Collective Bargaining for Parliamentary Employees

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On April 30, 1985 Bill C-45, the *Parliamentary Employment and Staff Relations Act* was introduced in the House of Commons. Its purpose is to grant parliamentary employees the right to bargain collectively and to regulate the form such bargaining would take. Nearly one year to the day later, and in the wake of a decision by the Federal Court of Appeal that parliamentary employees are not eligible for certification under the *Canada Labour Code*, the bill passed second reading and was sent to a Legislative Committee.

The right of parliamentary employees to negotiate collectively, unthinkable twenty years ago on grounds of parliamentary privilege, is now accepted in principle by all political parties. It remains to be seen, however, if members studying this bill will do so in a way that reflects the spirit as well as the letter of the new rules inspired by the Special Committee on Reform of the House. That committee wanted parliamentarians to become true participants in the legislative process. Most legislators under both Liberal and Progressive Conservative administrations have tended to abdicate responsibility for parliamentary employees to the government and to the courts. The debate over Bill C-45 offers an opportunity to see if attitudinal change, so fundamental according to the report of the Special Committee, is a realistic possibility or a pipe-dream.

The question of collective bargaining for public employees first became an issue following the 1963 federal election when Prime Minister Lester Pearson established the Preparatory Committee on Collective Bargaining and Arbitration under the direction of A.D.P. Heeney. The report recommended establishment of an independent Public Service Staff Relations Board to determine and certify bargaining agents and to provide for the conciliation and arbitration of disputes. The government responded by introducing the *Public Service Staff Relations Act* which applied to departments and agencies listed in the Schedules to the Act. The House of Commons, the Senate and the Library of Parliament were not listed and consequently their staff did not fall under provisions of the Act.[1]

The legislation was studied by a Special Joint Committee of the Senate and House of Commons in 1966 and 1967. Several members wanted to amend the Act to include parliamentary employees. Others agreed with Maurice Ollivier, longtime Law Clerk and Parliamentary Counsel who argued that collective bargaining infringed on the privileges enjoyed by parliamentarians which are necessary to enable them to carry out public business.[2] Notwithstanding his testimony the committee recommended that the *Senate and House of Commons Act*, the *House of Commons Act*, and the *Library of Parliament Act* be amended to extend to parliamentary employees advantages and rights similar to those provided under the *Public Service Staff Relations Act*. Despite this recommendation no change was made to the Act which came into force in 1967.[3]

Over the next ten years the Canadian Labour Congress, the Public Service Alliance of Canada and other groups recommended that collective bargaining be extended to parliamentary staff. In 1976 a Parliamentary Association of Support Staff (PASS) was formed by staff of members of the NDP caucus. Their agreement with caucus covered working conditions under control of individual MP's as distinct from conditions such as salary which are determined by the House. The agreement has been renewed several times and provides for a grievance procedure through third party arbitration and established agreed procedures for staffing of vacant positions, technological change, overtime, standards for vacation, education and travel.

An *ad hoc* Committee of Parliamentary Employees was formed in 1982 with representation from both political employees like the NDP caucus and non political groups on the Hill. The Public Service Alliance of Canada launched a recruitment drive and within a year enough House of Commons messengers and drivers had signed up to allow the Alliance to apply to the Canada Labour Relations Board for certification as their bargaining agent. The decision to apply to the Board brought an outside perspective to what had previously been considered an internal parliamentary matter.

The Canada Labour Relations Board was established by the *Canada Labour Code* and charged with administering provisions of the code respecting the certification of bargaining units, the negotiation, conciliation and enforcement of collective agreements and the investigation of complaints concerning industries within federal jurisdiction. It does not cover civil servants but does apply to employees of certain Crown Corporations and to employees of a "federal work, undertaking or business" as defined in the Code.

Provisions of the *Canada Labour Code* are generally more favourable to employees than those of the of the *Public Service Staff Relations Act*. For one thing, bargaining units certified under the Code can negotiate matters pertaining to job classification and security which are not negotiable under the Act. The right to strike is also allowed to employees under the Code.

An application for certification as a bargaining unit by 110 House of Commons messengers was filed under the Code on November 4, 1983. The Board asked both the Public Service Alliance of Canada and the House of Commons to make submissions concerning its jurisdiction to deal with the application. The Senate also expressed an interest in the application and submitted a brief challenging the jurisdiction of the Board to even consider the question of whether it had jurisdiction over parliamentary employees. In the meantime the Board had received two

other applications for certification, one from a group in the House of Commons and one from the Senate.

The Board disagreed with the argument of Senate counsel that in recognition of the privileges of members of the House the question of collective bargaining for its employees could only be addressed by the House itself. It noted that in passing the *Canada Labour Code*, Parliament had conferred on the Board the responsibility for interpreting the Code in the first instance. "If the Board is erroneous in its interpretation or if Parliament wishes to change its mind it can amend the statute. However, this Board is at this time vested with the authority to interpret the Code as it now exists."[4]

A three member Board, chaired by Brian Keller, noted that Counsel for both the employees and the House agreed that the messengers were ineligible under the *Public Service Staff Relations Act* but were not specifically excluded under the *Canada Labour Code*. Their status under the Code depended upon whether the House of Commons could be interpreted as a "federal work or undertaking". After considering arguments presented by both sides the Board ruled that "except in relation to Crown employees and those under the *Public Service Staff Relations Act*, the *Canada Labour Code* fully occupies the field of federal labour competence". The Board ruled that the House of Commons is subsumed within the phrase "federal work, undertaking or business".[5]

The Board then considered whether the concept of parliamentary privilege renders inapplicable any of its rulings unless the House expressly decides to make the Code applicable. It concluded "Freedom of speech is so fundamental a concept that it probably would take express statutory language referring specifically to Parliament to override it. But collective bargaining rights of Parliamentary staff are quite removed from the rights of Members to freely express themselves or otherwise conduct themselves in Parliament. If Parliament wished to treat its own staff differently from other workers, then it can say so, but it is hard to understand why that should be presumed to be true."[6]

Given jurisdiction to deal with the certification application, the Board considered that the normal administrative procedures for certification would follow. However, before it could convene hearings for applications from other units the House asked the Trial Division of the Federal Court for a writ of prohibition preventing the Board from proceeding further with the matter. When the Court refused to issue such a writ, the House launched an action before the Federal Court of Appeal which would have the effect of setting aside the Canada Labour Relations Board' decision concerning jurisdiction. The Court heard arguments in January 1986. The House maintained that Parliament as an employer was not like any trucking, rail, shipping, bank, radio or television company that comes under the *Canada Labour Code*. The uniqueness of Parliament suggested the need to define a suitable legal framework for granting its employees the right to bargain collectively.

The decision of the Federal Court of Appeal on April 23, 1986 supported the position of the House. Justice Louis Pratte, with the concurrence of Justice Lacombe, stated there was no question that Parliament possessed the legislative competence to make the Canada Labour Code applicable to its employees. The only question was whether it had in effect done so. The case turned on the proper definition of the phrase "federal work, undertaking or business". Unlike the Labour Relations Board, Justice Pratte did not think the House could be so described. In defending this he had to distinguish the case from a Supreme Court decision overruling the Federal Court of Appeal which held that employees in municipal corporations in the Northwest Territories fell under the jurisdiction of the Board.

He acknowledged similarities between the two cases but maintained that the operations of the House are all ancillary to the performance of its sole task of participating in the making of laws. As a result of this important distinction, "I am of the opinion that it cannot be inferred from the decision of the Supreme Court that the operations of the House of Commons are embraced in the phrase "federal work, undertaking, or business". On the contrary, giving that phrase what appears to me to be its plain and ordinary meaning, I incline to the view that it does not comprise the activities of the House."[7]

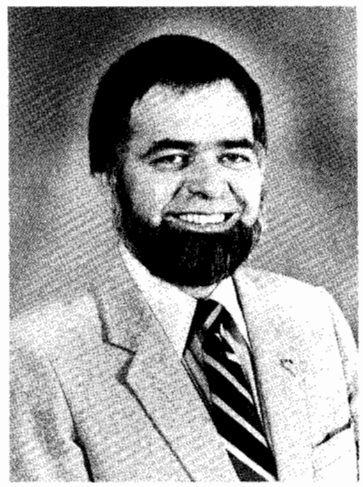
Justice Pratte said he was confirmed in his opinion by the history of the Civil Service Acts and the Labour Code. Parliamentary employees, he noted, were part of the civil service until removed under the revised *Civil Service Act* in 1961. Therefore as early as 1948, under the *Industrial Relations and Disputes Investigation Act* (forerunner of the Canada Labour Code), parliamentary employees could have argued that they had rights to collective bargaining which at that time were denied to other civil servants. In those circumstance, he reasoned, one would have expected the 1961 *Civil Service Act* not to have any application to these employees. But since that Act did confer on each House the power to apply any provision to its employees, "Parliament then, after having granted to employees of both Houses the right to compulsory collective bargaining in 1948, would, in 1961, have given to their employers the discretionary power to deprive them of that right. One should refrain in my view, from ascribing so absurd an intention of Parliament."[8] Justice Hugessen while in general agreement with the decision added two further reasons why the Board did not have jurisdiction. He said the House is not an "employer" in the meaning given to that term by the Code and secondly he maintained the employees in question are servants of the Crown and therefore specifically excluded from coming under the *Canada Labour Code*.

While the question was being fought out before the Canada Labour Relations Board and in the Courts a number of developments had taken place on the political front. In 1980 the Trudeau government commissioned a study by Robert Weir of the Privy Council Office on the subject. Completed in 1981 this document outlined the background to the question, looked at the situation in provincial and foreign jurisdictions and outlined several options open to the government.[9] Much of the comparative information was less than authoritative having been gathered largely from telephone discussions with provincial officials or staff in Ottawa embassies. The study contained at least one major factual error. It claimed no right to collective bargaining existed in the Library of Congress when in fact collective agreements have been in effect there for years. It also tended to pass lightly over collective bargaining regimes that already existed in the British House of Commons and the Quebec National Assembly.

Among the options listed by Weir were: putting parliamentary staff under the *Public Service Staff Relations Act*; establishing Parliament as a separate employer; declaring Parliament a federal work or undertaking thus putting its employees under the *Canada Labour Code*; enacting special legislation along with consequential amendments to the *Senate and House of Commons Act*, the *House of Commons Act* and the *Library of Parliament Act*. Another option was to make working conditions comparable to groups in the public service without establishing a collective bargaining process as such.

The report was eventually tabled in the House on January 27, 1983 and referred to the Standing Committee on Management and Members' Services for further study. In late 1983 a subcommittee chaired by Gérard Duquet and with assistance from



Some of the key participants in the debate over collective bargaining: l-r Ray Hnatyshyn, President of the Privy Council, Brian Keller, vice Chairman of the Canada Labour Relations Board, Jack Ellis, Chairman of Legislative Committee on Bill C-45 and Jean Bergeron, Executive Vice President, Public Service Alliance of Canada.

the Privy Council Office prepared draft legislation. The House was dissolved for the 1984 election without considering the bill.

In the course of its discussions the committee met with both Speaker Jeanne Sauvé and her successor Lloyd Francis. Speaker Sauvé said she had no objection to employees organizing themselves so that they could voice their grievances. Speaker Francis said that while he was acting under legal advice in opposing the applications before the Board he would be "more than pleased if the House could somehow express its views through the adoption of appropriate legislation."[10]

The main concern, according to Speaker Francis, was to proceed according to law. "The law is what the courts say it is. If the Federal Court in the action that has been commenced supports the intervention and says in effect that the Canada Labour Relations Board erred in assuming jurisdiction, than I would not want anything else than to proceed according to law . . . I felt following the legal advice I received, that I was under an obligation to resolved the matter so that there should be no doubt about that".[11]

Ian Deans of the NDP claimed there was a contradiction in Speaker Francis's argument. "We cannot get the government to move in bringing forward legislation that will give to employees of the House of Commons or employees of Parliament Hill the right to bargain collectively. Yet, at the same time when those employees finally received that right through a decision of the Canada Labour Relations Board, it was the administration under the direction of the Speaker, who moved to stop it. Now there is no way for us, as Members of Parliament, to get the government to move. I am really quite concerned . . . that the administration, under the Speaker's direction, was the vehicle used to stop the very thing that the Members had expressed a desire to have happen."[12]

Debate in committee during the last Parliament foreshadowed discussion which took place last November when the President of the Privy Council, Ray Hnatyshyn, moved that Bill C-45 be read a second time and sent to a Legislative Committee. There was, he said, genuine confusion and misunderstanding about the nature of rights presently enjoyed by parliamentary employees including differences of opinion as to the jurisdiction of the Canada Labour Relations Board in the matter. He asked for speedy passage of the bill which would remove the element of uncertainty. "In the end, after lengthy and costly legal proceedings, it is conceivable that, owing to the particular situation of Parliament, parliamentary employees could be considered as having no rights, that is without the right to join a union, establish a certified association, or bargain collectively. In the Government's view such a situation would be unsatisfactory. Parliamentary employees, ought to have the right to bargain collectively and be able to resort to a progressive labour relations system."[13]

Liberal spokesman Jean-Robert Gauthier asked why it was necessary to go the way of special legislation instead of simply allowing employees to come under the *Canada Labour Code*. He said Bill C-45 was inspired by the *Public Service Staff Relations Act* which itself was eighteen years old and badly in need of reform. He went on to quote from a letter sent by Brian Mulroney to the President of the Professional Institute of the Public Service during the 1984 election campaign. It said a Progressive Conservative Government would "negotiate directly with public service unions and associations toward the establishment of an improved collective bargaining system based on the provisions of the *Canada Labour Code*. Staffing, procedure, classification, technological change, designations and other issues will become negotiable."[14]

Michael Cassidy of the NDP blamed both Liberal and Conservative Governments for systematically putting road blocks in the way of employees forming a union. "The government House leader talks as if there was some sort of alien force out there taking these employees before the courts, but that is not

the case at all. It is the Government which has been taking these employees to court."[15] During hearings on Bill C-45 the Parliamentary Secretary to the House Leader, Doug Lewis, argued that it was the House of Commons *not* the Government which initiated the legal proceedings.

As for the merits of Bill C-45, Mr. Hnatyshyn argued that although the Public Service Staff relations Board is established as the advisory board to administer the legislation, the last two parts of the bill go beyond what is available under the *Public Service Staff Relations Act*. Bill C-45 makes applicable to parliamentary employees parts III and IV of the *Canada Labour Code* relating to minimum standards respecting hours of work, overtime, holidays and vacation entitlements, maternity leave, family bereavement leave, sick leave, the right to a hazard free work place etc.

On the other hand Rod Murphy of the NDP said the legislation had six major weaknesses. "First, the classification of positions and the assignment of duties cannot be dealt with in negotiations. Second, staffing, job appointments, appraisals, promotions, demotions, transfers and layoffs cannot be dealt with under this legislation. Third, grievance procedures are limited. Grievances cannot go to third party arbitration except in certain circumstances. Fourth, union grievances are not allowed in many areas. Fifth, Members of Parliament staff are excluded from the right of collective bargaining. Sixth, the right to strike is prohibited."[16]

The bill was not debated again until April 1986. Few new arguments came to light although several New Democratic Party members referred to a study entitled "Preserving the Employee's Prerogative" which contained a catalogue of grievances that had taken place during the past several months. Another point to emerge from the debate was that contrary to the common practice of freezing conditions while workers are applying for certification, numerous changes in working hours, vacation policy, and job classification had been implemented while the issue was before the Labour Relations Board. To some extent debate on this and other aspects of the question was rendered academic by the decision of the Federal Court of Appeal.

Conclusion

It is unfortunate that the government did not choose to send Bill C-45 which affects employees of both the Senate and the House as well as the Library of Parliament, to a Joint Committee. The new Standing Joint Committee on Parliament established last February would have been ideal although composition of that committee was still being debated at the time Bill C-45 passed the House. Adoption of C-45 in its present form by the House alone does not preclude a long debate in the Senate where the Liberal majority may take up the opposition of their colleagues in the House. Were that to happen the employees would once again find themselves the football in a game in which they have no control.

If the bill does not receive Royal Assent by the end of the present session, it will have to be re-introduced and unless there is unanimous consent, will have to make its way through the various stages of the House all over again. In that event perhaps the Standing Joint Committee on Parliament will be used as the vehicle for thorough consideration of all the possible ways to implement collective bargaining without limiting itself to a bill drafted and defended by the government.

If the Bill is further delayed the employees may well decide to appeal the decision of the Federal Court to the Supreme Court of Canada. It would be interesting to know what the highest court in the land thinks of the reasoning of the Federal Court in a case that is not without its constitutional overtones. Since the adoption of the *Canadian Charter of Rights and Freedoms*, there has been an increasing tendency to look to courts rather than legislatures for redress. As argued by the Special Committee on Reform of the House, legislators must be particularly vigilant or they will become relegated to a secondary role in the Canadian political process.

Parliamentarians are frequently told the House of Commons has become a model of efficient administration following the reorganization inspired by the Auditor General's critical report of 1979. Why should it not also become a model of harmonious labour relations? Only Members of the House of Commons, and eventually Senators, charged with examining Bill C-45 can bring a sad episode in our parliamentary history to an honourable conclusion. ■

Notes

[1]When the Civil Service Act was amended in 1961 parliamentary employees were removed from the jurisdiction of the Civil Service Commission. See Canada House of Commons Special Committee on the Civil Service Act (Bill C-71) 4th Session 24th Parliament 1960-1961 *Minutes of Proceedings and Evidence* for further information.

[2]See Canada, Parliament, Special Joint Committee on Employer-Employee Relations, *Minutes of Proceedings and Evidence*, November 8, 1966 pp. 817-838.

[3]*Ibid.*, February 3, 1967 p. 1312.

[4]Canada Labour Relations Board, *Reasons for Decision* (Public Service Alliance of Canada, applicant and House of Commons, employer) Board File 555-1991, Decision 456, April 9, 1984, p. 5.

[5]*Ibid.*, p. 12.

[6]Canada Labour Relations Board, *op. cit.* p. 18.

[7]House of Commons, V CLRB & PSAC, Dossier A 855-85, Federal Court of Appeal, April 23, 1986, p. 8.

[8]*Ibid.* p.13.

[9]See "Collective Bargaining for Employees of Parliament", Document tabled in the House of Commons by David Smith, Parliamentary Secretary to the President of the Privy Council, January 27, 1983, p. 11.

[10]See Canada, House of Commons, Standing Committee on Management and Members Services, *Minutes of Proceedings and Evidence*, no. 4, May 26, 1982, p. 23.

[11]*Ibid.*, May 16, 1984, p. 26.

[12]*Ibid.*

[13]House of Commons, *Debates*, November 1, 1985, p. 8267.

[14]*Ibid.*, p. 8271.

[15]*Ibid.*, November 4, 1985, p. 8333.

Ibid., November 1, 1985, p. 8274.

Editor's note: On June 5, Mr. Hnatyshyn presented a number of amendments to the legislative committee studying Bill C-45. Among other things grievance and adjudication rights were expanded. For example, individual classification (but not the classification system itself) would be subject to grievance. Transitory provisions with respect to evidence of employee support for certification were also proposed. The committee reported Bill C-45 as amended to the House on June 16, 1986. At press time it still had to get through report stage, third reading and consideration by the Senate.