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COLLECTIVE BARGAINING IN THE PUBLIC SERVICE OF CANADA: BOLD EXPERIMENT OR ACT OF FOLLY?

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I. INTRODUCTION

IN March 1967 labor-management relations in the Public Service of Canada entered a new era with the enactment of the federal Public Service Staff Relations Act.[1] In a country whose social and economic policies have been stamped with an indelible tone of moderation and whose labor policies have hitherto been largely derivative, the new statute must be regarded as profoundly significant. It establishes for employees of the Canadian federal government a regime of collective bargaining which in all essential respects parallels that prevailing in the private sector: exclusive representation rights for unions selected by a majority of employees in a bargaining unit; prohibition of employer unfair practices; and obligation to bargain in good faith; a right to strike which is inhibited only slighly by considerations of national safety or security; and binding collective agreements which are enforceable through arbitration.

Yet it must not be thought that the new statute was enacted without precedent or premeditation. Rather, it represented the logical culmination of developments in public employment collective bargaining reaching back a half century or more.[2] Early Canadian industrial relations legislation, enacted during the first decade of this century, dealt specifically with strike situations in which the community had either a direct proprietary interest or a special concern arising out of the essential nature of the industries affected. Public utilities, railways, and coal mines were early identified as industries worthy of legislative intervention which, during these formative years, took the relatively innocuous form of compulsory strike postponement and conciliation. In the present context, it is particularly relevant that from the outset these federal statutes

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The opinions expressed herein are the personal views of the author.

1. C.72, [1966-67] Can. Stat. [hereinafter the Act]. The Public Service of Canada is roughly analogous to the American Civil Service System.

2. *See generally* Arthurs, *Public Interest Labor Disputes in Canada: A Legislative Perspective*, 17 BUFFALO L. REV. 39 (1967).

contemplated that employees of both private firms and government-owned railways and municipally owned public utilities would be permitted to engage in collective bargaining. After an inhibiting constitutional decision which consigned jurisdiction over labor relations generally to the provinces rather than to the federal government,[3] the provincial legislatures speedily enacted laws which once again brought municipal public utilities within the purview of federal conciliation procedures.[4] Thus, even prior to the introduction of modern collective bargaining legislation, Canadians were accustomed to the use of a single statute to regulate labor relations in both the public and the private sectors.

Ontario's enactment in 1943 of the first labor relations statute[5] on the Wagner Act model marked a significant development in Canadian industrial relations. Shortly thereafter, the federal government, acting under its war emergency powers, virtually pre-empted provincial labor legislation by itself enacting regulations patterned after the Wagner Act.[6] This new regulatory scheme covered the great bulk of the nation's workforce with the exception of provincial and federal civil servants. Nevertheless, a number of unions representing municipal employees sought and obtained bargaining rights at this time,[7] and their members have since enjoyed the normal collective bargaining regime which prevails in the private sector. The provinces reoccupied the legislative field after World War II, and over a period of years passed (or revived) a variety of strike postponement or strike prohibition statutes covering essential industries.[8] Still, the practice of collective bargaining survived in these industries and even expanded—at least in seminal form—to include most provincial civil servants.

During this period, at least one pioneering experiment in public sector unionism helped to eclipse once and for all the more conventional view of employment relations between a sovereign state and its employees. In 1944, the people of Saskatchewan elected to office a CCF (democratic socialist) government. This new government

3. Snider v. Toronto Elec. Commr., [1925] 2 D.L.R. 5.

4. *See* F. ANTON, THE ROLE OF GOVERNMENT IN INDUSTRIAL DISPUTES 74 (1962).

5. Collective Bargaining Act, c.4, [1943] Ont. Stat. 11 (repealed 1944).

6. Order-in-council P.C. 1003 (1944).

7. *See* S. FRANKEL & R. PRATT, MUNICIPAL LABOUR RELATIONS IN CANADA (1954); H. LOGAN, TRADE UNIONS IN CANADA: THEIR DEVELOPMENT AND FUNCTIONING 294 (1948). Among the municipalities whose employees were organized (as appears from reports of various Labour Relations Board decisions) were the cities of Toronto, and Timmins, Ont., Winnipeg, Man., and Halifax, N.S.

8. *See* Arthurs, *supra* note 2.

promptly enacted a statute on the model of the Wagner Act which it accepted unreservedly as applicable to provincial civil servants.[9] As a result, from 1944 until 1966 Saskatchewan treated public and private employment relations as indistinguishable. In 1966 a serious strike threatened the publicly owned Saskatchewan Power Corporation; only then did the provincial government enact emergency dispute legislation[10] which outlawed strikes endangering the public interest but did not otherwise interfere with collective bargaining. By 1966, the province of Quebec had similarly normalized its collective bargaining relations with unions representing public employees, subject only to fairly limited restraints on the timing and extent of strikes.[11] By this time, as well, most provincial legislatures had brought municipal governments and their employees fully within the provisions of generally applicable collective bargaining statutes, subject only to legislation governing the right of essential employees to strike.[12]

Three constitutional facts partially explain the relative ease with which collective bargaining spread at the municipal and provincial levels in Canada. First, the immunity of the state (in Canadian parlance, "the Crown") from general legal rules governing private relations is nothing more than a common-law principle which can be overridden simply by passing a statute. In Saskatchewan, for example, all that was necessary to extend collective bargaining rights to public employees was for the legislature to define "employees" in such a way as to include those employed by the provincial government.[13] Second, municipalities in Canada have never been regarded as sovereign political entities. Rather, they are creatures of provincial legislation, enjoying only such power as might be delegated to them by the province; a corollary is that they enjoy only those immunities conferred by the province.[14] A third consideration, perhaps more practical than legal, is the position of the executive in a parliamentary system of government. By con-

9. Trade Union Act 1944, c.69, §§ 2(5)-(6), [1944] Sask. Stat. (2d. sess.) 207 [now SASK. REV. STAT. c. 287, §§ 2(e)-(f) (1965)].

10. The Essential Services Emergency Act 1966, c.2, [1966] Sask. Stat. (2d sess.) 2.

11. Labor Code, QUE. REV. STAT. c.141, § 99 (1964), as amended, Act of June 17, 1965, c.50, [1965] Que. Stat. (vol. 1) 461; Civil Service Act, c.14, §§ 68-75, [1965] Que. Stat. (vol. 1) 157.

12. In Ontario, for example, a legislative provision enabling municipalities to opt out of the Labour Relations Act was repealed. Act of May 18, 1966, c.76, § 37, [1966] Ont. Stat. 311.

13. This was accomplished through passage of the Trade Union Act 1944, c.69, § 2(6), [1944] Sask. Stat. (2d sess.) 207 [now SASK. REV. STAT. c. 287, § 2(f) (1965)].

14. I. ROGERS, THE LAW OF CANADIAN MUNICIPAL CORPORATIONS 9-10 (1959).

stitutional custom, the party which enjoys the support of a majority in the legislature also controls the executive branch of government. Coupled with the fact that party discipline is strong, this means that, for practical purposes, the executive controls the legislative process. It would be unthinkable, then, for the legislature to refuse to honor an agreement negotiated by representatives of the government. Although, as in a presidential system, the appropriation of funds is ultimately the prerogative of the legislators, in a parliamentary sytsem they could refuse to honor the commitment of the executive only at the cost of bringing down the government and precipitating an election.

In addition, one potentially formidable obstacle to federal recognition of the collective bargaining rights of public employees was simply not present in Canada in the mid-1960's. The traditional belief—or myth—that collective bargaining is somehow intrinsically incompatible with the dignity and functions of a sovereign state[15] had been subverted by years of practical experience with labor relations on the private sector model in governmental and quasi-governmental employment.

This brief background sketch of the Canadian labor relations scene suffices to indicate that several important impediments to the introduction of a full-fledged system of public service collective bargaining which exist in the United States have no counterpart north of the border. Particularly at the practical level, there were no insuperable hurdles to the enactment of the 1967 Canadian federal law. To understand how and why the new federal statute came to be enacted within this reasonably hospitable environment, it is important to trace the course of employment relations in the Canadian Public Service.

II. Background of Collective Bargaining in the Public Service of Canada[16]

Employee organization in the Canadian Public Service began in 1889 with the establishment of the Railway Mail Clerks Associa-

15. *Cf.* Finkelman, *When Bargaining Fails*, in Collective Bargaining in the Public Service: Theory and Practice 116, 120 (1967):

> To my mind, references to sovereignty in this connection have the effect . . . of anaesthetizing intelligent examination of the relations between employers and employees. . . . Ideological concepts such as sovereignty are often no more than political myths functioning to preserve the existing social structure.

(Professor Finkelman, formerly chairman of the Ontario Labour Relations Board, is now chairman of the Public Service Staff Relations Board).

16. *See generally* Report of the Preparatory Committee on Collective Bar-

tion. Postal employees soon formed similar organizations, and within twenty years significant beginnings of a general civil service association had emerged; by 1920, even professional employees had formed an association. However, no significant formal machinery for labor-management consultation at the federal level appeared until 1944. In that year, the federal government created the National Joint Council of the Public Service of Canada to advise it on wages and working conditions for its employees. Other bipartite advisory groups were established in the succeeding years; one of the most important was the Pay Research Bureau, whose function was the development of benchmarks for public employment conditions based on carefully selected private equivalences.[17] Institutionally, the federal government's agreement in 1953 to the voluntary, revocable check-off of dues strengthened the various employee organizations.

Whatever else these years of development represented, by the early 1960's there was not yet a regime of collective bargaining in the Public Service. The federal government continued to act unilaterally in fixing wages for its employees, although it was ostensibly committed to accepting the guidance of the Civil Service Commission. The Commission, in turn, engaged in consultation with the employee associations—initially on an informal basis, but after 1961 pursuant to a statutory mandate.[18] Needless to say, neither the strike weapon nor arbitration was considered an appropriate dispute resolution mechanism when the Civil Service Commission and employee representatives failed to agree in the course of such consultations. Moreover, no formal mechanism had emerged which authoritatively determined the right of associations to speak on behalf of employees at the federal level or which protected the right of employees to join and participate in associations. However, it was not the lack of a legal mechanism for regulating relations between the Civil Service Commission and the employee associations which proved to be the fatal deficiency in this system. Rather, it was the fact that the Civil Service Commission had the power only to recommend to the federal government that the terms of employment agreed upon in consultation be implemented.

GAINING IN THE PUBLIC SERVICE 15-42 (Canada, 1965); Herman, *Collective Bargaining by Civil Servants in Canada*, in COLLECTIVE BARGAINING IN THE PUBLIC SERVICE; PROCEEDINGS OF THE I.R.R.A. 1966 ANNUAL SPRING MEETING 10, 15 (G. Somers ed. 1966).

17. *See* text accompanying notes 81 and 82 *infra*.

18. Civil Service Act, c.57, § 7, [1960-61] Can. Stat. 381. This 1961 legislation contemplated, in addition to consultation between the Civil Service Commission and the employee associations, direct consultation between the government and the associations.

In 1963, the Conservative government then in power rejected a pay increase recommended by the Civil Service Commission after discussions with the employee associations. This action precipitated a crisis in public service employment relations at the federal level. By chance, this crisis coincided with a crisis in the political fortunes of the Conservative Party; soon afterward the government fell and a national election ensued. Since it followed the government's rejection of the "negotiated" recommendations of the Civil Service Commission, the election provided a convenient occasion for the discussion of full-blown collective bargaining rights for federal public servants. Each of the three major political parties responded to public inquiries from the civil service unions by supporting a system of collective bargaining in which compulsory arbitration would be used to resolve negotiation impasses. The Liberal Party won the 1963 election and, after taking office, appointed the Preparatory Committee on Collective Bargaining in the Public Service to investigate the technical problems of fulfilling its election pledge.

One particular feature of the new Liberal cabinet must be mentioned here, because it helps to explain not only the forthright discharge of an election promise, but also the nature of the committee appointed. The Prime Minister, Lester Pearson, was himself a former civil servant, as were a number of his senior cabinet ministers. Given this affinity between the political leaders of the country and their former colleagues in the federal civil service, it is not surprising that they took immediate steps to harmonize government-employee relations. Similarly, it is not surprising that the committee appointed for the purpose of executing this mission was comprised almost entirely of senior public servants. The Chairman of the Preparatory Committee, Mr. A. D. P. Heeney, was an outstanding and widely respected civil servant who had served the Government of Canada for almost thirty years; other members of the Committee included the Chairman of the Civil Service Commission, the Secretary of the Treasury Board,[19] and senior management-level civil servants from a number of other important government departments. In addition, the Preparatory Committee sought and obtained assistance from a number of academic experts, management and labor professionals, and respected labor neutrals. Of course, the committee also consulted actively with various employee associations in the public service and with the national labor centers.

19. *See* text accompanying notes 28 and 29 *infra*.

The Preparatory Committee saw its task as essentially a technical one: How best might collective bargaining be implemented in the Public Service? Virtually absent from the Committee's report (and presumably also from its deliberations) was any discussion of the fundamental, underlying political issue of whether public servants should be permitted to engage in the process of collective bargaining. This issue was taken to have been settled by the events of the preceding months. Accordingly, the Committee recommended in July 1965 a complete system of collective bargaining for all federal government departments and agencies not falling within the scope of the general federal labor relations statute applicable to private employers and certain public service enterprises.[20] The Committee proposed binding arbitration as the central method of impasse resolution for both grievances and interest disputes.

However well conceived this system of compulsory arbitration might have been, a successful seventeen-day postal strike rendered it obsolete within a matter of weeks. This strike drastically transformed the attitudes of both employers and employee representatives toward the recommendations of the Preparatory Committee. In its report, the Committee had declined to recommend an explicit legislative prohibition against public employee strikes:

> Looking at the recent history of the Public Service, we concluded that it would be difficult to justify a prohibition on grounds of demonstrated need. We concluded also that, if a strike should ever occur, the Government would not be without means to cope with it. At the present time, most of the employees to whom the proposed system would apply do not have a "right to strike" and would be subject to disciplinary action by the employer if they were to participate in a strike. Nothing in the recommendations of the Committee is intended to change the position.[21]

The postal strike revealed the unintentional irony of this statement. Considerable public sympathy for the strikers forced the government to appoint, as "the means to cope with the strike," a fact-finding commission which largely vindicated the postal workers' position. Although the Preparatory Committee had pointed out that public service strikers would not be exercising a "right to strike"[22] and would theoretically be subject to disciplinary action, the government realized that it could not, as a practical matter, suspend or

20. Industrial Relations and Disputes Investigation Act, CAN. REV. STAT. c.152 (1952).

21. REPORT, *supra* note 16, at 36-37.

22. Here the distinction between "right" and "privilege" becomes razor thin.

discharge thousands of employees. Consequently, it confronted the necessity of thinking the unthinkable and legalizing the illegal. At the same time, the success of the postal strike and the growing identification of public employees with the main body of the Canadian labor movement combined to persuade other civil service employee associations to demand the right to strike instead of compulsory arbitration. Even private sector unions, undoubtedly anxious to avoid the precedent of a statute denying the right to strike, vigorously protested the proposals for compulsory arbitration.[23]

As a result of this pressure, the Preparatory Committee substantially altered its original proposals. When draft legislation was ultimately introduced in Parliament, it contained a novel formula under which a union could elect, upon certification, to resort either to binding arbitration or to the strike.[24] After appropriate preliminary formalities, the draft statute was sent to a joint committee of the Senate and House of Commons for study. Since a parliamentary majority continued to elude the Liberal government, which held a mere plurality rather than a majority of seats, there was a risk that the deliberations of the joint committee on this controversial measure might be used for political harassment. However, a genuine nonpartisan atmosphere prevailed. The legislators sought and weighed the advice of employer and employee representatives in a frank and friendly manner, and all of the participants in the work of the joint committee made contributions which sometimes constituted significant amendments to the original scheme of the legislation. To a large extent, the manner of the statute's enactment as much as the merit of its substantive provisions gives hope that the Public Service Staff Relations Act will in fact prove workable. So far, the predominant attitude of those engaged in administering the Act and in representing the interest groups subject to its provisions seems to be one of good faith and self-restraint.

III. The Public Service Staff Relations Act

A. *Coverage*

The Public Service Staff Relations Act applies to all employees in the Public Service of Canada, either in the central administra-

23. *See* Herman, *supra* note 16, at 22; Love, *Proposals for Collective Bargaining in the Public Service: A Further Commentary*, in Collective Bargaining, *supra* note 16, at 24, 26.

24. *See* text accompanying notes 67-71 *infra*. It may be significant that the first lawful strike under the new statute was conducted by the very group of employees whose unlawful strike had prompted this fundamental change in the legislative scheme —the postal employees. *See* page 992 *infra*.

tion, or in one of several autonomous agencies. The Act defines the "employer" by reference to two lists, one of government departments and agencies forming part of the central administration, and the other of autonomous agencies identified as "separate employers."[25] Within the central administration, the Treasury Board performs the employer function; the separate employers conduct their own labor relations. There seems to have been little rational basis for assigning a given agency to one or the other list of employers,[26] and it must be assumed that the two lists reflect established traditions or political sensitivities which caused some agencies to have greater autonomy than others. It should also be noted that a number of government-owned corporations, such as the Canadian National Railway and Air Canada, fall under general federal labor relations legislation.[27]

The Treasury Board, comprised of a committee of senior cabinet ministers chaired by a president, has its own staff[28] which represents its "client" agencies before the various tribunals established under the Act, conducts labor negotiations, and monitors employment conditions and grievance-handling procedures at the departmental level. The Treasury Board represents a tendency toward centralization, modernization, and professionalization of personnel management. Still, individual government departments and agencies—including those represented by the Treasury Board—tend to value their traditional autonomy and to cling to pre-collective bargaining habits of employer-employee relations. To what extent these separate departmental foci of power can be displaced by the central staff of the Treasury Board is more than a mere practical or political problem. It also involves policy considerations as to whether, or to what extent, specialized needs and wishes of various branches of the Public Service should give way in the interest of national conformity. The potential for conflict created by this arrangement is

25. § 2(o) of the Act.

26. For example, the Dominion Coal Board and the National Energy Board are both part of the central administration, while the Atomic Energy Control Board is not; the National Film Board is a separate employer, while the National Gallery and the National Library are part of the central administration.

27. Industrial Relations and Disputes Investigation Act, CAN. REV. STAT. c.152 (1952).

28. In fact, the Treasury Board has existed since the establishment of the first Canadian Parliament after confederation in 1867; in a broad sense, it has always been responsible for government finances, *see* Address by D. J. Love, The Personnel Policy Branch of the Treasury Board: Its Mission, Character and Organization, Public Personnel Association, Ottawa, Oct. 1967. The statutory authority for the Treasury Board, and a definition of its function, is found in the Financial Administration Act, CAN. REV. STAT. c.116 (1952).

obvious, and it would be more serious if it were not for the extreme delicacy shown by the Treasury Board staff in its relations with the "client" departments of government.[29]

Very few categories of public "employees" other than managerial personnel are denied the right of collective bargaining under the Act,[30] and the statutory definition of managerial personnel is so narrow that the exception covers only a minimum number of persons.[31] In this connection, it is important to emphasize that there existed in the Canadian Public Service a long-standing tradition to link managerial and nonmanagerial personnel together in various employee associations. The survival of this tradition in the face of a more recent prohibition against management intervention in the affairs of employee associations may prove to be a matter of some controversy.[32] However, the situation is not without its parallels in the private sector, and it seems likely that over a period of time managerial and bargaining unit personnel will by a process of attrition become more clearly disassociated. The one area in which this process may be slow is among professional and scientific personnel who are bound together by interests and qualifications which transcend the employment relationship.[33]

29. *See* Love, *supra* note 28; Davidson, *Critical Issues in Collective Bargaining in the Canadian Federal Service*, in COLLECTIVE BARGAINING IN THE PUBLIC SERVICE: THEORY AND PRACTICE 163 (1967).

30. Section 2(m) of the Act, which exempts managerial personnel, also exempts casual, part-time and temporary employees, persons compensated by fees of office, and uniformed members of the Royal Canadian Mounted Police.

31. Section 2(u) of the Act defines a "person employed in a managerial or confidential capacity" as someone who is in a position confidential to a federal judge, minister, or deputy minister [who are themselves excluded by section 2(m)(i)], legal officers in the Department of Justice, and a person who is designated by the employer and found by the PSSRB

to be a person

. . .

(iii) who has executive duties and responsibilities in relation to the development and administration of government programs,

(iv) whose duties include those of a personnel administrator or who has duties that cause him to be directly involved in the process of collective bargaining on behalf of the employer,

(v) who is required . . . to deal formally in behalf of the employer with a grievance . . . .

(vi) who is not otherwise described . . . but who in the opinion of the Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer . . . .

32. *See* Davidson, *supra* note 29, at 167-69.

33. The Professional Institute of the Public Service, a long-established organization which represents several bargaining units, anticipated this problem by providing "affiliate membership" for persons ineligible for inclusion in a bargaining unit. *See* PROCEEDINGS, SPECIAL JOINT COMMITTEE OF THE SENATE AND OF THE HOUSE OF COMMONS ON EMPLOYER-EMPLOYEE RELATIONS IN THE PUBLIC SERVICE OF CANADA 416-17, 425-28 (1966). The Civil Service Association of Canada, a major service-wide organization,

B. *Administration*

The Act is administered by the Public Service Staff Relations Board (PSSRB), an independent administrative tribunal. In the common Canadian mode, the PSSRB is tripartite in composition, with two neutral presiding officers and an equal number of members "representative . . . of the interests of employees and of . . . the employer."[34] To ensure the neutral members' independence, they hold office for ten years and can be removed only by the procedure applicable to the removal of judges. The partisan members hold office for up to seven years, subject to removal by the cabinet "for cause."[35]

Both the Arbitration Tribunal, which deals with interest disputes,[36] and a corps of adjudicators, who deal with grievances,[37] operate under the administrative aegis of the PSSRB.[38] The Board itself appoints members of the Arbitration Tribunal[39] and nominates its chairman for appointment by the federal cabinet;[40] the Board also nominates adjudicators for cabinet appointment.[41] Moreover, the chairman of the PSSRB is empowered to appoint conciliators and expert or technical assistants.[42] The Preparatory Committee presumably devised this arrangement in order to strengthen the independence and impartiality of the Board. The Committee noted that the Minister of Labour could hardly be expected to assume administrative responsibility for such "third party" functions as conciliation, which normally are not performed by a labor relations board at all. Unlike the private sector, in public employment the government does not "stand between an employer and a group of organized employees in a position of impartiality . . . ."[43] Thus, it can be fairly said that the administration of the Act is almost completely free of public employer control or influence.[44] The importance of this point for

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also sought to ensure the continued membership of non-bargaining unit personnel. *Id.* at 232-33.

34. § 11(1).
35. §§ 11(2)-(3).
36. *See* text accompanying notes 83 and 84 *infra.*
37. *See* text accompanying notes 102-16 *infra.*
38. The Pay Research Bureau is also administered under the PSSRB.
39. § 60(1) of the Act.
40. § 60(2) of the Act.
41. § 92 of the Act.
42. § 17(4) of the Act.
43. REPORT, *supra* note 16, at 25.
44. The caliber of appointments made to the PSSRB and its adjunct bodies likewise helps to explain their impartiality and independence. The chairman of the PSSRB—the central figure in the entire scheme—is Jacob Finkelman, a former law

the "normalization" of employer-employee relations in the public sector can hardly be overemphasized. The Canadian arrangement is far more likely to win the confidence of public employees than the typical advisory body in the United States. Such bodies, often created by executive order, depend for their very existence on the grace and favor of the appointing power, and public employees, not surprisingly, may sometimes feel that their recommendations are not completely unbiased.

Not directly involved in the scheme of collective bargaining, but very definitely a part of the environment of employer-employee relations at the federal level, is the Public Service Commission. This Commission administers the Public Service Employment Act,[45] which establishes and implements the civil service or "merit" system of appointments and promotions, and provides a vehicle for employee training and development programs. This area of responsibility is much smaller than that exercised by the old Civil Service Commission prior to the advent of collective bargaining in the public sector. However, there are still problems of delimiting the jurisdictional boundaries between the Public Service Commission and the other bodies engaged in administering the collective bargaining relationship.

C. *Establishing the Bargaining Relationship: Operative Provisions of the Act*

Under the Act, a certified bargaining agent enjoys exclusive bargaining rights for all employees within an appropriate bargaining unit for both negotiation and grievance purposes,[46] subject only to timely displacement by a rival union[47] or to revocation of certification because of loss of support,[48] fraud,[49] or abandonment.[50] The Act requires certification as a basis for all bargaining relationships[51] in order to avoid the risk that the employer will deal with a favored union which does not enjoy the support of a majority of employees.

teacher and for many years chairman of the Ontario Labour Relations Board, the nation's busiest labor tribunal. The chairman of the Arbitration Tribunal is Justice Andre Monpettit of the Superior Court of Quebec, an experienced labor mediator.

45. C.71, § 2, [1966-67] Can. Stat.
46. § 40(1)(a) of the Act.
47. § 40(1)(b) of the Act.
48. § 41(4) of the Act.
49. § 43 of the Act.
50. § 42 of the Act.
51. § 49 of the Act.

In this respect, the federal public service legislation differs from comparable private sector statutes which permit voluntary recognition. The Act does not specify the method by which a union is to demonstrate its majority status on an application for certification. However, the Board has adopted a rule of thumb which accords certification outright to unions which can demonstrate a membership exceeding fifty-two per cent of the employees in the bargaining unit; unions which can demonstrate substantial (but lesser) support must submit to a secret ballot vote.[52]

After the Act became operative, considerable controversy arose as to which employee organizations were eligible for certification. The stakes were high, since disqualification would preclude an organization from participating in the race to win bargaining rights for virtually the entire Public Service. Three related cases illustrate the problems presented.[53] In anticipation of the new statute, several major public service employee associations had joined together to form the Public Service Alliance of Canada. In the *Hospital Services* case, the constitutionality of this coalition was challenged and the evidence of membership tendered by the group was impugned. The PSSRB sustained the Alliance on both counts, declining to evaluate the internal mechanisms by which the former organizations had agreed to merge, and accepting as evidence of continuing membership in the Alliance dues checked off after the merger on the basis of premerger authorizations. An adverse ruling would have prevented some of the major intended beneficiaries of the Act —the former employer associations—from participating in the critical contests for initial certification merely because they had combined. In the *Ships' Crews* case it was argued that a union which comprised both civil servants and private sector employees was ineligible for certification. The fear was that such a union might be unresponsive, or possibly inimical, to the interests of the Public Service. The Board also rejected this contention, finding in the legislative history of the Act no intention to grant a monopoly of representation

52. It should be noted that the logistics of taking a vote present potentially staggering problems. How should the Board conduct a ballot of ships' crews on a number of vessels which may be on the high seas for months at a time? What of lighthouse keepers who are virtually inaccessible except by helicopter? In such difficult circumstances, problems of communication and of the integrity of the secret ballot have been met with considerable ingenuity by the Board and with some degree of realism by the parties.

53. To date, the PSSRB has made copies of its significant decisions available on request. Publication and distribution of a formal series of reports will begin in the near future.

rights to the old-line civil service associations. However, the Board warned that the status of a union representing both public and private employees might be jeopardized should the Board find that extrinsic considerations were interfering with its representation of public employees. Finally, the *Council of Postal Unions* case raised the fundamental question whether certification should be granted to a union which disenfranchised certain persons within the bargaining unit which it claimed to represent. Here the Board drew the line, insisting that upon certification the union was required to accord membership rights to all employees in the bargaining unit.[54] In the same case, the PSSRB insisted that a newly formed Council of Postal Unions be established according to constitutional processes through which each constituent member would be required to participate in collective bargaining.

Definition of the appropriate unit for bargaining is a potentially difficult problem because of the unity of the management structure (at least in the central administration), and the need to preserve uniformity of employment conditions within the Public Service. The process is complicated by geographic dispersion of employees, the nationalist impulse among federal employees in Quebec, fear among some occupational groups that they will be burdened with the lesser bargaining power of other groups, and other strong centrifugal forces. In order to save the PSSRB from dealing with these problems during the hectic period immediately after the introduction of collective bargaining into the Public Service, the Act established a number of statutory bargaining units for the duration of the "initial certification period."[55] These statutory bargaining units reflected a new system of job classification which had been introduced by the Civil Service Commission in 1964. The Act divided the central administration into seventy-two functional groups and then clustered these groups into five broad occupational categories: scientific and professional, administrative and foreign service, technical, administrative support, and operational. During the initial certification period the Board was obliged to adhere to these statutory bargaining units unless it determined "that such a bargaining

54. Section 39(3) of the Act explicitly makes ineligible for certification any union "that discriminates against any employee because of sex, race, national origin, colour, or religion."

55. Section 26 of the Act authorizes the Public Service Commission to "specify and define the several occupational groups within each occupational category" established by the statute. During the initial certification period these occupational groups are intended to be coterminous with bargaining units.

unit would not permit satisfactory representation of employees . . . and . . . would not constitute a unit of employees appropriate for collective bargaining,"[56] or unless it became necessary to divide an occupational group into separate supervisory and nonsupervisory bargaining units. The initial certification period for each broad occupational category was to last for a period of approximately twenty months. Thereafter, upon application, the PSSRB could redefine bargaining units so long as it maintained the integrity of the broad occupational categories established by the statute.[57] Moreover, in the interest of uniformity throughout the Public Service, the Board was required to "have regard to" the nature of the established classification structure in any redefinition of bargaining units.[58]

Given the enormous tasks associated with bringing the legislation into operation, the idea of the initial certification period seems sound. Imposition of predetermined boundaries on bargaining units undoubtedly inhibited some employees from associating together for collective bargaining purposes, but it did expedite the certification process, and in the long run probably strengthened the collective bargaining system. Moreover, the experience gained during the initial certification period will presumably aid the Board should subsequent redefinitions of the appropriate units for bargaining prove necessary. To date, virtually all occupational groups within the central administration and among the separate employers have applied for certification. The Board has granted certificates to seventy-five bargaining units, comprising approximately eighty per cent of the 206,000 eligible employees in the Public Service.[59]

D. *Protection of Basic Rights*

The basic approach of the Preparatory Committee which proposed the Act was to seek normalization of labor relations in the Public Service:

> Legislation governing industrial relations in the private sector usually contains a number of provisions designed to protect the integrity of the collective bargaining relationship, including: a declaration of the freedom of employees to belong to any organization of their choice; a prohibition of employer interference in the

56. § 26(5)(a) of the Act.
57. § 32 of the Act.
58. § 32(2) of the Act.
59. Approximately 170,000 employees are now included in bargaining units. Of these, 120,000 are represented by the Public Service Alliance of Canada (successor to the pre-collective bargaining employee associations), and 25,000 are represented by the Council of Postal Unions.

> organization or administration of any employee organization; and an assurance that employees may exercise their rights without threats, intimidation or reprisals from agents of employee organizations or the employer.
>
> In the opinion of the Preparatory Committee, the principles underlying provisions of this kind are of fundamental importance and should be made to apply clearly to the Public Service system.[60]

The legislation, as finally enacted, reflects this basic philosophy of the Preparatory Committee. The Act clearly proclaims freedom of employee association[61] and forbids interference with that freedom by managerial personnel. In particular, the Act prohibits employer domination of unions,[62] discrimination in employment against unionists, and other analogous coercive tactics.[63] These prohibitions are enforceable by a procedure for filing complaints against the employer and any person acting on its behalf.[64]

The PSSRB has jurisdiction to hear and determine such complaints, to make remedial orders, and to invoke two different sanctions to ensure compliance. The Board may either make a report of noncompliance to Parliament[65] (which would undoubtedly be extremely embarrassing to the government) or consent to the prosecution of any individual who has violated the prohibitions contained in the Act.[66] However, beyond reporting to Parliament, no sanctions are directly available against the government itself. It is clear that conformity to the policy of the law ultimately depends on the government's willingness to comply rather than the fear of sanctions. Isolated acts of antiunionism are likely to occur, if at all, at the lower echelons of management or at points geographically remote from the main administrative centers. If the Treasury Board is able to assume control over such situations and to apply the neces-

60. REPORT, *supra*, note 16, at 26.

61. § 6 of the Act.

62. § 8(1) of the Act.

63. § 8(2) of the Act.

64. § 20 of the Act.

65. § 21 of the Act.

66. § 106 of the Act. The statute does not explicitly indicate that unfair practices or violations of remedial orders are criminal offenses, although reference is made in section 106 to "prosecution arising out of an alleged failure to observe any prohibition contained in section 8." Section 107 of the Criminal Code, c.51, [1953-54] Can. Stat. 365. provides: "Everyone who . . . contravenes an Act of the Parliament of Canada . . . is, unless some penalty or punishment is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years." Presumably, prosecution under this section is contemplated; certainly, the legislative intention was that prosecution should be the ultimate enforcement procedure. *See* Proceedings, *supra* note 33, at 917.

sary corrective measures, effective self-policing on the employer side will make it unnecessary to invoke the enforcement machinery of the statute. To date, there have been few complaints of unfair labor practices, and the enforcement provisions of the Act have not been invoked.

E. *Collective Bargaining: Arbitration or Strike?*

The Act requires both the employing agency and the bargaining agent, upon timely notice, "to bargain collectively in good faith and make every reasonable effort to conclude a collective agreement."[67] As a reflection of the statute's general adherence to private sector principles, this admonition is hardly surprising. It is the procedure for impasse resolution which represents the most novel (and, some say, the most radical) feature of the statute. Following certification, the bargaining agent for each certified union is required to choose between two procedures "for resolution of any dispute to which it may be a party":[68] arbitration or a process of conciliation.[69] Since arbitral awards are "binding on the employer and the bargaining agent . . . and on the employees,"[70] choice of the arbitration option forecloses the possibility of a strike.[71] However, no comparable binding effect accompanies the report of a conciliation board, and there are no prohibitions elsewhere in the statute which would preclude a post-conciliation strike. By inference, then, strikes are permitted following exhaustion of the conciliation process.

The failure to announce affirmatively the existence of a right to strike is hardly surprising. In the first place, no Canadian court has ever clearly held that strikes by public servants are per se illegal;[72] thus there was no need for Parliament to reverse an existing legal norm. Second, while it is true that Canadian labor relations statutes have seldom contained an express reference to the right to strike, the courts have recognized that such legislation impliedly incorporates the common-law right to strike.[73]

The Act does not, however, entirely abandon the public interest in the continued operation of government to the whim of nego-

67. § 50 of the Act.
68. § 36(1) of the Act.
69. § 2(w) of the Act.
70. § 72(1) of the Act.
71. This point is made explicit by section 101(1)(b) of the Act.
72. The issue was raised, and avoided, in A. G. British Columbia v. Ellsay & B.C. Govt. Employees Assn. [1959] CLLC 15,262 (B.C. Sup. Ct.).
73. Regina v. CPR *ex rel.* Zambri, [1962] S.C.R. 609.

tiators. If a union has elected to resolve its collective bargaining impasses by a process of conciliation—and, impliedly, by a strike—rather than by arbitration, the Act forbids certain "designated employees" within the bargaining unit from striking because their duties "consist in whole or in part of duties the performance of which at any particular time or after any specified period of time is or will be necessary in the interest of the safety or security of the public."[74] But it should be noted that the definition of "designated employees" is very circumscribed. The Act denies the right to strike only to those persons whose absence from work would imperil interests which are absolutely vital; employees whose absence would merely imperil the "public interest," "convenience," or "welfare" are still permitted to strike.

The procedure for identifying "designated employees" is designed to avoid controversy over this issue during the course of a strike when the pressures of conflict would make resolution of the matter especially difficult. Within twenty days after either party has served a notice to bargain, the employing agency must establish a list of essential employees. If the union does not object to the employer's list, all of the persons so identified are taken to be "designated." However, in the event that the bargaining agent files an objection, the Board must hold a hearing to determine whether the listed employees are really essential to the "safety and security of the public."

In practice, the various government employers have exercised great self-restraint in designating critical employees. Of approximately 33,000 employees in bargaining units governed by the strike option, the government has "designated" only eighty-six. In each case, the union has accepted the employer's unilateral judgment. Thus, the Board has not had occasion to determine authoritatively the meaning of the statutory phrase "safety and security of the public." Nevertheless, some clue to the meaning of this standard may be gleaned from the *Air Traffic Controllers* case,[75] where the only "designated" employees were those controllers thought necessary to provide emergency assistance to overflying and noncommercial aircraft at various airports throughout the country. Obviously, such a small number of "designated" controllers would be inadequate to service regular domestic commercial air traffic, which would neces-

74. § 79 of the Act.

75. *See* note 53 *supra*.

sarily be suspended for the duration of a strike within this particular bargaining unit.[76]

The Act does not expressly provide for the designation of additional employees during a strike if the employing agency or the Board initially misjudged the number or type of employees necessary to protect the public interest. The PSSRB would undoubtedly mobilize its full statutory resources to cope with such a crisis, including its power to "review, rescind, amend, alter or vary any decision or order made by it."[77] It might well be argued that the employer and the Board should have anticipated all contingencies in making the original choice of designated employees, but this argument might have the unfortunate effect of prompting the employer to exaggerate at the outset the number of designated employees on the basis of remote contingencies.

A second series of problems concerns the relationship between striking employees and designated employees in the same bargaining unit. If a government employer determines that a skeleton staff is necessary during a strike in order to provide services essential to the "safety and security of the public," how is such a staff to be selected from among the employees in a bargaining unit? What happens if some of the designated employees resign or become ill? Must the same individuals continue to work throughout the strike, or can the strikers serve in rotation? What of the risks of sabotage, deliberate slow-downs, or "work-to-rule" campaigns by designated employees? And what of the wages paid to designated employees: if the remuneration for continuing on the job exceeds strike pay, should the designated employees be required to turn the surplus over to the union strike fund? Although these as yet unanswered questions are potentially troublesome, the statutory procedure for designating employees in advance of an actual strike situation is fundamentally sound. The fact that the parties are not locked in conflict makes it more likely that they will agree upon the list of designated employees. If there is disagreement, the Board can undertake the difficult adjudicative problems of defining and identifying employees in essential services without the extra pressure of a strike situation. Finally, if a large proportion of employees in a bargaining unit must be designated as essential, thus impairing the union's

76. Air travellers who have been trapped for hours on the runways and in the air corridors of New York airports because of a "work-to-rule" campaign by air traffic controllers might regard an outright strike as a lesser evil.

77. § 25 of the Act.

ability to strike, that fact is made obvious so that the union can opt for arbitration at an early stage in the proceedings.

Of the fifty-three bargaining units which had elected between arbitration and conciliation as of August 31, 1968, only eight had chosen the latter method of impasse resolution. The forty-five units which selected arbitration contained 79,000 employees, while the eight strike-potential units encompassed 33,000 employees; of the latter, some 25,000 were postal workers. Since no election has yet been made in another twenty-two units containing almost 56,000 employees, the predominant pattern of impasse resolution is still to be determined. Obviously, the developing course of negotiations under the two systems of dispute resolution will directly influence not only the choices of the remaining undecided units but also the decisions of units which may want to alter their previous elections.[78]

To date, experience under each system has been relatively satisfactory. It has frequently been suggested that when the possibility of a strike is removed, collective bargaining will deteriorate because the disputing parties will prefer to take their chances with an arbitrator rather than to conclude an agreement through direct negotiations.[79] However, the limited experience under the Public Service Staff Relations Act suggests that arbitration does not necessarily spell the end of real collective bargaining. Some twenty agreements covering 55,000 employees have now been signed in bargaining units governed by the arbitration option. Of these, all but two or three were the product of direct negotiations unassisted by even a conciliator;[80] the Arbitration Tribunal has yet to hear a single case.

To be sure, several unusual circumstances may have contributed to the enviable record of the bargaining units which opted for arbitration. First, it must be remembered that the unions concerned have voluntarily abandoned their right to strike. It might be assumed, therefore, that they have decided to approach collective bargaining in a more responsible, less militant, manner than their private sector or strike-potential, public sector counterparts. Second, the government is aware that disillusionment with bargaining under the arbitration option would surely lead a union to change its option at the earliest opportunity. Accordingly, it is reasonable to

78. Section 38 of the Act provides for alteration of the process of dispute resolution.

79. *See* Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 938, 939-40 (1969).

80. Under section 52 of the Act, either party may apply to the Chairman of the PSSRB for "the assistance of a conciliator in reaching agreement," although appointment of a conciliator is not mandatory.

assume that the government's bargaining stance has been one of flexibility and restraint.

Beyond these short-run considerations, the institutional arrangements provided by the statute undoubtedly contribute to the amicable settlement of disputes. Perhaps most important in this regard is the provision of a factual framework for enlightened bargaining. The Pay Research Bureau, established in 1957, has obtained the cooperation and confidence of the government and the employee associations both in gathering and in disseminating data useful in the bargaining process.[81] By largely removing factual issues from the realm of controversy, the Bureau enables negotiators to focus attention on the admittedly difficult task of choosing the criteria by which those facts are to be evaluated. Second, if the parties fail to resolve their differences in direct negotiation, the dispute does not pass directly to arbitration. Instead, the Act provides for the intervention of a conciliator on the request of either party.[82] Only if the conciliator fails to bring the parties together does the focus shift from bargaining to binding third-party determination.

If and when it is necessary to resort to arbitration, the Act contains elaborate provisions to ensure that the issue will be clearly and narrowly defined for the arbitrator.[83] The Arbitration Tribunal, moreover, is not simply left to speculate upon the principles by which public employment working conditions are to be fixed. The Act provides the Arbitration Tribunal—and presumably negotiators seeking to avoid arbitration—with specific criteria for determining wages and working conditions.[84] While these standards are admittedly broad, they at least constitute an attempt by Parliament to discharge its legislative obligations by stating that public employees are to enjoy employment conditions comparable to those in the private sector. Coupled with the data generated by the Pay Research Bureau and submitted to the scrutiny of an Arbitration Tribunal staffed by highly competent men, these legislative guidelines are likely to produce a decision which the disputants will respect. Certainly, neither party need fear that arbitration involves risks of irresponsible or ill-informed third-party determinations. Indeed, the very rationality of the arbitration process may encourage

81. *See* Gauthier, *Pay Research and Employee Relations in the Canadian Federal Service*, in K. WARNER & J. DONOVAN, PRACTICAL GUIDELINES TO PUBLIC PAY ADMINISTRATION 156 (1965).

82. § 52 of the Act.

83. *See* Kheel, *supra* note 79, at 939, 941.

84. § 68 of the Act.

the parties to simulate it in private negotiations, and thus avoid arbitration altogether.

In the case of bargaining units which opted for the right to strike, the experience to date is somewhat less than conclusive. While the air traffic controllers were able to negotiate an agreement without recourse to a strike, 25,000 postal workers who apparently felt obliged to employ the ultimate sanction called a postal strike which lasted for nineteen days—from July 18 to August 8, 1968. This was hardly a surprising development. In 1965 the postal workers had resorted to a seventeen-day walkout; on several other occasions, national and local union groups had threatened strike action. A number of factors contributed to the militancy of these groups: deep-seated grievances against poor working conditions; departmental management which was understaffed and ill-prepared for collective bargaining; a new union leadership cognizant of the fact that their predecessors had been purged as "moderates"; and overtones of French Canadian nationalism in the Montreal local union. Circumstances beyond the immediate control of the parties added several ingredients to this witches' brew: a federal election occurred in the midst of bargaining; a new Postmaster-General took office; critics called for an overhaul of postal services and mail rates; and the government attempted to restrain inflation by encouraging a policy of wage restraint throughout the economy.

Bargaining began at a slow, almost fatalistic pace. While the parties made some progress on minor items, and although a board of conciliation succeeded in resolving other issues, the government made no response to the union's unrealistically high wage demand until the very eve of the strike. Predictably, this last-minute move proved "too little, too late," and the first legal strike of Canadian federal workers began. Much more unpredictable was the comparatively mild reaction of the Canadian public. To some extent, the press was sympathetic to the grievances of the employees and critical of the government's failure to make an earlier wage offer; thus, it initially adopted a fairly neutral attitude. Having learned the lessons of the previous mail strike in 1965, many businesses had made arrangements to continue serving customers and collecting accounts for the duration of the strike. Welfare agencies and similar organizations also provided emergency services to their clientele through alternate devices. While there was some inconvenience and extra expense, the strike did not appear to cause a major communications crisis.

As the strike progressed, however, the patience of the public began to wear thin, and pressure mounted for legislation to end the walkout. The government's position was awkward indeed. It was reluctant to withdraw the right to strike on the very first occasion upon which it had been exercised, and it was equally hesitant to undertake the task of suppressing the almost certain defiance which a back-to-work order would bring. On the other hand, the government could hardly afford to capitulate to union demands. The postal workers were seeking wage increases beyond those which had been accepted by unions subject to arbitration; moreover, it was doubtful that the militant union members would even accept any recommendation made by its negotiating team. Thus, while the government was under increasing pressure to end the strike, it could not afford to reach a settlement with the postal workers which would destroy the faith of other unions in the efficacy of the arbitration option. Finally, such factors as veiled threats of special antistrike legislation, increasing public hostility toward the strike, and financial pressure on the individual union members (who received no strike pay) helped to move the union toward settlement. After further concessions by the employer and the vigorous and imaginative efforts of a special mediator, the parties reached an agreement. By a narrow margin, the union membership ratified the agreement, and the postal strike was over.

The postal strike, then, can be seen either as vindicating the predictions of doom by detractors of the new statute or as proving the good sense of its draftsmen. Critics would contend that the Act proferred the right to strike to "irresponsible" unionists who used it at the first opportunity to the considerable inconvenience, if not the lasting detriment, of the country. Conversely, proponents of the Act might argue that a postal strike was inevitable, that the statute merely circumvented awkward problems of law enforcement, and that the community's actual loss was negligible. Moreover, they would contend that public inconvenience was a small price to pay for the preservation of free collective bargaining and that the ultimate resolution of the conflict within the range of settlements among bargaining units subject to arbitration augurs well for the future of the system.

F. *The Scope of Bargaining*

The Preparatory Committee had clearly recommended before passage of the Act "that legislation place no limitation on the

subject matter of discussion at the bargaining table . . . ."[85] At the same time, it proposed that arbitration (the only method of dispute settlement then contemplated) be limited to controversies directly related to wages, hours, leave entitlement, and working conditions.

> The entitlement of employees to superannuation, death benefit and accident compensation should continue to be governed by law. Furthermore, it should be made clear that the subject-matter of arbitration may in no circumstance extend to the processes governing appointment, transfer, promotion, demotion, lay-off, discharge, discipline and classification.[86]

This attempt to permit an unlimited scope for negotiation while withholding the means of dispute resolution for some subjects may prove to be a source of difficulty, especially since arbitration has been supplemented by the strike option in the final version of the statute. A strike-potential union which is denied satisfaction on one of the "excluded" matters may simply become intransigent over those matters which are bargainable. Even where the union has opted for arbitration rather than the right to strike, such frustration would necessarily impair the bargaining process. The statute, as enacted, seems to make the scope of conciliation, arbitration, and collective agreements coterminous,[87] but it does not expressly restrict the scope of bargaining. The parties may discuss anything, but they are forbidden to insert any provision in a collective agreement which would require the passage of new legislation (except for the purpose of appropriating funds) or which would detract from the operation of the other statutes enacted as part of the comprehensive scheme for Public Service employment relations.[88] In addition, a general provision of the Act authorizes the government, by cabinet order, to exempt itself from doing anything contrary to the "safety or security of Canada or any state allied or associated with Canada."[89]

The latter limitation is unlikely to present significant problems, but the former raises the possibility of a clash between the new collective bargaining regime and the older civil service system. The Public Service Staff Relations Act prohibits an arbitration tribunal

85. REPORT OF THE PREPARATORY COMMITTEE ON COLLECTIVE BARGAINING IN THE PUBLIC SERVICE 34 (Canada 1965).
86. *Id.*
87. §§ 56, 70(2), 86(2) of the Act.
88. § 56 of the Act.
89. § 112 of the Act.

or a conciliation board from dealing with "the standards, procedures or processes governing the appointment . . . demotion, transfer, lay-off, or release" of employees.[90] The Public Service Employment Act confers upon the Public Service Commission "the exclusive right and authority to make appointments,"[91] as well as a mandate not only to "establish the merit of candidates" for appointment[92] but also to oversee the processes of promotion, demotion, and lay-off.[93] Yet it is almost inevitable that unions will seek to influence the determination of standards governing these important incidents of employment. Would a strike aimed at such an objective be unlawful? Even if it were, will not the existence of a deeply felt concern require a vehicle for its amicable resolution? Will not the absence of such a vehicle haunt the collective bargaining process?

The Act does not provide a mechanism for easing possible tensions between the civil service system and the collective bargaining process, except that the Public Service Commission is required "from time to time [to] consult with representatives of any employee organization certified as a bargaining agent . . . or with the employer . . . with respect to the selection standards . . . or the principles governing the appraisal [and] promotion . . . of employees . . . ."[94] That this potential area of difficulty has not yet given rise to public controversy is due in part to the characteristic pragmatism demonstrated by both unions and government administrators in the Public Service, in part to a traditional Canadian diffidence toward litigation.

G. *Implementation and Administration of Collective Agreements: Grievances*

Whether a collective agreement is the product of negotiation or an arbitration award, it is final and binding upon the employer, the bargaining agent, and the employees in the bargaining unit.[95] In one short passage, the Preparatory Committee brushed aside both the practical and philosophical objections to such a provision:

[I]n many areas, the traditional authority of the Crown has been

90. §§ 70(3), 86(3) of the Act.
91. C. 71, § 8, [1966-67] Can. Stat.
92. *Id.* at §§ 10, 12, 31.
93. *Id.* at §§ 13-21 (promotion), 31 (demotion), 29 (layoff).
94. *Id.* at § 12(3).
95. §§ 58, 72 of the Act.

> circumscribed by laws that limit its freedom of action or require its action to be brought to the attention of Parliament. The conclusion to which we have come can be simply stated: although the arbitration of disputes represents a limitation on the historic right of the Crown to determine unilaterally the terms and conditions of employment of those in its service, it is not likely to interfere with the capacity of the Government to discharge its responsibility.[96]

That senior civil servants should give such short shrift to the prerogatives asserted by their predecessors in office and their confreres in other jurisdictions was, as the title of this Article suggests, either an act of folly or one of candor and courage. Of course, implementation of a collective agreement is "subject to the appropriation by or under the authority of Parliament of any moneys that may be required by the employer therefor."[97] The Act, while acknowledging that the legislature retains ultimate control over the public purse, assumes that Parliament will routinely honor agreements and awards made in accordance with its provisions. Since the majority party in the House of Commons controls the executive branch of government, it is unlikely that this statutory assumption will prove to be ill-founded.

In order to facilitate implementation of the Act during the initial round of negotiations, Parliament established a statutory timetable for bargaining which provided that the first agreements negotiated in each occupational category would all expire on a specified date.[98] The legislators added a statutory stipulation that collective agreements could be signed only after a certain date[99] and for a minimum term of one year.[100] These provisions were intended to bring the first (and hopefully subsequent) agreements in each bargaining unit into a regular cycle of periodic pay revisions for the entire Public Service. The obvious desirability of such an arrangement, however, collided with the imponderables of a collective bargaining system: delays in certification due to union rivalry or simple inexperience in organizing, delays in bargaining due to intraunion political processes, overwork of the employer representatives, or the predictable failure of negotiators to agree promptly on all outstanding issues. To cite but one example, the postal strike

96. REPORT, *supra* note 85, at 37.
97. §§ 56, 74 of the Act.
98. § 26(6) of the Act.
99. § 26(6) of the Act.
100. § 57 of the Act.

was settled less than two months before the date fixed by law for the expiration of the first collective agreements. While the minimum statutory term of one year could have been satisfied by making this agreement retroactive, raw memories of the recent strike made the prospect of a fresh round of negotiations in two months too awful to contemplate. The parties ingeniously agreed, therefore, to sign two agreements, one to operate retroactively and expire on the date specified by the Act, the other to come into effect and operate from that date forward. With the wisdom of hindsight, it seems clear that Parliament should have established a more flexible statutory timetable. However, the timing of representation questions—certification of new bargaining agents, severance of bargaining units, and decertification—was fixed by reference to the expiration dates of the initial agreements.[101] Thus, to have allowed a more protracted period for the first round of negotiations would have further postponed the opportunity for minority and dissident groups to seek a change in representation.

Turning to the question of grievances, the Act's provisions are indeed liberal. An employee aggrieved by unilateral employer action relating to employment, by a collective agreement or arbitral award, or by "any occurrence or matter affecting his terms and conditions of employment" may present a grievance.[102] In one respect, this broad-gauged grievance process is apparently designed more for catharsis than for confrontation. The employee cannot pursue his grievance to adjudication unless it involves "the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or . . . disciplinary action resulting in discharge, suspension or a financial penalty . . . ."[103] In all other cases, the grievance can be pursued only through discussions with successively higher levels of management, up to (but not including) the Minister responsible.

The private sector would do well to emulate some of the grievance procedures in the Act. First, the right to pursue grievances is not delimited by the collective agreement alone. Thus, the opportunity exists for an employee to bring to the attention of senior management officials sources of friction or incidents of lower-level maladministration not covered by the contract. Second, the right to seek adjudication of grievances in the critical area of discipline is

101. §§ 26, 41 of the Act.
102. § 90(1)(b) of the Act.
103. § 91 of the Act.

statutory rather than contractual. As such, it extends to *all* employees, whether or not they are covered by a collective agreement and whether or not they are even eligible for inclusion in a bargaining unit.[104] Third, a balance is carefully struck between individual and group interests. An individual employee "owns" his personal grievance, but he may not challenge the interpretation or application of a collective agreement or arbitral award unless he has the approval and assistance of his union.[105] Since the interpretation of the collective agreement might set a precedent which would affect the entire bargaining unit, the certified bargaining agent retains exclusive control over such grievances (except in relation to discipline) by monitoring individual claims. If no bargaining agent is certified, of course, the employee may seek representation by the union of his personal preference. The Act also permits either party to a collective agreement to file a grievance if the matter is not one which may be the subject of a grievance by an individual employee.[106]

Adjustment of grievances is the task of a corps of "adjudicators," one of whom, as chief adjudicator, assumes responsibility for the administration of the system. Adjudicators hold office for fixed terms, and are assigned to individual cases as they arise.[107] Alternatively, the parties may consent to adjudication by a tripartite board[108] or by an adjudicator named in their collective agreement.[109] Neither alternative device has yet been used. Although much can be said for naming an adjudicator in an agreement (or, indeed, on an ad hoc basis, by mutual designation), two considerations militate against the use of such a system: first, the obvious desire to preserve uniformity of decision throughout the Public Service,[110] and second, the fact that the public bears the cost of grievance adjustment through the regular

104. Section 2(p)(i) of the Act provides that managerial personnel are eligible to submit and process grievances. Ironically, the first grievance to be adjudicated after the legislation came into force was that of a personnel manager who was found to have been improperly discharged, Caron case, file 166C-1 (unreported, Sept. 21, 1967).

105. §§ 90(2), 91(2) of the Act.

106. § 98 of the Act.

107. §§ 92, 94 of the Act.

108. §§ 93, 94(2)(b) of the Act.

109. § 94(2)(a) of the Act.

110. To some extent this is achieved by the exercise of the chief adjudicator's power to determine whether a grievance falls within the jurisdictional limits defined in the Act and whether it is timely. PSSRB Regulations and Rules of Procedure, SOR/67-200, as amended by SOR/68-114, § 53. Moreover, all "policy" grievances (*i.e.* those filed by the employer or the bargaining agent) must be heard by the chief adjudicator. § 98 of the Act.

adjudicators.[111] The decisions of an adjudicator are binding on the parties,[112] and may be enforced[113] or reviewed only by the PSSRB;[114] court review is precluded.[115] Finally, those matters which fall within the purview of the Public Service Commission cannot be made the subject either of a grievance or of adjudication[116]

Surprisingly, the first eighteen months under the new legislative scheme have yielded barely seventy grievances for adjudication, and of these over one half were held to be nonjusticiable on procedural or jurisdictional grounds. In part, the paucity of cases reflects the preoccupation of the parties with the processes of certification and negotiation, in part their desire to be reasonable during the difficult initial period of adjustment. It may also reflect the absence of collective agreements which would provide a source both of new employee rights and of interpretative difficulties. However, an approach to adjudication has at least been articulated in terms which may well determine its future development:

> The whole spirit and intent of the Public Service Staff Relations Act is to secure to the governmental employees covered by it . . . a regime of fair dealing which reflects concepts of industrial justice as they have developed in the private sector. To be sure, these concepts are expressed through institutions and rules which give due weight to the special characteristics of public employment. But the underlying principles of the new statute are to be taken as the expression of this aspiration, rather than as the haggard reflection of past policies . . . .[117]

IV. Conclusion

I have ventured into considerable—perhaps excessive—detail in describing the new Canadian federal statute out of a conviction that it represents the "emperor's clothes" approach to the problems of public service employment relations. Like the small boy in the old folk tale, I share to a considerable degree the conviction of the

111. § 97 of the Act. Subsections (2) and (3) provide that the Board may recover some or all of the costs of normal adjudication, but to date this has not been done. If the parties elect to name their own adjudicator, they must bear the costs. Thus, financial incentives do encourage the use of the regular adjudicators.

112. §§ 96(4), 96(5) of the Act.

113. § 96(6) of the Act.

114. Section 23 of the Act provides for review by the PSSRB only of a "question of law or jurisdiction" arising in connection with grievance adjudication. Such questions may not be raised in the course of a proceeding to enforce the decision of an adjudicator. § 96(6) of the Act.

115. § 100 of the Act.

116. § 90 of the Act.

117. *Caron* case, *supra* note 104.

draftsmen of the statute that unwarranted deference to the imaginary trappings of governmental authority has blinded us to the naked realities of life. In functional terms, at least, many of the arguments raised against the extension of collective bargaining to public employees are merely ghosts of the objections to collective bargaining in the private sector which were laid to rest a generation or more ago.

This is not to say that public employment presents no special problems, or that the new Canadian statute adequately deals with all such problems. Undoubtedly, there will be difficulties in implementing the dual system of dispute settlement, in maintaining appropriate relationships between competing claims for limited public funds, in reconciling a collective bargaining system with the platonic ideal of a civil service system, and in withstanding the temptations of unions and employing agencies to use public opinion and political pressure as a supplement to conventional bargaining tactics. But these reservations do not undercut the basic validity of the legislation.

The ultimate justification for the Public Service Staff Relations Act lies in its recognition of the need to normalize public service employment. It is quite clear that public employees in Canada (as well as in the United States) will no longer acquiesce in the denial to them of rights now regarded as basic by their fellow employee-citizens in the private sector. As many public employers are coming to realize, the choice is not between collective bargaining and unilateral control by a sovereign employer. Rather, it is between orderly collective bargaining and chaotic, extralegal conflict.