"ARE QUEBEC ARBITRATION PROCEDURES OBSOLETE?"

A PANEL DISCUSSION

Chairman: PROFESSOR MAXWELL COHEN, Q.C.

Present: MR. MARC LAPOINTE.
MR. A. L. STEIN, Q.C.
MR. P. CUTLER.

EDITOR'S NOTE:—*As a special added service, the McGill Law Journal herewith publishes the following excerpts from the transcript of a panel discussion—on the topic "Are Quebec Arbitration Procedures Obsolete"—which took place on Wednesday, March 1, 1961, at Chancellor Day Hall, Faculty of Law, McGill University. The panelists were Messrs. Marc Lapointe, P. Cutler and A. L. Stein, Q.C., prominent members of the Bar of Montreal and widely-experienced lawyers in labor law matters. The chairman was Professor Maxwell Cohen, Q.C. The Editors of the Journal feel that the views expressed at this panel discussion are of interest and significance to all members of the legal profession, in this province and beyond, and are particularly timely in view of the proposed amendments to labour legislation in Quebec. The kind permission of the panel members to print their views—which were orally presented and were for the most part "off the cuff"—is gratefully acknowledged.*

THE CHAIRMAN: This marks one of the enterprising occasions when McGill University has managed to have visit us people in a field of considerable interest to this Faculty dealing with subjects of wide legal and social concern.

The subject of the Panel today — "Are Quebec Arbitration Procedures Obsolete?" — obviously poses the question of, first, determining the scope of arbitration in this province. It poses the question as to how far the practice in this province of arbitration has been successful in solving disputes, how far the relations of arbitral process and judicial process have impinged on each other, and what the courts have said about the arbitral process. It also poses the question whether the arbitral process is favoured or not favoured by management or labour, and for what reasons.

(*The Chairman then proceeded to introduce the panel members*).

It gives me great pleasure to call on Mr. Lapointe.

MR. LAPOINTE: Mr. Chairman, first of all I shall assume that we will prolong the mistake as far as terminology is concerned and we will include in this

discussion the type of arbitration which is not actually "arbitration", properly speaking, although it is given that name in Quebec. I am obviously talking of *interest* disputes. We will include these in our discussions. In other words, we shall be dealing with disputes, covered by the Labour Relations Acts, between the parties when a contract is discussed for the first time after certification and a collective agreement is sought as well as when one of these collective agreements is renewed: in other words, in either case, when the parties do not have any rights but have only interests.

We shall also cover today that type of dispute where the parties disagree on an alleged violation or interpretation of an agreement that has already been concluded. That is the real arbitration. In the Province of Quebec, there is a non-statutory arbitration; the law forces the parties to go through an "arbitration" setup which is not really an arbitration simply because the law does not add that it has to be final and binding. However, conventionally the parties always put a clause in their collective agreement whereby they agree that they are going to be bound—that is conventional arbitration. Finally, there is the third type, the true statutory type of arbitration, which exists in the case of public services and their employees, and where the law states that for any kind of dispute, both *interest* and *rights* disputes, there is going to be a final and binding arbitration, provided for in the Act itself.

The question before us today is: Has this type of arbitration become obsolete or is it obsolete? I say that I do not think it can be obsolete because it never got off the ground properly as far as I am concerned. There should never have been, I think, any attempt to force parties to go through that kind of procedure, a procedure which is not final and binding. I have always strongly disagreed with this type of legislation which leads nowhere unless the parties agree beforehand to submit to it. I admit, however, that it has served some kind of purpose, in the case of a union which is not very militant or in the case of a weak union. They have enjoyed this type of procedure, where they can use public opinion or publicity over an *interest* dispute in an attempt to get an employer to sign an agreement to which they are going to be amenable. Outside of that I do not think there is any justification for that type of system and therefore I repeat, I do not think it is a question of being obsolete or not; I do think it should never have been enacted. There is talk presently of amending that whole area of labour legislation in the Province of Quebec.

Dealing with the second type, that is arbitration within a collective agreement for disputes *re* the interpretation or alleged violation of a collective agreement; in Quebec it is usual, conventionally, that the parties agree to be bound. This type of arbitration may be achieved in two ways. I refer you again to Section 24, second paragraph, of the Labour Relations Act. It states that the parties may invent their own system of arbitration. We call that in this field, the private arbitration system. Or the parties may refer to the system found in the Quebec Trade Disputes Act, a three man board. In both instances,

in the majority of cases where you have large firms and large unions, they agree to be bound conventionally by that type of arbitration.

This experience, especially the first one where the parties invent their own sustem of arbitration, has I think been very useful and has had very happy results. The parties have learned through this experience with arbitration to tighten up clauses and collective agreements. They have learned to respect collective agreements. All these types of system have been extremely successful.

In the case where the parties have to go to the Quebec Trade Disputes Act, where the chairman may be appointed by the government if the parties fail to agree, this type has also been successful although to my mind less successful than private arbitration. The reason is that unfortunately, the delays seem to be longer in the case of disputes that go through this process. The second reason, I think, why there have been difficulties is because the Department of Labour insists that when you adopt this system, the parties first go to a conciliator. I have found out in practice that a conciliator can never achieve very much where it is a case of interpreting whether it is right or wrong or "black and white", and sometimes he confuses the issue and actually creates antagonism between the parties before they finally reach the adjudicating body, that is the third person.

Finally, I come to the public services and their employees, *e.g.* school teachers, municipal employees. There I will have to distinguish again between *interest* disputes and *rights* disputes. Regarding *interest* disputes, we have found that this system of statutory arbitration has to a grave extent killed collective bargaining. The parties do not any more risk collective bargaining because they know that eventually they may end up in an arbitration which is going to be final and binding; *i.e.* it becomes like a judgment, it creates a title in the beneficiaries of the arbitration award.

Apart from the fact that it has killed collective bargaining, we also have to realise that it has resulted in long delays in the process because the government when this law was enacted, had to constitute within a matter of one year something like two or three thousand of these arbitration boards. This is due to the semi-permanent character of these boards (2 years). Obviously the government, having to find that many chairmen, could not do it and it had to adopt a system whereby the province war zoned areas of jurisdiction were assessed to judges. If one morning the various school commissions or municipal corporations involved in a dispute with their employees were to ask for arbitration, for these boards to sit, they would be completely flooded. In some cases where they have had to face many arbitrations in a given zone it has created tremendous delays which in turn has created a lot of irritation.

That leaves a last question. How competent are three men to decide accurately and finally whether a school teacher should get a $5.00 increase per week or per month instead of $2.00 or $3.00? What are the criteria? Are we advanced

far enough to establish criteria in *interest* disputes? That is what they do. The arbitrators substitute themselves for the parties in their collective bargaining to a great extent and that is why it has killed collective bargaining.

Regarding *rights* disputes. I think arbitration in the public services has been a very successful thing. As a matter of fact, we note as we progress in that area, as well as in the general area of industrial arbitration for collective agreements between companies and unions, that we are very very rapidly approaching a stage where it resembles more and more litigation in front of a normal court. For instance, my *confrère* here may tell you that we have started recently, in recent years to throw at each other jurisprudence, interpretation rules of similar types of clauses in collective agreements from right across Canada, and I think that is quite proper and quite correct and will probably develop as we go along.

If I may summarise, I do not think we should say that arbitration of *interest* disputes is obsolete. I do not think it should ever have existed. So far as arbitration of *rights* disputes are concerned I think it is far from obsolete. I think it has played a very useful role in the recent years. It has been the most active and fortunate development in labour relations, and I think that the proponents — and there are proponents at this moment for labour courts, real labour courts, similar for instance to the French tribunaux de Prudhomme — of that ideal will have a hard time in *rights* disputes to substitute courts for Arbitration Boards.

MR. STEIN: Mr. Chairman, ladies and gentlemen, may I express my personal and keen pleasure, and I am sure that of my colleague Mr. Cutler's as well, at the opportunity of being here before you and participating in the panel discussion with your lecturer, Mr. Marc Lapointe, particularly under the chairmanship of your Acting Dean, Professor Maxwell Cohen.

The topic today is not a new one for me and yet, being compelled as we are in matters of this kind to review the subject, it astounds me how many new aspects, how many fresh points seem to arise in my mind. To cover the whole area would be a very difficult task. Certainly it would be an undertaking I could not attempt in a matter of ten or fifteen minutes, hence our plan is for each speaker to confine himself to a different area.

It is my intention to deal with the provisions of the Quebec Trade Disputes Act. I will try do so in a very brief and perhaps sketchy review.

May I point out at the outset that under the Labour Relations Act, as well as under one or two other of the labour laws of this province, reference is made, when dealing with conciliation or arbitration, but more particularly with arbitration, to the Quebec Trades Disputes Act. In other words, under the Labour Relations Act, for example, where certification is given to a union and the union then attempts to negotiate with the employer, as it is compelled to do by that Act, if the negotiations break down the law provides that they (the parties) are compelled to go through the process of arbitration in ac-

cordance with the Quebec Trades Disputes Act. Similarly in the case of the Public Services Employees Disputes Act and other labour statutes. Of course, as Mr. Lapointe has indicated, there are many conventional agreements, with the provision, that in the event of disagreement, grievance or dispute, if the parties cannot solve the problem it must be solved by the procedure set up under the Quebec Trades Disputes Act. Consequently, it is very important for you to carefully review this Act and consider it in the light of our topic — "is it obsolete"?

It is my considered opinion that it is obsolete. The Quebec Trades Disputes Act was consented to in 1901. In essence it has not changed in sixty years. Hence I think you are entitled to consider it, at least, as fairly ancient. In sixty years our country and our province have certainly advanced beyond the conception of the legislative fathers who drafted this Act, for they had in mind at the time, I believe, a simple formula for the prevention of strikes or lockouts. I refer you, therefore, to the preamble of the Act, which is both interesting, and revealing as to the intention of the legislators,

> "Whereas the establishment of councils of conciliation and arbitration for the friendly settlement of disputes between employers and employees will induce the culmination and maintenance of better relations and more active sympathies between employers and employees and would be in the public interest"

and this is most significant —

> "by providing simple methods for prevention of strikes and lockouts."

The Act basically comprises two parts, a part which sets up or establishes a council of conciliation and a part which sets up a council of arbitration, as they call it, but which we can call a board of arbitration to distinguish more readily between the two.

A registrar is appointed to act for both parts of the Act. This registrar is given some rather wide powers. It is interesting to note the provision that he is to be chosen from among persons performing other duties in public service. It is a part-time job in effect. It is partly clerical and partly the work of a conciliator. He is given the power to "do all such other things as may be required to carry out this Act and to perform all other duties prescribed by the Minister of Labour." He has the right to summon witnesses. He is appointed by the Lieutenant Governor in Council. Note his name, particularly, as "Registrar". Subsequently, when you refer to Articles 13 and 14 of the Labour Relations Act you will find a reference to a man called the "conciliation officer".

I confess that I know of no official position called the "conciliation officer", other than that the registrar has, implicitly if you wish, the power to act as a "conciliation officer". Yet in practice you will find that there is a chief conciliation officer for this district, of Montreal. Moreover, both he and his deputies or assistants or, to be brutally frank, his clerks, young men of rather limited training, frequently summon the negotiating parties to attend at the

so-called conciliation offices for the purpose of disclosing their differences, to the conciliator whom they meet for the first time.

The Act also defines a trade dispute and, speaking very quickly, this means when there is a strike or the threat of a strike. I think this definition is sufficient for the purpose of our discussion today.

The registrar may be approached by either one of the disputing parties or he may take cognizance of the strike or threatened strike himself by virtue of the fact that he finds this out through newspapers or some other means. In modern times, it is hardly likely that the registrar, if he is the conciliation officer, reads every newspaper in the Province of Quebec. Consequently he is now informed as to strikes in the various municipalities, particularly since today we have many districts which are very far from the district office of the chief conciliation officer.

The Act also provides for the composition of the council of conciliation. It is supposed to comprise four members, two appointed by one disputing party and two by the other. There is provision for their official appointment by the Minister of Labour; upon a request from each side, cognizance is taken of the appointments and such appointees are given the positions as members of the council of conciliation.

What is amusing is the fee to be paid to such conciliation councillors; a fee which has not been changed since 1901. For the preliminary meeting each councillor is to receive $3.00, for a whole day sitting $4.00, and for a half-day sitting $2.00 In twenty-five years I have yet to refer an industrial dispute in which my clients have been interested, to a council of conciliation. Apart from public service disputes where there might have been the possibility of using a council of conciliation, I do not think there have been many cases of councils of conciliation set up in the manner proposed under the Act. They have no powers to speak of — except "to try with all due dispatch to bring the parties to an agreement or have them agree to arbitration, or failing such an agreement to submit the matter to arbitration." So much for the first part of the Act, that is the part dealing with the establishment of a council of conciliation. In my humble opinion, *this entire section should be repealed*; it is obsolete and nobody in recent years has made use of the council of conciliation as it is provided for under this part of the Quebec Trade Disputes Act.

We now come to the second section, which deals with the council of arbitration or the board of arbitration. Here we have a council or a board of three; of which the first two are appointed, one by each litigating or disputing party, and the third or chairman by the two thus appointed. The first two appointments are made known to the Minister of Labour who then approves their nomination to the Board. These two meet within brief delay thereafter and select from a list submitted to them, usually by the chief conciliation officer, the third member of the Board or chairman. At one time the Department of

Labour used to have a list of judges and other prominent people for this purpose. Today there is a list of lawyers for the same purpose.

One of the provisions of the Act, Article 18, requires that the chairman, if selected by agreement between the two arbitrators, should be a competent person. No other qualification is required. On the other hand, if the parties do not agree and the Minister then selects the impartial chairman of the board, there is some further qualification required. In such case, it is necessary to appoint an "experienced, impartial person not personally connected with or interested in any trade or industry or likely by reason of his occupation, business, vocation or other influence to be biased in favour of or against employers or employees." I am intrigued by the words "not likely by reason of his business, occupation, or vocation or other influence to be biased."

The fee paid to these arbitrators is hardly in keeping, in my humble opinion, with the kind of work which each of these arbitrators is required to do, nor in keeping with the duties they are supposed to fulfill.

In my opinion there is no need for three arbitrators. It is useless to appoint a representative of one of the litigants or disputing parties as an arbitrator. Usually it necessitates two lawyers to act for the same client, one on the board and one pleading in front of the board. Frequently I do not know which position to take, whether I should be in front of the Board as a pleader, or behind the scenes as an arbitrator, this depending largely on who the chairman happens to be! This is a contradictory position which should be eliminated. The fees for arbitrators are limited to $20.00 a day now. It used to be $10.00 a day. Surely a busy lawyer could not afford to close his office for say, a period of five days or a working week to earn the munificent fee of $100.00 for the week. It would hardly pay for the weekly salary of a competent secretary today let alone the other expenses of an office. Similarly, with respect to the chairman. Here you need someone with considerable experience and training who can render a decision in a trade dispute and it is suggested that someone of that competence should act on a full-time basis at a fee of $30.00 a day! The Act also provides that sittings of the arbitration board are to be public but may be made private if the chairman so rules. I see no reason why, under Section 24 any of the sittings of an arbitration board, except when it deliberates, should be private. Privacy is permitted in our judicial system in certain rare and well defined cases, but certainly should not be a matter of the chairman's discretion in the case of an arbitration or a legal dispute between a union, and its members and an employer or an association of employers.

Finally, there is a provision under the Act which says that the decision of the Board of Arbitration shall be according to "equity and good conscience". But there may arise also questions of law and of contract and in such cases, equity and good conscience, may not be applicable as the only rules to govern the decision.

Then, we have the delays; the lengthy delays which occur at all times and is one of the strongest criticisms against our present arbitration system. A delay of three months for the Board's decision is provided under the Act with additional delays by the Minister, expressed in this manner:

> "These extra, supplementary delays shall not exceed the delay suggested by the council of arbitration."

Finally the award of the Board of Arbitration is not binding, and this is the most frustrating part of the whole Act. From beginning to end, this means nothing but delay. This means going through the motions of arbitration only. It is useless arbitration. It is intended in most instances to create a background of public opinion, or colour. Considerable damage, meanwhile, may be done to the bargaining position of one of the parties if the other party can take advantage of a delay of six months and face the issue at hand six months later! Business conditions might change. Consequently, unless an arbitration is binding — and there I agree wholeheartedly with your lecturer, Mr. Lapointe — it is useless to go through these motions between employers and employees.

There is another provision in the Act which intrigues me very much. No paid agent is supposed to be present at an arbitration. Mr. Cutler, you will have to clarify this matter for me because I wonder whether a union organiser is a paid agent? Perhaps even a lawyer is a paid agent! Yet the Act under Article 28 says no paid agents are to be present.

I will take a few moments to discuss the creation of a labour court. As to the present system of arbitration under the Act, it is my suggestion that it should be repealed. In its place, I suggest we have a labour court, appointed by the Lieutenant-Governor in Council, having the same powers as the Superior Court with judicial districts, a chief justice and several judges, with a clerk, with a stenographer attached to the court and paid for out of the revenue of the government. There should be no appeals except in limited areas of the decisions of the Labour Court. The judge of the Labour Court should be assisted by two experts, one representing labour and one representing management in cases where such experts are required. But I suggest the judgment should be that of the judge, not of the experts. I suggest counsel should represent the parties at these hearings; and that petitions or some other formal, but not too formal, pleadings should be adopted as the procedure in writing. Issues should be joined. There should be no ex-parte reports by investigators or inspectors which we cannot control. Salaries for these judges should be adequate, at least $20,000.00 per annum for a chief justice and at least $18,000.00 per annum for the judges of the Court. Finally, I suggest that there should be no costs awarded against contesting parties, except, perhaps, in cases where disbursements may have been uselessly incurred as a result of proceedings. Such a Court would function efficiently and in the public interest.

MR. CUTLER: (*Mr. Cutler discussed several features of the law which, he maintained, were far from obsolete. He then explained why he was opposed to the idea of a labour court.*)

". . . it is my feeling that the litigants in labour disputes cannot be compared to litigation generally. For example, if you have ever been involved in an accident, it is probable that you were involved with someone you had never seen before and, after judgment, would never see again. The distinction is that in the case of the employer and employee they live side by side, and you have a different type of situation. I venture to say we should get away from the formalism of a court, that we should leave it to the parties to work it out the best way they can, operating under the least possible amount of legislation.

MR. LAPOINTE: I want to make my position very clear. The part which I believe has become, or has always remained, obsolete does not have to do at all with real arbitration. The part that I think should be redrafted in the Act is that part after "conciliation". As you know, you have an eight-day notice; you have a thirty-day period of negotiation; then a fourteen-day period of conciliation. Where I really believe the process starts being obsolete is at that point. The compulsion, as far as I am concerned, should stop at that point and from thereon there should be the opportunity for the parties either to agree to pursue the matter with the assistance of third parties or, if they do not want to do so, then the immediate right or the immediate sanction of collective bargaining should intervene. In other words, there should be the almost immediate possibility of lockout or strike. That is the part I believe to be obsolete.

I never said I was against arbitration of rights disputes. On the contrary, I am in favour. I think they should be developed more. I even said I was afraid that I was far from being convinced that labour courts would be a good thing. Let me ask my *confrère* Mr. Stein a question. What would be the type of cases, what would be the jurisdiction that he would allow to go before the labour courts? *Interest* disputes and *rights* disputes or just rights disputes? If the *interest* disputes are not allowed to go before labour courts, what does he do with them?

MR. STEIN: I would suggest that the jurisdiction cover the entire province and apply to all labour relations, *interest* as well as *rights* disputes and even other matters which might be declared as forming part of the jurisdiction.

In other words, I say the Act ought to provide a jurisdiction broad enough to cover all those phases of the activities which we call labour relations now provided for under the Labour Relations Act, under the Quebec Trades Disputes Act and under the conventional disputes, where existing agreements provide grievance procedure or arbitration procedure. All this could come under the jurisdiction of a labour court.

THE CHAIRMAN: I cannot understand why Mr. Lapointe makes this profound attack on interest arbitration when at some stages in disputes of some kinds, clearly third party intervention is better than letting the parties slug it out. It seems to me there is a lot to be said for intervention at some stage, even on

interest matters. I do not know why you have such confidence, Mr. Lapointe, in the ability of the parties to do a better job by negotiation when they keep hammering at each other for weeks and get nowhere or why you think the public interest is better served in not having third party intervention.

MR. LAPOINTE: I do not eliminate third party intervention. I do not eliminate conciliation by conciliator. But in my system it would mean revamping the whole system so that we do not have clerks staffing the conciliation department any more. I see a complete rebuilding of the conciliation service and a group of experts brought in, well paid, people the parties would respect, experts in specific fields of industry that the parties would respect, and they would do the work that the Conciliation Boards are supposed to do. I see no reason, when the parties are very far apart, to submit them again to another third party intervention. There are many arbitration boards on interest disputes, which only seem to be effective because they happen to do the job which was supposed to be done by professional conciliators. If the parties are really far apart, arbitration boards become a delay and retard the beneficial effect of the pressure brought upon the parties by the threat of a stoppage of work.

MR. STEIN: In the conventional type of arbitration — in other words where there is an existing agreement between the parties and provision is made for it — how would you sanction such a decision?

I did not mention the sections of the Code of Civil Procedure, Articles 1431 to 1444, dealing with arbitrations. But under our provincial jurisprudence, unless a specific dispute is detailed in the submission to arbitration, it has been held that such an arbitration is not binding upon the parties. What are you going to do with the contract which simply says that "We agree to submit a grievance arising out of this agreement to arbitration"?

MR. LAPOINTE: Actually I go one step further than what you have just said. Presently under the Labour Relations Act you could, in the Province of Quebec, even for a *rights* dispute (that is, a dispute arising during the term of collective agreement) have a legal strike in the Province of Quebec. That is why the parties make a conventional agreement that they will be bound; in other words, they add to the Quebec Trades Disputes Act by their own personal agreement.

You say "What is going to be the sanction?" Most of the collective agreements, where it is stated that the parties agree that they will be bound by the decision of the arbitrator, as far as I am concerned there is no sanction except that you may go before a court and allege that there was according to the agreement a compromise made, the juridical type of agreement called compromise, between the parties and it should be respected by the parties.

You have another solution. You may have one company or one union that originally and conventionally agree to be bound by a final and binding decision of an arbitration board but will not agree to be bound after the award is out. The sanction is that from there on they will never be capable of inserting any

arbitration clause in their collective agreement, and that to me is a sanction large enough to make or force the parties to agree to be bound and to respect that agreement. I have seen it happen time and time again.

MR. STEIN: I disagree. An employer is at the mercy of the union which has violated the agreement.

MR. LAPOINTE: How?

MR. STEIN: Because, notwithstanding that the union has apparently violated the terms of the agreement, he has no recourse except, either to go out of business or to settle with the strikers on their illegal stand. And my learned friend Mr. Cutler has done that on many an occasion. A classic example occurred two years ago when, before we could get together to settle the issue, we were forewarned that there was going to be a strike, whether we agreed to the demands or not. It was the predetermined policy of the union to have a strike for moral effects.

MR. LAPOINTE: You jumped to an extreme here. Let us suppose that there is a collective agreement with the final and binding arbitral clause in it. The employees or the union alleges that the employer has violated a clause. They go before an arbitration board, which, they agree, is going to render a final and binding award. They plead their case. They lose it. This is one situation. They do not have to go on strike necessarily. They may accept the award.

Now supposing they win a case for unjustified dismissal. The Board orders the reinstatement of the employee and the employer says, "I won't reinstate; in spite of the fact that it is final and binding, I won't reinstate. These guys sitting on the board were crazy and therefore I won't accept it despite what you say." There is a sanction to that right in the law. It is the right to strike legally, Art. 24, second paragraph.

MR. STEIN: Yes, strike.

MR. LAPOINTE: Maybe more. It may be that in the next collective agreement the union will say to the employer, "Never again will we agree to be bound, since every time we have a dispute and after having gone through the formal type of arbitration, we have to strike anyhow. According to the Act it need not be final and binding. We will not agree to be bound by this type of arbitration and we can strike at any time in the term of the agreement."

MR. STEIN: I agree that is a sanction on the part of the union. I agree.

MR. LAPOINTE: The same with the employer.

(At this point Prof. H. D. Woods, Professor of Economics and Director of the Industrial Relations Centre at McGill University, who had been sitting in the audience, requested permission to speak.)

PROFESSOR WOODS: Possibly a reference to Ontario might clear up this. There has been a very recent amendment. What you have there at the present

time is this. First of all, the Labour Relations Act contains the requirement that any dispute during the life of an agreement shall be submitted to a final and binding procedure, arbitration if necessary. Also, the Act provides that if the parties do not include such an arbitral clause in there, there is a clause in the Act which is presumed to be in there. Finally, the Act says that there shall be no strike or lockout during the life of the agremeent. So anybody who violates what in the United States would be normally a violation of the agreement, in Ontario all the way along the line it is violating the law as well.

MR. LAPOINTE: That is only in the case of *rights* disputes, not *interest* disputes.

PROFESSOR WOODS: That is right.

The recent amendment to the Ontario Act contained a clause which probably covers Mr. Stein's problem. The recent amendment says that if the parties have submitted to arbitration and an arbitrator has ruled—and forty days, I think it is, has elapsed—and the party who has been required to do something by the arbitrator fails to do so, then any party involved, the employees, the company or the union, may file the arbitration award without reasons in the Supreme Court of Ontario, and the award becomes an order of the court. Anybody who then fails to live up to the arbitrator's award is in contempt.

Coming back to Mr. Stein's problem, I think Ontario also has given the lead on that one because, as you know very well, in the case of a dispute where the electrical workers went on strike, and also the power corporation, one of our confrères in the legal teaching profession ruled that because the union was required to take every reasonable step to prevent a wildcat strike during the life of an agreement and such a wildcat strike had taken place, in his opinion the union had not taken all reasonable steps and therefore he found them in violation and he assessed damages against them. Recently the courts have upheld his power as arbitrator to do that.

MR. LAPOINTE: One court; it is in appeal. I agree with your first point but not with the second part.

MR. CUTLER: Professor Woods, I was upholding the laws only for the purpose of saying they are not obsolete. I do not think the legislature is called upon to regulate what a contract will contain, a contract that is going to be arrived at freely between the parties. If the employer does not want to sign a contract unless it has a no-strike clause, let him not sign it. If a union conversely wants it or does not want it, let them not sign the contract. But I do not think the legislature has any call for coming in unless one adheres to the concepts which I mentioned before Professor Woods came in, the distinction between public servants and non-public servants. I think these are matters which should be left to the parties side by side.

Coming back to the sanctions, I would think your clients would do well to entrust you with getting damages in the Province of Quebec concerning the

matters you have referred to. I think you have no problem at all. If the parties have made an agreement, they will have to live by that agreement and the courts will see to it.

THE CHAIRMAN: Damages can be assessed.

MR. CUTLER: And there is more than damages involved, of course. Sometimes it is a question of dismissal and should a man remain dismissed or not.

I come back to this. I should like to see a minimum of legislation which would be followed by a minimum of prerogative rights of any kind and judgments because once we get into court, once we get into dotting the *i*'s and crossing the *t*'s and trying to foresee everything as it may happen in a labour-management situation that changes from minute to minute in a plant, I think we are going to have to test every change and take it all the way up to the Supreme Court, and no sooner do we get there than we have the same thing as in taxation laws and start all over again.

Q.—I would like to ask Mr. Lapointe two questions.

I would like to know the relation of the percentage of lockouts and strikes. When one reads the papers one hardly ever reads that a lockout has taken place, but usually a strike has taken place. This leads me to the conc.usion that the union has a far greater power behind it than the company.

MR. LAPOINTE: You have noticed in my lectures to you that I very often use the words "stoppage of work" and I do it purposely. Everytime you read the word "strike" I would venture to suggest that half the time it is not a strike but it is an employer forcing a strike on the employees. By the position he takes he makes it impossible for the union to get out of the situation except by going on strike. It does not appear in the newspapers. What the newspaper man sees is the picket line. But it is not a strike; it is a lockout. As a matter of fact, in the language of personnel managers when they meet each other in their clubs they will sometimes use the following expression: "Well, is your company able to take a strike this year" "Take a strike": that is the common language of personnel management. This situation is part of the tactics of the company. When business is bad, they have a large stockpile and they do not dare say to the clerical people and key people, "Stay home"; they like the union to strike so that they will be able to reduce the stockpile in the warehouses and avoid overhead expenses.

Therefore you cannot base yourself on what you read in the newspapers. I would say that it is probably half and half and the situation depends on the economic conditions.

Q.—You seem to feel that small unions cannot afford strikes whereas big unions can. As a labour lawyer, can you not see anything else that would be less destructive to society than this drastic step?

MR. LAPOINTE: You must let me elaborate. I firmly believe that the important thing is not the strike or the lockout. The important thing is the possibility and the immediate possibility of a stoppage of work. I believe in collective bargaining and I believe the system of law that we have superimposed on collective bargaining is hampering the operation and effect of the collective bargaining process. I say that if you want to keep on going this way with more laws, let us forget about collective bargaining. That is my whole point. But the idea is that if you submit the parties, immediately or after a certain length of time, to the possibility of stoppage of work which is going to hurt them, then the cooler heads will come forward and if there is actually no dispute between the parties, there will not be a strike because the cooler heads will intervene and bring about a compromise. I claim that the system as it now exists plays havoc with the collective bargaining system because it permits the parties to play around with it.

As a matter of fact, Mr. Cutler or Mr. Stein said that the parties stall for time because they want to hit the season when the chocolate keeps well. If the whole system was right, this could not happen or it would happen much less. You say I am in favour of a strike; no, I am not, and I base myself, as I said before, on experience in the United States. There, when the termination date of a collective agreement is at midnight, both the employees and the employers use the expression: "no work, no contract" and "no contract, no work". You do not have more strikes there; you have less. Why? Because the system is left to play freely. The unions know what a strike costs and the workers know it, but at this moment they do not realise it because this system is a screen in front of their eyes. If they knew that as soon as the contract expired there was a possibility of a stoppage of work, they would attend the general meetings.

Let me give you an illustration. Today you had a meeting to set up your wage demands. Some chaps go to that meeting; most of them stay home and do not even go. Why? Because they know now from the experience of fifteen years that no matter what is going to be put forward as far as demands are concerned the important moment will be the post-arbitration time, the fourteen days before the strike. That is the time when they will attend the meetings, not now. So they do not go to the meetings, they do not take any responsibility.

MR. STEIN: I am very much in accord with Mr. Lapointe's last remarks, for the philosophical reason which he gives; namely, I do feel that this superstructure which has been imposed by virtue of the Labour Relations Act artificially frustrates the direct negotiation between the parties. I too feel that the parties, if left to themselves, could directly negotiate and if they had the proper alternative they could be brought to that decision quickly.

But there are certain points on which we disagree. First of all, I do not consider that one excludes the other. I believe that we should have a board

of mediation which is separate and apart from the labour court about which I am talking. This board of mediation should be composed of qualified, trained people. I am talking of men of the calibre of Professor Woods and others of that kind who, with their prestige, and by their competence, are the men to be chosen for this type of work. There should be a permanent staff. They should be trained in economics; they should have prestige and enjoy the confidence of both parties. They should be impartial and they should be truly representative of the public interest, as the early Act says. This should be at the initial stage of negotiation, to bring the parties together. In other words, this should take the place — this board of mediation — of the obsolete section of the Quebec Trades Disputes Act which talks about a council of conciliation. There should be a separate act dealing with mediation. They have that in the United States; they have excellent boards of mediation.

MR. LAPOINTE: No.

PROFESSOR WOODS: Purely voluntary.

MR. STEIN: I am suggesting that this is the calibre of mediation we should have. If a man of that calibre came and sat beside Mr. Cutler, myself and our clients we would have something to talk about, we would not be afraid of our bargaining position. But when I have to sit down with a clerk who does not know "tuppence-ha'penny" about the issue, and he has the nerve to suggest to me and my client that we tell him at this point, how far we are prepared to advance in our negotiations with the union, and tell him what position we are prepared to take, and how much we are prepared to offer, although he does not have the confidence of the other side either; this is nonsense. This is not the type of mediation which we should have. We should have separate mediation, distinct and apart from the functions of a labour court. I mean a labour court which has a final and binding decision in the first instance, with no appeals to higher courts except in very limited instances.

Q.—Where would you get conciliators? Are you going to have them appointed too so there is a conciliation board or are you going to lead to a *laissez-faire* situation of power between union and employer?

MR. LAPOINTE: On this point, I would keep the law as it is. First of all, the parties have to negotiate for a certain length of time. By law they have to do so. In the next step, I would have intervention by third persons, a conciliator, of the civil service, compulsorily but initiated by experts.

Q.—Where would you get the experts?

MR. LAPOINTE: Offer $15,000.00 and you will get them.

Q.—This is a government board now?

THE CHAIRMAN: Mr. Lapointe is simply saying that a government department could provide a conciliation service staffed by first class men as the Federal

Mediation Service does in the United States. You pay them good money and have first class people.

MR. LAPOINTE: The best mediators in the United States now working for the American Institute of Arbitrators come from the Federal Mediation Department.

From there on after that, it will be the end of the compulsion as far as I am concerned. From there on the possibilities will be either a Conciliation Board if the parties mutually agree to go on with another step, or the immediate possibility of a stoppage of work.

PROFESSOR WOODS: May I make one observation? Again in Ontario they have introduced another interesting experiment. In the case of negotiations disputes or *interest* disputes as Marc calls them, they have for quite a number of years now given the Minister the discretion of not granting a conciliation board, which we call a council of arbitration, and increasingly the Minister has used that discretion to refuse a board when he is satisfied that the parties have not genuinely negotiated.

THE CHAIRMAN: In good faith?

PROFESSOR WOODS: In good faith. So there is always that threat that they cannot go to a board. It is the uncertainty of the next step that makes people negotiate in the present stage.

The other thing they have done is this. In a fairly recent amendment to the Act in Ontario they have given the parties the freedom mutually to escape from the whole conciliation procedure by agreeing to their own private mediator. If for example you are negotiating—take for example the clothing industry—nothing is more ridiculous, as you know yourself, than to have the permanent umpire who is very close to the parties. But if he does not resolve the conflict they have to go through the ridiculous nonsense at the conciliation office. In Ontario if the parties agree to their own mediator the system is completely private. Several other provinces have followed. How far they are using it I am still trying to find out.