THE PUBLIC INTEREST IN COLLECTIVE BARGAINING: AN ANALYSIS OF THE CHANGING ROLE OF THE GOVERNMENT

by

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B.Sc., University of British Columbia, 1965

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF BUSINESS ADMINISTRATION

in the Department

of

COMMERCE AND BUSINESS ADMINISTRATION

We accept this thesis as conforming to the
required standard

THE UNIVERSITY OF BRITISH COLUMBIA

April, 1969

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ABSTRACT

Problem

This thesis attempts to determine if the Canadian federal and provincial governments are increasing their assertion of the public interest in the collective bargaining process. The primary concern is to determine to what extent the government, through its new labour legislation will be able to affect the quality of collective agreements. The quality of collective agreements can be affected directly through arbitration or can be affected indirectly by influencing the power positions of the negotiating parties.

Method of Investigation

The first problem which is tackled is the definition of the public interest. The public interest is a term now being used in labour legislation, for which a precise definition is not easily derived. A literature analysis is undertaken to develop a conceptual framework of the public interest.

Since this is an investigation of the changing role of the government, it is necessary to establish the traditional role of the government in the collective bargaining process. This is accomplished by examining less recent government legislation as well as case studies of the applications of the U.S. Taft-Hartley Act.

The public employees of Canada and the United States are treated as a special case. Recent legislative developments in

both countries have resulted in federal public servants to become active in collective bargaining. These recent developments consist in Canada of the Public Service Staff Relations Act, and in the United States of the Executive Order 10899.

The new developments in provincial labour legislation consist of B.C.'s Bill 33, Saskatchewan's Essential Services Emergency Act, and Ontario's Rand Royal Commission Report. These two Acts and the Royal Commission Report are analyzed critically for their potential effect upon the collective bargaining process.

Conclusions

The literature analysis of the public interest reveals that there is no universally acceptable definition of the public interest. The public interest can only be meaningfully used within a situational framework. In other words, the concept is capable of definition only within a specific situation. Despite the fact that the concept is not likely ever to be universally defined, it will undoubtedly continue to be widely used.

The policy of the Canadian federal and provincial governments regarding collective bargaining has traditionally been to assist the parties to come to an agreement. The role of the government has not been one of interference. It has consisted solely of facilitating agreements by postponing work stoppages and by providing mediators. Although the effectiveness of these measures can be questioned, the intent is quite clear.

The recent provincial legislation seems to reinforce the proposition that the strike is an undesirable form of social conflict. It is felt to be undesirable in the sense that the legislation encourages the parties to collective negotiations to settle their dispute without resorting to work stoppages. At the same time, it recognizes that the threat of a work stoppage is part of the collective bargaining process.

The new legislation formalizes the concept that there are certain kinds of collective bargaining relationships which are heavily endowed with the public interest. Whereas government activity in these kinds of disputes had occurred on an ad hoc basis in the past, the Rand Report, B.C.'s Bill 33, and the Saskatchewan legislation established mechanisms which will provide for the assertion of the public interest in extraordinary labour disputes. In some cases, and where the parties cannot come to an agreement without resorting to a work stoppage, the new legislation will provide an agency or mechanism through which the government can submit the dispute to compulsory arbitration.

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CHAPTER I

INTRODUCTION

Recent legislation in British Columbia and Saskatchewan, as well as legislative proposals in Ontario, have sparked interest and controversy in the concept of the public interest as it applies to the collective bargaining process. The public interest is not a new concept; Plato and Aristotle spoke of it, and so did Adam Smith even though he called it the "commonweal". The assertion of the public interest in the collective bargaining process is relatively recent, however.

When a study is made which involves the public interest, two as yet unanswered questions always crop up:

1. Who should determine the public interest?,
2. How should the public interest be determined?

Many scholars have attempted to answer these two questions; those searching for eternal truths have all failed to produce a universal definition of the public interest. The answers to these questions are inevitably value laden because of the very nature of the questions themselves.

A far less value laden approach to the public interest is to attempt to answer the question:

> "Who has asserted the public interest, and under what circumstances?"

This kind of approach does not stray into the area of value judgements but presents a pragmatic approach to the public interest. It suffers from the deficiency that it does not present a guide for the future application of the public interest. It

has the advantage that the public interest can thereby be defined in terms of legislation and precedents.

The public interest in collective bargaining could also be called the public's interest. In other words, it represents the interests of the party not directly represented during the collective bargaining sessions. Collective bargaining is, for the most part, a confrontation and eventual accommodation of two self interests. Consequently, the public interest is asserted by forces operating outside of the collective bargaining process. These external forces consist of social sanctions and legal sanctions. It is upon these legal or more formal sanctions that this thesis will focus its attention.

A. Purpose:

The purpose of this thesis is to examine whether recent government legislation and legislative proposals represent a new interpretation by the government of what constitutes the public interest. First of all, it will be necessary to determine the traditional nature of the public interest in collective bargaining. Secondly, by analyzing new legislation and a proposal for new legislation, it will be possible to determine what, if any changes have taken place in the nature of the public interest in collective bargaining.

B. Data:

1. The Public Interest as an Abstract Concept

A survey of the literature will be made to find at least a theoretically acceptable concept of the public interest. If the public interest cannot be defined as a general concept,

then it will be related to concepts which can be more easily and specifically dealt with and which relate to the collective bargaining process.

2. The Traditional Role of the Government

The traditional role of the government in the collective bargaining process can be determined by analyzing past federal and provincial legislation. The provincial legislation by and large follows the pattern of the federal laws governing collective bargaining. Emphasis will therefore be placed upon analyzing the federal government's activities in the collective bargaining process.

3. The United States National Emergency Disputes

No analysis of the role of the public interest in collective bargaining can be complete without including a brief description of the American experience under the Taft Hartley emergency dispute provisions. The Taft-Hartley Act has provided the bulk of the case histories related to public interest disputes. From historical data provided by the only available indexed source, The New York Times, case histories will be pieced together of several national emergency disputes. It is expected that the American experience will reveal whether the public interest is an economic, a social, or a political concept or whether the public interest is a combination of these concepts.

4. Federal Public Employment

Two public service collective bargaining systems are briefly described. The data for the U.S.system was obtained from the Executive Order 10988 which created it. The data for

the Canadian system of collective bargaining was obtained from the Heeney Report and from the Public Service Staff Relations Act which encompasses not only the Heeney Report's recommendations but also implications not covered in the Report.

The public employees' collective bargaining system appears to deserve separate attention primarily because of the inherently special status of the government employer. Only the Canadian and American federal approaches will be examined in detail.

5. The Rand Report, Bill 33, and the Saskatchewan Essential Services Act

The analysis on these three pieces of legislation was reasonably simple and straightforward. Neither Bill 33 nor the Saskatchewan legislation have been operating long enough to include examples of application. The Rand report was only released in August of 1968, and, although it does contain recommendations for legislation, the recommendations have not yet been acted upon. The analysis for these three items of legislation focussed upon two aspects of government activity:

(i) attempts to influence the content of collective agreements

(ii) attempts to influence the power positions of the disputants.

CHAPTER II

DEFINING THE PUBLIC INTEREST

A. General

As far back as Adam Smith's use of the term commonweal, man has never been able to properly define the nature of the "public interest". This thesis attempts just such a definition despite the generations of recognized scholars who have failed in similar attempts. The problems of definition of the public interest (or commonweal) arise when an attempt is made to find an all encompassing, universal definition capable of withstanding the changes in social structure brought about by the passage of time. Many scholars have devoted considerable energy to defining this elusive term "public interest". Few have succeeded in defining the term in even the most general terms.

The scholars can choose between two positions. Those in search of precise definitions and not willing to settle for anything "less" can quit in frustration and suggest that scholars would better spend their time in the analysis of concepts likely to lead to concrete and useful results. Others, despite being equally frustrated, can refuse to abandon the study of the concept, merely because it has eluded precise definition. They can chose to live with the present use of the term rather than deny that it plays any useful role in our society. More complete arguments for these two positions will be examined subsequently in this chapter.

Ideally, a perfect definition of the public interest would be an abstract concept capable of being applied to all

phases of private-public interaction. It would lighten the burden of decision makers in the fields of economic planning, legislative and judiciary activity, and social planning as well as assist various regulatory agencies in their policy formulations. Ideally a single definition would enable us to "prove" that:

1. counter cyclical fiscal measures are required whenever unemployment reaches the 4 percent level
2. zoning regulations are necessary to protect aesthetic interests
3. certain regulatory agencies are needed to administer certain government policies
4. certain strikes in the private sector of the economy require government intervention

No such precise definition of this elusive concept occurs however. Despite this lack of definition, both the judiciary and the legislatures have felt it necessary to attach to certain of their policies and decisions a certain quality of "public interest." This quality has been presented under various names all more or less synonimous--if not quantitatively then certainly qualitatively. In the United States, for example, the Taft-Hartley Act speaks of "The Public Health and Safety," while Saskatchewan's Essential Services Emergency Act of 1966 prescribes certain actions to be taken in the "public interest". In British Columbia, as recently as 1968, wide sweeping powers were granted to a regulatory agency to act in "the public interest."

"Public interest" policies are not exclusive to the field of labour relations. Anti-trust legislation has existed in Canada since 1889 [Anti Combines Act] and in the United States since 1890 [the Sherman Act]. Both these acts expressed the public interest by regulating the relationship between businesses themselves as well as between businesses and the public.

B. The Validity of the Public Interest Concept

A question comes to mind in relation to the definitional problem of this "public interest" phrase. If this phrase has so far defied precise definition why not abandon its use and related attempts to define it? There are two schools of thought in answer to this question. One group is sceptical of the term itself, of the people who use it to justify their policy decisions, and of the people who continue in their attempts to define it. The other group of scholars are simply reacting to the reality of the situation. They argue that as long as this notorious descriptive phrase "in the public interest" is being used then scholars have no choice but to be concerned with its use and meaning.

Frank J. Sorauf(1) expresses his frustration with the fact that nearly every political decision has been justified by labelling it "in the public interest." He complains that it means one thing one day and the complete opposite in another situation. He concludes his discussion with the observation that since the public interest has eluded precise scholarly definition "to argue that what is not good enough for the scholar

should suit the politician does little to further the effective political dialogue which our democratic politics presumes."[2] Sorauf describes his perceptions of the public interest in a fashion which deserves quoting here. "In much of contemporary usage, public interest means an interest possessed by (and, presumably at least dimly perceived by) 'the public' or some segment of it; in this sense it is a real, empirically identifiable interest. And at the same time it refers to a goal in the interest of the public, whether or not that public is or is not sufficiently enlightened to grasp it."[3] In a less loaded fashion he finds that the phrase "in the public interest" has come to mean some criterion or desideratum by which public policy may be measured, some goal which policy ought ideally to pursue and attain."

Essentially what Mr. Sorauf is sceptical about is the lack of definition of what goals are to be pursued and who is to set these goals. He does not seem to deny the existence of a public interest but merely its operational usefulness.

Glendon Schubert has made a very thorough analysis of the philosophies of public interest.[4] He sums up his opinion of the term "public interest" by concluding that "the public interest concept makes no operational sense, notwithstanding the efforts of a generation of capable scholars"[5] and that "political scientists might better spend their time nurturing concepts that offer greater promise of becoming useful tools in the scientific study of political responsibility."[6] He criticizes the use of the public interest concept because it neither adds

to nor subtracts from the theory and methods otherwise presently available for analyzing political behavior.

Schubert does not deny the existence of a public interest nor the frequent use made by politicians of the phrase. He simply questions the wisdom of so many scholars chasing fruitlessly after an all encompassing definition for this public interest concept when all of these searches have ended up in failure. Schubert does, however, admit that there have been many definitions of the public interest put forward, but that all of these definitions have been oriented towards particular circumstances, not toward universal situations.

Sorauf and Schubert have taken the stand that because the public interest is a vague concept it should be dropped from the vocabulary of politicians and that scholars too would be better to work on more useful concepts.

J.R. Pennock, Gerhard Colm, and C.W. Cassinelli have taken another position which is: as long as the term is being used, scholars should continue to seek to determine how the term is being used and what meaning(s) it is intended to convey.

J.R. Pennock(7) feels that there is no doubt that the public interest is a vague concept. He nevertheless feels that it has some validity. He draws a parallel between the term "public interest" and the word beauty, both being almost impossible to define in precise terms for all cases. He makes the point that both, although being vague in the abstract sense, lose a great deal of this vagueness when applied to specific circumstances. Both words are intended to convey a certain quality to

whatever it is they describe. He points out that students of esthetics are in notorious disagreement as to what constitutes beauty. Yet much of this disagreement disappears when the terms are placed in a situational concept.

Pennock maintains the usefulness of such a term as public interest. "It is a reminder that private rights are not exhaustive of the public interest."(8) In other words, he feels that there is a kind of synergistic quality about the public interest, or that it is greater than simply the sum of individual self interests. "A term that plays this role even though it lacks precision is as valuable as it is inescapable. Moreover, in many particular applications, the context of the situation gives the phrase greater definition. For such uses it has the special virtue that it serves as a receptacle for accumulating standards."(9)

Gerhard Colm(10) is even more positive about the desirability of using the term "in the public interest." He admits that denying the term any genuine meaning has both methodological appeal to the theorists in political science and is welcomed by all who are tired of hearing the word bandied about by those who make pretenses to idealism while in reality they are advocating particular interests. Nevertheless, Colm argues "that we deal more adequately with problems of economic and social policies, public finance, and judicial procedures if we face up squarely to the meaning of the term public interest than if we deny this concept or let it in only by the back door."(11)

Colm maintains that politicians, statemen, judges and those concerned with the formulation of government policies simply could not do without this "vague, impalpable but all controlling consideration, the public interest."(12) Colm further argues that the term loses much of its vagueness as a result of political debates, judicial interpretations and translations into specific goals of economic performance and achievement.

C.W. Cassinelli(13) also looks upon the public interest as a necessary tool of the policy maker. He scoffs at the claim that the concept is useless as a tool of analysis or an aid to scientific study and that therefore it should be abandoned from usage. "This statement is quite irrelevant. The public interest as an ethical concept has functions quite different from those of analytic models."(14) ..."The public interest is the highest ethical standard applicable to political affairs."(15)

Cassinelli claims that the ethical standard of the public interest can be applied to all phenomena relevant to public policies, despite its apparent vagueness. He admits that "the phrase itself is expendable; even though men of political affairs continue to use it,it could disappear from scholarly prose with no effect whatsoever on the existence and significance of the idea to which it refers."(16) He goes on to argue that we cannot escape from this kind of ethical standard. "The simple fact that men distinguish between good and bad obliges us to think and write about problems of ethics, and the ultimate goals

of political life are unquestionably among the most important of these problems."(17)

Despite the views of those whom I have chosen to call the sceptics: those who propose dropping the word from current usage, there is agreement on the following points:

1. The phrase "the public interest" is in current usage as an inescapable fact of political life.
2. The phrase does lack definition in a precise universal sense.
3. It may be easier to define for specific situations.

C. Two Typologies of the Public Interest

The concept of the public interest is heavily involved in philosophical and ethical value systems. In order to have a better conception of how value systems affect the public interest and hence public policy, a brief analysis will be made of the different kinds of roles assigned to public policy. Public policy is invariably the result of a philosophical or ethical set of values.

A brief description of two typologies of the public interest will be undertaken. The first typology is one undertaken by Niemeyer and splits up the various theories in terms of the relationship between private utility and the public interest. The second and somewhat less appealing typology is proposed by Schubert. It is based on W.A.R. Leys typology and concentrates on the functions of public officials.

1. Niemeyer's Typology

Niemeyer's Typology[19] compares four concepts of the public interest as exemplified by the philosophies of 1) Plato and Aristotle, 2) Augustine and Aquinas, 3) Locke, Adam Smith, and J.S. Mill, and 4) Marx and Lenin.

Plato and Aristotle believed that a government should be run by guardians of the public interest who would themselves have no private interests either in the distribution of goods or in the economic welfare of the community. Material production, under this system, is relegated to the sphere of private individual concerns. A government "is not an arrangement for the purpose of communal labour but rather for the philosophical rule of the community."[20] The guardians (or the government) of the community are divested of material possessions in order to divest them of material concerns.

Plato and Aristotle felt that there was a rational element in man's soul and that this element was divine in character. The guardians (philosopher-Kings?) of the community would express this divine element; and, having been relieved of material concerns, these guardians would therefore express views not related to private interests but to the "public interest."

The second grouping of philosophies is characterized by the writings of Augustine and Aquinas. This is sometimes referred to as the Catholic ethic. For Augustine and Aquinas man's destiny was now perceived as the salvation of his individual soul. Accordingly the activities of political governments were restricted to peace order and a minimal justice. "Function-

ally speaking an entire realm of human life was staked off in which governments must not interfere: the realm of the salvation of souls."(21) "Hierarchically speaking, government was limited by the higher authority of 'natural law' to which human law ought to defer."

According to the logic expressed in this philosophy, "The right ordering of individual lives was the criterion common to the sphere of the public interest, the ecclesiastical sphere, and the private sphere. The overall purpose of salvation created order overlapping the three spheres: it invented moral rules for private economic activities, drove individual rulers to public acts of personal penitence and produced such hybrid phenomena as the Inquisition with its mixture of concern for public order and concern for individual salvation."(22)

The third philosophy of the public interest is characterized by the writings of Locke, Smith and Mill. For them, the political community was intended to promote men's individual needs and aspirations. Civil society for Locke existed for the sake of private utility. Locke felt that the possession of property was the chief reason for men uniting to form societies.

Adam Smith added the concept of the "Invisible Hand." He suggested that it was the task of society as a whole to establish a framework of laws such that any individual in pursuing his own self interest would be "led by an invisible hand to promote an end which was no part of his intention . . . By pursuing his self interest man frequently promotes that of society more effectively than when he really intends to promote it."(23)

Government activity was to be restricted to creating a realm of private initiative and aspiration.

Government's activities were limited by "the natural order of "society;" the self adjusting and self equilibrating system of private activities to which public laws ought to defer"[24] (the free market forces). Consumer satisfaction was the criterion common to the sphere of government and the sphere of the invisible hand and it provided the substance of the standards of judgement: 'good government,' 'efficient economy.'

Theoretically this philosophy suggests that government activity is supposed to defer to the 'natural order' of self adjusting private activities. In practice however, this natural order of economic private activities has lead to 1) breakdowns in the economic system, 2) undesirable results, 3) failure to provide and ensure individual satisfaction. In these three cases "governments in the name of public utility have taken the invisible hand under public management."[25] Public utility therefore is the goal of government hence it is even possible to argue that the public interest (when motivated by Public utility) can point in socialistic directions.

Niemeyer points out reassuringly that "retention of private property rights is not wholly incompatible with public direction or regulation of large scale industries."[26] In any case if we have socialism in the West today, "it is then one of the varieties of a liberal order that assigns to the public interest the task of satisfying private aspirations."[27]

The last philosophy of the public interest is represented by Marx and Lenin. In the pure sense,private property no longer exists and material production is no longer entrusted to the individuals. "The social order is thus essentially the order of collective labour and its management . . . For the future society, the first society that will be fully human, Marx defines the public interest as that of labour management."(28)

Lenin(29)has added a refinement to the ideas of Marx, predicting a period of struggle to bring about this ideal society; he speaks of a "protracted struggle" lasting perhaps several lifetimes. From Lenin's ideas have "emerged a peculiar type of public interest, the type of interest that is connected with the idea of a combat government"(30) (a government whose purpose seems to be the fight against forces holding back the transition to the ideal marxian society).

2. Schubert's Typology

Schubert(31) developed his typology based upon an investigation of the writings of political science theorists since the 1930's. He classifies his ideas into three broad groups 1) Rationalists; 2) Idealists; 3) Realists.

The rationalists according to Schubert "envisage a political system in which the norms are all given insofar as public officials are concerned . . . The function therefore of government and bureaucratic officials is to translate the given norms into specific rules of government action."(32) The rationalists all agree that public policy should promote the common good which reflects the presumed existence of various

common - frequently majoritarian - interests. The theory offers no guidance in determining the precise nature of the public or common interests.

Schubert's second category is that of the idealists. He sums up their ideas of the public interest as follows: "The public interest is what the elite thinks is good for the masses."(33) Idealists apparently conceive of the decision making process as "requiring the exercise of authority in order to engage in social planning by clarifying a vague criterion"(34) (the public interest). Complete reliance is placed upon the moral and ethical preconditioning of the individual decision maker. The problem with this philosophy is that there is no guarantee that the tyrants will remain benevolent.

Realists are Schubert's last classification. These theorists state that "the function of public officials is to engage in the political mediation of disputes (between competing interested groups); the goals of public policy are specific but in conflict." Hence the public interest is derived from the resolution or compromise of conflicting goals.

Whereas Niemeyer makes his classifications of public interest theories on the basis of different philosophies or social goals, Schubert, on the other hand bases his classification on a more mechanistic level: who is to interpret and apply the public interest? It might therefore appear that any definition of the public interest might have to be made in terms of goals or social values and in terms of implementation of these same goals or social values.

D. Finding A Common Thread

Despite the difficulties encountered in constructing a single definition of the public interest a brief survey of past scholarly definitions could still reveal some common ground. Schubert and Niemeyer both concentrated on the differences between uses, and meanings of the public interest. A brief survey of present opinion of the meaning of the public interest could still reveal a common thread as to what constitutes the public interest.

Wayne A.R. Leys(36) considered the public interest a set of criteria for putting a value judgement upon public policy. He feels that public policy should:

"1) maximize interest satisfaction (utility)

2) be determined by due process

3) be motivated by a desire to avoid destructive social conflict"(37)

Leys admits that seldom will it be possible to find alternatives which will satisfy all three of these conditions.

John D. Montgomery(38) finds the term itself impossible to define accurately, yet as a concept, the public interest is of overwhelming importance. Montgomery feels that the public interest offers, to the Western mind at least the ultimate ethical justification for demanding the sacrifices which the individual may be called upon to make in the interests of the state, and it prescribes certain of the ultimate goals of organized society."(39)

Edgar Bodenheimer has suggested that the public interest represents something quite distinct from individual self interest. "The public interest approach looks primarily to the social constituent in man . . . aware of the fact that he does not live alone in this world but must adapt his behavior to the interests of others and the good of the whole."(40) In this connection Walter Lipman defined the public interest as being "what men in the end would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently."(41) Both these definitions appeal to man's social instincts.

J.R. Pennock feels that the use of the public interest in legislation is necessary. He feels that a definition of the public interest is essentially a situational concern and will vary from time to time and from place to place. He feels that the role of the legislature can often be quite effective by simply delegating its authority to an administrative agency to administer in accordance with the public interest. In doing this, Pennock claims that the legislature "is providing the means for applying a dynamic and increasingly precise policy based on experience (and) continuing contact with special interests"(42) and special social and economic conditions.

Julius Cohen, a lawyer, breaks up the public interest into two separate and distinct factors. The first factor is that the public interest represents the basic community values or goals. The second factor is an instrumental one "a policy would be in the public interest if its consequences would implement one or more of the established basic values of the community."(43)

David Braybrook[44] speaks of the public interest in terms of social goals and public policies. He finds that it is difficult if not impossible to deal with all problems with the same concept of the public interest. He deals with more or less "obvious" examples and finds that the public interest really differs from situation to situation. His conclusion is that definitions of the public interest are largely situational ones not necessarily applicable in any two, however similar, sets of circumstances.

The use of the public interest concept appeals to Gerhard Colm[45] principally because it escapes precise universal description. He conceives the "public interest" concept as being the bridge between public policies and social values. The public interest serves to justify both the means and the ends of public policies.

R.A. Musgrove has contributed a generally accepted definition of the public interest giving the economist's point of view. "The tradition of economic analysis anchors in the hedonistic proposition whereby individual interests, by courtesy of the invisible hand, coincide with the public interest."[46] Yet Musgrove points out that economists have had to reconsider the premise that the "standard of public interest is provided by the results which would be obtained under perfect competition."[47] Partly as a result of the Depression of the 30's and the development of Keynesian economics, economists have recognized that the public interest must be broadened to include the non-economic implications of economic processes. Musgrove maintains, however,

that this latter concept of the public interest is not entirely the province of the economist and defines it more specifically as "efficiency in the creation and maintenance of material welfare."(48)

Stephen Bailey views the public interest concept as largely situational in nature. He points out that determining the course or policies dictated by public interest usually means reconciling several competing or conflicting goals. He points out that the phrase "the public interest" is the decision maker's anchor rationalization for policy caused pain."(48) He adds however, that to have this phrase serve its purpose over the long run, "public servants must be able to give it a rational content anchored in widely shared value assumptions."(49)

Harold Laswell proposes that public interest consists of two elements 1) content, 2) procedure. He describes a series of broad goals which human beings have in common. His definition of the public interest is best summed up in his own words: "the specification of goals in reference to the social and historical process with a view to the possible improvement of strategies appropriate to their fulfillment."(50)

E. Summary

Whether or not one feels that the public interest concept has any validity, one must certainly admit its existence. It exists in anti-trust legislation, in consumer protection legislation and labour legislation. Scholars such as Schubert and Sorauf may be quite justified in suggesting that the term be

stricken from the English language. Nevertheless, notwithstanding their opinions, the phrase "the public interest" has been used by legislatures and the judiciary. In all likelihood it will continue to be used. There seems to be little doubt that it does serve as a favorable descriptive to tag onto certain kinds of public policies. In any case, it will do little good simply to ignore it.

A search of the literature on the public interest has revealed three simple facts relating to the use of the public interest concept.

1. There is no universally applicable definition of what constitutes the public interest.
2. The public interest is usually used to describe public policies.
3. It represents
    a) the priorities which have been assigned to one or more social goals or values
    b) the manner in which these goals will be attained.

The element of the public interest which has caused so much frustration and bewilderment to scholars is that the goals of "the public interest" policies are forever changing. Changes in social goals occur as a result of changing social environment. As the social environment changes then changes occur in the priorities for social goals or even the social or common values themselves. Thus the changes in environment are reflected in changes in public policy.

The relationship between the public interest and social values and public policy is not a static one and this is the reason it has thus far escaped rigorous definition. Any attempt to hold one of these three variables constant only results in distortion of the rest of the system.

One of the analyses which can be done however is to examine certain public policies and to examine the intentions of the legislatures who proposed these policies and further to examine how the public policies were applied. Using this kind of inductive analysis it is possible to arrive at a more general definition of the public interest. Normally, however, this will only be possible for a relatively narrow sphere of activities (such as Labour Policy for instance). This kind of analysis would concentrate on the legislature's and the judiciary's perceptions of what social goals were important in chosen case examples. Careful attention would also have to be paid to the nature of the body chosen to administer the public interest.

CHAPTER III

THE TRADITIONAL ROLE OF GOVERNMENT

A. General

Before an examination is made of the "new thinking" with respect to government influence on the collective bargaining process, it is necessary to examine the traditional role of government in Canada. The word traditional is used here to describe existing legislation prior to 1965. There is nothing terribly "traditional" about labour legislation since most significant pieces of labour legislation have only come into being since the turn of this century.

The government's activities in the field of collective bargaining through the mediation and investigation mechanisms provided for in the existing body of legislation has sometimes been referred to as intervention. Yet an examination of the legislation and its intent does not reveal any actual "intervention" into the collective bargaining process. On the contrary, the early legislation seemed to have as its principal purpose the prevention of destructive social conflict (or what was then regarded as such) through the facilitation of Collective Bargaining.

An examination of Canadian labour legislative history will show that the intent of the legislation was not one of intervention as such. In fact even since the turn of the century the legislation not only of Canada but also of the U.S.A. and Great Britain seems to have as its axioms the assumptions that strong

trade unions and effective collective bargaining are desirable elements of a healthy industrial society.

B. The Federal Conciliation Act 1900

Although legislation pertinent to labour relations had been passed before this time, the Federal Conciliation Act was the first sign that the Federal government was interested in the collective bargaining process.[1] Under various criminal code amendments the Canadian Parliament had by this time already provided conditions allowing trade unions to pursue lawful aims without fear of the criminal law. Prior to 1892, unions whether registered or unregistered, could be harrassed through the criminal code whenever any picketing activity was taking place. Unions had even been subject to restraint of trade regulations under our anti combines legislation.

The new legislation was the first provision made for the settlement of industrial disputes. It appears to have been modelled after the British Conciliation Act of 1896. The act provided for conciliation and arbitration but contained no compulsory provisions. In addition to the conciliation and arbitration provisions it provided for the creation of a department of labour. The minister of labour was empowered to gather and publish facts and statistics pertaining to labour. The minister was instructed "to take such steps as seems to him expedient" in order to help the parties to a dispute to settle their disagreement. To this end, he could appoint a conciliator or conciliation board at the request of either party or an arbitrator at the request of both parties.

C. The Railway Labour Disputes Act 1903

This act added another twist to the labour relations scene in Canada. The act arose out of a dispute between the CPR and its employees over the company's refusal to deal with the union representative. The legislation itself took two years to get through parliament and underwent considerable revision before finally being passed. When finally passed it provided for postponements of strikes and lockouts until the "procedures" of the act had been complied with. The procedures of the act included a conciliation committee and an arbitration board. The act allowed a conciliation committee to be set up on the initiative of the minister or upon the request of either party to a dispute. If the conciliation procedure failed to bring about agreement, then the minister could appoint an arbitration board. Although the parties to a dispute were forced to face each other during mediation, they were not forced to bargain collectively. Neither were they compelled to accept the arbitration board's awards.

The act applied only to the Railroad industry,yet it is of significant importance in that it applied to what was then regarded as somewhat of an essential industry. The railroad at this time was the only link binding the country together and as such was felt to be a vital artery of commerce as well as being of no small political importance. Despite the importance of the railroad, the act still placed a great deal of emphasis solely on the influence of public opinion. The act substituted for compulsory arbitration "the principle of compulsory investigation

and its recognition of the influence of our informed public opinion upon matters of vital concern to the public itself."[2] At this stage of the legislation, no compulsion was made upon the parties to bargain collectively nor was there any withdrawal of the right to strike nor was there any compulsion with respect to acceptance of the arbitration award despite the belief that the railroads were a "vital" industry.

D. The Industrial Disputes Investigation Act 1907

This federal act is largely of a consolidative nature incorporating features from both the Federal Conciliation Act (1900) and the Railroad Disputes Investigation Act (1903). The intent of the act was directed principally towards industries coming under federal jurisdiction: mining, railroads, and public utilities. The act generally provided for compulsory mediation before a strike could take place.

This act had an interesting side effect of almost forcing the parties to a dispute to engage in collective bargaining. W.L. McKenzie King was the deputy minister of Labour at this time and is generally credited with the drafting of the act. He comments on it: "The Act by its very nature often led to what was tantamount to collective bargaining but it was a de facto not a de jure process."[3]

Aside from wartime legislation, this act remained in force for some forty years. The act was declared ultra vires in 1925 by virtue of the fact that labour legislation under the B.N.A. Act was provincial responsibility. Soon after 1925 all

the provinces except agricultural P.E.I. passed "enabling legislation" making the Federal legislation applicable within the provinces. Major changes in labour legislation were not to be seen until after the passage of the United States' Wagner Act of 1935.

E. Wartime Labour Legislation

The influence of the Wagner Act was felt in Canada through a series of executive orders. PC 7307 in 1941, for instance, prohibited the calling of a strike until the dispute had been investigated and a strike vote had been taken. The most famous of these executive orders was PC 1003 in Feb. 1944.

PC 1003 had as its objective "the maintenance of industrial peace and the promotion of collective bargaining satisfactory both to employers and employees." PC 1003 expressed the desirability that

1) "employers and employees should freely discuss matters of mutual interest with each other"
2) "differences arising out of industrial disputes be settled by peaceful means" (no strike or lockout)
3) "both employers and employees should be free to organize for the conduct of negotiations between them and that a procedure should be established for such negotiations."

The orders applied for the duration of the war and covered virtually every industry whether under federal or provincial jurisdiction.

More specifically the executive orders provided for the peaceful settlement of grievance disputes through compulsory arbitration. It also made collective bargaining compulsory before a strike could take place.

F. Industrial Relations and Disputes Investigation Act 1948

Following World War II the I. R. & D. I. Act was passed by parliament to replace PC 1003 and the I.D.I. Act. Various forms of it appear as part of provincial labour legislation. The act has remained virtually unchanged during the past 20 years and, in fact, fairly represents the state of labour legislation across Canada, except, of course, for the relatively recent developments in B.C. and Saskatchewan.

Specifically the act provides for:

1. A guarantee that employers and employees have the right to belong to collective bargaining organizations.
2. Either party to serve notice to the other to begin collective bargaining "in good faith".
3. The settlement of grievance disputes without a work stoppage - by compulsory arbitration if necessary.
4. No strike or lockout until after the conciliation process.

In addition to these points, the act created the Labour Relations Board to administer the legislation, as well as defining such terms as employee, and trade union. Section four describes what constitutes unfair labour practices and is designed to protect

the employees and their trade union from any steps which the employer might take in an attempt to hinder or intimidate any employee in the exercise of his "rights".

Our own B.C. Labour Relations Act contains very much the same provisions even though the Industrial Conciliation and Arbitration Act from which it is derived preceded the federal legislation by over ten years. Compulsory conciliation was made part of the act in 1943 through an amendment of the Industrial Conciliation and Arbitration Act. After World War II the whole act was revised and to it was added the concept of a regulatory agency - the Labour Relations Board - to administer the new legislation: The Labour Relations Act.

G. Conclusions

Thus nowhere in any government legislation has there been any evidence of government intention to "interfere" in the collective bargaining process (excepting of course the wartime experience). On the contrary most of the early legislation in Canada was intended to promote the growth of Trade Unions and the use of Collective Bargaining. Unions were first of all exempted from our anti-combines laws. Secondly, picketing as a result of an industrial dispute was made legal where previously such activities would have come under the "watching and besetting" sections of the criminal code.

Two basic concepts which dominate labour legislation today are 1) the right to contract, 2) the right to property. In fact nearly all of the provisions of labour legislation can be rationalized in terms of these concepts. The B.C. Labour Rela-

tions Act, for example, expresses the view that every employee has the right to organize for the purpose of collective bargaining. This is nothing more than a restatement of a basic human right under British civil law - the right to contract or not to contract and the right to delegate to someone else one's right to contract i.e. to enter into a principal-agent relationship. The employer too has the right to participate in an "employer's organization."

It could be said that Section 16 of the B.C. Labour Relations Act, for example, interferes with the employer's right not to contract. This is in fact not the case, the section does not compel the employer to contract, but merely to bargain with his employees or their representative. There is a long history of employers refusing to bargain with, or even to recognize, the representative of his employees. This section merely forces the employer to deal with his employees collectively just as he would normally have to deal with each one individually.

The act also provides for enforcement of the collective agreement as a legal contract. Section 22 of the B.C.L.R. Act expresses the opinion that there should be no stoppage of work during the life of the agreement. Grievances arising out of the interpretation of a current contract must be settled by bargaining or by arbitration. The parties have complete freedom to settle any grievances by any means they should choose <u>except a work stoppage</u>.

By far the most contentious issue in the present labour legislation is the concept that there should be no strike until the parties have submitted to compulsory conciliation. This

provision raises the question as to whether the government is actually interfering in the collective bargaining process itself. If one is to accept the idea that a great deal of the effective collective bargaining is carried out in an "eleventh hour" crisis atmosphere (i.e. just prior to a strike deadline), then there can be little doubt that compulsory conciliation has some effect on the bargaining process. The principal effect, however, is directed at the timing of the process. There is no question of government withdrawal of the right to strike or the right to lockout. Compulsory conciliation, therefore, does not constitute "intervention" in the collective bargaining process.

Before there could be "intervention" in the collective bargaining process there would have to be a third point of view presented during the actual conciliation process. In actual fact there is no room for the government or anyone else to present a third point of view under the established conciliation process. Both the federal and provincial legislations are very specific in their wording on this issue. The federal act outlines the function of a conciliation board to "endeavour to bring about agreement between the parties in relation to the matters referred to it" (S32(1)). The B.C. Labour Relations Act contains identical wording regarding the function of a Conciliation Board. Nowhere is there any mention that the conciliation process should concern itself with the quality of an agreement. The instructions are very clear: the purpose of conciliation is to help the parties to settle their dispute; the terms of the settlement are of no concern to the conciliation board.

CHAPTER IV

THE TAFT-HARTLEY ACT: EMERGENCY PROVISIONS

A. Introduction

It is not the purpose of this chapter to enter into lengthy discussions of the Taft-Hartley Act (properly called the Labour Management Relations Act). There has already been a great deal of discussion and controversy regarding such questions as its constitutionality, its merits and especially its interpretation. There has been enough discussion in fact to fill a great many volumes.

It is the purpose of this chapter to describe some of the applications of the Taft-Hartley Act's emergency provisions as case studies in order to demonstrate the inter-relatedness of social economic and political factors relevant to the application of the Act. There are few arguments that provisions should not exist to deal with certain kinds of unusual labour disputes, yet there has been vigorous controversy regarding the specific application of the Taft-Hartley emergency provisions. The wording of the Act allows for administrative flexibility; hence, the Act has been applied in a variety of "emergency" circumstances, including some where the question of emergency could be seriously challenged. The emphasis of this chapter will be placed on bringing out those elements of the United States federal government domestic and foreign policy which were directly or indirectly promoted through the application of the emergency provisions of the Taft-Hartley Act.

It will be necessary to briefly describe those sections of the Taft-Hartley Act which will be pertinent to the subsequent discussion. The discussion will center upon those sections which have been used to deal with disputes generally classified as National Emergency disputes.

Section 206 of the Taft-Hartley Act permits the President to appoint a board of inquiry to inquire into a labour dispute and make a report to him thereon. The dispute must affect "an entire industry or a substantial part thereof" which is engaged in interstate or international commerce. The President must further be of the opinion that a strike in such industry "would, if permitted to occur or to continue, imperil the national health and safety." The report is not to contain any recommendations and is to be made available to the public.

Section 208 provides that: upon receiving the board's report, a District Court may be petitioned to enjoin the strike. The courts are empowered to enjoin such strikes or lockouts if they find that such strikes would indeed

(i) affect an entire industry or substantial part thereof, engaged in commerce...

(ii) if permitted to occur or to continue will imperil the national health and safety.

From 1947 to 1965, the act has been used 24 times by a total of four Presidential administrations in a limited number of industries but under a great variety of social, economic and political conditions. It is the intention of this chapter to determine whether the Act was given a consistent definition in

its application. It is hoped that such questions will be answered as: "Is the national health and safety synonymous with biological health and national defense?" "Is there an element of economic health in the application of national health?" "Does national safety also imply an element of public order?" In other words: is there a single definition of the public interest or of the national health and safety?

It has already been shown in Chapter II that the scholars have fairly unanimously failed to describe the public interest in precise quasi mechanical terms. This chapter will attempt to determine whether or not there is at least an operational definition of the public interest or the national health and welfare.

The bulk of the information presented in this chapter has been gathered from the New York Times. Despite the criticisms which can be leveled at newspaper reporting the New York Times was the most objective form of indexed first hand information available at the time and place of writing.

For the purposes of tying in all the interrelated factors surrounding the decisions to invoke the Taft-Hartley emergency provisions, the analysis will be sub-divided into three arbitrarily chosen periods of time. These subdivisions roughly correspond to three Presidential administrations and hence it follows that they can be labelled as the Truman period, the Eisenhower period and the Kennedy-Johnson period. Each administration was faced with its own particular problems; some involving international politics; some involving domestic problems; while some are simply problems of public order.

It must be remembered here, by the reader, that the problems faced by the United States especially on the international political front, are of a far greater magnitude than those which we in Canada face, under normal circumstances. For quite some time since World War II, for example, the United States has adopted the role of major guardian of the Western social system. Consequently, there is a very strong interrelationship not only between domestic affairs in the U.S.A. and its foreign policies, but also between domestic affairs in the U.S.A. and the global political situation.

B. The Truman Period: 1947-1952

President Truman during whose administration the Act was finally brought into force used the emergency provisions of the Taft-Hartley Act a total of 10 times during his administration. In fact it was used a total of seven times in 1948 alone, in a variety of situations.

1) Meat packers strike 1948

On March 15, 1948, President Truman ordered a board of inquiry to look into a meat packers dispute between the United Packinghouse Workers C.I.O. and five major meat packing companies.[1] The actual strike involved 83,000 workers and was directed against the five biggest meat packing companies in the United States. The dispute was finally settled at four of these plants about 10 weeks after the beginning of the strike with the union's acceptance of the company offer.

The report of the Inquiry Board found that the company's offer was fair. Both companies and labour submitted their

dispute to the Federal Mediation Service, thereby avoiding a Taft-Hartley injunction.

The background to this strike offers a great deal more insight into why the dispute was of such significance. 1948 was the year of the Russian takeover in Czechoslovakia as well as being a year when Berlin was still considered threatened by Communist powers. It was suggested in editorials that this was no time to have such a strike "just as the rest of the nation was rallying to face a fateful crisis in Europe." Thus suggesting that the external threats upon the security of the western world demanded a stable domestic situation.

When the strike ended, it was discovered that union strike funds were depleted, and that there had never been a serious meat shortage in the United States.

Possibly a crucial factor in the calling of the strike was the rivalry between two unions employed in the meat packing industry. At the time that the C.I.O. was going on strike to back up their demands, the A.F.L. unions decided to remain at work and not to honour the C.I.O. picket lines. The unrest was not restricted to rivalry between the two unions, the strike was characterized by public disorder and violence including the killing of a picketer, resulting in the National Guard being called out in Minnesota and Iowa to restore order. Another example that public order was being jeopardized was the conviction of a local of the C.I.O. for refusing to bargain (the first such conviction under the Taft-Hartley Act).

It appears therefore that crucial consideration in the invoking of the Taft-Hartley emergency provisions were:

1) a desire to maintain stable conditions on the domestic scene in order to better cope with the country's international problems;
2) warnings that the public order was going to be threatened - as indeed it was. (The union notified the Federal Mediation Service 90 days before the strike that "there might be trouble arising out of the packinghouse negotiations".)

2) Coal Miners' Pension Dispute 1948[2]

This is the well known strike in which John L. Lewis was convicted of Contempt of Court, in that he was found to have instigated coal miners to walk off their jobs in defiance of a Court order.

President Truman, in attempting to maintain economic stability on the home front was forced to consider the following facts presented to him by his Secretary of Labour. The Secretary estimated that a 30 day strike in the coal industry would

(i) shut down or curtail 36% of the nation's power output
(ii) cut down 56% of the nation's production of coke byproduct
(iii) cut down 56% of the nation's steel and rolling mills production
(iv) affect 69% of the Class I Railroads
(v) affect 36% of the cement mills
(vi) affect 43% of all other industries

The strike had begun on March 15; the situation on April 9 had become critical. Four hundred thousand miners had walked off the job, and an estimated 164,000 other workers had been idled, including 70,000 railroad workers. It was further estimated that coal-using trains would have their operations cut back by 50%, by April 16. Partly on the basis of these facts, therefore, on April 9, President Truman pledged the full force of the law to bring about an end to the strike.

3) The Telephone Dispute 1948(3)

This dispute is very difficult to interpret in terms of presidential intent in appointing a Board of Inquiry. Negotiations between company and employees had not broken down at the time, and, in fact, the Board of Inquiry agreed to postpone its hearings to allow negotiations to proceed unimpeded. As a result of this action by the Board of Inquiry, the inquiry never took place, and the company and union concluded a contract by themselves.

The dispute involved only the long distance operators or less than 5% of the total communication industry work force. Neither company nor union seemed to understand how their dispute could create a national emergency affecting the "national health and welfare." One can only speculate that the dispute could have affected the efficiency of the government of the United States at a time when it depended upon all of its resources.

C. The Eisenhower Era 1952-1959

1) Atomic Energy Disputes 1954[4]

Generally speaking, these kinds of disputes are much more easily connected with national emergencies and national defense than most others. The employees involved were actually employed by private contractors working directly for the Atomic Energy Commission (a government agency). It was the government's contention that these employees did not possess the right to strike as they were working for private contractors who were in effect government agents. The two plants involved at Oakville and Peducah were producing the fissionable material used in making Atomic and Hydrogen Bombs (Uranium-235).

At the time of this dispute the Cold War was still in high gear, and the United States was attempting to maintain its Atomic arms lead over Russia. Clearly, therefore, the operations of the Atomic Energy Commission were of direct concern to the President in that they affected the defense programs of the U.S.A.

It was claimed by the Atomic Energy Commission, that a work stoppage by the employees involved in the dispute, would cause irreparable damage to equipment and processes. In retrospect, however, it was pointed out that such a strike would have cut down auxiliary operations of the plant but would not have affected the continuous process of making U-235 which was the process of direct concern to the defense of the United States.

2) Basic Steel Industry Strike 1959[5]

This particular strike is worth devoting some attention to in this paper, primarily because there is a large amount of data available on it. A great deal of emphasis was placed by the government upon the defense effects of a strike in this industry, yet President Eisenhower was nevertheless very reluctant to use the emergency provisions of the Taft-Hartley Act. Some background information to this dispute is essential at this point.

It must be pointed out that the year prior to this dispute was 1958 and was generally recognized to have been a year of economic recession. One of the concerns of the nation as reflected in the editorials of the New York Times, appeared to be inflation. One of these editorials explained the attitude of President Eisenhower as believing that "in the steel industry, both prices and wages are administered i.e. subject to change (normally increase) without any relationship to either supply or demand." A March 15 editorial suggested that the outcome of the negotiations "... will determine the national level of wages and prices. The course of the Cold War may be shaped by the ability of the negotiators to evolve a pattern that will strengthen the competitive position of the West in the production duel, which Krushchev had proclaimed as the decisive battleground between East and West." The perceived importance of these negotiations is thus well established, and it is therefore not surprising that the President felt obligated to remind the parties of the public interest in this dispute.

The intervention of President Eisenhower in this dispute was not clear cut and direct at first however. During the negotiations, the President made personal pleas to both parties to continue their negotiations, and impressed upon them the public interest in "price and wage stability." Finally on June 27, negotiations had reached a deadlock. On this same day the union leaders requested the President to establish a fact-finding board, but the President refused, giving as reasons that "...by passing the Taft-Hartley Act, Congress, specifically limited the use of such presidential Boards of Inquiry to national emergencies..." On July 15, 18 days after the union plea, the threatened strike finally began.

On October 9, the President finally felt justified in invoking the emergency provisions of the Taft-Hartley Act. Presumably an 84 day steel strike now imperiled the "national health and safety." The Board of Inquiry reported ten days later on October 19, that: "There is a growing national interest in ways of achieving both price stability and economic growth; the public interest has put an unusual strain on collective bargaining, the values of which the nation,nevertheless also seeks to preserve." This suggested that perhaps in this case, collective bargaining by itself was not capable of coping with the "public interest".

On October 20, the day after the Inquiry Board's report, the Attorney General applied to enjoin the strikers. Most of the evidence presented in court is directly related to the defense programs of the nation, yet an impressive amount of the

evidence is purely economic in nature. The following is a summary of the evidence presented:

(i) The Board of Inquiry concluded that it could see no prospect at all for an early settlement of the strike;

(ii) Strike has resulted in the depletion of steel inventories to 2/5 of their original level;

(iii) There are 765,000 employees idled as a result of the strike, supporting an additional 2,000,000 persons;

(iv) The planned program of space activities under N.A.S.A. (project Mercury - which had at this time the highest national priority) is being delayed;

(v) Also delayed is the production of steel components needed in the construction of military missiles and weapons systems, essential to the national defense plans of the United States;

(vi) The nuclear submarine and naval shipbuilding programs are being delayed which could irreparably injure the national defense and imperil the national safety;

(vii) There has been a cutback of exported steel products, vital to the support of U.S. bases overseas (i.e., NATO). This steel strike, if permitted to continue will seriously imperil the national safety.

(viii) The strike has adversely affected millions of small businesses without the resources to stock large inventories. Thus the national health will be imperilled if permitted to continue.

Thus there was no evidence presented that the biological health of the nation was ever imperilled although the Court did find and accept evidence to show that the economic health of the nation was seriously affected by the strike or the continuation thereof.

It is surprising to find an administration so reluctant to get involved in private negotiations, interpreting the "national health or safety" to include the economic health of the nation.

D. The Kennedy-Johnson period 1961-1968

Two court decisions will be used here to determine the grounds on which the federal government sought to enjoin. The first of these strikes occurred on the West Coast, involved the maritime industry, and began to immobilize the American Shipping fleet on March 16, 1962. The second strike was called by the I.L.A. (International Longshoreman's Association) and affected the Atlantic and Gulf coasts; the work stoppage began on October 1, 1964.

The arguments used by the United States government in its petition to the District Courts to enjoin the strikers will yield valuable clues as to how, in the view of the administration, the strike imperilled the national health or safety. Both these stri-

kes involved a virtual shutdown of normal shipping activities.

1) Maritime Industry Dispute 1962 (West Coast)

The Court found that the national defense of the U.S. was threatened by virtue of the fact that

(i) a strike would seriously disrupt the foreign aid program designed to provide military, economic and technical assistance to friendly foreign nations under the Mutual Security Act of 1954;

(ii) a strike would have serious adverse effect upon the nation's Food for Peace programs under the Agricultural Trade Development and Assistance Act of 1954 designed to furnish emergency assistance to friendly nations to meet famine and urgent relief requirements;

(iii) a strike would have an adverse effect upon the state of Hawaii (whose governor had already declared a state of emergency) which occupies an essential position in the defense of the nation;

(iv) a strike would immobilize the American merchant marine which is required to be available as a military auxiliary in time of war or national emergency;

(v) a strike would have "an adverse impact upon the nation's economy and thereby seriously impair the nation's overall defense position, since the defense effort of the United States is dependent upon the strength of the economy of the United States".(8)

The Court also found that the national health and safety of the United States was imperilled in view of the fact that a strike would have an adverse effect upon the maintenance in the U.S.A. of an "adequate supply of petroleum products which is essential to transportation, both military and civilian, and for the operation of industrial plants, and electric utilities and for heating".(9)

Thus it can be seen that the arguments presented to the Court were primarily of an economic nature. The national defense of the nation was affected only insofar as the disruption in the economy might generally weaken the ability of the nation to quickly react to a defense crisis.

2) The I.L.A.* Dispute 1964-65 (East Coast)

The Court decision regarding the government's petition for a strike injunction reveals that a substantial part of the testimony was almost purely economic in nature. The testimony contained roughly the same subject matter as that which was presented regarding the West Coast shutdown to show that the national security of the nation was involved.

The full text of the opinion of the Court in giving the reasons for granting the injunction emphasizes the economic aspects of the shutdown on the East coast.

(i) The testimony of the Maritime Administrator contained mostly vital statistics regarding the effect of an East Coast Shipping shutdown "thereby adversely affecting the national

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*International Longshoreman's Association

economy, with attendant peril to the national health and safety".[11]

The testimony of the Acting Maritime Administrator James W. Gulick stressed that the people of Puerto Rico would be seriously affected by even a short strike as a result of depletion of food stocks.

The report of the board of inquiry was also entered as testimony in the hearing and reported that "with respect to the same ports and as between the same parties, there exists a history in the last decade of failing to reach agreement in negotiations".[12] The Board further concluded, "The rigidity of positions on many of the main issues plus the complexity of items concerned with related crafts, makes the possibility of an early settlement most remote."[13]

The President of the I.L.A. (A.F.L.-C.I.O.), Thomas Gleason, testified that notwithstanding the strike, the I.L.O. had agreed to handle such cargoes as would be essential "to our national needs for defense and government functions."[13]

In view of the testimony presented to the Courts, by the government, it is clear that this administration placed a great deal of emphasis upon the economic effects to the remainder of the nation of a strike in the maritime or, in this case, in the longshore industry.

E. Conclusions and Summary

There are some obvious differences in the way in which each of the three administrations chose to use the Act. To Truman, it appeared to be a way of keeping the domestic labour

situation under control in order to cope with national and international problems. President Truman was faced with several problems which required a stable labour situation such as Marshal aid plan, the Berlin Crisis, the Russian takeover in Czechoslovakia (1948), as well as the return to the labour force of several million veterans.

The meat packers' strike was characterized by violence and clashes with law enforcement officers and was therefore a threat to the public order. The technical argument was, however, that if the strike went on long enough there would not be any meat to eat. The telephone strike on the other hand is somewhat puzzling, there appeared to be no real emergency; the only effect would have been an inconveniencing and slowdown in government communications. The use of the Taft-Hartley injunction, in the case of the coal miners' pension dispute, will meet with less controversy than the previous two uses. Nevertheless the strike was enjoined not merely because Americans were going to suffer physically but because the strike was affecting the economy of the nation, as well as because the strike was affecting the nation's foreign commitments.

President Eisenhower's administration was characterized by a greater reluctance to use the Taft-Hartley provisions. Nevertheless when he did use it, his reasons for using it were very similar to those used by Truman. The strike of the atomic energy plants used as one of the examples is reasonably straightforward. Clearly the national defense of the United States was far too involved for the government to allow a crippling shut-

down of either plant at a time when the United States was stockpiling atomic bombs and trying to retain its atomic lead over the U.S.S.R.

The steel strike created somewhat of a crisis. President Eisenhower and his administration were trying to get the economy rolling again following the 1958 recession. It was felt that the steel negotiations were going to set the standard for subsequent wages, in other areas of the economy. After an already lengthy strike, it became clear that steel stocks were almost depleted and that, unless the government asserted the public interest, the government's economic goals were going to be seriously and adversely affected. Add to these reasons, the fact that there was still no prospect of an early settlement, and the fact that defense construction was beginning to "feel the pinch"; thus there was no way for the government to stay out of this dispute any longer.

Whereas Eisenhower was reluctant to step into a labour dispute until it was a clear cut case of emergency, the Kennedy-Johnson administration's record shows that it would step into labour disputes if it was satisfied that the possibility of an emergency developing existed. It issued injunctions, for instance, in a dispute involving the Stellite division of Union Carbide. Stellite was producing an alloy used in manufacturing engine parts of certain aircraft and helicopters. A strike was never even allowed to begin, because of the "Vietnam buildup" at this time.

Both injunctions issued respecting the West Coast maritime dispute and the East Coast longshoremen's dispute were issued

not so much because of the possible suffering of the American people but because of these strike's widespread effects upon the economy generally and the widespread effects upon American commitments abroad, both economic and military.

The reader will recall that this chapter would attempt to answer some questions; here are some of the answers:

1. Are the terms "national health and safety" synonymous with biological health and national defense? It has clearly been shown that the U.S. administrations have all agreed that when the defense of the nation is affected, the Taft-Hartley provisions should be applied. In nearly every situation where injunctive relief was sought, testimony was presented to show that the defense of the nation could or was being affected. No conclusions can be reached as to whether or not the term national health and welfare includes the biological health of the people. The only case where this aspect could have been tested is in the case of the meatpackers' dispute. There was never any real case to prove that there was even a serious meat shortage.

2. Is there an element of economic health included in the application of the "national health" criterion? There has existed in many "emergency disputes" substantial and adverse implications to the economic health of the U.S.A. The economic implications were present in conjunction with equally serious military implications and it would be difficult to determine which of these two considerations the Courts felt were more important. It would be important to consider the economic and defense aspects of a dispute separately were it not for the fact that, in more than one dispute, the government argued that a healthy economy was

essential to the effective defense of the United States and its overseas interests. Thus it is safe to conclude that the economic stability of the U.S. is covered by the general term "national health and safety", at least as it has been interpreted by federal administrations.

3. Is there a single definition of the "national health and safety? The answer to this question is of course: no there is not! Sometimes, by careful scrutiny, it will be possible to isolate one factor as being of greater concern than the other factors contributing to an administration's decision to invoke the emergency provisions of the Taft-Hartley Act. Generally speaking, however, one is faced with a web of interwoven relationships including military and defense considerations, domestic, and international implications and economic and political factors, and combinations thereof.

CHAPTER V

THE SPECIAL CASES OF THE PUBLIC EMPLOYEES

A. Introduction

It is the intent of this chapter to examine the Canadian and United States systems of collective bargaining with federal public servants. This chapter will differ somewhat in emphasis from other chapters. Whereas other chapters were dealing primarily with labour management relations in the private sector, this chapter will examine the attempts at establishing collective bargaining in the federal public service. In the private sector, it is possible to speak of government influence or a third party point of view in the collective bargaining process, it becomes meaningless to do this type of analysis when the government itself is the employer. An examination can be made however, of the kind of concessions which the government has made in terms of letting public employees determine their own working conditions.

The analysis will examine two aspects of collective bargaining in the public service. The first aspect is the constraint which has been placed upon the employee groups with respect to the actual substance of bargaining. Both the U.S. and Canadian systems of federal civil service systems of bargaining have fenced off areas which are not to become the subject of collective bargaining. The second aspect of public service collective bargaining crucial to an understanding of the system is the power balance between the management and employee groups. Since the functioning of collective bargaining is often strongly influenced by the abi-

lity of one party to impose a cost of disagreement upon the other, the power position of both management and employee groups is of significant importance.

There can be little doubt that bargaining in the public sector will present the government with some rather unique problems; unique in that these problems will be more pronounced than they would be in normal collective bargaining situations in the private sector. The principal source of these differences is inherent in the special status of the state as an employer. The state is often looked upon as an arbiter of labour management relations, not necessarily in the sense that it will dictate "reasonable" terms and conditions of employment, but in the sense that it attempts to create conditions leading to the successful conclusion of negotiations between disputants. This function it must perform in the case of public employees. In addition to this, however, the state must sit across the "table" from its employees' representatives, and bargain with them on behalf of the public. Although it is sometimes suggested that one of the differences between private and public employment is that private employees are profit seeking, it would be inaccurate to suggest that governments are free from the financial squeeze created by rising costs. It could be suggested in fact that the government too is under pressure to produce more (in this case more services) at a lower cost to the taxpayer. Thus we see the dual role of government, on the one hand to facilitate agreement, on the other hand to drive as hard a bargain as possible.

B. The United States Federal Legislation

The public interest in collective bargaining between federal employees and the state finds official expression as Executive Order 10988 dated February 1962.(1) Despite the fact that permanent associations of manual employees had existed in the U.S. federal civil service since the turn of the century, prior to 1962, the government had not expressed any opinions concerning such associations although, legally, such associations were entitled to exist and petition the government.(2)

It was not until President Kennedy signed Executive Order 10988 that any kind of formal mechanism was established to deal with collective employee action for the purpose of collective bargaining. Machinery and procedures were established for the certification of bargaining agents and the granting of official recognition to the employee representatives. Although the wording of the order seems to shy away from the use of terms common to the labour management field in the private sector (union-employee association, bargaining unit--appropriate unit, labour relations--employee management cooperation), nevertheless there is an unmistakable intent to unionize the federal public service.

The preamble to the Executive Order outlines the purpose of the order. It suggests that the "participation of employees in the formulation and implementation of personnel policies affecting them contributes to effective conduct of public business" and that "... the efficient administration of the Government . . . requires that orderly and constructive relationships be maintained between employee organizations and management

officials; . . ." These statements precede the actual regulations and statement of rights and responsibilities of employees and managers and are presumably intended to denote the spirit of the regulations.

I. Bargaining Substance

First of all, it must be made clear that E.O.* 10988 does not speak specifically about bargaining in the pure sense of the word. Bargaining as it sometimes takes place in private industry, bargaining in the sense that both parties will attempt to maximize gains and minimize losses, does not appear to be part of the intent of E.O. 10988. The federal employer has reserved certain rights which are not to become subjects for bargaining. Nevertheless a great many areas of labour management relations will apparently be the subject of bargaining sessions.

The first suggestion of what the employees of the federal public service are to be interested in, is contained in Section 5(b). This section instructs the agencies to consult with its employees on the

(i) formulation and implementation of personnel policies and practices;

(ii) matters affecting general working conditions;

but it also adds that the agency must not consult its employees on matters which would not normally be part of the collective negotiations.

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*Executive Order

A further section (S. 6(b)) adds that employee Associations shall be given the opportunity to be represented at discussions between management and employees concerning:

(i) grievances,

(ii) personnel policies and practices,

(iii) other matters related to general working conditions.

As broad and all encompassing as these areas for bargaining appear to be, they are limited in scope.

Section seven lists certain "management prerogatives, which the civil service managers have more or less reserved as their own area of decision making. They retain for themselves the right to hire, promote, transfer, demote and discharge employees within any government agency. Presumably, this provision might have the result of dampening discussion in these areas during bargaining sessions. Normally, these points would provide for vigorous discussions during bargaining sessions in private employment. Another area given special status during bargaining sessions is the area of "determining the methods, means and personnel by which operations of the government" are to be conducted. [S.7(1)e] This is rather curious wording in view of the fact that many private businesses have profited from a good number of union initiated changes.

One explanation of the reserving of certain management prerogatives has been proposed by Hart.(3) He suggests that the government might have felt that closed shops simply could not be tolerated in the Public Service. The government would certainly want to retain the merit system of hiring policy and may have feared that letting a union control its manpower supply would

have had detrimental effects. Whatever the explanation, the regulations certainly restrict somewhat the scope of bargaining discussions.

A further restriction upon the content of any collective agreement is contained in Section 7(1). This section expresses the desirability that all employees be governed by the policies of various agency regulations as well as policies set forth in the Federal Personnel Manual, none of which are matters subject to collective negotiations.

II. Power Structure

No examination of collective bargaining can be complete without a description of the relative power position of the two parties. This examination will be restricted to describing those parts of the executive order which directly affects the parties' bargaining position. It will be most useful if one can extract from this Executive Order, the quality of the government's attitude towards the employee organization and collective bargaining. The regulations of the executive order contain a number of restrictions upon the employee organizations.

The first restriction, and perhaps the most critical one, is contained in Section 2. The order specifies any employee organization will not receive recognition if it ". . . asserts the right to strike against the Government of the United States or any agency thereof, or to assist or participate in any such strike . . ." It remains to be seen whether this no strike order can or will be enforced. In any case it cannot but influence

the bargaining position of the employee organization, in view of the fact that it has removed the threat of strike.

Another restriction is one which restricts the type of association which will receive recognition by the government. Excluded are organizations ". . . which advocate the overthrow of the constitutional form of government in the United States. "(S.2) Presumably this would thereby exclude certain types of politically inclined organizations - such as far left and far right wing organizations. Also excluded are organizations which discriminate on the basis of race, color, creed or national origin. Section three describes another kind of "objectionable" employee organization as one whose leader is ". . . subject to corrupt influences or influences opposed to basic democratic principles."

These restrictions upon the type of association which will be accepted as representing the employees are especially significant in view of the fact that it is the agency in question which must determine which unit will be appropriate for collective bargaining. Section eleven as well as Section five of E.O. 10988 make it quite clear that whenever an employee organization applies for official recognition on behalf of all or part of the employees of a government agency it is the agency itself which must determine whether the organization is qualified to represent the bargaining unit in question.

Although not directly affecting the collective bargaining process but certainly a significant indicator of the government's attitude towards the unions is Section 8 dealing with grievance

procedures. "Procedures for the consideration of grievances . . . shall conform to standards issued by the Civil Service Commission." [S.8(a)(1)] This indicates in fact that the federal government has retained some degree of control over grievance procedures. This same section goes on to say that collective agreements may include provisions for the arbitration of grievances but that "Such arbitration . . . shall be advisory in nature, with any decisions or recommendations subject to the approval of the agency head." [S.8(b)]

Another interesting provision is contained in Section 13; although it does not deal directly with collective bargaining, it certainly will affect the position and behavior of the parties. Section 13 provides for the drafting of (1) proposed standards of conduct for employee organizations (2) a proposed code of fair labour practices. The crucial part of this section provides that these standards of behavior will be set by the Department of Labour and the Civil Service Commission.

C. The Canadian Federal System

In August 1963 the federal government appointed a committee called "The Preparatory Committee on Collective Bargaining in the Public Service."(4) This committee was composed primarily of senior government officials and was to make preparation for the introduction into the Public Service of appropriate forms of collective bargaining and arbitration. The official report was published in July 1965 and contained recommendations for subsequent legislation to be named the Public Service Staff Relations Act.

In February 1967, Parliament approved the new act which is to govern the collective bargaining relationship between the government and the federal public employees. The act makes provisions for certification of employee organizations as well as setting up a form of collective bargaining for the public employees. In addition, the act sets up the Public Service Staff Relations Board to administer the various provisions of the Act. The actual legislation follows the recommendations of the Heeney Report* reasonably closely.

I. Bargaining Substance

There do not appear to be too many restrictions upon the parties to collective negotiations to restrict the areas for bargaining. Nevertheless the government has specified in Section 56 of the P.S.S.R.** Act that no collective agreement shall contain provisions which "would require . . . the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating moneys required for its implementation." This same section specifies the pieces of legislation which, despite the fact that they are pertinent to the status of the employees, are not to be altered through the process of collective bargaining. These include: 1)The Government Employees Compensation Act, 2) Government Vessels Compensation Act, 3) Public Service Employment Act, 4) Public Service Superannuation Act. Essentially what the government is saying is that they are pre-

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*The report of the Preparatory Committee on Collective Bargaining in the Public Service.

**Public Service Staff Relations Act.

pared to discuss such "bread and butter" issues such as rates of pay, hours of work, leave and discipline but are not prepared to amend the present system of hiring and promotion (the merit system) nor is it prepared to discuss the general financial administration of the government, nor will it discuss the present scheme of superannuation.

It will be interesting to watch the development of collective bargaining in the federal civil service. Especially interesting will be the developments concerning the issue of the specified limits of collective bargaining. Pension schemes, for instance, have often been the subject of fairly vigorous bargaining sessions, especially in the private sector. Nevertheless the government's decision not to involve these "fringe issues" in the actual collective bargaining sessions does not preclude the employees from making representation to the government through other channels.

The government has taken a rather interesting stand with respect to boards of arbitration, not arbitration of grievance disputes, but arbitration arising out of a situation where the parties to collective negotiations are not able to conclude an agreement. Section 70 outlines the subjects with which arbitral awards may deal: "rates of pay, hours of work, leave entitlements, standards of discipline, and other terms and conditions of employment directly related thereto." [S.70(1)] This same section goes on to outline those subjects which are not to be incorporated in arbitral awards such as: "standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees." [S.70(3)]

This latter part of Section 70 is an apparent attempt to protect the "merit system" of hiring and promotion, it remains to be seen whether the merit system can be kept outside the arena of collective bargaining.

As an additional guide to boards of arbitration there is Section 68 which prescribes those considerations which the government feels are important in making awards. The full text of this section follows:

> 68. In the conduct of proceedings before it and in rendering an arbitral award in respect of a matter in dispute the Arbitration Tribunal shall consider
>
> (a) the needs of the Public Service for qualified employees;
> (b) 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;
> (c) the need to maintain appropriate relationships in the conditions of employment as between different grade levels within an occupation and as between occupations in the Public Service;
> (d) 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
> (e) any other factor that to it appears to be relevant to the matter in dispute.

Despite the specific suggestions made as to what the government feels are important considerations in making arbitral awards, there does not appear to be any lack of flexibility in this portion of the legislation in view of S.68(e) which allows the arbitrators to consider any other factors which they deem relevant.

II. The Power Structure

Under the P.S.S.R. Act there has been a somewhat different delegation of power than occurred in the United States under Executive Order 10988. Whereas in the United States the responsibility for administering the labour relations system has been placed in the hands of the individual agencies, the Canadian system is to be administered by an especially created board named the P.S.S.R. Board. This Board is in effect the key to the new system of collective bargaining as far as federal public servants are concerned.

The Board's chairman as well as the other members are appointed by the Governor General in Council. The Chairman and vice-chairman are not to be representative of any interested groups. The remainder of the members are to be chosen as being representative in equal numbers of the interests of employees and the interests of the employer respectively.

The Board will administer the process of certification [S.27]. It will determine what units are appropriate for collective bargaining as well as determine those employees who will be designated as being excluded from the provisions of the act (managerial personnel etc.). The Board is also empowered to deny certification from any organization which is affiliated or donates funds to any political party [S.39]. The Board is further empowered under Section 20 and 19 to make regulations of a general nature as well as make inquiries into suspected violations of the Act. (Unfair labour practices, unfair employer practices, etc.)

The Board's functions also include the settlement of disputes arising out of questions of law. These may be questions of law related to arbitration of grievance disputes or they may be questions of law that may be referred to it as a result of arbitration conciliation or adjudication. The Board in fact is empowered not only with setting its own rules and procedures, but also those of the arbitration tribunal.

The powers of the Board are not restricted simply to matters of legal intrepretation. The Board appoints the members of the arbitration tribunal while the chairman of the arbitration tribunal is appointed by the Governor in Council upon the advice of the Board. Any conciliator appointed under Section 52 or any conciliation board appointed under Section 78 is appointed by the chairman of the Board.

What will undoubtedly become a key to the operation of the act is the question of the selection of the method of resolution of disputes. According to Sections 37 and 38, the bargaining agent when applying for certification on behalf of a group of employees must specify the method by which subsequent conflicts will be resolved should bargaining not bring about an agreement. He has the choice of two methods: the first being conciliation while the second is arbitration. This selection of the process of resolution of conflicts then becomes part of the certification for that bargaining agent.

The choice made by the bargaining agent may be altered upon application to the Board but there are some time constraints imposed upon this change of process for resolution of a dispute.

The intention of Section 38 is to compel the bargaining agent to stick to the choice of process once he has given notice to bargain collectively until the negotiations in question have been successfully terminated. It appears that the process may be changed once a contract has been signed, but cannot be changed once notice to bargain has been given until the next collective agreement comes up for renegotiation. This section effectively keeps the process for the resolution of conflicts in force throughout any one series of negotiations.

As far as the actual process of conciliation is concerned, there is very little that is unusual about it. Once the process has been chosen by the bargaining agent, it can be brought into action by either party. It consists of two steps: a conciliation officer and a conciliation board. The conciliation officer can be brought into a dispute at the request of either party and reports to the chairman of the Board his success or failure to bring the parties to an agreement. The conciliation board step can be activated at the request of either party or alternately, at the request of the Board. The conciliation board's report is to contain its findings as to the facts of the dispute as well as recommendations regarding the matters in dispute. Section 89 further provides that, if both parties so agree, the recommendations of the conciliation board can be made binding upon the parties and enforced accordingly.

The second process of resolution specified by the P.S.S.R. Act is Arbitration. In this case the recommendations of the Arbitration Tribunal are binding upon both parties to

the dispute [S.72] with no resort to strike action permitted. [101(1)b] Once notice to bargain has been given by the bargaining agent, and the negotiations have subsequently broken down, then either party to the dispute can make a request to go to arbitration. Although the findings and recommendations of the Arbitration Tribunal are binding, Section 67(2) provides that if the parties can agree with respect to one or more of the matters in dispute then the Tribunal is not to make an award with respect to these matters. The Arbitration Tribunal is guided in making its awards by Sections 68 and 70. Section 70 makes clear those matters which are to be subject to becoming part of arbitral awards as well as those matters which may not be dealt with. This section allows the arbitral awards to contain recommendations about wages and hours of work, etc., but not about matters covered in the Public Service Employment Act and related to the "merit system" of hiring and promotion. Section 68, which has already been reproduced (p. 62) suggests considerations which the tribunal must make in making its awards. Of special interest is the absence of a consideration which, it has often been suggested, should be of concern to an arbitration tribunal - the economic condition of the country.

The government of Canada has, through the P.S.S.R. Act, placed itself in much the same position that employers in the private sectors have been accustomed to for some time. The Treasury Board will be responsible for the bargaining as well as a host of other management functions as described in the new Financial Administration Act. The administration of the federal

labour relations system is delegated to the quasi-autonomous body, the P.S.S.R. Board. The Parliament of Canada retains the right to veto any financial commitment made by the government-employer (the Treasury Board).

D. Conclusions

It should be obvious from the foregoing discussion that there are some vital differences between the system under which the United States federal civil servants will bargain and the new Canadian system introduced in February 1967. The differences between the two systems do not occur in the area of bargaining substance. Both the Canadian and U.S. systems specifically exclude from the bargaining process any matters essential to the functioning of the "merit system" of appointment and promotion.

In speaking on the House of Commons bill E-181, which was later to become the Public Service Employment Act, the Minister of National Revenue, the Rt. Hon. E.J. Benson said: ". . . This measure will not only retain the merit system of appointment and promotion, and the type of job security long enjoyed by civil servants, but will extend them to thousands of additional employees."(5) The Report of the Preparatory Committee also insisted that certain matters be given special status in collective bargaining.(6) They suggested that no subject actually be excluded from bargaining although the matters related to superannuation, appointment, promotion and discipline should under no circumstance form part of an arbitral award. It should be remembered, however, that the Committee was making recommendations without knowing that there was to be a new division of power as a result

of the new Public Service Employment Act and the new Financial Administration Act.

It is the new division of power which gives the Canadian federal system such a different outlook compared to the American system. Under the U.S. E.O. 10988, most of the power during bargaining sessions will be in the hands of the Agency representative. It will be recalled that it is the agency which is responsible for a great deal of the actual administration of the Executive Order, exclusive of grievance procedures. Not only must the agency assume the role of employer and management during collective negotiations, but it must also administer the system. This leaves unanswered the question of what happens in case there is a conflict of interest between the administration function and the bargaining function.

The Canadian system makes an attempt to avoid this possible conflict of interest. Through the introduction of three bills simultaneously, there has been a substantial redistribution of powers. Parliament has retained the right of veto over any financial arrangements; it is after all the ultimate authority of the land. Under the Financial Administration Act, the Treasury Board assumes the role of management. It is responsible, among other things, "for the determination of rates of pay, hours of work, leave and other conditions of employment; for the classification of positions and employees, for the establishment of standards of discipline; and for the promotion of safe and suitable working conditions."(7) In other words, the real employer will be the Treasury Board, and in this role the Treasury Board will be in much the same position as any large employer in the

private sector. The problems of administering the regulations and generally running the system has been delegated to the P.S.S.R. Board, a quasi-independent body.

Despite the differences in regulations both the U.S. and Canadian governments have some common philosophies towards federal civil servants. They both assert the idea that the legislative bodies cannot relinquish their authority as national sovereigns. In neither system is there any way for the employee associations to force upon the country anything it does not wish. In Canada, the Treasury Board is responsible for collective bargaining; in the U.S.A., the agencies perform this function; in both cases any agreements are subject to the overriding authority of the legislatures. In both countries there is unequivocal approval for the functioning of a form of collective bargaining in the civil service.

There are some differences in policies between the United States and Canada. Perhaps the most obvious of these is the case when collective bargaining by itself is not capable of resulting in a collective agreement. In the United States, there is an outright ban on strikes and an insistence that any form of arbitration must be advisory in nature. In Canada, the government has recognized that there are many government services which could conceivably be interrupted without causing anything much worse than a public nuisance. Consequently there has been no outright ban on strikes other than strikes of the armed forces and the R.C.M.P. It may well be that the absence of a strike

ban is little more than a realization that a ban on strikes is difficult if not impossible to enforce effectively.

CHAPTER VI

THE SASKATCHEWAN LABOUR RELATIONS SYSTEM

A. Introduction

This chapter will examine the Essential Services Emergency Act which was recently passed by the Saskatchewan legislature. The Act is only a portion of the whole labour relations system presently operating in that province. It will be looked at in conjunction with the Trade Unions Act because it too contains unusual features. The emphasis of this chapter will be placed upon determining the kind of attitude which the Saskatchewan legislature has taken towards the collective bargaining process.

It can be safely said that compared to many provinces Saskatchewan has adopted a kind of laissez-faire approach to labour relations. The new legislation still is very moderate in outlook yet it nevertheless effects a step towards increased government interest in the collective bargaining process.

Both the changes in the Trade Union Act and the Essential Services Emergency Act were suggested in a report made to the government by a special Inquiry Commission. Most of the report's recommendations were implemented. Among other things, the report suggested strongly that ". . . labour negotiations should be left to management and the trade union with a minimum of outside interference."(1) It further expressed the hope that labour and management approach the bargaining table with good will and attempt to resolve their differences without resort to the strike or lockout. It added, however, that there were cases where the public could

feel justified in not letting the parties to a dispute settle their difference completely on their own but that, nevertheless, "only in those areas where the public interest places a duty upon the Government that any interference with this process could be justified."(2) Finally this report summed up its feelings that any legal amendment to the existing body of laws ought to give consideration to giving maximum protection and freedom to the individual worker. Nowhere in the report is there any recommendation that the government ought to interfere in the collective bargaining process except under exceptional circumstances.

B. The Trade Unions Act

The Trade Union Act contains an unusual feature regarding the settlement of grievance disputes. Other provinces and the federal government have legislation requiring that all collective agreements provide for the compulsory arbitration of grievance disputes. This provision is intended to outlaw strikes during the life of a valid collective agreement. When a collective agreement contains no provision to submit grievance disputes to private arbitration then the legislation normally requires that the parties submit their dispute to a Labour Relations Board for arbitration whose award then becomes binding upon both parties. The Trade Union Act contains no such provision. Saskatchewan never has banned and still does not ban strikes during the life of a collective agreement.

A recent amendment to the Trade Union Act provides for the enforcement of arbitration clauses voluntarily included in

any collective agreement [S.23A]. Under this section arbitration awards shall be enforceable as orders of the Labour Relations Board, and no stoppage of work will be allowed during the life of an agreement whenever such agreement provides that grievance disputes are to be settled by arbitration.

In addition, in cases where a collective agreement provides for the settlement of grievance disputes by arbitration, but the parties have not agreed upon an arbitration procedure, then Section 23B applies. This provides for an arbitration procedure to be followed whenever the parties cannot agree upon a procedure of their own. When one party fails to nominate its representative then the other party may apply to the courts to appoint a member in behalf of the first party. The two nominees choose a chairman with both parties paying half of the chairman's expenses.

The Act contains no requirements as to how the arbitration process is to be conducted. Once the parties agree beforehand that this should be the process for the resolution of grievance disputes, then the parties must honour their agreement, instead of resorting to strike action. Despite the government's unwillingness to get involved in the actual arbitration process, the message of the government to labour and management is clear: "We would prefer you settle your disputes through arbitration rather than by a strike, but above all we would rather you settled your own disputes."

C. The Essential Services Emergency Act

The Essential Services Emergency Act was passed during a special session of the Saskatchewan Legislature on September 7, 1966. The session was called to "deal with an emergency the Government feared would develop if a strike of gas supply workers of the Saskatchewan Power Commission . . . were allowed to continue."(3) The strike had begun on September 2; the legislation received Royal Assent on September 8 and was proclaimed in force on September 12, thereby making any further strike action by these workers illegal.

The Act recognizes that there should not be any strike under certain specific circumstances of "emergencies." The critical section of the Act is Section 3.

> 3. Where at any time in the opinion of the Lieutenant Governor in Council a state of emergency exists in the province or in any area of the province in such circumstances that life, health or property could be in serious jeopardy by reason of a labour dispute involving:
>
> (a) employees engaged in the operation of any system, plant or equipment for furnishing or supplying water, heat, electricity or gas service to the public or any part of the public; or
> (b) employees engaged in the provision of hospital services anywhere in the province;
>
> the Lieutenant Governor in Council may by proclamation declare that from and after a date fixed in the proclamation all further action and procedures in the dispute are to be replaced by the emergency procedures provided in this Act.

This means that government actions under this Act are limited to conditions of "emergency" where the circumstances are such that "life, health or property" could be in serious jeopardy. The Act is not very specific as to what it means by these terms.

It certainly does not answer the inevitable question of whether these emergencies also include such things as the economic health of the Province. (It is this very question which has plagued the United States in its application of the Taft-Hartley emergency provisions.) Despite the lack of specific definitions, it is clear that the Act was intended to provide procedures for dealing with labour disputes surrounded by unusual circumstances.

The actual emergency procedures consist of banning any present or impending strike and subsequently to settle the dispute through compulsory arbitration. One wonders from the wording of the Act whether the arbitration procedures once started are intended to replace collective bargaining or are intended to supplement it. There is no provision in this piece of legislation for the parties to substitute their own settlement regarding one or more of the matters in dispute, for part of the arbitration award (as is sometimes provided in similar legislation elsewhere).

D. Summary

Despite a general attempt to maintain a "laissez-faire" approach to labour relations, Saskatchewan too has chosen to increase public involvement in the collective bargaining process. As far as the average collective negotiations are concerned, there is little government interest other than requiring the enforcement of arbitration clauses already forming part of the collective agreement. The Essential Services Emergency Act is directed towards labour disputes in certain specific industries. The underlying philosophy is simply that there are certain kinds of labour

disputes the resolution thereof simply cannot be left completely up to the parties involved. The legislation recognizes that the government must be able to prevent or stop strikes in organizations providing essential services, as well as provide a tribunal to prescribe the terms of employment, should the parties not be able to conclude their own collective agreement.

CHAPTER VII

THE BRITISH COLUMBIA APPROACH--BILL 33

A. Before Bill 33

On December 2, 1968, a brand new shiny framework for the processing of collective bargaining disputes went into operation in British Columbia. In the spring of this same year the B.C. Legislature passed a bill commonly known as Bill 33, but officially called the Mediation Commission Act. The passing of the act resulted in the repeal of many sections of the B.C. Labour Relations Act which had previously been the regulator of the labour relations system in British Columbia.

The B.C. Labour Relations Act will still govern the processes of certification and grievance arbitration. The new Bill 33 has reasserted the requirement that all collective agreements provide for the compulsory arbitration of disputes arising out of interpretations of valid collective agreements [S.23]. The new legislation is directed primarily at streamlining the collective bargaining process, a step long advocated by both labour and management. At this point of time, it is not yet possible to gauge the effect which the Bill will have upon the collective bargaining process. Nevertheless it is possible to detect some drastic changes in the climate which the new bill will create.

Before one can examine the "new climate," however, it will be necessary to backtrack somewhat and describe the old process very briefly. Under the regulations of the B.C. Labour Relations Act, a strike was prevented from occurring not only until a strike

vote had been taken, but also until a complex conciliation process had been complied with. This conciliation process was a two step one each normally requiring certain periods of time statutorily defined.

The first step in this elaborate conciliation process was the appointment of a conciliation officer who would subsequently report to the Minister of Labour either:

1) that the parties had readied an agreement

or 2) that the parties had not reached agreement, in which case he would make "recommendations as to the matters in dispute."

The second step in the conciliation process involved the appointment of a conciliation board consisting of one representative from each of the disputing parties and one chairman nominated by the first two representatives. The duties of the board were simply to assist the parties to conclude an agreement, and, failing this, to "make recommendations regarding the matters in dispute."

The system as it was being used resulted in a major problem. Despite the fact that the "machinery was provided merely to facilitate agreement,"(1) the machinery in fact delayed effective collective bargaining. The timing and regulations governing the two step conciliation procedures were such that unilateral action, by either union or management (such as strikes or lockouts), was not allowed until usually long after the actual expiry date of the collective agreement. Neither party was able to apply economic sanctions until these conciliation procedures had been complied with.

Since the function of both conciliation board and conciliation officer was to find "terms and conditions that the parties can agree to"[2] this usually meant finding some sort of a compromise between the company's offer and the union's demands.[3] The bargaining usually started prior to conciliation; at this point the floor for bargaining was the company's offer. The conciliation officer's and the conciliation board's recommendations both had a tendency to raise the effective floor for collective bargaining.

When collective bargaining first got under way, management was faced with a lengthy and cumbersome conciliation process. Each of these steps usually raised the effective level of bargaining somewhat; consequently management was often unwilling to lay all of its cards on the table until after the conciliation board's recommendations were released. And, in fact, it was often subsequent to this point and frequently just before a strike deadline that a good deal of the effective bargaining took place.[4]

The new legislation does away with the old two step conciliation process.

B. <u>The Mediation Commission Act (Bill 33)</u>

The main thrust of the Bill is directed at providing the parties to a collective bargaining dispute with new machinery to deal with these disputes. The central core of the new legislation is the creation of the Mediation Commission to administer the provisions of the Act (Mediation Commission Act); especially important, are the terms of reference of the Commission. A brief

description of the Act will suffice to point out the crucial elements of the new legislation.

There are essentially two ways in which the Mediation Commission can become involved in a labour dispute. The first way is associated with unusual circumstance where the Minister of Labour "considers that the public interest is or may be affected by the dispute" [S.11(2)] or alternatively when the Lieutenant Governor in Council feels that the public interest and welfare are sufficiently involved in a labour dispute. The second way for the Commission to become involved in a labour dispute is by request of either party.

Section 11(b) provides that, at the request of either party to a collective negotiation, the Commission <u>may</u> appoint a Mediation Officer. There is no compulsion on the part of the Commission to follow this course of action. Once the Commission has appointed a Mediation Officer, there exists the possibility that, should the Mediation Officer not be successful in getting the parties to conclude an agreement, the full Commission will be brought into the dispute.

The Commission may hold full hearings into any dispute for which a Mediation Officer has been appointed. The decision of whether or not the full Commission is to get involved in a labour dispute is normally left up to the Commission itself.* While the Mediation Officer's report does not contain any recommendations regarding any of the matters in dispute, the report of the Media-

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*Except where the Lt. Gov. in Council refers a dispute to the Commission under Sections 18, 19.

tion Commission is to contain recommendations of just such a nature. The Act specifies that: "The Decision shall state the terms and conditions which in the opinion of the Commission would be a fair and reasonable collective agreement between the parties, together with reasons supporting the opinion held by the Commission." [S.15(1)]. In other words the recommendations will not be arrived at on the same basis used by the old Conciliation Boards. Whereas Conciliation Boards were instructed to bring the parties to an agreement, there was no direction as to the quality of such agreements. The Commission has no such discretion in view of the wording of Section 15; it must recommend terms and conditions which would constitute a "fair and reasonable collective agreement."

C. The Public Interest

The new Bill 33 introduces the concept that what is in the best interests of two disputing parties to collective negotiations is not necessarily in the interest of the public at large. The government felt it necessary to provide a mechanism through which parties to a dispute would have a contract providing for the terms and conditions of employment whenever the parties could not agree among themselves on such matters.

The emphasis of the Bill appears to be on preventing a strike, presumably when a strike would have excessively harmful effects upon third parties, i.e., the community at large exclusive of the disputing parties. The controversial Section 18 provides that the Lieutenant Governor in Council may refer any labour dispute to the Commission whenever it is necessary to protect the

"public interest and welfare." The Commission then takes over the dispute and handles it on the "adversary system" similar to that which is practiced in a court room (not necessarily using the same rules and procedures).

The Commission handles labour disputes in much the same manner as legal disputes would be handled in a court room. The Commission determines those matters which are in dispute with the help of the parties involved. The Commission then assigns the burden of proof to either party regarding each of the matters in dispute. Presumably, the Commission hands down an award (or recommendation) based upon the merit of the rational arguments presented to it by the disputing parties. Once an award is made, it is final and binding upon both parties "except to the extent that the parties agree to vary the same". [S.18(1)(b)(ii)]

D. The Public Service

Public Service employees are treated in much the same way that employees would be if they were working in industries heavily endowed with the public interest. There is one difference, however, in that Section 50 provides that any person employed in the Public Service "who takes part in a strike . . . is guilty of an offence under this Act."

The Executive Council (the Cabinet) has been set up as the employer for the purposes of collective bargaining. All the provisions of the Act, pertinent to employers also apply to the "government-employer" (the Executive Council). The awards of the Commission, when handed down, are binding upon the government and

its employees. Even in the public service, however, the parties to a bargaining dispute may still modify the decision of the Commission as they wish.

E. Summary and Conclusion

Prior to the introduction in the B.C. Legislature of Bill 33, it was felt that any changes in the current legislation would embody some of the recommendations of the Nemetz Report.(5) When the legislation was finally presented to the House, it contained very little reference to the Swedish labour relations system. In fact there appeared to have been substantial borrowings from the workings of the Australian Arbitration Commission.(6) Nevertheless, some of the recommendations of the Nemetz report were implemented.

Nemetz seemed to have recognized that the Conciliation Board system had its problems in view of the fact that "the decisions of these conciliation boards have a significant influence upon the trend of settlements throughout our economy."(7) He showed concern that the terms of reference of Conciliation Boards were inadequate, that finding "terms and conditions that the parties can agree to" was simply not enough.

Nemetz further pointed out that a permanent body should be established to administer mediation procedures and thereby give some stability and continuity to the mediation function. Through its legislation, the government has indicated that the people would be well served through the implementation of these two recommendations.

The Mediation Commission was formed to provide a permanent force of highly qualified men to deal with labour disputes. The Commission is of a semi-independent nature. The government can order the Commission when and where to act in unusual circumstances, but it cannot directly tamper with the quality of its judgements or awards.

The new system of labour relations has several assets. The first asset is the elimination of the old two-step conciliation process with the resultant "step function" (raising the floor for collective bargaining) every time a conciliation report was made. The second asset is that the government is now freed from administering the mediation procedures, and, in fact, of getting involved in labour disputes at all, except in unusual circumstances.

The third asset of the new system is the actual terms of reference of the Commission--the concept of making recommendations on the basis of what constitutes "a fair and reasonable collective agreement." This is the concept which has great potential to influence the labour relations climate in B.C.

"Collective bargaining as it is currently practiced in Canada is not, by and large responsive to logical rational argument . . . in far too many cases, wage increases reflect the raw economic power of either labour or management."(8) This is how the present collective bargaining system has been described by Dr. Noel Hall. He further went on to explain that "collective bargaining is very much a vehicle for activating latent power: power springing from a monopoly position; power derived from

control over access to particular skills; power arising from holding a strategic position in the economy; power based on widespread public support . . ."(9)

The Commission's recommendations are intended to result in much the same thing which would normally have been arrived at through collective bargaining, i.e., "a collective employment contract." (One can hardly call the Commission's recommendations a collective agreement.) The process through which the Commission will arrive at its conclusions will, in some cases, contain strikingly different provisions than those which would normally have been contained in a collective agreement had collective bargaining been allowed to follow its course to conclusion. This then is the most interesting aspect of the new legislation: the prospect that collective bargaining will be influenced by another process with a greater rational content. It may well be that collective bargaining, in general, will undergo a subtle change in emphasis. It may be that results during collective negotiations will be obtained less through the use or the threat of economic sanctions and more through the use of rational argument and persuasion.

Whether this change of emphasis actually occurs or not is at the moment pure speculation. Nevertheless it is an interesting aspect of the legislation. Neither is it possible, at this time, to know whether the government, in drafting the legislation, intended to influence the collective bargaining process as widely as this.

A final comment should be made here regarding the compulsory feature of the Act--the feature contained in Section 18

which has been the target of so much controversy. Despite the controversy about this section, it gives the provincial legislature no power which it did not have before the passage of the Act. This section simply delegates power from the legislature to the Cabinet. Whether it was a necessary step or not can be debated, but it is certainly not an indication that the government intends to put an end to all strikes.

In commenting on the Bill in general, the B.C. Minister of Labour and now Attorney-General, the Hon. Leslie R. Peterson, said that the legislation was aimed at preventing a "possible dislocation of services essential to the public (at which time) a strike or lockout is virtually not acceptable to the public."(10) "Nor does it have any intention of taking away or inhibiting the right of labour to strike in cases that do not have widespread implications for the province as a whole."(11)

The government obviously has no intention of applying the arbitration provisions in lieu of freely negotiated collective agreements. The Act clearly provides that the parties may substitute their own terms and conditions of employment, at any time, for those suggested by the Commission in its recommendations. The Minister of Labour himself asserted that: "a freely negotiated collective agreement is preferable to any other."(12)

CHAPTER VIII

AN ONTARIO PROPOSAL: THE RAND COMMISSION REPORT

A. Introduction

In August 1966, the government of Ontario appointed the Honourable I.C. Rand to head a Royal Commission Inquiry to "inquire into the means of enforcement of the rights, duties and obligations and liabilities of employees and employers, . . . and of trade unions and their members, . . . with relation to each other and to the general public . . ., and the use of strikes . . ., and to report thereon and to make such recommendations as he may deem fit . . ."(1) The Royal Commission Inquiry terminated with the release of its report which will be referred to simply as the Rand Report.

The Rand Report contains recommendations on virtually every aspect of labour relations,yet it is the intent of this chapter to restrict itself to discussion of those recommendations which directly concern the collective bargaining process itself. As in prior chapters, this discussion has arbitrarily chosen two points of focus: 1) the effect upon the bargaining substance, and 2) the effect upon the power positions of the disputants. The report itself makes recommendations for three distinct types of employment: 1) general industrial employment; 2) public service employment; 3) essential industries or services employment. This chapter will deal with each of these types of employment situations in turn.

The kind of collective bargaining with which the Rand Report seems to be most concerned is the situation where an agreement is finally concluded through an interplay of economic coercion or, ultimately, economic power. The focal point of his concern is the regretable situation which almost always results when two parties cannot reach agreement, the third party in the dispute - the public - bears a sizeable portion of the costs of disagreement. He criticizes the commonly asserted desire to maintain "free collective bargaining." The Rand Report says that truly free collective bargaining ". . . may be assumed to imply that the parties, left to themselves come to an agreement of their own volition without other compulsion other than rational persuasion . . ."(2) "At the same time it is admitted by both labour and management that economic coercion generated by them is the decisive factor in the 'agreement' . . . What the insistence . . . (on free collective bargaining) . . . means is that they demand to be let alone to fight it out with their own weapons, regardless of the effect on the public or any other interest; 'free' means from the rules of society."(3) It would appear, therefore, that the Rand Report is not overly sympathetic toward those who would advocate that labour and management should be allowed to settle their contract disputes on their own terms. In fact, the Rand Report has taken particularly dead aim at strikes in general, describing them as economic struggles, . . . trailing . . . wastage and turmoil. It further adds that the strike will soon be regarded as a "barbarian" form of social struggle.

B. General Recommendations

The Rand Report would create an Arbitration Tribunal to oversee the Ontario labour-relations scene. This Tribunal would create its own rules of practice and procedure subject to the approval by the Governor General in Council. The Report proposes that the Tribunal not be bound by legal rules of evidence, but that the proceedings be carried out under an atmosphere of informality, if possible.

This same Tribunal would have wide sweeping powers with respect to handing down arbitration awards, ending strikes lasting longer than 6 months, and suspending or making modifications of the provisions of the Labour Relations Act. The Tribunal may also declare its award binding upon the parties as a collective agreement. Since these powers of the Tribunal are so wide sweeping it will be necessary to examine these carefully in order to determine the potential effect of the report upon the collective bargaining process.

Section 25 empowers the Tribunal to declare a strike ended. Under this provision, the temporary replacements which the employer may have hired during the strike, become permanent employees at the discretion of the employer. This section further provides that striking employees may return to their employment. The reader should be reminded here that it is not the purpose of this paper to question the wisdom and clarity of purpose of such a provision. The implications of this section are clear, however--if in only one sense--that employees remaining

on strike for a period in excess of 6 months could wind up in a very awkward situation regarding their jobs.

Section 24 of the recommendations of the Report provides another occasion for the Tribunal to go into action. When a strike (or lockout) has been in progress for 90 days, then either party may request that the dispute be settled by compulsory arbitration. The second party is not compelled to accept the award. If the second party does not accept the award, however, then the first party may also request that the Tribunal make "such modifications and suspensions of the Act relating to picketing, the status of strikers, the employment of replacements or the re-employment of strikers which may appear to it (the Tribunal) to be just and to be conducive to the conclusion of an agreed collective agreement." [S.24(b)] This same section allows the Tribunal to declare the arbitral award binding upon both the parties to the dispute if it is satisfied that the party rejecting the award ". . . has failed to bargain in good faith, or has acted clearly unreasonably . . ." [S.24(c)].

The other interesting provision suggested by the Rand Report is that contained in Section 21. Section 21 provides that an employer may attempt to convince the Tribunal, beyond a reasonable doubt, that economic terms proposed by the union are such that the most probable result would be the bankruptcy of the employer. Should the employer succeed in so convincing the Tribunal, then the Tribunal may use its discretionary powers to change or suspend any provisions of the Act relating to picketing and the status of striking employees . . . "as may appear just."

A union may also make similar application to the Tribunal should it be threatened with destruction.

Clearly, therefore, the Tribunal would be used whenever, at its discretion, the power positions of employer and unions showed a glaring discrepancy, and one of the parties was attempting to take advantage of the inequity of power. The powers of the Tribunal would be exerted in cases when collective bargaining had clearly broken down or when the parties have contravened regulations of the Act or when either party has failed to act in good faith.

C. Public Employment

The bulk of the recommendations regarding public employees are contained in Section 54 of the Rand Report. The essence of this section is simply that public servants have not been given the right to strike prior to this and that at the present time there appears to be no reason why they should expect to be able to strike. The Rand Report recognizes that a form of collective bargaining can be practiced in the public service, but that strikes of public employees cannot be tolerated. The reasoning offered by the Rand Report is somewhat insular in nature as if little consideration had been given to the advantages of allowing civil servants to strike.

Some quotations from the report will serve to illustrate the kind of attitude which the authors of the Rand Report hold towards public employment. Before this is done however, it must be pointed out that in no way does the report suggest a mechanism through which public employees would be able to bargain effecti-

vely. There is a passing reference that "Generally speaking, . . . in public employment, arbitration has proved reasonably satisfactory, and the fact that in certain cases it is compulsory does not detract from the quality of the results."(4)

The Rand Report suggests that perhaps civil servants have certain advantages over employees in the private sector. "Permanence of economic security in private enterprise is today being sought by workers as never before; annual incomes, pensions, insurance, and other benefits demonstrate the life outlook that has supplanted the day to day concern. This desideratum in employment is most fully satisfied in the public sector . . .; there is no reason why that permanency should be excluded as a consideration to be taken into account in public collective bargaining."(5) Rand goes on: "When individuals . . . voluntarily undertake these responsibilities (of the public service) they enter a field of virtual monopoly."(6) Because the public develops rights of expectations and because a society is based on a "structure of interwoven trust, credit and obligation, good faith and reliability are essential to its mode of operation." It is for these reasons that the authors of the Rand Report have suggested that there should not be any strikes tolerated in the public service. The Report would ban strikes in the public service while offering a system of arbitration as the only presently viable alternative to the strike whenever the parties cannot reach an agreement.

D. Essential Services and/or Industries

The Rand Report also gives special consideration to employment situation in what it calls essential industries. /S.56/.

No strike would be allowed after an industry is declared essential, and the Tribunal would step into the dispute; determine the matters which were in dispute and eventually hand down an award which would normally constitute a collective agreement as far as the Act is concerned.

Despite the fact that the Rand Report recommends that there should be no strike subsequent to an industry being declared essential, there is no other compulsion placed upon the disputing parties other than forcing them to find areas of agreement. The parties may elect to arrive at their own collective agreement without any help, or they may elect to submit their dispute to a private arbitration process. Should the gears of the Tribunal have been put in motion the parties may still substitute their own settlement for any or all of the Tribunal's recommendations on the matters in dispute. During its hearings the Tribunal may even hear arguments from the government as well as from both disputants.

There is an obvious lack of definition in Section 56. First of all there are no criteria set for the Tribunal's awards. Secondly there is only a loose description of what constitutes an "essential industry, business or service" which is such as owing to its public involvement, and the effect upon it of a strike may be declared so by the Lt. Governor-in-Council. The declaration shall depend upon the "existing actual or imminent degree of danger to the health, safety, convenience or vital interest of the public." [S.56].

Another discretionary power which the Tribunal possesses deals with stoppages of work in essential services. Although the recommendations of the report are that there should be no strikes in industries declared to be "essential," the Tribunal "in its discretion may permit the temporary cessation of such part of the work or service involved as it may specify . . . as not being to the maintenance of substantial service for the health, safety, convenience or vital interest of the public." [S.56.9]

E. Summary and Conclusions

The Rand Report's recommendations are an unashamed attempt to influence the outcome of the collective bargaining process. An attempt is made not so much to influence the quality of the agreements but rather to encourage the signing of agreements. Nevertheless there are provisions in the recommendations which could affect the quality of a collective agreement.

The Rand Report shows concern over industrial disputes of the kind which have resulted in the closing of a business because the union's demands were simply greater than the company's ability (willingness) to pay. The case described in the Report is the recent case of the New York Herald-Tribune which was forced into bankruptcy partially as a result of the demands made by striking employees. In order to deal with this particular type of situation, the recommended legislation would allow the Tribunal to make arbitrary changes in picketing regulations, and the status of striking and replacement employees--an obvious mechanism to-

weaken the position of the union. This same regulation would apply to an employer attempting to break a union.

The Tribunal is allowed to make or suspend existing regulations with respect to picketing etc. . . .; the aim of the Tribunal being to take steps which in its opinion seem "just" and will be conducive to the conclusion of a collective agreement. The Rand Report has assumed that the essence of a strike is that employees find the terms of employment unsatisfactory and hence stop working while they insist upon retaining their status as employees. Being very concerned with strikes and their effect upon third parties, Rand has aimed most of the report's fire-power at the tools of coercion of both labour and management. The fundamental concern is that collective agreements be concluded. The Report explains that: "The ordinary incidents of strikes: picketing, replacement and reemployment of strikers as supplementary features of coercion may be made effective to that end by just and fair modifications (of the regulations) to meet the particular circumstances of any case, . . . For that, a flexible jurisdiction of the Tribunal is called for. Either the employer or the union should therefore be permitted . . . to apply for such modifications (of the regulations) as may be found to be just and appropriate." The powers of the Tribunal would be "designed to meet situations where special circumstances are present such as <u>lack of good faith, inequality of power</u> or <u>unreasonableness in terms proposed</u>."(7)

The objectives of the recommendations are, in the words of the Report:

1) "To confine legitimate economic pressures, so far as is reasonably possible, to the employer and his employees . . . involved in a dispute, to the exclusion of third persons."(8)

2) "To induce, the parties towards an agreement with the minimum of disruption of their normal working activities and relations," (i.e. strikes).(9)

3) "Within the limits of fairness to both parties, to increase the pressures toward agreement with the minimum of external intervention"(10)

As far as essential services and public service employment is concerned, the Report's opinion is that the public is too strongly affected for employees in these categories to be allowed to strike.

CHAPTER IX

SUMMARY AND CONCLUSIONS

Summarizing a paper such as this is, of course, rather more difficult than summarizing a quantitative analysis. This paper was after all a qualitative analysis of the new wave of opinion which tends to support or argue the philosophy that there is a need for increased government interest in the collective bargaining process. The opinion in question is that the public interest should in some fashion be asserted in certain or all collective bargaining relationships.

Before the conclusions respecting this new wave of opinion can be made, however, it may be wise to review our findings with respect to two topics: 1) this problem of what constitutes the public interest; 2) what is the traditional role of government.

A. The Public Interest

Bill 33 speaks of the "public interest", the Taft-Hartley Act speaks of the "national health and safety", the Rand Report also speaks of the public interest so that avoidance of the term is not practical in a study of this sort. Some scholars have attempted to convince us to stay away from this vague and undefinable (at any rate not in any precise mathematical sense) concept of the public interest. There is no doubt that, on the basis of the opinions reviewed in this study, one simply cannot assign any single meaning or definition to the public interest. The inevitable question arises, of what use, then, is this con-

cept of the public interest if it cannot be defined.

To say, unequivocably, that the concept is incapable of being defined and that its use should be abandoned is to be far too harsh. A satisfactory definition of the public interest may never be found, but there is little doubt that it will continue to be used by politician and legislator. The public interest is capable of being applied in specific circumstances; in other words, it possesses a situational meaning. Furthermore, it is a convenient descriptive to be attached to certain kinds of public policies - often those kinds of policies applied by governments which result in personal costs to some portion of the individuals in our society but which, it is alleged, will eventually result in greater benefits to the whole of society. Public interest policies imply a kind of synergistic approach to the distribution of social benefits i.e. the sum of the personal costs of a policy are less than the total social benefit.

Once a public interest policy has been formulated it usually involves an evaluation of the extent to which certain socially acceptable social goals or values are or would be affected. Its application involves choosing between these goals or values--choosing which is more important or which should be given higher priority. Sometimes these goals or values will appear to be pulling in different directions.

What are these goals and values which we have been throwing about so freely? In the field of labour relations there are some goals or fundamental concepts to which we cling despite the fact that we must sometimes compromise these treasured values.

We cling for instance to the right of individuals or groups of individuals to contract or not to contract. We uphold the right of individuals or groups of individuals to use property for profit within the limits of civilized law. We assert the desirability of individuals being able to pursue wealth of various kinds be it material, spiritual or otherwise; in other words, there should be some incentive for individuals to "better" themselves. These are values very dear to our capitalistic way of life and represent a laissez-faire kind of philosophy.

There are other values, however, which also form part of our social structure. Most of these values are designed to maintain the solidarity of the society and are contained in our system of laws and unwritten codes of behavior. Individuals, for instance, are protected from the destructive acts of other individuals. We uphold the desirability of having a competitive business atmosphere and institute anti-combines laws which are in fact, restrictions upon the individual's (counting corporations as individuals) ability to strive for greater profit. There exists an intangible sense of fair play in our system of values and laws. When companies were powerful and employee associations weak, we made laws to weaken the power position of industrial organizations relative to their employees. The anti-combines laws are another example of this intangible sense of fair play, these laws place limits upon the extent to which individuals may increase their utility (to use an economic term) at the expense of other individuals especially when the gains in private utility are obtained at the expense of the rest of society. Society has many such protective devices.

Part of the existing public interest is directed toward protecting the rights of the individual which we hold dear; part of the public interest is directed toward regulating the activities of individuals (or somehow restricting these activities) to maximize the benefits of our civilization for the whole community. Therein lies the essential problems of determining what is in the public interest:

(i) It is difficult to measure the benefits of alternative policies and thereby determine which goals are to be given priority.

(ii) These goals and values have changing priorities over time.

(iii) Once it is agreed that a certain goal is in the public interest, we must still face the problem of how this will be implemented.

Since it is clearly difficult to speak specifically about the public interest in labour disputes, it is essential therefore that one realizes that there are things directly related to the public interest about which one can speak specifically. The only way one can speak specifically upon the subject of the public interest is to relate it to specific public policies, social goals or fundamental values. When one is speaking about the public interest, one is invariably referring to public policies or a public consensus or the public good. Government instituted policies (including the absence of them) directly affect and result from our values and community goals. It is important therefore when analyzing labour relations legislation to recognize that there

are essential social values involved; and it is equally important to consider that new legislation or public policy often reflects a change in social values or a change in the priorities of the community's goals.

B. The Traditional Role of Government

Generally speaking, governments concerned themselves very little with the collective bargaining process. Nevertheless, the legislation already on the books did imply that collective bargaining itself was a desirable process. Laws were made to encourage the organization of employees to enable them to take collective action during wage negotiations. Certification procedures were set up to give official recognition to the employees' chosen representative. Laws were passed to force the employers to bargain collectively with their employees, and penalties were provided for anyone found guilty of unfair labour practices. Although we upheld the employer's right not to contract with his newly organized employees, the employer was forced to bargain in good faith with his employees. One might well ask: what is the purpose of bargaining other than to conclude a contract.

This is where one notices the first apparent conflict of social values or goals. On the one hand we do not want to force the employer to enter into a contract; on the other hand we uphold the desirability of effective collective bargaining. Hence we see values which are generally acceptable when taken in the abstract, coming into conflict when they are applied. There are countless case histories dating as far back as the turn of the

present century, of employees and employers locked in virtual combat over whether the employer should have to bargain with the employee representative. One group felt that they were merely attempting to assert their rights, while the other group felt its rights were being infringed upon. Management felt that it was being forced to contract in a new and different way - in a collective contract. This is, in effect, exactly what the result of the government's policy on bargaining "in good faith" resulted in.

The position of the employees was very simple. Employees, each facing a large corporate management on an individual basis, had no bargaining power; hence effective collective bargaining was not possible. The choice, which was made then by the legislators, was clearly to ensure effective collective bargaining at the cost to management of having one of its rights (that of not contracting) somewhat curtailed.

It appears that strikes are accepted by federal and all provincial governments* as an unavoidable part of the collective bargaining process because no government has yet banned strikes outright. There does exist, however, the underlying theory which seems to indicate that all efforts should be made to avoid strikes whenever possible. As long as collective bargaining is to remain the acceptable process for the determination between employee and employer of terms and conditions of employment, the strikes may be unavoidable in some cases. Nevertheless every effort is made by the government to avoid the actual strike by assisting the parties to conclude a collective agreement. The federal and most

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*Applies to all provinces except Saskatchewan

provincial governments* have set up two step conciliation procedures which must be followed before a work stoppage can occur. The theory was that it would give both parties more time to bargain as well as give skilled conciliators a chance to attempt to resolve the differences between the parties. Another restriction* regarding the strike was the enforcement of collective agreements as binding contracts once they were agreed upon. In other words, parties to a valid collective agreement were expected to reserve any differences arising out of the interpretation of that agreement without resorting to the strike.

One of these strike restrictions has been effective in cutting down wildcat strikes and generally stabilizing the relationship between employee and employer during the life of the collective agreement. The result has been that most of the disputes which do become full scale grievances eventually are settled by arbitration either private arbitration or arbitration of the Labour Relations Boards. The success of this provision is evidenced by the fact that, in Saskatchewan, where there is no legal requirement to settle grievance disputes without work stoppages, most collective agreements voluntarily include provisions to settle grievances through arbitration.

The other strike restriction is generally conceded to have been well intentioned but completely ineffective. The effect of delaying the strike until the statutory conciliation procedures have been complied with has not been such as to give the parties more time to complete their negotiations. The overall effect has

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*Applies to all provinces except Saskatchewan

been to delay effective negotiations until the conciliation procedures have been complied with. It is widely acknowledged by both labour and management that many of the really substantial issues are often settled at the "eleventh hour" of bargaining. The net effect of the two step compulsory conciliation procedures has simply been to delay this eleventh hour crisis from the expiry date of the contract to a point in time usually long past this natural eleventh hour - to the time when the conciliation procedures have been complied with.

There have been four other instances where a government has asserted the public interest, in this case, in specific disputes. It was decided that specific strikes simply would no longer be tolerated by the public. They were dealt with through extra legal steps requiring the passage of special legislation; the disputes were:

(i) 1950; - National Railroad strike (CNR & CPR)

(ii) 1958; - B.C. coast steamships strike

(iii) 1961; - a threatened strike of the railroads

(iv) 1959; - Newfoundland I.W.A. dispute

The role of government toward public employees was traditionally very simple. With the exception of Saskatchewan's provincial government, governments generally denied their public employees, both effective collective bargaining and the right to strike. Saskatchewan, on the other hand, has been successfully bargaining with its public employees without ever having had to deny them the right to strike.

In conclusion, therefore, traditionally the government has attempted to stay out of collective bargaining disputes. The only kinds of involvement, which can be detected stems from a desire or policy to encourage employees to bargain collectively and a policy to encourage the settlement of collective bargaining disputes without work stoppage. Governments have generally passed legislation, i.e., unfair labour practice laws, which have generally resulted in the curtailing of the economic power which could have been exerted, by the employer, against employees attempting to organize for the purposes of bargaining. The only remaining involvement by the provincial and the federal governments has resulted from the enforcement of those laws which require that grievance disputes be settled without work stoppages. These laws in effect treat the collective agreement as a legal and binding contract between the employees and the employer.

C. The New Role of the Government

1. The new role of the government has been generally characterized by the realization that there are certain kinds of labour disputes, the settlement of which cannot be left completely to the two disputing parties. In all cases where new legislation has been passed there has been no attempt to substitute any form of compulsion for collective negotiations. Whenever two parties sign an agreement of their own accord, then public policy has expressed the opinion that this is in the public interest. There is no attempt to interfere with the contents of a freely negotiated collective agreement, UNLESS, there exists a threat

that a work stoppage will occur or a work stoppage has actually occurred.

The Taft-Hartley Act restricts government action to presidential action and court action in those areas where a national emergency exists and where the national health and safety are imperilled. Clearly these provisions restrict government action to highly unusual circumstances generally classified as emergencies, and only where a strike is threatened.

Whereas the Taft-Hartley's provisions allow for administrative flexibility in determining emergencies, Saskatchewan's Essential Services Act leaves no such administrative flexibility. The legislation prejudges those situations which will be regarded as emergencies; emergencies in this case are those disputes affecting public utilities and hospital services. These emergencies are far more specific and less ambiguous than those emergencies referred to in the Taft-Hartley Act.

The B.C. Bill 33 and the Rand Report's recommendations provide mechanisms for the statutory involvement of public bodies or agencies in disputes involving the public interest. These disputes need not necessarily be classified as emergencies. In both these labour relations systems, provisions are made for public involvement in disputes other than emergency disputes. In neither system is there any interference with the collective bargaining process unless it appears that the process has faltered sufficiently that a strike has occurred or is threatening to occur. In both systems agreement between the parties takes precedence over any externally imposed terms and conditions of em-

ployment (subject of course to the law of the land). Both Bill 33 and the Rand Report provide for government involvement in unusual labour disputes only, and do not provide a system where the government agency is automatically involved with making recommendations in every labour dispute. In other words, Bill 33 and the Rand Report prescribe public participation in labour disputes only when:

(i) the parties cannot agree amongst themselves

AND (ii) the dispute is of such a nature that the settlement thereof cannot be left to the disputing parties.

2. Another stand which the government has taken seems to be that the strike is an undesirable form of social conflict. Taft-Hartley's provisions would delay strikes in order to give the parties a cooling-off period and perhaps give public opinion a chance to force the parties to a settlement. The Saskatchewan legislation prescribes that there should be no strikes in "essential industries." The Rand recommendations prescribe much the same thing except that essential industries will be defined by the Lt. Governor-in-Council instead of by statute as is the case in the Saskatchewan system. Bill 33 prohibits strikes when the dispute involves the "public interest".

The inevitable problem arises when one comes to decide which disputes are "special" enough to warrant asserting the public interest. In one case, the problem has been made easy by careful definition of an essential industry. The Rand Report contains several specific descriptions of conditions under which strikes may be ended through third party intervention. In most

cases, there will have to be a period when the "third party" to a dispute is groping for an answer to the question of when this third party must assert the Public Interest in labour disputes. Because of the lack of definition in this area, the best one can hope for, is consistent application of the various legislations.

3. The public employees of both Canada and the United States are in a sufficiently special position to deserve separate consideration. The American proposal in E.O. 10988, clearly indicates that, at this point, public employees will not be granted truly effective collective bargaining. The federal agencies responsible for the bargaining have been instructed to enter discussions with their employees, but they have not relinquished enough power to the employee associations to make effective bargaining possible. The employees have no right to strike and arbitration is provided on an advisory basis only. If an agreement between agency and employees cannot be reached through consultation and discussion then, the employees have no recourse to sanctions of any sort (except the increasingly popular "slowdown" or "work to rule") against the agency-employer. The Canadian Public Service Staff Relations Act at least promises effective collective bargaining. The division of powers brought about through the passage of the Financial Administration Act makes effective collective bargaining possible. The Public Service Staff Relations Board, an independent body, will administer the system, while the Treasury Board will be able to bargain effectively on behalf of the government. All this has been provided without challenging the authority of Parliament.

A word of warning about the Canadian federal system should be included here. The system has not yet survived a real test of fire. It remains to be seen whether the government can continue to give public employees the option of either striking or going to compulsory arbitration. It is quite possible for instance to visualize a situation where employees have chosen to exercise their right to strike, and that the public eventually feels that the strike can no longer be tolerated. Despite its weaknesses, this Canadian system shows great promise of being capable of delivering the public employees, the same benefits of collective bargaining which private employees already possess.

D. The Future of Collective Bargaining

It is clear that existing public policy wishes to retain collective bargaining as the basis for the determination of terms and conditions of employment. It is also clear that strikes are regarded as somewhat of a "necessary evil" and that there are indications that strikes will not always be tolerated by the public. The question therefore remains to be answered: What is to become of collective bargaining if it is to be stripped of the strike? Since collective bargaining is responsive by and large to the threat or use of raw economic power, can collective bargaining continue to be an effective process?

1. Banning Strikes

First of all, there is no indication that strikes will ever be completely outlawed or banned. The legislation presently

being tried out only provides a mechanism for the assertion of the public interest in certain kinds of special disputes. There is not as yet any indication that strikes should be banned simply as a matter of principle (although this is neither a strange nor new theory to those familiar with the labour relations literature). It is unlikely that any such general strike ban will ever be implemented in the near future in Canada - if for no other reason than that it would be almost impossible to enforce.

The indications are that a strike should be an action of last resort. The implication is that the strike is an undesirable form of social conflict. There are, however, precious few alternatives to strike action, once it has been firmly established that neither party will soften his stand during collective negotiations. Nevertheless it would seem reasonable that alternatives to the strike be sought for and that attenpts be made to make them work, as long as we maintain that the strike is an "unavoidable evil".

2. The Need for an Alternative

The need for an alternative to strike action will grow greater and greater as our tolerance of the third party effects of a strike decreases. At the moment, machinery has been created to prevent strikes in industries of an essential character. How much longer will it be before we try to ban strikes causing merely general public inconvenience? (the Rand Report's recommendations left the door open for such action to be taken). The only alternative to the strike at the moment appears to be compulsory arbitration. Compulsory arbitration may be a satis-

factory alternative whenever both parties agree to be bound by the decision of the arbitration tribunal. Surely, however, when disputants cannot agree upon compulsory arbitration as an alternative solution, some effort will have to be expended, by both scholars and practitioners in the labour relations field, to find more imaginative solutions to the problem. As long as collective bargaining remains responsive to the threat or use of coercion, then ways must be found to allow the parties to impose upon each other a cost of disagreement, other than the strike.

3. Possible Changes in the Nature of Collective Bargaining

There is some hope that through the use of compulsory arbitration in critical industries in British Columbia, we may evolve a new kind of dispute settlement process. In British Columbia, there will exist the possibility that a labour dispute may be exposed to critical and rational analysis. The Mediation Commission, once it holds hearings, bases its decisions upon what constitutes a fair and reasonable collective agreement and not upon the ability of one party to impose a cost of disagreement upon the other. The awards of the Commission will not be responsive to coercion but to rational argument. There exists the possibility that the Mediation Commission will indirectly change the character of collective bargaining if only in those sensitive industries which are likely to be affected by the "public interest" aspects of the Act.

The character of collective bargaining may well be influenced not only by B.C.'s Mediation Commission, but also by

Rand's arbitration tribunal and the federal civil service arbitration tribunal. One should not expect to see immediate and radical changes in the character of the collective bargaining process. The changes, if any, are more likely to be subtle changes in emphasis from a coercive atmosphere to a more rational one.

4. Contents of Collective Agreements

There is no evidence in any of the recent legislation to support the view that Canadian governments are at all concerned with the contents of collective agreements signed in the private sector. It seems surprising that an organization entrusted with the economic helmsmanship of a nation would fail to express some interest in the contents of the actual agreements signed. One need only remember the repercussions across the nation of the 1966 St. Lawrence Seaway workers' 30% (over two years) wage increase, to realize the importance of even one such significant wage agreement.

5. Conclusion

In conclusion, therefore, it may be said that governments are showing increasing concern with the third party effects of strikes in essential industries and those industries which are heavily endowed with the public interest. Governments have nevertheless asserted that freely negotiated collective agreements are to be preferred to any other method of determining terms and conditions of employment. In the future, however, changing

social, economic, and political factors may well bring about increasing government assertion of the public interest in the quality of actual collective agreements.

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