The Fleck Strike: A Case Study in the Need for First Contract Arbitration

Constance Backhouse

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj

Citation Information
http://digitalcommons.osgoode.yorku.ca/ohlj/vol18/iss4/1

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.
THE FLECK STRIKE:
A CASE STUDY IN THE NEED FOR
FIRST CONTRACT ARBITRATION

By Constance Backhouse*

I. THE FLECK STRIKE

On March 7, 1978, eighty of the one hundred and forty-six female workers of Fleck Manufacturing Plant, a company producing automotive wiring in Centralia, Ontario, walked out in what was to become one of the most notorious—and certainly one of the most bitter—strikes in Ontario labour history.1 From the outset, the strike was marred by violence, property damage, and numerous instances of intimidation. Twenty-three persons were charged with criminal offences. The cost to the company, to the Ontario government and to the United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter the UAW), exceeded three million dollars.2

© Copyright, 1980, Constance Backhouse.
* Assistant Professor of Law, University of Western Ontario.

1 This factual account of the Fleck strike has been drawn from newspaper articles from the following sources: London Free Press, March 6 to May 12, 1978; Toronto Globe & Mail, April 23 to May 10, 1978; and Toronto Star, August 16, 1978. As well, a series of interviews was conducted by the author with some of the principal actors in the dispute: Robert White, Canadian Director of the UAW, interviewed in Toronto, December 19, 1978; James Fleck, then Visiting Professor at Harvard Business School, interviewed in Cambridge, Mass., November 9, 1978; A. Seymour, International Representative of the UAW, London, Ontario, interviewed in London, Ontario, July 16, 1979; F. Berlet, President of Fleck Manufacturing Ltd., interviewed in Tillsonburg, July 18, 1979; H.P. Rolph, attorney for the UAW in this matter, interviewed in Toronto, July 11, 1979.

2 Although the company would not reveal its losses, the UAW estimated its strike expenses at $8,000 a week. The government also ran up a hefty bill. At one point, four hundred and fifty police officers were on the scene. A squad of thirty riot-equipped police-
The workers' principal proposals were for union security and wage increases. In conversations with representatives of the media, they also stressed concerns about unsafe and unsanitary working conditions. Further, calling it a demand for "human dignity", a number of women strikers raised serious allegations of sexual harassment on the job from male supervisors. As well, several public figures entered the fray, taking dramatically opposite positions.

Jack Riddell, the Liberal M.P.P. representing the riding in which the Fleck plant is located, visited the plant on March 20, 1978. After a half hour visit, he walked to the picket line and threatened the employees with possible closure of the plant unless they ended the strike. Riddell made statements to reporters accusing the union of using devious methods and threats to get the workers to join the union and go on strike. Taking a somewhat different stance, after a face-to-face meeting with a number of the strikers in April, Dr. Bette Stephenson, then the Ontario Minister of Labour, in an almost unprecedented move, endorsed the position of the strikers in their battle for union security. Stating it was "inappropriate" in this day and age for an employer to resist union security, she came down firmly on the side of the strikers.

Beyond these rather extraordinary features, the Fleck strike provides a classic illustration of the myriad problems that can arise in labour disputes between employers and unions in the early stages of their relationship. The initial process of union certification raises questions about the most efficacious method of determining the degree of union support—whether by union membership cards or a secret ballot vote. In this instance, certification was granted by the Ontario Labour Relations Board on the basis of union membership evidence. Management publicly announced that this form of certification caused them to harbour suspicions of employee intimidation. The employer's unfair labour practices (so found by the Ontario Labour Relations Board in a decision released July 20, 1978)—raise the issue of the extent to which employers should be allowed to express their opinions on union organization to their employees. The entrenched positions the parties took on the issue of union security—the union demanding a Rand formula clause and the
First Contract Arbitration

vice-president of the company publicly declaring that he would resign before he would see a union shop in his plant—clearly reflected the ideological tensions that exist over this question in society at large. After the employees began the strike, the Fleck plant continued to operate, at production of approximately half of the pre-strike levels, using the labour of some supervisors and the employees who refused to join the strikers. Distressed about the strike-breaking potential of this situation, the strikers focussed their energy on the crossings of the picket line and recurring scenes of violence erupted.

When the police arrested Al Seymour, the UAW international representative, at the outset of the strike for interfering with entry to the plant by the non-striking workers, the union saw this as an attempt to intimidate the strikers. Top UAW officials reacted angrily and called upon male UAW members from neighbouring plants to join the striking women on the picket lines. Several hundred of these fellow union members answered the summons and the media described subsequent picket activity as a "rampage". Not all the violence was inflicted by the strikers. The press recounted numerous instances where women strikers and outside union sympathizers were struck by police officers. A number of women strikers commenced legal proceedings against the police, claiming they had been assaulted during picket line altercations. Questions immediately spring to mind about how best to regulate picketing, rights of employers to continue to operate during a lawful strike, and the role of the police in labour dispute violence. In addition, the union threatened to expand the picketing to the nearby 6,000 employees at the Ford plant in Oakville (one of Fleck's largest customers), raising questions about secondary picketing. Ford initially responded that it intended to honour the terms of its contract to purchase automotive wiring from Fleck. When several Fleck women picketed the Ford plant in Talbotville, closing it down for one day, Ford immediately applied for and received an ex parte injunction enjoining Fleck pickets at all Ford plants. Eventually, however, as a direct result of union pressure, Ford decided to cut back on its quotas from Fleck.

In August, 1978, Fleck management capitulated and agreed to the adoption of a Rand formula in their contract. The union members ratified the two-year contract, giving effect to minimal pay increases and agreeing to drop court action against the company arising out of the Ontario Labour Relation Board's decision to consent to prosecute. Fleck management agreed to try to get the police to drop charges against the scores of people who had been charged in various picket line disturbances. The nature of the dispute at Fleck inevitably leads to consideration of the concept of first contract arbitration as a dispute-resolving mechanism. Clearly the issues of union certification,

---

6 A "closed shop" refers to a collective bargaining agreement provision that requires that no person who is not a member of the union may be hired. A "union shop" provides that all present and future employees must become and remain union members. A "Rand formula" provides that all members of the bargaining unit must pay union dues, whether union members or not, although union membership as such is not compulsory. (Labour Relations Law Casebook Group, Labour Relations Law: Cases Materials and Commentary (2nd ed. Kingston: Queen's University, 1974) at 528 and 538.
union security, unfair labour practices, continued operations during strikes, picket line violence, and secondary picketing are all inter-related with the notion of first contract arbitration. Deficiencies in one part of the labour law system often create or exacerbate problems elsewhere. However, it is clear that intense, prolonged labour disputes of the kind that occurred at the Fleck plant are not conducive to labour peace and healthy collective bargaining. Is there a better way? While the Fleck strike gives rise to a host of questions and issues concerning the application of legal rules to labour disputes, the focus of this paper will be on the issue of first contract arbitration, and its potential for ending or avoiding similar labour-management confrontations in the future.

II. DEFICIENCIES OF EXISTING LABOUR LAW REMEDIES IN A FIRST CONTRACT SITUATION

At the outset, before any case can or need be made for first contract arbitration, one is required to make a convincing argument that the standard remedies are deficient when the problem is refusal to bargain for a first collective agreement. There is a need, particularly in first contract situations, to be concerned about the limits to remedies available for the breach of collective bargaining legislation: 1) time is of extreme tactical importance; 2) there is a particular psychological dimension to the employment relationship; 3) the facts of discrimination are difficult to ferret out; and 4) the parties do not sever their relationship after they have concluded their initial litigation over the breach.

Time is critical in the initial unionization drive. The parties are just beginning to learn to deal with an adversarial collective bargaining relationship. The peculiar nature of first-contract disputes often causes the parties to focus on political and ideological battles, rather than on economic issues. This usually reflects the fact that the employer is actually resisting the very concepts of collective bargaining and recognition of the trade union. Employers are frequently attempting to destroy the union through delay and bad faith bargaining; unfair labour practices7 may be camouflaged as "hard" bargaining or, in blatant cases, as intransigence. Leading up to the typical first contract dispute, the union has been certified by a board or is voluntarily recognized by the employer. The parties begin to bargain, often reaching an impasse. A number of these cases will develop into Fleck-like situations where the employer will resort to a series of unfair labour practices to forestall productive bargaining. Instead of bargaining in good faith, the employer will use devious bargaining tactics to frustrate the possibility of ever concluding any agreement.

Virtually all collective bargaining statutes in Canada and the United States require that both a trade union and an employer must bargain in good faith and make every reasonable effort to conclude a collective agreement. Historically in the Canadian context, the remedy for breach of this duty was

---

7 "Unfair labour practices" is a term of art, found in The Labour Relations Act, R.S.O. 1970, c. 232, ss. 56-72.
a labour board's "consent to prosecute" the violator in Provincial Criminal Court. This route was unsatisfactory for a variety of reasons. The process was time-consuming and expensive since the complainant was required to make out a *prima facie* case before the Board, and then successfully prove the breach in court. Criminal standards of proof and strict rules of evidence before the Provincial Court complicated the situation and criminal courts lacked expertise in labour relations matters. Finally, the court's remedial authority was limited to fines. As a result, in a wave of legislative reform in the 1970's, broader remedial authority was granted to most Canadian labour relations boards.

**The Cease and Desist/Direction to Bargain Approach**

Today remedies for breach of the affirmative duty to bargain differ slightly throughout the various jurisdictions. In Ontario, the Labour Board is empowered to make an order "directing the employer ... to cease doing the act or acts complained of" or to make an order "directing the employer ... to rectify the act or acts complained of." In the typical remedial award under this legislation, Boards have given cease and desist orders and directions to engage in good faith bargaining forthwith. This approach carries with it a number of deficiencies:

1) The order operates only prospectively. It may ensure good faith bargaining in the future, but it does nothing to redress the past wrong. There also appears to be some concern about the logic and effectiveness of merely ordering an employer to comply with the legal requirement of good faith bargaining—especially since this is typically something that has been intentionally avoided for some time.\(^8\)

---

\(^8\) The Labour Relations Act, R.S.O. 1970, c. 232, s. 79(4)(b). The Labour Code of British Columbia, S.B.C. 1973, (2nd Sess.) c. 122, provides in s. 28 that the Board may "make an order directing an employer ... to do any thing for the purpose of complying with this Act ... or to refrain from doing any act ... in contravention of this Act ... or make an order directing an employer ... to rectify any contravention of this Act ... or make an order determining and fixing the monetary value of any injury or losses suffered by an employer, trade-union, or any other person as a result of a contravention of this Act ... and directing an employer, trade-union, or any other person to pay to that employer, trade-union, or other person the amount of the monetary value fixed and determined by the board."

The Trade Union Act, S.N.S. 1972, c. 19, provides in s. 34 that the Board "may make an order requiring any party to the collective bargaining to do the things that in the opinion of the Board are necessary to secure compliance. . . ."

The Canada Labour Code, R.S.C. 1970, c. L-1, Part V provides in s. 189 that the Board may "by order, require the party to comply with that ... [duty to bargain] section and may ... in addition to or in lieu of any other order that the Board is authorized to make under this section, by order, require an employer ... to do or refrain from doing anything that it is equitable to require the employer ... to do or refrain from doing in order to remedy or counteract any consequence of such failure to comply, . . ."

The United States National Labor Relations Act, 29 U.S.C.A. §160, provides that the Board may "issue and cause to be served ... an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action ... as will effectuate the policies of this subchapter. . . ."

---

2) The employees have suffered financial and other damages as a result of their employer's refusal to bargain. The employer's intransigent approach has inhibited the signing of a contract that would provide the employees with improved wages, benefits, and non-monetary terms and conditions of employment. Cease and desist orders and directions to bargain in good faith do nothing to compensate employees for these losses.10

3) The union has also suffered financial losses. To counter the employer's bad faith bargaining, it has had to incur additional negotiation and litigation expenses. If the employer's strategy is ultimately successful and the union loses its constituency without obtaining a contract, it has incurred organizational costs without obtaining a unionized plant. Traditional remedial orders do nothing to compensate unions for the additional expenses caused by an employer's illegal practices.11

4) Employers who manage to delay or prevent the negotiation of contracts through bad faith bargaining effect great labour savings. This provides them with an unfair advantage over their competitors in the market and encourages other employers in the industry to adopt unfair labour tactics themselves.12

5) Employee support for a union swiftly diminishes in the face of employer bad faith bargaining as the union appears powerless to improve wage levels or working conditions. As a result, the employer may greatly undermine the union or oust it completely. Through the breach of labour legislation, employers may effectively prevent the exercise of employee rights to join and participate in the activities of a trade union.13 Cease and desist orders and directions fail to provide any penalty to the employer in these situations.

This last point is clearly borne out by the results of research conducted by Professor Philip Ross.14 In his study of the United States National Labor Relations Board bargaining cases, Professor Ross determined the following:

---

10 See Note, NLRB Power to Award Damages in Unfair Labor Practice Cases (1971), 84 Harv. L. Rev. 1670 at 1676; Schlossberg & Silard, The Need for a Compensatory Remedy in Refusal-to-Bargain Cases (1968), 14 Wayne L. Rev. 1059 at 1063-65; and Michigan note, id. at 374.


"The major shortcoming of the NLRB lies in its failure to adopt adequate and realistic remedies in those cases where the employer has unmistakably demonstrated a continuing intent to frustrate the Act."\(^{15}\) Ross’s research indicates that a contract is signed in most situations where the employer honours its duty to bargain without delay, but that the chance of a contract being signed is cut in half if the case must go to court enforcement of a bargaining order. Professor Ross found that the problem was worsened in the first contract context. First contract bargaining situations involved a very significant proportion of failures to fulfill the duty to bargain. In addition, employers violating the duty to bargain in first contract situations also committed a significant number of other unfair labour practices. Where no breach of the duty to bargain in good faith was alleged, the likelihood that the parties would conclude a first contract was estimated between 86 per cent and 97 per cent. If the employer refused to bargain in good faith, chances of reaching a first contract dropped to 57 per cent. If the employer continued the pattern of bad faith bargaining until a court of appeal was compelled to make an order to remedy the situation, Ross estimated that the likelihood of signing a first contract was no greater than 36 per cent.\(^{16}\)

In analyzing the deficiencies of the cease and desist/direction approach, one should also give some consideration to the goals of remedial action in unfair labour practice cases. The most effective remedy would create the following results: 1) it would deprive the breaching party of the benefits of the unlawful activity; 2) it would prevent the commission of any further breaches; and 3) it would compensate the parties who have been injured by the unlawful activity.\(^{17}\) Although the second goal may be reached by the cease and desist/direction approach, clearly the first and third goals will not. The novel remedy of first contract arbitration, first enacted in British Columbia, has proven far more effective in meeting these goals.

III. FIRST CONTRACT ARBITRATION IN BRITISH COLUMBIA

A. The Birth of the Concept and the Process of Legislative Enactment

It was a protracted, bitter strike in 1973 between Sandringham Private Hospital and the Canadian Union of Public Employees, in Victoria, British Columbia that precipitated the enactment of first contract arbitration. Although the trade unions in British Columbia had organized the acute-care public hospitals, the drive to organize the predominantly female and immigrant workforce of extended-care private nursing facilities was just beginning. The owners of the highly labour-intensive private hospitals were very reluctant to accept unionization. The hospitals were paid by the government a

\(^{15}\) Ross, supra note 13, at 300.

\(^{16}\) Ross, id. at 299. Brief for the Charging Party at 12, Ex-Cell-O Corp., 185 N.L.R.B. No. 20, 74 L.R.R.M. 1740 (August 25, 1970), (survey of UAW contracts). This analysis of Ross’s study has been drawn from Harvard note, supra note 10, at 1675.

\(^{17}\) See Tiidee Products, Inc., supra note 13, at 255 (D.C.), 1249 (F.2d); and Kraus, Note, Labor Law – J.P. Stevens, Searching for a Remedy to Fit the Wrong (1977), 55 N.C.L.Rev. 696 at 698.
The Sandringham strike captured the attention of the newly-elected New Democratic Party provincial government. The NDP had been elected in British Columbia in 1972. That year the British Columbia strike record hit an astounding 2,500 work days lost per year per thousand workers. It has been postulated that one of the reasons the NDP was elected was that the public hoped that a new government, more closely tied to labour and committed to a systematic program of labour reform, could do something to bring some order to the existing chaos.

In early 1973, Bill King, the NDP Minister of Labour, decided that a full-scale review of labour legislation should be conducted by “three wise men”. An informal commission, composed of Ted McTaggart (then a senior, respected union lawyer), Noel Hall (a University of British Columbia labour economist, and head of the industrial relations department), and Jim Matkin (a labour law professor at the University of British Columbia), was to travel across the country seeking the views of interested parties and academic, neutral observers. The consultation process was low key, and no formal white paper was released.

Eventually the three-man group, along with King, Jim Kinnaird (Associate Deputy Minister of Labour), and Paul Weiler (a professor of law from Osgoode Hall Law School who was to chair the new British Columbia Labour Relations Board), spent three days in a secret, intensive session completing the first draft of the new Labour Code. The labour legislation incorporated a number of drastic changes including the abolition of judicial review of the labour board’s decisions, a completely new structure for the labour board, an innovative code of picketing provisions, and new procedures to accredit employers’ associations and councils of trade unions. First contract arbitration was merely a small part of this comprehensive reform package. Paul Weiler has described it as an afterthought: “Clearly the problem of the acrimonious first contract dispute had been around for some time. It had been

---

18 The strike was eventually settled and the union obtained a contract; this was accomplished before the British Columbia Labour Code had been enacted.


20 Id. at 4.

King’s initial intent was to appoint a formal commission to review the labour relations situation. The commission was to be composed of the head of the British Columbia Federation of Labour, one of the senior management representatives from Cominco, and a labour lawyer who had represented both labour and management (Mary Southin). The Commission was aborted when the British Columbia Federation of Labour—affronted that they were not being given total control over the review process—refused to sit on the Commission.
recognized although not clearly articulated. However, it was Sandringham which caused King to suggest this remedy."^{21}

Weiler admitted that his initial reaction to King's idea was skepticism. "I thought it constituted an unwarranted interference with the concept of freedom of contract," he stated.^{22} All of the persons involved in the drafting process recognized that the trade unions would be distraught over such a provision. Weiler stated: "We all anticipated that the trade unions would be inflamed. Although the trade unions would be the primary beneficiaries of arbitration in this special context, they feared that it would set a precedent—'the thin edge of the wedge'—for the growing use of legal compulsion elsewhere."^{23} Although the management sector was uniformly opposed to first contract arbitration legislation, it was the British Columbia Federation of Labour which spear-headed the fight against this new remedy. (Some of the trade unions that were not affiliated with the B.C. Federation came out in support of first contract arbitration). The trade unions within the B.C. Federation argued that the proper recourse against an intransigent employer was to withdraw the labour of the workers. If a particular group of employees was too weak to exert pressure on their employer by strike action, the law had to recognize that collective bargaining was meaningless in that relationship. The B.C. Federation threatened that even if the legislation was enacted, it would instruct all of its trade union affiliates not to make use of the first contract arbitration remedy.^{24}

---

^{21} Interview of Paul Weiler by the author at the Harvard Law School, Cambridge, Massachusetts, February 8, 1979. Weiler also added the following:

The Sandringham Hospital dispute was prominent in the minds of the Premier and Bill King. They recognized that standard labour law remedies were inadequate in dealing with this problem. It was King who came up with the idea for first contract arbitration—it was probably an idea which came to him in the middle of some night.

One should not overestimate the rationality of the process of development of legislation. There are always a variety of influences and ideas operating. There's no blueprint in the abstract, before the law is drafted and put into operation. It was only after first contract arbitration was put into the statute and the Board began to interpret the legislation that the rationale was articulated.

^{22} Id.

^{23} Id. and see supra note 19, at 52.

^{24} This threat was ultimately carried out, but within months of the legislative enactment, many of the British Columbia Federation affiliates—including its key members such as the Steelworkers, the IBEW, etc.—were making applications before the Board to use the provision. In one ironic incident, the Operating Engineers' business agent brought a first contract arbitration application before the Board, contrary to the professed policy of boycott espoused by the top Operating Engineers' officials inside the British Columbia Federation. When questioned by the press about his departure from the official line, the business agent blurted out, "It's true, I know that's the policy of the B.C. Fed., but every so often we have to think of the workers."

The British Columbia Federation expanded their lobbying activities beyond the jurisdiction of the province. In 1974, the province of Manitoba was also in the process of revising its labour legislation under an NDP government. Russ Paulley, the Manitoba Minister of Labour, was prepared to include a first contract provision in the new Manitoba legislation. The British Columbia Federation was concerned that if the Manitoba government adopted this legislation, it would undercut their efforts to keep the provisions
The NDP government, elected with the support of the British Columbia trade union movement, agonized over the strident trade union opposition to first contract arbitration. The final decision was to include the new remedy in the draft legislation. According to Weiler, it was concluded that the trade union position "was transforming an admittedly important principle of freedom of contract into an iron-clad rule." The government did not plan to use the new remedy as the automatic response to an impasse in first contract bargaining. In his *Reconcilable Differences: New Directions in Canadian Labour Law*, Weiler has noted that what they were concerned about "was a deadlock produced because the parties were incapable of bargaining at all, especially if one of the parties—typically, though not exclusively, the employer—had simply not accepted the principle of collective bargaining itself. In that exceptional case, the prospect of compulsion did not horrify us."

Recognizing the novelty of their new first contract legislation, the drafters hedged the remedy about with a number of restrictions. First, arbitration

---

out of the British Columbia legislation. They convinced the Manitoba Federation of Labour to lobby Paulley with the result that no first contract arbitration provision was ever adopted in Manitoba. Instead, the Manitoba government enacted a half-measure: *Labour Relations Act*, S.M. 1972, c. 74, s. 75.1:

(1) Where

(a) within 1 year after the expiry of 90 days after the date on which a union is certified as the bargaining agent for a unit ...;

(b) no collective agreement has been in effect between the bargaining agent and the employer since the date on which the union was certified ...; and

(c) without the written consent of the bargaining agent the employer increases the rate of wages or alters any term or condition of employment ... the bargaining agent may, in writing, request the employer to prepare a written code of employment for the employees in the unit setting out the rates of wages and the terms and conditions of employment of the employees in the unit as increased or altered. ...

(3) A code of employment under this section ... is effective for a period of 1 year. ...

(5) Where a code of employment prepared by an employer under this section ... is in effect, the provisions of this Act apply in all respects as though a collective agreement were in effect between the employer and the bargaining agent in the terms of the code of employment.

After enactment of the British Columbia first contract arbitration legislation, in every annual brief made to the NDP government in British Columbia, the B.C. Federation continued to demand the removal of first contract arbitration. This demand was ultimately dropped when the Social Credit government defeated the NDP government. According to cynical observers, the B.C. Federation dropped the demand because they feared that the new government might actually act upon it.

---

25 *Supra* note 19, at 52.
26 *Id.* at 53.
27 *Id.* The first contract provisions ultimately enacted were contained in the *Labour Code of British Columbia*, S.B.C. 1973, (2nd Sess.), c. 122. Sections 70, 71, and 72 provided as follows:

s.70(1) Where a trade union certified as bargaining agent and an employer have been engaged in collective bargaining with a view to concluding their first collective
was available only in first contract situations. According to Weiler, 99 per cent of these bitter, protracted strikes took place in first contract situations. “We were willing to exclude the other one per cent,” he stated, “in order to make the remedy more attractive, more defensible.”

Second, the contract arbitrated by the Board was to last for only one year. After this period, the parties were to be thrown back into the collective bargaining system once more. Third, a referral from the Minister of Labour was required before the Board could consider a first contract arbitration remedy. The Minister, using the assistance of mediators in his department, would be in a position to screen out all but the very serious cases for which the remedy had been created. Weiler accounted for this screening device as follows:

The virtue of this provision was that no-one was entitled as of right to ask for binding arbitration. You can give all the discretion you want to an adjudicator, but if somebody has the right even to come before a tribunal, that alone can very badly distort the negotiating process. We didn't want that to happen.

The original idea was to use the Ministerial screening device for only a few years. Once the jurisprudence had been developed, and guidelines had been drawn up for the parties, it was hoped that the screening provision could be dropped.

agreement and have failed to conclude an agreement, the Minister may, at the request of either party, and after such investigation as he considers necessary or advisable, direct the board to inquire into the dispute, and if the board considers it advisable, to settle the terms and conditions for the first collective agreement.

(2) The Board shall proceed as directed by the Minister and, if the board settles the terms and conditions, those terms and conditions shall be deemed to constitute the collective agreement between the trade union and the employer and are binding on them and the employees, except to the extent to which they agree in writing to vary any or all of those terms and conditions.

s.71 In settling the terms and conditions for a first collective agreement under s. 70, the board shall give the parties an opportunity to present evidence and make representation, and may take into account, among other things:

(a) the extent to which the parties have, or have not, bargained in good faith in an effort to conclude a first collective agreement, and

(b) the terms and conditions of employment, if any, negotiated through collective bargaining for comparable employees performing the same or similar functions in the same or related circumstances.

s.72 In no event shall the collective agreement settled by the board under s. 70 be for a period exceeding one year from the date the board settles the terms and conditions for a first collective agreement under that section.

Weiler has commented on these restrictions, noting that they were required because of the broad powers granted to the Labour Relations Board:

The substantive criteria the Board was required to examine in first contract arbitration were very broad. There was no requirement to go through a full-scale adjudication to make a finding of bad faith bargaining. The Board was allowed instead to make a free-wheeling, informal judgment about the attitudes of the parties. Given the looseness of the substantive criteria, we had to hedge the remedy with a number of other restrictions.

(Supra note 21.)

28 Supra note 21.

29 Supra note 19, at 53.

30 Supra note 21.
B. **Labour Board Interpretation**

The Labour Board has not had extensive experience in the application of the first contract provisions. Over the first five years of the life of the legislation, the Board has used its power to impose contracts, on average, less than twice a year. Almost all applications have been brought by trade unions, although the Board did receive three or four applications for first contract arbitration from employers. In several of the cases which have come before the Board, detailed consideration has been given to the purpose and application of this remedy. The first case heard was *London Drugs Ltd.* In this decision, the Board attempted to flesh out its understanding of the purpose of the legislation and the guidelines it intended to use in its application. The union had been certified and was attempting to bargain for a first contract. The employer appeared to be adamantly opposed to the concept of unionization. Key union supporters were fired, a course of action that the Board determined to be an unfair labour practice. After the first negotiating session, bargaining broke off and a legal strike ensued. The employer replaced strikers with other employees, terminating many of the jobs. The union members were conducting extensive picketing. Company officials began to approach employees individually, offering wage settlements that had never been offered to the union.

Although in the usual case compulsory arbitration was imposed when a strike was damaging to the public interest, the Board determined that this was not the essence of the section 70 remedy. The Board concluded that neither the public interest character of the dispute nor the length of the duration of the strike were relevant factors. Further, the Board carefully reiterated that the Labour Code made no guarantee that a collective agreement would be concluded in all cases. First contract arbitration was not intended to apply where both parties were "genuinely prepared to sign a collective agreement" but failed to do so because each took a different position. The objective was to promote collective bargaining, not to be a substitute for it. Where an employer was bargaining in bad faith as part of a strategy to oust the union

---

31 The number of referrals by year (from the Ministry of Labour) and distribution of cases by method of disposal applied by the Board are as follows:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Applications</td>
<td>17</td>
<td>9</td>
<td>0</td>
<td>1</td>
<td>27</td>
</tr>
<tr>
<td>Disposition:</td>
<td>Contract imposed</td>
<td>8</td>
<td>Application rejected</td>
<td>6</td>
<td>Settled with the assistance of the Board</td>
</tr>
</tbody>
</table>

(These statistics were drawn from the Annual Report of the Labour Relations Board of British Columbia, 1977, at 51-54.)

32 In these cases the unions were creating a situation which was hurting the employer primarily through pressure applied from secondary sources. The Board settled all of these employer applications and no contracts were imposed.

(Supra note 21; none of these cases was reported.)


34 *Id.* at 143.

35 *Id.*
completely, first contract arbitration was to prevent, at least for a year, the accrual of any benefit from those efforts.

The Board pointed out that under the legislation bad faith bargaining was not a prerequisite to the exercise of section 70. Instead, the Board was directed to consider two matters: bargaining, and comparable terms and conditions of employment. The Board concluded that the Legislature had provided this second gauge because bargaining was often difficult to evaluate. Furthermore, the Board stated that an employer could be so unreasonable in negotiations as to impair the possibility of collective bargaining, despite the fact that management was still prepared to sign an agreement on its own terms. The Board cautioned that the Legislature "did not require a union to pay any price that was asked in order to achieve a first agreement." However, it would require very strong evidence, with an employer relying upon "extremely unrealistic proposals" to justify a first contract remedy in the absence of bad faith bargaining. In the case at hand the Board found evidence of a pattern of abusive employer conduct that had created a bargaining impasse requiring section 70 resolution. In fashioning the terms and conditions of the imposed contract, the Board stated that section 70 contracts should not be used "to achieve major breakthroughs in collective bargaining." However, the terms should be "sufficiently attractive" to the employees that they would "think twice" about a decertification application. In this instance, the Board invited the parties to submit written contracts. The intention was to use the process of final offer selection. Upon examining the contracts submitted, however, the Board concluded that final offer selection was unworkable and instead asked the parties to make oral argument giving their reasons for each proposed provision. During these presentations a form of bargaining began, and the Board ordered the parties to continue to bargain in the Board's hearing rooms with panel members observing and providing advice to each side. This form of mediation-arbitration resulted in the resolution of many outstanding issues. The remaining points of contention were ultimately arbitrated by the Board.

In another case heard very near in time to the London Drugs case, Grandview Industries Ltd., the Board refused to provide a first contract remedy. There had previously been a collective bargaining relationship in the Grandview plant, which had ceased when the operations were shut down for valid business reasons. Now that operations had started up again, a new union had been certified to represent the employees. Grandview was a subsidiary of Noranda Corporation, which was party to numerous collective agreements. Grandview itself was "no stranger to collective bargaining".

---

30 Id. at 144.
32 Id. at 147.
having concluded contracts for units of employees in its Ontario region. The Board reasoned that the fact of previous collective bargaining on the part of the employer, while not conclusive, constituted a strong argument against the use of section 70 powers. In this case, the Board found no evidence that the company had opposed certification through unfair labour practices or any other means. The union's bargaining authority did not appear to be endangered. There had been no employer attempt to negotiate with anyone other than the union. Monetary proposals had been given to the union, and these proposals were within the range of existing settlements at the employer's other operations, where contracts had been concluded with other trade unions and this trade union. When the strike began, there was no attempt to replace the strikers. The Board concluded that first contract arbitration should not be imposed. Bargaining was transpiring between two parties, "sophisticated in the art of bargaining", who simply could not agree on terms.

The most pessimistic of the early decisions applying first contract arbitration legislation was that of *M. & H. Machinery and Iron Works Ltd.* The union had been certified over the employer's objections that trade unions did not belong in small businesses. The futility of attempts at bargaining soon led to a strike. The employer continued to operate, using the labour of its principals only. Intermittent picketing resulted in property damage and even a shotgun incident. The Board imposed a contract:

From start to finish in the history of this relationship, the Employer has adamantly refused to participate in [the exercise of collective bargaining]. Its principals hold stubbornly to the view that small businesses such as theirs should have the cloud of trade-unionism removed from over their heads. The results of their stonewalling tactics over the past year is that all of the employees have lost their jobs and the Union has been frustrated in the bargaining rights it secured under the laws of this province.

In what appears to be an expression of doubt about the efficacy of the remedy in this situation, the Chairman of the Board continued:

I confess that I am not especially hopeful that first contract arbitration will produce any radical change of heart on the part of this Employer. However, I do believe it would make a mockery of the policies underlying s. 70 of the Code if the Board did not intervene in this case.

C. Evaluation of First Contract Arbitration in British Columbia

Weiler has observed that first contract situations can be broken down into five categories:

1) In 30 per cent of the cases, the union application for certification is a pure formality. A collective agreement has already been signed. (This situation is extremely prevalent in the construction industry.)

---

43 *Id.* at 148.
44 *Id.*
46 *Id.* at 517.
47 *Id.*
2) In another 30 per cent of the cases, certification occurs where the employer is not strongly opposed to unionization and collective bargaining. There is no collective agreement before certification, but after certification a contract is signed. There is only a short period of bargaining, and no strike.

3) In still another 30 per cent of the cases, the employees have obtained certification, but this is an “instant” event without much durability. The union has typically negotiated a standard industry agreement in other plants and presents this standard agreement to the employer as the union’s bargaining proposal. The employer rejects it for bona fide business reasons. The union’s bargaining position is inflexible; it recognizes that if it agrees to dilute the standard agreement for this employer, other employers will begin to demand concessions. Confronted with a dilemma, the union canvasses the opinions of the membership to determine whether there is support sufficient for a strike. Because of turnover and lack of interest on the part of remaining union members, the employees reject the idea of a strike. The union then abandons the unit, although there is rarely any formal decertification.\(^4\)

4) Approximately 5 per cent of the remaining cases involve an anti-union employer who is absolutely determined to defeat the union. Once bargaining begins the employer refuses to discuss monetary settlements until all the rest of the contract language is settled. The employer deliberately stalls in every manner possible. Meanwhile, union supporters are being laid off or dismissed and replacements are being screened. Supervisors will be downgrading the union in informal discussions with employees, and letting it be inferred that but for the union’s alleged intransigent bargaining position over contract language, wage increases or other benefits would be immediately forthcoming. By the time the union goes back to the employees for a strike vote, support has diminished to the point where a strike is no longer feasible. The employer sits tight at this point and waits for the employees to petition for decertification.\(^5\)

5) In the small number of remaining cases, the employer carries on exactly as he has in category (4), but miscalculates. Support for the union is still strong enough to produce a strike vote. The strike begins and the employer continues to operate, hiring replacements and using the labour of supervisors and some of the non-striking employees who cross the picket lines. The picketing employees see the employer operating without loss and sense there will be no movement at the bargaining table. Predictably, violence soon erupts on the picket line and police move in to escort the non-striking employees through the picket lines. The case attracts public attention and the labour movement rallies around. Especially where the situation involves employees who are poorly paid minority workers, and the employer appears particularly intransigent and “Neanderthal”, the case becomes a cause célèbre.\(^6\)

The British Columbia Labour Board intended that its first contract provisions should cover cases in categories (4) and (5), but not in category (3).

\(^{4}\) Supra note 19, at 49-50.

\(^{5}\) Id. at 50-51.

\(^{6}\) Id. at 51.
The problem was to ensure that the Board did not erroneously apply the remedy to category (3) cases, and to convince the labour relations community that only category (4) and (5) cases would be considered. Initially the unions believed the first contract arbitration remedy would provide relief in category (3) cases and came to the Board demanding the imposition of a standard industry agreement. The Board was forced to refuse such applications, and continued to refuse them for some time until the boundaries of the remedy became clearer. When questioned about whether the first contract arbitration remedy inevitably affected cases outside categories (4) and (5), Weiler admitted it did “to some extent”, especially at the outset before the labour relations community understood the Board’s strict position.

In evaluating the first contract arbitration remedy, Weiler has pointed to three goals.\(^5\) The first is to put an immediate end to the confrontation, a goal that is especially important in category (5) cases. Weiler has commented, “To me, that by itself is sufficient justification for first contract arbitration. It was obviously what we had in mind in enacting it.”\(^6\) Evaluating how effective the legislation has been in achieving this goal, Weiler was enthusiastic. He described a category (5) labour dispute as

an emotional and messy confrontation, in which the parties not only are inflicting disproportionate harm on each other, totally out of line with the negotiating issues dividing them, but their willingness to escalate the dispute is drawing others into the mêlée—sympathizers, the police and public authorities, or third party employees.\(^5\)

He felt strongly that first contract arbitration was “a sharp surgical instrument for lancing those running sores in the body of industrial relations.”\(^5\) Obviously the first contract remedy ends the dispute upon imposition of a contract. Does this dispute flare up again at the end of the year when the contract terminates? Does the remedy provide only an interim solution? Weiler has observed that in none of the cases known to him did the dispute flare up again after the contract terminated, but he warned against drawing any conclusions from this since in most cases where the Board imposed a contract, the union was eventually decertified. Weiler added that in his opin-

---

52 Supra note 21. Weiler commented:

We tried to make it clear in the first cases that we would not use the first contract remedy in hard bargaining situations. I'm fully appreciative that that is no guarantee to the parties. They can't be sure that the Board will recognize hard bargaining for what it is, or even that the Board will follow the guidelines it has laid down for itself. There is no question but that the unions thought they could get the standard agreement in any case they brought before the Board. We had to tell them many times that first year that we would not do this. We rejected as many applications for contracts as we imposed.

But clearly it is detrimental to have the unions coming so often before the Board. It hardens bargaining positions, and lessens the likelihood for settlement. This impact is inevitable at the outset, but it lessens dramatically after the industrial relations community realizes that the Labour Board means what it says. (supra note 21).

53 Supra note 19, at 53-55.

54 Supra note 48.

55 Supra note 19, at 53.

56 Id.
ion these cases were not as significant as the far larger number of cases where
the Board was able to mediate a voluntary settlement: "So far as I know, none of those cases ever returned to haunt us. My sense is that ending the
nasty dispute in the first year will end it for good. Either collective bargain-
ing will take or it won't. There are no guarantees."57

The second goal Weiler has articulated for first contract arbitration is
that of promoting understanding through "trial marriage". According to
Weiler, it had been assumed that much of the difficulty surrounding first
contract negotiations arose because the employer was completely distrustful
of unions, very apprehensive about the effect collective bargaining would
have upon its business. The intent was that actual experience with union-
management relationships under a contract would eliminate that paranoia.
There would be a breathing space of a year during which the parties could
get used to each other. Living through one year under a first contract would
act as a trial marriage and perhaps would create a base for a more sophisti-
cated, long-standing relationship.58 After five years experience, Weiler is now
skeptical of that thesis. The union-management relationships did not mature:

The unions were decertified after the expiry of the contract which we had imposed.
These bargaining units tended to be small, employee turnover was high, the union
was not able to retain or to rebuild its support, and the employer remained hostile
throughout the entire experience.59

Weiler has concluded that certain pre-conditions are required for first con-
tract arbitration to be able to initiate long-range collective bargaining over
the opposition of a determined employer. The unit must be sizeable (100
employees or more), and the union must have managed to maintain a strong
core of supporters (25-30 employees). Furthermore, the contract should
endure for two years rather than one. When the contract lasts for only one
year, before the tumult has died down the year has passed and the union
supporters have been unable to get organized. With a two year agreement
the union supporters have a reasonable period in which to form an inside unit
committee to administer the contract and illustrate the day-to-day benefits of
collective bargaining.60 "Only in this way will the union have the footing it
needs to survive the expiry of the first contract, when it must negotiate a
renewal on its own," he stated.61 The Board has clearly recognized the limita-
tions of the first contract remedy with respect to the "trial marriage" theory.
A change in approach is evident from the reluctant imposition of the first

57 Supra note 21.
58 Supra note 19, at 53.
59 Id. at 54. Weiler knew of only one case that had gone through decertification
where the first contract was settled through Board mediation rather than imposed. (supra
note 21.)
60 Id. Weiler noted that although the new federal Canadian labour legislation pro-
vides for a one-year first contract, the newly-enacted Quebec provisions allow for two
years. (supra note 21.) (See section on Quebec legislation, infra.)
61 Id. Before leaving this discussion of the "trial marriage" theory, it is interesting
to examine the Board's use of union security provisions in first contract arbitration. In
the first imposed contract, London Drugs, the union asked for a union shop provision
which would have enabled it to get rid of the non-union employees. The Board refused
this request, and wrote a looser union security clause into the contract imposed. Weiler
contract in the *M. & H.* case to the case of *Kidd Brothers Produce Ltd.*, where the Board refused to apply the first contract remedy because particular conditions, similar to those outlined by Weiler above, were not present.

The third goal Weiler has ascribed for first contract arbitration is that of prevention. His assessment was that the remedy had been of great effect in this area. He concluded that the existence of section 70, coupled with careful application and interpretation of the remedy by the Board, had essentially eliminated situations of the Sandringham type from the provincial labour scene. When the Board did impose first contracts, it made the compensation package "rather generous." The intent was to discourage other employers from using the types of practices that could prompt a Labour Board hearing. "There's no doubt in my mind about the impact of that policy," stated Weiler, adding:

First contract confrontation died out in the provincial jurisdiction in British Columbia. We did not experience the long, agonizing battles which have cropped up in Ontario in the last few years. Nor can that be explained by the suggestion that British Columbia has a mild labour relations climate. Quite the contrary! In fact there was such a bitter fight at a Vancouver radio station (Station CKLG) which came within the jurisdiction of the Canada Labour Code, at that time not containing any provision for first contract arbitration.

It seems clear that a good portion of the prevention attributed to section 70 was effected by labour lawyers and industrial relations consultants who communicated the Labour Board's intentions to their clients and were able to persuade many to engage in serious negotiations. A significant role was also played by the Board's own mediators. As stated earlier, most of the section later asserted that "from a purely practical point of view" this was a wrong decision (supra note 21.) The union was ultimately decertified. So many union members had been replaced by non-union employees that the union had lost its foothold. From this point on, the Board was satisfied that the weaker union security clause was a mistake. All future first contracts which the Board imposed included a union shop provision. Justifying this, Weiler commented: "You need a union shop clause to ensure cohesion among the unit for the next bargaining session. You need more than a contract that ends the previous dispute. The union needs a footing and a perceived footing in the bargaining unit. The union shop gives it the strength so that it has a shot at making a go of it the next time round." (supra note 21.)

62 *Supra* note 45.


64 *Supra* note 19, at 54.

65 *Id.* Weiler has been questioned about the appropriateness of using a general deterrence policy in the labour relations context. The argument runs that it may not be fair to the parties to impose a generous wage settlement in the hopes of deterring others in the industrial relations community. Perhaps this type of reasoning should not be imported into labour law from criminal law. Initially Weiler responded that it is not solely deterrence which is involved here, that there is also an element of compensation. In addition, he noted that general deterrence principles have often been utilized in dealing with individual employees, (in the discharge and discipline arbitration context). He saw nothing wrong with directing general deterrence principles against individual employers. (supra note 21.)

66 *Supra* note 19, at 54.
70 applications that came before the Board were ultimately settled at the mediation stage.\(^67\)

In evaluating the three goals, then, it appears that first contract arbitration works effectively in implementing the goals of ending the dispute and prevention, and not so effectively in promoting understanding through trial marriage, at least in the absence of certain preconditions. An interesting problem has emerged, however. The Ministerial screening device has backfired to some extent and may have destroyed the effectiveness of the deterrence goal. When the screening provision was built in, no natural justice guidelines were required; no format for a hearing was set out. As a result, when the NDP government lost the next provincial election and the Social Credit government took over the administration of the labour legislation, a new set of political views came to bear on the operation of the Labour Code. Eventually the party caucus and the provincial Cabinet got into the act of making these screening decisions. For the first period after the election, the Social Credit government refused to let any section 70 applications through to the Board (with the exception of two employer applications). In effect, executive discretion repealed the first contract remedy. This approach certainly had the potential to destroy the effective deterrence of the provision. For this reason, Weiler has concluded that including a screening process was a mistake, at least viewed from the long run. Nevertheless, perhaps in mute testimony to the effectiveness of the remedy, the Social Credit government has recently relented and allowed a union section 70 application to be turned over to the Labour Board.\(^68\)

\(^{67}\) Weiler described the mediation process in first contract arbitration cases. At the outset, the Board was reluctant to force the parties into a time-consuming hearing in an adversary setting. "That sort of rigid format is especially disastrous when the parties are having a tough time establishing a collective bargaining relationship in the first place," Weiler asserted. Instead, the Board required the parties to submit a detailed written statement outlining the events from the original organizing drive through to the present bargaining impasse. In most first contract cases, the Labour Board had already been involved with the parties; it had determined the initial certification and had adjudicated unfair labour practice complaints. Thus the Board was able to cross-check the stories of the parties with its own files. The Board also discussed the matter with the Ministry of Labour mediators. "Our approach was that of wide-ranging investigation. Only after this did we make a judgment about whether to get involved," stated Weiler. (supra note 21.)

Once the Board determined it should intervene, it would require the parties to submit their final offer of a complete collective agreement, including compensation and wage rates. Some employers were reluctant to submit monetary proposals. The Board informed them that failure to submit a counter-offer would result in Board imposition of the union proposal. (In fact, in the M. & H. case, the employer persisted in its refusal and the Board did just that—the union's demand was imposed without amendment.) Once the proposed agreements had been submitted, the Board would have the parties meet with Board officers and sometimes Board panel members. A process of mediation would begin. In most cases, the majority of terms would be settled, and the Board would impose its decision on the few outstanding items. "In our opinion, the mediation-arbitration technique worked much better than a full-scale hearing procedure," concluded Weiler. (supra note 21.)

\(^{68}\) Supra note 21.
IV. INTERIM REMEDIES IN THE ABSENCE OF FIRST CONTRACT ARBITRATION

Lacking first contract arbitration legislation, the Ontario Labour Relations Board (OLRB) has struggled to devise some effective means of dealing with refusal to bargain in the first contract situation. In a number of cases parties appearing before the Board have requested that a contract be imposed, despite the lack of such legislation. Compensation for employees and unions has also been sought.

A. Imposition of a Contract

DeVilBiss (Canada) Ltd.\textsuperscript{69} was a case analogous to the Fleck situation—a first contract employer refusal to bargain. The Board found that the employer had failed to bargain in good faith and in addition, during negotiations, had unilaterally implemented wage increases and other improvements contrary to the Ontario Act. The union requested that the Board direct the employer to sign a one-year collective agreement containing the wage increases and other improvements that the employer had already announced, as well as "the other necessary clauses common to all collective agreements (i.e., recognition, grievance procedure and statutory arbitration clause; statutory dues deduction on a voluntary basis.)\textsuperscript{70} The OLRB refused to make such an order, pointing out that the legislation was based upon the premise that the parties were in the best position to draft and agree upon the terms of a collective agreement. The Board stated, "[T]he legislation is based upon the notion of voluntarism and [it is] reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal."\textsuperscript{71}

Differences as to the substantive terms of the collective agreement were to be resolved by recourse to economic sanctions. Commenting on the novel remedy sought, the Board stated that it had "doubts that the Board possesses the authority" to impose a contract.\textsuperscript{72} Nevertheless, the issue of the Board's power to issue such a remedy was not resolved conclusively, since the Board determined that in this case the parties were quite capable of arriving at their own agreement.\textsuperscript{73} A typical direction to bargain was issued.\textsuperscript{74}

\textsuperscript{70} Id. at 59 (O.L.R.B. Rep.), 110 (Can. L.R.B.R.)
\textsuperscript{71} Id. at 61 (O.L.R.B. Rep.), 112-13 (Can. L.R.B.R.)
\textsuperscript{72} Id. at 66 (O.L.R.B. Rep.), 118 (Can. L.R.B.R.)
\textsuperscript{73} Id.
\textsuperscript{74} Union counsel in the subsequent Board hearing of the Radio Shack case (supra note 12) would stress that DeVilBiss demonstrated the inadequacy of the Board's conclusion not to impose a contract, because a collective agreement was not subsequently achieved by the parties. (Radio Shack, supra note 12 at 1265 (O.L.R.B. Rep.), 139 (Can. L.R.B.R.) The Board noted at that time, however, that the union had never brought an application alleging non-compliance with the Board's bargaining order:

Surely it is incumbent on the beneficiary of a bargaining order to husband the directive carefully and, in a non-compliance proceeding, there is a heavy onus on a respondent to persuade this Board that its subsequent conduct is consistent with the
In Board of Health of Haliburton, Kawartha, Pine Ridge District Health Unit\textsuperscript{76} the parties were negotiating for a renewal of their collective agreement. During the negotiations the employer agreed orally to the union's request that any impasse in future negotiations of the contract would, at union request, be submitted for final and binding arbitration. The parties were unable to settle all the outstanding issues in this round of bargaining, however, and a lockout ensued. When work was resumed upon the termination of the lockout, bargaining continued. The employer withdrew its previous agreement on the arbitration clause for future negotiations. The union sought a ruling of employer bad faith bargaining from the OLRB, and an order making the clause on voluntary arbitration “effective between the parties as though made by final agreement.”\textsuperscript{77} Although the Board made a finding of bad faith bargaining, the finding was made upon other bargaining issues. The Board specifically stated that it was not bad faith to withdraw a tentative agreement reached earlier.\textsuperscript{77} In conclusion, the Board refused to consider ordering this clause (or any other) to be included in the agreement.

In The Journal Publishing Co. of Ottawa Ltd.\textsuperscript{78} the OLRB made a finding of bad faith bargaining on the part of the union and the employer both. The union requested that the Board impose the “contractual terms” that the parties “would have been expected to reach if there had been good faith bargaining.”\textsuperscript{79} The union wanted these terms to be retroactive to the expiry date of their last contract. In this case the Board concluded that the imposition of a collective agreement was clearly outside the scope of its authority:

[L]abour disputes are to be ultimately resolved by recourse to economic sanctions —the strike and the lockout. Compulsory interest arbitration has never been an ingredient of this statutory scheme. Does the existence of bad faith bargaining allow the Board to deviate from the clear scheme of the Act when exercising its remedial authority? We think not.\textsuperscript{80}

Buttressing its conclusion with additional arguments, the Board pointed out that such a remedy would be too difficult to apply in any event. There was no way of determining what the terms of the contract would have been. In fact, the parties might have failed to conclude any collective agreement. The terms of the contract might even have been detrimental to the union. To

\textsuperscript{77} Id. at 67 (O.L.R.B. Rep.), 223 (Can. L.R.B.R.)
\textsuperscript{78} Id. at 71 (D.L.R.B. Rep.), 228 (Can. L.R.B.R.)
\textsuperscript{80} Id. at 322 (O.L.R.B. Rep.), 196 (Can. L.R.B.R.)
impose a contract would require an exercise in speculation “without benefit of even such rudimentary navigational aids as the criteria that are found in those statutes that provide for interest arbitration.” Further, the use of compulsory arbitration as a remedy for failure to bargain in good faith could undermine the entire collective bargaining system. The parties would be likely to abandon the bargaining process to seek a remedy from the Board. The Board concluded that its remedial powers existed to complement the duty to bargain, not to supplant it.

B. Compensation to the Employees

Employees suffer financial loss when faced with employer bad faith bargaining: lost wages and employment benefits caused by the employer's failure to settle upon a contract and damages flowing from strikes and lockouts caused by bad faith bargaining. In a number of cases compensation for these losses has been sought. Both the OLRB and the British Columbia Labour Relations Board have considered the “make whole” remedy of compensation to the employees for the employer's failure to bargain. In the Ottawa Journal case the union requested that the OLRB award damages to employees for wages and other employment benefits lost as a result of the lockout. The employer argued that damages should never be awarded in bad faith cases. Although the OLRB refused to accept the employer's argument completely, it did note that the awarding of damages ought not to result in the indirect imposition of a collective agreement, stating: “In this case . . . it would be inappropriate to award damages for loss of wages suffered as the result of the lockout, since this approach would require the Board to determine terms and conditions of employment for those employees during that period.” In addition the Board felt it should not compensate for damage that had occurred from the use of legal economic sanctions. It stated: “The

81 Id. at 323 (O.L.R.B. Rep.), 197 (Can. L.R.B.R.)
82 Id. In The Municipality of Casimir, Jennings and Appleby, [1978] O.L.R.B. Rep. 507, [1978] 2 Can. L.R.B.R. 284, the OLRB departed from this policy, albeit in an unusual case. Following certification, the employer raised the issue of employer involvement in the organizing campaign, which it alleged deprived the Board of jurisdiction to grant the certificate. Despite this objection, bargaining had begun and the parties had reached agreement on a contract contingent upon the Board's confirmation of the original certification. The Board confirmed, but the employer sought judicial review. The employer refused to sign the contract because it might prejudice the judicial review application. Instead, the employer unilaterally implemented the terms of the agreement. The union sought a Board finding of bad faith bargaining and requested a Board order requiring the employer to sign the agreement. The Board granted this order, concluding that the employer was bargaining in bad faith, that there could be no prejudice pending judicial review because the employer had already implemented the terms of the agreement, and the agreement would necessarily fall if the certificate was quashed. Because the parties were ad idem on all of the terms of the proposed agreement, the Board was persuaded to issue an order requiring the parties to execute a document embodying these terms. Concluding that no interest arbitration was involved here, the Board stated: “[T]here is no need for the Board to substitute its value judgments on particular issues for those which might be hammered out between the parties as they have all been hammered out.” (Id. at 519 (O.L.R.B. Rep.), 295 (Can. L.R.B.R.)
83 Supra note 78.
84 Id. at 324 (O.L.R.B. Rep.), 198 (Can. L.R.B.R.)
mere existence of an element of bad faith bargaining cannot convert an other-
wise legal strike or lockout into an illegal act, that would give rise to exten-
sive liability in damages.  

The OLRB used the “make whole” remedy for the first time in the unfair labour practice case of Academy of Medicine, Toronto Call Answer-
ing Service. This was a run-away shop situation, where out of anti-union animus the employer had unlawfully shut down business during a strike. The OLRB concluded that it would not be feasible or appropriate to order the employer to re-open. However, the employees were entitled to some compen-
sation. An award of three months’ wages was made, which the Board described as an assessment designed to afford the employees “a reasonable period in which to secure alternative employment without loss of income.”

In the recent case of Grey-Owen Sound Health Unit the OLRB again used a “make whole” remedy. Lost wages were awarded to the employees based on a breach of the employer’s duty to bargain. It should be noted, however, that this was not a first contract situation. The previous contract, originally imposed through voluntary binding interest arbitration, had expired in 1976. The expired contract contained a clause requiring future interest disputes to be resolved by binding arbitration. Despite this clause, the health unit locked out its employees, openly admitting that the lockout was designed to force the union to agree to drop its demand for interest arbitration. The Board awarded lost wages to the employees and also ordered the employer to pay interest on the compensation owed.

C. Compensation to the Union

A union faced with bad faith bargaining will incur negotiating, litigating, and organizational expenses in combatting such tactics—expenses that some claim should be collected from the employer. Clearly this is a compromise remedy. It neither imposes a collective agreement nor is subject to the argument that the claimed amounts are too speculative. However, the notable deficiency of this approach is that union costs are seldom as much as the employer’s saving in labour costs derived from bad faith bargaining. Several cases have considered a union request for financial compensation for its increased expenses attributable to employer bad faith bargaining. In the Ottawa Journal case the union asked for damages based on the expenses it had incurred for litigation and the lockout attributable to employer bad faith bargaining. While the OLRB agreed that extra negotiating costs experienced because of the employer’s conduct might in some cases be awarded to the union, in this particular case the remedy was refused. The Board stated: “This is a case where neither side can give a clean bill of health, both sides on different occasions having failed to meet the standard of good faith bar-
gaining. . . . The appropriate remedy, in the Board’s view, is a bargaining

85 Id.
86 Supra note 11.
87 Id. at 795 (O.L.R.B. Rep.), 196 (Can. L.R.B.R.)
89 Supra note 78.
order directed at both sides." In the *Academy of Medicine* case the OLRB awarded the union "all reasonable organizational, bargaining, legal, and other expenses associated with its efforts to acquire and pursue its statutory rights" including costs of proceedings before the Board.

The British Columbia Board has been less hesitant to apply a "make whole" remedy, perhaps because its legislation providing for first contract arbitration has made it more adventuresome in dealing with such cases. The case of *Kidd Brothers Produce Ltd.* is an example of a situation where the Board refused to award a first contract, and instead ordered a "make whole" remedy. Following hard on the heels of the *M. & H.* case, where the Board had expressed its pessimism about the potential for success of first contracts imposed in certain situations, the *Kidd Brothers* case provided an extreme example of the type of labour situation where the first contract would be unlikely to succeed. There had been a clear-cut employer pattern of misconduct: unfair labour practice firings, non-compliance with Board orders to reinstate, further firings, employer intimidation of employees. The Board concluded that although the union's application satisfied the legislative requirement for first contract arbitration, section 70 should not be applied in this instance because there were "no real prospects for rejuvenation of [employee] support" for the union. The section 70 remedy had not been intended to be solely a punishing mechanism, but instead a positive device to encourage meaningful collective bargaining. Reasoning that since first contract arbitration in this case would not fulfil this goal, the Board refused to apply the remedy. Curtailing its application of the first contract arbitration remedy, the Board instead provided a "make whole" order of compensation to the union under its broad remedial authority to order rectification of labour legislation violations. As a result of the employer's bad faith bargaining, the union had failed to achieve the rights and status normally associated with certification. A cease and desist order merely ordering employer

---

90 Id. at 324 (O.L.R.B. Rep.), 198 (Can. L.R.B.R.)
91 Supra note 11.
92 Id. at 795 (O.L.R.B. Rep.), 195 (Can. L.R.B.R.)
93 Supra note 11.
94 Supra note 45.
95 Supra note 11, at 319.
96 Id. at 318-19.
97 Weiler has commented as follows:

We were learning more about the process as we went along. Before the *Kidd Brothers* case, we held a meeting with the entire panel to discuss whether the "make whole" remedy was the better remedy. Our legal clerks did a great deal of research on the "make whole" remedy. Although we did not determine at that point that the "make whole" remedy was the proper response in the *Kidd Brothers* case, we did conclude that in certain cases it would be a defensible remedy. Because of our wide remedial authority, we were able to fit the "make whole" remedy into our arsenal of remedies for unfair labour practices. On occasion, the "make whole" remedy is preferable to the first contract remedy. On other occasions, the right decision is to do nothing at all. (Supra note 21.)
compliance in the future would therefore be of no remedial authority. The Board determined that only a “make whole” order would be adequate.\(^8\)

D. Radio Shack Decision

The recent Radio Shack case\(^9\) deserves detailed examination since it has moved significantly further than previous jurisprudence in this area. On December 5, 1979, the OLRB handed down its decision in Radio Shack, a decision that the Toronto Globe & Mail described as “a landmark, detailing the most comprehensive set of remedies for bad faith bargaining ever given by a labour board in Canada.”\(^10\) The situation involved bad faith bargaining allegations surrounding first contract negotiations. Radio Shack had begun negotiations after having dismissed two employees for union activity, refused to reinstate an employee despite a Board direction to do so, threatened to move the plant out of Ontario, provided support for an anti-union petition, conducted overt surveillance activities of union members, and disparaged the Board’s procedures.\(^11\)

In a deliberate attempt to polarize the employees, Radio Shack had distributed to its employees bright red T-shirts embossed with the words, “We're company finks ... and proud of it.”\(^12\) During the bargaining sessions the company had put forward rigid and inflammatory proposals calculated to intensify the conflict.\(^13\) One of the most contentious bargaining issues was that of union security. The company was adamantly opposed to the introduction of union security, having gone so far as to send a memo to its employees stating: “We have told you before and we tell you again—no one has to be a union member TO WORK AT RADIO SHACK—NOW OR EVER.”\(^14\) At the Board hearing, the company admitted that it could offer no business reasons for refusing the demand for union security, but opposed the provision because it believed the union lacked sufficient employee support.

The union accused the company of bad faith bargaining and the Board

\(^8\) Calculating the amount due, the Board stated:
In assessing the losses suffered by the Union in this case, we begin from the premise that a union is an organization in the business of providing collective representation for employees. ... In this case, the Union’s loss of support among the employees in the bargaining unit was directly attributable to the aggravated character of the Employer's misconduct. In an attempt to maintain the support of the employees in the face of the Employer's continued opposition, the Union was required to incur expenses that it would not otherwise have been required to incur. While there is nothing which the Board can now do to recapture the employees' support for the Union, we are unanimously of the view that the Union should be compensated for the portion of the lawyer's fees, litigation expenses, and Union organizational expenses which are directly attributable to the Employer's misconduct. (Supra note 11 at 325.)

\(^9\) Supra note 12.

\(^10\) Toronto Globe & Mail, January 30, 1980.

\(^11\) Supra note 12, at 1246 (O.L.R.B. Rep.), 122 (Can. L.R.B.R.)

\(^12\) Id. at 1223 (O.L.R.B. Rep.), 102 (Can. L.R.B.R.)

\(^13\) Id. at 1247 (O.L.R.B. Rep.), 123 (Can. L.R.B.R.)

\(^14\) Id. at 1226 (O.L.R.B. Rep.), 104 (Can. L.R.B.R.)
concluded that Radio Shack had breached the Act.\textsuperscript{105} Considering the issue of union security, the Board stated:

[W]e have difficulty with [Radio Shack's] explanation that [its] position on union security is simply an unwillingness to agree to a Rand formula where the union lacks a very large degree of employee support. Where the employer adopting this position has played no significant role in unlawfully contributing to the absence of such support, the position is unobjectionable. ... But where an employer adopts this stance after having engaged in the kind of pervasive unlawful conduct that [Radio Shack] has engaged in, [it may cause the Board to conclude the employer has failed to bargain in good faith.\textsuperscript{106}]

The union requested wide-ranging remedies from the Board for the employer's bad faith bargaining. It sought: 1) a declaration that the employer had violated the Act, 2) a request that the Board determine all outstanding issues and direct the parties to execute a collective agreement, 3) alternatively, a Board submission of outstanding issues to interest arbitration, 4) alternatively, a payment of compensation to the union for all expenses attributable to its attempt to pursue its statutory rights, and 5) alternatively, a direction to bargain and several forms of additional relief.\textsuperscript{107} The union tried to distinguish this case from the decision in \textit{Ottawa Journal},\textsuperscript{108} where the Board had refused to impose a contract, by arguing that in this situation the employer had not recognized the union at all.\textsuperscript{109} Summing up its plea for these sweeping remedies, the union stated that the case called for innovative relief.

Dealing first with the request for the "make whole" remedy to the employees and the union, the Board concluded that damages were being sought for "the loss of an opportunity to negotiate a collective agreement or the loss of an opportunity to achieve an agreement at an earlier point in time."\textsuperscript{110} An order was given for the company to pay all union negotiating costs incurred to the date of the decision and all extraordinary organizing costs caused by the employer's improper actions.\textsuperscript{111} In addition the company was ordered to pay the employees "all monetary losses that the union [could] establish by reasonable proof as arising from the loss of opportunity to negotiate ... a collective agreement," plus interest.\textsuperscript{112} The union's legal costs were denied.

The Board concluded that it lacked jurisdiction to grant the request for the imposition of a contract. The British Columbia legislation specifically provided for this type of remedy, but set out numerous preconditions such as Ministerial consent. The Board concluded that it was unreasonable to think that the Ontario Legislature intended to give the OLRB more power than the British Columbia Board without any overt reference to this type of remedy in the Act. In addition, where contractual terms (such as grievance arbitra-

\textsuperscript{105} Id. at 1247 (O.L.R.B. Rep.), 123 (Can. L.R.B.R.).
\textsuperscript{106} Id. at 1250 (O.L.R.B. Rep.), 126 (Can. L.R.B.R.).
\textsuperscript{107} Id. at 1220-21 (O.L.R.B. Rep.), 100 (Can. L.R.B.R.).
\textsuperscript{108} Supra note 78.
\textsuperscript{110} Id. at 1258 (O.L.R.B. Rep.), 133-34 (Can. L.R.B.R.).
\textsuperscript{111} Id. at 1271 (O.L.R.B. Rep.), 144 (Can. L.R.B.R.).
\textsuperscript{112} Id. at 1271 (O.L.R.B. Rep.), 145 (Can. L.R.B.R.).
tion) were imposed upon the parties in other sections of the Act, the legisla-
tion stated specifically that this was required. If the Legislature had intended
that the Board be given the power to impose contracts, it would have made
this power explicit. Despite this conclusion the Board continued:

However, [this] is not to say that bargaining orders, cease and desist directions, and
findings of bad faith cannot have an indirect impact on the content of a collective
agreement. For example, surely this Board has the power to direct a party to
cease and desist in the making of unlawful or inflammatory proposals, and, in
doing so, the content of any resulting collective agreement will be indirectly
affected.\footnote{Id. at 1268 (O.L.R.B. Rep.), 142 (Can. L.R.B.R.)}

The Board's order thus stated that the company position on union security
violated sections 14, 56, 58 and 61 of the Act, and directed the company to
bargain in good faith, ordering Radio Shack to make a complete proposal
that it was willing to accept at the next meeting. In making this proposal,
Radio Shack was ordered to cease and desist from its position on union
security, to drop its insistence on a voluntary dues check-off.\footnote{Id. at 1269 (O.L.R.B.), 143 (Can. L.R.B.R.)}

Radio Shack immediately sought judicial review of several aspects of the
order. Most importantly, it sought a finding that the Board had erred in im-
posing a "make whole" remedy, and that the Board had indirectly imposed
a contract term by putting the company in the position of having to offer the
compulsory dues check-off that the union wanted. On the "make whole"
remedy, the company argued that before such an award could be made the
Board would have to conclude that a collective agreement would have been
signed, when it would have signed, and what the terms of the contract would
have been. Arguing that this would involve the Board in wild speculation,
Radio Shack asserted that such an award amounted to a penalty.

The Divisional Court ruling\footnote{Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America &
O.L.R.B., released by Divisional Court, February 29, 1980.} unanimously upheld the OLRB on all
challenged points. The court rejected the employer submission on the "make
whole" remedy, noting that the courts themselves had long recognized that
damages could be awarded for the loss of opportunity:

So long as the award of the Board is compensatory and not punitive; so long as it
flows from the scope, intent and provisions of the Act itself, then the award of
damages is within the jurisdiction of the Board. ... The Board's interpretation of
its power to award damages cannot be deemed to be patently unreasonable. It may
be that the company's submission on this point is premature and that it will wish
to consider whether the Board has been unreasonable when it makes its findings
as to the quantum of damages.\footnote{Id. at 30, 33.}

The Court also dealt with the argument that the Board had imposed a term
of the contract upon the company by ordering it to cease and desist from its
position on union security. While reiterating that the Board had no authority
to impose a collective agreement, the Court pointed out that the rigid com-
pany position on union security had the purpose of avoiding a collective
agreement. It was all part of the company’s earlier tactics to undermine the union in the eyes of the employees. In light of this, the Board’s cease and desist order was reasonable and within its jurisdiction, even if it had the indirect effect of imposing a term of a collective agreement upon the parties. In this respect, the Radio Shack decision would seem to have overruled the earlier Ottawa Journal case.117

The last stage in the scenario was Radio Shack’s application for appeal to the Ontario Court of Appeal. The application was denied on March 11, 1980, and the company agreed at that point to comply immediately with the sweeping remedial orders of the Board. Radio Shack clearly represents the high-water mark in the fashioning of remedies for bad faith bargaining by the OLRB. Despite the “make whole” award and the indirect imposition of a union security contract term, the Board and the Divisional Court articulated once again that the Board is not authorized to engage in or impose first contract arbitration. The Board itself somewhat indirectly pointed to the need for legislative reform in this area by stating in the decision:

If the statute, as currently drafted, is inadequate to get at the roots of first agreement recognition conflict, it is as much a function of this Board’s expertise to point this problem out as it is to elaborate properly the general language used... This Board has tried to elaborate the statute to give ongoing life and meaning to the Legislature’s intent, but there comes a point where the legislation ends and the Board can go no further.118

E. American Litigation: Response of the National Labour Relations Board

The tensions experienced in Ontario are also felt in the labour law of the United States, where labour boards are struggling to find effective remedies in the case of the intransigent employer’s refusal to bargain. When a union sought the imposition of a provision in a first contract, the National Labour Relations Board’s (NLRB) initial reaction was to grant the request, but it was overruled by the courts in a response opposite to that of the Ontario courts. The classic case in this area is H. K. Porter Co., Inc. v. NLRB.119 The United Steelworkers union had been certified by the NLRB in 1961 and bargaining began shortly thereafter. For eight years litigation see-sawed between the Board and various courts. The main issue in dispute was the union’s bargaining demand for a dues “check-off” union security clause. The company’s objection to this clause was not based on legitimate business

---

117 Supra note 78. The Board in the Ottawa Journal case, it will be recalled, had explicitly refused to award damages to the union as this would have had the “indirect effect” of imposing a collective agreement.

118 Supra note 12, at 1267 (O.L.R.B. Rep.), 141 (Can. L.R.B.R.)

119 H. K. Porter Co., Inc. v. NLRB, 397 U.S. 99, 90 S.Ct. 821 (1970). The H. K. Porter case was raised in argument during the hearings on Radio Shack. The union argued that H. K. Porter could be distinguished because of the difference in wording between the Ontario legislation and the National Labor Relations Act, 61 Stat. 136, 29 U.S.C.A. The Divisional Court in Radio Shack agreed with this argument and in addition distinguished the American authorities by pointing to the differences in legislative interpretation between the countries (due to the American emphasis on Congressional debates.) The Divisional Court also noted that the American decisions were not uniform on this point in any event.
reasons, but was grounded in its stance that it would not "aid and comfort
the union". The long delay was chiefly the result of the skill of the com-
pany's negotiators, who took advantage of every possible opportunity to stall.
The NLRB and the Court of Appeals, District of Columbia Circuit, had
concluded that the company's refusal to bargain about the dues check-off
was made solely to frustrate the making of any collective agreement. In
1968 the Board and the Court of Appeals had ordered the company to grant
to the union a contractual clause providing for the check-off of union dues.
This was the first time in the history of the National Labor Relations Act that
either an employer or a union had been ordered to agree to a substantive
term of a collective agreement. The Court of Appeals had concluded that
this was the only effective remedy available in the face of such employer
intransigence.

The Supreme Court refused to uphold the order, noting that the NLRB
had the power "to require employers and employees to negotiate", but did
not have the authority "to compel a company or a union to agree to any
substantive contractual provision of a collective bargaining agreement." Recognizing the deficiency of the remedies left to the Board, the Court sug-
gested legislative reform might be in order:

It may well be true, as the Court of Appeals felt, that the present remedial powers
of the Board are insufficiently broad to cope with important labor problems. But it
is the job of Congress, not the Board or the courts, to decide when and if it is

---

120 Id. at 101 (U.S.), 822 (S.Ct.)
121 Id.
122 Supra note 119.
123 Supra note 119, at 106 (U.S.), 825 (S.Ct.)
124 Id. at 102 (U.S.), 823 (S.Ct.)

The Court continued:
The object of this Act was not to allow governmental regulation of the terms
and conditions of employment, but rather to ensure that employers and em-
ployees could work together to establish mutually satisfactory conditions. The
basic theme of the Act was that through collective bargaining the passions,
arguments, and struggles of prior years would be channeled into constructive,
open discussion leading, it was hoped, to mutual agreement. But it was re-
cognized from the beginning that agreement might in some cases be impossible,
and it was never intended that the Government would in such cases step in,
become a party to the negotiations, and impose its own views of a desirable
settlement. (Id. at 103-104 (U.S.), 823 (S.Ct.))

It is implicit in the entire structure of the Act that the Board acts to oversee
and referee the process of collective bargaining leaving the results of the
contest to the bargaining strengths of the parties. ... [T]he act as presently
drawn does not contemplate that unions will always be secure and able to
achieve agreement even when their economic position is weak, or that strikes
and lockouts will never result from a bargaining impasse. (Id. at 107-109 (U.S.),
825-26 (S.Ct.))
The argument that a union faced with an intransigent employer should strike is
somewhat faulty. The Act permits legal strikes but certainly does not intend to
encourage them. That this is so is made clear by the explicit statutory duty to
gain. Further, this line of argument fails to recognize the difference between
an economic strike and the unfair labour practice strike. In the latter the em-
ployer is engaging in a labour stoppage in order to oust the union entirely.
(Schlossberg & Silard, supra note 10, at 1080-81.)
necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side’s demands.\textsuperscript{125}

Similar arguments have been raised in considering the “make whole” remedy of compensation to employees. In \textit{NLRB v. Tildee Products, Inc.},\textsuperscript{126} the NLRB had issued a cease and desist order in the face of employer refusal to bargain. The union petitioned for judicial review, contending that the Board’s traditional remedy in the face of such employer intransigence rewarded the company for its unlawful conduct. The District of Columbia Circuit Court agreed with the union, stating: “Enforcement of an obligation to bargain collectively is crucial to the statutory scheme.”\textsuperscript{127} The Court concluded that an effective remedy should provide for compensation to those who had suffered from the breach of the legislation. As well, the Court stated that the remedy should remove from the violator any benefits that had accrued by its unlawful conduct. This was particularly important for first contract cases:

Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally forced to bargain with the union some years later, the union may find it represents only a small fraction of the employees. . . . Thus the employer may reap a second benefit from his original failure to comply with the law: he may continue to enjoy lower labour expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively.\textsuperscript{128}

The Court sent the case back to the NLRB for reconsideration of a “make whole” remedy, citing the \textit{H. K. Porter} decision and attempting to distinguish it from the case at hand:

We in no way suggest that the Board can compel agreement or that the make-whole remedy is appropriate under the circumstances in which the parties would have been unable to reach agreement by themselves. Quite the contrary, we have specifically limited the scope of our remand first, to consideration of past damages, not to compulsion of a future contract term, and second, to relate to damages based upon a determination of what the parties themselves would have agreed to if they had engaged in the kind of bargaining process required by the Act.\textsuperscript{129}

When the Board reconsidered the case, it again refused to apply a “make whole” remedy, holding that the remedy was not “practicable”.\textsuperscript{130} The Board did, however, order the employer to reimburse the union for expenses incurred in preparing and presenting the bad faith bargaining case. These expenses were to include the costs and expenses compiled during the Board and court proceedings, reasonable counsel fees, salaries, witness fees, transcript and record costs, travel expenses and \textit{per diem} allowances, and other reasonable costs and expenses.\textsuperscript{131}

In another case illustrating the NLRB’s approach to “make whole”

\textsuperscript{125} \textit{Supra} note 119, at 109 (U.S.), 826 (S.Ct.)

\textsuperscript{126} \textit{Supra} note 13.

\textsuperscript{127} \textit{Id.} at 255 (U.S. App. D.C.), 1249 (F.)

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Id.} at 259 (U.S. App. D.C.), 1253 (F.)

\textsuperscript{130} \textit{Tildee Products, Inc.}, 194 N.L.R.B. 1234 (1972) at 1235.

\textsuperscript{131} \textit{Id.} at 1237. Also see Schieber, \textit{Surface Bargaining: The Problem and a Proposed Solution} (1974), 5 U. of Toledo L. Rev. 656 at 663.
orders, *Ex-Cell-O Corp.*, the union brought bad faith bargaining and unfair labour practice charges against the employer in a first contract situation. The Trial Examiner made findings of unfair labour practices, granted a cease and desist order, and directed the employer to "make whole its employees for any losses suffered on account of its unlawful refusal to bargain with the [union]." The NLRB was sympathetic to the Trial Examiner's recommendation, but reluctantly determined that it could not approve his order. The Board concluded that such a remedy would be "too speculative":

Who is to say in a specific case how much an employer is prepared to give and how much a union is willing to take? Who is to say that a favorable contract would, in any event, result from the negotiations? . . . To answer these questions, the Board would be required to engage in the most general, if not entirely speculative, inferences to reach the conclusion that employees were deprived of specific benefits as a consequence of their employer's refusal to bargain.

---


133 Id. at 107.

134 The NLRB stated:

We have given most serious consideration to the Trial Examiner's recommended financial reparations Order, and are in complete agreement with his finding that current remedies of the Board designed to cure violations of s. 8(a)(5) are inadequate. A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of two or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the union from the loss of employee support attributable to such delay. (Id. at 108.)

135 Id. at 110. The "too speculative" argument has been further elaborated upon. Opponents of the "make whole" remedy point out that the proponents of this approach have attempted to ascribe a quantified economic value to the right to bargain. They argue that it cannot be assumed that such a right, although provided by statute, possesses any monetary value. Note, *Monetary Compensation as a Remedy for Employer Refusal to Bargain* (1968), 56 Georgetown L.J. 474 at 514.

They also point out that to qualify for such a remedy the union would have to prove that if the employer had bargained in good faith a collective agreement would have been concluded, as well as prove that such a contract would have included greater benefits than those actually received during the employer's refusal to bargain. It is pointed out that bargaining may lead to a deadlock, followed by a lawful strike, lockout, or permanent plant closure. In such situations, although there has been good faith bargaining, the employees would suffer a complete loss of earnings. (Michigan note, *supra* note 9, at 377-81.)

A number of the proponents of this remedy have attempted to formulate a method of calculating damages. Since the Board would first have to be convinced that an agreement would have been reached if the employer had bargained in good faith, the Board should be given evidence on the likelihood that the parties would have signed an agreement. The union's case would rest on its past history of negotiations with this employer or others similarly situated, and upon evidence based on averages. Alternatively, the Board could avoid an all or nothing decision by the use of a discount factor to reflect the percentage likelihood that the parties would not have reached agreement. Once the Board determines that an agreement would have been concluded, it must ascertain the amount of the injury. Evidence which could be considered includes: increases given by this employer to employees represented by the same union in similarly situated plants, increases won by the union from employers generally, as well as average wage increases documented by the Bureau of Labor Statistics. (Harvard note, *supra* note 10, at 1695-98.)
Furthermore, the Board refused to see any distinction between this remedy and the *H. K. Porter* imposition of a contract. Although in *H. K. Porter* the remedy sought would have "operate[d] prospectively to bind an employer to a specific contractual term," according to the Board this was virtually indistinguishable from the remedy requested in the case before it, which would "operate retroactively to impose financial liability upon an employer flowing from a presumed contractual agreement."\(^{136}\) In both situations the employer had not agreed to the contractual stipulation for which it was being forced to bear responsibility.\(^{137}\) The union subsequently applied to the District of Columbia Court of Appeals for review of the Board's decision.\(^{138}\) Based upon the Court's earlier reasoning in *Tiidee Products*, the Court summarily reversed the Board's decision, stating: "[A]n employer's refusal to bargain based on a frivolous challenge to an election is of itself a serious and manifestly unjustified repudiation of the employer's statutory duties and denial of the employee's statutory rights to collective bargaining.... [T]he 'make-whole' compensation is a proper remedy in such circumstances."\(^{139}\) The case was remanded to the Board for further proceedings.

Concerned about the deficiencies of traditional remedies, a number of American labour commentators\(^{140}\) have proposed a new remedy, one still untried by any labour board: the retroactive application of the collective agreement ultimately agreed upon by the union and the employer to the date of the employer's violation of its duty to bargain. The goals underlying the "make whole" remedy can be seen in the retroactive remedy. Employees would be compensated retroactively for their employer's refusal to bargain. This remedy would withstand the arguments against the imposition of a contract because it focuses upon the union-management contract as the basis for the damage award, rather than assessing compensation on something the parties have not agreed upon. Some commentators disagree with this contention, pointing out that the Board would still be stipulating at least one term of the agreement, the retroactivity clause. It is, of course, a matter of perspective; it could be seen merely as delayed imposition of damages for unlawful behaviour. The form should not be mistaken for the substance. Theoretically, the order would remove the incentive for an employer's delaying tactics. The employer would gain nothing by bad faith bargaining because the agreement eventually concluded would be applied retroactively. However, the retroactive order might backfire in the sense that it could strengthen an employer's determination to avoid signing any contract at all. In addition, even if an agreement were concluded the employer would have taken into consideration the effect of the retroactivity order on the over-all cost of the package.\(^{141}\)

---

\(^{136}\) Supra note 132, at 110.

\(^{137}\) Id.

\(^{138}\) 449 F.2d 1046 (1971).

\(^{139}\) Id. at 1049.


\(^{141}\) Illinois note, id. at 408.
F. American Legislation: Labor Law Reform Act, 1977

Responding to criticism about the weaknesses of the NLRB's remedial authority, legislators in the American Congress took action. The Labor Law Reform Act was introduced to the 95th Congress, First Session, House of Representatives, in 1977. Among a number of other legislative reforms, the proposed bill specifically provided the NLRB with authority to award a "make whole" remedy in the face of concerted employer refusal to bargain. The bill was referred to the Committee on Education and Labor which considered it, made some amendments, and recommended it be passed. The Congressional Record indicates that the bill revealed marked divisions, both in the House and in the Senate. The chairman of the committee that had considered the bill, Frank Thompson, Jr., (House of Representatives, Democrat, New Jersey), was strongly in favour of its enactment. Commenting on testimony given by witnesses during the hearings held in Roanoke Rapids, North Carolina, (the location of seven plants owned by J. P. Stevens, Ltd., the notorious anti-union employer), Thompson stated:

We heard witnesses from throughout the region, including workers from many different companies, State legislators, clergy, journalists, academics, and other prominent citizens. ... The testimony we heard was at times quite moving and perhaps the most compelling we have heard on how the existing labour laws fail to protect working men and women.\(^{142}\)

Several of the Republican Congressmen disagreed. Representative John M. Ashbrook, (Rep. Ohio), called the bill "a one-sided approach to labor law reform."\(^{143}\) Senator Thurmond, (Rep., South Carolina), also vigorously opposed the bill. Quoting in the Senate from the Southern Textile News, he referred to the bill as "purely and simply a political pay-off reward[ing] organized labor for its support in the 1976 presidential campaign."\(^{144}\) He described the bill as "pro big labor", a bill that would "make it easier for unions to organize and [would] grant them coercive new leverage at the bargaining table."\(^{145}\) He concluded that enactment of the provisions would create "an unequal and distasteful interference in the balance of normal collective bargaining relations."\(^{146}\) The bill quickly became the subject of vociferous lobbying, and its enactment now appears to be stalled indefinitely.

Section 8 of the bill provided that the NLRB could, as a remedy for refusal to bargain prior to the entry of a first agreement, award to the affected employees compensation for the delay in bargaining caused by the unfair labour practices. The measure of such damages was to be objective, and to consist of the difference between the wages and other benefits received by the employees during the period of delay, and the wages and other benefits they were receiving at the time of the unfair labour practice, multiplied by a factor which represented the changes in such wages and benefits elsewhere in the

---

\(^{142}\) The Congressional Record, 95th Congress, First Session, September 28, 1977, H-10304.

\(^{143}\) Id. September 27, 1977 at H-10128.

\(^{144}\) Id. October 27, 1977 at S-17979.

\(^{145}\) Id.

\(^{146}\) Id.
same industry, as determined by the Bureau of Labor Statistics. The wages would be received retroactively from the time of the unlawful refusal to bargain until the bargaining began. The Committee's Report outlined clearly why such legislative reform should be enacted. The Committee noted that many employers had discovered that it was more profitable to defy and ignore the provisions of the National Labor Relations Act than to comply with them. The order to bargain was not an adequate remedy to compensate employees whose employer had unlawfully refused to bargain.\textsuperscript{147} The Committee attempted to distinguish the "make whole" remedy from the \textit{H. K. Porter} analysis of the imposition of a contract:

> Even a hasty analysis of the proposal should make it clear that the Board would create no contract but would rather order the payment of a sum of money to employees. The remedy is in essence a backpay award to employees which in no way creates a "union contract" or any other kind of contract. The terms of the actual first contract between a union and an employer would remain to be bargained out between them.\textsuperscript{148}

The Minority Report, which disagreed with the use of the Bureau of Labor Statistics index on a variety of grounds,\textsuperscript{149} also disagreed with the Majority's distinguishing of this legislation from the \textit{H. K. Porter} case. The Minority Report stated:

> The "make whole" remedy is clearly a governmental intrusion into the substance of collective bargaining [which] constitutes a total departure from our national labor policy. The intrusion of the government into labor-management relations historically has been to bring the parties to the bargaining table—not to write a contract for them.\textsuperscript{150}

Clearly there are problems with this legislative approach to the "make whole" remedy. Freedom of contract is indeed impaired. The Board must assume that if the employer had bargained in good faith that the parties would have concluded a collective agreement. The Board must also assume that the agreement would have amounted to the average amount of wage settlements negotiated in other plants. Although the legislative intent here is not to set up a contract, but to allow the parties to negotiate whatever con-

\textsuperscript{147} The Committee stated:

> The need for a remedy to compensate employees for delay in bargaining was recognized by all the members of the Board in \textit{Ex-Cell-O Corporation}, 185 N.L.R.B. 107, the case in which the majority determined that it presently lacked the authority to grant such a remedy. The dissenting members of the Board agreed that a remedy for the losses resulting from bargaining delay was essential to effectuate the purposes of the Act, and argued that the Board presently has authority to grant such a remedy. H.R. 8410 resolves that issue by empowering the Board to provide a make whole remedy and specifying the form which such a remedy must take. It does so because experience has shown that the absence of such a remedy encourages employers to delay bargaining for as long as possible.

(Report No. 94-637 at 39-40.)

\textsuperscript{148} \textit{Id.} at 41.

\textsuperscript{149} These figures are compiled based on settlements for units of 1000 or more employees, and in some instances, 5000 or more, whereas the great majority of units found appropriate under the National Labor Relations Act consist of less than 50 employees.

\textsuperscript{150} \textit{Supra} note 144, at 88.
tractual agreement they wish, a section 8 award would obviously set a platform below which the employer cannot expect to achieve a settlement. To the employer at least, there is most of the impairment of freedom of contract that he would incur with first contract arbitration. However, there is one major deficiency in this approach. The Board is put to all the problems inherent in trying to set out a contract, but then is allowed to apply it only retroactively. The contract is not left in place to govern the parties throughout the trial period of their collective bargaining relationship. First contract arbitration, which presents only a marginal increase in the impairment of freedom of contract, solves this problem. In other words, this “make whole” approach produces a limited effect at a very high cost.

V. FIRST CONTRACT ARBITRATION IN THE FEDERAL JURISDICTION IN CANADA

At the same time as the above debate was going on in the American Congress, the Canadian government was giving consideration to enactment of first contract arbitration in the federal sector. In 1977 the federal Liberal government introduced Bill C-8, *An Act to Amend the Canada Labour Code*.\(^{151}\) Among other labour legislation amendments, the Bill proposed the enactment of first contract arbitration, in a form similar to the British Columbia legislation. In the context of the enactment of this legislation,\(^{152}\) the government

\(^{151}\) S.C. 1977-78, c. 28.

\(^{152}\) The Bill was passed, royal assent was given on May 12, 1978, and the first contract arbitration provision was proclaimed in force on June 1, 1978. The new legislation read as follows:

\[s. 171.1\]

(1) Where an employer or a bargaining agent is required, by notice given under section 146 after December 31, 1975, to commence collective bargaining for the purpose of entering into a first collective agreement between the parties with respect to the bargaining unit for which the bargaining agent has been certified and the requirements of para. 180(1)(a) to (d) [no strike or lockout until certain requirements met] have otherwise been met, the Minister may, if he considers it necessary or advisable, at any time thereafter direct the Board to inquire into the dispute and, if the Board considers it advisable, to settle the terms and conditions of the first collective agreement between the parties.

(2) The Board shall proceed as directed by the Minister under subsection (1) and, if the Board settles the terms and conditions of a first collective agreement referred to in that subsection, those terms and conditions shall constitute the collective agreement between the parties and shall be binding on them and on the employees in the bargaining unit, except to the extent that such terms and conditions are subsequently amended by the parties by agreement in writing.

(3) In settling the terms and conditions of a first agreement under this section, the Board shall give the parties an opportunity to present evidence and make representations, and the Board may take into account

(a) the extent to which the parties have, or have not, bargained in good faith in an attempt to enter into the first collective agreement between them;

(b) the terms and conditions of employment, if any, negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit; and

(c) such other matters as the Board considers will assist it in arriving at terms and conditions that are fair and reasonable under the circumstances.
outlined the purpose behind the first contract arbitration remedy. The Minister of Labour, John C. Munro, speaking before the Standing Committee on Labour, Manpower and Immigration, pointed out that first contract arbitration was designed to deal with a situation encountered “very, very frequently” in the federal jurisdiction, “particularly involving broadcasting outlets”:

The Canada Labour Relations Board certifies the employees as a bargaining unit for collective bargaining purposes. Then they go to negotiate with the employer and it is spun out and spun out and spun out and no collective agreement is ever signed. Both sides charge each other with bargaining in bad faith and so on. There are motions and applications before the Canada Labour Relations Board. It still spins out and before you know it the whole thing dies. The employees have moved and finally given up, and so on. This has happened innumerable times.\(^{153}\)

Munro emphasized that the proposed amendment was in no way designed to undermine free collective bargaining, but rather was intended to overcome unethical and unjust bargaining tactics that were undermining the collective bargaining process and causing serious dissatisfaction with the equity of the system.\(^{154}\) Jacques Olivier, Parliamentary Secretary to the Minister of Labour, also addressed the Standing Committee. He articulated the “trial marriage” thinking behind the remedy, stating, “It seems to us that this new procedure will help the two parties to come together.”\(^{155}\) He pointed out that much of the problem in first collective agreements could be attributed to personality conflicts and attitudinal differences. The remedy of first contract arbitration would permit the second collective agreement to be bargained by the parties in a “much more serene atmosphere.”\(^{156}\)

Olivier also pointed to the deterrence goal, stating:

“At the present time certain employers and unions as well, although it is mostly certain employers, think that if they negotiate for years they can humiliate unions duly certified ... and by doing so prevent the conclusion of a collective agreement. We think that this new mechanism will put some pressure on both parties.”\(^{157}\)

Thomas Eberlee, Deputy Minister of Labour, also addressed the Standing Committee. He argued that first contract arbitration would, in fact, reduce conflict: “We have had many, many situations where a union has been certified and the employer has resisted. We just have a thing that goes on forever, and a community is torn apart sometimes. So it is a thing designed to reduce conflict.”\(^{158}\) Olivier hastened to caution, however, that the mechanism would not be applied “automatically.” “Under no circumstances must such a prac-

---

\(^{(4)}\) Where the terms and conditions of a first collective agreement are settled by the Board under this section, the agreement shall be effective for a period of one year from the date on which the Board settles the terms and conditions of the collective agreement.


\(^{154}\) Id.

\(^{155}\) Id. Issue No. 1, November 1, 1977, February 9, 1978 at 1:31.

\(^{156}\) Id. Issue No. 3, February 16, 1978 at 3:31.

\(^{157}\) Id. Issue No. 1, November 1, 1977, February 9, 1978 at 1:31-32.

\(^{158}\) Id. Issue No. 1, November 1, 1977, February 9, 1978 at 1:33-34.
tice become usual or a matter of course. A union must not simply wait until a strike reaches a point where the government must intervene," he added.

There was considerable opposition to the amendments. It was in the Canadian Parliament that debate was held over the need for and efficacy of first contract arbitration, a debate that had never taken place prior to the enactment of the British Columbia legislation. The federal Standing Committee received numerous submissions from both labour and management groups concerning the first contract arbitration remedy. In many cases, the arguments against first contract arbitration were not articulated in the most cohesive or compelling manner. Nevertheless, the strands of argument advanced are very revealing and will be referred to in this more comprehensive analysis, where they shed some light on the discussion. Many of the arguments raised against first contract arbitration are drawn from the case that is made against the use of compulsory arbitration as a general dispute resolution mechanism in labour relations. Although many of these arguments are valid when made in the general compulsory arbitration setting, they lose their compelling quality when raised against this limited form of first contract compulsory arbitration.

Two commonly-expressed points in favour of the right to strike and against compulsory arbitration can be categorized as the "catalyst argument" and the "catharsis argument." Briefly put, the catalyst argument takes as the first premise that the parties are the persons best situated to determine terms and conditions of employment. The desire to avoid the economic losses of a strike or lockout provides the best catalyst for the parties to resolve their differences in a collective agreement. When the right to strike or lockout is removed, the parties will be less willing to compromise. Third party intervention and arbitration provide a far less effective catalyst to settlement. The catharsis argument is founded upon the contention that, in certain labour situations, a strike or lockout may cause a healthy "clearing of the air." Paradoxical though it might seem, collective bargaining is designed to resolve conflict through conflict, or at least through the threat of conflict. Although the system may seem costly, it may well be more healthy and less expensive in resolving labour-management disputes than any other method.

While the catalyst and catharsis arguments may contain valid points against the adoption of compulsory arbitration across the board in all labour disputes, their forcefulness is lessened when compulsory arbitration is restricted to first agreements. The first contract remedy does not prohibit strikes or lockouts per se. The employees may have been on strike or locked out for some time before the labour board intervenes to impose a first contract. In

160 This section of the article is based upon an examination of the arguments made by the parties appearing before the Standing Committee, a reading of the general literature on the merits and disabilities of compulsory arbitration in the labour relations context, and discussions with Paul Weiler which took place on February 20, 1979 at Harvard Law School, Cambridge, Massachusetts.
addition, the remedy is not applied automatically in all first contract disputes. In any given case, the parties will not be certain that the remedy applies to them until the Board so holds. Thus the catalytic effect of the strike is not lost. With respect to the catharsis theory, again the strike or lockout may have run for some time before a contract is imposed. Furthermore, analysis of bitter first contract disputes such as the one at Fleck indicates that the cathartic effect of the strike or lockout in such cases may be more illusory than real. The work stoppage may be exacerbating the situation rather than clearing the air. The conventional methods of dispute resolution have failed in the face of hostile ideological attitudes held by the parties, and the remedy of compulsory arbitration provides a better result.

Another of the most compelling arguments against compulsory arbitration involves its "chilling" effect upon the bargaining process. It is asserted that the parties to the dispute will believe that they can obtain more through arbitration than they can achieve through a settlement they negotiate themselves. Unions have no reason to negotiate a settlement; for they can always get "something more" than the company offered by refusing to accept the offer, and waiting for the outside arbitrator to "split the difference." The employer in this situation is foolish to make any offer at all; for whatever offer it makes would be regarded as the "floor", since the arbitrator normally feels obligated to jack the package up to a higher level. Compulsory arbitration is also accused of having a "narcotic" effect on collective bargaining. Compulsory arbitration serves as a crutch for weak leadership in either the union or management. It allows the parties to abdicate their responsibility, an abdication that may soon spill over into other dimensions of the relationship taken as a whole. The Canadian Association of Broadcasters' brief to the Standing Committee on Bill C-8 contended that negotiations in first contract disputes would be conducted in light of the prospect of interference by the Minister in the dispute. Negotiating positions would be established with a view to a party's position before the Labour Relations Board.

However, in first contract arbitration, there is no opportunity for the "narcotic" effect to take hold. The parties cannot become addicted to the remedy of compulsory arbitration because it is available only in the first round of bargaining and not, even then, as a matter of right. In addition, the argument is based on the premise that the parties would have bargained but for compulsory arbitration. In the first contract context, at least in the limited cases for which the remedy was designed, the parties are not bargaining in any serious manner. Clearly then, in the context of the situation that the first contract remedy was designed to resolve, this argument loses its strength. However, the concern remains that the potential application (or misapplication) of the remedy might affect the bargaining of parties for whom the remedy was not designed. Weiler has recognized and admitted that this effect is inevitable at least in the first period after the remedy is enacted. This detri-

---


103 Supra note 6 at 30.

mental effect lessens dramatically, however, as the labour relations community realizes that first contracts will be imposed only in a narrow range of circumstances. The strictness of the application of the remedy diminishes any "chilling" effect that may occur at the outset.\footnote{Supra note 21.}

Another argument commonly expressed against compulsory arbitration contends that the problems of arbitrating terms and conditions of employment are insurmountable in a free enterprise economy. Concern is voiced over the propriety of subjecting some forms of income, namely wages and salaries, to control while not similarly regulating others. Once a government-appointed board gets into the business of fixing wages or working conditions, it is argued, prices must also be set by the government board because of their intimate relationship. Next the government would be forced to regulate profits. Such government control is at odds with the notion of free enterprise.\footnote{Williams, The Compulsory Settlement of Contract Negotiation Labour Disputes (1949), 27 Texas L. Rev. 589 at 654; Keel, supra note 162, at 22; Queen's Casebook, supra note 6, at 23.} However, the first contract remedy is by no means part of a comprehensive, systematic compulsory arbitration regime. Contracts are imposed only within a narrow range of situations. The term of such contracts is limited and then the parties are thrown back into the collective bargaining system. In such a restricted context it becomes difficult to make the case that government must logically move into the areas of price and profit regulation.

One of the most powerful arguments for collective bargaining and against compulsory arbitration is based on the proposition that collective bargaining promotes democratization of the workplace. Represented by their union, workers can obtain a voice in setting the terms and conditions of their employment.\footnote{Supra note 19, at 32-33.} Weiler has put this traditional labour argument powerfully, arguing that collective bargaining constitutes an experience in self-government. Employees may participate in the determination of their conditions of employment, rather than "simply accepting what their employer chooses to give them."\footnote{Id. at 33.} He concludes:

If one believes, as I do, that self-determination and self-discipline are inherently worthwhile, indeed, that they are the mark of a truly human community, then it is difficult to see how the law can be neutral about whether that type of economic democracy is to emerge in the workplace.\footnote{Id. at 33.}

However, the first contract arbitration remedy was designed precisely to further the democratization potential of collective bargaining. It was designed to be applied only in cases where the employer was unfairly frustrating the employees' desire to bargain collectively. The first contract was to be imposed in order to deprive such employers of their unlawful gain from such behaviour, and to give the employees and their union a foothold from which to pursue collective bargaining in the future. Furthermore, the employees rarely suffer
from the imposition of a temporary first year agreement. They will retain the opportunity to take destiny into their own hands. Within the time limits set out in the labour legislation, they remain free to switch unions, alter the terms and conditions of the collective agreement imposed (if management consents), and apply for decertification of the trade union.

Critics of compulsory arbitration inevitably point out that compulsory arbitration never puts an end to all strikes. Countries that have introduced a compulsory arbitration regime have discovered that this by no means eliminates work stoppages. This argument, clearly compelling in the context of the discussion of any systematic compulsory arbitration regime, also withers in the face of first contract arbitration. First contract arbitration does not outlaw work stoppages a priori, even in cases where a board decides to impose an agreement. The parties are free to indulge in work stoppages until a board imposes a contract. At that point, a board imposition of a contract does seem to work. The parties end the dispute and resume operations. One of the most dramatic results of the first contract arbitration remedy has been to put an end to bitter and usually protracted disputes and to get the parties back to work.

The most serious philosophical argument against compulsory arbitration remains to be considered. Critics loudly decry the infringement upon freedom of contract that compulsory arbitration creates. Ernest Steele, President of the Canadian Association of Broadcasters, told the Standing Committee that first contract arbitration was an intervention contrary to the principles of free collective bargaining. The Bell Canada brief claimed that the unilateral aspect of this decision-making process was a prime example of unwarranted interference with collective bargaining. Even the trade union representatives who appeared before the Committee repeated much of this sentiment. One is tempted to counter this freedom of contract refrain with the quick response that first contract arbitration legislation typically provides that, although a board may impose a first contract, the parties are free to revise any of the terms and conditions upon their mutual agreement. Does this not meet

---

170 Williams, supra note 166, at 651-52; Stanford, supra note 167, at 474-79. Stanford notes that during World War I, Great Britain's Munitions of War Act of 1915 prohibited strikes and lockouts and imposed large fines for violation. Yet over 1.5 million munitions workers took part in unlawful strikes. Only one out of every 500 of these workers was prosecuted. Stanford concluded: "Compulsory arbitration was not a successful method of avoiding disputes in Great Britain during the war period; and, as the Whitley Committee Report of 1918 says, 'in normal times, it would undoubtedly prove less successful.'" (Id. at 474-75). Furthermore, both Australia and New Zealand have long had wide experience with compulsory arbitration, and neither of these countries can point to any degree of success. Australia and New Zealand continue to suffer from more than their share of strikes and lockouts.


173 Id. Issue No. 8, March 9, 1978 at 8:40. Although the representatives of the trade union movement approved of the first contract remedy, (their reaction is discussed more fully below), they were at pains to point out that the Canadian trade union movement remained uniformly opposed to compulsory arbitration.
the freedom of contract argument? Steele refused to accept this response, stating persuasively before the Standing Committee: "To suggest that the parties in subsequent negotiations are free to alter inappropriate terms and conditions imposed by the Labour Relations Board is unrealistic. The difficulty of 'negotiating down' from a first agreement is appreciated by persons familiar with the collective bargaining process."\textsuperscript{174} Related arguments can be made that first contract arbitration infringement of freedom of contract is minimal because the compulsory arbitration affects only the first agreement and lasts for only one year. These arguments are similarly unconvincing because the Board-imposed terms and conditions clearly tend to set the floor upon which future negotiations will be based.\textsuperscript{175}

The basic proposition that first contract arbitration infringes freedom of contract must be examined more closely. Morris Cohen has outlined the philosophy behind freedom of contract:

Contractualism in the law, that is, the view that in an ideally desirable system of law all obligation would arise only out of the will of the individual contracting freely, rests not only on the will theory of contract but also on the political doctrine that all restraint is evil and that the government is best which governs least.\textsuperscript{176}

Cohen points out that this theory is connected with the "classical economic optimism" that there is a "pre-established harmony between the good of all and the pursuit by each of his own selfish economic gain":

These politico-economic views involve the Benthamite hedonistic psychology, that happiness consists of individual states of pleasures and that each individual can best calculate what will please him most. Back of this faith of legal individualism is the modern metaphysical assumption that the atomic or individual mind is the supreme reality and the theologic view that sin is an act of individual free-will, without which there can be no responsibility.\textsuperscript{177}

Cohen notes, however, that unless there is positive power to achieve what we deem good the notion of freedom from restraint is an empty one. Without some restrictions, freedom of contract would logically lead not to a maximization of liberty but to contracts of slavery entered into because of economic pressure. Regulations involving some restrictions on the freedom of contract are essential to real liberty.

Canadian legislatures have concluded that the proper policy is to encourage collective bargaining in the labour relations context. The power of the state is used to enforce employment contracts, but the state wishes to encourage the negotiating of collective employment contracts if the employees so desire. Thus an initial restriction is placed on freedom of contract in that

\textsuperscript{174} Id. Issue No. 5, February 28, 1978 at 5A:12.
\textsuperscript{175} Id. Issue No. 6, March 2, 1978 at 6A:14. The brief presented to the Standing Committee by the Railway Association of Canada met this argument head-on: The first agreement signed by the parties is always the most important since in effect it determines the basic parameters that the parties see in their collective bargaining relationship, and it is from these parameters that subsequent collective agreements are developed.
\textsuperscript{176} Cohen, \textit{The Basis of Contract} (1933), 46 Harv. L. Rev. 553 at 558.
\textsuperscript{177} Id. at 558-59.
employers and unions are required to bargain in good faith. Labour legislation compels even a reluctant employer to negotiate with a union whose presence is detested. The employer is allowed to disagree with the union as to terms and conditions, but there must be 

bargaining. Where an employer is involved in the breach of this duty to bargain in the vulnerable first contract context, there is no real contracting in the sense that society wishes to protect. In fact, through such actions the employer is attempting to prevent employees from exercising their rights to bargain collectively, to engage in a process of free contracting, which is a right that society wishes to support.

Apart from the classical freedom of contract philosophy, proponents of freedom of contract in the labour relations sense have elaborated a special line of reasoning. The major argument in favour of freedom of contract in labour relations is not the ideological, abstract premise that people must be free, but rather involves a more functional, instrumental argument. Labour and management are reputed to know much better than any outsider what contract provisions are relevant and important to them. Third party arbitrators, lacking knowledge of the business and the needs of labour and management, are not as well qualified to produce decisions that are appropriate in the context of any given labour-management relationship. It is better to have direct negotiation between those who are actually going to be affected and bound by the contract. The essence of collective bargaining involves a series of trade-offs. Only the parties know which contract provisions are most important to them. The outsider can never hope to share this knowledge and can only try to award provisions based on the bargaining postures of the parties and some sense of the standard rules. The resulting contract may often be quite unsuited to the needs and desires of the parties.\textsuperscript{178} This argument, while compelling in its logic, assumes that the parties are engaged in bargaining. The virtues attributed to freedom of contract will be realized only where the parties are seriously engaged in a process of give and take, where they are searching for acceptable compromise positions and creative solutions to their differences. Yet in the cases for which first contract arbitration is envisaged as a remedy, the parties are not engaged in anything like this process. Therefore, the imposition of a contract involves only minimal sacrifice to the concept of freedom of contract. In conclusion, when compulsory arbitration is confined to first contract situations, most of the arguments against compulsory arbitration—those of freedom of contract and others—lose their vitality.

Apart from the more general philosophical arguments against compulsory arbitration, a number of other arguments were raised against first contract arbitration during the Standing Committee hearings. Many of these arguments were addressed more specifically to the first contract arbitration

\textsuperscript{178} Report of the Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and their Employees (Ontario: 1964) in Queen's Casebook, supra note 6, at 26; Keel, supra note 162. The brief of the Canadian Bankers Association, supra note 153, Issue No. 10, March 15, 1978 at 10A:68, noted that the intervention of an outsider having only limited second-hand knowledge of the operations would create the risk of imposition of terms and conditions that might disturb the labour-management relationship and might imperil the viability of the employer's operations.
First Contract Arbitration

remedy itself. One argument was that the situation was not serious enough to justify such a drastic remedy. Rather ironically, this argument was articulated by Ernest Steele, from the Canadian Association of Broadcasters. The federal government, it will be recalled, when introducing the new remedy, attributed the need to first contract problems within the broadcast industry. Steele contradicted this premise, denying that the broadcasting industry was anti-union, and pointing out that approximately 15 per cent of the industry was unionized. He noted that over the previous seven years first contract situations had created “real difficulties” on only five occasions—a “not very frequent” pattern. He asserted that first contract arbitration would violate the most basic principles of free collective bargaining “in an effort to overcome a problem which has not yet shown a seriousness which would justify such drastic action.”

To the contrary, Jacques Olivier, Parliamentary Secretary to the Minister of Labour, responded: “We must remember that 60% of the working hours lost because of strikes and lockouts happen in connection with the first collective agreement.” The brief presented by the Canadian Labour Congress also stated: “As a matter of fact, more than one-half of the time lost through strikes and lockouts is due to the employer’s [anti-union] attitude [in first contract negotiations].” This is erroneous information. In fact the work-days lost across Canada during first contract negotiations approximate only 5 per cent of the total work-days lost due to collective bargaining work stoppages. However, the argument that the problem involves only a small proportion of labour work stoppages can be just as easily used to support the remedy as to oppose it. If the number of first contract work stoppages are few, the labour board will have to use the remedy less often. It therefore will involve a less drastic intervention into the collective bargaining system. Further, although the numbers of employees involved may be low, for the individuals caught up in an acrimonious, protracted first contract dispute, the seriousness of the situation can hardly be denied.

In addition, although the numbers are small now, there is reason to believe that the situation may change in the future. The changing demography of the labour force has clear-cut implications for the trade union’s continued viability. Trade unionism has historically been a blue-collar phenomenon, but it is the predominantly non-union, white-collar service sector that is the growing portion of the workforce. To maintain the present levels of mem-

170 Supra note 153, Issue No. 5, February 28, 1978 at 5:5.
171 Id. at 5A:12.
172 Id. Issue No. 3, February 16, 1978 at 3:32.
173 Id. Issue No. 8, March 9, 1978 at 8A:19.
174 Strikes and Lockouts in Canada, 1976, (Ottawa: Supply and Services, 1977) at 16. In 1977 out of 3.3 million work days lost, 186,290 were due to first contract negotiations, or 5.6%. Strikes and Lockouts in Canada, 1977, (Ottawa: Supply and Services, 1978) at 24. In 1978 out of 7.4 million work days lost, 187,340 were due to first contract disputes or 7.4%. Strikes and Services in Canada, 1978, (Ottawa: Supply and Services, 1979) at 19.
bership, the trade unions must organize in these growing sectors of the economy. As they do, they will increasingly run up against employers who are unfamiliar with collective bargaining and who may prove to be intransigent, ideologically-motivated adversaries. Shirley Carr, a Vice-President of the Canadian Labour Congress, recognized this explicitly:

Right now . . . the number of cases where you would have to impose a first contract are a definite minority. But I suggest to you that there will be a lot of them in the future, relative to the bank organizing or the true white-collar field organizing; in the institutions, in the banking institutions and the insurance companies, where we intend to get into, the radio stations, and you name it.184

Finally, the remedy is important irrespective of the proportion of work-days lost attributable to first contract strikes. This kind of conflict is very damaging to the general climate and tone of industrial relations.85 The nature of first contract battles can create an impact far beyond the effect that would normally be created by a less ideological work stoppage. The Fleck strike is an excellent case in point. Although the strike involved less than two hundred employees and a small manufacturing plant, it became so emotional and so visible that long-term relationships between management, labour and government were severely damaged.

Another argument against first contract arbitration made by a number of the employers who appeared before the Standing Committee was based on its potential to create business uncertainty; employers would never be certain when the Board might impose a first contract. The Canadian Bankers' Association expressed concern over the Board's ability to recognize bad faith bargaining in any event.186 Pointing to the lack of criteria and the wide scope of Ministerial discretion in the application of the remedy, a number of employer groups expressed concern over their inability to predict when the remedy might be invoked. The Canadian Manufacturers' Association stated, "The employer, especially, would be in a difficult position as he would have lost an important element of control over his labour costs. This provision, therefore, could reduce the employer's initiative to invest in new enterprise, because it will be even more difficult to predict return on investment."187 This complaint is largely based on speculation. It is difficult to know how much business uncertainty would be involved, or the extent to which invest-

184 Supra note 153, Issue No. 8, March 9, 1978 at 8:42.
185 Weiler, supra note 160.
These same techniques are applied by conciliators and mediators who deliberately stage posturing and confrontation by the parties in order to generate pressures that bring about a settlement. They also utilize various other techniques including that of deciding when, if at all, a changed position by one party will be communicated to the other. Within this context, in virtually any set of negotiations, both parties are susceptible to the allegations during certain stages of negotiations of "bad faith", if their actions are considered in isolation and out of context. . . . [A] labour tribunal's intervention, particularly with the delays inherent in such a process, can seriously frustrate the bargaining process as it is regularly carried out.

ment would be lost. However, on a theoretical level the argument has some validity. In the final analysis, a process of compulsory arbitration does take decisions out of the hands of the parties. There is always the possibility that the arbitration tribunal will impose terms and conditions to which either the employer or the union (or both) would never have voluntarily agreed.

Nevertheless, Weiler has asserted that this is not a compelling argument against first contract arbitration:

If you probe beneath the surface of this argument, you recognize that it is really an argument against any form of unionization. The employer is saying that before investing he wants to determine what the profits should be and therefore, also, what the labour costs can amount to. The employees are given no say in this determination.188

Collective bargaining, Weiler notes, is the antithesis of this. Collective leverage gives employees the opportunity to bargain for a higher return on their labour, to have a say in the setting of wage rates. Even where an employer has invested in a non-union operation, there is no guarantee of immunity from unionization. Furthermore, as long as the employer is engaging in hard bargaining, and not trying to violate the principles of the labour statute, he can insulate himself from first contract arbitration. (Weiler admits that, of course, there is no guarantee that a labour board will always be correct in its interpretation of employer conduct, but this is a risk inherent in any adjudicative system.)

Some of the parties who appeared before the Standing Committee challenged the effectiveness of the deterrence goal in first contract arbitration. André Fortier of the Canadian Chamber of Commerce charged that the deterrent effect of the remedy was attributable to intimidation: "The parties conclude the first collective agreement [in British Columbia] in fear of going in front of Paul Weiler's court—if I can use the vulgar expression to describe the B.C. Board."189 Weiler has countered:

Deterrence is a polite word for intimidation. That is what the remedy is supposed to do. If the prospect of coming before "Paul Weiler's court" intimidates the parties into sitting down and bargaining in good faith as they are supposed to do under the legislation, I have no problem with that.190

The Canadian Bankers' Association also questioned the deterrent effect of the first contract arbitration remedy in British Columbia.191 Noting the small number of applications for imposition of a first contract, the Association attributed this not to deterrence, but to the ineffectiveness and unacceptability of the remedy; "The B.C. Board is extremely reluctant to impose first collective agreements. As well, the record shows that the parties have been most reluctant to apply, and in fact have now virtually abandoned it as an acceptable recourse."192 Weiler has also countered this assertion. He disagrees that

---

188 Weiler, supra note 160.
189 Supra note 153, Issue No. 3, February 16, 1978 at 3:45.
190 Weiler, supra note 160.
192 Id.
the parties are reluctant to apply for the remedy out of a sense of its ineffec-
tiveness. Instead, he claims that the deterrent effect is real. He points to the
fact that not only have there been few applications, but also that there has
been a virtual elimination of the bitter first contract "cause célèbre" labour
dispute in the provincial jurisdiction.193

The criteria to be used in compulsory arbitration have always been a
matter of contention. Although a series of guidelines have been proposed—
the history of prior negotiations and wage decisions between the parties, in-
tra-industry wage comparisons, competitive wage surveys in related industries,
government statistics on the cost of living, productivity tables, balance sheets
on a company's ability to pay194—neither labour academics nor the parties
themselves have been able to agree on which criteria should be used and how
they should be applied. The criteria set forth in the legislation for first con-
tract arbitration, both in the British Columbia legislation and in the proposed
federal legislation, were specifically designed to provide a maximum of flexi-
bility. The Labour Boards were given the discretion to consider the extent to
which the parties had bargained in good faith, the terms and conditions of
employment negotiated through collective bargaining for employees perform-
ing the same or similar functions in the same or similar circumstances, and
such other matters as the Board felt would assist it at arriving at fair and
reasonable terms and conditions.

This invoked a storm of protest from employer organizations appearing
before the Standing Committee. The Canadian Manufacturers' Association
pointed out that, under the new section 117.1(3) of the Code, the Board
was authorized to consider whether or not bargaining in good faith had
occurred. Including this in the criteria implied that one party might be treated
more favourably in the imposed agreement if the other was found by the
Board to have bargained in bad faith. The Association argued that while bad
faith bargaining was regrettable, it should not be the basis for determining
wages and benefits, which were essentially economic issues.196 The Associa-
tion also viewed the criteria in the new section 171.1(3) (b) as too restric-
tive. Although the Board might consider provisions found in other collective
agreements, the Association argued that it should also consider the compara-
brable rates of pay and working conditions provided by union-free employers.
"The Board should be required to take account of the total compensation
provided by employers in the related industry and/or area, irrespective of
whether they are unionized or not."196 The logical result of taking such
account would be to undermine collective bargaining; an employer would
not have to worry about any imposed agreement if it lasted only a year and
reflected non-union terms and conditions.

Weiler has defended the flexibility and measure of discretion built into
the criteria for first contract arbitration. Initially, he has disputed the argument

193 Weiler, supra note 160.
194 Keel, supra note 162, at 13; Holly and Hall, Dispelling the Myths of Wage Arbi-
tration (1977), 28 Lab. Law J. 344 at 351.
196 Id.
that both union and non-union wage scales should be used for comparison. He points out that the reason why people embrace collective bargaining is that they wish to make a move from non-union wages to union scales of compensation. In addition, he has asserted as follows:

By setting out rigid criteria, you are prejudging the whole issue. There are serious problems in finding standards of comparability. Are you talking about the comparability of employees with respect to their background and skills, or are you talking about the comparability of industries? We didn't want the Board to be seen as putting its stamp of approval on any one standard, saying "that is the valid comparison." To have done this would have been to say to the world at large—bad faith or not—"here's what the Labour Board thinks is reasonable." Weiler noted that this would inevitably have expanded the reach of the provision. If the Legislature had tried to lay down strict principles of comparability it would have caused a harmful effect on collective bargaining. As a result, while the Board looked for points of comparison in each case, as a matter of policy it stated that it would not publicly disclose the terms of the contracts imposed. "None of our decisions laid down principles of valid reasonable comparison. What we were explicitly adopting was a policy of 'ad hocery'," noted Weiler.

The Railway Association of Canada raised an additional objection to the specific first contract legislation proposed. They took issue with the use of the Labour Board as the appropriate arbitration forum for first contracts. They argued that the Canada Labour Relations Board was not the proper vehicle for the arbitration of interest disputes. As an alternative, they recommended that the legislation should provide for individual arbitrators, experienced in arbitrating interest disputes, to handle such cases. Weiler has taken issue with this objection. The only virtue he sees in using ad hoc arbitrators is that it might encourage a more searching examination of true comparisons in setting the terms and conditions of wages and other benefits. However, he points out that the negative factors far outweigh the positive features. He assumes that such an ad hoc arbitration system would involve the initial Ministerial and Board determination that a first contract should be imposed, and then the transfer of the case to an outside arbitrator for determination of the contract terms. Such a system would create greater time delay. It would also sacrifice the Board's mediation-arbitration ability. In addition, he points out that it is preferable to have a single tribunal administer all aspects of labour legislation. A single tribunal such as the Labour Board can develop an overview of the process when it deals with all facets of collective bargaining, such as certification, unfair labour practices, strike votes, bargaining duties, decertification, etc. From this vantage point, the Labour Board can develop the most realistic policies about when and how the remedy of first contract arbitration should be used.

The trade union organizations that appeared before the Standing Com-

---

197 Weiler, supra note 160.
198 Id.
199 Supra note 153, Issue No. 6, March 2, 1978 at 6A:15-16.
200 Weiler, supra note 160.
mittee also had several suggestions for alteration of the proposed legislation. The Canadian Labour Congress recommended that the decision to set up the arbitration board should not rest solely with the Minister, but should be initiated on the request of either party involved. The Confédération des syndicats nationaux (CSN) went a step further and recommended that the arbitration procedure should be initiated only at the request of the union. The reasoning behind the built-in safeguards of the screening process of Ministerial review and the Board discretion to intervene has been dealt with earlier. Although the Ministerial screening device has proved to be capable of subversion, it remains clear that it is necessary to build in review procedures before the arbitration procedures are initiated. To allow the parties to initiate the process as of right results in a negative effect on collective bargaining.

Of all the submissions made by management groups, the view that received the most widespread and fervent support remains to be considered. The typical employer opinion was that the solution to the problem of acrimonious first contract disputes was not arbitration but a mandatory secret ballot certification vote. The Canadian Manufacturers' Association outlined the position:

Failure to conclude first agreements is not so often related to the respective demands of the parties as it is to the representative character of the newly certified union. The real solution to this problem is to protect the rights of individuals by requiring a government-supervised secret ballot prior to the granting of bargaining rights.

This position seems difficult to accept. One would be hard pressed to try to make the argument that employer opposition to trade unions is always—or even in the majority of cases—founded on genuine belief that the union does not represent the employees. In many cases, especially those for which the remedy was designed, the employer has taken deliberate action to destroy whatever union support may already exist through concerted firings and layoffs of union members, screening of replacements and a program of intimidation directed against union supporters. Furthermore, there is no inherent need to separate these options and choose one or the other. There is no reason why both secret ballot certification votes and the first contract arbitration remedy could not be part of the same labour legislation scheme. (The issues surrounding the need for, and the negative features flowing from, mandatory certification votes are complex and are not addressed here.)

Labour's initial approach to first contract arbitration resembled that of management to some extent. They too expressed concern about the compulsory arbitration implications of the remedy. They stated they would have preferred to see legislative enactment of the Rand formula union security clause. However, after the initial hostile response of the British Columbia

---

203 See discussion of "First Contract Arbitration in British Columbia" above at text accompanying notes 18 et seq., supra.
Federation of Labour and correspondingly of the Manitoba Federation of Labour, the Canadian Labour Congress came out with qualified support for the proposed federal legislation:

The CLC prefers to limit government intervention into collective bargaining matters to a strict minimum . . . . However, the experience of past many years has convinced us that there is a class of employers which tend systematically to avoid any collective bargaining and thus to conclude a first agreement which would set a pattern . . . . Legislation similar to that proposed . . . already exists, for instance, in British Columbia . . . and has proved useful.206

However, Shirley Carr made clear that the trade union movement retained some sense of reservation; “I think it should be on the record that the Canadian trade union movement is opposed to compulsory arbitration, and there are some of us who still feel that the imposition of first agreement is, in fact, a form of compulsory arbitration.”206 Despite this, Carr admitted that the CLC had surveyed its membership across the country and found that the feeling in this instance (in view of the fact that there had been so much difficulty organizing radio and television stations and banking institutions) was in favour of first contract arbitration.

Although the trade union movement seemed to be giving grudging approval to first contract arbitration, by far the preferred position was to argue for legislative enactment of the Rand formula union security clause. Following the Fleck strike, Robert White, UAW Director for Canada and International Vice-President, submitted a brief to the Ontario government calling not for first contract arbitration, but for legislated union security.207 White explains this position by contending that in almost all difficult first contract

205 Id. Issue No. 8, March 9, 1978 at 8A:19. The CSN also approved of the proposed remedy, stating that it believed first contract arbitration was necessary to break certain employers’ resistance towards union certification; resistance that was obvious not only in the course of certification procedures but also during negotiations. (Issue No. 10, March 15, 1978 at 10A:25.)

206 Id. Issue No. 8, March 9, 1978 at 8:40.

207 The relevant portions of the brief, a copy of which was obtained from Robert White, read as follows:

November 7, 1978

UNION SECURITY: UAW STATEMENT TO ONTARIO GOVERNMENT

1945: UAW workers in Windsor strike the Ford Motor Company for 100 days and eventually win the precedent-setting “Rand Formula”.

1968: UAW workers in Wallaceburg are forced to strike N. American Plastics for 23 months. The key issue of the Rand Formula was not won at that time but the struggle continued and we were finally successful in gaining union security in 1977.

1974: UAW workers in Longueuil, Quebec strike United Aircraft for 20 months and again the Rand Formula is the center of the bitter confrontation. As a result of this strike, Quebec legislates the Rand Formula into all collective agreements.

1978: UAW workers in Centralia strike Fleck Manufacturing for 162 days and the combination of the courage of the women and the solidarity of supporters inside and outside of our union leads to winning the Rand Formula.
strikes the fundamental issue was union security and union recognition. If the union security issue were resolved by legislation, in the majority of first contract cases the economic issues could probably be resolved. There would be no need for first contract arbitration. White's reluctance to countenance first contract arbitration seems to rest on the fear that it is the "thin edge of the wedge." The majority of the trade union movement is opposed to compulsory arbitration and sees first contract arbitration as a form of compulsory arbitration. However, White concedes that in some small, anti-union enterprises first contract arbitration can prove useful. "Although the majority of the trade unionists oppose compulsory arbitration of any form, those who are on their backs after six months of a strike for a first agreement would probably go for first contract arbitration." Recognizing that first contract arbitration is of "some benefit," he cautions that the trade union movement does not see it as a "cure-all."

There are a number of problems apparent with the trade union preference of Rand formula union security legislation over first contract arbitration. As a practical matter, resolving the union security issue will no more remove all employer antipathy to unions than will mandatory secret ballot certification votes. Although union security legislation might have solved the Fleck dispute, none of the British Columbia first contract cases centred on union security. Furthermore, automatic Rand formula union security might in fact prove counter-productive in some cases. Some employers harbour deep ideological hostility to all forms of union security. In the face of legislated union security the only way such employers could ensure there were no union security provisions in their plants would be to prevent the signing of any collective agreement. Thus this legislation might aggravate some labour disputes, causing some employers to become more intransigent than ever. Solv-

---

THE FLECK STRIKE IS NOW OVER. THE FLECK FIGHT IS NOT.

August 17, 1978

The Honourable William G. Davis, Q.C., Premier of Ontario

I am writing this letter shortly after my return from Centralia, Ontario where, as you are no doubt aware, a settlement has been achieved in that long and bitter Fleck strike. . . .

Never again in Ontario should workers have to do what Fleck workers did—strike for a Rand Formula check-off. Never again in Ontario should massive use of police be used to support an employer trying to break a strike and deny the workers their right to have a union.

It is time for action by your government on this issue. The compulsory dues check-off should be automatic by legislation, once a union is certified by the Ontario Labour Relations Board.

I suggest to you such legislation would do a great deal to avoid a repeat of the "Fleck" strike.

Yours truly,

Robert White.

208 Interview with Robert White, Canadian Director of the UAW, December 19, 1978.
209 Id.
210 Id.
ing the union security problem by statute clearly would not obviate the first contract problem.\footnote{Furthermore, the legislative enactment of union security provisions raises a number of other issues that must be addressed (much in the way the call for mandatory secret ballot certification votes does). These are not to be discussed here.}

With the passage of time the unions' public stance on first contract arbitration has undergone some revision. The Ontario Federation of Labour set up a special committee to examine growing union complaints of employer unfair labour practices against a background of a number of bitter strikes. Based on the research of this committee, the OFL made a submission to the Ontario government requesting: 1) the outlawing of strikebreaking, 2) automatic Rand formula union security to be granted with certification, and 3) arbitration of first contracts when parties failed to reach agreement, similar to legislation in British Columbia and Quebec.\footnote{\textit{Toronto Globe \\& Mail}, October 31, 1979.} In November of 1979 the OFL convention adopted a resolution urging the government to enact legislation that would ensure that unions were able to reach a first agreement.\footnote{\textit{Id.} November 30, 1979.} Despite this recent "mellowing" in the union attitude towards first contract arbitration, it is still clear that the labour movement perceives other steps, such as the elimination of strikebreaking and compulsory Rand formula union security, to be better solutions to the problem of bad faith bargaining in the first contract setting.\footnote{Subsequent to the writing of this article, the Ontario Progressive Conservative Government enacted an amendment to \textit{The Labour Relations Act} to provide for automatic dues checkoff in the form of the Rand Formula. (\textit{An Act to Amend the Labour Relations Act, S.O. 1980, c. 34}).}

Before leaving this discussion, it is important to reflect upon the general attitudes of labour and management to first contract arbitration. It is quite clear that neither labour nor management was the leading lobbyist for the adoption of the first contract remedy. The remedy was conceived of, enacted and developed by government and academic labour neutrals. Management and labour have taken positions opposed to compulsory arbitration based on what they perceive to be their basic institutional interests. Both fear first contract arbitration as the "thin edge of the wedge." The question obviously arises as to the validity of enacting and enforcing a labour law remedy for which neither labour nor management has expressed an unequivocal desire. The answer is perhaps best summed up by the Operating Engineers' business
agent who blurted out in an unguarded moment that while the labour movement might be opposed to compulsory arbitration of any sort, “every so often we have to think of the workers.”

Hedged about with various restrictions and carefully designed so as to affect collective bargaining as minimally as possible, the remedy of first contract arbitration is supportable in a way that compulsory arbitration in general is not.

VI. THE QUEBEC EXPERIENCE

In the fall of 1977, hearings were held before the Quebec Commission Permanents des Relations de Travail, to consider amendments to Quebec labour legislation. The Quebec Minister of Labour, Pierre-Marc Johnson, recommended at that time that a form of first contract arbitration be adopted. His reasoning was based largely on the successful experiences that the Labour Relations Board of British Columbia had with this remedy. Johnson claimed that his Ministry was concerned, as a practical matter, with approximately 23-29 cases a year where a strike or lockout had occurred over a refusal of the employer to recognize the trade union. More specifically, Johnson mentioned his concern with such labour disputes when their duration was lengthy, and when the employer attempted to continue to operate with “scab” labour. He proposed that first contract arbitration, based upon the experience in British Columbia, would act to end the work stoppage, possibly encourage a trial marriage given certain conditions and would serve as a deterrent to employers who might otherwise bargain in bad faith as part of a ploy to refuse recognition to the union.

The legislation enacted was quite similar to the British Columbia legislation. The remedy was limited to first contracts. Where there was failure to conclude an agreement, either party was authorized to apply to the Minister of Labour, who had the discretion to submit the dispute to a council of arbitration. It should be noted that this latter provision shows some departure from its British Columbia counterpart, in that an ad hoc council of arbitration was given jurisdiction, rather than the Labour Court which administered the other provisions of the Quebec Labour Code. The powers of the council of arbitration were outlined in section 81d of the Code: “According to the behaviour of the parties as regards section 41 (duty to bargain in good faith), the the council of arbitration may decide that it must determine the content of the first collective agreement.” An additional departure from the British Columbia remedy authorized the council to impose a contract binding for a period of “not less than one year nor more than two years.”

215 Supra note 24.
219 The Quebec Labour Code, provides in s. 81a-81h as follows:
Sec. 81a. Where a first collective agreement is negotiated for the group of employees contemplated by the certification, a party may apply to the Minister to submit the dispute to a council of arbitration after the intervention of the conciliator has not been successful...
First Contract Arbitration

The indications are that this first contract remedy is receiving a form of application that differs qualitatively from the experience of other Canadian jurisdictions. In the short period of time from the end of January, 1978 (when the legislation became effective) to July 20, 1978, the Minister received 83 requests for first contract arbitration. Even allowing for an initial flurry of applications from parties uncertain as to how the legislation would be interpreted, as occurred in British Columbia at the outset, the number of applications here seems extraordinarily high. As of July 31, 1979, final decisions had been rendered in only eight cases. Two other interim decisions had been rendered, both on the question of whether or not a first contract should be imposed. Of these small number of decisions, in six cases the council of arbitration had decided to impose a first agreement. In comparison with British Columbia experience, it would seem that this ratio indicates a high percentage of imposed contracts.

A. Cases Following British Columbia Jurisprudence

A closer examination illustrates a definite lack of uniformity in reasoning among these decisions. Several of the decisions appear to follow closely along the lines of the reasoning set forth by the British Columbia Board. The case of Concorde Ford Sales Ltée et L'Union des Vendeurs d'automobiles et employés auxiliaires, January 12, 1979, involved the first decision reached upon an application for a first agreement. The council of arbitration concluded that an agreement should be imposed, noting that the parties were unable to reach a settlement on their own. In addition, based upon the behavior of the employer, the council concluded that it had no intention, from

---

Sec. 81c. The minister may, upon receipt of the application, entrust a council of arbitration with endeavouring to settle the dispute.
Sec. 81d. According to the behavior of the parties as regards section 41, the council of arbitration may decide that it must determine the content of the first collective agreement. It shall then inform the parties and the Minister of its decision.
Sec. 81e. If a strike or lock-out is in progress at that time, it must end from the time when the council of arbitration informs the parties that it has deemed it necessary to determine the content of the collective agreement to settle the dispute.
From such time, the conditions of employment applicable to the employees comprised in the bargaining unit shall be those the maintenance of which is provided for in section 47.
Sec. 81f. To determine the content of the first collective agreement, the council of arbitration may take into account, inter alia, the conditions of employment prevailing in similar undertakings or in similar circumstances.
Sec. 81g. At any time, the parties may agree upon one of the matters of the dispute. The agreement shall be recorded in the arbitration award, which shall not amend it.
Sec. 81h. The arbitration award shall bind the parties for a period of not less than one year nor more than two years. The parties may, however, agree to amend its contents, in whole or in part.

229 None of the decisions of the councils of arbitration under this section have been reported. As a consequence of this, this article only refers to the decisions by name and date. Copies of these decisions can be obtained from the Ministère du Travail et de la Main-d’œuvre, Direction générale de la recherche, 425, St.-Amable, 4e étage, Québec, Québec, G1R 4Z1.
the date of the certification, of signing an agreement with the union. The employer’s attitude was described as demonstrating “serious negligence” and “total disinterest.” As a result of this evidence of bad faith, the council exercised its jurisdiction to impose an agreement.

In the case of Leon’s Furniture Ltd. et Union des employés de commerce, section locale 502, October 31, 1978, the majority of the council refused to impose a contract. The council stated that the criterion to be considered was the behavior of the parties as regards section 41, (the duty to bargain in good faith section). Before the council undertook this task, however, the parties were asked if they consented to have the council determine the contents of a first collective agreement. The employer had objected. The decision then made reference to the case law of British Columbia, emphasizing that the British Columbia legislation had provided the model for the Quebec provision. However, the council noted that the British Columbia legislation authorized the Board to impose a contract “if the Board consider[ed] it advisable.” The council distinguished the Quebec provision from this very general discretionary power, noting that its own legislation provided that the council’s decision was to be exercised “according to the behavior of the parties with respect to s. 41.” Nevertheless, the council concluded that, taking into account the differences between the Quebec and British Columbia legislation, the council should draw its inspiration from the British Columbia jurisprudence concerning the application of its section 70 first contract remedy. The council concluded that the purpose of the first agreement remedy was to encourage free collective bargaining.

The council compared the instant case with the Vancouver Island Publishing Co. case, where the British Columbia Board had refused to impose a contract because the union had made no serious attempt to bargain in good faith with the employer. The council stated that while the negotiations were deadlocked, this deadlock was not caused by any lack of diligence on the part of the employer. The council noted that if the deadlock had been caused by dilatory manoeuvres on the part of the employer conducted to sabotage the process of free collective bargaining between the parties, it would not have hesitated to impose a contract. Instead, the deadlock came about because the union had lost the support of its membership through a lack of diligence on its part. The union’s erosion of bargaining power was not related to illegal acts on the part of the employer designed to intimidate or coerce employees from exercising their rights to bargain collectively. There had been no refusal on the part of the employer to recognize the union. Instead of trying to improve its level of support among its membership, the union had come to the council asking for a first agreement. This was precisely the type of case, the council concluded, in which a first contract should not be imposed.

221 Concorde Ford Sales Ltée et L’Union des Vendeurs d’automobiles et employés auxiliaires, January 12, 1979 at 8.
222 Leon’s Furniture Ltd. et Union des employés de commerce, section locale 502, October 31, 1978 at 5.
223 Id.
In the case of *Produits de Métal Diamond Ltée* et *Association Internationale des Travailleurs du Métal en Feuilles, section locale 116*, February 9, 1979, the council of arbitration adopted the reasoning found in *Leon's Furniture Ltd.*, but found that reasoning inapplicable on the particular facts of the case. The council stated that it was true, as indicated in *Leon's Furniture*, that as with the British Columbia jurisprudence, the remedy of first contract arbitration was designed to promote collective bargaining, not to act as a substitute for it. In the instant case, the council determined that the deadlock in bargaining was initially attributable to a lack of diligence on the part of the union. In part, this was based on the employees' flagging support for the union. Although there had been no flagrant refusal to bargain on the part of the employer, the council felt itself unable to conclude that the employer intended to pursue negotiations with diligence either. A number of dissident employees had approached the employer directly, offering to leave the union if this would accelerate the settlement of higher salaries. The employer swiftly concluded salary raises in the order of 11-24 percent with these employees. The council stated that the employer was put in the situation where it could no longer negotiate with the union, since the union's demise was necessary for it to honour the undertakings made to the employees. At the same time, the employer had placed the employees in the position that they would have to leave the union in order to take advantage of the raises. Concluding that it was true that the employer was not the guardian of the integrity or survival of the union, the council also stated that the employer must not contribute by unlawful acts to its demise. The council concluded that the necessary factors were present to authorize the imposition of a first contract, but then decided not to impose one at this stage. Instead, the council announced that it would proceed by mediation, in view of the great progress made in negotiations before they had been unfortunately interrupted. It was stated that the hope was that the dispute would be settled in this manner. The council thus suspended any decision to impose a contract at this time.

B. *Cases Differing from the Approach of the British Columbia Board*

A number of cases where first contracts were imposed differed quite markedly from the type of reasoning employed in British Columbia. The case of *Les Métallurgistes Unis d'Amérique Local 8702* et *Canada Dry Ltd.*, April 27, 1979, provides an interesting example. The council of arbitration was designated to hear the dispute following a union request to the Minister of Labour. During negotiations the company's last offer had been accepted by the union negotiating committee, but subsequently rejected by the union membership. A strike had ensued for four and one-half months, which was marred with illegal acts. The membership apparently wished to achieve parity with the employer's competitors, whose employees had been unionized for a long time. The council stated that it would be impossible for this union to try to catch up in a single round of bargaining. Both parties told the council of their desire to end the work stoppage and to see a first contract imposed. Stating that the parties were incapable of settling their differences, and noting that they had made a point of calling upon a third party to decide in their place, the council decided to intervene to determine the contents of the
first agreement. This would appear to be a definite departure from the sort of analysis developed in British Columbia. Rather than examining the nature of the bargaining process and the tactics of the parties, the council seemed to be content to impose a contract because the parties were incapable of doing so themselves, and because they wished a contract imposed. This allows for a clear shirking of negotiating responsibility on the part of the parties, and indicates an unfortunate new line of reasoning.

The case of L'UQAM et Le Syndicat des Charges de Cours de L'UQAM, April 26, 1979, illustrates another departure from the line of reasoning developed in British Columbia, one which may create some problems in the future. The majority of the council in this case determined that the decision to impose a first contract was of a judicial or quasi-judicial nature. Citing Pigeon's Rédaction et Interprétation des lois,225 the council noted that the word “peut” was imperative when it was attributed to judicial or quasi-judicial jurisdiction.226 The first contract section used the word “peut” in section 81d (“the council of arbitration may decide that it must determine the contents of a first collective agreement . . . ”).227 As a result, once there was a preponderance of evidence of lack of diligence or good faith bargaining on either side, the council must decide to determine the contents of a first agreement. In this particular case, the union had stalled negotiations, claiming that it had to consult with another union, the Syndicat des Professeurs de l'Université de Québec à Montréal. The council determined that the union was insisting that a third party be included in the negotiations. Noting that collective bargaining was essentially a bilateral process, the council concluded that the union was not making reasonable efforts to arrive at a settlement, and was therefore culpable of lack of diligence. When the union continued to show bad faith throughout the mediation step before the council, a contract was imposed. This decision constitutes an unfortunate precedent in the application of first contract arbitration. Automatic application of the remedy whenever the evidence indicates bad faith bargaining is too heavy-handed an approach. It may serve to frustrate true efforts on the part of some parties to conclude an agreement through negotiation, and it will encourage applicants to abandon the bargaining table for arbitration.

There are some other indications that the arbitration remedy is being applied increasingly frequently in Quebec, without adequate attention to the goals of the remedy and the particular nature of the disputes at hand. The case of Le Syndicat des employés du C.E.C. (CSN) ou ses successeurs, ayant son siège social au 1001, et Le Centre Educatif et Culturel Inc., July 28, 1978, provides an excellent example. The council noted that the dispute had resulted in an extensive work stoppage of 21 months duration, a “difficult” strike. Concluding that it would be illusory to believe the parties could arrive at a settlement, and reciting the legislative language of “according to the

225 L'UQAM et Le Syndicat des Charges de Cours de L'UQAM, April 26, 1979 at 3.
226 Id.
227 Supra note 219.
behavior of the parties as regards s. 41, the council decided to impose a first contract. No further analysis was provided.

In three of the cases, Société d’Electrolyse et de Chimie Alcan Ltée et Syndicat des Policiers de l’Aluminium de la Mauricie, February 22, 1979, and Aarkash Chair Co. of Canada Ltd. et L’Union Internationale des Rembourreurs de L’Amérique du Nord, January 15, 1979, and City Buick Pontiac (Montreal) Ltd. et L’Union des Vendeurs d’Automobiles et employés auxiliaires, local 1974, January 12, 1979, no analysis of any kind was given concerning the decision to impose a first contract. Contracts were simply imposed in all three cases. Jurisprudence of this nature will do much to encourage increased applications for first contract arbitration, which will ultimately affect the quality of collective bargaining negotiations.

All these initial decisions give some cause for concern. Whether they are related to the unusually high number of applications is yet unclear. How the majority of the applications now pending decision will be treated remains uncertain. The situation is, however, serious enough to have caused Marc Lapointe, Q.C., Chairman of the Canada Labour Relations Board, to state: “In my view, the Quebec Code has squarely instituted compulsory arbitration of first collective agreements.” Lapointe’s point of view is that first contracts are being imposed in Quebec far too often, resulting in a serious distortion of collective bargaining. The Quebec experience may indicate that without careful application, the first contract arbitration remedy becomes a danger to the collective bargaining process. This is not to suggest that the remedy is not a necessary and useful one—it is merely to indicate that its application must be carried out with great caution.

VII. CONCLUSION

This analysis has culminated in the conclusion that first contract arbitration is a useful tool and an effective remedy in the face of some deadlocked first contract negotiations. The deficiencies of traditional remedies in a first contract situation—a cease and desist order, directions to bargain, criminal prosecution and fines—are apparent. More innovative approaches such as “make whole” orders of compensation to employees and trade unions are effective in some situations. However, there are cases where first contract arbitration is clearly the most appropriate remedy. Apart from the success of the remedy in putting an end to the bitter dispute and furnishing a general deterrence function in the labour relations community at large, there are some cases where first contract arbitration has the potential to establish a foothold for the trade union and to promote successful collective bargaining in the future. The narrow application of first contract arbitration and the restrictions with which the remedy is contained minimize the disruption to the collective bargaining system that is often caused by compulsory arbitration.
To return to the focus of this case study, it is interesting to query whether first contract arbitration would have functioned as an effective dispute resolution mechanism in the context of the Fleck strike. One can speculate as to what the course of the Fleck strike might have been if it had occurred in British Columbia. Would either party have applied for first contract arbitration? Given that the British Columbia Board's typical first contract arbitration award included a union shop clause, the Fleck management would have been unlikely to seek an end to the impasse through Board intervention. The UAW, however, despite its professed hostility to compulsory arbitration, would likely have applied for first contract arbitration. Robert White's comment that despite ideological opposition to compulsory arbitration in any form, "those who are on their backs after six months of a strike for a first agreement would probably go for first contract arbitration," is revealing.230

How would the British Columbia Board have dealt with a UAW application for first contract arbitration in the Fleck strike? The case bears a striking resemblance to the London Drugs case231 where a first contract was imposed. The employer in both cases had little prior experience with collective bargaining. There was a definite anti-union attitude exhibited by key management figures. Deliberate attempts by Fleck managers to intimidate the employees from exercising rights protected by labour legislation would have been categorized as unfair labour practices by the British Columbia Board, just as they had been by the Ontario Labour Board. Company officials in both cases had urged employees to bargain directly with management rather than through a union. In summary, a pattern of abusive employer conduct had created the bargaining impasse. It is likely that the British Columbia Board would have decided to impose a contract in the Fleck case. Certainly the Kidd Brothers232 reasoning is not applicable. There the Board recognized that since union support had been so effectively destroyed there was little point in imposing a contract, and instead compensation was awarded to the union. All of the conditions existed here to make the "trial marriage" function of the remedy possible. The unit was fairly sizeable, 146 employees. There was a strong and organized core of union supporters still within the unit, approximately 80 employees. There was a distinct hope that with the imposition of a contract collective bargaining could put down roots that would enable it to survive. It is interesting to speculate whether the British Columbia Board would have needed to impose a contract in the Fleck case, or whether the mediation-arbitration techniques would have served to settle the case before the Board was required to rule on the situation. Recognizing the inevitability of the union security provision, Fleck management might have conceded this point and the parties might have resolved the impasse before Board arbitration was required.

If one assumes that a first contract would have been imposed had first contract arbitration been available in Ontario at the time of the Fleck strike, would it have been a preferable result? One obvious advantage would have

230 Supra note 24.
231 Supra note 33.
232 Supra note 11.
been an immediate end to the acrimonious and financially disastrous strike. The overwhelming governmental costs would have been avoided and the violent episodes on the picket lines would have ceased. The potential for the “trial marriage” goal, as discussed above, was high. The general deterrence function should also be considered. It might have been that, confronted with the first contract arbitration remedy, the Fleck management would have felt compelled to bargain in good faith. Perhaps the impasse would never have occurred.

The obvious conclusion is that first contract arbitration should be enacted in Ontario (and other jurisdictions). That such legislation has not been adopted yet is attributable to a number of factors. The Ontario government is Progressive Conservative, rather than NDP, Liberal, or Parti Québécois. Although these other parties have all been responsible for the enactment of first contract arbitration in some jurisdiction, the Conservatives have yet to pass such legislation. Second, neither management nor labour appears to be pressing seriously for first contract arbitration. Management, not surprisingly, remains opposed and argues instead for the enactment of secret ballot votes on certification. The Ontario Federation of Labour after the Fleck strike lobbied the Ontario government for the enactment of union security legislation rather than first contract arbitration. Recent OFL requests that first contract arbitration be adopted appear to have been made as an afterthought, and this request is clearly of secondary concern, falling far behind requests for the elimination of strikebreaking and compulsory Rand formula union security. Despite this picture, it is to be hoped that the Ontario government will recognize the value of the first contract arbitration remedy and adopt it in spite of the reluctance of the parties to endorse it.

Fleck management has expressed the hope that the enactment of first contract arbitration in Ontario will not come about because of the Fleck strike. To the contrary, the Fleck strike provides the paradigm example of the pressing need for such legislation. With hindsight, it can be seen that first contract arbitration might have prevented the Fleck strike completely. At the very least, it would have put a speedy end to the bargaining impasse and work stoppage. The Fleck lesson should be put to good use. First contract arbitration possesses the potential to halt similar labour-management confrontations in the future.