

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

The Board pointed out that under the legislation bad faith bargaining was not a prerequisite to the exercise of section 70. Instead, the Board was directed to consider two matters: bargaining, and comparable terms and conditions of employment. The Board concluded that the Legislature had provided this second gauge because bargaining was often difficult to evaluate. Furthermore, the Board stated that an employer could be so unreasonable in negotiations as to impair the possibility of collective bargaining, despite the fact that management was still prepared to sign an agreement on its own terms.<sup>36</sup> The Board cautioned that the Legislature "did not require a union to pay any price that was asked in order to achieve a first agreement."<sup>37</sup> However, it would require very strong evidence, with an employer relying upon "extremely unrealistic proposals",<sup>38</sup> to justify a first contract remedy in the absence of bad faith bargaining. In the case at hand the Board found evidence of a pattern of abusive employer conduct that had created a bargaining impasse requiring section 70 resolution. In fashioning the terms and conditions of the imposed contract, the Board stated that section 70 contracts should not be used "to achieve major breakthroughs in collective bargaining."<sup>39</sup> However, the terms should be "sufficiently attractive" to the employees that they would "think twice" about a decertification application.<sup>40</sup> In this instance, the Board invited the parties to submit written contracts. The intention was to use the process of final offer selection. Upon examining the contracts submitted, however, the Board concluded that final offer selection was unworkable and instead asked the parties to make oral argument giving their reasons for each proposed provision. During these presentations a form of bargaining began, and the Board ordered the parties to continue to bargain in the Board's hearing rooms with panel members observing and providing advice to each side. This form of mediation-arbitration resulted in the resolution of many outstanding issues. The remaining points of contention were ultimately arbitrated by the Board.

In another case heard very near in time to the *London Drugs* case, *Grandview Industries Ltd.*,<sup>41</sup> the Board refused to provide a first contract remedy. There had previously been a collective bargaining relationship in the Grandview plant, which had ceased when the operations were shut down for valid business reasons. Now that operations had started up again, a new union had been certified to represent the employees. Grandview was a subsidiary of Noranda Corporation, which was party to numerous collective agreements. Grandview itself was "no stranger to collective bargaining",<sup>42</sup>

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<sup>36</sup> *Id.* at 144.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 147.

<sup>40</sup> *Id.*

<sup>41</sup> *Grandview Industries Ltd.*, [1974] 1 Can. L.R.B.R. 140.

<sup>42</sup> *Id.* at 147.

having concluded contracts for units of employees in its Ontario region. The Board reasoned that the fact of previous collective bargaining on the part of the employer, while not conclusive, constituted a strong argument against the use of section 70 powers. In this case, the Board found no evidence that the company had opposed certification through unfair labour practices or any other means. The union's bargaining authority did not appear to be endangered.<sup>43</sup> There had been no employer attempt to negotiate with anyone other than the union. Monetary proposals had been given to the union, and these proposals were within the range of existing settlements at the employer's other operations, where contracts had been concluded with other trade unions and this trade union. When the strike began, there was no attempt to replace the strikers. The Board concluded that first contract arbitration should not be imposed. Bargaining was transpiring between two parties, "sophisticated in the art of bargaining",<sup>44</sup> who simply could not agree on terms.

The most pessimistic of the early decisions applying first contract arbitration legislation was that of *M. & H. Machinery and Iron Works Ltd.*<sup>45</sup> The union had been certified over the employer's objections that trade unions did not belong in small businesses. The futility of attempts at bargaining soon led to a strike. The employer continued to operate, using the labour of its principals only. Intermittent picketing resulted in property damage and even a shotgun incident. The Board imposed a contract:

From start to finish in the history of this relationship, the Employer has adamantly refused to participate in [the exercise of collective bargaining]. Its principals hold stubbornly to the view that small businesses such as theirs should have the cloud of trade-unionism removed from over their heads. The results of their stonewalling tactics over the past year is that all of the employees have lost their jobs and the Union has been frustrated in the bargaining rights it secured under the laws of this province.<sup>46</sup>

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

I confess that I am not especially hopeful that first contract arbitration will produce any radical change of heart on the part of this Employer. However, I do believe it would make a mockery of the policies underlying s. 70 of the Code if the Board did not intervene in this case.<sup>47</sup>

### C. *Evaluation of First Contract Arbitration in British Columbia*

Weiler has observed that first contract situations can be broken down into five categories:<sup>48</sup>

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

<sup>43</sup> *Id.* at 148.

<sup>44</sup> *Id.*

<sup>45</sup> *M. & H. Machinery and Iron Works Ltd.*, [1974] 1 Can. L.R.B.R. 513.

<sup>46</sup> *Id.* at 517.

<sup>47</sup> *Id.*

<sup>48</sup> Weiler, Seminar given at the Harvard Law School, Cambridge, Massachusetts, "Labor Policy Course", September, 1978.

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

3) In still another 30 per cent of the cases, the employees have obtained certification, but this is an "instant" event without much durability. The union has typically negotiated a standard industry agreement in other plants and presents this standard agreement to the employer as the union's bargaining proposal. The employer rejects it for *bona fide* business reasons. The union's bargaining position is inflexible; it recognizes that if it agrees to dilute the standard agreement for this employer, other employers will begin to demand concessions. Confronted with a dilemma, the union canvasses the opinions of the membership to determine whether there is support sufficient for a strike. Because of turnover and lack of interest on the part of remaining union members, the employees reject the idea of a strike. The union then abandons the unit, although there is rarely any formal decertification.<sup>49</sup>

4) Approximately 5 per cent of the remaining cases involve an anti-union employer who is absolutely determined to defeat the union. Once bargaining begins the employer refuses to discuss monetary settlements until all the rest of the contract language is settled. The employer deliberately stalls in every manner possible. Meanwhile, union supporters are being laid off or dismissed and replacements are being screened. Supervisors will be downgrading the union in informal discussions with employees, and letting it be inferred that but for the union's alleged intransigent bargaining position over contract language, wage increases or other benefits would be immediately forthcoming. By the time the union goes back to the employees for a strike vote, support has diminished to the point where a strike is no longer feasible. The employer sits tight at this point and waits for the employees to petition for decertification.<sup>50</sup>

5) In the small number of remaining cases, the employer carries on exactly as he has in category (4), but miscalculates. Support for the union is still strong enough to produce a strike vote. The strike begins and the employer continues to operate, hiring replacements and using the labour of supervisors and some of the non-striking employees who cross the picket lines. The picketing employees see the employer operating without loss and sense there will be no movement at the bargaining table. Predictably, violence soon erupts on the picket line and police move in to escort the non-striking employees through the picket lines. The case attracts public attention and the labour movement rallies around. Especially where the situation involves employees who are poorly paid minority workers, and the employer appears particularly intransigent and "Neanderthal", the case becomes a *cause célèbre*.<sup>51</sup>

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

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<sup>49</sup> *Supra* note 19, at 49-50.

<sup>50</sup> *Id.* at 50-51.

<sup>51</sup> *Id.* at 51.

The problem was to ensure that the Board did not erroneously apply the remedy to category (3) cases, and to convince the labour relations community that only category (4) and (5) cases would be considered. Initially the unions believed the first contract arbitration remedy would provide relief in category (3) cases and came to the Board demanding the imposition of a standard industry agreement. The Board was forced to refuse such applications, and continued to refuse them for some time until the boundaries of the remedy became clearer. When questioned about whether the first contract arbitration remedy inevitably affected cases outside categories (4) and (5), Weiler admitted it did "to some extent", especially at the outset before the labour relations community understood the Board's strict position.<sup>52</sup>

In evaluating the first contract arbitration remedy, Weiler has pointed to three goals.<sup>53</sup> The first is to put an immediate end to the confrontation, a goal that is especially important in category (5) cases. Weiler has commented, "To me, that by itself is sufficient justification for first contract arbitration. It was obviously what we had in mind in enacting it."<sup>54</sup> Evaluating how effective the legislation has been in achieving this goal, Weiler was enthusiastic. He described a category (5) labour dispute as

an emotional and messy confrontation, in which the parties not only are inflicting disproportionate harm on each other, totally out of line with the negotiating issues dividing them, but their willingness to escalate the dispute is drawing others into the mêlée—sympathizers, the police and public authorities, or third party employees.<sup>55</sup>

He felt strongly that first contract arbitration was "a sharp surgical instrument for lancing those running sores in the body of industrial relations."<sup>56</sup> Obviously the first contract remedy ends the dispute upon imposition of a contract. Does this dispute flare up again at the end of the year when the contract terminates? Does the remedy provide only an interim solution? Weiler has observed that in none of the cases known to him did the dispute flare up again after the contract terminated, but he warned against drawing any conclusions from this since in most cases where the Board imposed a contract, the union was eventually decertified. Weiler added that in his opin-

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<sup>52</sup> *Supra* note 21. Weiler commented:

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

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

<sup>53</sup> *Supra* note 19, at 53-55.

<sup>54</sup> *Supra* note 48.

<sup>55</sup> *Supra* note 19, at 53.

<sup>56</sup> *Id.*

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

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

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

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

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<sup>57</sup> *Supra* note 21.

<sup>58</sup> *Supra* note 19, at 53.

<sup>59</sup> *Id.* at 54. Weiler knew of only one case that had gone through decertification where the first contract was settled through Board mediation rather than imposed. (*supra* note 21.)

<sup>60</sup> *Id.* Weiler noted that although the new federal Canadian labour legislation provides for a one-year first contract, the newly-enacted Quebec provisions allow for two years. (*supra* note 21.) (See section on Quebec legislation, *infra.*)

<sup>61</sup> *Id.* Before leaving this discussion of the "trial marriage" theory, it is interesting to examine the Board's use of union security provisions in first contract arbitration. In the first imposed contract, *London Drugs*, the union asked for a union shop provision which would have enabled it to get rid of the non-union employees. The Board refused this request, and wrote a looser union security clause into the contract imposed. Weiler

contract in the *M. & H.* case<sup>62</sup> to the case of *Kidd Brothers Produce Ltd.*<sup>63</sup> where the Board refused to apply the first contract remedy because particular conditions, similar to those outlined by Weiler above, were not present.

The third goal Weiler has ascribed for first contract arbitration is that of prevention. His assessment was that the remedy had been of great effect in this area. He concluded that the existence of section 70, coupled with careful application and interpretation of the remedy by the Board, had essentially eliminated situations of the Sandringham type from the provincial labour scene. When the Board did impose first contracts, it made the compensation package "rather generous."<sup>64</sup> The intent was to discourage other employers from using the types of practices that could prompt a Labour Board hearing.<sup>65</sup> "There's no doubt in my mind about the impact of that policy," stated Weiler, adding:

First contract confrontation died out in the provincial jurisdiction in British Columbia. We did not experience the long, agonizing battles which have erupted in Ontario in the last few years. Nor can that be explained by the suggestion that British Columbia has a mild labour relations climate. Quite the contrary! In fact there was such a bitter fight at a Vancouver radio station (Station CKLG) which came within the jurisdiction of the Canada Labour Code, at that time not containing any provision for first contract arbitration.<sup>66</sup>

It seems clear that a good portion of the prevention attributed to section 70 was effected by labour lawyers and industrial relations consultants who communicated the Labour Board's intentions to their clients and were able to persuade many to engage in serious negotiations. A significant role was also played by the Board's own mediators. As stated earlier, most of the section

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later asserted that "from a purely practical point of view" this was a wrong decision (*supra* note 21.) The union was ultimately decertified. So many union members had been replaced by non-union employees that the union had lost its foothold. From this point on, the Board was satisfied that the weaker union security clause was a mistake. All future first contracts which the Board imposed included a union shop provision. Justifying this, Weiler commented: "You need a union shop clause to ensure cohesion among the unit for the next bargaining session. You need more than a contract that ends the previous dispute. The union needs a footing and a perceived footing in the bargaining unit. The union shop gives it the strength so that it has a shot at making a go of it the next time round." (*supra* note 21.)

<sup>62</sup> *Supra* note 45.

<sup>63</sup> *Kidd Brothers Produce Ltd.*, [1976] 2 Can. L.R.B.R. 304. For a discussion of the case, see text accompanying notes 93 *et. seq.*, *infra*.

<sup>64</sup> *Supra* note 19, at 54.

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

<sup>66</sup> *Supra* note 19, at 54.

70 applications that came before the Board were ultimately settled at the mediation stage.<sup>67</sup>

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

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

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

<sup>68</sup> *Supra* note 21.

#### IV. INTERIM REMEDIES IN THE ABSENCE OF FIRST CONTRACT ARBITRATION

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

##### A. *Imposition of a Contract*

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

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

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<sup>69</sup> *DeVilBiss (Canada) Ltd.*, [1976] O.L.R.B. Rep. 49, [1976] 2 Can. L.R.B.R. 101.

<sup>70</sup> *Id.* at 59 (O.L.R.B. Rep.), 110 (Can. L.R.B.R.)

<sup>71</sup> *Id.* at 61 (O.L.R.B. Rep.), 112-13 (Can. L.R.B.R.)

<sup>72</sup> *Id.* at 66 (O.L.R.B. Rep.), 118 (Can. L.R.B.R.)

<sup>73</sup> *Id.*

<sup>74</sup> Union counsel in the subsequent Board hearing of the *Radio Shack* case (*supra* note 12) would stress that *DeVilBiss* demonstrated the inadequacy of the Board’s conclusion not to impose a contract, because a collective agreement was not subsequently achieved by the parties. (*Radio Shack*, *supra* note 12 at 1265 (O.L.R.B. Rep.), 139 (Can. L.R.B.R.)) The Board noted at that time, however, that the union had never brought an application alleging non-compliance with the Board’s bargaining order:

Surely it is incumbent on the beneficiary of a bargaining order to husband the directive carefully and, in a non-compliance proceeding, there is a heavy onus on a respondent to persuade this Board that its subsequent conduct is consistent with the



In *Board of Health of Haliburton, Kawartha, Pine Ridge District Health Unit*<sup>75</sup> the parties were negotiating for a renewal of their collective agreement. During the negotiations the employer agreed orally to the union's request that any impasse in future negotiations of the contract would, at union request, be submitted for final and binding arbitration. The parties were unable to settle all the outstanding issues in this round of bargaining, however, and a lockout ensued. When work was resumed upon the termination of the lockout, bargaining continued. The employer withdrew its previous agreement on the arbitration clause for future negotiations. The union sought a ruling of employer bad faith bargaining from the OLRB, and an order making the clause on voluntary arbitration "effective between the parties as though made by final agreement."<sup>76</sup> Although the Board made a finding of bad faith bargaining, the finding was made upon other bargaining issues. The Board specifically stated that it was not bad faith to withdraw a tentative agreement reached earlier.<sup>77</sup> In conclusion, the Board refused to consider ordering this clause (or any other) to be included in the agreement.

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

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

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

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spirit and intent of the Board's bargaining order. This is particularly the case in first agreement situations for all of the reasons associated with the difficulty of distinguishing continued bad faith from hard bargaining. Once having breached the Act, offending parties should not be surprised to find that to establish a *bona fides* intent they may be required to act temporarily in ways that the Board does not demand of others. (*Radio Shack, supra* note 12 at 1265 (O.L.R.B. Rep.), 139 (Can. L.R.B.R.))

<sup>75</sup> *The Board of Health of Haliburton, Kawartha, Pine Ridge District Health Unit*, [1977] O.L.R.B. Rep. 65, [1977] 1 Can. L.R.B.R. 221.

<sup>76</sup> *Id.* at 67 (O.L.R.B. Rep.), 223 (Can. L.R.B.R.)

<sup>77</sup> *Id.* at 71 (O.L.R.B. Rep.), 228 (Can. L.R.B.R.)

<sup>78</sup> *The Journal Publishing Co. of Ottawa Ltd.*, [1977] O.L.R.B. Rep. 309, [1977] 2 Can. L.R.B.R. 183.

<sup>79</sup> *Id.* at 322 (O.L.R.B. Rep.), 196 (Can. L.R.B.R.)

<sup>80</sup> *Id.*

impose a contract would require an exercise in speculation "without benefit of even such rudimentary navigational aids as the criteria that are found in those statutes that provide for interest arbitration."<sup>81</sup> Further, the use of compulsory arbitration as a remedy for failure to bargain in good faith could undermine the entire collective bargaining system. The parties would be likely to abandon the bargaining process to seek a remedy from the Board. The Board concluded that its remedial powers existed to complement the duty to bargain, not to supplant it.<sup>82</sup>

#### B. *Compensation to the Employees*

Employees suffer financial loss when faced with employer bad faith bargaining: lost wages and employment benefits caused by the employer's failure to settle upon a contract and damages flowing from strikes and lock-outs caused by bad faith bargaining. In a number of cases compensation for these losses has been sought. Both the OLRB and the British Columbia Labour Relations Board have considered the "make whole" remedy of compensation to the employees for the employer's failure to bargain. In the *Ottawa Journal* case<sup>83</sup> the union requested that the OLRB award damages to employees for wages and other employment benefits lost as a result of the lockout. The employer argued that damages should never be awarded in bad faith cases. Although the OLRB refused to accept the employer's argument completely, it did note that the awarding of damages ought not to result in the indirect imposition of a collective agreement, stating: "In this case . . . it would be inappropriate to award damages for loss of wages suffered as the result of the lockout, since this approach would require the Board to determine terms and conditions of employment for those employees during that period."<sup>84</sup> In addition the Board felt it should not compensate for damage that had occurred from the use of legal economic sanctions. It stated: "The

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<sup>81</sup> *Id.* at 323 (O.L.R.B. Rep.), 197 (Can. L.R.B.R.)

<sup>82</sup> *Id.* In *The Municipality of Casimir, Jennings and Appleby*, [1978] O.L.R.B. Rep. 507, [1978] 2 Can. L.R.B.R. 284, the OLRB departed from this policy, albeit in an unusual case. Following certification, the employer raised the issue of employer involvement in the organizing campaign, which it alleged deprived the Board of jurisdiction to grant the certificate. Despite this objection, bargaining had begun and the parties had reached agreement on a contract contingent upon the Board's confirmation of the original certification. The Board confirmed, but the employer sought judicial review. The employer refused to sign the contract because it might prejudice the judicial review application. Instead, the employer unilaterally implemented the terms of the agreement. The union sought a Board finding of bad faith bargaining and requested a Board order requiring the employer to sign the agreement. The Board granted this order, concluding that the employer was bargaining in bad faith, that there could be no prejudice pending judicial review because the employer had already implemented the terms of the agreement, and the agreement would necessarily fall if the certificate was quashed. Because the parties were *ad idem* on all of the terms of the proposed agreement, the Board was persuaded to issue an order requiring the parties to execute a document embodying these terms. Concluding that no interest arbitration was involved here, the Board stated: "[T]here is no need for the Board to substitute its value judgments on particular issues for those which might be hammered out between the parties as they have all been hammered out." (*Id.* at 519 (O.L.R.B. Rep.), 295 (Can. L.R.B.R.))

<sup>83</sup> *Supra* note 78.

<sup>84</sup> *Id.* at 324 (O.L.R.B. Rep.), 198 (Can. L.R.B.R.)

mere existence of an element of bad faith bargaining cannot convert an otherwise legal strike or lockout into an illegal act, that would give rise to extensive liability in damages."<sup>85</sup>

The OLRB used the "make whole" remedy for the first time in the unfair labour practice case of *Academy of Medicine, Toronto Call Answering Service*.<sup>86</sup> This was a run-away shop situation, where out of anti-union animus the employer had unlawfully shut down business during a strike. The OLRB concluded that it would not be feasible or appropriate to order the employer to re-open. However, the employees were entitled to some compensation. An award of three months' wages was made, which the Board described as an assessment designed to afford the employees "a reasonable period in which to secure alternative employment without loss of income."<sup>87</sup> In the recent case of *Grey-Owen Sound Health Unit*<sup>88</sup> the OLRB again used a "make whole" remedy. Lost wages were awarded to the employees based on a breach of the employer's duty to bargain. It should be noted, however, that this was not a first contract situation. The previous contract, originally imposed through voluntary binding interest arbitration, had expired in 1976. The expired contract contained a clause requiring future interest disputes to be resolved by binding arbitration. Despite this clause, the health unit locked out its employees, openly admitting that the lockout was designed to force the union to agree to drop its demand for interest arbitration. The Board awarded lost wages to the employees and also ordered the employer to pay interest on the compensation owed.

### C. Compensation to the Union

A union faced with bad faith bargaining will incur negotiating, litigating, and organizational expenses in combatting such tactics—expenses that some claim should be collected from the employer. Clearly this is a compromise remedy. It neither imposes a collective agreement nor is subject to the argument that the claimed amounts are too speculative. However, the notable deficiency of this approach is that union costs are seldom as much as the employer's saving in labour costs derived from bad faith bargaining. Several cases have considered a union request for financial compensation for its increased expenses attributable to employer bad faith bargaining. In the *Ottawa Journal* case<sup>89</sup> the union asked for damages based on the expenses it had incurred for litigation and the lockout attributable to employer bad faith bargaining. While the OLRB agreed that extra negotiating costs experienced because of the employer's conduct might in some cases be awarded to the union, in this particular case the remedy was refused. The Board stated: "This is a case where neither side can give a clean bill of health, both sides on different occasions having failed to meet the standard of good faith bargaining. . . . The appropriate remedy, in the Board's view, is a bargaining

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<sup>85</sup> *Id.*

<sup>86</sup> *Supra* note 11.

<sup>87</sup> *Id.* at 795 (O.L.R.B. Rep.), 196 (Can. L.R.B.R.)

<sup>88</sup> *Grey-Owen Sound Health Unit*, [1980] O.L.R.B. Rep. 223.

<sup>89</sup> *Supra* note 78.

order directed at both sides.”<sup>90</sup> In the *Academy of Medicine* case<sup>91</sup> the OLRB awarded the union “all reasonable organizational, bargaining, legal, and other expenses associated with its efforts to acquire and pursue its statutory rights” including costs of proceedings before the Board.<sup>92</sup>

The British Columbia Board has been less hesitant to apply a “make whole” remedy, perhaps because its legislation providing for first contract arbitration has made it more adventuresome in dealing with such cases. The case of *Kidd Brothers Produce Ltd.*<sup>93</sup> is an example of a situation where the Board refused to award a first contract, and instead ordered a “make whole” remedy. Following hard on the heels of the *M. & H.* case,<sup>94</sup> where the Board had expressed its pessimism about the potential for success of first contracts imposed in certain situations, the *Kidd Brothers* case provided an extreme example of the type of labour situation where the first contract would be unlikely to succeed. There had been a clear-cut employer pattern of misconduct: unfair labour practice firings, non-compliance with Board orders to reinstate, further firings, employer intimidation of employees. The Board concluded that although the union’s application satisfied the legislative requirement for first contract arbitration, section 70 should not be applied in this instance because there were “no real prospects for rejuvenation of [employee] support” for the union.<sup>95</sup> The section 70 remedy had not been intended to be solely a punishing mechanism, but instead a positive device to encourage meaningful collective bargaining.<sup>96</sup> Reasoning that since first contract arbitration in this case would not fulfil this goal, the Board refused to apply the remedy. Curtailing its application of the first contract arbitration remedy, the Board instead provided a “make whole” order of compensation to the union under its broad remedial authority to order rectification of labour legislation violations.<sup>97</sup> As a result of the employer’s bad faith bargaining, the union had failed to achieve the rights and status normally associated with certification. A cease and desist order merely ordering employer

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<sup>90</sup> *Id.* at 324 (O.L.R.B. Rep.), 198 (Can. L.R.B.R.)

<sup>91</sup> *Supra* note 11.

<sup>92</sup> *Id.* at 795 (O.L.R.B. Rep.), 195 (Can. L.R.B.R.)

<sup>93</sup> *Supra* note 11.

<sup>94</sup> *Supra* note 45.

<sup>95</sup> *Supra* note 11, at 319.

<sup>96</sup> *Id.* at 318-19.

<sup>97</sup> Weiler has commented as follows:

We were learning more about the process as we went along. Before the *Kidd Brothers* case, we held a meeting with the entire panel to discuss whether the “make whole” remedy was the better remedy. Our legal clerks did a great deal of research on the “make whole” remedy. Although we did not determine at that point that the “make whole” remedy was the proper response in the *Kidd Brothers* case, we did conclude that in certain cases it would be a defensible remedy. Because of our wide remedial authority, we were able to fit the “make whole” remedy into our arsenal of remedies for unfair labour practices. On occasion, the “make whole” remedy is preferable to the first contract remedy. On other occasions, the right decision is to do nothing at all. (*Supra* note 21.)