

Public Employment, Collective Bargaining and the Conventional Wisdom : Canada and U.S.A. La fonction publique, la négociation collective et la sagesse populaire : Canada-États-Unis

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Résumé de l'article

En général, les employés civils aux États-Unis et au Canada n'ont pas pu négocier collectivement avec leurs employeurs. Les gouvernements ont déterminé unilatéralement les termes et conditions d'emploi. Cette pratique était en accord avec les vues largement acceptées sur le statut spécial des gouvernements en tant qu'employeurs. On peut appeler ces vues la sagesse populaire. Selon celle-ci, la négociation collective dans la fonction publique n'était pas nécessaire, pratique ni légale. Des événements ont contredit cette sagesse au point qu'elle devient désuète.

Aux niveaux du fédéral, des états et des provinces, des organisations d'employés civils existent depuis plusieurs années. Il y a eu liberté d'association mais, à l'exception de la Saskatchewan, on n'a pas connu avant les années 1960 de système élaboré de négociation collective pour la plupart des employés civils. Aux niveaux municipaux, et particulièrement au Canada, la négociation collective a été plus répandue.

Plusieurs facteurs ont diminué l'influence de la sagesse populaire :

1. Des exceptions heureuses à la pratique générale (v.g. en Saskatchewan et à la Tennessee Valley Authority) ont démontré que la négociation n'était pas nécessairement illégale ni impraticable.
2. Une législation favorable a stimulé la croissance de la négociation dans le secteur privé et amplifié la différence du statut des employés des secteurs public et privé. On a accusé les gouvernements de refuser à leurs propres employés des droits qu'ils forçaient les autres employeurs d'accorder.
3. Dans des sujets étrangers aux relations de travail, les gouvernements se sont souvent engagés par contrats, et se sont soumis à l'arbitrage des griefs.
4. La substitution de la propriété privée à la propriété publique a souvent opposé les gouvernements à des syndicats établis qu'ils ne pouvaient pas ignorer.

Des changements récents dans les deux pays, indiquent une tendance vers la négociation collective dans la fonction publique. En 1965 les provinces du Québec et du Manitoba ont amendé leur loi de la Fonction publique afin de permettre la négociation collective. D'autres provinces envisagent des changements similaires. Le *Rapport Heeneey* a recommandé un système de négociation pour les employés civils fédéraux. Aux États-Unis, l'arrêté-en-conseil 10988 (janvier 1962) du président Kennedy introduisit la possibilité pour les employés civils de négocier collectivement. Au niveau des états, il y eut moins de changements significatifs vers un système de négociation. On peut s'attendre, toutefois, que plusieurs états suivront les sentiers déjà tracés par Washington.

Est-il possible de transporter dans le secteur public les procédures et pratiques qui se sont développées dans le secteur privé? L'emploi dans le secteur public diffère de celui dans le secteur privé en raison du statut particulier et des responsabilités spéciales de l'État. Celui-ci possède le pouvoir légal ultime. Et surtout, l'État démocratique a la responsabilité de mettre de l'ordre dans les affaires sociales en vue de protéger et de promouvoir le bien-être et la liberté des individus. L'État en tant qu'employeur diffère donc essentiellement de tous les autres employeurs. Ceci comporte des implications directes sur un système de négociation collective dans la fonction publique.

L'État doit utiliser son pouvoir souverain lorsque quelque chose menace son existence ou l'empêche sérieusement d'atteindre ses objectifs généraux. Il ne s'en suit pas qu'on doive rendre illégales les grèves des employés civils, ou qu'on doive supprimer toutes les grèves du genre en vertu du pouvoir de l'État. La question de la grève est la plus dramatique, mais on peut facilement lui donner une importance exagérée.

Il n'est probablement pas sage qu'un gouvernement souverain soumette des conflits d'intérêt à un arbitrage à sentence exécutoire. Le plus qu'il doive faire est de s'en remettre à une procédure d'arbitrage obligatoire conduisant à des recommandations. En pratique, ces dernières exerceraient une forte influence.

En principe, selon toute apparence, il n'existe aucun sujet qu'un gouvernement, à cause de son statut particulier, doive exclure du champ des négociations. En pratique, compte tenu du système de notation du personnel utilisé dans les nominations, une entente d'atelier fermé ne conviendrait pas. La présence d'un atelier syndical se défend moins bien dans le secteur public que dans le secteur privé.

Quand la négociation collective se développera davantage dans le secteur public, il surgira probablement des problèmes d'affiliations politiques et d'activités des organisations d'employés civils. Un problème semblable apparaîtrait à l'avènement (improbable) d'un leadership et d'un contrôle de type subversif d'un tel syndicat. On peut se demander si un gouvernement devrait suivre le principe courant à savoir que les affaires internes d'un syndicat ne regardent pas l'employeur.

L'influence traditionnelle des États-Unis sur les relations de travail au Canada n'a pas été importante dans l'élaboration de la négociation collective par les gouvernements. En général les changements au Canada sont apparus plus tôt, et ont introduit des droits de négociation plus significatifs, que ceux survenus aux États-Unis.

Public Employment, Collective Bargaining and the Conventional Wisdom : U.S.A. and Canada

W. B. Cunningham

The author states that the conventional wisdom has viewed collective bargaining in the public service as unnecessary, impractical and illegal. And he adds that, in general, and until recently, the prevailing practices in the United States and Canada have been in close harmony with the conventional wisdom. But the restless change of events threatens the existing state of affairs, described by the conventional wisdom, with progressive obsolescence. And the author answers the two following questions: Can the industrial relations system of the private sector be applied to public employment? To what extent does the nature of government employment raise unique problems?

The enemy of the conventional wisdom is not ideas but the march of events.

J.K. GALBRAITH,
« The Affluent Society »

Introduction

By the « conventional wisdom » Professor Galbraith means those ideas which are esteemed at any time for their acceptability. Because people find it convenient and comfortable to retain their familiar interpretation of the world around them these acceptable ideas have great stability. The relationship between the constantly changing world of events on the one hand and the ideas that interpret them on the other, is one in which the conventional wisdom is always in danger of obsolescence. There is, according to Galbraith, a continual tendency for the world of acceptable ideas to lose their usefulness or validity in interpreting the world of events. As he states it (and quite contrary

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to the often-quoted statement by Keynes): « Ideas are inherently conservative. They yield not to the attack of other ideas but to the massive onslaught of circumstance with which they cannot contend. »¹

Something like this has been happening in the United States and Canada with regard to collective bargaining in government employment. There has existed a fairly well-defined conventional wisdom which post-war events have been making obsolete. Eventually a new conventional wisdom will replace the old. In the meantime the current trends are raising a host of questions with legal and practical implications.

The Conventional Wisdom

The conventional wisdom has viewed collective bargaining in the public service as unnecessary, impractical, and illegal. It is unnecessary because governments have already granted their employees wages, working conditions, pensions, sick leave, insurance plans, holidays, vacations, and so on — in short, all the benefits that employees in the private sector have gained through collective bargaining. The government is not a profit-seeking employer. It is not subject to those pressures, emanating from competitive markets or private greed, to give employees only the necessary minimum. Instead, governments follow a policy of providing benefits similar to those granted by « good » private firms. Little more could be expected through a system of collective bargaining.

No one denies the evil of the former spoils system and the injustices of it to the individual employee. But governments have replaced the spoils system by merit systems. Competitive examinations impartially administered now govern hirings, promotions, and transfers. In view of these enlightened practices collective bargaining to obtain either economic benefits or individual justice is not necessary.

Suppose that critics of this conventional wisdom make a good argument for the benefits obtainable from a workable system of collective bargaining. It is easy to show, for instance, that governments below the federal level have not all eliminated the spoils system, that not all governments provide employment benefits equivalent to those provided

(1) GALBRAITH, J. K., « The Affluent Society », Pelican edition, 1962, p. 27.

by « good » private employers, and that within the merit system there remains much scope for daily individual injustices and personal grievances. Such critics encounter another part of the conventional wisdom's defence of the status quo, the idea that collective bargaining in government is unworkable.

Collective bargaining is unworkable for at least two reasons. Decisions on issues that form much of the substance of collective agreements are directly or ultimately the responsibility of an elected legislative body which in turn is responsible to the general public. These legislative bodies must retain their decision-making powers over items with important budgetary implications. But the composition of such bodies (competing and often antagonistic political parties and factions) and their operating methods (public debates) make them unsuitable for the role of negotiators on one side of a bargaining conference with their employees.

The second reason is the impotency of the employee unions in the event of an impasse in negotiations. Unions of government employees, so the argument goes, cannot strike effectively against the government. Such strikes are often illegal. Even if legally permitted to strike the services of government are so vital to society, and the public outcry is likely to be so loud, that no public employee union can hope to gain by such action. Deprived of the effective use of strikes the unions have little or no bargaining power. The distribution of power is too lop-sided for bargaining to be a practical arrangement. Should an impasse occur it would be resolved, in one way or another, by a unilateral decision of the government.

Critics of this part of the conventional wisdom may suggest, of course, that the legislative body should authorize top administrators to perform the bargaining function. Another suggestion is to use third-party arbitration as an equitable substitute for a union's lack of effective striking power. To such suggestions the conventional wisdom invokes legal arguments as a third part of its defense against change.

This brings the discussion into the realm of political ideas and theories of government. The state possesses sovereign powers. The idea of sovereignty is the idea that there must reside somewhere in the body politic an ultimate and final source of legal authority. The relevant question is whether the possession of sovereign power by the state inhe-

rently precludes the possibility of collective bargaining between the state and its employees.² This question the conventional wisdom has answered with a self-evident yes.³ A sovereign government, it is argued, cannot be compelled by lesser bodies to do anything that it choose not to do, and it cannot enter into contractual arrangements that bind its freedom to exercise its sovereign power in the future.

In addition to this political idea of sovereignty there are the legal rules restricting the delegation of power. These rules are especially important in the U.S.A., with its constitutional system of checks and balances in which specified functions and powers have been allocated to each of the three branches of government. A decision⁴ of the Missouri Supreme Court in 1947 shows the relevance of these rules.

It is a familiar principle of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void. If such powers cannot be delegated, they surely cannot be contracted or bargained away; and certainly not by any administrative or executive officers who cannot have any legislative powers... Thus qualifications, tenure, compensation, and working conditions of public officers and employees are wholly matters of law making and cannot be the subject of bargaining or contract.

This completes the inventory of the conventional wisdom arsenal. Collective bargaining in the public service is unnecessary, impractical, and illegal. These have been the agreeable and acceptable ideas expounded in both Canada and the United States, but perhaps more strongly held in the latter country. In both countries this conventional wisdom is currently being seriously challenged. North and south of the border, changing practices indicate a trend towards collective bargaining for government employees. To appreciate the nature of this trend it may be useful to outline the conventional practice before noting some of the changes.

The Conventional Practice

In general, and until recently, the prevailing practices in the United States and Canada have been in close harmony with the conventional

(2) GODINE, M.R., « The Labor Problem in the Public Service : A Study in Political Purulism ». Harvard University Press, 1951, p. 41.

(3) For some examples in the United States see : HART, WILSON R., « Collective Bargaining in the Federal Civil Service », Harper and Bros., N.Y., 1961, pp. 10-32.

(4) « Springfield v. Clouse », 206 S.W. 2nd 539, 545 (1947). Quoted in Hart *op. cit.*, p. 48.

wisdom as outlined above. This agreement has been close at the federal, state, and provincial levels of government; not so close for the less-than sovereign municipal governments.

Organisations of federal civil servants existed before the turn of the century. In the United States the lettercarriers combined in 1868 to press for an eight-hour day.⁵ Lettercarriers in Canada organized a union in 1891.⁶ Early in the present century protests against the executive orders (gag rules) of Presidents Roosevelt and Taft, which deprived government employees of their right to petition Congress on their own behalf, induced Congress to pass the Lloyd — La Follette Act of 1912. This Act, in its effect, secured the right of federal employees to belong to unions and, individually or collectively, to petition Congress. Five years later non-postal white-collar workers formed the National Federation of Federal Employees and affiliated with the A.F.L.⁷ Organisations of civil servants in Ottawa have existed for about 50 years. Thus federal employees in both countries have had the right to organize and some of their organisations have existed for many years.

These organisations have not had collective bargaining rights. Traditionally they have had two channels of influence. They could exert some direct influence when, and if, they were consulted, presented briefs to higher authorities, or if they participated in those councils or committees that have been formed to promote joint discussions. (Canada, for example, established a National Joint Council in 1944).⁸ In general employees and their organisations have not had the formal right to be consulted about proposed changes, and their powers have not extended beyond making suggestions, recommendations, or pleas. The pleas of supplicants have not necessarily been ineffective but the relationship has been one of paternalism, not bargaining.

The other channel of influence (from a bargaining point of view an indirect influence) has been the exertion of political pressure on the

(5) SCHNEIDER, B.V.H., « Collective Bargaining and the Federal Civil Service », *Industrial Relations: A Journal of Economy and Society*, May, 1964, p. 104.

(6) ANDRAS, A., « Collective Bargaining By Civil Servants », *Industrial Relations - Relations industrielles*, Vol. 8, January 1958, p. 41.

(7) SPERO, S. « Government as Employer », N.Y., Remsen Press, 1948, p. 178. The N.F.F.E. later withdrew from the A.F.L. in 1931. *Ibid.*, p. 190.

(8) For a list of the Council's shortcomings, see: BEST, J.C., « The Government as Employer », *Industrial Relations - Relations industrielles*, Vol. 16, No. 2 (April, 1961), pp. 171-172.

government. In the absence of bargaining rights and formal procedures some employee associations developed skillful techniques for obtaining the support of politicians and the attention of public opinion. These activities — professional pleading, political lobbying, public relations — cannot be called collective bargaining.

There is a paucity of information about the practices that have existed in the governments of the individual states in the U.S.A. In general they seem to have followed the federal pattern. Writing on this topic in 1961 Hart said that « labor-management relations at the state level parallel normal federal practices too closely to merit a great deal of attention ».⁹ Students of unionism and collective bargaining appear to have largely ignored the association of public employees at the state level. The editor of the *Industrial and Labor Relations Review* introduced an article in the July 1962 issue as « an initial effort to describe and analyze the common features... of 25 independent public employee associations ».¹⁰ At least two of these associations had existed for 50 years, and 14 of them existed before 1946. The author of the article reported that their major functions were membership recruitment and legislative representation.¹¹ As might be expected there was much variation from one state to another. It is clear, however, that collective bargaining played little or no part in the employment relationships.

Another practice in line with the conventional wisdom should be noted. Since 1945 at least 10 States, by legislation, have outlawed strikes by state employees.¹² In those states without explicit legislative prohibitions the prevailing view is that the courts would rule out such strikes. A leading writer has said that in the United States, « the slogan 'one cannot strike against the government' has become an article of faith to be accepted without question ».¹³ Some states have gone beyond merely outlawing strikes and forbid union membership for state employees.¹⁴

(9) HART, W., *op. cit.*, p. 133.

(10) Page 510. The article is: KRISLOV, JOSEPH, « The Independent Public Employee Association: Characteristics and Functions », pp. 510-520.

(11) *Ibid.*, p. 511. Also, see: SPERO, S., *op. cit.*, ch. 10, and pp. 223-225.

(12) NORTHRUP, H.R., BLOOM, G.F., « Government and Labor », Homewood, Ill., R.D. Irwin, Inc., 1963, p. 458.

(13) SPERO, STERLING, « Collective Bargaining in Public Employment: Form and Scope », *Public Administration Review*, Vol. XXII, No. 1 (Winter, 1962), p. 4.

(14) NORTHRUP, H.R., BLOOM, G.F., *op. cit.*, p. 463, note 11. It should also be noted that the Taft-Hartley Act of 1947, Sec. 305, outlawed strikes by federal employees, and that Congress in 1955 stiffened the punitive provisions. See: HART, W.R., *op. cit.*, pp. 34-35, and note 39.

With one exception the Canadian provinces have likewise followed the conventional wisdom. In Saskatchewan, the exception to the rule, the government began collective bargaining with its organised civil servants following the electoral victory of the C.C.F. in 1944. But the majority of Canadians continued to look upon this socialist government as an unwelcome aberration in the Canadian political environment. The tendency was to scorn rather than to emulate the socialist innovations.

At the other extreme has been the Province of Quebec. Legislation in that Province imposed severe restraints on collective action by provincial and municipal employees. Similar legislation also applied to employees in a wide range of public service activities, regardless of whether the enterprises were privately or publicly owned. This legislation outlawed strikes and imposed compulsory binding arbitration. For employees of the Province covered by the Civil Service Act, the Civil Service Commission acted as the council of arbitration.¹⁵ The law permitted provincial employees to form their own associations but prohibited affiliation with other organized labour groups. Activities of the two staff associations did not extend beyond recreational and cultural pursuits.¹⁶

In other provinces some staff associations can be traced back to the 1920's. Until relatively recently they functioned primarily as social clubs or co-operative societies.¹⁷ There has been freedom of association but no developed system of collective bargaining.

At the municipal level of government in both countries the federal, state, and provincial pattern has now been broken for many years. Unionism and collective bargaining in Canadian municipalities had become sufficiently common by 1953 that the Canadian Federation of Mayors and Municipalities financed a special study of it.¹⁸ The post Second World War growth of municipal collective bargaining has continued. Unlike the experience of many unions during the last decade

(15) WOODS, H.D., OSTRY, S., « Labour Policy and Labour Economics in Canada », Toronto, Macmillan of Canada, 1962, pp. 223-4.

(16) SCARROW, H.A., « Employer-Employee Relationships in the Civil Services of the Canadian Provinces », *Public Administration*, Spring 1957, p. 65.

(17) *Ibid.*, p. 65. For a full-scale study of staff relations at the federal and provincial levels, see: FRANKEL, SAUL, « Staff Relations in the Civil Service: The Canadian Experience », Montréal, McGill University Press, 1962.

(18) FRANKEL, S.J., PRATT, R.C., « Municipal Labour Relations in Canada », Montreal, Industrial Relations Centre, McGill University, 1954.

the leading unions of municipal workers substantially increased their membership. Collective agreements are now a common practice in Canadian municipalities.

In the United States, municipal unions have encountered legal obstacles not present in Canada. Uncertainties about the legality of collective bargaining and the signing of agreements have resulted in a slower development of municipal bargaining than in Canada. Although dampening its rate of growth and often affecting its outward forms the law has not prevented such bargaining from existing and growing. Goodine has reported that while written collective agreements were not widespread in 1946 there were « numerous and diverse types of employee relations plans, ordinances or other resolutions of law-making bodies which were unilateral in form but which in fact represented the product of prior bilateral negotiations with employee associations ». ¹⁹

In the 1950's some of the largest cities embarked on a policy of union recognition and collective bargaining. Following an extensive investigation and report by the New York City Department of Labor, Mayor Wagner in 1958 introduced collective bargaining for the nation's largest city. A year earlier Philadelphia had become the first major city to recognize one union as the exclusive bargaining agent. ²⁰ Cincinnati first formally recognized unions in 1951, and in 1957 also granted exclusive recognition. ²¹ These examples show that municipal collective bargaining in the United States has been diverging from the traditional federal-state pattern.

This completes a quick survey of what may be called the conventional practice. These practices are currently changing in the direction of more collective bargaining. To the extent they do so the conventional wisdom loses its relevance.

The Challenge to the Conventional Wisdom

In a stable society the conventional wisdom may, for a time, describe the existing state of affairs adequately, but never completely. The diversity of social arrangements makes it incomplete; the restless change

(19) GOODINE, M.R., *op. cit.*, p. 241.

(20) HART, W., *op. cit.*, pp. 125, 126.

(21) LANDER, A.S., « A Union View of Collective Bargaining in the Public Service », *Public Administration Review*, Vol. XXII, No. 1 (Winter, 1962), p. 11.

of events threatens it with progressive obsolescence. At no time did this acceptable and comfortable body of ideas fully agree with prevailing practice.

As early as 1920 the U.S. Department of the Interior had signed a collective agreement covering workers on the Alaska railroad. The Government Printing Office, originally owned privately, operated from 1861 to 1903 under a strict closed-shop agreement. When Congress established the Tennessee Valley Authority in 1933 it was freed from the administrative controls of the Civil Service Commission and given much of the freedom possessed by private firms. Since 1940 T.V.A. has regularly signed collective agreements with its blue collar and white collar workers and its bargaining system has become similar to that of many large privately-owned firms. The Bonneville Power Administration, under the Department of the Interior, signed its first collective agreement in 1945 patterned after the T.V.A. agreements.²²

Instances of this type have been exceptions. Nevertheless their very existence has weakened the arguments of the conventional wisdom. They served as examples that collective bargaining by agencies of the U.S. Government was not necessarily illegal or unworkable. In Canada the successful experience with collective bargaining in Saskatchewan has had a similar demonstration effect.

In the United States the Wagner Act of 1935, and in Canada the order-in-council P.C. 1003 of 1944, required private employers to bargain collectively with unions chosen by their employees. State and provincial governments passed similar laws. In Canada the provincial statutes imposed the same requirements on their subordinate units of government, the municipalities. Legislation of this type left the superior governments vulnerable to the charge that they denied to their own employees rights and privileges that they forced other employers to grant. A committee of the American Bar Association in 1955 censured the Government for lagging behind industry.²³

A government which imposes on other employers certain obligations in dealing with their employees may not in good faith refuse to deal

(22) See : TERRY, NEWELL B., « Collective Bargaining in the U.S. Department of the Interior », *Public Administration Review*, Vol. XXII, No. 1 (Winter, 1962), p. 20 ; and HART, W., *op. cit.*, pp. 86, 96-106.

(23) Quoted, with other examples, by HART, W., *op. cit.*, p. 3.

with its own public servants on a reasonably similar favourable basis, modified, of course, to meet the exigencies of the public service. It should set the example for industry by being perhaps more considerate than the law requires of private enterprise.

In British Columbia the Provincial Government Employees' Association made this type of argument a central part of a large-scale publicity campaign in 1953, in an unsuccessful attempt to obtain arbitration rights.²⁴ The rapid growth of unions and collective bargaining in the private sector, stimulated by favourable legislation, magnified the difference in status of public and private employees. This in turn led to pressure by civil servants for similar treatment.

Government practices in matters not directly related to employees have weakened legal arguments against collective bargaining. Governments enter into many types of contracts — for public works, land purchases, consultant services, and so on. These contracts are often for a fixed period of time and frequently extend over more than one budget period. Legal authorities have long recognized the power of governments to do this.²⁵ In what way, critics have asked, does the principle of sovereignty and the restrictions on delegating legislative power permit governments to enter these contracts but prevent the signing of collective agreements with unions?

A similar argument has been made with regard to arbitration procedures. Writing in 1961, Anderson said that, « ...arbitration of grievances in public employment is almost unknown » in the United States.²⁶ But in other matters cities often submit claims by or against them to arbitration, and put arbitration clauses in public works contracts. Surely, the critics have suggested, a referral of employee disputes to advisory arbitration would not violate any delegation-of-power principle.

The existence and successful functioning of collective bargaining in some areas of government employment; the development of bargaining in the private sector protected and encouraged by legislation; government practices in other matters — these events have been chal-

(24) LEONARD, WILLIAM, « The Rights and Powers of a Civil Service Association », Fifth Annual Conference, Institute of Public Administration of Canada, *Proceedings*, 1953, p. 74.

(25) ANDERSON, ARVID, « Labor Relations in the Public Service », *Labor Law Journal*, November, 1961, p. 1083.

(26) *Ibid.*, p. 1090.

lenging the conventional wisdom. Other changes have undoubtedly contributed to the challenge.

One of these has been the expanding total of public employment and the enlarging range of government activities and occupations. When New York City took over the operation of the city transit system, Michael Quill's Transport Workers Union, a C.I.O. affiliate that possessed representation rights for the subway workers, could not simply be wished out of existence. The controversies arising from this new responsibility of the city led to the thorough study of public employment policies that paved the way for a full acceptance of collective bargaining.

Some of the Canadian provinces found themselves in a similar position when they assumed control of electric power production. In both British Columbia and New Brunswick unions of skilled electrical workers insisted upon retaining their bargaining rights with the transfers from private to public ownership. In New Brunswick this became a leading issue in a provincial election. The incumbent Liberal Government had refused bargaining rights to the Power Commission employees. It was defeated and the newly-elected Conservative Government showed its gratitude by amending the Labour Relations Act.

These and other events seem to be reducing the conventional wisdom to the status of conservative dogma. They have been having an increasing effect on legislation and practice. Consider some of the recent changes in Canada.

In March 1965, the Manitoba Government amended its Civil Service Act.²⁷ During the preceding eighteen months a joint council representing the Province and its civil servants had held lengthy discussions. The amendments, reflecting the recommendations of this joint council, empowered the Government to enter into a collective agreement, to cover salaries and working conditions, with the Manitoba Government Employees' Association. On June 10, 1965, the Government and the Association signed a memorandum of Agreement which recognized the Association as the sole bargaining agent for provincial civil servants, a recognition that is to continue as long as the Association maintains as members a majority of the employees. The amendments to the Civil

(27) Bill 64, 1965.

Service Act also provided a dispute-settlement procedure involving a mediation board and, ultimately, a hearing by the Lieutenant-Governor-in-Council. The amendments did not explicitly grant the right to strike.

Recent changes in Quebec law represent an even greater shift from the past. The Quebec Labour Code that went into force September 1, 1964, reflected new principles and a new philosophy.²⁸ It granted most public service employees the right to strike subject only to those restrictions, common in Canada, that are associated with the certification and conciliation requirements (the latter no longer including a compulsory board hearing and report), and in emergency disputes a Taft-Hartley type of fact-finding procedure. Some three months later this newly-gained freedom enabled employees of the Quebec Liquor Board to engage in a lengthy but legal strike.

The new Code did not apply to civil servants (except Liquor Board employees) subject to the Civil Service Act. But in 1965 the Legislative Assembly changed the Civil Service Act to give provincial civil servants collective bargaining rights for salaries and working conditions.²⁹ In addition the changes granted these employees (with some exceptions) the right to strike. The Act specifically named the Quebec Civil Servants Union, a CNTU affiliate, as the employees' bargaining agent. Thus civil servants in Quebec, as in Saskatchewan, now have the right to bargain collectively and the right to strike against their employer, the Provincial Government.

Recent changes in Manitoba and Quebec provide the most obvious examples of the trend towards bargaining in public employment. Other provinces have not been immune to the winds of change. Alberta, where the staff association and the Government have held joint discussions, is expected to follow the example of the other two prairie provinces. Ontario amended its Public Service Act in 1963 to establish a new negotiating procedure and now has partial agreements with some branches of the civil service. Traditionally the Atlantic Provinces have been more resistant than the western provinces to innovation and social change. Civil servants were later than those elsewhere in forming their own associations. It is significant, however, that in 1965, an employee³⁰

(28) *Labour Gazette*, Vol. LXIV, No. 12 (Dec. 1964), p. 1072.

(29) *Labour Gazette*, Vol. LXV, No. 9 (Sept. 1965), p. 789.

(30) C. BURNHAM.

of the Nova Scotia Department of Finance and Economics was the national president of the Canadian Federation of Government Employee Organisations. The *Halifax Chronicle-Herald* has reported him as saying that the chief and immediate aim of the Federation is to get collective bargaining rights for public servants in all ten provinces.³¹ At the federal level, as is well-known, the Government is committed to the principle of collective bargaining, and its introduction now seems a certainty in the near future.

It is impossible to give a state-by-state account of changes in the United States. At one extreme, as mentioned earlier, there are a few states that forbid organisations of their public employees. At the other extreme are a number of states that have recently supported, either by statute or by executive order, the idea of collective bargaining. In 1957, amendments to Minnesota's no-strike law « not only guaranteed the right to organize, but also contained a provision, *unique in state law*, for state conducted representation hearings and secret ballot election of collective bargaining agents ». ³² A 1959 law in Wisconsin extended bargaining rights to municipal employees but not to state employees. ³³ The fifth edition of Bloom and Northrup's text, 1965, mentions 13 states as having some form of dispute settlement through collective bargaining. ³⁴

There are obviously great differences among the many states. No common pattern has emerged; certainly there has been no rush to introduce bargaining for state civil servants. Changes in permitted practices in the last eight years indicate the beginning of a trend in this direction. It is a trend that is likely to continue.

State governments commonly follow the pattern set in Washington, and the Federal Government broke new ground in 1962. Following the report of a special Task Force (chaired by Arthur Goldberg, the Secretary of Labor at that time) President Kennedy issued the now famous Executive Order 10988. ³⁵ This Order reflected a frank accept-

(31) November 22, 1965.

(32) HART, W., *op. cit.*, p. 134 (Italics added).

(33) ANDERSON, ARVID, *op. cit.*, p. 1069. Alaska and New Hampshire in 1959, Massachusetts and Illinois in 1960, are other states he mentions as having moved in the direction of granting bargaining rights.

(34) BLOOM, G.F., NORTHROP, H.R., « Economics of Labor Relations », Fifth edition, R.D. Irwin, Inc., 1965, p. 846.

(35) The full text of the Order is given in the *Industrial and Labor Relations Review*, Vol. 15, No. 4 (July 1962), pp. 548-553.

ance of the desirability of collective bargaining in the federal civil service. By the terms of the Order employee associations with majority support in appropriate bargaining units, for the first time, could achieve exclusive recognition as bargaining agents with the power to negotiate formal agreements. In an interim appraisal of the Order, Wilson Hart called it a smashing success for the politicians. « The new program will not be terminated... or emasculated by drastic revisions of the Order. »³⁶ If his prediction is correct the Order is the equivalent of a death warrant for the conventional wisdom.

Public Versus Private Employment

The difficulty of hammering out the details of a bargaining system suitable for government employment is one of the main obstacles to a more rapid introduction of such systems. There is an understandable and perhaps unavoidable tendency to borrow the procedures and practices prevailing in the private sector, altering these where necessary to fit the conditions of public employment. If it is possible to talk about a national industrial relations system³⁷ then predictably the sub-systems arising for government employees will strongly reflect the national forms.

Can the industrial relations system of the private sector be applied to public employment? To what extent does the nature of government employment raise unique problems? One way to approach these questions would be to focus attention on some leading features of the national industrial relations system — the right of association, defined bargaining units, exclusive bargaining agents, dispute settlement procedures — and to discuss each in turn with reference to its suitability for collective bargaining between a government and its employees. An alternative approach is to ask in what way does government employment differ from non-government employment. Only if there exists significant differences between the two is there any reason for assuming that the bargaining system in one will not work as well (or as poorly), without modifications, in the other. It follows that modifications which may be desired are of two types: those desired because of the unique features

(36) HART, W., « The U.S. Civil Service Learns to Live with Executive Order 10988: An Interim Appraisal », *Industrial and Labor Relations Review*, Vol. 17, No. 2 (January 1964), p. 213.

(37) See: DUNLOP, J., *Industrial Relations Systems*, N.Y., Henry Holt and Company, 1958.

of government employment; and those desired because it is thought that similar changes are needed in the private sector.

Government employment does differ from non-government employment. It is not easy, however, to capture the essence of the distinction in a few words. A few false distinctions may be noted first. The sheer size of government is one. There are some private firms that have revenue from sales greater than the total tax revenue of any government in Canada, and of any but the federal and perhaps some of the largest state governments in the United States. Related to size is the great diversity of occupations and activities in government employment unmatched, at least at the federal level, by the largest firms in the private sector. This appears to be more a difference of degree than of kind. The size and diversity of government activities obviously creates difficulties in constructing a workable bargaining system, but large private firms encounter similar difficulties. If any large-scale development of white-collar unionization should occur in the private sector these similarities would be more immediately obvious.

The large proportion of white-collar and professional workers in government employment is another feature sometimes noted. This may account in part for the slower development of collective bargaining in government but it does not appear to be more than a difference of degree from private employment. Note, first, that government employment includes a much higher percentage of blue-collar workers than may commonly be thought. In the United States W. Hart has stated that approximately one-third of federal government employees are paid in accordance with hourly or per diem wage schedules set up by the executive departments and agencies.³⁸ In municipal employment the percentage of blue-collar workers is undoubtedly higher. Second, the ratio of white-collar to blue-collar workers has been rising in private employment. Bargaining difficulties stemming from the existence of a large proportion of white-collar employees in the labour force do not appear to be unique to government employment.

The lack of any clear differentiation between employees and employers falls in the same category of false distinctions. A deputy-minister is an employee of the government and a general manager is an employee of a business corporation. Their powers and responsibilities

(38) HART, W., « The U.S. Civil Service Learns to Live with Executive Order 10988 », *op. cit.*, p. 219.

greatly exceed those possessed by the majority of employees. At lower levels of power and responsibility the dividing line becomes blurred in private business as well as in government. This is not to say that there are no difficulties in determining which employees should be included or excluded from bargaining units or that the difficulties may not be greater in government employment. But the problem itself is not a special one existing only in government.

A commonly posited difference is the vital nature of government services. Obviously the maintenance of law and order or national defence is vital to society and manufacturing hoola-hoops, funny-putty or super balls is not, to take extreme examples. Just as obviously the maintenance of janitorial services in a government building or the services of labourers on an experimental farm are not vital whereas a blackout from the interruption of electric power provided by privately-owned utilities endangers the health and safety of the affected communities. Logically any argument for special bargaining procedures or restraints based on the essentiality of government services applies with similar force to essential services provided by the private sector of the economy. The problem is one of emergency disputes and these must be classified on the basis of the services rendered, not on the basis of whether the employer is a privately-owned corporation or a government.

Activities of private enterprises are profit-seeking; most activities of government are not. While this difference should not be ignored there is a danger of over-rating its significance for collective bargaining in government. In the private sector the primary effect of profit-seeking on collective bargaining is the imposition of limits on what employers think they can offer to their employees during the course of negotiations. Governments are not subject to the restraints of declining profit margins but this does not mean the absence of pressures to resist employee demands. The unpopularity of high or rising tax rates, the competing demands for government expenditures in a wide range of activities, the complaints likely to arise from private employers competing with the government for available manpower, and the existence of national « guide-lines » for wage increases can produce pressures as effective as falling profits against excessive generosity by governments to their employees. In addition, of course, some government activities are profit-seeking or result in profits while pursuing other objectives; and in the private sector collective bargaining exists in some organisations that neither seek nor obtain profits.

A theory of public employment that distinguishes it from private employment must be based on the special status of the state as an employer.³⁹ The development of collective bargaining in the private sector reflected, among other things, a power struggle among rival interest groups in society. One result was a shift in the relative power of private groups. The state acted, and still acts, as an arbiter of these conflicts; in the United States and Canada primarily by establishing, enforcing, and altering the framework of rules governing the power struggle. In this way the state acts as the custodian of the public interest ensuring, at least, that group conflict does not destroy the social fabric of the state itself.

In collective bargaining with its own employees the state necessarily retains its role as an umpire in the public interest. In addition, however, this role must be combined with one in which the state is a direct party of interest in any conflict arising from the employer — employee relationship. Thus, there is a power relationship which differs fundamentally from that existing between a union and an employer in the private sector. It is not just a matter of the state employer having much more power than its organized employees. That is often true as well in the private sector. What makes them different is the nature of the state's power and its responsibilities. An analysis of the state as an employer cannot avoid an examination of the nature of the state itself.

No attempt is made here to discuss rival political ideas about what a state is, or should be. In Canada and the United States the dominant view is that the state possesses sovereign powers. Citizens view it as the final and ultimate source of legal authority. Assuming that this view of the state is unlikely to be seriously challenged or to change in the future, the relevant question is what are the implications of this special status of the employer for a system of collective bargaining in government employment.

In the past collective bargaining was looked upon as a challenge to or a dilution of the state's power, something that could not be permitted if the state was to retain its sovereignty. There was merit in such a view only on the assumption that the sovereign state was opposed to collective bargaining. If a sovereign state decides that a bargaining system is desirable there is nothing in the concept of sovereignty to

(39) For a more complete discussion of some of the ideas that follow see : GOODINE, M.R., *op. cit.*, pp. 21-61.

prevent the state and its employees from establishing such a system. To argue the contrary is to argue that the state's power is something less than sovereign.

There seems to be no reason why the special power status of the state should require a formal bargaining structure significantly different from that existing in the private sector. The ideas of units appropriate for collective bargaining, persons employed in a confidential capacity, exclusive representation by organisations with majority employee support, and so on will probably fit the conditions of government employment better than they have fitted some segments of private employment. Admittedly there are severe difficulties in working out the details in attempts to transfer these ideas to the public service. There were many difficulties in first applying the ideas in private employment. No attempt is made here to examine these difficulties. The direct participants are the ones who must construct the details of a workable system; and a system established as a result of joint deliberations will be the one most likely to work well. In principle the idea of sovereignty does not interfere with the adoption of the formal structure of the private-sector bargaining system.

There is at least one other fundamental distinction between the state employer and other employers. Sovereign power has not been the result of some divinely-ordered permanent system for ordering political relationships. Rather, the idea of sovereignty is a creation of the human mind in its centuries'-old ceaseless search and experimentation to obtain a satisfactory form of government. The idea has been retained because it has been found useful in the pursuit of a state's objective. In the western liberal democratic tradition a paramount state objective is the ordering of social affairs for the protection and enhancement of individual freedom and welfare. It is commonly held that it is the citizens who are the ultimate repository of the state's sovereign power. By voting, these citizens temporarily grant the exercise of their sovereign power to elected representatives who form a government that acts in a trustee capacity for all. While civil servants may be looked upon as employees of the state their immediate employer, and the one with whom bargaining must be conducted, is a government. This government employer is charged with the responsibility of advancing the objectives of the state, objectives that are unique in that they are not the primary purposes of other associations or of other employers.

There is no need to debate the question whether the objectives of the state have a higher normative value than those of other associations. Unless a state has the power to adjust the relationships among its internal entities, and their relationships to the state itself, there is little likelihood that these entities that collectively make up the state will be able to achieve their objectives, regardless of their normative values. In the democratic tradition the individual, not the state, is all important. But the state is all-important as a necessary condition for the achievement of the highest individual aspirations. It is surely this responsibility of the state that justifies its possession of sovereign power. Thus the state as an employer differs from all other employers not only because it possesses sovereign powers but also, and more importantly, because it has different responsibilities. This has direct implications for a collective bargaining system in the public service.

First, the state must use its sovereign powers when any action threatens its continued existence. Even when its existence is not threatened there may well be occasions when the state would be fully justified in using its power to overcome obstacles to the achievement of its general objectives. A lengthy strike by all civil servants would be an example of the first type; a strike by all guards at one penitentiary an example of the second type.

The question of strikes by civil servants is the most dramatic and contentious part of this general topic. There are sharply divided views on whether all such strikes should be prohibited, substituting some form of arbitration for the settlement of disputes, or whether strike prohibitions should apply only to employees rendering essential services. Advocates of a complete freedom to strike are rare.

M. R. Godine has given the strongest argument for prohibiting all strikes.⁴⁰

... a strike in the government service which does not impose immediate and profound injury upon the community still constitutes an open defiance of public authority. It is essentially the substitution of a private or group judgment for a government decision. Public acquiescence in such conduct implies the surrender by the government of the ultimate right to judge the merits of conflicting social claims which must of necessity include those disputes to which the government itself is a party.

...

(40) *Ibid.*, pp. 171-2.

« The *statu quo* state cannot permit group defiance and in so doing retain its quality of statehood. To wait upon consequences is to deny the validity of any particular priority to state decisions *per se*. In brief the resolution of the strike problem in the public service depends in the final analysis not upon an evaluation of social repercussions but upon a theory of the nature and value of the state. If its nature is held to demand a concentration of authority in excess of that possessed by any other group, a strike in the public service becomes almost a contradiction in terms. Its very rationale permits and indeed requires the state to suppress a challenge to its authority. »

Reduced to syllogistic form Godine's argument is:

- Major Premise* — The state cannot permit defiance of its ultimate authority.
- Minor Premise* — Any strike in government service « constitutes an open defiance of public authority ».
- Conclusion* — The state cannot permit any strikes in the public service.

The minor premises of this argument is questionable. It does not allow for the possibility that a government may, on occasion, recognized some benefits to itself or to the state from strike action by its employees. That is, the state though vested with final authority need not look upon all public service strikes as a challenge to or defiance of this authority. It is at least conceivable that a government might wish to use strikes as a part of its strategy recognizing, what has long been known, that strikes can have a beneficial effect on the future demands and behaviour of an employee group.

The strike by Canadian postal workers in the summer of 1965 was, indeed, « the substitution of a group judgment for a government decision ». Did « public acquiescence in such conduct » really imply « the surrender by the government of the *ultimate* right to judge the merits »? By permitting this group defiance did the Canadian State really lose « its quality of statehood »? Surely the answer is that the Canadian government temporarily refrained from using the full force of its sovereign power; it did not surrender its ultimate right to take stronger action. Godine's argument has an attractive logical simplicity that does not do justice to the results of experience.

It is not necessary to view all strikes by government employees as direct challenges to a state's sovereign power. If a legislature has

passed a law making such strikes illegal, a strike then becomes an open defiance of the law. If no anti-strike legislation exists a strike can then be viewed as an unwillingness of employee associations to accept « final offers » made by government administrators charged with the responsibility of collectively negotiating an agreement. For an incumbent government the strike raises the question of whether or not its consequences warrant the exercise of the state's sovereign power. If the government chooses not to use its ultimate power to impose a settlement the continuance of the strike, logically, should not be looked upon as a challenge to, or defiance of, that power. Rather, it is a defiance of the position of the government acting in an administrative, not a law-making capacity.

While the strike question is the most dramatic one its importance may easily be over-emphasized. Civil servants in the United States and Canada are not prone to strike. Many individual government employees abhor the idea of strikes and the constitutions of some associations explicitly rule out such action. There is no good reason to think that the introduction of a formal system of bargaining would be followed by any significant increase in strikes, whether legally permitted or not. The experience of Saskatchewan suggests otherwise. It is quite possible that with a formal bargaining system governments would be induced to make necessary and desirable changes in salaries and other employment terms more rapidly than heretofore thereby avoiding a possible progressive deterioration in morale and a build-up of discontent, frustration, and dis-satisfaction that could lead to thoughts of work-stoppages. Government employees and their associations may, or may not, be more responsible than other employees and their unions. This is probably an irrelevant consideration. What is relevant is that government employees are well aware of the responsibilities and power of their employer. It is this knowledge as much as anything that can be relied upon to keep strikes in the public service at a minimum.

There is no compelling reason for a state to prohibit all public service work stoppages regardless of their type, magnitude or duration. When one of the highest values of a state is that of individual freedom, including freedom of association, the state has an obligation to avoid, when possible, actions which restrict the range of this freedom. A state does not lose « its quality of statehood » when its government choose to permit its employees to engage in a strike. A state does lose, or has lost, something of « its quality of statehood » when it cannot effectively use

its sovereign power. The government's responsibility is to ensure that the use of state power is effective when required, not to wield it indiscriminately in every dispute. Experience in the United States has shown that the outlawing of public service strikes does not prevent them from occurring. The New York City transit strike was the most recent notable example. Laws that governments find unwise to enforce are better left unwritten. In government employment as in private employment mutual agreement rather than unilateral dictation, before or after a strike, is the preferable outcome of a dispute.

Setting aside the contentious question of strikes, does the unique status of the state as an employer require other special arrangements in a public employment bargaining system? A suggestion often made is that an arbitration procedure should be used to settle disputes in the public service. If strikes are prohibited to all employees or to any specified groups the right to submit disputes to arbitration seems justified. As a method for establishing new contract terms, however, arbitration has some well-known shortcomings that have prevented its wide-spread use in the private sector. In the public sector there is an additional problem arising from the sovereign nature of the state. A government if it wished, could provide by legislation for the submission of disputes to binding arbitration, and yet refuse, if it wished, to accept any particular award after it had been made. The concept of sovereignty requires the retention of authority to over-rule an arbitration board in a dispute to which the government itself was a contestant. To avoid the embarrassment that might result in the event a government found it necessary to refuse an arbitration decision, it would appear to be unwise for a government to establish initially any system of binding arbitration. The most that a government with sovereign powers should do is to commit itself to a compulsory arbitration procedure in which the awards themselves would not be binding on the government. In practice, advisory award from a responsible and respected arbitration body could be expected to have much influence on both parties. It is quite conceivable that governments and employee associations would regularly accept such awards. If so, the advisory awards would have the same effect as binding awards and there would be no question about the government's retention of its sovereign powers.

In principle there do not appear to be any terms of employment that a government, because of its special status, must exclude from the scope of bargaining. Some terms in collective agreements in the private

sector however may have different implications for the public sector, and a government could be justified in refusing to accept similar terms for public employment. Clauses dealing with union recognition and union security are of this type. A closed-shop contract is the most obvious example. It is possible that among the far-flung range of government activities there are some for which a closed-shop would be a satisfactory arrangement. In general, the merit system and the use of competitive examinations to select successful job candidates would rule out a closed-shop contract.

Whether or not a government should agree to a union shop clause is more open to debate. In the private sector unions have sought union shop clauses to lessen the threat, from hostile employers and non-union employees, to the union's security and established employment standards. If a government explicitly accepts collective bargaining the employee associations would not be faced with a hostile employer seeking to destroy them by promoting rival groups and encouraging employees to avoid union membership. There might be isolated instances of such behaviour by some administrative officials who were not in sympathy with the introduction into government of a bargaining system. The remedy would be exposure; administrators have a duty to accept and follow the government's policy regardless of their personal beliefs about its wisdom. Thus the argument for a union shop clause in public employment loses much of its force.

In addition the argument against a union shop is strong in public employment. Unlike the profit-seeking employer in the private sector the state has (or should have) as a primary objective the extension of individual freedom. A union shop clause would have the effect of forcing some employees against their wishes, to join an association or lose their employment. These arguments lead to the conclusion that a government in general should not agree to a union shop in public employment. The Rand formula could be used to diminish the employee frictions that « free riders » tend to create.

Employee associations do not necessarily restrict their activities to the negotiations and administration of collective agreements. In the private sector unions may engage in political lobbying and in more direct partisan political activities. Does the tradition and the law regarding the political impartiality of civil servants require that civil service associations refrain from partisan political action? The topic demands a more complete analysis than can be given here.

It should be noted that it is not easy to define what constitutes partisan actions. A union newspaper, for example, by its choice of photographs of political leaders and the frequency of their appearance, by the type and length of its news reporting, and by the choice and content of editorials can attempt to influence the political choices of its members. Educational programmes for members can seek to do the same thing. Laws that attempt to prohibit or restrict political action encounter many difficulties in defining the permissible area of behaviour.

Another point to note is that civil servants are commonly prohibited from political activities which other citizens in a democracy are encouraged to undertake, almost as a part of their duty as good citizens. In part this was a price paid by civil servants for the elimination of the spoils system. To protect civil servants and the civil service from elected officials, who were all too anxious to reward their supporters and penalize those who were not, was a highly desirable objective. It is not at all clear that its achievement required the protection of candidates for political office from partisan political action by civil servants, thereby denying important citizenship rights to these employees. With the great growth of government employment the practical importance of this question has much increased.

There are other reasons for having the principle of impartiality apply to civil servants. They must faithfully administer the government's policies regardless of the political party in power or their own dislike for its policies. Civil servants must also be impartial, and appear to be impartial, in their official relationships with the general public. Granting the force of these requirements, there exists large numbers of employees performing routine or menial tasks in which there is no opportunity for the employee to thwart government policies or to discriminate against other citizens. If such employees wish to campaign actively for the election of a candidate for political office why should they not be allowed to do so? One role of an employee association could be to protect such employees from political reprisals, these being processed as grievances. Perhaps the time has come for a challenge to the conventional wisdom that underlies the impartiality rules of the civil service.

In the private sector in the United States and Canada the general approach of the law has been to say that the internal affairs of a union are not the business of the employer. It is questionable whether a

government should apply the same principle to associations of public employees. Consider the case in which the effective control of a union is held by persons committed to an alien form of government. In private employment this does not represent a direct threat to the existence of the employer's business and the control of politically subversive groups is not one of his primary responsibilities. It is not unknown for employers to have a successful bargaining relationship with Communist-dominated unions. A government has a direct responsibility to maintain the existing system of government, and its civil servants at the very least have the responsibility to avoid actions designed to subvert the constituted order. It could be argued that there are some government activities in which a government could tolerate an employee association under subversive-type leadership. Equally, it is clear, there are activities such as those of a department of defence in which it seems to be beyond question that a government as an employer could not remain indifferent about the nature of the employees' association. In brief, a government can require employers in the private sector to refrain from intervening in the internal affairs of a labour union; a government should not apply universally this same idea in a collective bargaining system for public employment.

Nothing written above is meant to imply in any way that civil servants are likely to be subversive in thought or action or likely to allow their associations to come under the control of subversive leadership. An exercise in logical analysis cannot ignore this possibility, however, since experience in the private sector has shown that power in employee organisations can be captured by persons seeking to use the organisations for their own purposes, not necessarily those supported by the membership-at-large. Indeed this raises another question, that of the relationship of the individual employee to his association.

Does a government have an obligation to ensure that an employee association remains responsive to the wishes of its membership? If a government agrees to a Rand-formula check-off arrangement does the government have any obligation to impose a system of financial accountability? Is the operation of an association's internal judicial procedures something that a government can ignore? These questions can be subsumed in a more general one. Can the idea of unions as voluntary private bodies be transferred to the public service? Questions of this type have been raised with regard to unions in the private sector and governments have not entirely refrained from legislation to regulate

some internal union affairs. Problems in this area appear to be common to both private and public employment. The introduction of collective bargaining in public employment may have the effect of attracting more attention to them. On the other hand many though not all, of the questions lose their relevance in the absence of compulsory union membership. It has been contended above that there is less need for a union shop in public employment. If employee associations do not insist upon union shop clauses governments will have fewer reasons for seeking some regulation of the associations' internal affairs.

If the foregoing distinctions are valid ones they indicate that a public bargaining system must differ in some respects from that which has developed in the private sector. The differences arise from the responsibilities of the state and its need to maintain its sovereign powers for use, if necessary, in achieving its objectives. Dispute settlement procedures, negotiable terms, partisans political activities, and internal affairs of employee organisations have been examined above as areas in which some differences might be expected or required. There has been too little experience with public bargaining systems beyond the municipal level in the United States and Canada to permit more than a limited discussion with tentative conclusions. If the trend towards bargaining in public employment continues, an increasing number of persons may be expected to direct their attention to this topic and to provide the more complete analysis that its importance warrants.

Some Observations

How successful a public bargaining system becomes will depend in part upon how it is initially constructed and in part upon the attitudes of the participants. In the private sector collective bargaining developed in an atmosphere of hostility and conflict, at times erupting into armed clashes. This had its effect on the shape and on the results of private bargaining and eventually on the laws regulating it. If a government voluntarily agrees to establish a public bargaining system there is no need for the government to take the defensive attitude of an employer who is determined to minimise a union's power or achievements. Instead the government can direct its efforts to the construction of a system that it expects will yield positive benefits for the public service and its employees.

A government, possessing ultimate power, does not need to impose initially a host of detailed restrictions on the behaviour of civil service

associations. The enormous scope of government activities makes unwise any attempt to find general rules that will fit all situations. Difficult questions about the right to strike, to engage in partisan political activity, union shop clauses, interference in internal union affairs, and others do not have to be settled by legislation before bargaining can begin. They are matters for which as far as possible the initiating legislation should remain silent, waiting for the test of experience to determine what, if any, restrictions may be required. Such an ad hoc approach provides an element of flexibility highly desirable for a bargaining system encompassing such diversity as is found in government employment.

This ad hoc approach could have another benefit. It would be an expression of faith by a government in the reasonableness and responsibility of its civil servants. If new procedures are initially hemmed in with legislative restrictions which civil servants might interpret as reflecting a lack of trust in them, it could result in unnecessary irritation at the beginning of the bargaining relationship. This could be avoided by using the ad hoc approach.

The development of bargaining in public employment has some implications for the future growth of labour unions. White collar occupations make up the largest remaining area for possible gains in union membership. The example of white collar and professional employees belonging to unions that bargain collectively with governments should make it easier for unions to organize similar workers in non-government occupations.

There would also appear to be some implications for the future role of civil service commissions. Traditionally the commissions have performed many of the functions of a personnel department plus serving as a shield against the damaging thrusts of political patronage in the public service. It is possible to envisage strong employee associations jointly sharing with a civil service commission the responsibility for maintaining a merit system. Attempts to use the civil service for political patronage could be publicized, protested, and perhaps made the subject of formal grievances that could be carried to arbitration. If employee associations could effectively perform this protective function there would be less need for an independent civil service commission. With a collective bargaining system, on the other hand, there would be a greater need for some body directly responsible for the government's

labour relations with its employees: proposing general policies, co-ordinating the practices of individual departments, evaluating the bargaining procedures, keeping records of all agreements, formal grievances and arbitration decisions, conducting wage and salary research. Civil service commissions are not about to be abolished. As experience is gained with collective bargaining their protective function may be diminished and their industrial relations function grow in importance.

Finally it should be noted that the Canadian developments have not been a direct import from the United States. In general, public service employees do not belong to international unions with headquarters in the United States. Canadian governments have imposed fewer restrictions on their employees in such matters as joining unions or prohibiting strikes by legislation. Provincial government, by legislation, provided collective bargaining opportunities for municipal employees much earlier than in the United States where similar legislation is not yet common. Some Canadian provinces have gone much farther in providing meaningful bargaining rights to provincial employees than has been done by any of the states. As noted earlier President Kennedy introduced collective bargaining at the federal level in 1962. Some four years later the Canadian Government in Ottawa is expected to do the same thing. But there is an important difference. Executive Order 10988 provided limited bargaining rights not extending to such key issues as rates of pay and standard working hours. Such items are included in the proposals for collective bargaining by federal employees in Canada.⁴¹ Consequently the proposed Canadian system is a much more meaningful one for the employees. There have been parallel trends in both countries but it seems that the traditional United States' influence on labour practices in Canada has been relatively unimportant in the development of bargaining by governments.

The trends themselves are clear. That comfortable collection of ideas about the incompatibility of collective bargaining and public employment is becoming obsolete. It will eventually be replaced, not without some turmoil, by a new conventional wisdom in closer agreement with the world of events.

(41) For the U.S.A., see: SCHNEIDER, B.V.H., *op. cit.*, pp. 97-121. For Canada, see: *Report of the Preparatory Committee on Collective Bargaining in the Public Service*. Queen's Printer, Ottawa, July 1965.

LA FONCTION PUBLIQUE, LA NÉGOCIATION COLLECTIVE ET LA SAGESSE POPULAIRE: ETATS-UNIS ET CANADA

En général, les employés civils aux Etats-Unis et au Canada n'ont pas pu négocier collectivement avec leurs employeurs. Les gouvernements ont déterminé unilatéralement les termes et conditions d'emploi. Cette pratique était en accord avec les vues largement acceptées sur le statut spécial des gouvernements en tant qu'employeurs. On peut appeler ces vues la sagesse populaire. Selon celle-ci, la négociation collective dans la fonction publique n'était pas nécessaire, pratique ni légale. Des événements ont contredit cette sagesse au point qu'elle devient désuète.

Aux niveaux du fédéral, des états et des provinces, des organisations d'employés civils existent depuis plusieurs années. Il y a eu liberté d'association mais, à l'exception de la Saskatchewan, on n'a pas connu avant les années 1960 de système élaboré de négociation collective pour la plupart des employés civils. Aux niveaux municipaux, et particulièrement au Canada, la négociation collective a été plus répandue.

Plusieurs facteurs ont diminué l'influence de la sagesse populaire :

1. Des exceptions heureuses à la pratique générale (v.g. en Saskatchewan et à la Tennessee Valley Authority) ont démontré que la négociation n'était pas nécessairement illégale ni impraticable.

2. Une législation favorable a stimulé la croissance de la négociation dans le secteur privé et amplifié la différence du statut des employés des secteurs public et privé. On a accusé les gouvernements de refuser à leurs propres employés des droits qu'ils forçaient les autres employeurs d'accorder.

3. Dans des sujets étrangers aux relations de travail, les gouvernements se sont souvent engagés par contrats, et se sont soumis à l'arbitrage des griefs.

4. La substitution de la propriété privée à la propriété publique a souvent opposé les gouvernements à des syndicats établis qu'ils ne pouvaient pas ignorer.

Des changements récents dans les deux pays, indiquent une tendance vers la négociation collective dans la fonction publique. En 1965 les provinces du Québec et du Manitoba ont amendé leur loi de la Fonction publique afin de permettre la négociation collective. D'autres provinces envisagent des changements similaires. Le *Rapport Heeney* a recommandé un système de négociation pour les employés civils fédéraux. Aux Etats-Unis, l'arrêté-en-conseil 10988 (janvier 1962) du président Kennedy introduisit la possibilité pour les employés civils de négocier collectivement. Au niveau des états, il y eut moins de changements significatifs vers un système de négociation. On peut s'attendre, toutefois, que plusieurs états suivront les sentiers déjà tracés par Washington.

Est-il possible de transporter dans le secteur public les procédures et pratiques qui se sont développées dans le secteur privé? L'emploi dans le secteur public diffère de celui dans le secteur privé en raison du statut particulier et des responsabilités spéciales de l'Etat. Celui-ci possède le pouvoir légal ultime. Et surtout, l'Etat démocratique a la responsabilité de mettre de l'ordre dans les affaires sociales en vue de protéger et de promouvoir le bien-être et la liberté des individus. L'Etat en tant qu'employeur diffère donc essentiellement de tous les autres employeurs.

Ceci comporte des implications directes sur un système de négociation collective dans la fonction publique.

L'Etat doit utiliser son pouvoir souverain lorsque quelque chose menace son existence ou l'empêche sérieusement d'atteindre ses objectifs généraux. Il ne s'en suit pas qu'on doive rendre illégales les grèves des employés civils, ou qu'on doive supprimer toutes les grèves du genre en vertu du pouvoir de l'Etat. La question de la grève est la plus dramatique, mais on peut facilement lui donner une importance exagérée.

Il n'est probablement pas sage qu'un gouvernement souverain soumette des conflits d'intérêt à un arbitrage à sentence exécutoire. Le plus qu'il doive faire est de s'en remettre à une procédure d'arbitrage obligatoire conduisant à des recommandations. En pratique, ces dernières exerceraient une forte influence.

En principe, selon toute apparence, il n'existe aucun sujet qu'un gouvernement, à cause de son statut particulier, doive exclure du champ des négociations. En pratique, compte tenu du système de notation du personnel utilisé dans les nominations, une entente d'atelier fermé ne conviendrait pas. La présence d'un atelier syndical se défend moins bien dans le secteur public que dans le secteur privé.

Quand la négociation collective se développera davantage dans le secteur public, il surgira probablement des problèmes d'affiliations politiques et d'activités des organisations d'employés civils. Un problème semblable apparaîtrait à l'avènement (improbable) d'un leadership et d'un contrôle de type subversif d'un tel syndicat. On peut se demander si un gouvernement devrait suivre le principe courant à savoir que les affaires internes d'un syndicat ne regarde pas l'employeur.

L'influence traditionnelle des Etats-Unis sur les relations de travail au Canada n'a pas été importante dans l'élaboration de la négociation collective par les gouvernements. En général les changements au Canada sont apparus plus tôt, et ont introduit des droits de négociation plus significatifs, que ceux survenus aux Etats-Unis.