Industrial Relations and Social Security

CONCILIATION AND ARBITRATION OF INDUSTRIAL DISPUTES

Some Legal Aspects

By G. V. V. Nicholls.

THE report of President Roosevelt's Commission on Industrial Relations in Sweden, made public some months ago, closes with these significant words:

> "Although strikes and lock-outs still occur in Sweden, they occur within the framework of a voluntary system of collective bargaining in which the settlement of differences by methods of persuasion rather than by force has become the order of the day. The endeavor of the representatives of both workers and employers is to bring about, by objective factual consideration, an understanding of the problems, with respect for each other's motives and the adoption of policies and agencies which make for peaceful solutions."

We in Canada have this at least in common with Sweden that strikes and lockouts still occur here as they do there. But it can hardly be said that in Canada they occur, to borrow the words of the President's report, "within the framework of a voluntary system of collective bargaining". It would be more correct to say that in this country they occur within the framework of a more or less compulsory system set up by statute.

Let me explain what I mean. The conciliation and arbitration of industrial disputes may be, legally speaking, of two types; private or public. Private conciliation or arbitration is that method of peacefully settling a dispute which is provided for by the parties to a collective labour agreement. The workers in a plant through their representatives, or in a number of plants through a union, enter into an agreement as to wages, hours and conditions of labour with an employer or a group of employers. Contained in this collective labour agreement is a clause in which the parties undertake to submit all disputes arising out of it, and sometimes all disputes of any nature whatever, to peaceful settlement. By public conciliation or arbitration is meant, on the other hand, that system of peaceful settlement the machinery and scope of which are provided for by the state in special legislation. The difference between Sweden and Canada in the treatment of industrial disputes is that in Sweden the emphasis is upon private conciliation or arbitration, while here, because of the comparatively limited extent of collective bargaining, most disputes will be conciliated or arbitrated under the machinery created by the state, by legislation.

Arbitration Clauses in Collective Labour Agreements.

I should like to pay particular attention here to the provisions of collective labour agreements in which the parties undertake to submit all disputes arising out of them to conciliation or arbitration, to the so-called arbitration clauses. What is wanted in Canada, to borrow the words of the President's Commission again, is the "endeavor of the representatives of both workers and employers . . . to bring about, by objective factual consideration, an understanding of the problems, with respect for each other's motives and the adoption of policies and agencies which make for peaceful solutions". I am not criticizing the Canadian legislation, both federal and provincial, that sets up machinery for the peaceful settlement of labour disputes; it is excellent legislation of its kind. But the ideal system is undoubtedly one in which employers and workers settle their own differences without governmental interference.

As a general rule, arbitration clauses in collective agreements are now per-

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fectly legal. It used to be commonly said, and it is still a principle of law, that parties could not enter into a contract, which would give rise to a right of action for a breach of it, and then withdraw such a case from the jurisdiction of the ordinary courts. By the exercise of a certain ingenuity the courts, however, have avoided carrying this rule to its logical conclusion. While following precedent to the extent of conceding that it is against public policy to oust the courts of their jurisdiction by contract, they have held that the parties may enter into an agreement providing that no breach shall occur until after a reference has been made to arbitration. In other words, workers and an employer, or group of employers, may legally contract that no right of action shall accrue until a third person, contractually appointed and selected, has adjudicated upon any differences that may arise between them.

The case of *Caven v. C.P.R. Co.*, decided by the Judicial Committee of the Privy Council in 1925, is, I think, authority for the proposition that the decision of a board of conciliators or arbitrators, which is arrived at in accordance with the formalities prescribed in a collective labour agreement, must be respected. If the hearing has been properly conducted, the award of a private tribunal that the parties have themselves set up, is binding upon them, and the regular courts may be appealed to to prevent a violation of it.

Recently I have had occasion to examine a certain number of collective labour agreements in which an arbitration clause was incorporated. They were often inadequate. It is not enough for the parties to an agreement to express their willingness to arbitrate, if they fail also to provide the requisite machinery. Generally speaking such an agreement should leave as little as possible, in the way of procedure, to be decided upon by the parties *after* the dispute has occurred and tempers, perhaps, are running high. Detailed provision should be made for the appointment of the conciliators or arbitrators, the steps an aggrieved party must take in order to start the arbitral machinery rolling and the manner in which proceedings are to be conducted. The question, for instance, as to whether the arbitrators should be members of a permanent board, or be specially appointed to hear a particular dispute, must be decided. So, again, must the question whether they should be nominated by the parties to the dispute, one or two by the employer and one or two by labour, or be absolutely independent and unbiased.

Canadian Legislation Providing for Conciliation and Arbitration.

I come now to the subject of public conciliation and arbitration. There is an amazing amount of legislation in Canada designed or adapted to encourage the peaceful settlement of industrial disputes. This legislation ranges all the way from the so-called "Inquiries Act" of the Dominion to the "Labour and Industrial Relations Act" recently passed in New Brunswick. It would be possible to cite no fewer than forty-three federal and provincial statutes of this type.

Much of this, of course, was not particularly designed to encourage the peaceful settlement of labour disputes, and is not, properly speaking, conciliation or arbitration legislation at all. The Dominion "Inquiries Act" and the nine corresponding provincial statutes, known in the case of Nova Scotia as "The Public Inquiries Act", provide, for instance, not so much for the arbitration of labour disputes as for the investigation of all matters of public interest. It was under the Dominion "Inquiries Act" that the Royal Commission on Dominion-Provincial Relations, the Rowell Commission, was appointed. However, if these acts were not designed, they are adapted to facilitate the settlement of labour disputes. Royal Commissions have on occasion, and could again, be appointed under them to investigate and report on an impending strike or lockout, and investigation is a necessary preliminary to peaceful settlement.

The two federal statutes of real importance from the point of view of

arbitration, properly so-called, are the "Conciliation and Labour Act", first passed in 1900, and the "Industrial Disputes Investigation Act", enacted originally in 1907. The first tangible result of the growing interest manifest in labour matters in the eighties and nineties of the last century was the passing of "The Conciliation Act", the forerunner of the present "Conciliation and Labour Act". This statute has not, perhaps, received the attention it deserves, for its provisions are of importance. In its present form it empowers the Minister of Labour, where a dispute exists or is apprehended, to inquire into its causes and circumstances, to take the necessary steps for the purpose of enabling the parties to the dispute to meet together under the presidency of a chairman with a view to arranging an amicable settlement, to appoint a conciliator on the application of the interested employers or workmen, or to appoint an arbitrator or arbitrators on the application of both parties to the dispute. Some of these powers are not exercised in practice, but it is under the authority of the "Conciliation and Labour Act" that the federal Department of Labour undertakes its conciliation work. The Department has resident conciliators stationed at Ottawa, Montreal, Toronto and Vancouver. Through their efforts, carried on without publicity, a great number of disputes are settled without the need of setting up formal boards of conciliation or arbitration.

The "Industrial Disputes Investigation Act", or, as it is popularly called, the Lemieux Act, is designed to aid in the prevention and settlement of labour disputes in certain industries affected with a public interest, namely in mines and in industries connected with public utilities, such as railways, steamship companies, telegraph and telephone companies, gas, electric light, water and power companies. While the Lemieux Act is particularly aimed at disputes occurring in public utilities, a difference in any industry may be submitted for settlement under its machinery upon the written request of both parties. The Act is thus of wider application than is generally assumed.

In 1923 the constitutional validity of the Lemieux Act was attacked in the courts by the Toronto Electric Commissioners, whose employees had applied for a board of conciliation and investigation under its provisions. As might be expected, the case of the *Toronto Electric Commissioners v. Snider et al.* gave rise to much difference of judicial opinion. To be sure, the sections of the British North America Act that distribute legislative powers between the Dominion and the provinces were of little help to the judges, for they do not assign jurisdiction over industrial disputes to one or the other. However, in 1925, the case finally reached the Judicial Committee of the Privy Council, their holding being that the Act was ultra vires as interfering with the exclusive right of the provinces to legislate on property and civil rights.

Following upon the decision of the Privy Council the Dominion amended the "Industrial Disputes Investigation Act" to restrict its application to disputes occurring in mines or public utilities clearly under the legislative jurisdiction of the Dominion. At the same time the amendment provided that any dispute within the exclusive legislative jurisdiction of a province could by legislation of that province be made subject to the provisions of the Act. Most of the provinces took advantage of the permission extended them and there are now in all the provinces of Canada, except Prince Edward Island and British Columbia, Industrial Disputes Investigation Acts, which provide that the federal Act shall apply to every industrial dispute of the nature defined in it (that is, disputes occurring in industries affected with a public interest) that otherwise would have been within the exclusive jurisdiction of the province.

These acts were not of course the first provincial statutes to provide specifically for the conciliation and arbitration of industrial disputes. The first legislation of this kind was passed in Ontario in 1873 and a Mines Arbitration Act was passed in Nova Scotia in 1888 and re-

enacted in 1890. As a matter of fact, Nova Scotia has been a leader in the enactment of arbitration legislation. "The Mines Arbitration Act" was followed by "The Conciliation Act" in 1903 and both these statutes were repealed by "The Industrial Peace Act, 1925". Rather curiously, "The Industrial Peace Act, 1925" was itself repealed in 1926 by the "Industrial Disputes Investigation Act (Nova Scotia)", the limited application of which I have already referred to, and there is in consequence no general statute in Nova Scotia at the moment covering the whole of industry.

During the past year no less than four provincial acts of general application have been passed in Canada, namely, in Alberta, British Columbia, Manitoba and New Brunswick. As a result of this legislative activity only in Prince Edward Island, a non-industrial province, is there no legislation aimed directly at the peaceful settlement of disputes arising between employers and employees. You will be particularly interested in the "Labour and Industrial Relations Act"* of New Brunswick, which came into force on April 9th, 1938.

Neither the New Brunswick "Labour and Industrial Relations Act" nor the federal "Industrial Disputes Investigation Act" set up a system of what is technically known as "compulsory arbitration". Both statutes of course have compulsory features. For instance, the fundamental principle of both is that strikes or lockouts are prohibited prior to or during the submission of a dispute to a board of conciliation. Again, not only do they provide that their machinery can be set in motion at the request of either party to a dispute, but they give a minister of the Crown power of his own initiative to apply their provisions. Nothing, however, prohibits a strike or lockout, in the case of the federal act, after a memorandum of settlement has been signed or after the board has reported to the Minister of Labour, or, in the case of the New Brunswick statute, after the parties have voted on the recommendations of the board. Nor is the finding of a board of conciliation under either act binding upon the parties to the dispute; they are free to accept or reject the award unless they have expressly agreed to be bound by it. This freedom to accept or reject is inconsistent with so-called compulsory arbitration.

Procedure under the two acts is very similar. Actually the "Labour and Industrial Relations Act" of New Brunswick is seemingly wider in that it provides for a preliminary investigation by a conciliation commissioner before a board is constituted. His duties, in the words of the Act, are "to make all such suggestions and do all such things as he may deem right and proper for inducing the parties to reach a fair and amicable adjustment of their differences". In practice, however, the difference between the two statutes is not material for it is the custom of the Department of Labour, where an application for a board has been made under the federal act, to attempt as a preliminary to bring the parties together by informal mediation. The Department does so under the authority given it by the "Conciliation and Labour Act", the effect of which has already been explained.

No system of conciliation or arbitration, be it established by the parties in a private agreement or provided by the state, is workable unless employers and workers bring to it a spirit of cooperation, a willingness to concede that the other side may be at least partially right. Because of the limited extent to which the principle of collective bargaining has been applied in Canada, as compared to Sweden, the state has seen fit to intervene in this country and set up machinery of its own for the conciliation and arbitration of labour disputes. This machinery will become less and less necessary as there is a progressive increase in collective bargaining. The experience of Sweden at any rate would seem to suggest that the spirit of cooperation so essential for the peaceful settlement of labour disputes is most likely to be

*The main features of this Act have been discussed in PUBLIC AFFAIRS, Vol. II, No. 2, p. 93.

found in a framework of collective bargaining.

The method of settling industrial disputes by means of machinery provided by the parties themselves is also to be preferred because it is consistent with our general way of doing things in a democratic country. In other words, it applies in the industrial field the same principle of self-government that experience has proved to be sound, for us at least, in the political field. Until such time, however, as employers and employees accept the full implications of the principle of self-government and proceed to set their own houses in order, our legislatures will no doubt continue to pass arbitration statutes designed to do for industry what it is not doing for itself. But in passing them, it is submitted that, in the interests alike of employers, employees and the general public, three principles should be kept in mind:

1. that legislatures should pass only those arbitration statutes that are absolutely essential;
2. that there should be the greatest possible measure of uniformity in these statutes throughout Canada, assuming of course that the provinces are to have jurisdiction;
3. that state arbitration machinery should be recognized for what it is, namely a stop-gap until private arbitration is more generally accepted.

Recent Labour Legislation in New Brunswick

During the last session of the New Brunswick Legislature a number of important acts affecting labour conditions in the Province were written on the statute books. We give the following brief resume taken from an article in the *Canadian Congress Journal.*

"*Industrial Standards Act*: A new Industrial Standards Act, somewhat similar to the Nova Scotia Act was adopted. Its provisions are confined to jobs costing $100 or more, and apply only to construction work. It provides for the appointment of an inspector, who can call conferences of employees and employers for the purpose of drawing up working agreements which when signed by both parties, may, on the recommendation of the Minister, be proclaimed by the Government as the conditions to prevail in that trade during the life of the agreement in the specified zone. Penalties are provided for non-compliance with the Act or any schedules brought under it by proclamation.

"*Early Closing of Retail Stores*: A new Early Closing Act was passed which gives Civic and Municipal Councils much wider powers to pass early closing by-laws. The two principal provisions being: "every municipal council is hereby authorized and empowered to make by-laws requiring that (a) during the whole or any parts of the year retail establishments shall be closed and remain closed on each or any day of the week between such hours as any such by-law shall specify: (b) retail establishments shall be closed and remain closed during the whole or such part of each or any holiday as any such by-law shall specify" and "any municipal council may make by-laws under the authority of this Act of its own motion or upon petition of such proportion of persons engaged in any class or classes of retail trade as shall appear to the council to be truly representative of such class or classes."

"The Act also provides for penalties for the violation of any of its provisions or any by-law made under it."

Unemployment Insurance Endorsed By United Church of Canada

The Bay of Quinte Conference of the United Church of Canada held in Kingston, Ontario, during the past month, went on record in favour of a national contributory unemployment insurance scheme operated in conjunction with Employment Exchanges. Expressing the view that even though all workers would not benefit by such a scheme in the beginning, it was held there was immediate and urgent need to lay its foundation.