The Problem Posed by Technological Change to Industrial Relations: Freedman v. The Canada Labour Code

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Bill C-183 — *An Act to Amend the Canada Labour Code* — received Royal Assent on July 7, 1972, and became Chapter 18 of the Statutes of Canada, 1972. It is to come into force on a date to be fixed by proclamation. It repeals and replaces Part V of the *Canada Labour Code* [1] which, prior to the revision of the Statutes of Canada in 1971, was the *Industrial Relations and Disputes Investigation Act.*[2] That Act had been passed in 1948 and has served the federal jurisdiction without amendment over the intervening years.

There is no doubt that a revision of the legislation was long overdue. For example, the legislation did not contain any successor rights provisions such as are to be found in some form in the labour relations legislation of all the provinces. Over the years, the Department of Labour had proposed various amendments to the legislation but these proposals had not been acted upon by the Government of the day.

Substantial impetus was given to the prospect of major revision to the legislation by the delivery to the Prime Minister of the *Report of the Task Force on Labour Relations* (the "Woods Report") on December 31, 1968.[3]

Following the delivery of that report, the Department resumed in earnest the policy development process towards amendment or revision of the legislation. This was a process which had been going on for some years within the Department and which continued during the time that the Task Force was doing its work.

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[1] R.S.C. 1970, c.L-1

[2] R.S.C. 1952, c. 152

[3] *Canadian Industrial Relations: The Report of the Task Force on Labour Relations.* Information Canada, Catalogue No. CP32-6-1969.

The result of this process was that on June 28, 1971, Bill C-253 was introduced into the House of Commons by the Honourable Bryce Mackasey, then the Minister of Labour. He expected that interested parties would have the summer to read and react to the Bill. His expectations were fully realized. Many representations were made concerning the Bill. Most of the representations received were from employers and their associations. Their reaction was severely critical of a number of provisions, but centred on the provisions respecting technological change contained in sections 149 to 153 of the Bill. Trade unions and their organizations supported the technological change provisions as a step in the right direction, although the support was often not enthusiastic because of the narroy definition of the term "technological change".

Bill C-253 died on the Order Paper when the Third Session of the 28th Parliament prorogued. It was introduced in amended form by the Minister of Labour, the Honourable Martin O'Connell, on March 27, 1972, as Bill C-183. It passed all stages of Parliament and received Royal Assent on July 7, 1972. It now awaits proclamation.

I Technological Change as an Industrial Relations Problem

Technological change and its effects upon workers is not a new subject. In 1834, a group of farm labourers known to us as the Tolpuddle Martyrs were repressed and persecuted by the government in England because of disorders connected with protests concerning the use of a new threshing machine which threatened the winter employment of workers.

The Luddite movement in England was also at its height during the first half o fthe 19th century. This movement was, in part, a revolt inspired by hunger and unemployment against the introduction of steam looms, shearing frames and other machines which threatened the skills and employment of shearmen and weavers in the cloth industry. Such was the depth and impact of their resistance to changes in technology that the term "Luddite" has carried down to modern times as descriptive of an attitude of unreasoning, stubborn opposition to technological advances.

An even better example which can be regarded as the precursor of many subsequent events and difficulties is the great struggle in the engineering industry in England near the end of the 19th century. Employers in the industry were attempting to replace craftsmen on the new machines by cheap, unorganized labour. Their right to do so was challenged by the craftsmen and long, bitter strikes and lockouts followed. In the result, the employers esta-

blished their right to man the machines however they wished without interference.

It must be said at once that the background against which technological change occurs has altered in recent years so far as its effects on workers is concerned. All parties have adopted a more humane approach to the worker who is affected by a change. Many employers have agreed to include provisions in collective agreements which cushion the impact of change. Trade unions have become increasingly aware of the problems associated with changes and have, in many cases, succeeded in negotiating appropriate provisions. Government has also contributed a great deal to the amelioration of the adverse effects of technological change. In addition to such concepts as unemployment insurance and social welfare payments, government has provided training and retraining programs, manpower placement services, mobility grants and similar programs.

However, notwithstanding the improved background, the problem of the adverse effects of technological change upon workers persists. Its most obvious manifestation is the feeling of insecurity that exists among workers in many different types of industry. They have observed the quickening pace of change that is apparent in the world around them, including their workplace, and they are perfectly aware that a new machine or process might come into existence at any time which would make their job redundant. Their concern is that their job should be assured or, at least, that all possible steps be taken to ensure that they will receive every assistance possible in their plight when they are displaced or affected by a technological change.

The context of the problem has changed, not only for the worker, but for many employers as well. The employer seeking to impose a new threshing machine on the Tolpuddle Martyrs or a shearing frame in the face of opposition from the Luddites was doing so primarily to increase his profits. Today's employer is faced with a different situation — he must, in many cases, make technological changes with the least possible delay in order to remain competitive in both domestic and international markets.

The necessity for industry to have the ability to adapt quickly to a changing situation is recognized and well understood by government.

The position of the trade unions is easy to understand. Faced as they were with an employer attitude that insisted upon its right to make technological changes as it wished, the trade unions took

a position similar to that expressed in the old saw — "Your right to swing your arm ends at the point where my nose begins". There is no doubt that trade unions have a responsibility to attempt to protect their members from the adverse consequences which technological changes may have upon employment and security of employment. As in the case of the Luddites, this protection has occasionally taken the form of opposition to a proposed technological change. More often, the type of protection that is sought takes the form of measures which will enable a worker to retain employment or, at least, to soften or cushion the impact which a change may have upon him.

The foregoing discussion relates to the situation in Canada but is equally applicable to any other Western industrialized nation. However, Canada finds itself in a fundamentally different situation than any other such nation because of the concept of a closed agreement which exists in its labour legislation. In all Canadian jurisdictions a contract may be opened for renegotiation at certain times and an employer cannot be required to bargain collectively on any issue at any other time except where he consents to do so. Further, in all jurisdictions except Saskatchewan, a strike during the term of a collective agreement is illegal. This situation does not exist elsewhere among western industrialized nations.

The effect of these concepts as they relate to a situation where technological changes are imminent frequently places a trade union in an unenviable position. Consider a hypothetical case where a union has completed negotiations for a collective agreement; it has done so against the background of a particular fact situation and in light of what it knows or is able to learn about future plans of the employer. The collective agreement is binding for its term and may not be opened for renegotiation except with the consent of the employer. Let us imagine that, during the term of the agreement, the employer introduces a technological change which results in the displacement of one-third of the employees in the bargaining unit. Under the existing legislative scheme, the trade union has no lawful formal recourse. It cannot legally require the employer to even discuss the matter, let alone bargain about it. It cannot press its case by legal strike action. The employer, no doubt relying upon what he regards as his inherent rights as an employer, feels free to proceed with his plans regardless of consequences.[4]

[4] This is not to say that employers always behave this way. Indeed, there are very many examples of employers behaving in exemplary fashion in precisely these circumstances.

The above example is hypothetical and was deliberately made extreme for the purpose of illustrating the problem. However, situations similar to this example have occured and continue to occur.

The real danger is that affected employees, not having a legal remedy available, will resort to illegal means to protect themselves. Such a situation did occur in respect of the Nakina run-through described below and in a number of other situations. If it is correct to say that we are witnessing in segments of our society a tendency to increasing militancy and decreasing respect for established authority, it may follow that the hypothetical situation described above will become more explosive reality in the future.

In any event, a situation in which one party to a collective agreement can unilaterally change one or more of the fundamental assumptions on which the agreement was negotiated and concluded without a remedy existing in the hands of the other party is a situation that is fundamentally unfair and cries out for redress.

It may also be observed that, according to statistics collected by the Department of Labour, the incidence of provisions intended to deal with the effects of technological change in agreements in federal jurisdiction is low.[5]

Having arrived at the conclusion that some legislative change was necessary in order to cope with the problems to industrial relations posed by technological change, the question for federal policy makers was, what solution should be adopted?

There were a number of alternatives which were or could have been considered, among which were the recommendations of Mr. Justice Samuel Freedman contained in the *Report of Industrial Inquiry Commission on Canadian National Railways "Run-Throughs"*[6] and the scheme contained in sections 149 to 153 inclusive of Bill C-183 (which will be referred to as "the new Canada Labour Code"). This paper will describe and, to some extent, compare and assess these two approaches to the problem.

II The Freedman Report

The Canadian National Railway Company, having converted from steam to diesel locomotives and having made a number of other tech-

[5] These statistics are collected and appear as Appendix A-26 in the Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration for June 13, 1972 (Issue No. 23).

[6] Information Canada, Catalogue No. L35-965/1.

[7] *Report of Industrial Inquiry Commission on Canadian National Railways "Run-Throughs"*, p. 135.

nological changes, decided that it would "run-through" certain terminals in the interests of improved service and a reduction in costs. One such decision, made in August, 1964, involved the terminal at Nakina, Ontario.

A steam locomotive required servicing about every 125 miles and consequently servicing facilities had been established on the railway spaced to this requirement. Crews would normally run from one terminal to the other. A diesel locomotive, on the other hand, can be operated up to 6000 miles with little more than fuelling and minor servicing. Quite naturally, the CNR wished to take advantage of its new technology in every way it could. One of the techniques it decided to use was extended crew runs accomplished by no longer stopping at certain service points or terminals for servicing. This was termed a "run-through".

The concept of run-throughs was not a new one. Prior to the Nakina situation, the CNR had previously accomplished run-throughs on at least four occasions with respect to other points in Ontario and had proposed the run-through of a number of other points, chiefly in Western Canada.

The railway unions had always strongly opposed the decisions to run-through established terminals, arguing that these decisions constituted a change in the conditions of employment and ought to be the subject of negotiation between the unions and the Company. They had pressed this point before conciliation boards in 1961 and 1962 without success.

Nakina had been a terminal where 91 employees of the railway company made their homes and, in addition, served as a turnaround point for other running trades personnel. The Company's decision contemplated a progressive extension of crew runs through Nakina commencing on October 25, 1964, and continuing in stages until the plan would have been fully implemented in October, 1966. The initial stage of the plan would have required four employees to move from Nakina and full implementation at the end of the two-year period would have resulted in 50 jobs being eliminated at that terminal.

The CNR communicated its decision to the union on September 14. This was the first notice to the union of the proposed change in operations. There was a subsequent meeting at Nakina between Company officials, union leaders and employees at Nakina, at which the Company explained its run-through plans. A few days later, a citizen's group from Nakina met in Ottawa with Government ministers and others, but no action resulted from this meeting.

On the weekend preceding the commencement date for the run-through, there occurred a mass booking off of railway running tradesmen which, at its height, involved some 3,000 men. The railway collective agreements and usage recognized the right of a man who was sick or unfit for duty to book off work. However, in this situation, the act of booking off was intended as a concerted protest action. At the Inquiry which followed, these acts were found to constitute an illegal strike.

As a result of this massive protest, the Government of Canada, faced with the prospect of a tie-up in the trans-continental operations of the CNR, intervened and appointed the Honourable Mr. Justice Samuel Freedman as an Industrial Inquiry Commission pursuant to the provisions of section 56 of the *Industrial Relations and Disputes Investigation Act*. Mr. Justice Freedman was to inquire into the run-through at Nakina and at Wainright, Alberta, where there was a similar problem and in matters incidental or related thereto. It was to report its findings and recommendations for application with respect to the two terminals and for general application to similar situations arising in the future.

Mr. Justice Freedman's investigation into the situation at the two terminals and generally was careful and exhaustive and resulted in important and far-reaching recommendations. He delivered his report to the Minister of Labour on November 17, 1965.

After finding that run-throughs were justified economically and that on the basis of existing law the Company had the right to institute the run-throughs, Mr. Justice Freedman said:

> Should it continue to have that right? The question here raised lies at the heart of this Inquiry. The Commission is satisfied that it must be answered only in one way. The institution of run-throughs should be a matter for negotiation. To treat it as an unfettered management prerogative will only promote unrest, undermine morale, and drive the parties farther and farther apart. In that direction lies disorder and danger. By placing run-throughs, on the other hand, within the realm of negotiation a long step will be taken towards the goal of industrial peace. More than that, such a course will help to provide safeguards against the undue dislocation and hardship that often result from technological change.
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> The Commission believes that its answer is rooted in fundamental fairness. A run-through program cannot be developed overnight. Much prior planning for it is required. Management is the one to initiate such planning and it alone knows where the plan is to take effect and what is its proposed nature and scope. But it does not bring its plan to the bargaining table. In that state of affairs bargaining proceeds and a collective agreement is in due course signed. Thereafter management for the first time introduces its plan. But now the parties are in the closed period.