

compliance in the future would therefore be of no remedial authority. The Board determined that only a "make whole" order would be adequate.⁹⁸

D. *Radio Shack Decision*

The recent *Radio Shack* case⁹⁹ deserves detailed examination since it has moved significantly further than previous jurisprudence in this area. On December 5, 1979, the OLRB handed down its decision in *Radio Shack*, a decision that the *Toronto Globe & Mail* described as "a landmark, detailing the most comprehensive set of remedies for bad faith bargaining ever given by a labour board in Canada."¹⁰⁰ The situation involved bad faith bargaining allegations surrounding first contract negotiations. Radio Shack had begun negotiations after having dismissed two employees for union activity, refused to reinstate an employee despite a Board direction to do so, threatened to move the plant out of Ontario, provided support for an anti-union petition, conducted overt surveillance activities of union members, and disparaged the Board's procedures.¹⁰¹ In a deliberate attempt to polarize the employees, Radio Shack had distributed to its employees bright red T-shirts embossed with the words, "We're company finks . . . and proud of it."¹⁰² During the bargaining sessions the company had put forward rigid and inflammatory proposals calculated to intensify the conflict.¹⁰³ One of the most contentious bargaining issues was that of union security. The company was adamantly opposed to the introduction of union security, having gone so far as to send a memo to its employees stating: "We have *told you before* and we tell you again—*no one* has to be a *union member TO WORK AT RADIO SHACK—NOW OR EVER.*"¹⁰⁴ At the Board hearing, the company admitted that it could offer no business reasons for refusing the demand for union security, but opposed the provision because it believed the union lacked sufficient employee support.

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

⁹⁸ Calculating the amount due, the Board stated:

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

⁹⁹ *Supra* note 12.

¹⁰⁰ *Toronto Globe & Mail*, January 30, 1980.

¹⁰¹ *Supra* note 12, at 1246 (O.L.R.B. Rep.), 122 (Can. L.R.B.R.)

¹⁰² *Id.* at 1223 (O.L.R.B. Rep.), 102 (Can. L.R.B.R.)

¹⁰³ *Id.* at 1247 (O.L.R.B. Rep.), 123 (Can. L.R.B.R.)

¹⁰⁴ *Id.* at 1226 (O.L.R.B. Rep.), 104 (Can. L.R.B.R.)

concluded that Radio Shack had breached the Act.¹⁰⁵ Considering the issue of union security, the Board stated:

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

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

Dealing first with the request for the "make whole" remedy to the employees and the union, the Board concluded that damages were being sought for "the loss of an opportunity to negotiate a collective agreement or the loss of an opportunity to achieve an agreement at an earlier point in time."¹¹⁰ An order was given for the company to pay all union negotiating costs incurred to the date of the decision and all extraordinary organizing costs caused by the employer's improper actions.¹¹¹ In addition the company was ordered to pay the employees "all monetary losses that the union [could] establish by reasonable proof as arising from the loss of opportunity to negotiate . . . a collective agreement," plus interest.¹¹² The union's legal costs were denied. The Board concluded that it lacked jurisdiction to grant the request for the imposition of a contract. The British Columbia legislation specifically provided for this type of remedy, but set out numerous preconditions such as Ministerial consent. The Board concluded that it was unreasonable to think that the Ontario Legislature intended to give the OLRB more power than the British Columbia Board without any overt reference to this type of remedy in the Act. In addition, where contractual terms (such as grievance arbitra-

¹⁰⁵ *Id.* at 1247 (O.L.R.B. Rep.), 123 (Can. L.R.B.R.). The Board concluded that the employer had violated ss. 14, 56, 58, 59, and 61 of the *Labour Relations Act*.

¹⁰⁶ *Id.* at 1250 (O.L.R.B. Rep.), 126 (Can. L.R.B.R.)

¹⁰⁷ *Id.* at 1220-21 (O.L.R.B. Rep.), 100 (Can. L.R.B.R.)

¹⁰⁸ *Supra* note 78.

¹⁰⁹ *Supra* note 12, at 1259 (O.L.R.B. Rep.), 140-41 (Can. L.R.B.R.)

¹¹⁰ *Id.* at 1258 (O.L.R.B. Rep.), 133-34 (Can. L.R.B.R.)

¹¹¹ *Id.* at 1271 (O.L.R.B. Rep.), 144 (Can. L.R.B.R.)

¹¹² *Id.* at 1271 (O.L.R.B. Rep.), 145 (Can. L.R.B.R.)

tion) were imposed upon the parties in other sections of the Act, the legislation stated specifically that this was required. If the Legislature had intended that the Board be given the power to impose contracts, it would have made this power explicit. Despite this conclusion the Board continued:

However, [this] is not to say that bargaining orders, cease and desist directions, and findings of bad faith cannot have an indirect impact on the content of a collective agreement. For example, surely this Board has the power to direct a party to cease and desist in the making of unlawful or inflammatory proposals, and, in doing so, the content of any resulting collective agreement will be indirectly affected.¹¹³

The Board's order thus stated that the company position on union security violated sections 14, 56, 58 and 61 of the Act, and directed the company to bargain in good faith, ordering Radio Shack to make a complete proposal that it was willing to accept at the next meeting. In making this proposal, Radio Shack was ordered to cease and desist from its position on union security, to drop its insistence on a voluntary dues check-off.¹¹⁴

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

The Divisional Court ruling¹¹⁵ unanimously upheld the OLRB on all challenged points. The court rejected the employer submission on the "make whole" remedy, noting that the courts themselves had long recognized that damages could be awarded for the loss of opportunity:

So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board. . . . The Board's interpretation of its power to award damages cannot be deemed to be patently unreasonable. It may be that the company's submission on this point is premature and that it will wish to consider whether the Board has been unreasonable when it makes its findings as to the quantum of damages.¹¹⁶

The Court also dealt with the argument that the Board had imposed a term of the contract upon the company by ordering it to cease and desist from its position on union security. While reiterating that the Board had no authority to impose a collective agreement, the Court pointed out that the rigid company position on union security had the purpose of avoiding a collective

¹¹³ *Id.* at 1268 (O.L.R.B. Rep.), 142 (Can. L.R.B.R.)

¹¹⁴ *Id.* at 1269 (O.L.R.B.), 143 (Can. L.R.B.R.)

¹¹⁵ *Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America & O.L.R.B.*, released by Divisional Court, February 29, 1980.

¹¹⁶ *Id.* at 30, 33.

agreement. It was all part of the company's earlier tactics to undermine the union in the eyes of the employees. In light of this, the Board's cease and desist order was reasonable and within its jurisdiction, even if it had the indirect effect of imposing a term of a collective agreement upon the parties. In this respect, the *Radio Shack* decision would seem to have overruled the earlier *Ottawa Journal* case.¹¹⁷

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

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

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

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

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

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

¹¹⁹ *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 90 S.Ct. 821 (1970). The *H. K. Porter* case was raised in argument during the hearings on *Radio Shack*. The union argued that *H. K. Porter* could be distinguished because of the difference in wording between the Ontario legislation and the *National Labor Relations Act*, 61 Stat. 136, 29 U.S.C.A. The Divisional Court in *Radio Shack* agreed with this argument and in addition distinguished the American authorities by pointing to the differences in legislative interpretation between the countries (due to the American emphasis on Congressional debates.) The Divisional Court also noted that the American decisions were not uniform on this point in any event.

reasons, but was grounded in its stance that it would not "aid and comfort the union".¹²⁰ The long delay was chiefly the result of the skill of the company's negotiators, who took advantage of every possible opportunity to stall. The NLRB and the Court of Appeals, District of Columbia Circuit, had concluded that the company's refusal to bargain about the dues check-off was made solely to frustrate the making of any collective agreement.¹²¹ In 1968 the Board and the Court of Appeals had ordered the company to grant to the union a contractual clause providing for the check-off of union dues. This was the first time in the history of the *National Labor Relations Act*¹²² that either an employer or a union had been ordered to agree to a substantive term of a collective agreement.¹²³ The Court of Appeals had concluded that this was the only effective remedy available in the face of such employer intransigence.

The Supreme Court refused to uphold the order, noting that the NLRB had the power "to require employers and employees to negotiate", but did not have the authority "to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement."¹²⁴ Recognizing the deficiency of the remedies left to the Board, the Court suggested legislative reform might be in order:

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

¹²⁰ *Id.* at 101 (U.S.), 822 (S.Ct.)

¹²¹ *Id.*

¹²² *Supra* note 119.

¹²³ *Supra* note 119, at 106 (U.S.), 825 (S.Ct.)

¹²⁴ *Id.* at 102 (U.S.), 823 (S.Ct.)

The Court continued:

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

It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining leaving the results of the contest to the bargaining strengths of the parties. . . . [T]he act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. (*Id.* at 107-109 (U.S.), 825-26 (S.Ct.))

The argument that a union faced with an intransigent employer should strike is somewhat faulty. The Act permits legal strikes but certainly does not intend to encourage them. That this is so is made clear by the explicit statutory duty to bargain. Further, this line of argument fails to recognize the difference between an economic strike and the unfair labour practice strike. In the latter the employer is engaging in a labour stoppage in order to oust the union entirely. (Schlossberg & Silard, *supra* note 10, at 1080-81.)

necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands.¹²⁵

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

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

The Court sent the case back to the NLRB for reconsideration of a "make whole" remedy, citing the *H. K. Porter* decision and attempting to distinguish it from the case at hand:

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

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

In another case illustrating the NLRB's approach to "make whole"

¹²⁵ *Supra* note 119, at 109 (U.S.), 826 (S.Ct.)

¹²⁶ *Supra* note 13.

¹²⁷ *Id.* at 255 (U.S. App. D.C.), 1249 (F.)

¹²⁸ *Id.*

¹²⁹ *Id.* at 259 (U.S. App. D.C.), 1253 (F.)

¹³⁰ *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972) at 1235.

¹³¹ *Id.* at 1237. Also see Schieber, *Surface Bargaining: The Problem and a Proposed Solution* (1974), 5 U. of Toledo L. Rev. 656 at 663.

orders, *Ex-Cell-O Corp.*,¹³² the union brought bad faith bargaining and unfair labour practice charges against the employer in a first contract situation. The Trial Examiner made findings of unfair labour practices, granted a cease and desist order, and directed the employer to "make whole its employees for any losses suffered on account of its unlawful refusal to bargain with the [union]."¹³³ The NLRB was sympathetic to the Trial Examiner's recommendation,¹³⁴ but reluctantly determined that it could not approve his order. The Board concluded that such a remedy would be "too speculative":

Who is to say in a specific case how much an employer is prepared to give and how much a union is willing to take? Who is to say that a favorable contract would, in any event, result from the negotiations? . . . To answer these questions, the Board would be required to engage in the most general, if not entirely speculative, inferences to reach the conclusion that employees were deprived of specific benefits as a consequence of their employer's refusal to bargain.¹³⁵

¹³² *Ex-Cell-O Corporation*, 185 N.L.R.B. 107 (1970), rev'd *Ex-Cell-O-Corp. v. NLRB*, 449 F.2d 1046 (1971).

¹³³ *Id.* at 107.

¹³⁴ The NLRB stated:

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

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

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

A number of the proponents of this remedy have attempted to formulate a method of calculating damages. Since the Board would first have to be convinced that an agreement would have been reached if the employer had bargained in good faith, the Board should be given evidence on the likelihood that the parties would have signed an agreement. The union's case would rest on its past history of negotiations with this employer or others similarly situated, and upon evidence based on averages. Alternatively, the Board could avoid an all or nothing decision by the use of a discount factor to reflect the percentage likelihood that the parties would not have reached agreement. Once the Board determines that an agreement would have been concluded, it must ascertain the amount of the injury. Evidence which could be considered includes: increases given by this employer to employees represented by the same union in similarly situated plants, increases won by the union from employers generally, as well as average wage increases documented by the Bureau of Labor Statistics. (Harvard note, *supra* note 10, at 1695-98.)

Furthermore, the Board refused to see any distinction between this remedy and the *H. K. Porter* imposition of a contract. Although in *H. K. Porter* the remedy sought would have "operate[d] prospectively to bind an employer to a specific contractual term," according to the Board this was virtually indistinguishable from the remedy requested in the case before it, which would "operate retroactively to impose financial liability upon an employer flowing from a presumed contractual agreement."¹³⁶ In both situations the employer had not agreed to the contractual stipulation for which it was being forced to bear responsibility.¹³⁷ The union subsequently applied to the District of Columbia Court of Appeals for review of the Board's decision.¹³⁸ Based upon the Court's earlier reasoning in *Tiidee Products*, the Court summarily reversed the Board's decision, stating: "[A]n employer's refusal to bargain based on a frivolous challenge to an election is of itself a serious and manifestly unjustified repudiation of the employer's statutory duties and denial of the employee's statutory rights to collective bargaining. . . . [The] 'make-whole' compensation is a proper remedy in such circumstances."¹³⁹ The case was remanded to the Board for further proceedings.

Concerned about the deficiencies of traditional remedies, a number of American labour commentators¹⁴⁰ have proposed a new remedy, one still untried by any labour board: the retroactive application of the collective agreement ultimately agreed upon by the union and the employer to the date of the employer's violation of its duty to bargain. The goals underlying the "make whole" remedy can be seen in the retroactive remedy. Employees would be compensated retroactively for their employer's refusal to bargain. This remedy would withstand the arguments against the imposition of a contract because it focuses upon the union-management contract as the basis for the damage award, rather than assessing compensation on something the parties have not agreed upon. Some commentators disagree with this contention, pointing out that the Board would still be stipulating at least one term of the agreement, the retroactivity clause. It is, of course, a matter of perspective; it could be seen merely as delayed imposition of damages for unlawful behaviour. The form should not be mistaken for the substance. Theoretically, the order would remove the incentive for an employer's delaying tactics. The employer would gain nothing by bad faith bargaining because the agreement eventually concluded would be applied retroactively. However, the retroactive order might backfire in the sense that it could strengthen an employer's determination to avoid signing any contract at all. In addition, even if an agreement were concluded the employer would have taken into consideration the effect of the retroactivity order on the over-all cost of the package.¹⁴¹

¹³⁶ *Supra* note 132, at 110.

¹³⁷ *Id.*

¹³⁸ 449 F.2d 1046 (1971).

¹³⁹ *Id.* at 1049.

¹⁴⁰ Comment, *H.K. Porter: A Viable Contribution to Federal Labor Policy?* (1970), Univ. of Illinois Law Forum 401; Georgetown note, *supra* note 135.

¹⁴¹ Illinois note, *id.* at 408.

F. *American Legislation: Labor Law Reform Act, 1977*

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

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

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

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

¹⁴² The *Congressional Record*, 95th Congress, First Session, September 28, 1977, H-10304.

¹⁴³ *Id.* September 27, 1977 at H-10128.

¹⁴⁴ *Id.* October 27, 1977 at S-17979.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

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

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

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

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

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

¹⁴⁷ The Committee stated:

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

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

¹⁴⁸ *Id.* at 41.

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

¹⁵⁰ *Supra* note 144, at 88.

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

V. FIRST CONTRACT ARBITRATION IN THE FEDERAL JURISDICTION IN CANADA

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

¹⁵¹ S.C. 1977-78, c. 28.

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

s. 171.1

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

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

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

- (a) the extent to which the parties have, or have not, bargained in good faith in an attempt to enter into the first collective agreement between them;
- (b) the terms and conditions of employment, if any, negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit; and
- (c) such other matters as the Board considers will assist it in arriving at terms and conditions that are fair and reasonable under the circumstances.

outlined the purpose behind the first contract arbitration remedy. The Minister of Labour, John C. Munro, speaking before the Standing Committee on Labour, Manpower and Immigration, pointed out that first contract arbitration was designed to deal with a situation encountered "very, very frequently" in the federal jurisdiction, "particularly involving broadcasting outlets":

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

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

Olivier also pointed to the deterrence goal, stating:

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

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

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

¹⁵³ Minister of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration on Bill C-8, *An Act to Amend the Canada Labour Code*, 3rd Session, 30th Parliament, 1977-78, Issue No. 2, February 14, 1978 at 2:22; Issue No. 11, March 16, 1978 at 11:49-50.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* Issue No. 1, November 1, 1977, February 9, 1978 at 1:31.

¹⁵⁶ *Id.* Issue No. 3, February 16, 1978 at 3:31.

¹⁵⁷ *Id.* Issue No. 1, November 1, 1977, February 9, 1978 at 1:31-32.

¹⁵⁸ *Id.* Issue No. 1, November 1, 1977, February 9, 1978 at 1:33-34.