Employer-Employee Relations in the Public Service of Canada

Jacob Finkelman

In this article, the author explains the rationale behind the Finkelman report which contains many proposals for legislative change in the Public Service Staff Relations Act. Some of the key recommendations are discussed but substantial consideration is also given to the constraints the committee had to deal with.

It is beyond question that we have long passed the point of time in Canada when the issue as to whether public servants should be permitted to engage in collective bargaining can have other than one positive answer. But that is not to say that there are no substantial pockets of resistance to the principle that we have come to accept in the last seven years as the way of life for federal public servants. A little over a month ago, I addressed a meeting of the Ottawa Chapter of the International Personnel Management Association at which one member of the audience charged that collective bargaining should be regarded as « basically a dangerous, if not destructive, development in a political context ». And others preach a gospel of industrial relations, especially for professionals, that calls for a return to the idyllic conditions that prevailed in the garden of Eden before the fall. Nor ought we to overlock the fact that, in our neighbour to the south, the battle is far from being won. The rallying cries of abdication of sovereignty, unconstitutional delegation of powers and so on are still heard accross the land.

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* Communication présentée au Congrès de l'Institut Canadien de recherche en relations industrielles, Toronto, 1974.
Paper presented at the Canadian Industrial Relations Research Institute annual meeting, Toronto, 1974.

** FINKELMAN, J., *Employer-Employee Relations in the Public Service of Canada,* Proposals for Legislative Change, Part I, Information Canada, Ottawa, 1974, 301 p.

One must recognize that the very enactment of the *Public Service Staff Relations Act* in 1967 [1], altogether apart from its contents, was an event of the utmost significance. It took a great deal of political courage for the Government, and indeed for Parliament — and that includes the members of all political parties — to pass such a statute. When Government is considering what legislation ought to be enacted to deal with industrial relations in the private sector, it can weigh the interests of employers and trade unions in a relatively objective fashion. I do not overlook the fact that, in Canada, what is sometimes referred to as the private sector legislation is applicable to local governmental institutions as it is to private industry. But my point still holds true since, in the preparation of such legislation, Government at the federal level, or even at the provincial level, is not the employer of the employees in these institutions.

I used the phrase in a « relatively objective fashion » a few moments ago because, under the parliamentary system, governments consist of ministers, some of whom are employers and some of whom may be employees — the mix varies from time to time. In addition, members of Government are subject to pressures from organized employers and organized employees and, in a democratic society, must take these pressures into account. However, in the final analysis what Government bestows on, or takes away from, employers or trade unions at any particular time by a change in the general labour relations legislation is not its own wealth or its own rights or privileges, but the wealth, rights and privileges of others. Thus, in determining what should be included in labour relations legislation applicable to the private sector, Government stands, in a manner of speaking, above the fray.

The position is quite different when one is dealing with legislation applicable to public servants in a major sovereign jurisdiction. Here the Governement wears two hats; it is the employer and it also bears responsibility for producing the legislation framework for the governance of its relation with its employees. By the very fact that it enacts legislation which accords to its employees the right to engage in collective bargaining, it has surrendered its authority to establish certain conditions applicable to them by unilateral action and has made those conditions subject to shared decision-making. It has given up some of its own powers, not merely decreed that someone else may have to give up some of the authority which he formerly enjoyed.

[1] R.S.C. 1970, c. P-35.

THE RATIONALE BEHIND THE 1967 PUBLIC SERVICE STAFF RELATIONS ACT

Every statute dealing with collective bargaining invalidates many established or conventional rights, interests, privileges and modalities. In the public service context, the Heeney Committee[2] in the first instance, and the Government and Parliament at a later stage, had to take into consideration what measures had been adopted in the past to govern employer-employee relations in the public service of Canada and to determine which of these measures should be abandoned, which modified and what new rights and obligations ought to be created. No one knew how the new mechanism that was about to come into being would work; neither the employer nor the staff associations had had any experience with collective bargaining procedures as such — there had been a form consultation that could not, by any stretch of the imagination, be described as joint decision-making; the Civil Service Commission did have authority in matters of appointment and promotion to impose its will on the parties but, in matters of release for incompetence or incapacity, its authority was limited to the making of recommendations rather than binding decisions. It is scarcely surprising that, whatever the public posture of the various interests may have been at the time, both staff associations and the Government were hesitant to give up powers or advantages that they had enjoyed under previous legislation and they looked upon the new regime with some misgivings. This frame of mind accounts for some of the limitations that were imposed in the *Public Service Staff Relations Act* on the joint decision-making process that was incorporated in it.

Another factor that must have caused the authors of the legislation a great deal of concern was the nature of the bargaining community to which the legislation was made applicable and the wide dispersion of its members. The community was extraordinary in size — some 230,000 persons were covered — I venture to say the largest community ever brought *instantly* into collective bargaining at any one time in any jurisdiction. By the middle of the 1960s, such a large percentage of federal public employees were already members of staff associations that it was obvious these associations would be certified as bargaining agents for the respective units within a few months after the legislation came into force. The commencement of bargaining for so many bargaining units at about

2 *Preparatory Committee on Collective Bargaining in The Public Service,* Ottawa, August 1963.

the same time placed a very heavy burden both on the employer and on the bargaining agents.

The community was also extraordinary in its complexity. It consisted of blue-collar workers of the types who, in the private sector, had traditionally availed themselves of the rights conferred by private sector labour relations legislation, but even then only to the extent of about 30% of the eligible working force in Canada. It included large numbers of white-collar workers, whose private sector counterparts had long been covered by the private sector legislation, but who have only recently and very gingerly begun to organize into trade unions. It included many diverse professionals, some of whom — such as the members of the traditional professions of law, medecine and engineering — had been expressly excluded from private sector legislation, and many others who,in the past, have regarded collective bargaining as incompatible with their professional interests. Is included supervisory employees, and that well before similar types were brought within the *Canada Labour Code* [3] or most provincial legislation. Finally, the community was dispersed throughout the whole country, and indeed throughout the world, in literally thousands of locations. The unknown quantity of what might be the outcome of bargaining and whether it would be possible to preserve some desirable degree of uniformity with respect to conditions of employment for all these diverse elements indicated a cautious approach to the scope of bargaining.

In a continuation of our examination of what considerations had to be taken into account when collective bargaining legislation for federal public servants was first formulated, there was the perplexing question as to where the line is to be drawn between what can be left, in a democratic society, to be determined through a process of decision-making shared by the employer and the representatives of the employees and what must be determined by the normal legislative process. There was, at the time, little or nothing previous experience in the public service of Canada or in any other major jurisdiction to serve as a guide. The report of the Heeney Committee avoids any philosophic discussion of this problem. With the benefit of hindsight, I have expressed my views on this question in Part I of my report and I believe these views were apposite to conditions as they existed in 1965, 1966 and 1967, as they are to conditions in 1974. I said :

[3] S.C. 1970 c. 18.

> No matter what extensions are made in the scope of bargaining from time to time, some subjects will probably remain in which the public interest will be paramount to any interest that the employees in the Public Service and the organizations representing them may have in bargaining, where the protection and furtherance of these interests cannot be left to shared decision-making by the employer and the employee organizations through bargaining, but must be examined and established by those who are answerable to the electorate. As one scholarly observer of the scene has put it « One ought never to confuse the wishes of a limited interest group like a union with those of the entire electorate. » Class size in schools, case load for social workers and doctors, for example, may be legitimate subjects of bargaining to the extent to which they are aspects of the work load that employees are required to perform, but not when demands with regard to these matters are presented as an aspect of what constitutes good educational policy, or good welfare policy or good medical policy. The quality of education, of welfare and of medical care ought to be decided only through the normal legislative process. At times, it may be very difficult to draw the line between what can be entrusted to collective bargaining and what must be reserved to be dealt with only through the democratic process of legislation. But the line has to be drawn nevertheless to stay within the system as we have it.

Add also to the foregoing that, in 1967, many public servants found the thought of going on strike to be revolting and abhorrent. A process had to be devised for the resolution of disputes, in which those portions of the public service populated by employees who held these views might become involved, that would afford them an opportunity to protect and further their collective interest without being driven to withdraw their services. There were others whose capacity to conduct an effective strike was so slight that the use of the strike weapon by them would be counterproductive. This was brough forcefully to my attention when, in the early days of the *Public Service Staff Relations Act,* one of the most militant of the bargaining agents opted for the arbitration route.

To sum up, I am convinced it was inevitable taking into account all that I have referred to, that the federal legislation adopted in 1967 would depart in many essential respects from the legislation applicable to the private sector, whether it be the *Industrial Relations Dispute Investigation Act*[5] as it then stood or the more advanced legislation that had been adopted in the various provinces.

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[4] *Employer-Employee Relations in the Public Service of Canada,* Proposals for Legislative Charge, Part I, Jacob Finkelman, chairman, Public Service Staff Relations Board, Ottawa, Information Canada, 1974, p. 59.

[5] S.C. 1948, c. 54.

THE NEED FOR REVISING THE 1967 LEGISLATION

Six years have gone by since the *Public Service Staff Relations Act* first became law. As is often the sace with any new scheme of social legislation, some weaknesses have come to light; some expectations as to what could be achieved under the Act were disappointed; bargaining agents, having acquired a taste for the fruits of joint decision-making, began to press for the inclusion of additional matters in which that process would be substituted for unilateral determination by the employer. All of this was part of a normal evolutionary process. The question then arose, how to meet the needs of the situation. For what are probably obvious reasons, the Government felt that any proposal it made for amendment of the legislation would be taken as the minimal response of an employer to a bargaining « demand » by bargaining agents. Some third party had to be entrusted with the task of assessing the situation and making recommendations. On April 18, 1973, that task was assigned to me.

CREATION OF A REVISORY COMMITTEE

Whether selection of myself as the person who should examine the existing legislation, assess its defects and propose how it should be amended was good or bad is not for me to say. I can scarcely be regarded as an unbiased judge of my own qualifications and capabilities. But the choice did have certain important consequences. I can rightfully claim to having nursed this legislation along for six years, from its earliest days — it was, in a special sense, « my baby », with all that such an intimate relationship implies. I have spoken about its virtues throughout the length and breadth of this country and the United States and visitors have streamed to Ottawa from many parts of the world to observe what they regard as a shining example of how such matters ought to be ordered. Altogether apart from my association with the legislation, people have come to know me over the years as a gradualist, as one who seeks to effect a balance between the interests of the two sides to collective bargaining. How anyone could have expected me to make a report that would recommend very radical changes in the legislation is beyond my comprehension. I have been given to understand that my being designated as the person to review the legislation had the support of all political parties and the endorsement, not only of the Government, but of the bargaining agents as well. I doubt whether any of these interests had any illusions as to the approach I would adopt and I must assume that they regarded that sort of approach as acceptable.

Having regard to my continuing responsibilities as Chairman of the Public Service Staff Relations Board, there were severe limitations on the time frame within which I had to complete the report. I could not isolate myself completely from the work of the Board and the longer I was occupied on the legislative project the less contact would it be possible for me to maintain with the work of the Board. The Honourable Allan J. MacEachen, the President of the Privy Council, had indicated that there was considerable urgency in having the report produced at as early a date as possible. I could not afford the luxury of embarking on lengthy research projects. Time was of the essence. The team I recruited to assist me consisted of five persons, two on the legal and research side and three on what might be described as the policy side. Two of those on the policy side were persons who were well qualified to bring to bear in our discussions an informed opinion as to the way in which various proposals would affect the community from which they were drawn. They were Mr. Robert DesLauriers, Research Director of the Public Service Alliance of Canada, and Mr. Hugh Tolan, a member of the staff of the Treasury Board. The third member of the group was Mr. Paul M. Roddick who had been a senior member of the Secretariat of the Heeney Committee and therefore exceedingly well informed as to the thinking that went into the recommendations that Committee had made in its report in 1965 and into the basic premises of the legislation presented to Parliament in 1966 and 1967. I think you will agree with me this was a well rounded, balanced, practical team.

THE CONSTRAINTS IMPOSED UPON THE COMMITTEE

As we began to explore the problems that came to our attention, it became evident that no solution for some of them could be devised without research that would have to be conducted over a long period of time, that the solution of others might depend either on the complete or radical reorientation of other agencies and would involve time-consuming discussions that we could ill afford if we were to meet the required time limits. We also had to take into account the political situation and the collective bargaining timetable. As to the first of these, the bargaining agents held the view that the current political situation was the one most favourable to their interests and they were anxious that the way be cleared for new legislation at the earliest possible opportunity. As to the second, there are a number of agreements coming up for renewal in the late fall and early winter, the negotiations with respect to which would be much more difficult under the present legislation than they would be if the

legislation were amended. In addition, I had a personal, selfish interest in getting the job done quickly. I will have reached the mandatory retirement age on January 17, 1977. After the difficult years I have spent trying to make the machinery work, I would like to have a hand in breaking in the new model. Consequently, long term solutions and some complicated problems had to be left for someone else to deal with and resolve at a later date.

While the time element was an important consideration in establishing the perimeters of my study, there were also several others of practical significance that had to be taken into account; the nature and organization of the public service; the capacities of the bargaining agents and of the employer to deal with certain matters in a bargaining context; the capacity of the Board to cope efficiently with any vastly increased jurisdiction; the desirability of maintaining a large measure of uniformity between the legislation applicable to the public sector and that applicable to the private sector.

As to the first item just mentioned, I fall back on what appears in the report:

> Recommendations for the revision of the Public Service Staff Relations Act must take into account the needs of a Public Service that consists of a great variety of groups, many of which have unique qualities and conditions of work that distinguish them from other public servants. In some situations, a simple solution could be devised to meet the needs of one group, but that solution might play havoc with the interests of other groups and of a reasonably cohesive Public Service. A pattern of collective bargaining legislation that is constructive for the totality of the public service must be one adapted to the conditions of as large a proportion of the employees as possible, while assuring to each group a reasonable opportunity to govern the conditions peculiar to that group. Since legislation must be drafted in general terms, the best that one can hope to achieve is to find the highest factor common to all groups and then to make allowances for deviations but only to an extent that will not destroy the basic principles of the scheme. [6]

A related aspect of this problem is that there is both a need and a desire in the public service of Canada for the maintenance of uniform service-wide conditions in some areas, an objective that can be accomplished only by some form of coalition bargaining. Balkanization of the public service through agreements entered into on a unit-by-unit basis

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[6] *Employer-Employee Relations... op. cit.*, p. 5.

would tend to establish vested rights in the employees in each unit that could not thereafter readily be modified by coalition bargaining for many years to come. I therefore seemed desirable to refrain from making certain subject matters bargainable immediately and to provide other measures that would pave the way for service-wide bargaining, or bargaining covering a substantial segment of the community, at the time the next review of the legislation is undertaken.

To follow in the path laid out in the *Canada Labour Code* was one way of going about the business at hand. The principles embodied in the Code had been endorsed by Parliament and the Government would be hard put to refuse to make applicable to public servants the rules that it had laid down for employers in the private sector. Thus, to the extent to which the *Canada Labour Code* improved on the provisions of the *Public Service Staff Relations Act,* in so far as the interests of the employees were concerned, the *Canada Labour Code* usually, but not universally, served me as a model. On the other hand, I had to bear in mind that, if I went much beyond what was provided for in the *Canada Labour Code,* I might encounter stiff resistance from the employer. If my recommendations were to call for special privileges to be accorded to public servants, the Government would be under pressure to extend these privileges to the private sector as well. What I had to weigh was not so much the question as to whether a certain privilege should be extended to public servants but rather, in view of what I said earlier, whether the political considerations that might be involved in the Government making up its mind as to the impact of the recommendations on the private sector would delay the implementation of any recommendation that I would be making.

KEY RECOMMENDATIONS, APPOINTMENTS AND PROMOTIONS

The conditions under which a person can enter the employ of an employer and continue in that employ have traditionally been bargainable under private sector legislation. Expect for those jurisdictions that have enacted right-to-work laws, employers and trade unions have been entitled to include in their collective agreements provisions ranging from the closed shop, on the one hand, to the open shop, on the other. Most collective agreements also contain provisions which make length of service a factor either to govern or to be taken into account in the determination of whether a person is to be promoted, laid off or recalled. Unions seek to circumscribe the discretionary element of the employer in making decisions of the sort here under discussion and to subject these decisions

to review by a neutral third party vested with authority to apply prescribed or recognized standards.

For federal public servants, as for public servants in many other jurisdictions in Canada, access to employment has for many years been governed by the « merit principle », which has been described as the requirement that public employees be recruited, selected and advanced under conditions of political neutrality, equal opportunity and competition on the basis of merit, all under the supervision of an independent commission. Thus, persons seeking employment in the public service, have been assured of a high degree of objectivity in the assessment of their entitlement to employment and of their qualifications for promotion that gave them protection equal to, or in excess of, that enjoyed by employees in the private sector, even in cases where protection was afforded them by the terms of a collective agreement. Starting from the premise that there ought to be equal opportunity of access to public employment for all citizens, that the career development aspect of public employment must be protected and furthered and that these rights or privileges are accorded a substantial measure of protection through the merit principle, I could not see my way clear to recommend that initial appointment or promotion be made subject to collective bargaining.

Layoffs and Recalls

Layoff and recall presented quite a different problem. They are both bargainable under private sector legislation and the Chairman of the Public Service Commission had publicly declared himself in favour of removing layoff from the jurisdiction of the Commission — in effect saying that layoff be bargainable. It should be noted, however, that his proposal did not go so far as to treat recall in the same way. In considering the situation, I was convinced that the two items — layoff and recall — were inextricably intertwined and could not be separated. My first inclination was to recommend that both should be made bargainable. However, I could not put out of my mind the problems that such a course would create in the public service. As the report states :

> To accord to each bargaining agent at this time the right to bargain on lay-off and recall on a unit-by-unit basis would lead in the future to the possible, indeed one might say in some cases the probable, ghettoization of employees in specific occupational groups, or subgroups or bargaining units within an occupational group (within conceivably narrow geographical boundaries). The situation can be aptly pictured by paraphrasing a quotation that appears in the report of the Task Force on Labour Relations: Though the employees within the

> bargaining unit would be equal to each other, they would be unequal with others outside the unit; a little egalitarian island would have been created in the midst of a sea of inequality. Artificial barriers might be erected against the movement of laid off employees across bargaining unit lines to available positions for which they are qualified. The protection in law of length of service, which the bargaining agents are so anxious to have considered as a factor in determining the order of redundancy, lay-off and recall, would become meaningless for many employees. It is imperative that, in any plan devised to deal with lay-off, for whatever reason, and with recall in the Public Service, safeguards be built in that will prevent erosion of the traditional protection provided by the employer in the past for long service employees. Should this protection be significantly diminished, whether it be by collective bargaining or otherwise, there would undoubtedly be a public outcry that would lead ultimately to legislative revocation of any power that might be conferred on the parties to deal with these matters wholly on a bargaining unit basis. [7]

One approach to which consideration was given for a time was that layoff and recall be made bargainable but that the provisions in this regard should not be brought into force until a year after a new legislation became operative. During that year, the parties would be encouraged in coalition bargaining in the hope that such bargaining would establish a pattern of layoff and recall extending across bargaining unit lines in the hope that that pattern would continue to prevail. This approach was abandoned as unsuitable. The recommendation that was made was that :

> ... the Public Service Commission be vested with authority to establish by regulation
>
> (a) the order in which employees whose duties and responsibilities are substantially the same are to be laid off, and
>
> (b) the order in which employees who have been laid off and who have the minimum qualifications required for appointment to a vacant position are to be recalled,
>
> so as to provide for preference of employment to be given, as the Commission may deem appropriate having regard to geographic, organizational, occupational or any other relevant consideration, to the employee who has the longest continuous service in the Public Service. [8]

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7 *Ibid.*, pp. 74-75.

8 *Ibid.*, p. 76.

If this recommendation is accepted and the parties do not make the suggested solution work, layoff and recall can easily be made a matter for joint decision-making at a later date. An extension of the scope of bargaining is always within the realm of practical politics; to narrow the scope, once a matter has been conceded, is probably impossible. In assessing the significance of the recommendations on layoff and recall, one should also bear in mind the collateral recommendations calling for statutory notice for employees about to be laid off, the period of notice being fixed on a sliding scale in accordance with length of service.

Classification

One of the major targets on which the bargaining agents drew a bead was the classification process. A person's classification affects a wide range of his rights and interests, as well as the rights and interests of his bargaining agent — the bargaining unit in which he is included, pay plans that may be established through negotiation or by arbitral award, his rank and tenure, and that may affect the whole business of what is known in the Public Service as « red-circling ». In principle, classification or its counterpart is a bargainable item under private sector legislation. However, it is difficult to ascertain the extent to which the determination of classification standards has in fact become a subject of joint decision-making. The Co-operative Wage Survey in the Steel Industry has received a good deal of attention, but I believe it is fair to say that, apart from that effort, classification standards generally come into the bargaining picture in the private sector in tangential fashion.

During my interviews with the bargaining agents, it became obvious that, if the subject of classification standards were included within the scope of bargaining under the federal public service legislation, it would be a subject that would occupy the centre of the stage for many bargaining units. The matter was explored exhaustively. As I said in the report :

> Every aspect of the question as to whether classification standards should be included within the scope of bargaining received a good deal of attention during my interviews with the representatives of the bargaining agents and with the Treasury Board Secretariat. The nature and quality of classification standards, the dimensions of the problems that would confront the parties if classification standards were made bargainable, the time that might be required to develop a proper standard, the time relationship between negotiations for the renewal of a collective agreement and the development of a standard, the total resources that would be required by the parties if they

> embarked on a program of bargaining standards, the problems that would confront third parties called upon to resolve an impasse if one should be reached in the course of bargaining — the list could be amplified almost *ad infinitum* — all were thoroughly canvassed. [9]

It may be worthwhile at this point to draw together briefly the main recommendations in the report on classification. The report does not recommend that classification standards be bargainable, but it does recommend that classification standards be subject to consultation. No alteration in a standard would be capable of being made effective without adequate consultation. In discussions on public sector collective bargaining legislation, the term « consultation » has, in some quarters, acquired what can almost be described as an unsavoury connotation. I drew attention in the report to what had been accomplished in the Public Service through consultation over the years. It can be said without equivocation that the record is impressive. I am convinced that collective bargaining would have achieved much less than it did over the last seven years if it had not been preceded over a long period by an extensive pattern of consultation.

However that may be, the consultation called for by the recommendations in the report contemplates a process that is much more formal, and I would hope more effective, than what is said to occur under « meet and consult » statutes in other jurisdictions. Consultation is to begin within a relatively short period after formal notice to consult is given under the legislation. The Board is to be kept informed of every recourse to consultation and I anticipate that it will endeavour to make sure that consultation is not an exercise in futility. It is not contemplated that the Board will act as a referee throughout the consultation process, but it will be able to keep a weather eye open and offer sage counsel if it appears the parties are headed for serious trouble. It must be recognized at all times that the responsibility for settling disputes rests primarily with the parties and nothing should be done to destroy or undermine that sense of responsibility. Once consultation has commenced, it cannot be « broken off » without the consent of the Chairman of the Board unless and until a conciliator has been appointed and has had a reasonable opportunity of attempting to resolve any impasse that may arise. Either party has the right to invoke third-party intervention if consultation does not produce satisfactory results. In addition, the Chairman of

[9] *Ibid.*, p. 104.

the Board is given authority on his own initiative, but after discussion with the parties, to involve a conciliator in the consultation process.

The legislation would also spell out the nature of the obligation to consult. When notice is properly given, the parties would be required to meet and commence to consult within fixed time limits and make every reasonable effort to reach an agreement. A party aggrieved by a failure of the other party to observe this provision would be entitled to file a complaint with the Board. The report of the Woods Task Force [10] casts doubt on the wisdom of including in legislation a requirement that the parties bargain in good faith. The authors of that report said « . . .we cannot envisage such a duty being amenable to legal enforcement, except perhaps to the extent of an obligation to exchange positions ». [11] Whatever the situation may be in the private sector. I cannot agree that the conclusion of the Task Force is applicable to conditions in the public sector. There — and initially in so far as the federal scene is concerned — I have found that even a suggestion by the Board or by an adjudicator in the course of a proceeding or in a decision that a party did not act in good faith has had a salutary effect on the way in which the parties thereafter conduct their affairs. I venture to predict that the same attitude will continue in the future.

The doubts that Task Force entertained with regard to legal requirements for good faith bargaining — and the same doubts would arise in respect of the requirement for good faith consultation — are based on the view that, in those jurisdictions, particularly in the United States, where extensive use has been made of procedures for redress where bad faith in bargaining is alleged, there has been a development of « an elaborate jurisprudence on the issue of good faith bargaining, revolving largely around what subjects must be bargained, what may be bargained and what a party cannot insist be bargained » [12]. Under our federal public service legislation, these issues are dealt with otherwise than as aspects of good faith bargaining and the Board would be free on a complaint of the sort here under discussion to devote its attention to devising a remedy, of bad faith were established, that would be more in keeping with what I believe to be the real purpose for which such a provision is enacted. It will serve as a challenge to our ingenuity.

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10 *Canadian Industrial Relations, The Report of the Task Force on Labour Relations,* The Queen's Printer, Ottawa, 1969.

11 *Ibid.,* p. 163.

12 *Ibid.*

The recommendations in the report with regard to consultation do not rely on pronouncement of guilt and solemn adjurations to act in a proper manner. One of the concomitants of a change of classification standards may be the determination of the level of remuneration to which an employee may be entitled. Where consultation has been terminated, the employer would be required to give notice to the bargaining agent within a fixed period of any revised standard to be instituted. The bargaining agent would have the right to call upon the employer to consult in good faith on a new rate of pay for positions to which the revised classification standard applies and, if the Board is satisfied that the employer has not consulted in good faith, it may direct the parties to continue to consult and that the revised classification standard shall not be made effective for such period of time as it considers appropriate. This formula may not go so far as fully to satisfy a bargaining agent where the employer in the final analysis rejects a claim by the bargaining agent that the existing classification standard is inadequate or inequitable. I beleive it does go a long way along the route that should lead to a rational resolution of disputes regarding classification standards. I am convinced that one thing that will keep all parties « honest » is the realization that « If the recommended consultation process fails to meet the needs of the parties after it has been given a fair trial, they will undoubtedly seek other ways of resolving their differences » [13]. The recommendation opens the door wide and it can never be closed again.

The recommendations regarding consultation on classification standards must also be looked at in the light of the accompanying recommendations on classification grievances. Authority to deal with such grievances is to be vested in the Board and would be exercised by members of the Board endowed with the necessary qualifications for making an objective assessment of such grievances through a procedure that should afford an aggrieved employee a reasonable assurance that justice has been done. Nothing I have just said should be taken to reflect on the existing classification review procedure. However, it is inevitable, as the report points out that, « with the delegation of classification authority to departments, the views of the classification review board in most cases appears to the employee concerned to be a departmental voice which cannot be dissociated in any real sense from that of the person who made the initial classification decision ». [14]. The visible independence of the

[13] *Employer-Employee Relations... op. cit.*, p. 11.

[14] *Ibid.*, p. 199.

Board should go a long way to remove a cloud that now hovers over the classification review process.

CONCLUSION

I have heard it said in some quarters that many of the recommendations are procedural in nature. I would remind you of a statement by Maitland, the great legal historian, which has become part of the folklore of common law lawyers — a great deal of substantive law is concealed in the interstices of procedure.

Les relations entre employeurs et employés dans la fonction publique au Canada

Au Canada, le temps est bien passé où l'on s'opposait à la négociation collective pour les employés des services publics, ce qui ne signifie pas qu'il n'existe plus de poches de résistance. Il n'en reste pas moins que l'adoption, en 1967, de la *Loi sur les relations de travail dans la fonction publique* fut un événement de la plus haute importance. Le gouvernement qui se propose d'adopter une loi sur les relations de travail dans le secteur privé peut agir avec objectivité, se placer au-dessus des parties, puisqu'il n'est pas l'employeur. La situation est bien différente lorsqu'il s'agit de lois qui vont s'appliquer à ses propres employés; il se trouve alors ainsi à limiter ses propres intérêts et ses propres privilèges. Aussi, fallait-il une bonne dose de courage politique pour présenter une telle mesure.

La Commission Heeney, instituée pour étudier la question, avait à tenir compte de ce qui existait antérieurement et à voir quels nouveaux droits et quelles nouvelles obligations elle pouvait accorder. D'autre part, personne ne savait comment le nouveau mécanisme allait fonctionner. Ni l'employeur ni les associations n'avaient la moindre expérience dans le domaine de la négociation collective. La Commission de la fonction publique avait autorité en matière de nomination et de promotion, mais elle ne pouvait que faire des recommandations en matière d'incompétence et d'insuffisance professionnelle. Enfin, tant le gouvernement que les groupements existants hésitaient à se départir des pouvoirs et des avantages dont ils jouissaient sous la législation antérieure. Ils redoutaient donc l'implantation d'un régime nouveau et inconnu.

Les auteurs de la nouvelle législation s'en faisaient également au sujet de la nature de la collectivité à laquelle elle allait s'appliquer et de la dispersion de ses

membres. Cette collectivité s'étendait à 230,000 personnes qui appartenaient à différentes associations lesquelles formeraient autant de groupes distincts. Les négociations avec autant de groupes à peu près en même temps pesaient lourd sur les épaules des représentants du gouvernement. Il fallait encore tenir compte de la complexité de cet ensemble : cols bleus qui, dans le secteur privé, bénéficiaient depuis longtemps du droit de négociation collective; cols blancs qui, à l'extérieur de la fonction publique, depuis quelques années, adhéraient aux syndicats en nombre considérable sans compter les membres des professions libérales traditionnelles et aussi d'autres professions qui considéraient l'avènement du syndicalisme comme incompatible avec leurs véritables intérêts. Enfin, cette communauté de travailleurs était dispersée à travers un pays extrêmement vaste.

Comment, en pareille conjoncture, assurer un minimum d'uniformité dans l'établissement des conditions de travail ? Il y avait aussi la question du droit de grève. Beaucoup de fonctionnaires la trouvait impensable et il fallait trouver un moyen de résoudre cette question.

Le rapport de la Commission Heeney évita toute approche théorique de ces problèmes. C'est pourquoi la loi de 1967 fut, sur plusieurs points, fort différente de ce qui existait dans le secteur privé.

Nous voici maintenant en 1973. On a décelé certaines faiblesses dans le mécanisme mis en place. Les agents de négociation ont goûté aux fruits de la participation aux décisions sur des sujets qui relevaient autrefois de la discrétion de l'employeur. Tout cela faisait partie d'un processus normal d'évolution. Il importait de faire le point. On a confié la tâche de réexaminer la loi à l'auteur même s'il était président de la Commission qui avait assuré le fonctionnement de la législation initiale et qu'il l'avait vantée tant et plus. Il a accepté parce que tout le monde, gouvernement et agents de négociation, lui ont fait confiance. Il fallait faire vite à cause de la période des renouvellements de conventions collectives qui approchaient. Dans ce nouvel examen de la situation, il importait de tenir compte de plusieurs facteurs : nature et organisation de la fonction publique; capacité des agents de négociation et de l'employeur de traiter certains sujets dans un contexte de négociation, possibilité pour la Commission d'agir efficacement dans des cadres très élargis, désir de garder une bonne mesure d'uniformité entre la législation applicable au secteur privé et au service public.

Dans la deuxième partie de son travail, l'auteur considère brièvement quelques-uns de ces points. Le premier point qui a été retenu fut de viser au maintien des conditions uniformes pour tous les groupes et tout le territoire en vue d'empêcher la balkanisation du service public par la signature de conventions collectives qui tendraient à établir tout un réseau de droits acquis difficiles à briser plus tard sous un régime de négociation concertée.

En ce qui concerne le contenu des conventions collectives, il s'agissait de savoir si les parties étaient assez bien équipées pour s'engager dans certains domaines nouveaux. Il n'en fallait pas trop. Il faut du temps à un organisme pour obtenir la crédibilité et il lui en faut peut-être davantage pour digérer une nouvelle pièce

législative. C'est pourquoi, dans cette tâche de rénovation de la loi, l'auteur dit avoir visé à être concret, pratique. La qualité maîtresse d'un rapport d'une commission d'enquête, c'est de rendre hommage à « l'art du possible ».

Parmi les recommandations, l'auteur en discute deux : le problème de l'ancienneté et celui du classement des emplois. Sur le premier point, la Commission n'a pas cru devoir recommander l'application des principes d'ancienneté aux promotions parce que le système bien établi de l'avancement au mérite dans la fonction publique a assuré une protection valable aux fonctionnaires. Les mises à pied et les rappels au travail posaient un problème différent. Cependant, la Commission n'a pas cru devoir recommander qu'ils soient négociables, du moins dans l'immédiat. Elle a plutôt suggéré que la Commission de la fonction publique fasse un règlement qui permette aux employés mis à pied d'être rappelés au travail lorsqu'il y a des positions vacantes pour lesquelles ils possèdent les qualifications minimales requises.

En ce qui a trait à la classification, étant donné l'impossibilité pratique d'arriver à des accords rapides sur des sujets aussi complexes, il a été recommandé de mettre sur pied des mécanismes de consultation obligatoire qui pourraient éventuellement conduire à l'insertion de cette matière dans le processus de négociation collective. On ne guérit pas tous les maux d'une société du soir au matin et il fallait éviter de faire pire en voulant faire trop bien, et cela d'autant plus que la Commission a le pouvoir d'agir en ce qui concerne le traitement des griefs de classification.