Collective Bargaining in the Canadian Public Service

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IN recent years, the question of participation by public servants in the determination of terms and conditions of their employment has been receiving an increasing amount of attention in many countries including Canada. The importance of employee participation in the formulation of conditions of their employment may be justified in several ways. First of all, employee participation can go a long way in promoting optimum utilization of governmental manpower resources and in minimizing labor strifes that periodically jeopardize productivity in the public service. Secondly, since recognition of employees' rights to participation would result in a greater reliance on consensus rather than coercion in conflict-management within the public service, it would naturally aid in the development of democratic, as well as durable, dispute-settlement procedure. Thirdly, involvement in setting conditions of their service would encourage the employees to assume increasing responsibility and leadership in initiating necessary reforms in the realm of employer-employee relations. And finally, employee participation should also assist the employees psychologically to accept with minimum stress organizational changes which could otherwise cause considerable social and emotional turmoil in their work situations. The object of this article is to review the evolution, nature and scope of existing legislation concerning employee participation in the Canadian public service and to analyze briefly some of the problems that have been causing difficulty as well as delay in its implementation.

In Canada, at the beginning of this century, there was scarcely any legislation affecting employee rights in the public service. In the 1920's and 1930's, the government took a few significant steps to provide its employees with some statutory rights to air their grievances and make representations concerning certain working conditions in the public service. But until the 1960's, the over-all attitude of the government towards its employees was one of considerable condescension and paternalism. Today, however, due partly to the public service Staff Relations Act which came into force in March, 1967, employer-employee relations in the public service are far more progressive and democratic than

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that of most other countries in the world.

The Canadian public service came into being in 1867 with Confederation. But the first attempt at collective action by public servants came only towards the end of the nineteenth century when the postal employees set up two associations for themselves—the Railway Mail Clerks Association and the Canadian Postal Employees Association. An attempt to organize members from all over the civil service was made in 1907 with the creation of an employee association known as the Civil Service Association of Ottawa. Two years later, another organization called the Civil Service Federation of Canada was set up as a loose alliance of the Civil Service Association of Ottawa and the postal associations. The year 1920 witnessed the birth of two new employee associations, namely, the Professional Institute of the Public Service of Canada and the Amalgamated Civil Servants of Canada. In 1958, the Amalgamated Civil Servants of Canada and the Civil Association of Ottawa merged and created the Civil Service Association of Canada. In 1966, the Civil Service Association of Canada further merged with the Civil Service Federation of Canada and formed the largest public service association in Canada to date, the Public Service Alliance of Canada. At present, it represents over 142,500 Canadian public servants.

Although Canadian public servants began to organize themselves into employee associations of their choice as early as the late nineteenth century, specific legal rights sanctioning collective action to air their grievances came much later. It was mostly during the 1920's that, inspired by the introduction of the Whitley Council system in the United Kingdom, Canadian staff associations began to press forcefully for consultative rights in the formulation of conditions of employment for their members. But the disastrous depression years of the 1930's with conditions of high levels of unemployment and falling wages led to a general weakening of staff associations and a continuation of their "cap in hand" approach.

It was the outbreak of the Second World War with its attendant developments of inflation, high employment, expansion of the civil service, and increasing awareness concerning the importance of avoidance of employee strife in both private and public employment that resulted in a reversal of the situation in the 1940's. In May 1944, the government established a National Joint Council of the Public Service of Canada made up of representatives of the staff associations and senior officials representing the government as employer. The purpose of this body as outlined by the government was:

> to provide machinery for regular and systematic consultation and discussion between the employer and employee sides of the public service in regard to grievances and conditions of employment, and thereby to promote

increased efficiency and better morale in the public service.[1]

The National Joint Council served as a valuable consultative device between management and staff and as a forerunner to full collective bargaining in the public service. It produced many significant benefits for employees, such as superannuation, medical insurance, travel regulations, the five-day week, and the check-off of staff association membership fees. However, the employee associations did not accept it as an adequate alternative to collective bargaining because it had many limitations. The most serious among them was, perhaps, the fact that the Council did not possess the authority to deal directly with the important issue of civil service salary and that there was no provision for the settlement of disagreements between the staff and official sides of the Council. This meant that despite the establishment of the National Joint Council, the post-war decade continued to be one of considerable ferment for the public service.

The statutory right to be consulted on pay determination was extended to employee associations in 1961 by a new civil service act, but the employee associations were not pleased because it did not provide for the kind of consultative right for which they were clamoring. At any rate, the consultative process turned out to be extremely cumbersome especially because it made it necessary for the employee organizations to make representations at two different levels—the Civil Service Commission and the Treasury Board.[2] The employee disaffection also grew from the fact that the final determination of rates of pay and conditions of employment was still subject to unilateral decision of the Treasury Board. Given the circumstances, it was, perhaps, only natural that the demand by employee organizations for a right to negotiate directly with the government rather than through intermediaries continued unabated until the promulgation of the present legislation known as the *Public Service Staff Relations Act* in March, 1967.

This Act has been unique and epoch-making in many respects. First of all, for the first time in its history, Canada granted public service associations the status of trade unions with the right to collective bargaining, compulsory arbitration, conciliation and even strike action *vis-a-vis* the government as employer. Second-

[1] Statement of the Minister of Finance, J. L. Ilsley, concerning Order-in-Council P.C. 3676 of May 16, 1944, quoted in C. W. Rump, "Employer-Employee Consultation in the Public Service," *Civil Service Review*, Vol. XLV, No. 2 (June 1972), p. 8.

[2] The Treasury Board is a cabinet committee. It occupies a key role in the management of the public service because it has been delegated the exercise of certain important executive functions of the Governor-in-Council including the determination of terms and conditions of employment in the public service. For details regarding its responsibilities, see Canada, Laws, Statutes, etc., *Public Service Staff Relations Act*, 1967, 14-15-16 Elizs. 2, ch. 72 (secs. 5-6).

ly, as part of the collective bargaining system, the Act has also provided for the setting up of a machinery through which employees who have grievances about the terms and conditions of their employment can have access to a formal grievance procedure that permits third party adjudication. Lastly, besides outlining the legal steps that must be observed in the resolution of disputes, the Act has also provided for the establishment of an administrative apparatus, the Public Service Staff Relations Board (PSSRB), for the enforcement of its provisions.

The dispute settlement process envisaged in the Act offers employee organizations two different options—conciliation with the right to strike or arbitration with binding award. Public servants can not participate directly in the negotiation process, but, instead, can join employee organizations of their choice which would represent them in the bargaining process with the government. Before an employee organization can negotiate with the government for a collective agreement, that organization must be certified as a bargaining agent. Such certification may be granted to a single employee organization or to a council of employee organizations consisting of two or more organizations that have joined together for purposes of collective bargaining. Within a particular bargaining unit, all employees must be of the same occupational group allocated to an occupational category.[3] The requirements that must be met by an employee organization before it can be certified as exclusive bargaining agent for its members are:

1. it has no monetary affiliation with a political party;
2. it does not discriminate against employees because of sex, race, nationality, color or religion;
3. more than fifty per cent of the employees in the group are members of the organization seeking certification; and
4. the employer does not participate in the administration of the organization in such a way as would impair the fitness of the organization to represent the employee interests in the bargaining process.[4]

Following its certification, the bargaining agent has to specify the process for resolution of disputes it wants to follow, in the event that negotia-

[3] According to the present classification there are six occupational categories in the Canadian public service: Executive, Professional and Scientific, Technical, Administrative and Foreign Service, Administrative Support, and Operational. The Executive category does not come under the collective bargaining provisions of the Act. The Public Service Commission has the responsibility of specifying and defining the occupational groups in each of the five occupational categories that come under the collective bargaining provisions of the Act. So far, 72 occupational groups have been set up. These are:

28 occupational groups in the Professional and Scientific category;
13 in the Administrative and Foreign Service;
13 in the Technical category;
6 in the Administrative Support category;
12 in the Operational category.

[4] See Canada, Laws, Statutes, etc., *op. cit.*, sec. 39.

tions were unfruitful, i.e., either referral of the dispute to a conciliation board while retaining the right to strike under prescribed circumstances or referral to an arbitration tribunal for binding award. Regardless of which dispute settlement route is chosen, the Act requires that the choice must be made before collective bargaining can begin and it must remain in effect until it is altered prior to another round of bargaining.

When the dispute settlement route is that of referral to a conciliation board, prior to the establishment of a conciliation board, either party to the dispute may request the Public Service Staff Relations Board for the appointment of conciliator who will confer with the parties and assist them in reaching an agreement.[5] The conciliator can only offer suggestions. He cannot make binding directives. The conciliator has fourteen days from the date of his appointment, or such longer period as may be determined by the chairman of the PSSRB, to report his success or failure to the Board. The chairman of the PSSRB may refuse to appoint a conciliator if he is convinced that a conciliator would be unable to help the parties resolve their dispute. The request for the appointment of a conciliator, however, is not a mandatory requirement for the parties, and they may by-pass the conciliator step and proceed directly to the dispute settlement stage by a conciliation board. Under normal circumstances, the PSSRB chairman will establish conciliation boards without any hesitation. But after consultation with both parties, he may, however, decide not to appoint a conciliation board if he believes that it would not serve to bring about a settlement. If a request for a conciliation board is rejected by the PSSRB chairman, a strike may take place lawfully as soon as the parties are notified of the chairman's intention not to establish such a board.

The Act, however, stipulates that certain employees who are declared as "designated employees"[6] may not participate in a legal strike because they are considered indispensable for the safety and security of the public. Accordingly, no conciliation board shall be established until the parties have agreed on or the PSSRB has determined the employees or classes of employees in the bargaining unit whose services are essential to public safety and security. The Act also provides that, for the purpose of facilitating the specification by a bargaining agent of the dispute settlement process it wants to follow, the PSSRB can re-

[5] *Ibid.*, sec. 77.

[6] The designated employees are those "whose 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." See *ibid.*, sec. 79.

quire the employer to furnish a statement in writing of the employees or classes of employees in the bargaining unit whom the employer consider to be "designated employees." The statement or list may be challenged by the bargaining agents in such a case, the PSSRB makes the final decision.[7]

A conciliation board consists of three members. Each of the parties has to nominate one person to the board; these two members would then nominate a third person for appointment as chairman of the conciliation board. If any or all of these positions cannot be filled by the parties themselves, then the PSSRB chairman will make the necessary appointment. The conciliation board must submit its report within fourteen days after it has received its terms of reference unless otherwise extended by the PSSRB chairman or by agreement of the parties involved. The provisions of the conciliation board report can have the same subject matter as those of the arbitral award.

The report of a conciliation board is not binding on both parties unless they agree to the contrary in writing, before the conciliation board submits its report. They are free to accept or reject the report. If the report proves to be unacceptable, the employees have the right to declare a strike after seven days have elapsed following the receipt of the conciliation board report by the PSSRB chairman.

It must be mentioned, however, that the right to strike is not an unconditional one. First of all, it is extended only to those employees who are members of a bargaining unit that has selected conciliation as the route for resolving disputes. Secondly, as has been mentioned, a strike can be called only after the conciliation process has been fully exhausted. Thirdly, designated employees are not permitted to participate in a legal strike because they are considered vital for the safety and security of the public. Fourthly, no employee has the right to participate in a strike where a collective agreement applying to the bargaining unit in which he is included is in force. And fifthly, no employee organization has the right to declare a strike that would cause employees to participate in an unlawful strike, and the officers or representatives of such an organization are forbidden from counselling or procuring the declaration of such a strike.[8]

When the issues involved in the dispute are arbitrable and the bargaining agent has selected arbitration as the means of settling disputes, an arbitration tribunal is appointed to arbitrate upon the dispute. Arbitration tribunals are established by the Governor-in-Council upon recommendation of the PSSRB with an impartial chairman and two members appointed from panels of persons representing the interests of the employer and the employees respectively. According to sec. 70 (1) of the *Public*

[7] *Ibid.*, sec. 36.

[8] *Ibid.*, secs. 101-102.

Service Staff Relations Act, arbitrable issues are those that deal with rates of pay, hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto. The awards made by the tribunals are binding on both parties. In formulating its awards, the Arbitration Tribunal must be guided by the following considerations:

1. the needs of the public service for qualified employees;
2. the conditions of employment in similar occupations outside the public service, including such geographic, industrial or other variations as the Arbitration Tribunal may consider relevant;
3. the need to maintain appropriate relationships in the conditions of employment between different grade levels within an occupation and between occupations in the public service;
4. the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
5. any other factor that appears to be relevant to the matter in dispute.[9]

The *Public Service Staff Relations Act* is also unique in that as part of the collective bargaining system, it makes it mandatory for all departments to establish individually a grievance procedure that permits third party adjudication. The grievance procedure covers all employees including the managerial and confidential ones who are not permitted to belong to a bargaining unit. An employee can file a grievance on any matter that falls into any of the following categories: (1) where an employee feels himself to be aggrieved by the interpretation or application of a provision of a statute, regulation, by-law, or directive issued by the employer dealing with terms and conditions of his employment, or a provision of a collective agreement or an arbitral award; (2) any other occurrence or matter that affects his terms or conditions of employment for which there is no other administrative procedure for redress under any other Act of Parliament.[10]

There are various steps in the grievance procedure. Most grievances are settled internally. However, if an employee has exhausted his departmental remedies and his grievance has still

[9] *Ibid.*, sec. 68.

[10] See *Ibid.*, sec. 90. There are a few other important types of appeals in the public service that are covered by the *Public Service Employment Act*. They are appeals relating to:

1. appointment, including promotion;
2. demotion or release because of incompetence or incapability;
3. dismissal for violation of provisions of the *Public Service Employment Act* dealing with political activity;
4. revocation of appointment because of fraudulent practices during an examination conducted by the Commission. These appeals are handled by the Public Service Commission. For details, see Canada, Laws, Statutes, etc., *Public Service Employment Act*, 14-15-16 Eliz. 2, ch. 71 (secs. 5, 6, 21, 31 and 32).

not been dealt with to his satisfaction, he may refer the matter to adjudication by a single adjudicator or by an adjudication board.[11] Most cases submitted to adjudication are heard by boards of adjudication. The Governor-in-Council, on the recommendation of the PSSRB, appoints adjudicators, one of them being designated the Chief Adjudicator, who hear and adjudicate upon grievances referred to adjudication. An adjudication board is composed of three members, namely:

1. The Chief Adjudicator who is the chairman;
2. One member nominated by one party;
3. One member nominated by the other party.[12]

The adjudication decision is binding for both the employee and the employer. Adjudicators and adjudication boards, however, cannot render decisions which would contravene any article of an existing agreement or arbitral award or statutes.

Another noteworthy aspect of the *Public Service Staff Relations Act* is that it guarantees the political independence and neutrality of the Public Service Staff Relations Board, the body that is responsible for administering various provisions of the Act. The Board consists of a chairman, a vice-chairman, four members, representing the interests of the employees in the public service, and four members representing the interests of the employer. The chairman and the vice-chairman are appointed by the Governor-in-Council to hold office for ten years. During their tenure, they are removable only by the Governor-in-Council upon address of both Houses of Parliament. The major responsibilities of the Board include making regulations of general application on a variety of matters, such as representation issues, complaints, the hearing of questions of law and jurisdiction, the establishment of rules of procedure for its own hearings and for those of the Arbitration Tribunal and of adjudication boards, as well as certifying bargaining units, investigating complaints of alleged infringements of provisions of the Act, and deciding the lawfulness of strikes.

Ideally, the *Public Service Staff Relations Act* with its flexible and non-political provisions for dispute-settlement in the public service should have gone a long way in meeting the expectations of all parties to whom it is applicable. However, it is well known that in actual practice, the Act has failed so far to elicit the full support of the employees, the government and the public at large. The employee spokesmen have singled out and praised certain specific aspects of the Act as progressive and as in the best interests of the public service.[13] But

[11] See Canada, Laws, Statutes, etc., *Public Service Staff Relations Act,* 1967, sec. 91.

[12] *Ibid.,* sec. 93.

[13] For example, in an address to the Conference on Collective Bargaining in Public Employment at San Francisco on June 24, 1969, Mr. Claude Edwards, the President of the Public Service Alliance of

at the same time, they have been very critical of certain provisions of the Act which they consider as injurious to the cause of effective employee participation in the public service.

One important cause of employee dissatisfaction has been the major conditions of employment that are non-negotiable and non-arbitrable under the *Public Service Staff Relations Act.* Although such matters as job security, classification and super annuation do have profound impact on terms and conditions of employment, the Act denies the employees the right to negotiate on time.[14] The restrictions regarding subject matters which can be referred to arbitration are even greater. According to Sec. 70 of the Act, the subject matters that can be dealt with by Arbitration Tribunals are limited to rates of pay, hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto. In order to avoid any doubt as to the subjects with which an arbitral award shall not deal, sec. 70 of the Act further states that:

> No arbitral award shall deal with the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees, or with any term or condition of employment of employees that was not a subject of negotiation between the parties during the period before arbitration was requested in respect thereof.[15]

These two subsections of sec. 70 of the Act together spell three disadvantages for employees who resort to dispute settlement by arbitration. First of all, among the bargainable matters, only some are arbitrable. Secondly,

Canada, stated that the Public Service Alliance of Canada considered the following aspects of the Act as positive and praiseworthy:

1) The legislation applies to more than 200,000 employees of the Federal Government of Canada.
2) It guarantees the right of employees to join in organization of their choice and participate in the lawful activities of their organization.
3) It conveys exclusive bargaining rights to certified bargaining agents.
4) It provides for negotiations on wages, hours of work, leave entitlements, standards of discipline, and terms and conditions thereto.
5) It continues protections against discrimination and unfair labour practices.
6) It provides for a grievance procedure that permits third party adjudication.
7) It provides for two methods of dispute settlement at the option of the bargaining agent; arbitration with binding award or conciliation with the right to strike.
8) It is administered by a neutral non-political board composed of persons who are knowledgeable or expert in labor law.

See *Civil Service Review,* Vol. XLII, No. 1 (March 1969), p. 4.

[14] The Treasury Board has the sole right to classify positions, and assign duties in the public service. Sec. 7 of Canada, Laws, Statutes, etc., *Public Service Staff Relations Act,* 1967, 14-15-16 Eliz. 2, ch. 72 states that nothing in the Act shall be construed to affect the right or authority of the employer to determine the organization of the public service and to assign duties to and classify positions therein.

[15] See *Ibid.,* sec. 70 (1) and (3).

even if a subject matter is arbitrable, if it was overlooked originally as a subject of negotiation, the oversight cannot be rectified subsequently by placing the matter before the Arbitration Tribunal. And thirdly, although agreement may have been reached on a number of non-arbitrable issues prior to going before an Arbitration Tribunal, as soon as the employees take the arbitration route, the employer is free to withdraw their prior agreements.

It must be added here that the restrictions present on the scope of arbitration process are not merely theoretical. Ever since the Act came into being, the employees have repeatedly challenged many of these restrictions before the Arbitration Tribunals but with little success. The list of matters that have been ruled out for arbitration purpose from time to time is already a formidable one. It includes many important items such as: procedure governing appointments, appraisal, promotions, demotion and transfer of employees; lay-off procedures, restructuring and reclassification; joint consultation; restrictions on outside employment; contracting out; statement of duties; optional retiring leave; pay implementation and pay checks-issuance of retroactive pay checks; payment of overtime within a set time period; grievance procedure; suspension; related duties; definition of continuous employment; employee performance review; authorship and publications; retroactivity (i.e., earlier than date of award); crossing of picket lines; working accommodation; and membership fees.[16] As the employees see it, the denial of the right to negotiate and arbitrate these issues creates an intolerable imbalance in favor of the employer. Consequently, they have been petitioning the government that the scope of negotiable subject matters should be expanded to cover all employee-employer problems which could conceivably cause an impasse and that the existing distinction between bargainable and arbitrable issues must be erased.

A second major cause for employee dissatisfaction has been the exclusion of certain public servants from the provision of collective bargaining contained in the Public Service Staff Relations Act. The Act specifically excludes eight main classes of employees:

1) persons appointed to a statutory position by the Governor-in-Council under an Act of Parliament;
2) those locally engaged outside Canada,
3) persons whose compensation for the performance of the regular duties of their position or office consists of fees of office, or is related to the revenue of the office in which they are employed,
4) persons not working more than one-third of the normal period for persons doing similar work,
5) those who are members or special constables of the R.C.M.P., or who

[16] Collective Bargaining Branch of the Public Service Alliance of Canada, "Arbitration or Conciliation: Dispute Settlement Routes in the Public Service of Canada," *Civil Service Review*, Vol. XLV, No. 4 (December 1972), p. 16.

are employed by them, under the same conditions and terms as members,

6) persons employed on a casual or temporary basis, unless they have been employed for six months or more,
7) persons employed by or under the Public Service Staff Relations Board, and
8) members of the Armed Forces.[17]

Persons in managerial or confidential capacities may not engage in collective bargaining although they can resort to the grievance procedure. This includes a person who is:

a) employed in a position confidential to the Governor General to a Minister of the Crown, to a judge of the Supreme or Exchequer Court of Canada to a deputy head of a department, or to a chief executive officer of any other part of the Public Service,
b) employed as a legal officer in the Department of Justice,
c) who have executive duties in relation to the development and administration of government programs,
d) performing duties which include those of a personnel administrator, or who have duties that cause them to be directly involved in the process of collective bargaining on behalf of the employer,
e) required by reason of their responsibilities and duties to deal formally on behalf of the employer with a grievance presented in accordance with the grievance process provided by in this Act,
f) employed in a position confidential to any person described in (b), (c), (d), or (e) above,
g) not specified above, but who, in the opinion of the Public Service Staff Relations Board, should not be included in a bargaining unit by reason of their duties and responsibilities to the employer.[18]

A third aspect of the Act that has earned a great deal of employee displeasure has been its provisions regarding the establishment of bargaining units and certification process. The Act stipulates that the Public Service Commission must define and specify the occupational groups in each of the five occupational categories that are given collective bargaining rights and that the establishment of the bargaining units must be based on these occupational groups and not on the occupational categories. But according to employee spokesmen, if bargaining units were set up on the basis of occupational categories rather than occupational groups, it would have simplified their bargaining task enormously by enabling them to negotiate general contracts covering conditions of employment for each broad occupational category as such. Similarly, if certification of bargaining units was determined on the basis of majority membership in an occupational category rather than majority membership in an occupational group as the Act demands, it also would have been to the advantage of unions that had traditionally represented employees in the public service. It would have been relatively easier for them to enlist the necessary membership in each broad category as such and to

[17] See Canada, Laws, Statutes, etc., *Public Service Staff Relations Act, 1967,* sec. 2.

[18] *Ibid.*

obtain bargaining rights on their behalf. Accordingly, in the eyes of employee organizations, especially those that were already well established of the public service, the provision of seventy-two bargaining units imposes an unnecessary burden for them. It also causes delays and complicates certification proceedings due to the excessive proliferation of bargaining units, organizational strife and costly legal battles.[19]

A fourth element of the Act that has elicited employee protest relates to the point in time they have to exercise their option of the two different methods of dispute settlement it allows. Since the Act demands that the bargaining agent should specify the method of dispute settlement before the bargaining commences, and the method chosen will remain in effect until it is changed prior to the next round of bargaining, employee unions feel that it robs them of their maneuverability which is most essential for meaningful bargaining process and at the same time leaves considerable leverage for the employer. This is so because, when necessary, the employer can cause employee unions to accept less than their demands in non-arbitrable areas in order to avoid going to arbitration in other areas. It also permits the employer to force trade-offs in respect of non-arbitrable issues since he knows very well that if there are some non-arbitrable issues in dispute, none of which can be taken to arbitration, the employee unions have the option only either accepting the trade-offs demanded by the employer or dropping the issues entirely.[20]

The conciliation route with the right to strike is also not without its pitfalls. First of all, this option is denied to some bargaining units such as those of correctional officers, firefighters and hospital services because all or the majority of their members are designated employees. Secondly, many of those who legally possess the right to strike may also find that they cannot exercise it without risking serious consequences. For instance, a few bargaining units like the one for postal employees who number over 25,000, with no designated employees, located in one single department and whose strike could immediately inflict considerable inconvenience to the public, might find it relatively easy to launch an effective strike and close down the movement of mail, whereas many other bargaining units whose members are dispersed among departments and whose strike action may not immediately spell serious and visible disruption to public services might find it difficult to mount a successful legal strike.[21] Similarly, it is always unpredictable as to how long a strike will last or how successful it will be. At any rate, in the case of unions that

[19] For example, see Edwards, *op. cit.*, p. 8.

[20] Collective Bargaining Branch of the Public Service Alliance of Canada, *op. cit.*, p. 18.

[21] Edwards, *op. cit.*, p. 14.

are economically poor and whose members are unable to afford even a temporary disrupting of their income, their real strike power is of questionable nature. Besides, to a large number of public servants, the whole idea of the strike as a means of obtaining a just settlement of their disputes with the government may be somewhat repugnant and of doubtful value. This is so because they may recognize that their strike could inconvenience the public and that ultimately, devoid of public support, they could face the prospect of restrictive legislation by the government that could deny them not only the right to strike, but even the basic right to collective bargaining itself. Under these circumstances, most employee associations might consider that a negotiated settlement is far more preferable and easy to live with than a settlement reached through the strike route.[22]

This view seems to have been vindicated by the fact that of 81 bargaining units certified between 1967 and 1972, only 18 opted for the conciliation board method and the right to strike as a means of dispute settlement. Of 218 collective agreements signed during this period, all but 5 were settled without a legal strike.[23] Although all of these strikes, one by the seaway men, two by postal workers, one by the air traffic controllers and one by CBC technicians, had a telling impact on the public, perhaps it is still safe to say that the availability of the right to strike has not so far seriously jeopardized the collective bargaining process in the public service.

However, it is ironic that while the employee unions have been complaining that the *Public Service Staff Relations Act* has stacked the cards against them, the public resentment, arising from the inconvenience caused by strikes and excessive wage settlements (or what are said to be excessive) has been giving rise to political pressures that threaten the preservation of the present system. In response to public resentment, some parliamentarians also have been urging the government to adopt a hard-line approach against the public service unions, including, if necessary, the withdrawal of the right to strike. The public, as Professor Carrothers has correctly pointed out, has developed

> a growing disaffection with work stoppages in the public sector . . . . That means disaffection with the right to strike . . . In increasing numbers of cases the withdrawal of services is exercised not against the prevailing or the countervailing power but against the public . . . When the public interest appears to be victimized, private citizens are much more prone to conclude that they are being prejudiced by cynical manipulation and will urge a change in the system to provide the

22 *Ibid.*, p. 14.

23 Wilfred List, "Government Bargaining Felt Lacking Capable Negotiators with Authority," *Globe and Mail,* December 29, 1972, p. B2; also see "Carefully Chosen Figures," (Editorial) *Globe and Mail,* May 8, 1972.

protection to which they feel they are entitled.[24]

The government is obviously facing a serious dilemma. It is caught between the conflicting demands of the public for uninterrupted maintenance of public services and that of its employees for expansion of their collective bargaining rights including a widening of the scope of arbitration to make bargainable and arbitrable subjects the same. Perhaps, it is waiting for the most propitious moment at which it would be possible, without much outcry, to abolish the right of public servants to strike. But it has at the same time promised, though not yet passed, legislation that might widen the scope of bargaining rights of the public service.[25]

At the time of assuming office in 1968, Prime Minister Trudeau had made it clear that he did not believe that strikes should be permitted in the public sector of the economy because the balance of competing forces that functioned in the private sector did not function in the public sector. As the rotating strikes by the postmen were in progress in 1970, he reiterated this view and added that:

> the government could always pay from the pockets of the tax payers and particularly the poor, unprotected and unorganized part of the public . . . The unions must realize that they are building up a case to take the right to strike away from them . . . If the result is disruption of a basic commodity, then we will have to take the right to strike away from them.[26]

However, in 1971, as a result of public service pressures for amendments to the *Public Service Staff Relations Act*, his government established a committee known as the Bryden Committee to propose recommendations for amendment to the bargaining legislation. But although it is over two years now since the Committee submitted its report, the government has not yet made the report public.

Without attempting to anticipate what the government is likely to do to make the collective bargaining process in the public service more acceptable to the employees, the public, and itself, it may be stated here that in the view of the present author, overreacting to strikes and abolishing the right to strike will not solve the problem at all. It would be pointless to assume that a withdrawal of the right to strike from those who already possess it and a legal ban against it where it has not yet been granted would automatically guarantee a cessation of work stoppages in the public service. Indeed, there could still be illegal strikes. It is worth recalling that even

[24] Lifted from A.W.R. Carrothers' speech at the 1973 Outlook Conference of the Conference Board in Canada, Montreal, and noted in Harvey Shepherd, "Danger Noted in State Bargaining Control," *Globe and Mail*, October 27, 1972, p. B4.

[25] See Prime Minister Trudeau's letter to the President of the Public Service Alliance of Canada, *Argus Journal* (October 1972), p. 4.

[26] See (Editorial) *Globe and Mail*, September 5, 1970.

before the granting of the right to strike, there were strikes in the public service. Therefore, what we need today is, as Professor Carrothers says:

> . . . credibility in the system, the recognition of collective bargaining as an economic and social phenomenon with legitimate but limited political and psychological components, a recognition of cultural differences, and that kind of tolerance that comes with the acceptance of responsibility . . . If the alternative must be state control . . . then collective bargaining and the right to strike will be obsolete. In that event, so will private enterprise.[27]

But this is not enough. Besides striving to preserve the credibility in the collective bargaining system, consideration must also be given to the need for legislative amendments to the *Public Service Staff Relations Act* and other related legislation to make collective bargaining processes fully workable and acceptable to all parties concerned. It goes without saying that to make collective bargaining work effectively, the strength of the employer and employees must be more or less equal. If one is definitely stronger than the other, real bargaining will be impossible. In order to minimize the danger of the employer dictating settlements, the following steps seem worthy of implementation. First of all, the scope of collective bargaining must be widened to include all matters relating to conditions of employment that are of concern to employees. The existing legislation which denies them the right to negotiate such items as job security, classification, promotion, and other personnel movements goes only half-way to curb the appetite that some employees might have for work stoppages or strikes in the public service. It must be remembered here that the labor relations legislation which governs the private sector, including the federal *Industrial Relations and Disputes Investigation Act*, imposes no such arbitrary limitation on the conditions of employment which can be made subject to collective bargaining. It goes without saying that the public servants should have terms and conditions of employment comparable with the best terms and conditions obtained by employees in the private sector.

Secondly, the present system of arbitration which limits the number of matters that can be dealt with by the Arbitration Tribunals must be revamped to make it more attractive to all employees, and particularly those groups for whom the strike route is either unavailable or unpalatable. This may be best accomplished by amending sec. 70 of the *Public Service Staff Relations Act* to enable the Arbitration Tribunal to make an award in respect of any matter which is negotiable.

Thirdly, it is most essential that both the government and the employees make sincere attempts to reach agreement during the initial negotiation itself without recourse to the full dispute settlement machinery. It is

[27] Carrothers, *op. cit.*, p. B. 4.

worth noting that many labor relations experts have claimed that their experience with arbitration as the ultimate step in a dispute settlement process leads them to believe that the parties spend more time preparing for arbitration than they do in negotiations at the bargaining table. Especially in the case of the public service it is conceivable that the employer may not want to make all his concession at the bargaining table itself because the general public might criticize the government for such a negotiated settlement. On the contrary, if disputes are referred to an Arbitration Tribunal, the employer can easily deny responsibility for a decision which might be unpopular to the public at large.[28]

Fourthly, adequate steps must be taken to eliminate the enormous time lapses which have become so characteristic of arbitral awards today. As the Public Service Alliance of Canada pointed out in its brief to the Bryden Committee, a delay of more than six months in the rendering of arbitral awards has not been uncommon. When such delay usually occur over and above the many months of protracted collective bargaining that precedes the arbitration stage, it is obvious that the employees who opt for arbitration are subject to an unnecessary handicap in comparison with their counterparts who choose the conciliation-strike route.[29] There is further injustice when the Treasury Board fails to act upon the arbitration awards within the specified ninety-day period.[30] At present, the employer can be found guilty of a charge of failing to comply with the Act; but the *Public Service Staff Relations Act* does not provide for any penalty against the employer, although there is provision for penalties against employees and unions who contravene the legislation.[31] Here again, the best solution to the problem may be to amend the Act to provide for a time limit within which the Arbitration Tribunal must render a decision and a penalty against the employer if he flouts this requirement.

Fifthly, it has been noted by many seemingly impartial observers that a lack of experienced and capable ne-

28 Collective Bargaining Branch of the Public Service Alliance of Canada, *op. cit.*, p. 18.

29 See "Changes in Bargaining Legislation Sought by Professional Institute of the Public Service of Canada," *Globe and Mail* April 28, 1971, p. 2.

30 See Canada, Laws, Statutes, etc., *Public Service Staff Relations Act, 1967*, sec. 74.

31 For example, see *ibid.*, sec. 104. In 1970 the Public Service Staff Relations Board, in a ruling issued against the Public Service Alliance of Canada in its bid to win damages from the government for delays in payment of retroactive cheques to more than 5,200 employees in the Engineering and Scientific Support group, held that the government had failed to comply with the *Public Service Staff Relations Act*. But the Board said that in the absence of specific statutory provisions, it had no inherent authority to award damages in such circumstances.

gotiators with authority to make a final decision on the spot is almost always a serious problem in government bargaining with public service unions. Frequently, when it comes to crucial decision-making, decisions may have to be made at the cabinet level rather than at the bargaining table which means that government negotiating committees require constant recourse to the political authority for which they are simply spokesmen. Such lack of authority at the bargaining table can only lead to inconclusive and drawn-out negotiations with resultant build-up of employee frustrations. To help relieve the situation, the government must delegate sufficient authority to its negotiators not only to reach agreements with union negotiators, but also to inspire confidence in the union negotiators that they have the authority to do so. Or else, as McGill University economist Mrs. Shirley E. Goldenberg has suggested, the cabinet ministers themselves may have to come to the bargaining table.[32]

But negotiations in the public service would not be made easier by merely granting more collective bargaining rights to the employee unions. The employee unions must also resist the temptation to raise extravagant expectations among its membership and cease making unconscionable demands that are socially unjust and economically unrealistic. Although they might argue that they are merely acting in accordance with the formal rules of the game, as Prime Minister Trudeau has reminded them many times in the past, they have to remember that most of the rules which govern bargaining between private industry and its employees cannot apply to bargaining between the government and its employees. Unlike private industry, the government and the public servants are not disciplined by the realities of the market place. In private industry, the employees can close the plant by their strike, but an employer cannot be forced to give what he does not have. If the employees succeed in exacting an excessive settlement, the employer with finite resources would conceivably go broke. This is an automatic check on the union's power which is inherent in a free market economy, whereas in the case of the government, there is virtually no possibility that it can go broke, however much it may yield to its employees. The government's pocket may be viewed as bottomless as long as it can be refilled by the taxpayers. The government does not pay its employees out of its own pocket; it pays out of the pockets of the public. Besides, when government employees strike against the government, the government as an employer is seldom seriously hurt. It is the public that is hurt. Therefore, it is morally as well as socially unjust for employee unions to go on demanding without discipline more and more in terms of their wages and benefits and to unnecessarily withhold services

[32] For similar views, also see, John Schreiner, "Why Strikes Erupt in Public Service Unions," *Financial Post*, December 23, 1972, p. 1

from the public that is unrepresented at the bargaining table.[33]

Finally, the public must also be sensitive and sympathetic to the growing aspirations of its employees. Incensed by the inconveniences and economic losses resulting from militant action on the part of some public servants, it should not rush to the conclusion that revocation of the right to strike is the best way to end disputes in the public service. Instead, it must recognize that by turning the clock back in a hurry, it might invite more disputes and defiance than otherwise would be the case. What is needed at present is the cultivation of a constructive relationship between the employer, the employees and the public at large. Without such a foundation, there can be no hope for successful functioning of any form of participation by public servants in their management and, least of all, the system of collective bargaining.

33 See "Canadian Beads on a Broken String," (Editorial) *Globe and Mail*, January 26, 1972.