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Impasse Choice in the Canadian Federal Service: An Innovation and an Intrigue

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Aller au sommaire du numéro

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Résumé de l'article

Dans un jugement prononce le 31 mai 1982, la Cour suprême du Canada a déicide, dans une affaire entre le *Conseil du trésor du Canada* et la *Canadian Air Traffic Control Association* (CATCA), que la Commission des relations du travail dans la fonction publique (CRTFP), organisme administratif crée par la *Loi sur les relations de travail dans la fonction publique,* n'est autorisé à fixer ni les modalités des services essentiels, ni le nombre de salaries requis pour les assurer dans l'intérêt de la sécurité publique. Le jugement prescrit l'interprétation de la politique générale à suivre en matière de services essentiels et influera vraisemblablement sur le règlement des conflits chez les fonctionnaires fédéraux et provinciaux au Canada qui travaillent dans des services dits essentiels.

Jusqu'à ce que la Cour suprême rende sa décision, les parties suivaient l'interprétation de la CRTFP en matière de services essentiels dans la fonction publique fédérale. Selon cet organisme, la politique générale n'exigeait pas que l'on tienne compte de l'utilité et de la nécessité publique non plus que des taches normales dans la détermination des services essentiels.

Depuis 1967, la CRTFP fixait les modalités des services essentiels et le nombre d'employés requis pour les assurer dans l'intérêt de la sécurité publique. On défendait aux employés « désignes » pour assurer les services essentiels de participer aux grèves déclenchées par les autres membres de leur unité de négociation respective.

Les employés d'unités de négociation tel le groupe de contrôle de la circulation aérienne ont déclenche des grèves et dix pour cent des membres étaient déclares « désignes » alors que les autres se sont prévalus du droit de grève.

Dans son jugement, le Cour suprême a décide qu'il appartenait au gouvernement et non au tribunal administratif de déterminer les modalités des services essentiels et le nombre d'employés requis pour les assurer. Selon l'interprétation de la politique à suivre de la Cour suprême, la CRTFP n'est qu'habilitée à établir la ou les catégories d'employés désignés pour assurer les services juges essentiels par le gouvernement. En 1981, le gouvernement canadien a déicide que le contrôle de la circulation aérienne, y compris les vols commerciaux au Canada, était un service essentiel. Après la détermination par l'employeur des services essentiels à la suite de l'interprétation de la Cour suprême, la CRTFP a désigné tous les employés de l'unité de négociation du personnel de contrôle de la circulation aérienne comme étant partie des services essentiels.

La CRTFP accorde le droit de grève aux catégories d'employés comme les contrôleurs aériens qui ont opté pour la formule de conciliation. Toutefois, étant donné la politique présentement en vigueur, ils ne pourront plus menacer de faire la grève ou mettre leur menace à exécution. On a prévu des dispositions législatives en Colombie-Britannique, au Nouveau-Brunswick et au Québec pour déterminer les services essentiels et designer les employés qui doivent les assurer. Si les gouvernements provinciaux décidaient de suivre la politique du gouvernement fédéral, les fonctionnaires provinciaux assurant les services essentiels qui ont droit de grève pourraient se le voir retirer. Il est d'ailleurs fort probable que les gouvernements provinciaux imiteront l'exemple du fédéral sous ce rapport. En 1982, unanimement, les provinces ont dénonce les projets fédéraux de contrôle des salaires et d'interdiction du droit de grève dans le secteur public, mais, plus tard, elles ont elles-mêmes mis en œuvre des programmes législatifs similaires.

Une fois les programmes de restriction terminés, les fonctionnaires fédéraux retrouveront peut-être le droit de grève sans toutefois pouvoir s'en prévaloir en raison de la politique générale sur la détermination des services essentiels. En d'autres termes, les fonctionnaires fédéraux devront choisir l'arbitrage pour régler. leurs conflits d'intérêts avec l'employeur, c'est-à-dire le gouvernement fédéral. En conséquence, il est souhaitable que les syndicats dans la fonction publique songent, du moins à court terme, à améliorer le mécanisme d'arbitrage.

Impasse Choice in the Canadian Federal Service

An Innovation and an Intrigue

A.V. Subbarao

This paper discusses the effect of the Supreme Court's judgement on the impasse choice in the federal public service. The developments which led to innovation in the sixties and intrigue in the eighties are briefly described and analyzed. Important policy changes are suggested in order to restore and preserve the innovative features of the federal public sector collective bargaining system introduced in the sixties.

> «If that *designation* involved most of the members of the bargaining unit, the bargaining agent could then have *elected* for the arbitration procedure.»[1] (emphasis added)

The above statement by the Supreme Court of Canada as pronounced in its judgement on May 31, 1982 is expected to have a direct impact on the bargaining agents' choice of impasse procedures provided under the *Public Service Staff Relations Act* (*PSSRA*)[2] which governs employer-employee relations in the Canadian Federal Public Service. Under the legislation, a bargaining agent is entitled to choose one of two alternative impasse procedures, namely, arbitration or conciliation board with the right to strike. Under the conciliation/strike route, the employer is entitled to designate employees in a bargaining unit «whose duties consist in whole or in part of duties the performance of which at any particular time or after any specified period of time is or will be necessary in the interest of the *safety* or *security* of the public»[3]. (emphasis added)

The Canadian federal legislation (PSSRA) of 1967 which provided employees with a choice of impasse procedures including the right to strike and the designation of employees to provide services «in the interest of the

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safety or security of the public» was an innovation in public sector collective bargaining. It was an innovation at a time when federal employees in the United States had neither the right to strike nor access to arbitration of their interest disputes under the collective bargaining system introduced in 1962 by President Kennedy through Executive order 10988. In fact, U.S. federal employees still do not have the right to strike, and they are allowed to seek arbitration *only* when approved by the Federal Service Impasses Pannel, an agency established under the *Federal Service Labor Management Relations Act*, known as Title VII of the *Civil Service Reform Act* of 1978[4].

The innovative Canadian federal public service collective bargaining system, once considered a bold experiment[5], now provides the employer with a strategy «to impair the impact of a strike by employees in a bargaining unit»[6] and leave them with no choice but to opt for the arbitration procedure. The employer adopted such a strategy only in 1980 when it proposed the disignation of over eighty per cent of employees in the air traffic control bargaining unit, as opposed to *past practice* of mutually agreed designations of around ten percent from 1967 until 1980. The Supreme Court of Canada confirmed the Federal Court's decision that the employer has authority to designate a large majority of employees in a bargaining unit. The Court stated that the bargaining agent, in this case the Canadian Air Traffic Control Association (CATCA), *could have chosen the arbitration procedure instead of the right to strike.* In effect, the Canadian air traffic controllers have the option of choosing the strike route, but if they are «designated», their strike becomes illegal.

The air traffic controllers in the United States do not have the right to strike and 12,000 of them lost their employment for participating in a 1981 illegal strike[7]. Their union, the Professional Air Traffic Controllers Association (PATCA), was decertified on October 22, 1981 for organizing the strike. These developments in the United States and Canada may have set precedents warning the respective countries' federal government employees of the consequences of strike action. However, the developments in Canada, in comparison with those in the United States are intriguing to both industrial relations practitioners and scholars since the Government of Canada, the employer, is now in a position to control federal public employees' right to strike. Furthermore, it acquired this controlling authority without the existing legislation being amended to reflect a change in policy.

The purpose of this paper is to describe and analyze the developments in the Canadian federal public service collective bargaining system which led to «innovation» in the sixties and «intrigue» in the eighties. An understanding of recent developments is considered important at this point for two reasons. First, the impact of the judgement on the impasse choice

has not yet been fully felt since the *Public Sector Compensation Restraint Act (PSCRA)*[8] (Bill C-124) imposed restrictions on collective bargaining in the federal public sector for a period of two years beginning on June 29, 1982 immediately following the Supreme Court's pronouncement of its judgement on May 31, 1982. Second, the temporary restrictions of the *PSCRA* withstood the test of judicial interpretation[9] and they were found not to be inconsistent with the *Canadian Charter of Rights and Freedoms*. The judicial interpretation of the restraint legislation seems to indicate that the Government of Canada, if it wished to do so, could impose either temporary or permanent restrictions on the federal public service employees' right to strike. The question which only future developments will answer is whether the Government of Canada will adopt legislative measures to prohibit its employees' right to strike or whether it will use the process of designation to make the choice of the strike route unattractive.

DISPUTE RESOLUTION PROCESSES

From an historical perspective, arbitration was the only impasse procedure recommended in 1965 by the Preparatory Committee on Collective Bargaining in the Public Service of Canada[10], since its terms of reference included «arbitration as the method to be used for the resolution of disputes resulting from the inability of the parties in bargaining to reach agreement»[11]. The Committee, however, reviewed the impasse procedures prevailing at that time in public services elsewhere. It recognized the civil servants' right to strike in Saskatchewan «where in 1944 the public service became subject to the same labour legislation that governed employer-employee relations in the private sector»[12]. It also noted that the French Law «awarded the right to strike to all civil servants except members of the judicial, security, police and penitentiary services»[13]. It was familiar with the statutory provisions in Ontario for the resolution of disagreements by a Civil Service Arbitration Board. The British model, however, impressed the Preparatory Committee more than the others. «In considering the type of arbitration mechanism that should be provided for the public service, the committee was strongly influenced by the Arbitration Tribunal that has functioned successfully for many years in the civil service of the United Kingdom»[14].

Binding arbitration as recommended by the Preparatory Committee was satisfactory to most of the public service employees' organizations with the exception of those in the post office. When a Parliamentary Committee was considering the recommendations of the Preparatory Committee, the inside postal workers organized a strike and they were supported by the Let-

ter Carriers' Union. The postal unions also announced that they would defy any collective bargaining legislation that denied them the right to strike. «In the circumstances, the Government decided to accomodate the views of those who were opposed to arbitration in principle by including in the legislation an alternative process of dispute settlement directly comparable to that provided in the *Industrial Relations and Disputes Investigation Act*»[15] which, at that time, governed employer-employee relations in the private sector within the jurisdiction of the Government of Canada. Thus, the following alternative dispute resolution processes were incorporated in the legislation as provided in section 2 of the PSSRA[16]:

(a) referral of the dispute to arbitation, or
(b) referral thereof to a conciliation board.

In both the processes, the parties are required to bargain in good faith for the purpose of reaching collective agreements. They may also seek the assistance of a conciliation officer. A collective agreement signed by the parties, either with or without the assistance of a conciliation officer, becomes effective as long as it does not call for «the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating moneys for its implementation»[17]. In the event of a failure to reach an agreement through negotiations either party may seek referral of the dispute to arbitration or a conciliation board depending on the dispute resolution process the bargaining agent chose at the commencement of negotiations. The processes, however, differ between the two routes and some of the significant differences are discussed briefly in this section below.

First and foremost, *the composition* of an arbitration board is different from that of a conciliation board. An arbitration board, formerly known as an arbitration tribunal, consists of a chairman, appointed from among the members of the Public Service Staff Relations Board (PSSRB) and two members, each appointed from one of the two panels representing the interests of the employer and of employees, respectively. Members of a conciliation board, on the other hand, are nominated by the parties in dispute and the two nominees in turn nominate a third person who is appointed as the chairman. Hence, the parties in dispute have an immediate and a direct influence on the appointment of a conciliation board which is *ad hoc*. Thus, the provisions relating to the composition and appointment of conciliation boards in the federal public service are similar to those in the private sector whereas those relating to arbitration boards are more or less similar to «the British Tribunal, with a *permanent* Chairman»[18] and selection of members by the PSSRB from two *semi-permanent* panels.

Second, arbitration boards and conciliation boards are also different with regard to the *subject-matter* with which they are legally permitted to deal. While a conciliation board may normally make a recommendation in its report on all matters submitted to it by the chairman of the PSSRB that could legally become a part of the collective agreement, an arbitration award may deal only «with rates of pay, hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto»[19].

Third, a conciliation board is required to report its findings and recommendations within a specified *time period* whereas the arbitration boards are not constrained by such legal time constraints. A conciliation board shall report on a dispute within fourteen days of its referral or «within such longer period as may be agreed upon by the parties or determined by the chairman»[20] of the PSSRB. In practice, the time is usually longer than fourteen days.

Fourth, and probably the most important difference, is that *an arbitral award is binding* on both parties whereas a conciliation board's report contains only non-binding recommendations, which the parties may accept as they are, or use as a base for further negotiations, or reject them completely. A conciliation board's recommendations are binding on the parties only when it is voluntarily agreed upon beforehand by the parties in writing which is tantamount to voluntary arbitration. Otherwise, employees acquire the right to strike seven days after receipt of the conciliation board's report by the parties. The right to strike, however, may be restricted since *some employees* may be designated — the issue which led to the Supreme Court decision in 1982.

DESIGNATION PROCESS

The process of designation of employees takes place twice under the *PSSRA*, first, before a bargaining agent chooses the dispute resolution process, and second, before a conciliation board is appointed. The purpose and the process of designation on the first occasion are different from those on the latter occasion. The purpose of designation on the first occasion is to facilitate «the specification by a bargaining agent of the process for resolution of any dispute to which it may be a party in respect of a bargaining unit»[21]. Upon receipt of a request from a bargaining agent, the employer furnishes a statement of designated employees as required under section 36 (2) of the *PSSRA*. *A bargaining agent has no right to challenge the statement since it was furnished only to facilitate the bargaining agent's choice of impasse procedure.* A statement of designated employees furnished by

the employer before the appointment of a conciliation board, however, may be challenged by a bargaining agent. A conciliation board is not established until the PSSRB gives both of the parties an opportunity to present their views, and it determines the employees to be «designated». The PSSRB is also required to inform all designated employees personally so that they know that they are prohibited from participating in a strike should the bargaining agent conduct one. For the purposes of this paper, *the most important difference in the designation process between the two occasions is the opportunity a bargaining agent has to challenge the employer's proposal* of the number of designated employees. Prior to the Supreme Court decision such an opportunity enabled a bargaining agent to protect its members' right to strike which would be denied to them if they were all designated.

Bargaining agents in the past used to request a statement of designated employees before specifying the dispute resolution process. Recently, however, they have not been doing so, perhaps because by past experience they have developed an expectation of the appropriate percentage of employees in a bargaining unit to be designated. By the end of the first year of implementation of the *PSSRA*, an *average* of 15 percent of employees per bargaining unit was designated[22]. The percentage dropped to 11.5 by the end of the second year[23] and bounced up a little bit to 13.6 percent by the end of the third year[24]. The bargaining agents chose the strike route without requesting a statement of designated employees under section 36(2), but they could object to an employer's statement under section 79(2) if it contained more than the expected 10 to 15 percent of designated employees in a bargaining unit.

The objections raised by CATCA (1980) with respect to the employer's statement of designated employees in the Air Traffic Control bargaining unit, by the International Brotherhood of Electrical Workers (IBEW) (1969) in the Electronics unit and by the Public Service Alliance of Canada (PSAC) (1978) in the Communications, Data Processing, Program administration and the Clerical and Regulatory units are only a few of the challenges that the PSSRB was required to determine under section 79 (3). Section 79 (3) of the *PSSRA* requires that the PSSRB:

> after considering the objection and affording each of the parties an opportunity to make representations, shall determine which of the employees or classes of employees in the bargaining unit are designated employees.[25]

In determining designated employees, the PSSRB identified criteria which seemed to have guided it as well as the parties until the employer sought, in 1981, a judicial interpretation of section 79(3).

DESIGNATION CRITERIA

The PSSRB was called upon in 1969, for the first time, «to construe and apply section 79»[26] to determine designated employees before the appointment of a conciliation board in the Electronics bargaining unit case involving the Treasury Board and the IBEW whose policy statement provided its members with the right to strike[27]. The PSSRB was required to decide between the collective bargaining rights of the employees and the safety or security of the public. It expressed its concern for both these rights and indicated how it balanced the public interest and the employee's rights in its decision making process:

> «The role of the strike in North America is generally accepted to be purely economic. The traditional and normal raison d'être of a strike is to interfere with, or bring to a stop, the normal operations of the employer — as an employer — with a view to reducing the employer's bargaining power and increasing that of the employees. The right to strike has been tolerated, accepted and even encouraged by society itself as a means of balancing the bargaining power of the employer and the employees with a view to an eventual settlement. By-products of the strike are the inconvenience or hardship that may be suffered by the employers' customers. *But the prime target is the employer, not the public. If the exercise of the right to strike does affect the safety and security of the public*, rather than the profitability or convenience of the employer, *the role of strike is tranformed* by a change in kind and not merely a change of degree or effectiveness».[28] (emphasis added)

The PSSRB added that «section 79 (1) comes into play» and the employees would be designated «where there are reasonable grounds for accepting the *probability* or even perhaps only a *possibility* that human life or public safety and security would suffer»[29]. It rejected «public convenience and necessity» as a criterion in designating employees since «it does not appear in the *PSSRA*»[30].

Wherever the parties mutually agreed and submitted «the statement of designated employees», the PSSRB accepted the agreement. Whenever the parties failed to reach an agreement, the PSSRB was required to interpret section 79 in designating employees. «In the absence of any definition or guidance in the *Public Service Staff Relations Act* as to the interpretation or meaning to be attached to the words safety or security in relation to the public», the PSSRB felt, that «the Board must apply *the criteria* it deems to be appropriate in any particular case, based on the evidence and arguments placed before it by the parties of interest»[31]. A review of its decisions reveals that the PSSRB identified and applied consistently the following five criteria in determining designated employees until instructed otherwise in 1981 by the Federal Court of Appeal:

(1) level of services;
(2) period of time to maintain specified level of services;
(3) number of employees;
(4) specification of duties;
(5) past practice.

The first criterion that the PSSRB identified was *the level of services* which was essential to be maintained at all times in a bargaining unit. Determination of the level of services was considered important for protecting the safety and security of the public as well as the employees' right to strike in view of the fact that employees in a bargaining unit provide services on a number of programs in different departments. For example, employees in each of three bargaining units, namely, the Program Administration, Data Processing and Clerical and Regulatory groups provide services relating to initiation and continuation of payments on thirteen different social welfare programs in several departments including Health and Welfare, Employment and Immigration and Indian and Northern Affairs. The PSSRB was called upon to determine *the extent* of payments under each of the thirteen social welfare programs that «are necessary in the interest of safety or security of the recipients in the event of a strike»[32]. It stated that the safety or security of the public is not affected by a failure to provide all social welfare payments to all recipients at all times since some of the recipients are economically independent. «Within a spectrum of each program», it stated, «there may be a segment of recipients who have such a degree of income dependency that there may be a risk of a hazard to their health if such recipients were deprived of the opportunity to receive payments to which they are entitled and on which they rely as the only reasonable and reliable source to meet their minimum needs for sustenance»[33].

Each government department responsible for a social welfare program was required to identify recipients who were economically dependent on the payments by using a «means test» of annual income similar to that specified in the War Veterans Allowance/Civilian War Allowance Program. The PSSRB determined that those who were dependent on a payment should continue to receive payments at all times. Payments to those who were not dependent under a program such as the Canada Manpower Training program could be suspended during a strike since they, «in the opinion of the PSSRB», were not «necessary for the safety or security of the public». The PSSRB, thus, determined the level of services that were essential to be maintained at all times under different social welfare programs in different departments. The PSSRB made such a determination upon receipt of a *written request from both parties*, namely the Treasury Board and the PSAC, the bargaining agent certified to represent employees in the three respective

bargaining units. The parties also agreed in writing that they would be bound by the PSSRB's determination of the level of services to be maintained in the event of a strike.

In a similar case involving the Heating, Power and Stationary plant operations bargaining unit, the PSSRB determined *the level of heat* to be maintained in different government buildings in the event of a strike

> Complexes to which heat was supplied that the board identified as housing some employees performing essential functions included the Parliament Buildings (East, Centre and West blocks), the Supreme Court and the Department of Justice, the Department of National Defence (located, at the time, at Cartier Square, Ottawa), a building where employees were involved in radio protection and several buildings in which employees were engaged in testing food and drug products and carrying on research concerning communicable diseases.[34]

The PSSRB identified another category of buildings including the Ottawa Postal Terminal (Alta Vista), National Revenue Taxation, Statistics Canada, Public Service Language School, Executive Training Centre, Mineral Process Directorate, Geological Surveys Supply Centres, National Library and Public Archives, National War Museum and Victoria Museum and observed that it was «difficult to draw any inference about the functions carried out in them». It remarked that «although the functions performed in these buildings were not required for the safety or security of the public, serious damage might be done to their valuable contents if temperature and humidity were not maintained *at proper levels*»[35] (emphasis added). The Special Joint Committee which studied the Finkelman Report, later on recommended that the temperature in all buildings should be maintained at all times above 5° celsius[36]. Thus, the PSSRB determined different *levels of heating* to be maintained in the event of a strike in different complexes. In the first category of buildings, the level of heating required was to maintain confortable working conditions and in the second category, it was to provide minimum heating level for preventing serious damage to valuable contents.

The second criterion that the PSSRB identified was the *period of time* during which the specified level of services was to be maintained in a bargaining unit. The PSSRB felt that it was required to specify services to be maintained in the interest of the safety or security of the public *during the period of a strike*. The PSSRB differentiated between the services to be maintained during the period of a strike if the strike were to take place and those which occured during normal times. It felt that the policy makers did not contemplate a «business as usual»[37] situation in the event of a strike and hence, the differentiation was necessary to identify those services which were needed to be maintained during the period of a strike.

The third criterion was the specification of the *number of employees* in each class in a bargaining unit that was required to provide essential services during a strike. The PSSRB determined the number of employees only when the parties failed to reach an agreement. In this difficult task, it was guided by its own principle established very early in 1969 that «the Board ought to err, if ever it does, on the side of caution»[38]. It exercised extreme caution and designated large numbers of employees in several bargaining units. «Taking everything into account, our determination is that all employees in the Electronics Bargaining unit proposed for designation by the Employer who are engaged in the servicing of integrated systems be designated under section 79 (3) of the Act on a standby basis»[39]. It also designated 95 percent of employees in the Heating, Power and Stationary Operations bargaining unit, 92 percent in the Correctional unit, over 90 percent in the Firefighters unit, 71 percent in the Primary Products unit and about 50 percent in each of the Radio operations and Communications units[40]. The percentage of employees, designated in these bargaining units indicates that the PSSRB was sensitive to the public's need for essential services.

The number of employees designated in most of the cases under the *PSSRA* seemed to be larger than those in other jurisdictions where similar provisions exist. For example, the former chairman of the Board under the *New Brunswick Public Service Labour Relations Act* suggested a «rule-of-thumb» of fifty percent of employees in a bargaining unit to be designated «whose duties were necessary in the interest of public health». He expressed «the view that the designation of any larger percentage would make a strike by the remaining employees meaningless and ineffective»[41]. In 1979, the British Columbia Labour Relations Board designated less than one hundred of 2,200 employees in a bargaining unit represented by the Hospital Employees Union at the Vancouver General Hospital[42]. Hence, the effect of the right to strike and the interest of the public are the main considerations in determining the *number of designated employees* in all jurisdictions wherever provisions existed to that effect.

The fourth criterion was the *specification of duties* that designated employees were required to perform in the event of a strike in a bargaining unit. The PSSRB was confronted with this question in the Heating, Power and Stationary Plant operations case. The question was relating to employer's freedom to assign to a designated employee any duties or responsibilities. The PSSRB answered that «once the employee is designated he must perform the work for which he has been designated and the employer is not free after the employee has been designated to use him as he sees fit, nor is he free to decide unilaterally what is required for safety or security»[43].

The employer challenged the authority of the PSSRB to limit the employer's power to assign duties to a designated employee in the Data Processing Case. The PSSRB rejected the challenge and stated that:

> in our opinion, the purpose of section 79 when read together with paragraph 101 (c) is to limit the scope of a legal strike only to the extent of ensuring the performance of those duties that are necessary in the interest of the safety or security of the public.

Hence, the PSSRB confirmed that «an employee who is designated pursuant to section 79 of the Act may be required, in the event of a strike, to perform only those duties for which he has been designated»[44].

The fifth and the final criterion was the *past practice* that the parties established in designating employees. In the Air Traffic Controllers' case, the PSSRB held that «the past practice of the parties provides the most reliable guide for designating employees»[45]. In 1981, however, the employer proposed that 1782 operational air traffic controllers out of a total of 2169 in the bargaining unit would be required to *perform their regular duties at all times*. This proposal was contrary to all mutually agreed designations between the employer and the CATCA since the Act came into effect in 1967. The mutual agreements were more or less identical both in terms of the level of services to be maintained in the event of a strike as well as in the number of designated employees. In the past also, the parties agreed that in the event of a strike, air traffic control services would be provided in «emergency and hazardous situations» only, which were strictly in the interest of safety or security of the public. In order to provide those services, the mutual agreements in 1976 provided for the designation of 192 air traffic controllers and 142 alternates, in 1977 for 197 and 146 and in 1978 for 198 and 150, controllers and alternates respectively[46]. On the basis of past practice and in view of the parties' presentations before it, the PSSRB in 1981 determined the level of services and designated 272 out of 2169 air traffic controllers and 151 alternates. It was this determination that the employer appealed to the Federal Court[47]. The Federal Court's interpretation of section 79, which differed from that of the PSSRB, was subsequently upheld by the Supreme Court of Canada in its 1982 judgement.

JUDICIAL INTERPRETATION OF THE DESIGNATION CRITERIA

In the appeal, counsel for the employer argued that the PSSRB wrongly assumed the authority «to determine what services the Government of Canada and the Department of Transport should provide in the event of a strike» and «to decide what duties designated employees should perform in the interest of the safety and security of the public»[48]. According to counsel

the judicial interpretation of «the authority» of the PSSRB established in no uncertain terms that it was not empowered to identify and apply the designation criteria that it did in its decision making process under section 79 of the *PSSRA*. With regard to the first criterion, the Federal Court of Appeal held that the subsection 79 (1) «does not authorize the Board to determine the *level of service* to be provided» (emphasis added)[49]. The Supreme Court of Canada concured with the decision of the Federal Court and added «that the Board construed s.79 as giving to it the authority to determine what level of air services should be provided in Canada in the interest of the safety or security of the public»[50]. The Hon. Mr. Justice Martland of the Supreme Court of Canada, who wrote the reasons for its unanimous judgement, further commented that «with respect, I do not agree with the construction of the section, nor do I regard s.79 as having been enacted for that purpose»[51].

Regarding the second criterion, the period of time, the Federal Courts' interpretation establishes that the PSSRB has no authority to differentiate the strike period from other times for the purpose of determining designated employees. The Federal Court of Appeal held that «the subsection does not authorize the Board to designate duties to be performed or the extent of services to be rendered *in the event of a strike*». The Court observed that «The sole duty of the Board pursuant to subsection 79 (1) is to determine, *before a conciliation board has been established*, what *employees or classes of employees* in the bargaining unit are, *at the date the matter is being determined performing duties* which are necessary for the safety and security of the public»[52] (emphasis added). The Supreme Court of Canada agreed with this interpretation and observed that to construe the words in the manner suggested by the PSSRB «is to strain their meaning unduly»[53].

With respect to the third and the fourth criteria, the Federal Court of Appeal held that «under section 79(a) the Board has neither the authority *to prescribe the work to be done* by designated employees nor the power to determine *the number of employees* ...»[54] (emphasis added). The Federal Court also held that «Past practice» the fifth criterion, «does not, as the Board seemed to think, provide a guide for it to consider in designating employees». According to the Court, «the task imposed on the Board is to carry out the will of Parliament as expressed in the Act — no more, no less». The Court observed that «If that necessitates reaching a result which differs from that previously reached by mutual agreement of the parties, the fact cannot in any way affect the construction of the section»[55].

NEUTRALITY IN DESIGNATION OF EMPLOYEES

In effect, the judicial interpretation of section 79 questioned the validity of the designation criteria previously used by the PSSRB and suggested a procedure that the PSSRB must follow in determining designated employees in future. The procedure seems to give full authority to the employer rather than to the PSSRB, a neutral administrative agency. «In making a determination under section 79» the Federal Court of Appeal observed that «the Board must ascertain what, in fact, the duties of controllers are at the time of such determination»[56]. In complying with the directions of the Federal Court, the PSSRB ascertained the information and the employer furnished the regular duties of operational air traffic controllers. The PSSRB was also informed by the employer that the Minister of Transport, endorsed by the Government of Canada, decided that the commercial air system must be maintained during any strike by air traffic controllers.

Counsel for the employer, in fact, argued that the «Board does not have the authority to review the decision of the Minister of Transport and/or that of the Government of Canada to require that aerodromes and air stations, falling under the federal jurisdiction, remain operational *at all reasonable times* for the users of those services»[57] (emphasis added). The PSSRB rejected the argument and held that «the Board, in making determination in respect of designated employees is not bound to take into account ministerial of governmental pronouncements as to the level of service to be maintained»[58]. Instead, the PSSRB determined the level of services and the number of air traffic controllers required to maintain that level of service in the interest of the safety and security of the public in the event of a lawful strike. The Federal Court found fault with the PSSRB and held that «the Board erred in its interpretation of the authority conferred upon it by section 79 (1)». The Court added that «the Board's fundamental error was in arrogating to itself a power which the section did not confer upon it»[59].

In view of the Court's interpretation of section 79 and the employer's submissions, the PSSRB determined on November 19, 1981 that «all operational air traffic controllers, as a class of employees, have duties which consist in whole or in part of duties the performance of which at any particular time or after any specified period of time is or will be necessary in the interest of the safety or security of the public»[60].

The major concern in this discussion is *the employer's motive in proposing designation of all air traffic controllers against the past practice of designating by mutual agreement only about ten percent in the bargaining unit*. The employer felt that in the past «the number of designations and the

duties they were required to perform provided the air traffic controllers with a very effective strike weapon and it became almost common place for CATCA to reach a point during subsequent negotiations where the threat of strike was used, exerting tremendous pressure on the bargaining process»[61]. On the other hand, the employer stated that the groups such as the Electronics Technicians, Radio Operations, Air Traffic Control Assistants, Firefighters, General Labour and Trades and Heating, Power and Stationary Plant Engineers who also perform duties in Transport Canada have less bargaining power than the air traffic controllers because their «numbers of safety and security designations and the duties to be performed by them in the event of a strike have been such as to significantly lessen or in some cases, eliminate the impact of such a strike»[62]. In other words, *the employer proposed designation of all air traffic controllers so that their threat to strike, like that of other employee groups, could be nullified.*

The employer's motive was brought to the attention of the Supreme Court of Canada by counsel for CATCA in an appeal of the Federal Court's decision. The counsel also submitted that the Federal Court's interpretation of section 79 and the subsequent decision of the PSSRB «would reduce the effectiveness of legitimate strike action»[63]. The Supreme Court of Canada agreed that «the result of the court's decision is certainly to impair the impact of a strike by employees in a bargaining unit involved here but that does not mean that the decision is wrong»[64].

In view of the judicial interpretation of section 79, if the employer or the government decides to provide air traffic control to all flights including those of the commercial airlines, to continue all kinds of social welfare payments to all recipients, to maintain comfortable temperature in all government buildings and to maintain «business as usual» in all other cases, the PSSRB is required to designate all employees in their respective bargaining units. The employer's decision of the level of services to be maintained at all times would seem to determine the number of employees to be designated employees in a bargaining unit as long as it has no authority to designated employees in a bargaining unit as long as it has not authority to question the employer's motive even if the motive is intended to weaken the bargaining power of a bargaining agent. One is left to wonder what its function has become under section 79 as a result of the two court decisions.

Did the Parliament of Canada intend to empower *the employer or the government* to decide the duties or services essential in the interest of the safety or security of the public on a business as usual basis? If the policy makers had such an intent in 1967 at the time the *PSSRA* was enacted, it is not obvious in the legislation. In fact, expert opinion indicates that the designation of essential services should be left to impartial neutral bodies

which could properly balance the interests of the public and the rights of the bargaining parties[65]. The PSSRB is a neutral body which assumed, until 1981, that it had such authority. Since the judicial interpretation contradicts this assumption, Parliament must indicate *through an appropriate amendment* to the *PSSRA* if the policy makers intended to empower the neutral body with the authority to determine essential services or whether to give this power to the employer where it now seems to rest. In the absence of such a clarification, the impasse choice, although apparently available in the legislation, is meaningless in reality.

CHOICE OF IMPASSE PROCEDURES

Until the Supreme Courts' decision in 1982, the conciliation/strike route became more attractive than the arbitration route to a large majority of federal public service employees and their bargaining agents. By March 31, 1982 seventy-four percent of employees entitled to engage in collective bargaining under the *PSSRA* opted for the strike route. The PSAC, which represents about three-quarters of employees covered under the *PSSRA* and which opted for arbitration for all its bargaining units upon initial certification in 1967-68, adopted a resolution at its annual convention in 1982 recommending to all its members that they «opt for the conciliation/strike route as the dispute settlement method»[66]. The situation in 1982 was a complete contrast to that in 1967-68. During the first year (1967-68) of implementation of the *PSSRA*, an overwhelming eighty percent of employees opted for arbitration[67].

During the early seventies, bargaining agents started switching to the conciliation/strike route and by 1976, the proportion of employees in the arbitration route dropped to about one-third[68]. By the mid 1970s, strike activity also increased in the federal public service. Out of a total of twenty-seven strikes which occurred betwen 1969 and 1981, six of them took place in one year between November 1974 and December 1975[69]. Until 1974, strikes were organized in only the Postal Operations, Air Traffic Control, Ship Repair and Electronics bargaining units which had opted for the conciliation/strike route from the beginning[70]. But, after 1974, other bargaining units such as the Primary Products Inspection, General Labour and Trades, Nursing, Meteorology, Translation, Aircraft Operations, Radio Operations, Translation, Data Processing and Clerical and Regulatory groups also organized strike action[71]. Most of these units initially opted for the arbitration route and subsequently revised their impasse choice. Some bargaining units such as Radio Operations[72], Communications[73], and Firefighters[74] switched back and forth from one route to the other between

rounds of contract negotiations. In most of these cases, a large majority of employees in a bargaining unit was designated which might have reduced their bargaining power in the strike route.

Bargaining power became important, particularly by the mid-seventies, when contract negotiations in the federal public service were concerned more with hard bargaining over basic issues such as compensation, hours of work and other related conditions of employment[75]. Some bargaining agents might have though that they could break new ground on these issues by following the strike route. Moreover, the annual percentage wage increases in the federal public service were found to be higher in the strike route than in the arbitration route during 1974-75[76]. In 1978, the government proposed Bill C-28 which would have made the bargaining outcome on wages, more or less, comparable in the two dispute resolution processes[77]. The Bill would have required the arbitration boards and conciliation boards to take into consideration aggregate compensation of comparable groups in dealing with wage disputes. But, Bill C-28 failed to become law. In 1982, however, Bill C-124, the *Public Service Compensation Restraint Act* was enacted on August 4, 1982, but it was effective from June 29, 1982.

Under Bill C-124, the Government determined the compensation plan of every employee group covered by the *PSSRA* for a period of two years and allowed the parties to a collective agreement to «amend any terms or conditions of the collective agreement or arbitratial award other than wage rates or other terms and conditions of the compensation plan»[78].

Bill C-124, in effect, suspended temporarily the federal public service employees' right to strike. Employees acquire the right to strike under the *PSSRA* only after the receipt of a conciliation board's report. The bargaining agent representing the Program Administration group was informed on October 6, 1982 that «the chairman of the PSSRB is without authority to establish a conciliation board pursuant to section 78 of the *PSSRA* during the period that the *PSCRA* remains in force»[79]. The PSAC challenged the validity of the *PSCRA* as inconsistent with the *Canadian Charter of Rights and Freedoms*, but the Federal Court of Canada dismissed the claim. While the *PSCRA* restrained the employees' right to strike temporarily for a two year period, the judicial interpretation of section 79 of the *PSSRA* permits the employer to designate a large majority of employees in a bargaining unit which might impair the effectiveness of a strike. The postal unions which might have organized strikes to challenge the employer's authority to designate have not been covered by the *PSSRA* since 1981[80]. The CATCA preferred to challenge before the courts and failed. Under the circumstances, federal public service employees and their bargaining agents

are expected to be very cautious in choosing impasse procedures for the round of contract negotiations after the expiry of the *PSCRA*. Otherwise, they might be caught in a situation similar to the one that the Research Council Employee's Association (RCEA) was locked into during the first round of contract negotiations in 1968-69. The RCEA chose the strike route and the employer designated all employees in the bargaining unit. Recognizing that the conciliation board option for settling disputes could not function in this case, the parties then agreed:

> «that if a stage should be reached in their negotiations at which a conciliation board would be called for, each of them would nominate as its representative on such a board a person who was a member of the appropriate panel of the Public Service Arbitration Tribunal, that the two representative members of the conciliation board selected in this fashion would agree to the appointment of the Chairman of the Public Service Arbitration Tribunal as chairman of the conciliation board, that the parties would refer to the conciliation board only certain matters that were listed in this agreement (all of which appear to be matters that would normally fall within the jurisdiction of the Public Service Arbitration Tribunal) and that they would accept as binding the recommendations of the conciliation board on the matters listed».[81]

An alternative for a bargaining agent unwilling to organise an unlawful strike would have been to face the employer with the conciliation board's recommendations and accept the employer's offer if the employer chose to reject the board's recommendations. A bargaining agent in such a situation would have very little bargaining power in comparison with that of the employer.

Collective bargaining in the Canadian Federal Public Service under those circumstances would be similar to that in the United States Federal Service. What the United States government established through *legislation*, the Canadian government might have accomplished by judicial interpretation of the existing legislation which was once considered «innovative» and by adopting appropriate legislative and collective bargaining strategy.

POLICY CHANGES NEEDED

Bargaining power of both parties needs to be balanced if the system of collective bargaining in the federal Public Service is to accomplish what the Preparatory Committee in 1965 hoped:

> «The system of bargaining and arbitration will create both a challenge and an opportunity for the employer and the organizations representing employees, providing them with an *incentive* to apply themselves with

> determination and vigor to the solution of problems of joint concern. We have reason to hope that, in terms both of administrative effectiveness and the fair and equitable treatment of employees, the Public Service will stand to gain».[82] (emphasis added)

Since judicial interpretation has removed that incentive, in order to accomplish these objectives, a few important policy changes[83] in the form of amendments to the existing legislation are suggested.

First and foremost one necessary policy change is a provision to permit the parties to choose the impasse procedure after the negotiations reach an impasse rather than before they begin. This would provide a degree of procedural uncertainty which, as Frankel says in his report for the New Brunswick government, encourages negotiators to try harder to reach agreements[84]. It would avoid a situation that was considered «an exceedingly awkward position» by the RCEA Research Council Employees' Association. It would also enable the parties to make a proper choice appropriate for the issues and the negotiating climate that prevails when the parties reach an impasse. Similar provisions exist in the New Brunswick Public Service Labour legislation.

Second, a joint agreement is preferable to one party's choice of impasse procedure. The parties may be required to negotiate until they reach an agreement or an agreement on impasse procedures before a specified date prior to the expiry of an existing collective agreement. The parties are more likely to respect the impasse procedure that they have mutually agreed to, and they are expected to be forthcoming in framing the issues in reference as well as in making their presentations before a third party. The PSSRB may be required to choose the impasse procedure if the parties fail to agree. In such a situation, the PSSRB could choose the impasse procedure and leave the employer and the bargaining agent to nominate the third parties.

Third, the process of appointment of third parties should be similar under both impasse procedures. The process of appointment of conciliation boards is established in Canada and it seems to be more acceptable to the parties since they have a say in the selection of its members. A different procedure was adopted for arbitration panels with the apparent hope that «it would ensure some measure of continuity in the standards of interpretation and judgement on which arbitral awards are based»[85]. Moreover, the Preparatory Committee hoped that «it would stand a fair chance of gaining the respect and confidence on which the success of the whole system will ultimately depend». Experience with the arbitration route in the federal public service does not seem to support these expectations[86]. It is doubtful if the employer and bargaining agents will develop confidence in the present system of arbitration, particularly in dealing with the hard bargaining issues

that are expected to have a long-term impact. Furthermore, full reliance on third parties trained in the legal profession may, according to one of its members[87] who is also a practitioner, have a deleterious effect on the kinds of awards which arbitrators make.

> «I have done some interest arbitration and am personally acquainted with the people who do the bulk of it in Canada. The one thing that the arbitration fraternity has in common is that we all know *little or nothing about basic public finance*, about the long-term impact on an employer's budget of apparently innocuous changes in working conditions... and about all the other material necessary for an intelligent response to the questions posed by the statutes or the parties». (emphasis added)

The parties may develop confidence in the arbitration process if they have an opportunity to assess the competence of an arbitrator with reference to the issues that are referred to him/her. A process of selection similar to that established by the National Academy of Arbitrators might be adopted and the PSSRB might maintain a list of arbitrators who would be made available to the parties who actually make the selection of each arbitration board.

Fourth, final offer arbitration should be available as another alternative impasse procedure. It does not allow an arbitrator «to split the baby down the middle»[88], particularly in dealing with economic issues when the parties stick to extreme positions. The *risk* of an arbitrator awarding «either-or» positions functions as a threat, and makes the parties move closer, if not settle, bilaterally. The threat of final offer arbitration is considered to be similar to that of a workstoppage in contract negotiations. The function of workstoppage is to impose cost of disagreement and the purpose of a party's threat is to increase the opponents' expected cost of disagreement so that the opponent concedes and moves its position closer to that of the party. Like the threat of a workstoppage, a party's threat of final offer arbitration will increase the opponents' expected cost of disagreement if the arbitrator selects the party's final offer. The opponents' expected cost of disagreement depends upon the difference between its and the party's final offers. The Opponent concedes and moves its offer closer to that of the party in order to reduce its cost of disagreement. These mutual threats act to encourage both parties to move toward a common settlement point. Hence, final offer arbitration may be a real alternative to the conciliation board/strike route and it deserves to be added as a third alternative impasse procedure in the *PSSRA*.

Fifth, the subject matter of arbitration should be expanded and all issues that could become a part of the collective agreement could be included in an award.

Sixth, there should be a time limit on arbitration proceedings. Some arbitration tribunals took over one year from the time of request for arbitration to the date of issue of an award, and the average time taken was over two hundred days in 1972. Although the situation improved by the late seventies, the average time remained around seventy days by 1981.

Finally, if free collective bargaining is desired, a neutral body such as the PSSRB must be empowered to designate *essential services* in the federal public service. *Impartiality is considered essential in the designation process* and must be perceived as being impartial. The government, which is a party in the bargaining process, could hardly be expected to be impartial. Even if it is, the bargaining agents are unlikely to perceive its impartiality. They are more likely to conclude that the government is not interested in conducting negotiations in the conciliation board/strike route, but is more interested in making that impasse choice unattractive to the employees.

The changes proposed are aimed at maintaining impartiality in the designation process, and at improving the interest arbitration process in the federal public service. Improvements, hopefully, will make arbitration a *real* alternative impasse procedure.

Le règlement des conflits d'intérêts relatifs aux services essentiels dans la Fonction publique fédérale

Dans un jugement prononcé le 31 mai 1982, la Cour suprême du Canada a décidé, dans une affaire entre le *Conseil du trésor du Canada* et la *Canadian Air Traffic Control Association* (CATCA), que la Commission des relations du travail dans la fonction publique (CRTFP), organisme administratif créé par la *Loi sur les relations de travail dans la fonction publique*, n'est autorisée à fixer ni les modalités des services essentiels, ni le nombre de salariés requis pour les assurer dans l'intérêt de la sécurité publique. Le jugement prescrit l'interprétation de la politique générale à suivre en matière de services essentiels et influera vraisemblablement sur le règlement des conflits chez les fonctionnaires fédéraux et provinciaux au Canada qui travaillent dans des services dits essentiels.

Jusqu'à ce que la Cour suprême rende sa décision, les parties suivaient l'interprétation de la CRTFP en matière de services essentiels dans la fonction publique fédérale. Selon cet organisme, la politique générale n'exigeait pas que l'on tienne compte de l'utilité et de la nécessité publiques non plus que des tâches normales dans la détermination des services essentiels.

Depuis 1967, la CRTFP fixait les modalités des services essentiels et le nombre d'employés requis pour les assurer dans l'intérêt de la sécurité publique. On défendait aux employés «désignés» pour assurer les services essentiels de participer aux grèves déclenchées par les autres membres de leur unité de négociation respective. Les employés d'unités de négociation tel le groupe de contrôle de la circulation aérienne ont déclenché des grèves et dix pour cent des membres étaient déclarés «désignés» alors que les autres se sont prévalus du droit de grève.

Dans son jugement, le Cour suprême a décidé qu'il appartenait au gouvernement et non au tribunal administratif de déterminer les modalités des services essentiels et le nombre d'employés requis pour les assurer. Selon l'interprétation de la politique à suivre de la Cour suprême. la CRTFP n'est qu'habilitée à établir la ou les catégories d'employés désignés pour assurer les services jugés essentiels par le gouvernement. En 1981, le gouvernement canadien a décidé que le contrôle de la circulation aérienne, y compris les vols commerciaux au Canada, était un service essentiel. Après la détermination par l'employeur des services essentiels à la suite de l'interprétation de la Cour suprême, la CRTFP a désigné tous les employés de l'unité de négociation du personnel de contrôle de la circulation aérienne comme étant partie des services essentiels.

La CRTFP accorde le droit de grève aux catégories d'employés comme les contrôleurs aériens qui ont opté pour la formule de conciliation. Toutefois, étant donné la politique présentement en vigueur, ils ne pourront plus menacer de faire la grève ou mettre leur menace à exécution. On a prévu des dispositions législatives en Colombie-britannique, au Nouveau-Brunswick et au Québec pour déterminer les services essentiels et désigner les employés qui doivent les assurer. Si les gouvernements provinciaux décidaient de suivre la politique du gouvernement fédéral, les fonctionnaires provinciaux assurant les services essentiels qui ont droit de grève pourraient se le voir retirer. Il est d'ailleurs fort probable que les gouvernements provinciaux imiteront l'exemple du fédéral sous ce rapport. En 1982, unanimement, les provinces ont dénoncé les projets fédéraux de contrôle des salaires et d'interdiction du droit de grève dans le secteur public, mais, plus tard, elles ont elles-même mis en oeuvre des programmes législatifs similaires.

Une fois les programmes de restriction terminés, les fonctionnaires fédéraux retrouveront peut-être le droit de grève sans toutefois pouvoir s'en prévaloir en raison de la politique générale sur la détermination des services essentiels. En d'autres termes, les fonctionnaires fédéraux devront choisir l'arbitrage pour régler leurs conflits d'intérêts avec l'employeur, c'est-à-dire le gouvernement fédéral. En conséquence, il est souhaitable que les syndicats dans la fonction publique songent, du moins à court terme, à améliorer le mécanisme d'arbitrage.

NOTES

1 [1982] 1 S.C.R. 708.

2 S.C. 1966-67, c. 72.

3 Section 79, *PSSRA*, S.C. 1966-67, c.72.

4 5 U.S.C. SS. 7101-7135.

5 J. FINKELMAN, «Canada's Bold Experiment», *An address* delivered to the Public Personnel Association Seminar on Negotiating with Organized Public Employees, Albany, New York, April 23, 1968.

6 [1982] 1 S.C.R. 708.

7 Gilles TRUDEAU, «Labor Relations Rules Applying to Air Traffic Controllers in the United States and Canada», *Seminar on Labor Law Policy*, Harvard Law School, April 1982.

8 S.C. 1982, c. 122.

9 *Public Service Alliance of Canada and Her Majesty the Queen in the right of Canada as represented by the Treasury Board*, (1984), F.C.

10 *Report of the Preparatory Committee on Collective Bargaining in the Public Service*, Ottawa, Queen's Printer, 1965.

11 *Ibid.*, p. 34.

12 *Ibid.*, p. 19

13 *Ibid.*, p. 22.

14 *Ibid.*, p. 35.

15 *Proceedings of the Special Joint Committee of the Senate and of the House of Commons on Employer Employee Relations in the Public Service of Canada*, Ottawa, Queen's Printer, 1966, pp. 204-205.

16 S.C. 1966-67, c. 72.

17 Section 56 (2) (a) of the *PSSRA*, S.C. 1966-67, c.72.

18 Report of the Preparatory Committee, *op. cit.*, p. 35.

19 Section 70 (1) of the *PSSRA*, S.C. 1966-67, c. 72.

20 Section 86 (1) of the *PSSRA*, S.C. 1966-67, c.72.

21 Section 36 (2) of the *PSSRA*, S.C. 1966-67, c.72.

22 *First Annual Report of the PSSRB*, 1967-68.

23 *Second Annual Report of the PSSRB*, 1968-69, p. 28.

24 *Third Annual Report of the PSSRB*, 1969-70, p. 22.

25 Section 79 (3) of the PSSRA, S.C. 1966-67, c.72.

26 PSSRB File 181-2-8.

27 J. FINKELMAN and Shirley B. GOLDENBERG, *Collective Bargaining in the Public Service: The Federal Experience in Canada*, Montréal, The Institute for Research on Public Policy, 1983, p. 477.

28 PSSRB File 181-2-8.

28 *Ibid.*

30 Ibid.

31 PSSRB File 181-2-134.

32 PSSRB File 181S-2-1.

33 *Ibid.*

34 PSSRB File 181-2-42.

35 *Ibid.*

36 *Report of the Special Joint Committee on Employer-Employee Relations in the Public Service of Canada*, 47-14.

37 PSSRB File 181-2-1.

38 *Ibid.*

39 PSSRB File 181-2-8.

40 A.V. SUBBARAO, «Reply to Mr. Quinet», *Industrial Relations*, Vol. 19, No. 3, Fall 1980, p. 364.

41 Quoted in FINKELMAN and GOLDENBERG, *op. cit.*, p. 544.

42 Paul WEELER, *Reconcilable Differences: New Directions in Canadian Labour Law*, Toronto, Carswell, 1980, p. 211.

43 PSSRB File 181-2-32.

44 PSSRB File 181-2-116.

45 PSSRB File 181-2-134.

46 *Ibid.*

47 *Re the Queen in the Right of Canada and the Canadian Air Traffic Control Association*, (1982), 128 D.L.R. (3rd) 685.

48 (1982), 128 D.L.R. (3rd) 687-88.

49 (1982), 128 D.L.R. (3rd) 691-92.

50 [1982] 1 S.C.R. 706.

51 [1982] 1 S.C.R. 706.

52 (1982), 128 D.L.R. (3rd) 693.

53 [1982] 1 S.C.R. 708.

54 (1982), 128 D.L.R. (3rd) 689-90.

55 (1982), 128 D.L.R. (3rd) 694.

56 (1982), 128 D.L.R. (3rd) 695.

57 PSSRB File 181-2-134.

58 *Ibid.*

59 (1982), 128 D.L.R. (3rd) 693.

60 PSSRB File 181-2-134.

61 Appendix I to PSSRB File 181-2-134.

62 *Ibid.*

63 [1982] 1 S.C.R. 708.

64 [1982] 1 S.C.R. 708.

65 Harry W. ARTHURS, «Labour Disputes in Essential Industries», *Study No. 8, Task force on Labour Relations*, Ottawa, Queen's Printer 1970, p. 246.

66 Quote in FINKELMAN and GOLDENBERG, *op. cit.*, p. 430.

67 A.V. SUBBARAO, «Impasse Choice and Wages in the Canadian Federal Service», *Industrial Relations*, Vol. 18, No. 2, Spring 1979, p. 233.

68 A.V. SUBBARAO, «The Impact of Two Dispute Resolution Processes on Negotiations: A Theoretical Analysis», *Relations Industrielles,* vol. 32, p. 741-2.

69 Table 25 in FINKELMAN and GOLDENBERG, *op. cit.*, p. 741-2.

70 A.V. SUBBARAO, «Impasse Choice and Wages in the Canadian Federal Service», *op. cit.*

71 Table 25 in FINKELMAN and GOLDENBERG, *op. cit.*, p. 741-2.

72 Initially chose the strike route, altered to arbitration in 1973 and reverted to the strike route in 1975.

73 Initial option arbitration, altered in 1970, reverted in 1972 and opted again strike route in 1974.

74 Initial specification arbitration, altered to strike route in 1971 and reverted to arbitration in 1974.

75 For a detailed discussion, see. A.V. SUBBARAO, «The Impact of the Two Dispute Resolution Processes on Negotiations: A Theoretical Analysis», *op. cit.*, pp. 216-233 and John C. ANDERSON and Thomas A. KOCHAN, «Impasse Procedures in the Canadian Federal Service: Effects on the Bargaining Process» *Industrial and Labor Relations Review*, Vol. 30, April 1977, pp. 283-301.

76 SUBBARAO, «Impasse Choice and Wages in the Canadian Federal Service», *op. cit.*, p. 234.

77 Section 68 amendments in Bill C-28.

78 Section 7 of the *PSCRA*, 1982.

79 Conciliation Board File 190-2-112.

80 Postal employees are covered by the *Canada Labour Code* since the Post Office became a Crown Corporation.

81 See the note on page 28 of the PSSRB *Second Annual Report* 1968-69.

82 Report of the Preparatory Committee, *op. cit.*, p. 43.

83 Some of these were suggested in the past by others like Finkelman in his *Report on Employer-Employee Relations in the Public Service of Canada, Proposals for Legislative Change*, Ottawa, Information Canada, 1974. The proposed changes are now considered more important in view of the recent developments.

84 *Report of the Royal Commission on Employer-Employee Relations in the Public Service of New Brunswick*, 1967, p. 34.

85 Report of the Preparatory Commitee, *op. cit.*, p. 35.

86 For a discussion of experiences, see L.W.C.S. BARNES and L.A. KELLY, *Interest Arbitration in the Federal Public Service*, Kingston, Canada, Industrial Relations Centre, Queen's University, 1975, 34 pp.

87 Paul WEELER, *op. cit.*, p. 226.

88 *Ibid.*, p. 267.