Prerogative in Private and Public Employment

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It has often been noted that there is a difference between public and private employment. It is my contention that all the differences frequently cited are but manifestations of one essential difference. That difference is that, though there are elements of contract and status in each, in private employment the contractual element predominates, while in public employment status predominates. One appreciates the full significance of this fact when an attempt is made to trace the history of management's right to direct its employees and the development of what is often referred to as management prerogatives. If management does exercise some inherent authority in unchartered areas, that authority can only come from the exercise of some power or contractual right over employees. In the private sector, management exercises contractual rights over employees but in some instances also exercises a power over employees that has no relationship to the contractual arrangement between the employer and his employee. On the other hand, in public employment, the essence of the relationship resides in the exercise of power inherent in the public employer, with the caveat that there may be contractual or legislative limitations on the exercise of this power.

Private Employment

The modern law of private employment has evolved as a result of the changing human relationships brought on by the development of a class of freemen, as distinct from serfs, and the Industrial Revolution.[1] The modern, legal concept of employment was a result of applying contract doctrine to the older relationship of master and servant.[2] This relationship developed out of serfdom and status rather than contract[3] and some aspects of status remained in the

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1 See Carrothers, *Collective Bargaining Law in Canada* (1965); Fridman, *The Modern Law of Employment* (1963); Selznick, *Law, Society and Industrial Justice* (1969), 121-137; Wedderburn, *The Worker and the Law* (1965), ch. 5.

2 See Selznick, *supra*, f.n.1, 122-137.

3 See Fridman, *supra*, f.n.1, 30.

evolution from serfdom to master-servant. Thus, though the parties contract in the ordinary sense on some matters such as wages, a great many terms and conditions are implied by law rather than set by mutual agreement.[4] The essence of the relationship is captured by Selznick, where he states that:

> The old law of master-servant looked to the household as a model and saw in its just governance the foundations of an orderly society. The household model made sense in an overwhelmingly agricultural economy where hired labour, largely permanent, supplemented the work of the family members and all were subject to the authority and tutelage of the father-manager. The model also fit the early pattern of work and training among skilled artisans. In this setting, the relation of master and servant was highly diffuse and paternalistic. Work was carried out in the house of the master or in a small shop nearby. The workman lived as a member of the household and often remained for life with the same master. It was against this background that the law of master-servant developed.[5]

As the theory of employment evolved, a "contract" of service was said to arise whenever one person agreed to serve another.[6] There were attached to this relationship certain legal attributes, the most important being the right of the master to command and the obligation of the servant to obey.[7] This attribute has continued in the modern contract of employment and has become the touchstone of managerial prerogative. "[T]here can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the 'contract of employment' ".[8]

If the relationship in law is one of contract, then management has only those rights agreed upon by the parties to the contract. Thus in theoretical terms management can be said to be exercising its contractual rights in cases where it discharges or disciplines an employee. All this, however, assumes that the parties are free to bargain and contract from more or less equal positions of strength. This is, of course, not always the situation in the employer-employee relationship. Management's ability to act in an arbitrary manner stems not from its contractual rights but from its position of relative economic strength. Management has power. The fact that the em-

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[4] See Selznick, *supra*, f.n.1, 123; Selznick likens the relationship to that of marriage, which may be entered into voluntarily but whose character is fixed by the law.

[5] Selznick, *supra*, f.n.1, 123.

[6] Fridman, *supra*, f.n.1, 17.

[7] See *Yewens* v. *Noakes* (1880), 6 Q.B.D. 530; *R.* v. *Negus* (1873), L.J.M.C. 62; *Simmons* v. *Heath Laundry Co.*, [1910] 1 K.B. 543.

[8] Kahn-Freund, *Labour and the Law* (1972), 9.

ployer-employee relationship has been put into contractual terms, however, disguises that power. When management exercises its power in discharging, suspending, fining or otherwise acting against the interests of its employee, it is often under the guise of a right in contract, when in fact there was never any question of the employee's ability to bargain over the exercise of that right. Consequently management, in the private sector, has come to assume a great many rights over employees to be management prerogatives, exercisable at will.

The right to discharge has been described as the principal source of the employer's power over his employee.[9] At common law, the discharge of an employee was possible in two instances: where there was just cause an employee could be discharged summarily; where there was no cause he could be discharged on proper notice. Both situations arise from an exercise of contractual rights real or implied, not from any inherent right to discipline an employee although, to be sure, the motive for discharge may be a desire to discipline in the punitive sense of that word. It is not uncommon for discharge to be referred to as the ultimate disciplinary sanction.[10] It is submitted, however, that this is misleading insofar as motives are not a pertinent factor in the analysis of the exercise of contractual rights.

Earlier texts and cases suggest that at one time it was justifiable to discipline (or chastise, as it was then called) an apprentice, who stood in a relationship similar to that of a hired servant.[11] Wedderburn suggests that this was because of the quasi-parental nature of the relationship[12] and such an explanation is in keeping with its historic development. In 1906 Smith was able to write in his text on master-servant that "notwithstanding passages which may be found in books apparently to the contrary, no master would be justified in even moderately chastising a hired servant of full age for dereliction of his duty".[13] Carrothers writes as follows:

> There does not appear to be any common law authority for the proposition that an employer has power to discipline an employee. Such powers at best emanated from the old law of master-servant when the relationship was considered to be one of domestic relations; even then the power seems to have been confined to the power of a master over an infant apprentice.[14]

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[9] Blades, *Employment at Will* v. *Individual Freedom; On Limiting the Abusive Exercise of Employer Power*, (1967) 67 Colum.L.Rev. 1404, 1405.

[10] See Hepple & O'Higgins, *Individual Employment Law* (1971), 105.

[11] Cooper and Wood, *Outlines of Industrial Law* 5th ed. (1966).

[12] Wedderburn, *supra*, f.n.1, 75.

[13] Smith, *Master Servant* 4th ed. (1886), 122.

[14] Carrothers, *Labour Arbitration in Canada* (1961), 86.

However, it is apparent from history that masters were in the habit of disciplining their servants by various means, including corporal punishment,[15] and that the habit lingered on.

The relationship of master-servant being contractual, the master, at law, has no greater rights or remedies than are granted by law or the contract. In fact, however, it would appear that masters did impose a variety of disciplinary sanctions on servants who in most cases, because of their relatively weak position, acquiesced in the penalty. These penalties might range from overt fines, suspensions, demotions or transfers to the less obvious withholding of bonuses, awards and other advantages. From the beginnings of industrialization, the position of the servant and employee has been one of economic dependence.[16] This dependence made the employee vulnerable to extra-legal sanctions. This vulnerability to management's disciplinary action provided the impetus for legislative intervention in the employment relationship. Thus the employee's plight has been alleviated somewhat by collective bargaining, which seeks to regulate the disciplinary function rather than deny it, and, to a lesser extent, by Labour Standards legislation. The hallmark of the relationship, however, is still contract.

Public Employment

An understanding of management prerogative in public employment and the position of the public employee in Canada requires an examination of the executive power of the government in relation to its employees. The Civil Service as such is not a formally recognized institution in the Canadian Constitution. The public employee is not an employee of the legislative branch of government but rather of the executive.[17] Inasmuch as Canada's institutions have been modeled on those of Great Britain it is necessary to look to the origins of the public service in that country. Just as the modern private sector employer-employee relationship has its historic roots in the master-

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[15] See Macaulay, I *History of England,* 424, where he states that 17th century masters well born and bred were in the habit of beating their servants; see also Bendix, *Work and Authority in Industry* (1956), ch. 2 *passim.*

[16] See Kahn-Freund, *supra,* f.n.8, Introduction; Berle, *Power* (1969); Drucker, *The New Society* (1950), ch. 8; Galbraith, *American Capitalism* 2d. ed., 114, where he states that "because of his comparative immobility, the individual worker has long been vulnerable to private economic power"; Blades, *supra,* f.n.9, 1404; Woods, Ostry, and Zaidi, *Labour Policy and Labour Economics in Canada* (1973), 498.

[17] Lyon and Atkey (eds.), *Canadian Constitutional Law in a Modern Perspective* (1970), 218; Hodgetts, *The Canadian Public Service 1867-1970* (1973), 56-57.

servant household model, so also does the public employment relationship. The British Public Service can be viewed, in an historic perspective, as an extension of the royal household and thus, insofar as the executive branch is an extension of the monarchy, the focus of direction and responsibility for the public service is a matter of royal or executive prerogative.

Prerogatives of the Crown are preserved in Canada by the B.N.A. Act. Sections nine and eleven provide that "[t]he executive government and authority of and over Canada is hereby declared to continue and be vested in The Queen" and that "[t]here shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada". Section 12 provides that all power, authority and functions previously exercised by the Imperial Parliament or various provincial legislatures is to vest in and be exercisable by the Governor General in conjunction with the Queen's Privy Council for Canada, until altered by the Parliament of Canada. Further, section 131 specifically provides that:

> Until the Parliament of Canada otherwise provides, the Governor General in Council may from time to time appoint such officers as the Governor General in Council deems necessary or proper for the effectual Execution of this Act.

The exercise of executive power in the federal government rests on the royal prerogative as modified by constitutional practice and legislation.[18] Thus the power to hire and direct the public service resides in the executive, subject to its being restricted by Parliament.

Hodgetts divides the manner in which Parliament is capable of restricting the executive in relation to the public service into three categories.[19] First, it may limit the form of the service. He points out that Parliament has, with the exception of the Privy Council Office, statutorily created or recognized all the departments of government and that it is unlikely that any new department would now be created without statutory approval. Parliament has not, however, gone very far in detailing the organization of the departments created by statute. Indeed they are exceedingly brief, and apart from restricting patronage through the *Civil Service Act*,[19a] and extending collective bargaining through the *Public Service Staff Relations Act*,[19b] Parliament has shown little inclination to involvement in the detail of administration. Second, it may assign duties and functions.

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[18] See Cheffins, *The Constitutional Process in Canada* (1969), ch. 4; Mallory, *The Structure of Canadian Government* (1971), 137.

[19] See Hodgetts, *supra*, f.n.17, 58.

[19a] S.C. 1960-61, c.57.

[19b] R.S.C. 1970, c.P-35.

Though this power must reside in Parliament, Hodgetts points out that the exercise of the power by Parliament is an administrative impossibility and that it must delegate broad responsibility to the executive. The third category of Parliamentary restriction is in the area of managerial authority. Again, Hodgetts points out that though Parliament in theory can exercise ultimate authority, managerial authority is delegated to or assumed by the executive. Through the provisions of the *Financial Administration Act*[20] the Treasury Board[21] is granted wide powers in establishing the terms and conditions of employment in the public service.[22] Thus those powers in relation to employees which rested on the royal prerogative may be exercised by the executive branch of the Canadian government subject to parliamentary restrictions. The legitimacy of the use of prerogative power by the executive is said to lie in the fact that the source of their power (as distinct from their authority) is political and dependent on support in the House of Commons.[23] Thus, if it is a part of the Crown prerogative to dismiss employees at will, the executive branch of the Canadian Government can, subject to restrictions placed on it by the legislature, dismiss employees at will. The exercise of the power is made legitimate by the support the executive has in the House of Commons. However, it is important to recognize that all this is subject to the will of the populace expressed through Parliament. Thus Dr Saul J. Frankel, an authority on the Canadian Public Service, was able to say that:

> The people as sovereign may... hold their civil servants in virtual bondage — recruit them by conscription and maintain them in monastic isolation; or they may grant them the right of association, provide channels for mutual consultation, and even, if they will, accept as binding the recommendations of a tribunal which owes its existence to the sovereign's caprice.[24]

The question then in examining managerial prerogatives in the public service is, as Arthurs puts it, "whether or not the legislature

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[20] *Financial Administration Act*, R.S.C. 1970, c.F-10.

[21] For a history of the development of the Treasury Board see White and Strick, *Policy, Politics and the Treasury Board in Canadian Government* (1970).

[22] The *Public Service Staff Relations Act, supra*, f.n.19b, provides that the Treasury Board rather than the Civil Service Commission is the bargaining agent of the employer. The Civil Service Commission (or Public Service Commission as it was renamed in 1967) is more properly seen as an agent of Parliament.

[23] See Cheffins, *supra*, f.n.18, ch. 2.

[24] Frankel, *Staff Relations in the Civil Service* (1962), 13; the statement also appears in Frankel, *Staff Relations in the Public Service; The Ghost of Sovereigny*, (1959) 2 Can.Pub.Admin. 65, 67; the statement is cited and approved by Arthurs, *Collective Bargaining by Public Employees in Canada: Five Models* (1971), 12.

wished to preserve or abandon government's traditional freedom of unilateral action",[25] and not simply one of unalterable prerogatives.

The terms and conditions of Crown employment in Canada are established pursuant to legislative authority by the Treasury Board. The *Financial Administration Act* establishes the Treasury Board, which acts for the Queen's Privy Council for Canada on all matters relating to, *inter alia,* "personnel management in the public service, including the determination of terms and conditions of employment of persons employed therein".[25a] The Treasury Board's powers with respect to the exercise of its responsibility in relation to personnel management are extremely broad. They are set out in section 7 of the Act and include the power to determine manpower requirements, train, classify, determine pay and hours, establish standards of discipline, establish standards for working conditions and other terms and conditions of employment not specifically enumerated. Subsection (2) of section 7 provides that the Treasury Board may delegate the exercise of any of these powers to a deputy minister or the chief executive officer of any portion of the public service.

The exact legal nature of the Crown-servant relationship has never been unquestionably established. The courts have not been hesitant in finding a contract of employment to exist where a contract document exists[26] and there can be no doubt that the Crown has the capacity to enter into an employment contract.[27] In other instances, however, particularly in the case of holders of civil service positions, there is hesitation in finding a contractual relationship, real or implied. In a recent British case, *Inland Revenue Commissioners* v. *Hambrook,*[28] a claim for damages for loss of services was disallowed, partly on the basis that the relationship of master-servant did not exist between the Crown and its employee. Lord Goddard said in that case that "[a]n established civil servant, whatever his grade, is more properly described as an officer in the civil employment of Her Majesty...".[29] And further, after discussing the authorities that favour a contractual relationship:

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[25] Arthurs, *supra,* f.n.24, 11; see also Mallory, *The Structure of Canadian Government, supra,* f.n.8, 155-163.

[25a] R.S.C. 1970, c.F-10, s.5(1)(e).

[26] See *Dunn* v. *The Queen,* [1896] 1 Q.B. 116.

[27] Mitchell, *The Contracts of Public Authorities* (1964).

[28] *Inland Revenue Commissioners* v. *Hambrook,* [1956] 1 All E.R. 807.

[29] *Ibid.,* 810 *per* Lord Goddard.

> It is I think fair to say that the trend of their Lordships' opinion seem to be that in the absence of some special term, such as engagement for a definitely expressed period, there is not a contractual relationship.[30]

There is some question about whether a contractual relationship exists between the Crown and its servants. One is not able to present thorough and reasoned arguments reconciling all the judicial opinions.[31]

In contrast to this uncertainty it can be said that the primary aspects of the private employment relationship definitely arise out of contract, though the rights and duties of each are not exclusively determined by contract. We have seen, for instance, that Labour Standards legislation prescribes minimum wages, hours of work, standards of safety, vacations, compensation for loss of work through accident and even security against loss of employment. The legislation does derogate from the scope of the contractual relationship and private employment has to this extent been aptly described as moving from contract to status.[32] Though this legislation seldom applies to the Crown-servant relationship, that relationship is even more overshadowed by statute. The civil servant is more dependent on special statutory provisions that establish his rights and duties in relation to the Crown employer. His very position may be dependent solely on statute. Arthurs has written of a new status emerging in the employment relationship, that of "industrial citizenship".[33] He uses the term to describe the condition of the employee increasingly governed by public and private legislation. The term is most apt when applied

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[30] *Ibid.*, 811.

[31] Richardson, *Incidents of the Crown Servant Relationship,* (1955) 33 Can. Bar Rev. 424 holds that a contract exists between the Crown and its employees; Wade and Phillips, *Constitutional Law* 7th ed. (1965) say the question is open; de Smith, *Administrative and Constitutional Law* 2d ed. (1968) also considers the question to be open; as does Wedderburn, *supra,* f.n.1; Cooper and Wood, *supra,* f.n.11 say a contract exists; Blair, *The Civil Servant — A Status Relationship,* (1958) 21 M.L.R. 265 states a contract does not exist; Mitchell, *The Contracts of Public Authorities* (1954) does not find it necessary to decide the point; Fridman, *supra,* f.n.1 says that the Crown has the capacity to enter into contracts of employment but that such contracts do not bind the Crown in the same way and to the same extent as a similar contract of employment would bind any other person; Hepple and O'Higgins, *Public Employee Trade Unionism in the United Kingdom* (1971) accept Richardson's view; Webber, *Some Recent Developments in the Law of Master Servant,* (1960) 13 Current Legal Problems 112, 121 says "[t]he position of a Crown servant is one of status rather than of contract".

[32] Dicey, *Lectures on Relationships Between Law and Opinion in England in the 19th Century* (1926); Arthurs, *Developing Industrial Citizenship,* (1969) 45 Can. Bar Rev. 786.

[33] Arthurs, *supra,* f.n.32.

to the public servant, whose position is one of status and whose terms and conditions of work are not generally a matter of contract.

Leo Blair is the most ardent advocate of the status position of the public employee.[34] He acknowledges the difficulty of determining what a "status" is, but goes on to note that it is a legal condition involving at least three essential attributes. Those attributes are: first, "a significant degree of public or social interest in the existence of the condition; second, the condition must be legally relevant in a substantial and general manner; third, the conditions must be such that it can be conferred or withdrawn only by means of some intervention by the state".[35] A superficial consideration of these requisites is sufficient to show that there is nothing in them to prevent public employment from being considered a condition of status, and that the legal position is more one of status than contract.

Blair argues that it is much less confusing to look at the relationship as one of status rather than contract:

> ... the contract approach has confused the real issues because of the need ... to import into the contract terms like "unilateral", "unenforceable" and "implied term" and so on. These subterfuges would be rendered unnecessary by acceptance of a status relationship; this would make it easier to appreciate the true importance of "the law of the civil service" which is not contractual but legislative in effect.[36]

One appreciates the full weight of what Blair is saying when one reads in one of the more recent books on the British Public Service that:

> The balance of authority is now, however, clearly in favour of the view that there is a contract.... The contract is subject to an implied term that the civil servant is dismissable at any time at the will of the Crown, with or without notice as the Crown wills. In consequence no compensation can be recovered by a civil servant for wrongful dismissal.[37]

Though the question of status or contract is not clearly decided in the cases, Canadian and English case law has established several important principles with respect to Crown employment and the prerogative power of the Crown in relation to employees.[38] These cases enunciate that employment by the Crown is at pleasure; that

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[34] See Blair, *The Civil Servant — Political Reality and Legal Myth*, (1958) Pub. L. 32; Blair, *The Civil Servant — A Status Relationship*, (1958) 21 M.L.R. 265; Blair, *The Crown Servant Relationship*, (1955) 33 Can. Bar Rev. 1108.

[35] Blair, *The Civil Servant — A Status Relationship, supra*, f.n.34, 265-66.

[36] *Ibid.*, 274.

[37] Hepple and O'Higgins, *supra*, f.n.31, 24-25.

[38] See *Clarke* v. *A.-G. Ont.* (1965), 54 D.L.R. (2d) 577; *Zamulinski* v. *The Queen* (1957), 10 D.L.R. (2d) 685.

this precept may only be impaired by statute;[39] that purported agreements and rules concerning procedure on dismissal and other terms of employment are without legal effect if they are not statutory;[40] that an employee of the Crown has no legally enforceable right to continued employment by the Crown in the absence of a statutory security of tenure.[41] The conceptual basis for all these findings put forward by those who maintain the relationship is contractual is that, by reason of public policy, the Crown should not be bound to employ its servants otherwise than at pleasure. The intrusion of public policy into the Crown-servant relationship has had a much more debilitating effect in terms of the employee's security than it has ever had in the private employment relationship. Public policy has dictated that the Crown be as free as possible from the fetters of a contractual relationship. It extended so far as to say that the salary of a public officer is not assignable by him;[42] it has moved a court to find, where a civil servant sought to collect a statutory pension, that:

> There is no express contract to pay or provide on retirement of the public officer any sum certain, or any retiring allowance, and I think there is no such contract to be implied from his employment in the civil service.[43]

Those who maintain that there is a contract between the Crown and its servants must imply public policy terms in the contract of employment,[44] which, as we have seen, robs the contract of any efficacy whatsoever. The necessity of implying a public policy clause in a "contract" is in fact questionable when we recognize in the Crown employer sufficient prerogative powers to avoid the undue restriction of contract.

In attempting to explain the public employment relationship in terms of contract certain terms must be implied in the contract to accommodate the Crown's prerogative. Insofar as the doctrine of public policy is used to support and perpetuate those prerogatives, one must examine the origins of the doctrine to find what real purpose it serves. The public policy doctrine was initially infinitely sensible in the context in which it arose. Public policy, however, is a

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[39] *Dunn* v. *The Queen, supra,* f.n.26; *De Dohse* v. *The Queen* (1897), 66 L.J.Q.B. 422; *Shenton* v. *Smith,* [1895] A.C. 229; *Gould* v. *Stewart,* [1896] A.C. 575.

[40] *Terrel* v. *Secretary of State,* [1953] 2 Q.B. 482; *Rodwell* v. *Thomas,* [1944] 1 K.B. 596; *Shenton* v. *Smith, supra,* f.n.39; *Dunn* v. *The Queen, supra,* f.n.26.

[41] *Terrel* v. *Secretary of State, supra,* f.n.40; *Shenton* v. *Smith, supra,* f.n.39; *Dunn* v. *The Queen, supra,* f.n.26.

[42] *Powell* v. *The King* (1905), 9 Ex. C.R. 364.

[43] *Balderson* v. *The Queen* (1897), 6 Ex. C.R. 8; see also *Matton* v. *The Queen* (1897), 5 Ex. C.R. 401.

[44] See Richardson, *supra,* f.n.31.

concept which is capable of changing over time and it is when the public policy enunciated in eighteenth century cases gives rise to implied terms in a modern employment relationship that it appears absurd.

The belief that public policy dictated that Crown employees be dismissable at will originated at a time when people in public service did not have jobs, were not employed by the Crown, but held office. Blackstone, in his *Commentaries*, considered offices to be property, incorporeal hereditaments which could be held in fee simple, fee tail, life or a term of years, just as estates in land.[45] Writing on the holders of judicial office, McIlwain states that:

> The grant of an office, in medieval England was, in effect, the same as a grant of land: it conferred on the grantee an estate in the office, and (usually more important) in its emoluments. In both lands and office the rights vesting in the grantee were, of course, strictly determined by the terms of the grant, unless some rule of law supervened.[46]

Just as in a grant of property, the grantor of an office could impose limitations on the grant. Thus grants of office from the King were sometimes "during pleasure" but more often were "during good behaviour". Through the eighteenth century it seems that little practical distinction was drawn between these two grants.[47] In either case the law implied a condition that the office holder should perform his duties properly. If not, he could be removed by *scire facies*. In a *scire facies* proceeding it was incumbent on the court to determine the issue of proper performance, the burden being on the Crown.[48]

Thus the earlier cases deal with the discharge and suspension of Crown servants from offices which were considered to be property. Such a concept is alien to the modern concept of employment. The cases are significant in that they demonstrate that at one time the Crown could grant offices in perpetuity or for a term of years. Further, they show that the relationship established by the grant of such an office might be terminated or suspended in circumstances where the grantee cannot carry out his duties under the office. The practical result of this is similar to that obtained by the doctrine of fundamental breach in employment contracts where the employee is

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[45] Blackstone, II *Commentaries*, 36.

[46] McIlwain, *The Tenure of English Judges, Constitutionalism and the Changing World*, 295; as quoted by Logan, *A Civil Servant and his Pay*, (1945) 61 L.Q.R. 240, 249.

[47] Cohen, *The Growth of British Civil Service*, 36.

[48] The reason why the Crown bore the burden probably relates to the real property concept that a man could not derogate from or frustrate his grant to the prejudice of the grantee.

incapable of performing his part of the contract.[49] The cases also illustrate how the concept of public policy came to intrude on the Crown-servant relationship.

A property interest in an office gives a great deal of security. Security, however, was thought to entail some undesirable features, particularly in the case of a judicial office. Thus in *Sir George Renyl's* case[50] it was held that since his office was a judicial one it could not be granted for a term of years because such a grant might fall into a stranger as executor or assignee of Renyl. Other cases followed and developed this principle,[51] establishing that the public interest imposes limitations on grants of office from the Crown.[52]

The question of suspension from an office granted by the Crown was dealt with at an equally early time in *Slingsby's case.*[53] Slingsby was master of the Mint, an office granted for life, but was suspended from his duties by the Crown. The court decided that the Crown was bound to continue his salary, by reason of the grant of office, but that it would be "strange to deny the King that liberty which every subject hath, to refuse the service of any man whom he doth not like". Thus Slingsby was properly suspended.[54] The case is illustrative of a common law right of suspension from service apart from any

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[49] See Mitchell, *The Contracts of Public Authorities* (1954), 34, and at 32, where he cites Coke as saying:

> If an office either in the grant of the King, or a subject which concerns the administration, proceeding or execution of justice or the King's revenue, or the commonwealth or the interest, benefit or safety of the subject or the like, if these or any of them be granted to a man that is unexpert and hath no skill or science to exercise or execute the same the grant is merely void, and the party disabled by law and incapable to take the same *pro commodo regis et populi* for only men of skill, knowledge, and ability to exercise the same are capable of the same to serve the King and his people.

[50] *Renyl's case* (1612), 9 Co.Rep. 95A; 77 E.R. 871.

[51] *Meade* v. *Lenthall* (1640), Cro. Car. 587, 79 E.R. 1104; *Progers* v. *Frazier* (1681), 2 Show. K.B. 171, 89 E.R. 868; see Mitchell, *supra,* f.n.49, 52.

[52] The public interest in maintaining an independent judiciary is today preserved by legislation which provides for the appointment to be "during good behaviour". See Cheffins, *supra,* f.n.18, ch. 5.

[53] *Slingsby's case* (1680), 3 Swans. 178; 36 E.R. 821.

[54] One must note the similarity between this result and that arrived at in *Thompson* v. *City of Windsor* (1938), 35 O.W.N. 117, where the employer was bound contractually to pay wages but was free to dismiss the employee from the performance of his duties. In *Slingsby's case* the Crown was not bound by contract but by its grant of office, a species of property. Though conceptually different, in reality the right to suspend (though wages were paid) had the same effect.

question of dismissal,[55] at a time when a position in the public service was one of property and an office a matter of status.

The case of *Smyth* v. *Latham*[56] represents a turning point from the medieval concept of an office as property to the modern concept of Crown employment. The plaintiff had been a paymaster for thirteen years. He was appointed under the provisions of a statute which stated that it was expedient that permanent regulations be established in relation to payment, etc., of Treasury bills and that therefore the Commissioners of the Treasury might appoint those persons to be paymasters whom they think fit. The plaintiff argued that this was a remedial statute and should be interpreted liberally. He contended that to give full effect to the statute it must be assumed that the appointment was for life. Alternatively, he said that his written appointment was a deed poll which passed a freehold in the office of paymaster and, insofar as there were no words of limitation contained therein, it was an estate for life. In short, he would have had the matter determined as if the office were property, according to the principles enunciated in cases dealing with grants of property. There was no suggestion in the argument that the relationship was one of contract or that either party was relying on contractual rights or obligations as determining the relationship.

Tindal,C.J. was quick to dispel any illusions that the office was property, and made a distinction between the older office granted by the Crown and the modern statutory position created by Parliament:

> As the office of a paymaster of exchequer bills is not an ancient common law office, of which the duration and the appointment are governed by ancient usage, but is an office of modern origin, and not made the subject of legislative enactment until the statute above referred to, the question as to duration and tenure is no other than an inquiry into the meaning and intention of the statute itself.[57]

The officer's position was not to be determined by principles of property or contract, which was not even suggested, but by statute. His position was one of status, to be determined by the terms of the statute. Tindal,C.J. found that the object of the Act could not be that a certain number of officers be permanently appointed but that there "should at all times be a number adequate and sufficient, and not more than adequate and sufficient, for the regular payment of the bills which might be outstanding at any particular time".[57a]

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[55] See Richardson, *supra*, f.n.31, 440.
[56] (1833), 9 Bing. 692; 131 E.R. 773.
[57] *Ibid.*, 777 *per* Tindal,C.J.
[57a] *Ibid.*, 778.

The object of the Act could not be put into effect if the Commissioners have the power to appoint but not to remove.[58] He therefore found that appointment under the statute could be during pleasure only and not for life. It must be stressed that Tindal,C.J. was simply interpreting the statute and attempting, by the use of rules of statutory interpretation, to determine what the statute said about the term of office. He was not suggesting an implied term of employment or propounding a rule of the Crown's prerogative.

Since the efficient operation of the civil service is often put forward as justification for the principle that the civil servant is dismissable at will, the following statement of Tindal,C.J. is worthy of note:

> ... it would seem to be an unreasonable construction of the act, to hold, that if ten paymasters had been appointed when ten were necessary, and from a change of circumstances one alone was sufficient to perform all the duties, yet that the commissioners of the treasury have no power of removing the nine, but must still retain the full number.... .[59]

This interpretation is reasonable and indeed necessary for the efficient operation of the civil service. However, the principle of dismissal at pleasure without notice where the relationship is one of status appears harsh in view of the reasonable notice doctrine that developed in the private contractual employment relationship.

The later cases dealing with the Crown-servant relationship are a conceptual nightmare. Some problems have arisen from a failure to draw an adequate distinction between the civil and military servants of the Crown,[60] others from the introduction of new arguments to justify principles that would better have been laid to rest.

The concept of dismissibility at pleasure originated in cases dealing with military service. However, the need for strict discipline and the general nature of military service require a consideration of different values than are present in the Crown-civil servant relationship.[61] Thus it was decided in *Macdonald* v. *Steele*[62] that His Majesty's pleasure supersedes all inquiry since he has absolute direction and command of the army. In *Re Poe*[63] Denman,C.J. refused

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[58] The rule of construction that the power to appoint includes the power to dismiss is legislatively enacted in the Canadian *Interpretation Act*, R.S.C. 1970, c.I-23, and has been adopted by most of the provinces.

[59] *Smyth* v. *Latham, supra,* f.n.56, 779.

[60] See Mitchell, *supra,* f.n.49, 36; Richardson, *supra,* f.n.31, 425-6; Logan, *supra,* f.n.46, 242-244.

[61] See Mitchell, *supra,* f.n.49.

[62] *Macdonald* v. *Steele* (1792), Peake 233; 170 E.R. 140.

[63] *Re Poe* (1833), 5 B. & Ad. 681; 110 E.R. 942.

to grant a writ of prohibition against a dismissal from the army imposed by a court marshal, recognizing the Crown's absolute right to dismiss military personnel. Lastly, in *Re Tuffnell*[64] Malins,V.C. said, "It would be a most injurious thing to the public service if the Crown had not the power, which we know it has ... of saying to any naval or military officer misconducting himself ... that the Crown has no longer occasion for his services".[64a]

The concept of dismissibility at pleasure enunciated in the military cases was introduced into cases dealing with civil employment as well. In *De Dohse* v. *The Queen*,[65] a military service case, Brett,J. held that it was a rule applicable to all service under the Crown. The case went to the Court of Appeal, where it was held that a contract for seven years service, such as was relied on by the plaintiff, was against public policy and could not be validly made by the Crown; in an obiter opinion in the House of Lords, Lords Herschell and Halsbury concurred in the view that a seven year appointment would be contrary to public policy. This opinion was considered binding and followed in *Shenton* v. *Smith*[66] and *Dunn* v. *The Queen*,[67] two cases on civil employment. In *Shenton* v. *Smith* Lord Hobhouse, in delivering judgment for the Privy Council, stated that:

> Unless in special cases where it is otherwise provided servants of the Crown hold their office during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service.[68]

Insofar as he would appear to base his finding on an implied term of service, his judgment has been criticized and the suggestion made that his comment "unless otherwise provided" refers only to the possibility of a statutory limitation.[69] However, it has been pointed out that Lord Hobhouse did refer to the absence of any special contract and did contemplate the possibility of regulations under the statute in question being incorporated as conditions of service.[70] In *Dunn* v. *The Queen*, again following *Shenton* v. *Smith* and *De Dohse*, Lords Esher and Herschell held that only statutes can limit the absolute power of the Crown to dismiss.

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[64] [1876] 3 Ch.D. 164.

[64a] *Ibid.*, 172 *per* Mallins,V.C.

[65] *De Dohse* v. *The Queen*, *supra*, f.n.39.

[66] *Shenton* v. *Smith*, *supra*, f.n.39.

[67] *Dunn* v. *The Queen*, *supra*, f.n.26.

[68] *Shenton* v. *Smith*, *supra*, f.n.39, 234-235 *per* Lord Hobhouse.

[69] See Robertson, *Proceedings Against the Crown* (1908), 358.

[70] See *Shenton* v. *Smith*, *supra*, f.n.39, 233 *per* Lord Hobhouse; see also Mitchell, *supra*, f.n.49, 38.

A more recent and significant decision on point is *Reilly* v. *The King*,[71] a case that went to the Privy Council from the Supreme Court of Canada.[72] Reilly, a Quebec lawyer, had been appointed by letters patent under the Great Seal of Canada to the Federal Appeal Board for a period of three years, later extended another five. Subsequently, but prior to the expiration of this term, the office was abolished by statute. Reilly brought an action for damages by petition of right. McLean,J. in the Exchequer Court seemed to indicate that there cannot be in public office a contractual relationship regarding salary or a term of employment on the one hand and a duty to serve faithfully on the other.[73] Mr. Justice Orde of the Supreme Court held that the relationship might be contractual but that, if so, the contract must be subject to an implied term that the Crown can dismiss at pleasure. The *ratio decidendi* in all three courts would seem to be that when further performance of a contract, if one exists, becomes impossible by legislation, then the contract is discharged and will not support an action for breach.

Though they are obiter, the words of Lord Atkin are significant in that they have been relied on in at least one or two subsequent cases as modifying the principle of dismissibility, and by one writer as establishing that civil servants have a contractual relationship with the Crown [74] (though this latter proposition seems questionable). Lord Atkin outlines Justice Orde's contention that a contract exists and that a term is implied in that contract on dismissibility, and states that:

> Their Lordships are not prepared to accede to this view of the contract, *if contract there be.* If the terms of appointment definitely prescribe a term and expressly provide for a power to determine "for cause" it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded.[75]

and further:

> So far as the rights and obligations of the Crown and the holder of the office rested on statute, the office was abolished and there was no statutory provision made for holders of the office so abolished. So far as the rights and obligations rested on contract, further performance of the contract had been made by statute impossible, and the contract was discharged.[76]

He also indicates that no distinction is to be made between the modern grant of an office and other service. Further, he says that

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[71] *Reilly* v. *The King*, [1934] 1 D.L.R. 434.
[72] *Reilly* v. *The King*, [1932] 3 D.L.R. 529 (S.C.C.).
[73] *Reilly* v. *The King*, [1932] Ex. C.R. 14.
[74] Richardson, *supra*, f.n.31, 425.
[75] *Reilly* v. *The King*, *supra*, f.n.71, 436 *per* Lord Atkin.
[76] *Ibid.*, 437.

were an implied term, such as suggested in this case, to prevail, it would defeat the security given to judicial and quasi-judicial offices whose appointments are during good behaviour, thus undermining the concept of an independent judiciary.

Several authorities have held that Lord Atkin's argument holds true whether the limitation on the right to dismiss is found in statute or contract, *i.e.*, whether the "term of appointment" or limitation to "dismissal for cause" is found in statute or contract.[77] This question was considered in Canada in *Genois* v. *The King*,[78] where a fireman was employed for seven months but was summarily dismissed before the expiration of that period. Angers,J. was of the opinion, following Lord Atkin, that a contract could exclude the implication of a provision for dismissibility but held that the provision in the contract for seven months employment did not exclude the implication that it could only be excluded by a just cause provision. This is questionable and has been criticized.[79] If we accept that the position is one of status the situation is somewhat different. Where the terminability of the Crown employee is expressed in statute, as it is in Canada, it is unnecessary to imply a term on dismissability. In *Zamalinski* v. *The Queen*,[80] a dismissed civil servant sought, by Petition of Right, a declaration that he was still an employee, that his dismissal was improper and damages for being deprived of a hearing. Thorson,P. described the Canadian position as follows:

> In Canada, the right of the Crown to dismiss persons employed in the Civil Service of Canada is statutory and it is not necessary to consider its source or whether it is a term imported into the contract of employment of the civil servant or whether considerations of public policy demands its unimpaired maintenance.[81]

Crown servants in Canada have been subject to terms and conditions of employment established by statute since 1868.[82] The terms used in that and subsequent statutes and the extent to which an employee in the Public Service is governed by statute would seem to be incompatable with the notion of a contractual obligation between the Crown and its employees.

These statutory rules present a problem to the advocate of the contractual position. Richardson makes a very persuasive argument

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[77] See Richardson, *supra*, f.n.31; Mitchell, *supra*, f.n.49, 44.
[78] *Genois* v. *The King*, [1937] Ex. C.R. 176.
[79] Mitchell, *supra*, f.n.49, 46.
[80] *Zamulinski* v. *The Queen*, *supra*, f.n.38.
[81] *Ibid.*, 694 *per* Thorson,P.
[82] *Civil Service Act*, S.C. 1868, c.34.

for the existence of a contract between the Crown and its employees, and, in doing so, it is incumbent on him to show the relationship between that contract and those terms and conditions of employment promulgated in statute or regulations made under statute by the executive. He would hold that all those terms unilaterally promulgated by the employer become terms of the contract binding both the Crown and the civil servant, thus requiring an explanation of how this can be so with regulations made after the employment is entered into.[83] The utility of trying to force the Crown-servant relationship into the contractual mould, already strained in the private sector by trying to accommodate the reality of the private employer's prerogative powers with the doctrine of mutuality, is questionable. Blair, Richardson's critic, comes up with a much more realistic appraisal of the relationship between any contract that might exist and the terms and conditions of work promulgated by statute:

> It is true that it is by entering into a contract of service with the Crown that a civil servant is brought within the scope of any relevant statutory provisions. Nevertheless, it is submitted that it is untrue to say that "the statute is simply an offer that certain provisions will give rights to those persons who bring themselves within its scope". ...Is it not rather the case that the statute lays down certain rights and obligations which are then incumbent upon the parties to the contract in question? The legal incidents thus arising derive from the legislation itself; certainly the contract must be made before the statutory provisions can affect the parties, but the contract is often completely powerless to vary the statutory rights. Thus the contract, while it creates the *conditions* in which the provisions of the statute will take effect, does not create the *rights* themselves.[84]

Commenting on non-statutory regulation of the terms and conditions of work he further states, quoting Richardson again:

> "...neither party is directly and contractually bound by the regulations, which constitute mere statements of policy, but, if either party does not observe their terms or if the Crown changes its 'policy', the Crown may exercise its power of dismissal at pleasure or the servant may resign immediately ..." (p. 432). Thus the British civil servant knows that his employment in the civil service will be circumscribed by regulations — which may alter from time to time; but he appreciates that he may resign if he feels unable to accept the regulations or that he may be dismissed if he fails to obey them. This does not, of course, mean that there is no "law" of the British civil service. I can do no better than quote Professor W.A. Robson on this point:
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> > The fact that there is very little legislation or case law dealing with the civil service does not necessarily mean that there is no law and practice of the civil service. There is such a thing as customary

[83] Richardson, *supra*, f.n.31, 432.
[84] Blair, *The Crown Servant Relationship, supra*, f.n.34, 1111.

> administrative law; and I contend that there is a considerable body of customary administrative law and practice regulating the civil service. By this I mean a pattern of conduct regulating the relations between the Crown and its servants, involving obligations which are clearly formulated and regularly followed by all concerned. Such a pattern of conduct can give rise to rights and duties which are effectively recognized and observed by the administrative authorities concerned even though they are not enforceable in the courts of law ["Administrative Law", in Campion (ed.), *British Government Since 1918* (1950) p. 97...].[85]

It is submitted then that although there may be a contract of employment between the Crown and its servants, all the incidents of the relationship are a matter of status, not contract. Management's prerogative in the public service is statutory in nature or a residual executive power not altered by Parliament.

Summary

It must be admitted that there is a prerogative of management in Crown employment. It is, however, generically different from the prerogative that has developed in the private sector. In a sense the exercise of the Crown prerogative in relation to its employees is more legitimate than the exercise of the private sector management prerogative; it is a residuary power remaining in the Crown, unrestricted by Parliament.[86] This prerogative should not be associated with public policy and implied contractual terms since these are explanations for prerogative powers in a contractual analysis of Crown employment. A conclusive case has not been made for Crown employment being in all cases or in all respects a contractual relationship. It is also confusing to relate the Crown prerogative, a constitutionally recognized power, to public policy, which originated on a completely different basis. Public policy as it was properly articulated in relation to Crown employment was that Crown employees were not holders of office for life and were dismissable. Subsequently, or consequently, it was recognized by statute that the civil servant in Canada is terminable at will. The real question in relation to the later cases is, does public policy further dictate that a public servant be dismissable without notice, or that he may not recover his pay? These questions have not yet been adequately dealt with by the courts.

However, given the peculiar prerogative of management in the public service and the employee's position of status, this is not to

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[85] *Ibid.*, 1110. (Italics deleted).

[86] See Cheffins, *supra*, f.n.18, 93.

say that the use of arbitrary power will not be restricted. Arthurs' "industrial citizen", subject to statutory terms and conditions of work not of his own making, was not an oppressed employee. The emerging status Arthurs described was rather one capable of enhancing the employment relationship. That status is one to which are attached rights and duties analogous to the rights and duties of citizenship generally.[87] Those rights which Arthurs sees being protected by industrial citizenship are reflections of changed public policies.[88] He goes on to show that these rights have developed within the system itself through Labour Relations Boards and arbitration, through specialized tribunals and not the courts.[89] Thus we find the terms and conditions of the status of public employees, long neglected by the common law, being regularized by distinctive legislation. Further, this legislation incorporates to varying degrees collective bargaining such as has been used in the private sector to relieve the employee from the arbitrary exercise of management prerogatives that stemmed from the exercise of power. Such power has an effect similar to, but is generically different from, the prerogative power that resides in the Crown employer.

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[87] Arthurs, *supra*, f.n.24, 787.
[88] *Ibid.*, 789.
[89] *Ibid.*, 813.