Adjudication in the Canadian Public Service

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The rule of law is always difficult to establish and as difficult to maintain. Nowhere is this more apparent (except in the anarchy of international affairs) than in the arena of labour-management relations, where disputes are often decided by a trial of strength or endurance, and both parties are traditionally reluctant to bow to the judgment of a third party.

The most publicized contests in North America — a "Big Steel" strike or a Canadian rail strike, for example — almost invariably arise out of "interest disputes". In others words, after months of bargaining and mediation or conciliation, the parties fail to conclude a new collective agreement. Each has sought by all available means to advance or protect its own economic interests, and neither is willing to risk its future on the unpredictable conclusions of a stranger. Both have persistently demonstrated their alienation from the judicial process, which on its part has been slow to adapt itself to modern industrial relations. For a company and a union to submit in advance to arbitration of an interest dispute is so rare as to be even more sensational than a hard-fought strike. In general, a wholly disinterested and unbiased arbitrator or judge, even if such a paragon exists, is somewhat naively assumed by both parties to be *ipso facto* ignorant of their work and incapable of appreciating their problems. This presumption is so strong that it is only when public demand becomes irresistible that legislators dare to impose binding arbitration on the embattled protagonists.

There is, however, another and less-publicized kind of dispute in which slow but steady advances are being made toward establishing the rule of law in labour-management relations. This is the "rights dispute", where the parties disagree about the interpretation or application of langnage in a collective agreement defining their respective rights and obligations. Coupled therewith is the notion, now generally accepted, that the employer's *régime disciplinaire* must be administered fairly, and that no employee should suffer discharge or other punishment without just cause.

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The past half-century has seen an increasing recognition throughout the United States and Canada of the principle that "rights disputes" are properly subject to final and binding determination by a neutral. A natural concomitant of this is the growth of an indigenous jurisprudence, echoes of which have been heard in courts of law, notably when the power of arbitrators to award damages was upheld by the Supreme Court of Canada in *Re Polymer Corp. and Oil, Chemical & Atomic Workers' Union, Local 16-14* [1] and a recent unanimous judgment of a Divisional Court (Ontario High Court of Justice) in *Re Samuel Cooper & Co. Ltd. and International Ladies Garment Workers' Union et al.*[2] Significant decisions in the private sector have been reported for more than 25 years in *Labour Arbitration Cases,* which now takes notice of awards in most provinces and is expanding in size and scope.

Labour arbitration was born within the collective agreement itself, at a time when its legal status was doubtful or non-existent. Long before the enactment of the Wagner Act [3] by the United States Congress and subsequent Canadian labour relations legislation, there were agreements made which included an "arbitration clause", sometimes modelled after similar clauses in commercial contracts.

In Canada, federal and provincial labour legislation carried the development two steps further in the post-war years by requiring the parties to a collective agreement to include a satisfactory arbitration clause, and also that, if it were omitted, one would be provided on application of either party,[4] or a model clause set out in the statute itself would be deemed to appear in the agreement.[5] A similar result is produced indirectly by the effect of articles 88, 89 and 81 in Quebec's *Code du travail.*[6] Through these distinctively Canadian requirements, arbitration in the private sector continues to be theoretically consensual, although in reality it is imposed on the parties by law. The absence of such compulsion in the United States and the United Kingdom is said by some observers to be responsible for an inordinate number of work stoppages conducted in those countries with a view to "settling" grievances while collective agreements are in effect.

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[1] (1961), 26 D.L.R. (2d) 609 (Ont. H.C.); aff'd 28 D.L.R. (2d) 81 (Ont. C.A.); aff'd *sub. nom. Imbleau* v. *Laskin,* [1962] S.C.R. 338; 33 D.L.R. (2d) 124.

[2] [1973] 2 O.R. 841 (Ont. D.C.).

[3] *National Labor Relations Act,* 1935, 49 Stat. 449, 29 U.S.C.

[4] *Canada Labour Code,* R.S.C. 1970 c.L-1, s.125; S.C. 1972, c.18, s.155.

[5] *Labour Relations Act,* R.S.O. 1970, c.232, s.37.

[6] S.Q. 1969, c.47 and c.48.

When finding an arbitrator, the parties were at first left to their own devices. In Canada, they would usually resort to the appropriate Minister of Labour or his deputy to appoint an arbitrator (or chairman of a "board of arbitration") if they could not agree on one themselves. More recently, the governments of Ontario and Quebec have established a commission or *conseil consultatif* to maintain lists of acceptable arbitrators and assist the parties in making their choice. This development was undoubtedly accelerated by amendments to the *Judges Act* in 1967[7] which effectively prevented judges from continuing to function as labour arbitrators in the private sector. It remains true, however, that the parties to collective agreements are compelled by law to finance their own "judicial" system at substantial cost to themselves and not to the public treasury. Unlike litigants in civil actions, they bear the entire expense of the tribunals to which they constantly turn for justice in rights disputes. That the parties cheerfully accept this rather peculiar or anomalous arrangement illustrates their continuing lack of confidence in the courts as well as government itself, and their cherished belief that disputes within the labour-management family are nobody else's business. The latter illusion persists notwithstanding their zeal in cultivating the arts of publicity and public relations with a view to improving their respective images in the next round of collective bargaining, a phenomenon most noticeable in large industrial or mining undertakings and also in public utilities where governmental intervention is always a possibility.

The Government of Canada is of course the nation's largest employer. It was inevitable that sooner or later the advantages won by employees in the private sector would be claimed by their counterparts in the public sector, including both the protection of collective agreements and access to the arbitration or adjudication of rights disputes. The *Public Service Staff Relations Act*,[8] enacted by Parliament in 1967, provided the legislative foundation for collective bargaining in the Public Service of Canada, or, to be more exact, in all departments or ministries and a number of specified boards, commissions, corporations and other agencies falling within the federal jurisdiction, the latter being known as "separate employers". Part IV of the Act, being sections 90 to 99 inclusive, recognized the right of an employee to present a grievance concerning any occurrence or matter affecting

[7] R.S.C. 1970, c.J-1, s.37(1).

[8] R.S.C. 1970, c.P-35.

his terms and conditions of employment, other than any occurrence or matter in respect of which an administrative procedure for redress is provided in another Act of Parliament. Part IV also recognized the right to refer certain grievances, but not all grievances, to "adjudication" (or, as it is known in the private sector, "arbitration") after exhausting all remedies within the grievance process of the department or agency concerned. The determination of such grievances by adjudicators was expressly made binding upon all parties by section 96.

Broadly speaking, the system resembles the processing and arbitration of grievances which have grown up in the private sector in the United States and Canada. There are, however, significant differences. It remains true, at least in theory, that the legal basis for the right to grieve and the right to go to arbitration in the private sector is to be found in the collective agreement between the contracting parties rather than in public law; the courts have so held on many occasions. Indeed there is a considerable variation in grievance and arbitration procedures to be found in the private sector, although a general pattern may be discerned throughout North America. On the other hand, the nature of the employment relationship in the Public Service and its status in law cannot be the same as in the private sector, if only because the law-making authority which enacts legislation with respect to collective bargaining is itself directly or indirectly also the employer of employees in the Public Service. This is a fundamental distinction giving rise to certain new departures which characterize the legislation, administration, law and practice in the Canadian Public Service as compared with what is found in the private sector.

In some respects the 1967 legislation was highly innovative, which is apparent from the distinctive features of its adjudication system as they have emerged during seven years of experience. By identifying differences between arbitration in the private sector and adjudication in the public sector, it may become possible to better appreciate the merits and limitations of each system.

First and foremost, there is an important difference in that an employee in the Public Service of Canada has a legal right to present a grievance, whether or not there is in existence a collective agreement applicable to him. That right is rooted in section 90 of the statute. It is subject to the following three qualifications:

(1) The term employee is defined in section 2(m) of the Act, and there are eight classes of persons excluded by that definition, the most numerous being members of the Armed Forces,

the Royal Canadian Mounted Police, persons casually employed for less than six months and persons employed in managerial or confidential capacities.

(2) An employee, as so defined, is not entitled to grieve if there is a statutory provision for redress other than those provided by or under the *Public Service Staff Relations Act.*

(3) By the general provisions of section 112, nothing in the Act or any other Act shall be construed to require the employer to do or refrain from doing anything contrary to any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Subject to the three qualifications mentioned above, an employee in the Canadian Public Service has a right to grieve, and the right is rooted in the statute rather than in any agreement between the employer and an organization representing employees. While agreements may include clauses with respect to grievance procedure, they are invalid if inconsistent with the minimum requirements of the Act or the regulations made by the Board established thereunder.

There is a second important difference between adjudication in the Public Service and arbitration in the private sector. If the employee has a grievance with respect to the interpretation or application of a collective agreement or arbitral award with respect to him, there is a collateral limitation on his right to grieve. He is not entitled to present or process any such grievance unless he has the approval of and is represented by the certified bargaining agent for the bargaining unit to which the agreement or the award applies. In such cases, of course, he may not be represented by any employee organization other than his own certified bargaining agent. These limitations are not relevant in a case where there is no bargaining agent for the unit in which the employee is employed, because there can be no agreement or arbitral award unless there was a bargaining agent under Part II of the Act at some earlier date.

Each department and agency of the federal government was required initially by regulations made under section 99 of the Act to devise its own procedure with respect to the form of grievances, the number of steps in the procedure and the time limits. The procedures are not uniform, although they were made subject to approval by the Public Service Staff Relations Board, and there are considerable variations. For example, in many departments

there are four steps in the grievance procedure, which is the maximum; in others there are three steps or levels and there may be units, notably that of the Foreign Service Officers, where there are only two levels.

There is a third feature of the statutory scheme which is not merely distinctive but unique. Although persons employed in a managerial or confidential capacity are excluded from the definition of an employee, nevertheless there are saving clauses which give managerial and confidential personnel the right to grieve as though they were employees. This includes the right to grieve after a suspension or discharge, and such grievances may be referred to adjudication. Moreover, it would appear, although the point has never been tested, that such persons, if not members of any bargaining unit, may be represented by any employee organization if such representation is desired by the grievor and agreed to by the organization of his choice. In practice, certain discharged employees of managerial or executive rank have taken their cases to adjudication, where they were represented by counsel.

Yet another distinctive feature of the statutory scheme is that the scope of adjudicability (that is, the classes of grievances which may be referred to adjudication and the conditions precedent for doing so) is strictly defined within the Act itself and not by agreement. An attempt has been made in at least one agreement to broaden the scope of adjudicability, but its effect or validity has not yet been determined.

Although the right to grieve is very widely defined in section 90, only three classes of cases may be referred to adjudication by aggrieved employees or their bargaining agents under sections 91 and 98.

The first class includes any employee grievance with respect to the interpretation or application in respect of that employee of a provision of a collective agreement or an arbitral award. The second class is that of grievances in which there has been "disciplinary action resulting in discharge, suspension or a financial penalty".

A condition precedent for both is that the grievance must have been presented up to and including the final level of the departmental grievance process without a result satisfactory to the employee. If the grievances are based on agreements, the reference must also be approved by the bargaining agent concerned and the bargaining agent must formally express its willingness to represent the employee in the ensuing proceedings. Needless to say, this condition does not apply to disciplinary grievances, where the

employee may be represented at adjudication by himself, by counsel or by any other person. In practice, most employees in disciplinary cases are represented by the appropriate union or bargaining agent.

A third class of cases may also be referred to adjudication. Under section 98 of the Act either the employer or a bargaining agent may refer a dispute in which it is alleged that an obligation exists under a collective agreement, that there has been a failure to observe or carry out the obligation, and that its enforcement is sought. Such references have included claims by unions for injunctive relief or an order in the nature of mandamus, and claims by the employer for damages against a bargaining agent. An important qualification of this remedy is that no such case can be referred under section 98 if the obligation alleged is one which may be the subject of an individual employee grievance. Another qualification is that references under section 98 must be heard and determined by the Chief Adjudicator, and not by any other adjudicator.

This adjudication system is necessarily different in structure from the *ad hoc* pattern of arbitration so prevalent in the private sector. As provided by section 92 of the Act, adjudicators are appointed for a fixed term of not more than five years by the Governor in Council — in fact, the Cabinet. No one may be appointed, however, except on the recommendation of the Public Service Staff Relations Board, which consists of a permanent Chairman and Vice-Chairman together with eight members of the public, theoretically "representative" in equal numbers of employer interests and employee interests. No adjudicator may be removed from office by the Governor in Council except on the unanimous recommendation of the Board.

One of the adjudicators is chosen Chief Adjudicator, and must hear all references under section 98. He may hear and determine other references himself or assign them to other adjudicators appointed under the Act. He is made responsible for the administration of the grievance adjudication system and is provided with necessary facilities and a supporting staff, including a Registrar. The Chief Adjudicator must dispose of preliminary or interlocutory matters, after a hearing if necessary. These include certain applications under rule 55 for the enlargement of prescribed times, and contested applications for adjournment under rule 55A. He may direct under rule 55C that two or more grievances be consolidated and heard together. Further, under rule 55B any adjudicator may direct that an interested person or organization be added or joined

to the proceeding as a third party and given an opportunity to participate.

In the private sector it is still the practice of many employers and unions to resort to an arbitration "board" consisting of a neutral chairman and a nominee of each party. Experience in the public sector suggests that the tripartite board is not only cumbersome and costly but also superfluous. The *Public Service Staff Relations Act* provided that the parties could agree on a Board of three, but this has never been done. After more than seven years of experience every decision has been rendered by one adjudicator.

There are now considerably more than 100 collective agreements in the Public Service, affecting at least 200,000 public servants with collective bargaining rights. Certain of these agreements are made with respect to large bargaining units which include employees in many different departments. Indeed the agreement for the secretarial, stenographic and typing group covers personnel in all departments. Further, many agreements have clauses in common; the language is either identical or similar. As a result, the adjudication of a grievance originally arising with respect to one employee in one department under an agreement dealing with only one bargaining unit may have a service-wide impact. By the weight of precedent, it may affect the rights and obligations of both the employer and the employees in many different departments and in many different bargaining units. Inevitably, careful attention must be paid by all parties, and also by the adjudicators themselves, to the jurisprudence which has been under development since the inception of the system in 1967. This is not to say that adjudicators are bound by the doctrine of *stare decisis* or that all decisions constitute binding authorities; but it does mean that some measure of consistency must be maintained in the interpretation and application of important provisions in collective agreements, and in the application of certain principles of law and practice. It is therefore important that departments and agencies of the Government as well as all bargaining agents be supplied with copies of every decision rendered by adjudicators. In addition, summaries of "Significant Principles Established in Decisions of Adjudicators" appear in each annual report of the Public Service Staff Relations Board. After being tabled in Parliament, these are readily available from Information Canada.

It follows that cases taken to adjudication cannot be processed on an *ad hoc* basis, as usually happens in the private sector. There must be a clearly defined procedure in which the appropriate forms

are specified by the regulations, and all other procedural requirements must be met. There must be a file for each reference and a permanent register in which all decisions are preserved in both official languages. Thus it has become necessary to establish a supporting apparatus somewhat analogous to that which is maintained by the courts in processing litigation. Experience has shown that while some flexibility in procedure may be required, it is equally necessary that all parties understand clearly what is required of them in referring a case to adjudication and in carrying it through to a final decision.

The enforcement of adjudication decisions rests on three sections in the Act. Section 96 requires compliance by all parties whenever the decision on a grievance referred to adjudication calls for action to be taken by an employer or an employee or a bargaining agent. Under section 20, failure to comply may give rise to a complaint to the Public Service Staff Relations Board. If the Board determines that any person has failed to give effect to an adjudicator's decision, the Board itself may direct compliance. Further, if there is failure to comply with the Board's order or direction, the Board under section 21 shall forward to the appropriate minister copies of its order, and relevant documents together with a report of the circumstances, all of which must be laid by the minister before Parliament within fifteen days. From 1967 to 1974 it has never been necessary to resort to this means of enforcement.

As noted above, only two classes of grievances are adjudicable upon reference by an individual employee. Broadly speaking, they are contract interpretation grievances and grievances relating to major disciplinary penalties. It is important to recognize, however, that the use of the term "disciplinary action" has the effect of barring employees from taking cases to adjudication if the action complained of is not in reality disciplinary. The *Public Service Employment Act*,[9] which in its present form was enacted at the same time as the *Public Service Staff Relations Act* (replacing the earlier *Civil Service Act*) expressly provides that employees may be released or demoted on grounds of incompetence or incapacity, although such releases and demotions may be appealed to the Public Service Commission, a statutory body which is entirely distinct from the Public Service Staff Relations Board. The Commission is charged with maintaining the merit system and is responsible for the recruitment, appointment, training and promotion

[9] R.S.C. 1970, c.P-32.

of public servants, but it is not directly concerned with collective bargaining, labour relations or grievance procedures under the *Public Service Staff Relations Act*, nor is it directly concerned with such management responsibilities or prerogatives as the maintenance of order and discipline, which are vested in the Treasury Board by the *Financial Administration Act*,[10] as amended in 1967.

Further, again under the *Public Service Employment Act*, an employee may be laid off by reason of lack of work or the discontinuance of a function (section 29) or a probationary employee may be rejected for "cause" (section 28) and neither a lay-off nor a rejection may be appealed to the Commission. Moreover, a release, a demotion, the denial of an increment, a lay-off or a rejection (or a "declaration of abandonment" under section 27 of the *Public Service Employment Act*) cannot be referred to adjudication under the *Public Service Staff Relations Act* unless the employee first establishes, either at a preliminary hearing or at the opening of the principal hearing, that the action taken was in reality "disciplinary action" and was not what it purported to be. The distinction between cases arising under the *Public Service Staff Relations Act* and cases which properly fall within the ambit of the *Public Service Employment Act* has given rise to a number of important and difficult decisions. Indeed, in the first 852 employee grievances referred to adjudication, jurisdictional objections were raised in 211, of which 89 were successful.

It has become clear from decisions of adjudicators and the Board that a termination of employment by reason of incompetence or incapacity and for no other reason is not adjudicable because it contains no element of disciplinary action taken in response to misconduct, breaches of discipline or some other form of voluntary malfeasance. Strictly speaking, incompetence or incapacity, if wholly involuntary, being beyond the control of the employee, should not attract disciplinary action even though it may be necessary to terminate employment or demote the employee by reason of his inability to perform the functions for which he has been employed. On the other hand, adjudicators have concluded that if in fact termination occurred because of some voluntary wrongdoing or malfeasance, or an act or omission alleged to constitute voluntary malfeasance or wrongdoing, then the action taken by the employer should be considered on the merits and the adjudicator should determine whether it was justified as disciplinary action and, if so, whether the penalty was appropriate.

[10] R.S.C. 1970, c.F-10, s.7(1)(f).

Some reference may now be made to the results to date of the system established by law in 1967. There are no reliable statistics with respect to the number of grievances presented and processed through various levels of grievance procedures within departments and agencies. It is beyond doubt, however, that there have been many thousands. Most, having been settled or abandoned, never reached adjudication.

From March 13, 1967, when the legislation came into force, to March 31, 1974, there were 1,450 grievances referred to adjudication on the initiative of individual employees. Of these only 469 were disciplinary. Many of the others have been "group grievances", in the sense that the original complaint was signed by two or more employees but processed as one grievance and subsequently as one reference to adjudication. By July 1, 1974, the total number of references exceeded 1,600. By that time, these included 58 "policy grievances" under section 98 of the Act, all but two of which were referred by bargaining agents.

The system is administered by the Chief Adjudicator, who is also the only full-time adjudicator. There have been between five and thirteen other adjudicators who hear and determine on a *per diem* basis such cases as are assigned to them by the Chief Adjudicator. Most hearings are held in Ottawa, where the headquarters of management and almost all bargaining agents are located. However, cases may be and often are heard elsewhere, particularly when there are many local witnesses. There have been hearings in nine provinces and also in the Yukon and North West Territories.

All decisions of adjudicators must be in writing with reasons, as required by section 52 of the P.S.S.R.B. Regulations and Rules of Procedure, and they are issued to the parties in both official languages. A few references are disposed of, by consent of the parties, on the basis of written representations only, which may be supported by a joint statement of facts and issues. In most cases, however, there is a hearing, open to the public. Only one case has been heard *in camera*, and then only because the grievor was facing trial for an indictable offence and publicity could have been highly prejudicial. Witnesses on both sides give their sworn testimony, documentary exhibits are filed, and spokesmen for the parties present their arguments. The adjudicator must make very full notes because testimony is rarely transcribed by a court reporter.

In general, both employers and bargaining agents in the Public Service appear to understand and observe the requirements of

natural justice and their respective rôles in the practice and procedure developed by adjudicators since 1967. The strict formality associated with trials or appeals in courts of law is not observed, but hearings are conducted in orderly fashion and references are processed from filing to final disposition in accordance with the P.S.S.R.B. Regulations and Rules of Procedure. Similarly, the necessity of relevance and the general principles of the law of evidence are respected but not unreasonably applied. This is thought to be consistent with the requirement in section 96 of the Act that "the adjudicator shall give both parties to the grievance an opportunity of being heard".

At adjudication hearings the employer (either the Treasury Board or a "separate employer" such as the National Film Board) is represented by counsel, usually one of the legal officers in the Department of Justice (who are excluded from the definition of an "employee" for the purposes of the Act). In most cases, however, employees are represented by union staff members, some of whom have become experienced advocates. It is noteworthy, however, that laymen — no less than members of the Bar — frequently rely on or attempt to distinguish previous decisions by adjudicators or by arbitrators in the private sector or by judges in courts of law. This practice suggests that respect for precedent is a natural and spontaneous response to the need for clarity and certainty. Indeed it can be said that the characteristics of a common law system are growing and flourishing once again in a new and different environment.

Notwithstanding the provisions of section 96 of the *Public Service Staff Relations Act* and a so-called "privative clause" in section 100, there are two avenues of "appeal" from the decision of an adjudicator. The effect of section 23 is that any "question of law or jurisdiction" arising before, during or after an adjudication proceeding may be referred to the Board by either of the parties or by the adjudicator himself. There have been more than 50 such references by employers or bargaining agents. Secondly, since June 1, 1971, either party has had the right, under section 28 of the Federal Court Act,[11] to ask the Federal Court of Appeal to review and set aside the decision of an adjudicator. Four applications of that kind reached the Court between 1971 and 1973, either directly or after a reference to the Board. In two, the adjudicators' decisions were upheld, and in two they were reversed.

[11] S.C. 1970-71-72, c.1.

It should be noted that in the Canadian Public Service the terms "adjudicator" and "adjudication" are used advisedly — at least in the English text of the Statute. (The French text unfortunately confuses the matter by describing "Reference to Adjudication" as *Renvoi à l'arbitrage* and "Reference to Arbitration Tribunal" as *Renvoi au Tribunal d'arbitrage.*) The Act provides in Part III for a three-man "Arbitration Tribunal" to resolve certain interest disputes. The function of the Tribunal is to make binding awards with respect to arbitrable issues in cases where bargaining agents have failed to conclude collective agreements with the employer, and which have been referred to arbitration. Such cases of course arise when bargaining agents have previously elected the arbitration option rather than resorting to conciliation, which may lead to the strike option. The jurisdiction and the functions of the Arbitration Tribunal are entirely distinct and separate from those of adjudicators, and the two should not be confused, as they often are. For clarity, one system is known in the English text as "arbitration" and the other system as "adjudication".

It will be apparent from what has been said in this paper that much of the work of adjudicators corresponds to that of arbitrators in the private sector, but that there are real differences in their terms of reference and in the consequences. Of those differences, perhaps the most important is that adjudicators have an unrivalled opportunity of participating in the creation of a coherent body of case law in a large area of labour-management relations.