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FINAL OFFER SELECTION:
TWO CANADIAN CASE STUDIES
AND AN AMERICAN DIGRESSION

By S. A. Bellan*

A. INTRODUCTION

It has been observed that politics and religion do not admit of rational
discussion and for this reason these topics should be avoided in polite com-
pany. Perhaps another subject should be added to the list — compulsory
arbitration — for here, too, reason seems a meagre bulwark in the face of
the volatile response usually evoked by the suggestion of a compulsory
arbitration system. A quotation from the AFL-CIO bulletin is illustrative:

Once this nation starts down the path of compulsion as a way of life, it will not
stop with workers. The history of every dictatorship proves that once a govern-
ment is allowed to compel workers to labour against their will, it inevitably uses
the weapon of compulsion against employers, and ultimately, all citizens... But free workers if they are to be free must have the right to strike.1

Compulsory arbitration, broadly speaking, connotes a system under
which both parties must submit their differences to arbitration for resolution
in lieu of the right of each to inflict economic harm — via a strike or lock-
out — on the other. Compulsory arbitration, in theory and practice, embraces
numerous variants, usually engrafted on the “free” collective bargaining sys-
tem at different points. That is, the parties may be compelled to invoke
compulsory arbitration if a settlement has not been reached within a specific
time limit from the commencement of negotiations, after conciliation, media-
tion, a cooling-off period, etc. It should be noted that compulsory arbitration
represents one end of the spectrum, free collective bargaining the other, with voluntary arbitration and ad hoc legislative intervention falling somewhere
between. This paper is intended to explore one such arbitration variant —
final offer selection.

While final offer selection may be adopted voluntarily by the parties
themselves or imposed by legislation, the criticisms are generally similar.
Opponents declare interest disputes unsuited for arbitration; a third party
imposed settlement would lack the “acceptability” of a negotiated agreement;
multiple non-compatible issues embodied in a single offer force an “unrea-
sonable” choice either way; both offers may be patently “unreasonable”,

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1 AFL-CIO Legislative Department, "Compulsory Arbitration", In Transit (April, 1972).
dictating a selection contrary to the public interest. The following quotation is apposite:

While such a system is said to encourage reasonableness by both parties, it is actually gimmickry which encourages poker playing. Sweetly reasonable and unpalatably sour proposals may often be intermixed in each party's offer, but the arbitrators are powerless to select only the reasonable elements. Furthermore, even if under such a system it may be said that the parties deserve what they get, the ultimate award carries with it little promise of stability. Anyone with labour relations experience knows that wherever a winner and a loser may be identified, the leadership of the loser is likely, if only to regain face, to cause trouble.\(^2\)

In contrast to conventional arbitration which usually employs a "compromise" or "saw-off" principle in reaching a settlement, under final offer selection the arbitrator must choose the entire proposal of either party; in bald terms this is how the "game" is played — and in equally blunt language, the model has been denounced as "Russian roulette". Curiously enough, this model has generated more names than applications. That is, final offer selection is also referred to as "forced choice", "either-or", "last best offer", "sudden death", "all-or-nothing", "one-or-the-other", "winner-take-all". Yet FOS has been rarely utilized in Canada. This essay focuses on the two recent Canadian applications of FOS — the settlements of the high school teachers and Boards of Education in Wentworth County and Sault Ste. Marie. Material is primarily drawn from interviews with the parties.\(^3\) For clarification, the terms the "teachers" and the "Board" refer to the chairmen of the respective negotiating committees unless a broader meaning is indicated either specifically or in context.

B. THE WENTWORTH COUNTY DISPUTE

On April 16, 1974, the negotiating committees of the Wentworth County teachers and Board of Education initiated discussion of the ground rules to govern salary negotiations for the 1974-75 contract. When agreement on these ground rules was reached on May 13, the parties were committed to final offer selection as the method of resolving their differences if "collective bargaining" should fail.

It should be noted at this point that the "bargaining" in question is excluded from the ambit of The Ontario Labour Relations Act (O.L.R.A.)

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\(^3\) In the Wentworth County dispute, the Chairmen of the Teachers' and Board's Negotiating Committees — Mr. W. Schaefer and Mr. T. Burton, respectively — were interviewed. Unfortunately, it was impossible to reach Judge Robin Shea, the arbitrator, as he was recovering from an illness. However, he was not required by the parties to give reasons for his selection beyond stating that all evidence properly submitted was taken into consideration. I would further like to thank the other teachers and Board members for their cooperation in answering my questions. In the Sault Ste. Marie settlement, Mr. D. Forsythe of O.S.S.T.F., who was instrumental in preparing the teachers' brief was interviewed in person while Dr. L. Lukenda of the Sault Board was contacted by telephone. Mr. G. Ferguson, the arbitrator selected in the case, kindly made available his comprehensive arbitration award indicating the rationale for his choice of proposals and, further, his paper (as yet unpublished) regarding final offer selection.
by virtue of s. 2(f). Theoretically, each teacher is bound by an individual contract of employment with his local Board. In practice, however, the Boards have “discussed” salary structures with teachers’ negotiating committees — with the admixture of “bargaining” and “paternalism” varying with the locality. Teachers, denied the right to strike legally under the Act, have resorted to various “pressure” tactics — work to rule, mass resignation, withdrawal of voluntary services, and such like — to enhance their position in salary disputes. Both parties agreed that the system functions poorly at present but the type of legislative response desired obviously differs. The consensus among teachers seems to favour inclusion in the O.L.R.A., while the Board appears to be concerned with protecting their constituents — the taxpayers — from “footing the bill” for high wage settlements.

Briefly summarized, final offer selection was to follow the mediation phase in negotiations according to the following ground rules (see Appendix A):

1) after the lapse of the mediation deadline (i.e., three weeks) the final offer of each side on all outstanding negotiable items was to be submitted to a Selection Officer;

2) the Selection Officer was to be chosen by mutual agreement or random selection from a panel of four names submitted by each side;

3) each submission was to indicate the position of the committee prior to mediation, issues settled during mediation and the final position;

4) the Selection Officer could require written clarification of either submission but no changes in the final positions were permitted; the decision was to be totally in favour of either final offer;

5) the decision — in writing and binding — was to be handed down within 30 days; the Selection Officer was not to be required to justify his decision beyond stating that all evidence properly submitted was taken into consideration.

The adoption of the ground rules represents a blend of several factors. The personal predilections of Mr. W. Schaefer, Chairman of the Teachers’ Negotiating Committee, whose contact with the model in a course in industrial relations led to his strong espousal of FOS, provided the initial impetus. The Board’s first response was decidedly cool; the teachers felt their proposal was considered “Mickey Mouse” although the Board perceived their own reaction as cautious. The Board seemed to be persuaded to agree to FOS upon learning that the model had been incorporated into the ground rules of the Ottawa County Board for the past three years (although negotiations had been settled without recourse to FOS) and upon the concession of the teachers embodied in Rule 31 that,

as a prerequisite condition of acceptance of the foregoing procedures, it is agreed that no sanction, mass resignation, withdrawal of any normally performed service, lockout or other action of a similar nature shall be imposed by either party.

In 1971, the teachers had instituted a work to rule campaign to support their wage demands which had resulted in considerable bitterness and ill-
feeling among the teachers, Board, students and parents. Neither party wished to repeat this experience. In fact, the teachers felt this concession was decisive in convincing the Board to approve the ground rules. While the Board stated the barring of sanctions was not critical, it seems that this was quite influential.4

After agreement on the ground rules, negotiations dealing with salary grids and working conditions proceeded without significant success until the intervention of the Mediator, Mr. T. Mancini, on August 29, in accordance with Rule 20. Here, again, the parties' perceptions differed: the teachers felt the mediator was of "some" assistance while the Board considered the mediation phase "very productive", i.e., the teachers' working conditions were deleted, discussion of a 16 month agreement was broached, and the financial records of the Board "opened" to "clear the air". The Board's policy had been to adhere strictly to The Schools Education Act regarding disclosure of accounts, etc. This had aroused some ill-feeling as the teachers claimed the Board's spending had been well below the expenditure ceiling set by the Ministry and, thus, the wage increases could readily be afforded, yet the teachers could not fully substantiate their case unless the data was made available.5 In response to the increased disclosure of financial information, the teachers moderated their demands for the remainder of 1974 but pushed for a substantial increase in 1975.6

The parties continued to negotiate after formal intervention by the mediator for the three week period prescribed by the ground rules before the FOS procedures were to become operative. And, in fact, settlement was reached on all major items before the deadline. The salary grid was tentatively agreed upon at a teacher-Board meeting held in the absence of the mediator. On September 20, the District 36 teachers ratified the "tentatively agreed upon items" by a vote of 71 per cent and rejected the Board's offer on four items (which subsequently went to arbitration) by a vote of 89 per cent. Both parties reported considerable pressure was generated by the FOS

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4 It is of interest to note that the teachers felt that their promise regarding the barring of sanctions was not believed by the Board. Considerable tension was created, the result of which could have eroded the confidence in the "good faith" bargaining of the other party and prompted an emotional response. It seems, however, that the distrust stemmed from a few individual Board members and that the Board Negotiating Committee firmly considered the teachers "honour-bound".

5 The Board's income is derived from grants from the Ministry of Education and the municipality. Should the local Board "pierce" its expenditure ceiling, i.e., the total budget, the Ministry may impose a penalty equal to the amount of excess spending. In the instant case, the Board had consistently aimed at a budget approximating the "grant ceiling" (about 60-70 per cent of the total figure) and, hence, as the teachers suspected, funds had accumulated and were available to satisfy the wage demands.

6 The 16 month agreement was adopted to dovetail the contract term with the Board's fiscal period which is set by the Ministry and coincides with the calendar year. Previous contracts ran from September to August with serious budgetary problems for Boards trying to maintain ceilings and/or estimate expenditures for the following year.
Final Offer Selection

Deadline after mediation, viz., each preferred to reach agreement through negotiation rather than risk a complete loss in arbitration. The Board admitted to the bargaining tactic of "keeping something back" for mediation and conceded that the mediation stage may have delayed agreement. Thus, at the arbitral stage, the following issues were left unresolved:

1) responsibility allowances for Department Heads, Assistant Department Heads, and Minor Heads;
2) salary scales for Principals and Vice-Principals;
3) cumulative sick leave; and
4) extra degree allowance.

But, as was later revealed, the financial differential was a mere $23,000 of a total county educational budget of approximately $22 million.

As the negotiating committees were unable to agree on a Selection Officer, each side presented a panel of four names with the new stipulation (requested by the Board) that the nominees be limited to the county court judiciary to ensure some measure of neutrality. Each side objected to two of the other's nominees and these names were deleted. Judge Robin Shea was selected by lot from the four remaining names.

As mentioned earlier, Rule 27 required both parties to place their submissions before the Selection Officer. It is interesting to note that Rule 31 of the Suggested Ground Rules provided for the exchange of briefs between the parties as well. This stipulation was omitted from the final procedures, probably through inadvertence. The Board expressed the opinion that in view of the few issues unresolved and the narrow gap between the parties such an exchange was unnecessary. It seems logical that the greater the disparity and the more numerous the issues, the more likely it would be that the parties would press for openness. The Board frankly admitted that the amount "at stake" at arbitration considerably influenced the tactics chosen in preparing their submission to Judge Shea.

Under Rule 29, the Selection Officer was not required to justify his decision beyond stating that all evidence properly submitted was taken into consideration. The suggested ground rules had merely stated that all evidence should be considered. The alternative phrasing seems to indicate a desire to limit somewhat the scope of the Selection Officer by excluding possible criteria of selection not presented by either party, e.g., a general governmental anti-inflationary policy. And, further, while both parties stressed the "reasonableness" of the offer as the sole criterion for the arbitrator, each side elaborated this concept in its written submission. The Board emphasized "comparability" as the preeminent criterion, viz., comparability of wage packages with Boards in similar localities with like enrolment levels. Reference to expenditure ceilings was omitted as the wage grid had been settled and the budget parameters secured. However, the Board agreed that if the award might have "pierced" the ceilings (with possible Ministry penalties), this factor would have been
forcefully urged upon the arbitrator as almost conclusive of the case. The teachers cited practices in surrounding Boards as justification for the increases in responsibility allowances, i.e., other Boards hired subject consultants, persons to prepare teaching resources and such like while these duties in Wentworth were assumed by Department Heads, Assistant and Minor Heads. Again, the proposals for salaries of principals and vice-principals refer to the salary grid accepted in the adjacent Hamilton secondary schools. The argument for the extra degree allowance was based on the rise in costs of obtaining such a degree and the lack of change in this figure since 1969-70. Thus, not unexpectedly, the employer-Board defined “reasonableness” as what comparable employers were paying and the Board’s ability to pay (that is, recognizing the constraint of the expenditure ceiling) while the employee-teachers viewed “reasonableness” with reference to salaries of employees (not necessarily teachers) in the immediate area, teachers in adjacent districts and cost of living increases.

The Board also indicated that the narrow gap obviated the need for written reasons for the Selection Officer’s choice but that they would prefer a written judgment if only because it afforded the ‘losing’ party an opportunity to challenge the decision if the Officer had acted on “incorrect” or “irrelevant” evidence.8

Judge Shea selected the teachers’ offer as “most reasonable”; the teachers became the “designated winners” and the Board the “designated losers”. Both parties, however, were pleased with the results of their “experiment”. The Board commented that the winner-loser title was irrelevant in view of the narrow disparity between the parties’ offers — a mere $23,000.

The perceptions of the parties of the process of arbitration by FOS may be summarized as follows:

1) both reported significant convergent pressures to appear “reasonable” in the eyes of the Selection Officer, particularly after the mediation phase;
2) both sides felt strongly motivated to settle the agreement themselves — for personal satisfaction and to avoid the risk of complete loss at arbitration; and yet, both felt that FOS gave the parties a larger measure of control than did conventional arbitration;
3) both parties believed that the FOS deadline (with its criterion of “reasonableness”) set the tone for “civilized” bargaining from the outset and that they felt that less emotion and grandstanding was displayed during negotiations and less animosity remained after settlement than in previous years;

7 This, of course, raises the issue as to whether the Ministry, in setting expenditure ceilings, is establishing the upper limit of “reasonableness” for the arbitrator or whether the arbitrator should treat the budget as one factor but not necessarily determinative of the matter (or perhaps ignore such constraints as artificial).
8 Judicial review of arbitration awards is a controversial issue at best, but here, where the arbitration is consensual, not statutory, the court would likely require manifest evidence of error before intervening.
4) the teachers felt that the FOS device operated to equalize bargaining positions whereas formerly they had felt "underdogs" in a more paternalistic setting;

5) both felt that the time frames — set in advance — prevented a stalemate from developing and kept talks progressing (albeit slowly at times); both heartily endorsed the banning of sanctions during negotiations;

6) in the school system, sanctions such as work to rule rapidly generate a heated response from parents and students adding to the difficulties at the bargaining table; further, the teachers here were reluctant to risk splitting their own ranks or penalize students by imposing sanctions (the bitter schism of the Windsor teachers, between those who walked out and those refusing to strike, was cited, as well as the acrimony resulting from a work to rule campaign in the district in 1971);

7) both parties felt compelled to justify their positions during negotiations by reference to "concrete" financial data in preparation for the FOS criterion of reasonableness; indeed, both reported that the FOS deadline encouraged "realistic" bargaining throughout;

8) both favoured use of FOS for the next round of contract talks.\(^9\)

Some criticisms were also noted. The Board would have preferred item by item selection rather than the total package and intended to press for more restrictive guidelines if FOS is used again, such as, requiring a written decision from the Selection Officer, item by item selection, confining FOS to monetary issues and outlining criteria for the arbitrator. While both parties felt the response of the media, particularly, the Hamilton Spectator, was positive and supportive, each thought the public generally understood little of the FOS procedure. The teachers expressed some disquiet at a few press releases categorizing their demands as "outrageous" prior to the award, although after the decision, the Board officially commented that it was "happy" with the settlement. Again, because of the lack of widespread knowledge of FOS, the teachers experienced some difficulty in communicating effectively with their own constituency. The teachers did express the reservation that any proposal in an inflationary situation that coped with cost-of-living rises could yet appear "unreasonable" in terms of FOS.

But the parties by and large were well pleased with FOS and deserve praise for their willingness to initiate a novel procedure in a most orderly fashion.

C. THE SAULT STE. MARIE DISPUTE

The imposition of expenditure ceilings in 1971 considerably altered negotiations between the teachers and the Board. Whereas the teachers previously had accepted the offer which they felt most closely approximated the

\(^9\) As the composition of the teachers' Negotiating Committee changes annually, however, it is as yet uncertain whether FOS will be adopted; informal feedback, though, seems positive.
monies available to the Board, by the commencement of negotiations in early March of 1974 the teachers felt their position relative to other wage earners in the community had been seriously eroded.

Fearing protracted and hostile bargaining sessions, the teachers proposed final offer selection early in the negotiations. The Board resisted a commitment at this time partly because of the “newness” of FOS; the system was virtually untried in Canada. Both parties did resolve to turn to mediation and if necessary, voluntary arbitration modelled on FOS if a deadlock developed during negotiations; the teachers further agreed not to invoke any sanctions during the term of the current agreement, that is, not until August 31, 1974.

The imperceptible progress achieved after nearly two months of bargaining prompted the teachers, on May 10, to overwhelmingly approve a withdrawal of voluntary services effective September 1, 1974 should the contract not be settled by that time. Talks continued until June 26, adjourned for the summer, resumed on August 27 and then broke off on September 4 when the teachers' request for a cost of living increase was ignored. Relations were further exacerbated as the Board, angered by the imposition of the threatened sanction, refused to pay the grid increment claiming the collective agreement had expired on August 31 and the teachers responded with a civil suit.

The services of Mr. T. Mancini, the mediator requested by the Ministry of Education, proved fruitless. Pressure, however, was building: the students staged a “walk out” on three occasions to protest the elimination of the extracurricular activities, football in particular; a number of teachers wished to resume the extracurricular programme despite the stalemate in negotiations out of concern for their students. Both sides wanted some device to end the teachers’ sanction, break the impasse and yet “save face”.

The solution was final offer selection. On October 8, 1974, Mr. D. Lawrence, President of the Sault Ste. Marie Division Ontario Secondary School Teachers' Federation forwarded the following proposal to Dr. L. Lukenda, Chairman of the Board of Education:

1) The withdrawal of voluntary services would cease;

2) negotiations would be resumed on October 10 and 15, and extended upon mutual agreement for October 16 and 17;

3) if the dispute was still unsettled, outstanding items would be submitted to a single arbitrator, mutually acceptable or appointed by the Ontario Labour Management Arbitration Commission, if necessary;

The salary structure for teachers forms a matrix or “grid”, that is, the salary of an individual teacher at any point in time is determined by integrating two factors — the number of years of teaching experience and the “group level”, representing the academic qualifications.

It should be noted that on settlement of the contract, the teachers implemented a full extra-curricular programme, including special scheduling of “spring” football in cooperation with NOSSA.
4) the arbitration would be restricted to money on the grid, responsibility allowances, extra degree allowances, principals’ and vice-principals’ salaries, the principals’ expense allowances, death benefits, and the benefit plan;

5) items tentatively settled prior to the date negotiations broke off would be deemed finalized; items agreed upon during the resumption of negotiations before the arbitrator was appointed would be deleted from the list in (4);

6) within two weeks of the last day of negotiations, the final offer of each party, with written argument, would be submitted to the arbitrator and released to the other;

7) within the next ten days, a rebuttal limited to a reply to points raised in the other’s argument would be likewise submitted and released;

8) the arbitrator, on the basis of the written and oral evidence presented, would make his award by selecting the entire final position of either party without amendment or alteration.

The Board accepted the proposal; the parties were looking to FOS to succeed where six months of intensive, often bitter negotiations had failed to produce a contract.

With FOS adopted, the parties resumed negotiations on October 10 and 15 and succeeded in resolving three issues, namely, the principals’ expense allowance, death benefits, and the benefit plan.

As prescribed in the terms of arbitration, the parties submitted written briefs and rebuttals regarding the five remaining issues, i.e., money on the grid, responsibility allowances, extra degree allowances, principals’ and vice-principals’ salaries. At the hearing on November 21, viva voce evidence was adduced concerning the updating of statistical data already submitted and settlements reached in areas referred to in the briefs (but not offers as yet unaccepted). Both this Board and the teachers requested that the arbitrator, Mr. G. Ferguson, provide written reasons for his award. Both parties asked that the award be handed down as soon as possible; in fact, the decision with written reasons was released approximately three weeks after the hearing.

The terms of reference for the arbitrator contained no guidelines beyond the stipulation that the award was to be based on the evidence presented and constitute the entire package offer of one party. However, the teachers submitted a highly sophisticated brief and rebuttal amounting to 45 and 20 pages, respectively, setting out in detail the statistical data and suggested criteria for selection. Under the heading “Criteria for Determining Facts in Awarding an Arbitration Decision”, the teachers reviewed the criteria cited in the Welland County General Hospital dispute (1965), the “Vancouver formula” used by the Nechako teachers, the Windsor Board-teacher arbitration and the Wellington County Separate School case. Criteria which were impossible to analyse in quantifiable terms were rejected. The following factors were put forward:

1) recent secondary school salary settlements in the area;

2) recent salary settlements for other teachers and other public service employee groups;
3) trends in the cost of living;
4) the employees' right to share in the increase in productivity;
5) trends respecting the relative position of various employees within society.

Extensive statistical data were marshalled to buttress the teachers' request for an 11.8 per cent increase across the salary grid and for monetary allowances: grid comparisons with the Board's offer, teachers' proposal and recent school settlements, including the settlement with the Sault elementary school teachers; rate comparisons with Board of Education secretarial staff, Sault constables and firefighters; information published by the Canada Department of Labour for the second quarter of 1974 regarding base wage rates established by collective bargaining settlements for various industries; the Consumer Price Index reflecting the cost of living spiral; the Gross Provincial and National Products; purchasing power indices; career earnings of Sault secondary school teachers and police constables; a longitudinal survey of Sault wages for teachers, police, firefighters and an "industrial composite". The teachers vigorously asserted that comparison with non-teacher groups was essential to preserve the relative position of teachers within society, i.e., both to incorporate the cost of living increase and the real growth of the economy. Finally, the teachers maintained that the expenditure ceilings were irrelevant to the issue:

The arbitrator must not be put in the invidious position of having to decide whether a board can afford to pay what is necessary under the circumstances. Boards have the responsibility and authority to adjust budget priorities in whatever fashion they choose. . . . If the Board, in fact, cannot honour its obligations, then it is the Board's responsibility to approach the Minister. . . . They cannot simply explain that the Ministry does not provide enough money and then expect teachers to accept only the amount of money which the Ministry does provide.12

The Board's presentation was not nearly as comprehensive or detailed. Indeed, the Board commented that individual school boards are seriously disadvantaged in arbitration in comparison with the resources of Ontario Secondary School Teachers' Federation whose staff and research facilities are available to the teachers' bargaining units. On the issue of across-the-grid increases, the Board argued that a consistent percentage increment benefited the senior staff in the higher salary brackets far more than those in the junior levels. Thus, the Board's salary proposal differed in percentage increase for each step in the grid.

As in the Wentworth case, the arbitrator selected the teachers' final offer. Before the arbitral award, the teachers felt that the Board was attempting to discredit them unfairly in the eyes of the community; their "victory" was viewed as a tremendous morale boost, that is, that their argument appeared fair and reasonable to a neutral third party. The teachers speculated that the award enabled the Board to shift responsibility for piercing the expenditure ceilings to the arbitrator. However, D. Lukkenda, Chairman of the Board, candidly stated that the government ceilings could not "tie the hands" of the arbitrator as this would effectively emasculate the procedure. He did concede that as the Board is an elected body, an arbitration decision

12 The teachers' rebuttal to the Board's submission, at 8-9.
necessitating an increased tax rate might prove more palatable to the constituents than a negotiated settlement requiring such an increase. The Board, though, felt that the teachers had benefited by the rather drastic changes occurring in the economy over the negotiation period; that is, whereas 10 per cent might appear a generous settlement in the spring, by the fall such a figure was inadequate to cope with the spiralling cost of living.

The arbitrator, Mr. G. Ferguson, delivered a comprehensive and lucid arbitral decision clearly outlining those factors influencing his selection of the teachers' offer. The negotiating history of the parties, including the tactics adopted by both sides (i.e., the withdrawal of voluntary services and refusal of salary increment) and the items settled or withdrawn before arbitration, were deemed irrelevant; questions of past "fault" were outside the present determination. Further, the freedom of the arbitrator to seek data on his own initiative was closely circumscribed:

I do not believe that I have the right to seek outside information or advice or to consult with experts in the educational field. I must base my decision on the evidence which is placed before me by the parties.1

Further, that the teachers' offer would pierce the expenditure ceilings and possibly subject the Board to financial penalties was expressly rejected as outside the ambit of meaningful consideration of the offers of both parties on the merits. It should be noted, though, that the offers were relatively close: for example, the minimum-maximum offers for principals' and vice-principals' salaries respectively were $25,735 to $27,835 and $22,060 to $24,160 for the Board and $25,994 to $28,006 and $22,192 to $24,205 for the teachers. Additional comparisons of the Board's and teachers' offers are detailed in Appendix B. It should also be mentioned that the Board's final offer likewise pierced the government ceilings.

Ferguson pointed to the following factors as determining his selection:

1) statistics proving that there had been a substantial increase in the cost of living in 1973 and 1974;
2) the comparison of the percentage amount of increases which had been paid to teachers and the percentage increases given to industrial workers in Sault Ste. Marie in the last five years;
3) settlements which had been negotiated in collective bargaining in Ontario in 1974;
4) the obvious conclusion that the purchasing power of a teacher occupying the same position on the salary grid had eroded due to changes in the cost of living;
5) the offer of the Board for increases to the responsibility allowance appeared to be unreasonably low;
6) the teachers' offer was based on a consistent application of an increase of 11.8 per cent for each level on the grid.14

The Board had compared total salaries of teachers at two different levels.

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13 G. Ferguson (unreported) at 5.
14 Id. at 11.
of experience on the salary grid in formulating its offer. Ferguson designated part of the differential an "experience allowance", separate from the percentage increment across the grid and preferred the teachers' proposed consistent increase of 11.8 per cent to the Board's varying percentages. With regard to the principals' and vice-principals' salaries, Ferguson indicated that as almost one quarter of such teachers were at the maximum position in the grid, the teachers' offer better coped with the cost of living increase. The reduced purchasing power of the dollar and the possibility of further devaluation over the next years were important factors. The Board's contention that the teachers' proposal was dangerous or inflationary was rejected as an allegation without evidentiary foundation beyond a general labelling of any wage increase to a substantial number of people as "inflationary".

The teachers, as expected, were well pleased with the result but indicated that they would have preferred to settle the dispute themselves. The Board, too, was generally satisfied with the award, although there was continued disagreement with the arbitrator's rejection of the Board's increment proposal in the favour of the "consistent" offer of the teachers.

D. COMPARISON OF THE WENTWORTH AND SAULT NEGOTIATIONS

The obvious difference between the Wentworth and Sault negotiations is the point of adoption of final offer selection, viz., the Wentworth teachers and Board provided for FOS in their ground rules before initiating salary negotiations whereas in the Sault dispute, FOS was implemented as ad hoc device to resolve an impasse in bargaining. In both instances, the impetus for adoption of FOS came from the teachers; the Boards were initially reticent and agreement to use FOS was linked with teachers' sanctions — in the Sault after the imposition of the withdrawal of voluntary services and in Wentworth in return for an undertaking not to impose any sanctions.

The procedural aspects of the arbitration process itself presented some interesting contrasts. Wentworth preferred to guarantee some measure of neutrality in the arbitrator by requiring that nominees be county court judges and selecting by lot if none was mutually acceptable; Sault provided for appointment of an arbitrator by the Arbitration Commission should the parties fail to agree. (It should be noted that a Commission appointment of an arbitrator was not required.)

Neither required written reasons in the terms of reference although the Sault teachers and Board did request a written decision from arbitrator G. Ferguson. Both groups confined arbitral discretion to consideration of the evidence presented. The Wentworth Board did indicate that they would press for written reasons in the next round of negotiations if FOS were again utilized. Similarly, an exchange of briefs and a possibility for rebuttal — as provided for in the Sault arbitration — would likely be preferred by the Wentworth Board particularly if the number of items going to arbitration was significant.

Again, neither group specified criteria or guidelines in the terms of reference for the arbitrator. The Wentworth Board's negotiators referred to
"reasonableness" as the touchstone of the arbitrator's selection; however, both the teachers and the Board elaborated "reasonableness" with reference to the financial data of "comparable" schools and/or other sectors in the community. Both parties in the Sault case were silent regarding criteria in the instructions given to the arbitrator. The teachers, though, presented a comprehensive statistical analysis of wage settlements and explicitly outlined the criteria they viewed as determinative after reviewing several arbitral decisions. The Sault Board indicated that it would have preferred initial agreement on criteria to be used by the arbitrator in selecting the offer. The Board felt that restrictive and predetermined criteria, for example, exclusion of wage settlements outside of Ontario, would obviate the problem of the O.S.S.T.F., with its greater resources, inundating the arbitrator with data while the Board could not finance an equally sophisticated brief.

In each case the arbitrator was directed to choose the entire offer of one party rather than an item by item consideration. The Wentworth Board expressed a preference for this latter form especially if both monetary and non-monetary items remained unresolved before arbitration. The Sault Board and teachers, however, felt that such a selection would encourage a resort to the "saw-off" principle of conventional arbitration; that is, the arbitrator would attempt a "compromise" solution or more palatable decision by balancing his choices.

Both commented on the "reasonableness" of the costs involved as well; in the Sault case, the oral hearing lasted only three hours, whereas in Wentworth, written briefs were submitted without viva voce evidence and Judge Shea declined to submit a fee for his services claiming the exercise was part of his "public duty".

The parties to the Wentworth dispute reported considerable pressure to adopt a realistic, objective bargaining stance throughout and to settle as many items as possible rather than risk loss at arbitration. While the time period between adoption and implementation of FOS in the Sault case was extremely short, the three bargaining sessions did resolve the remaining peripheral items, leaving the major monetary issues for arbitration; apparently neither side wished to chance a loss at arbitration over their stance on a relatively minor point. The Wentworth negotiators, further, experienced a definite reduction in the emotionalism that had characterized earlier contract disputes. In the Sault, as well, the parties felt that the necessity of preparing a written brief to convince a neutral third party of the merits of their offers tended to force both sides to adopt a more realistic position without posturing for effect.

Finally, in both disputes the arbitrator selected the teachers' offer; the teachers, not unexpectedly, were well pleased with the outcome, but the Wentworth and Sault Boards, too, strongly endorsed the final offer selection route. The possible implications of these two instances of FOS in Canada for "free" collective bargaining are discussed in the concluding section of the paper.
E. AN AMERICAN DIGRESSION

Legislation has been enacted in several American states implementing FOS for employees in the public sector. In addition, ad hoc statutes and voluntary agreements have turned to FOS to resolve bargaining impasses. This section is intended to review briefly the FOS experience in Indianapolis, Eugene (Oregon), and Wisconsin and Michigan. The first is an example of consensual arbitration, the second of a city ordinance, and the third of state legislation. Implications of these experiences are discussed in the conclusions of the paper; this section is predominantly descriptive.

1. Indianapolis

On February 22, 1972, after five months of negotiations, the City of Indianapolis and the American Federation of State, County, and Municipal Employees agreed to resolve their contract dispute through final offer arbitration. The procedures were modelled on Bill 280 in the Indiana Senate (which was not enacted into law), i.e., the arbitration panel was to "select the most reasonable in its judgment, of the final offers submitted by the parties, and such final offer shall be the binding contract between the parties" and "not to compromise or alter the final offer which it selects". Of critical importance was the stipulation that the available financial resources of the State agency represented, in effect, the upper limit on reasonableness in that an award which necessitated deficit financing was prohibited.

The final offer of the parties may be outlined summarily:

1) wages: the city proposed a 5.5 per cent increase (representing an average wage rate of $124 per week); the union demanded 7.6 per cent (roughly, $128 per week).

2) health care: the union wanted the city to absorb the increases in Blue Cross premiums instituted in 1971 and 1972; the city resisted on budgetary grounds — that this item alone would cost approximately $90,000 — and on the legal argument that state law restricted public employers to contract for group insurance for its employees, i.e., the Attorney-General had indicated that the applicable statute excluded coverage for dependents under the Blue Cross Family Plan;

3) the union asked for an extra week of sick leave per year for service for employees who exhausted their sick leave for hospitalization and recovery; the city proposed that the 12 day maximum be continued although it was willing to permit employees to take unused sick leave when injured on the job;

4) the union wanted a full day's pay for employees when weather conditions prevented work; the city offered 4 hours' pay;

5) the union demanded time-and-a-half for work in excess of 8 hours per day; the city proposed overtime for work in excess of 80 hours in a two-week period;

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10 That is, Wisconsin, Michigan, Iowa, Minnesota, Massachusetts, and a city ordinance in Eugene, Oregon.

6) the union requested weekly pay cheques for certain comparatively low-paid employees; the city wished to continue its bi-weekly pay schedule;

Item 5 was clarified during arbitration and agreement reached between the parties. Further, discussion with respect to item 3 reduced cost estimates from $50,000 to $11,712 yearly; this issue might have been settled during negotiations if not for the ambiguity of the union proposal.

The two member arbitration panel first tested the individual proposals of each party against the standard of "reasonableness". The Board thought that the union wage demand of 7.6 per cent was reasonable given wages for employees in comparable classifications in private industry. That the wage demand of 7.6 per cent exceeded the 5.5 per cent standard of the Pay Board was held not conclusive of the issue. Finally, the Board felt the public interest was in no way jeopardized and funds were available. The Board favoured the city's position on item 4 and the union's proposal on item 6. The possible illegality of the demand for: Blue Cross premiums for dependents was disregarded: "whether the union's proposal is legal or illegal, the Board must deal with it on its merits". But the panel warned that other arbitrators might well feel the violation of Federal or State law "unreasonable" by definition and conclusive of the selection.

The city's package was selected on the grounds that the costs of the Blue Cross premiums and sick leave amounted to $101,712. The union's offer thus represented a labour cost increase of 10 to 12 per cent.

The Board held that the city could not produce the funds needed to provide an increase of this size without impairing an orderly and efficient operation of its government and thus jeopardizing the public interest. Additionally, the Board emphasized that

... even in collective bargaining in private industry, the Board takes judicial notice that contracts calling for such an increase are not currently being negotiated. Clearly, a contract which is 'reasonable' does not depart from the mainstream of what is currently the practice in industry. To be 'reasonable', a contract must conform to the general character of wage and fringe settlements.

In making the award, the Board chafed under the restriction of FOS and would have preferred the discretion to compromise or at least select among the proposals. This suggests that where a number of issues are to be resolved, including monetary and non-monetary factors, item by item selection might be indicated as a means of introducing some flexibility while somewhat excluding the "saw-off" principle, since no compromise was allowed on any one item. It should be noted, however, that the union and the employees accepted the decision in good faith; no strike or other sanctions

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17 The Pay Board, established in 1971 by an Executive Order of the United States President, was intended to develop and establish criteria and standards for the stabilization of wages and salaries in an effort to combat inflationary pressures.
18 Id. at B-3.
19 Id. at B-5.
20 Id.
(i.e. slowdown) resulted. In fact, the national headquarters of the union remained positive: “We think the decision is an important one because it lays down a precedent for ad hoc solution procedures for municipal disputes, as an alternative to (strikes)".21

2. Eugene

In 1971 Eugene city council enacted the city ordinance establishing final offer selection for public service employees. A rigorous bargaining-arbitration timetable is delineated so that contracts are coincident with the fiscal year and are finalized before the annual budget adoption deadlines in May and June. Briefly, the first stage of “good faith” bargaining is followed by mediation (which may be mutually waived), then “official” negotiations lasting 25 days. If no agreement is reached, each party submits a final offer and one alternative offer comprising the entire proposal or limited to specific items remaining unresolved. After five further days of negotiation, if no settlement is reached, the arbitration procedure is invoked. Of interest is the provision that “parties may continue to discuss these offers until agreement is reached or a decision rendered by the tripartite arbitration panel”.22 The panel is mandated to hold at least one hearing and deliver its decision within ten days of convening. The most reasonable package offer is determined solely on the basis of four criteria: “the bargaining history of the parties, relevant market comparisons in the private sector, relevant market comparisons in the public sector and the city’s ability to pay”.

Six contracts with the three bargaining units — the firefighters, police and civilian employees have been negotiated under this procedure and are briefly discussed.

1) The entire 1971-72 firefighters’ contract went to arbitration. Major issues included staffing standards and promotion, longevity pay and salary scale. The city offered 6.0 per cent mainly in across-the-board increases and 6.5 per cent in a package stressing health and retirement benefits. The union demanded 8.6 or 7.4 per cent packages with longevity and manning standards included in both offers. The Board cited the unreasonableness of the mandatory staffing standards as justification for the rejection of the union’s offers; the first city offer was chosen out of consideration for the union’s preference for across-the-board increases.

2) The entire 1971-72 police contract was also submitted to arbitration. The main disputed items were the scope of management rights and the wage increase. The city offered 6.2 and 6.7 per cent packages; the union demanded 15.9 and 13.0 per cent. Informal feedback from the panel critical of the

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21 Id.
23 Id. at 192.
24 The unions are entitled: Eugene Fire-Fighters Association, International Association of Fire-Fighters Local 851 AFL-CIO (140 employees); Eugene Police Patrolmen’s Association (145 employees); American Federation of State, County, & Municipal Employees Local 1724A — AFSCME (300 employees).
union's demand led to renegotiation and a settlement without an arbitration award. The city's second offer was largely adopted with the economic adjustment raised to 6.8 per cent.

3) The first American Federation of State, County, and Municipal Employees' contract in 1971-72 resulted in settlements of most issues, with the exception of union security, as both parties wished to avoid arbitration. The city wanted a maintenance of membership provision; the union demanded a union shop. The city did not oppose the agency shop in principle. Rather it felt compelled to oppose the proposal as a sizeable number of the employees were non-union or even anti-union. The gratuitous fact-finding services of the state were utilized instead of an arbitration panel and state officials examined the submissions of the parties and other relevant data. However, as either the union or city position had to be selected, the result in practical terms was FOS.

4) The 1972-3 police contract (to run for two years) was settled without recourse to arbitration, based on a 12 per cent over-all economic adjustment and an innovative promotion policy.

5) The 1972-73 firefighters' contract was negotiated by the parties except for the provision regarding longevity pay. The city offered a tax sheltered annuity benefit of 3.0 per cent or an across-the-board increase of 2.8 per cent; the union proposal amounted to 3.1 per cent. The city's across-the-board offer was accepted by the arbitration panel; rejection of the other proposals was grounded basically on the lack of comparable plans in the relevant labour market.

6) The 1972-73 AFSCME negotiations resulted in consensus regarding non-monetary items but the wage increase was submitted to arbitration. The city's packages totalled 5.9 or 6.2 per cent; the union's 10.4 or 10.0 per cent, both based on a one year agreement. Again, as a result of negative feedback concerning the union proposal, direct negotiations were resumed and the union settled for 13 per cent over the first two years and a wage reopener for the third year of a three year deal.

It should be mentioned that the general context of union-management relations in the city was conducive to productive negotiations, i.e., both sides recognized the other's legitimacy and daily contact was cooperative, not hostile. Further, the city council played a minimal role in bargaining and there was, consequently, little politicizing of the issues; the personnel director is the chief negotiator, reporting to the city manager. The financial position of the city has been sufficiently healthy to avoid recourse to the criterion of "ability to pay" and, hence, competition for the allocation of scarce resources has been relatively absent.

3. Wisconsin

The State of Wisconsin enacted legislation in 1972\textsuperscript{25} providing for final
offer arbitration to resolve contract disputes between local governments and policemen, firefighters and county law enforcement officers. The scope of the statute is limited to cities with populations between 2,500 to 500,000, thereby excluding Milwaukee. Under the statute, either party may petition the Wisconsin Employment Relations Commission to order arbitration; the Commission, however, issues such a directive only if convinced, after intensive mediation efforts during an investigation, that a genuine impasse has been reached. While the parties may agree to utilize conventional arbitration, this option is rarely exercised. Rather, the usual form is final offer selection on an entire package basis. Guidelines for the arbitrators, identical with the Michigan statute, state that weight be given to the lawful authority of the employer, stipulations of the parties, ability to pay, cost of living; comparisons with other employees in the public and private sectors doing similar work, comparisons with other employees generally in comparable communities, and other factors which normally or traditionally are taken into consideration in determining wages, hours and conditions of employment in the private and public sectors.

However, arbitrators largely rely on three of the nine criteria, namely, the cost of living, the ability of the government unit to pay and the wage rates of public employees in similar occupations in comparable communities. There is some tendency for the first arbitrated decision to be rather high — in effect, a catchup award — with later awards roughly following the cost of living increase. The parties feel that the existence of arbitration is reducing the disparity in wage rates both between communities and within each occupation, although data is not available to substantiate this.

The “inability to pay” argument has not been warmly received by arbitrators who have not accepted the prior adoption of a budget for the current fiscal year by the appropriate legislative body as establishing an inflexible upper limit on the award. Arbitrators generally appear to believe employees are entitled to wage and salary increases that will keep them abreast with increases in the cost of living and will bring them up eventually to comparable jobs in comparable communities. A legitimate inability to pay argument creates a tendency for the arbitrator to spread the period of time over which a community is given to become comparable with other communities. Rarely, however, has an arbitrator suggested that inability to pay legitimates substandard wages or reductions in real earnings over the long run.

The following table illustrates the pattern of contract settlement for the police, firefighters and county law enforcement officers for the three years since the final offer statute was introduced:

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29 Dennis & Somers, *supra*, note 27 at 94.
Number of Police, Firefighter, and County Law Enforcement Officers Agreements Negotiated and Number and Percent of These Agreements Resolved by Mediation, Fact-Finding, and Arbitration

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Number of bargains</td>
<td>427</td>
<td>143</td>
<td>173</td>
<td>147</td>
</tr>
<tr>
<td>No. of Mediationsa</td>
<td>52</td>
<td>22</td>
<td>13</td>
<td>9</td>
</tr>
<tr>
<td>No. of fact-finding petitions</td>
<td>64</td>
<td>12b</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>No. of arbitration petitions</td>
<td>—</td>
<td>14b</td>
<td>43</td>
<td>40</td>
</tr>
<tr>
<td>Total number of requests for third party assistance</td>
<td>116</td>
<td>48</td>
<td>56</td>
<td>49</td>
</tr>
<tr>
<td>No. of fact-finding awards</td>
<td>24</td>
<td>4</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>No. of arbitration awards</td>
<td>—</td>
<td>7</td>
<td>16</td>
<td>1</td>
</tr>
<tr>
<td>Total number of awards</td>
<td>24</td>
<td>11</td>
<td>16</td>
<td></td>
</tr>
</tbody>
</table>

Note: The number of bargains was calculated from the questionnaires and adjusted to reflect the 70 per cent response rate and the number of two-year agreements. The number of mediations, fact-finding and arbitration petitions, and fact-finding and arbitration awards is taken from state records. Adjustments were made in state figures to convert them from fiscal years to calendar years, as municipal agreements run for calendar years.

aIn order to avoid double counting, the number of mediation cases has been reduced by those that were not settled at that step and were referred to fact-finding or arbitration.

bWhen the 1972 amendments providing for arbitration were enacted, there were still some situations in which the parties had not reached agreement on their 1972 contracts. Fourteen of these, some of which had originally been filed as fact-finding cases, resulted in arbitration petitions. The cases which were refiled as arbitration cases have been subtracted from the fact-finding cases to avoid double counting.

cAs of April 1, 1974, there had been 49 petitions for third-party assistance in negotiating 1974 agreements. Twenty-three petitions were still pending at some step of the procedure. Therefore, although only one award had been issued as of April 1, 1974, the total number that will be issued is not yet known.31

Clearly, the parties continue to prefer to conclude negotiations themselves rather than opt for a “simple” arbitrated decision. For example, of the 173 negotiations in 1973, two-thirds reached agreement without third party inter-

31 Id. at 85.
viation; three-quarters of the remaining 56 disputes were resolved by the parties during mediation either during the Commission’s investigation or at an arbitration hearing; only 9 per cent of the 173 negotiations (16 in all) were settled by arbitral decree. As of April 1, 1974, the 147 disputes were settled by the parties themselves in 98 cases (67 per cent); and of the 49 involving third party assistance, 25 were concluded via mediation, one by arbitration and 23 were still pending at some stage in the process.

Of interest, also, is the following issue analysis of arbitration cases, based on the 24 awards published by April, 1974:

<table>
<thead>
<tr>
<th></th>
<th>(# cases)</th>
<th>(# issues)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conventional Arbitration</td>
<td>11</td>
<td>11</td>
</tr>
<tr>
<td>Final Offer Arbitration</td>
<td>1*</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>7</td>
<td>3-5</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td>6-8</td>
</tr>
<tr>
<td></td>
<td>1</td>
<td>12</td>
</tr>
</tbody>
</table>

*in 4 of the 7 the issue was wages

Both interviews and examination of the awards suggest that final offer arbitration persuades the parties to reduce the number of issues to be arbitrated. Further, “of the 173 bargains for 1973, agreements concluded under the final offer arbitration statute, only about 3 or 4 involved (the) multiple non-compatible issue dilemma”. That is, the likelihood that each side will present offsetting reasonable and unreasonable demands on different issues apparently is more an academician’s dilemma than practical problem.

Support for final offer selection over conventional arbitration or even FOS on an issue by issue basis seems widespread among unions, management and arbitrators. The box-score on awards is currently twelve to eleven in favour of management.

It must be remembered that the primary function of interest arbitration is to equalize bargaining power where the right to strike is denied. It seems as though the system of final offer selection is workable and acceptable as a strike surrogate: the vast majority of the larger cities and counties that have fallen within the framework of the FOS statute have established viable collective bargaining relationships in which the parties ordinarily negotiate their own settlements despite the fact that there is no right to strike.

4. Michigan

The Michigan final offer statute is confined to economic issues in dispute between local governments and police, firefighters and deputy sheriffs.

82 Stern, supra, note 27 at 40.
83 Id. at 42.
84 Id.
85 Id.
86 Id. at 43.
87 Dennis & Somers, supra, note 27 at 97.
88 Supra, note 26.
While arbitral criteria are identical to those in the Wisconsin statute, the procedure differs significantly. However, as the model really approximates mediation-arbitration, in that the parties are not required to outline their final offers on the economic issues at any specific phase in the proceedings, the discussion is minimal in this paper and is simply a sketch of the system.

The arbitration hearing is seen as a continuation of the negotiation process; offers are modified in response to changes in the other side's proposals and/or feedback from the arbitrator. Further, the arbitrator is empowered to remand the dispute for three more weeks of bargaining after the formal hearing. The scanty data suggest that FOS coupled with the great flexibility of the arbitrator to "mediate" first has increased the number of "negotiated" contracts: "under conventional arbitration, in 39% of cases where hearings were held, no award was necessary because a settlement had been made during the arbitration proceeding. Under final offer thus far, the comparable figure has jumped to 64%". The rate of requests for arbitration, however, has remained the same under the earlier statute providing for conventional arbitration and during the first eighteen months of the final offer amendment. Acceptability seems to be high for both the management and union sides, probably because the model really is "med-arb". In fact, Stern indicates that the union representatives endorse the legislation wholeheartedly but "none of them has said that the substitution of binding arbitration for fact-finding with advisory recommendations has, as far as they are concerned, changed the bargaining process".

F. IMPLICATIONS FOR "FREE" COLLECTIVE BARGAINING

The touchstone of any labour relations system is, of course, acceptability. Provided that the process yields results satisfactory to the parties themselves, i.e., deals with the negotiations of the moment and preserves the ongoing relationship of the bargainers, the design of the process should not be required to contain an ideological bias. Yet a chief criticism of arbitral systems reveals a decided moral judgment:

Experience — particularly the War Labour Board experience during the '40's — shows that a statutory requirement that labour disputes be submitted to arbitration has a narcotic effect on private bargainers, that they turn to it as an easy — and habit forming — release from the obligation of hard, responsible bargaining.

Apparently, for the parties to seek a "simple" solution to settling contract

30 Supra, note 25.
40 Supra, note 28 at 44.
41 Id. at 45.
42 Dennis & Somers, supra, note 27 at 95.
43 Stern, supra, note 27 at 40. Comment by W. Wirtz at 1963 meeting of the National Academy of Arbitrators.
disputes without recourse to or threat of economic punishment is in some way “immoral”.

Once one recognizes this ideological component — that “responsible” bargaining must be conducted in the shadow of economic sanctions — one may proceed to a more dispassionate examination of the functioning of the final offer selection variant of the arbitration process.

It should be noted that the arbitration statutes in Wisconsin and Michigan have not turned the bargainers in those states into “addicts” turning to arbitration to “fix” their contract disputes. As shown by statistical studies the overwhelming majority of contracts continue to be settled in the negotiation stage with or without the services of a mediator. Furthermore, the legislation is not viewed as a replacement of the collective bargaining process, rather what is to be eliminated is the economic sanction possessed by each party. It is only upon the failure of the “free” bargainers to conclude an agreement that arbitration is invoked to break the impasse.

To be effective, the form of arbitration must indeed supply a “strike surrogate”. That is, the system must generate sufficient convergent pressures to foster “good faith” bargaining and the desire of the parties to reach an agreement. It is contended that final offer selection meets both these tests — namely, acceptability and the “strike surrogate”.

The acceptability of the arbitral decision is no doubt related to the parties’ perceptions of their input and control over the outcome. Several comments made during the Wentworth interviews are worth noting here. That is, both parties expressed the view that they had been given the “short end of the stick” under conventional arbitration; the Board felt the arbitrator perceived the taxpayer as a limitless source of revenue; the teachers saw the arbitrator as overly sympathetic with the government’s policy of expenditure ceilings and felt that they were the whipping boy for the rest of society. This seems to highlight a major weakness of conventional arbitration, that is, that the “saw-off” approach, using a “cut-and-paste” pattern of settlement, pleases neither party. Under final offer selection however, the parties retain greater control over the arbitration process; the result is literally dictated by one of the parties. Again, both negotiators in Wentworth commented favourably on this feature of FOS. Yet both parties also reported that their final positions were so close that the designation of “winner” or “loser” was irrelevant. Indeed, the designated “loser”, the Wentworth Board, was highly pleased with the result and strongly favoured repeating the procedure in the next round of talks. This sentiment was echoed by the Sault Board who felt that conventional arbitration did not encourage good faith negotiations in that extremism would likely be rewarded in any saw-off or “split the difference” settlement. It seems reasonable to infer that if the convergent pressures are generated forcing the parties’ final offers to closely approximate one another, acceptability of the outcome should follow.

Nonetheless, that FOS produces a “winner” and a “loser” is most frequently cited as a weakness; that is, obvious victories by one or other of the parties would generate acrimonious relations over the long run. It is contended, however, that the win-loss concept is endemic to the collective
bargaining system and is by no means confined to FOS. To be sure, if the negotiations proceed smoothly, trade-offs result in a collective agreement; good will and cooperation are likely to abound in such serendipitous circumstances. But if each side wants what the other cannot or chooses not to grant, the zero-sum game becomes apparent. That is, in a free collective bargaining system, the final arbiter is the strike or lockout — and one side or the other can better withstand the economic consequences. The strike has been termed a catharsis, "clearing the air" of the workplace; but surely this is to gloss over the real bitterness engendered by picket line violence, loss of irreplaceable wages, decreased expectations, loss of faith in the bargaining process and such like.

The win-loss concept may be viewed from another perspective as well: the negotiators "win" if a bargain is concluded which is acceptable to the union rank and file and/or senior management. Considerable effort must be expended by negotiators to convince their respective constituencies that they "won" at the bargaining table. And, occasionally, the negotiators will be rebuffed and the proposed collective agreement retitled an unacceptable losing position.

These comments cannot erase the fact that FOS does clearly designate a "winner" and "loser". But it is felt that FOS merely reflects the broader win-loss notion of the collective bargaining system and, in fact, by generating convergent pressures, the parties, as in the Wentworth study, may be so close together that animosity is lessened at the end of the arbitration process. Finally, by forcing the parties themselves to compromise rather than risk everything at arbitration, the result is likely more acceptable than if the arbitrator had himself compromised the two positions to reach a settlement.

Final offer selection usually proceeds on an entire package basis rather than item by item, the Michigan statute being the sole example of the latter form in the case studies. The selectors in the Indianapolis arbitration chafed under this curtailment of their discretion, preferring the "flexibility" of conventional arbitration or at least item by item choice. However, the consensus seems to be that the entire package route is more suitable in that an itemized selection would permit the arbitrator to balance the award by selecting offers from both parties:

the Eugene experience with entire package selection suggests that issue-by-issue selection would permit the arbitrator to substitute his judgment for the compromises the parties could not or would not make at the table and to balance a multi-issue award with something for each side, thus reducing the incentive to avoid final offer arbitration.44

Should the parties wish to introduce greater flexibility into FOS, the Eugene model of submitting two "final offers" seems commendable; the parties retain control of the outcome but the device permits one offer to emphasize fringes, the other across-the-board wage increases or to allow a "realistic" and "political" submission to effect a settlement yet satisfy the constituents. Moreover, as indicated in the Wisconsin data, the multiple non-compatible issue

44 Long & Feuille, supra, note 22 at 39.
dilemma appears extremely rarely in practice. The Sault Board also recommended that either party be permitted to accept the final offer of the other after presentation to the arbitrator but before an award. Such a procedure might tend to encourage the arbitrator to mediate the dispute before selecting the “winner” but, carefully framed, the proposal might well encourage the parties to reach a settlement in the eleventh hour and without outside intervention.

Final offer selection has other advantages over conventional arbitration — it is less expensive and more expeditious. Since the arbitrator must select one offer or the other, the evidentiary process is greatly shortened. The usual procedure requires the submission of written argument, perhaps, rebuttal and, if necessary, a brief hearing to clarify positions or update financial data. Often, as in the Wentworth case, *viva voce* evidence is not adduced, while the Sault hearing lasted roughly three hours. Conventional arbitration normally necessitates much more lengthy hearings — with consequent increased costs to the parties. As mentioned earlier, Judge Shea, arbitrator for the Wentworth dispute, declined to submit any fee for his services.

As FOS stresses “reasonableness” as the preeminent criterion for selection, it appears better to encourage openness in submission of briefs, i.e., releasing of the documents to the other party and the opportunity for rebuttal.

All parties favoured the appointment of a single arbitrator rather than a tripartite board. This stance departs from the norm in Ontario whereby the tripartite board is the predominant arbitration model as reported by Werry and Carew. However, the tripartite board seems to derive its popularity from the desire of the parties to have a nominee in close contact with the chairman — who, under conventional arbitration, may shape the settlement largely at his discretion. Under FOS, though, the chairman’s role is confined to selecting one or other of the offers. A nominee may be presumed to select his own side’s position rather than completely embrace the other party’s view and since there is no ‘discretion’ of the chairman to influence, the post of nominee is superfluous — at best, a representative could reiterate the arguments for adoption of his party’s proposal already presented at the hearing or in the written submissions. Theoretically, therefore, a single arbitrator seems better suited for final offer selection. The utilization of a single arbitrator also is more efficient and the parties all expressed a desire for a minimum of delay in decision-making. Goldblatt’s study indicates that the time involved in the arbitration process is lengthened where tripartite boards are involved. For example, the median time from the date the grievance was filed to first hearing was four and a half months for a single arbitrator but six months for a tripartite board; from the date of the final hearing to a majority award, two and a half weeks and five weeks respectively; from the date the grievance was filed to the date of the last award, six months and eight months respectively. Goldblatt’s data support the intuitive notion that one person


usually reaches a decision in less time than three persons who must discuss the matter. However, the delay involved is considerable even for a single arbitrator to determine the issue. It must be noted, though, that the study dealt with rights arbitration in the conventional arbitral form. It must be remembered that final offer selection as discussed in this paper is interest arbitration superimposed upon the collective bargaining process. The parties are free to impose rigid time locks for presentation of submissions, length of hearing, and the handing down of the award; the Wentworth study is a clear example of such time limits being decided upon at the commencement of negotiations and adhered to throughout. Again, one intuitively senses that the time needed to select A or B is less than that needed to compromise A and B. Thus, it is contended that the arbitration process under final offer selection is both less time consuming because of the use of a single arbitrator rather than a tripartite board and because of the design of the process itself.

The terms of reference regarding the criteria of selection varied from the silence of the Sault instructions through the emphasis on “reasonableness” in Wentworth to the detailed listings in the American statutes. It must be stated, though, that the Sault teachers and both parties in Wentworth elaborated criteria for selection in their written briefs. To the extent that the parties do not embody specific criteria in their instructions, the arbitrator is given discretion to “select” the criteria by which he will “select” the offer. It has been suggested that the arbitrator should be confined to the evidence submitted by the parties, viz., the judiciary’s right to call expert testimony and take notice of facts is not appropriate here:

A selector must make his choice of a final offer based on the evidence which is presented to him. It is not his proper function to seek outside, independent evidence on those matters which remain in dispute. It is up to the parties to present their cases and it is not the selector’s proper function to interject his views on what evidence should be adduced nor to question the parties as to why they have not seen fit to bring any particular type of evidence to him in support of their offers.47

This view reflects a desire to afford greater control over the arbitration process to the parties themselves in that, not only must the arbitrator choose one offer or the other, but he must do so only on the basis of the evidence presented by the parties and exclude outside influences. However, access to information and data by the arbitrator is essential to a rational selection. Prohibiting the arbitrator from seeking such data from responsible bodies such as Statistics Canada and various governmental departments may have significantly negative consequences for those small companies and/or unions whose resources — financial and otherwise — are minimal and result in an unsophisticated brief with meagre statistical backing for an otherwise meritorious position. The Sault Board is a case in point. The Sault Board suggested that either the government should set up such bureaux or the school boards should organize to counterbalance the resources of O.S.S.T.F. The establishment of impartial research bureaux for various industries and sectors of the economy under governmental auspices would obviate much of the difficulty. The Pay Research Bureau for the federal pub-

47 G. Ferguson, supra, note 3 at 11.
lie service and the police research bureau created by The Police Amendment
Act are examples of such data resource centres, available to aid both parties
in preparing their briefs and the arbitrator in choosing between them.

Written reasons for the arbitrator’s selection were usually required or
requested. A reasoned argument for choosing one offer and rejecting the
other would seem to be valuable to the parties, both in increasing their con-
fidence in the instant decision and in providing some guidelines for future
negotiations. Manifestly irrelevant reasons for selection would likely afford
the aggrieved party an opportunity for judicial review, certainly under a
statutory system of final offer selection.

Final offer selection is intended to obviate the need for and prevent a
recourse to other economic sanctions such as the strike, lockout, work to
rule, etc. In preventing a test of economic strength, FOS may be considered
to afford some advantage to the weaker party. However, a system which
requires the subjugation of the weaker party despite a more compelling argu-
ment for its “offer” on the grounds of a brute force standard is hardly at-
tractive. Another criticism stresses the possibility that the arbitrator may be
forced to choose between two patently unreasonable offers whereas arbitral
discretion could shape a reasonable compromise or collective bargaining force
a test of strength. Firstly, it is suggested that the likelihood of such an
occurrence is remote. Few unions or companies would wish to risk everything
at arbitration — rather than compromise themselves. Further, even fewer
negotiators would risk losing face so dramatically — in front of both their
superiors and their counterparts — by backing the losing side. Consequently,
it is argued that the bargainers themselves have a vested interest in “closing
the gap” even if a collective agreement could not be reached. Secondly, the
result would likely be no better under conventional arbitration which would
probably impose a settlement unacceptable to either “unreasonable” party,
while collective bargaining would merely have one side eventually “knuckle
under”. Finally, the criticism ignores the very real convergent pressures re-
ported in the case studies which are generated by FOS.

The experience in Wentworth and the United States supports the pro-
position that final offer selection reduces the number of issues — peripheral
items are eliminated. Even in the Sault case, four items were settled prior
to arbitration but after adoption of FOS. To be sure, the issues were not the
main contentious items; but that is the point — subsidiary clauses are settled
or dropped lest one’s offer be adjudged unreasonable over a minor matter.
Thus, what proceeds to arbitration represents the core of the dispute.

Furthermore, if the FOS procedures were adopted in the ground rules
or from the outset of bargaining, the deadline for settlement would force the
parties closer together on the major issues lest an extreme demand taint an
otherwise reasonable offer. One senses that the Indianapolis case wherein
the entire package was rejected because of an “unreasonable” health care
requirement need only be experienced once to convince the parties to
moderate their demands in future. Posturing for effect — a valuable tactic
in bargaining — is of little assistance in formulating an offer attractive to a
third party looking for reasonableness. The Wentworth negotiators reported
that contract talks were significantly less political and emotional than previously and the American case studies add weight to this view. In fact, final offer selection has been referred to as “civilized bargaining”.

Final offer selection would appear well suited in areas where the strike and other such sanctions are inappropriate either for reasons of safety (e.g. air traffic controllers, firefighters, etc.) or the reluctance of the parties themselves to invoke penalties because of consequences for others (e.g. teachers, nurses and other professional groups). Negative impressions of conventional arbitration, however, have “turned off” some to the possible FOS alternative. The O.S.S.T.F., for example, has proposed a resolution prohibiting the use of arbitration in any form in fashioning the Board-teacher contracts. Hopefully, the teachers’ “victories” in the Wentworth and Sault cases may prevent this form of dispute resolution from being discarded before a fair trial.

A labour relations system must resolve disputes effectively and in a manner acceptable to the parties involved. The case studies herein support the assertion that final offer selection seems to satisfy both criteria: the procedures provide a “strike surrogate” enhancing the possibility of a settlement by the parties without recourse to arbitration and the results appear to be acceptable both in terms of the immediate dispute and the ongoing employer-employee relationship.

APPENDIX A: GROUND RULES IN THE WENTWORTH DISPUTE

11 All agreements made with respect to specific items shall only be tentative until agreement has been reached on all items. Both parties agree that the ratification of any offer or request is subject to the consent and acceptance of their respective bodies politic.

12 Any offer agreed to by both negotiating committees cannot be withdrawn in whole or in part except when such change is mutually agreed upon by both Committees.

14 The Teachers’ Committee shall have access to such Board records as are considered to be public information. As to further records, the Board Committee will consider each request on its own merit. All requests are to be directed to the Chairman of the Board Committee.

16 Third party intervention is acceptable in principle to both parties, in the form of mediation followed, if necessary, by a form of Final Offer Selection mutually agreed upon by both Committees.

18 Any of these ground rules may be set aside by mutual consent of the Chairmen.

26 In the event that final agreement has not been reached by the mediation, the final offer and final request indicating outstanding negotiable items shall be referred to a Selection Officer appointed in the following manner:

(a) Each Committee shall submit at a meeting called within three days for this purpose, a list of four members of the judiciary prepared to serve as Selection Officer.

(b) A Selection Officer shall be appointed by mutual agreement OR failing agreement, a Selection Officer shall be chosen from the lists by random selection at the meeting in question.

27 Each submission shall indicate in three separate parts:

(a) the position of the appropriate committee at the point of reference to the Mediator.
(b) Any points of agreement reached during mediation.
(c) The final position of both parties.
Copies of such submissions are to be at the Office of the Selection Officer within seven days of acceptance of appointment.

28 The Selection Officer may require written clarification of either submission but may not accept any changes in the final positions submitted to him and shall decide totally in favour of either submission.

29 The Selection Officer will convey his decision, which shall be binding on all parties in writing, to both parties within thirty days of the final date for submission under Clause 27. The Selection Officer will not be required to justify his decision beyond stating that all evidence properly submitted was taken into consideration.

30 Each party shall share equally the fee and disbursements of the Selection Officer.

31 As a pre-requisite condition of acceptance of the foregoing procedures, it is agreed that no sanction, mass resignation, withdrawal of any normally performed service, lockout or other action of a similar nature shall be imposed by either party.

APPENDIX B: COMPARISON OF THE BOARD AND TEACHERS' FINAL OFFERS IN THE SAULT DISPUTE

<table>
<thead>
<tr>
<th></th>
<th>Board</th>
<th>Teachers</th>
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<tr>
<td><strong>Principals' Salaries</strong></td>
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<td>Teachers</td>
<td>25,994 to 28,006</td>
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<td><strong>Vice-principals' Salaries</strong></td>
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<td><strong>Responsibility Allowances (selected items)</strong></td>
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<td>Minor Head</td>
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