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## THE FLECK STRIKE: A CASE STUDY IN THE NEED FOR FIRST CONTRACT ARBITRATION

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### 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.<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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)<sup>5</sup>—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

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men set up a tactical command post in an old government building a stone's throw away from the Fleck plant. Over fifty officers were billeted in the surrounding hotels, and there were three paddy wagons, eight marked cruisers, and a brace of unmarked cars all stationed at the scene. Although the strike was not settled until mid-August, by early April the Ontario Provincial Police estimated they had already spent 1,400 work-days on strike duty, and more than \$2.5 million in wages, not including motel bills, meals, and other expenses. An unusually partisan local newspaper account stated: "The spectacle of two score police officers who earn \$9 an hour plus overtime, watching a handful of striking women fight to earn more than minimum wage, continues here." (*London Free Press*, March 30, 1978, article by Julian Hayashi.)

<sup>3</sup> *London Free Press*, March 22, 1978.

<sup>4</sup> The UAW subsequently sought consent from the Ontario Labour Relations Board to prosecute Riddell for breaching *The Labour Relations Act*, R.S.O. 1970, c. 232. The Board determined that Riddell's statements had conveyed threats to the job security of Fleck employees and held that a *prima facie* case had been made out of a breach of s. 56 of the Act. Consent to prosecute was granted although the union never took any further action in the courts. (*Fleck Manufacturing Co.*, [1978] O.L.R.B. Rep. 615.)

<sup>5</sup> *Id.*

vice-president of the company publicly declaring that he would resign before he would see a union shop in his plant<sup>6</sup>—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,

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<sup>6</sup> 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 practices<sup>7</sup> 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

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<sup>7</sup> "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. . . ."<sup>8</sup> 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.<sup>9</sup>

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<sup>8</sup> *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. . . ."

<sup>9</sup> See Note, *An Assessment of the Proposed "Make-Whole" Remedy in Refusal-to-Bargain Cases* (1968), 67 Mich. L. Rev. 374 at 374 and Note, *An Analysis of the NLRB's Objections to a Make-Whole Remedy in Refusal-to-Bargain Cases* (1971), 3 Rutgers-Camden L.J. 272 at 290-92.

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.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> In his study of the United States National Labor Relations Board bargaining cases, Professor Ross determined the following:

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<sup>10</sup> 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.

<sup>11</sup> See *Kidd Brothers Produce Ltd.*, [1976] 2 Can. L.R.B.R. 304 at 324-25; and *Academy of Medicine, Toronto Call Answering Service*, [1977] O.L.R.B. Rep. 783 at 794-95, [1978] 1 Can. L.R.B.R. 183 at 194-95.

<sup>12</sup> See Michigan note, *supra* note 9, at 374; Schlossberg & Silard, *supra* note 10, at 1065-66; Rutgers note, *supra* note 9, at 292; *Radio Shack*, [1979] O.L.R.B. Rep. 1220 at 1258, [1980] 1 Can. L.R.B.R. 99 at 134.

<sup>13</sup> See Harvard note, *supra* note 10, at 1676; Michigan note, *id.* at 378; Rutgers note, *id.* at 290-92; *NLRB v. Tiidee Products, Inc.* 138 U.S. App. D.C. 249 at 255 (1970), 426 F.2d 1243 at 1249; Ross, *Analysis of Administrative Process Under Taft-Hartley*, 1966 Labor Relations Yearbook 299 at 302-303.

<sup>14</sup> Ross, *id.*; Ross, *The Government as a Source of Union Power*, (Providence: Brown University Press, 1965).

"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."<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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

<sup>15</sup> Ross, *supra* note 13, at 300.

<sup>16</sup> 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.

<sup>17</sup> 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.

*per diem* rate for the vast majority of their nursing home patients. The government was reluctant to increase these rates and the employers thus anticipated that it would be difficult to pass on wage increases. The employer recruited other employees, and bitter scenes ensued on the picket line. Although there was no serious violence, the degree of harassment was intense, and there were several vehicular incidents.<sup>18</sup>

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.<sup>19</sup> 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".<sup>20</sup> 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

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

<sup>19</sup> Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at 1.

<sup>20</sup> *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."<sup>21</sup>

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.<sup>22</sup> 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."<sup>23</sup> 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.<sup>24</sup>

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<sup>21</sup> 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.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* and see *supra* note 19, at 52.

<sup>24</sup> 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*."<sup>25</sup> 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."<sup>26</sup>

Recognizing the novelty of their new first contract legislation, the drafters hedged the remedy about with a number of restrictions.<sup>27</sup> First, arbitration

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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.

<sup>25</sup> *Supra* note 19, at 52.

<sup>26</sup> *Id.* at 53.

<sup>27</sup> *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."<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

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.

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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.)

<sup>28</sup> *Supra* note 21.

<sup>29</sup> *Supra* note 19, at 53.

<sup>30</sup> *Supra* note 21.

### B. *Labour Board Interpretation*

The Labour Board has not had extensive experience in the application of the first contract provisions.<sup>31</sup> 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.<sup>32</sup> 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.*<sup>33</sup> 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"<sup>34</sup> 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.<sup>35</sup> Where an employer was bargaining in bad faith as part of a strategy to oust the union

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<sup>31</sup> 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:

Year	1974	1975	1976	1977	1974-7
Applications	17	9	0	1	27
Disposition:					
		Contract imposed			8
		Application rejected			6
		Settled with the assistance of the Board			11
		Withdrawn			2

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

<sup>32</sup> 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.)

<sup>33</sup> *London Drugs Ltd.*, [1974] 1 Can. L.R.B.R. 140.

<sup>34</sup> *Id.* at 143.

<sup>35</sup> *Id.*