

tice become usual or a matter of course. A union must not simply wait until a strike reaches a point where the government must intervene,"<sup>159</sup> he added.

There was considerable opposition to the amendments. It was in the Canadian Parliament that debate was held over the need for and efficacy of first contract arbitration, a debate that had never taken place prior to the enactment of the British Columbia legislation. The federal Standing Committee received numerous submissions from both labour and management groups concerning the first contract arbitration remedy. In many cases, the arguments against first contract arbitration were not articulated in the most cohesive or compelling manner. Nevertheless, the strands of argument advanced are very revealing and will be referred to in this more comprehensive analysis, where they shed some light on the discussion.<sup>160</sup> Many of the arguments raised against first contract arbitration are drawn from the case that is made against the use of compulsory arbitration as a general dispute resolution mechanism in labour relations. Although many of these arguments are valid when made in the general compulsory arbitration setting, they lose their compelling quality when raised against this limited form of first contract compulsory arbitration.

Two commonly-expressed points in favour of the right to strike and against compulsory arbitration can be categorized as the "catalyst argument" and the "catharsis argument." Briefly put, the catalyst argument takes as the first premise that the parties are the persons best situated to determine terms and conditions of employment. The desire to avoid the economic losses of a strike or lockout provides the best catalyst for the parties to resolve their differences in a collective agreement. When the right to strike or lockout is removed, the parties will be less willing to compromise. Third party intervention and arbitration provide a far less effective catalyst to settlement. The catharsis argument is founded upon the contention that, in certain labour situations, a strike or lockout may cause a healthy "clearing of the air." Paradoxical though it might seem, collective bargaining is designed to resolve conflict through conflict, or at least through the threat of conflict. Although the system may seem costly, it may well be more healthy and less expensive in resolving labour-management disputes than any other method.<sup>161</sup>

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

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<sup>159</sup> *Id.* Issue No. 3, February 16, 1978 at 3:48.

<sup>160</sup> This section of the article is based upon an examination of the arguments made by the parties appearing before the Standing Committee, a reading of the general literature on the merits and disabilities of compulsory arbitration in the labour relations context, and discussions with Paul Weiler which took place on February 20, 1979 at Harvard Law School, Cambridge, Massachusetts.

<sup>161</sup> Can., *Canadian Industrial Relations: The Report of the Task Force on Labour Relations*, (Canada: 1968) at 119.



addition, the remedy is not applied automatically in all first contract disputes. In any given case, the parties will not be certain that the remedy applies to them until the Board so holds. Thus the catalytic effect of the strike is not lost. With respect to the catharsis theory, again the strike or lockout may have run for some time before a contract is imposed. Furthermore, analysis of bitter first contract disputes such as the one at Fleck indicates that the cathartic effect of the strike or lockout in such cases may be more illusory than real. The work stoppage may be exacerbating the situation rather than clearing the air. The conventional methods of dispute resolution have failed in the face of hostile ideological attitudes held by the parties, and the remedy of compulsory arbitration provides a better result.

Another of the most compelling arguments against compulsory arbitration involves its "chilling" effect upon the bargaining process. It is asserted that the parties to the dispute will believe that they can obtain more through arbitration than they can achieve through a settlement they negotiate themselves. Unions have no reason to negotiate a settlement; for they can always get "something more" than the company offered by refusing to accept the offer, and waiting for the outside arbitrator to "split the difference." The employer in this situation is foolish to make any offer at all; for whatever offer it makes would be regarded as the "floor", since the arbitrator normally feels obligated to jack the package up to a higher level.<sup>162</sup> Compulsory arbitration is also accused of having a "narcotic" effect on collective bargaining. Compulsory arbitration serves as a crutch for weak leadership in either the union or management. It allows the parties to abdicate their responsibility, an abdication that may soon spill over into other dimensions of the relationship taken as a whole.<sup>163</sup> The Canadian Association of Broadcasters' brief to the Standing Committee on Bill C-8 contended that negotiations in first contract disputes would be conducted in light of the prospect of interference by the Minister in the dispute. Negotiating positions would be established with a view to a party's position before the Labour Relations Board.<sup>164</sup>

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

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<sup>162</sup> Keel, *The Pros and Cons of Compulsory Arbitration* (New York: New York Chamber of Commerce, 1961) at 14-15.

<sup>163</sup> *Supra* note 6 at 30.

<sup>164</sup> *Supra* note 153, Issue No. 5, February 28, 1978 at 5A:10.



mental effect lessens dramatically, however, as the labour relations community realizes that first contracts will be imposed only in a narrow range of circumstances. The strictness of the application of the remedy diminishes any "chilling" effect that may occur at the outset.<sup>165</sup>

Another argument commonly expressed against compulsory arbitration contends that the problems of arbitrating terms and conditions of employment are insurmountable in a free enterprise economy. Concern is voiced over the propriety of subjecting some forms of income, namely wages and salaries, to control while not similarly regulating others. Once a government-appointed board gets into the business of fixing wages or working conditions, it is argued, prices must also be set by the government board because of their intimate relationship. Next the government would be forced to regulate profits. Such government control is at odds with the notion of free enterprise.<sup>166</sup> However, the first contract remedy is by no means part of a comprehensive, systematic compulsory arbitration regime. Contracts are imposed only within a narrow range of situations. The term of such contracts is limited and then the parties are thrown back into the collective bargaining system. In such a restricted context it becomes difficult to make the case that government must logically move into the areas of price and profit regulation.

One of the most powerful arguments for collective bargaining and against compulsory arbitration is based on the proposition that collective bargaining promotes democratization of the workplace. Represented by their union, workers can obtain a voice in setting the terms and conditions of their employment.<sup>167</sup> Weiler has put this traditional labour argument powerfully, arguing that collective bargaining constitutes an experience in self-government. Employees may participate in the determination of their conditions of employment, rather than "simply accepting what their employer chooses to give them."<sup>168</sup> He concludes:

If one believes, as I do, that self-determination and self-discipline are inherently worthwhile, indeed, that they are the mark of a truly human community, then it is difficult to see how the law can be neutral about whether that type of economic democracy is to emerge in the workplace.<sup>169</sup>

However, the first contract arbitration remedy was designed precisely to further the democratization potential of collective bargaining. It was designed to be applied only in cases where the employer was unfairly frustrating the employees' desire to bargain collectively. The first contract was to be imposed in order to deprive such employers of their unlawful gain from such behaviour, and to give the employees and their union a foothold from which to pursue collective bargaining in the future. Furthermore, the employees rarely suffer

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<sup>165</sup> *Supra* note 21.

<sup>166</sup> Williams, *The Compulsory Settlement of Contract Negotiation Labour Disputes* (1949), 27 Texas L. Rev. 589 at 654; Keel, *supra* note 162, at 22; Queen's Casebook, *supra* note 6, at 23.

<sup>167</sup> Stanford, *Compulsory Arbitration—A Solution for Industrial Decay?* (1952), 13 U. Pitts. L. Rev. 462 at 491.

<sup>168</sup> *Supra* note 19, at 32-33.

<sup>169</sup> *Id.* at 33.



from the imposition of a temporary first year agreement. They will retain the opportunity to take destiny into their own hands. Within the time limits set out in the labour legislation, they remain free to switch unions, alter the terms and conditions of the collective agreement imposed (if management consents), and apply for decertification of the trade union.

Critics of compulsory arbitration inevitably point out that compulsory arbitration never puts an end to all strikes. Countries that have introduced a compulsory arbitration regime have discovered that this by no means eliminates work stoppages.<sup>170</sup> This argument, clearly compelling in the context of the discussion of any systematic compulsory arbitration regime, also withers in the face of first contract arbitration. First contract arbitration does not outlaw work stoppages *a priori*, even in cases where a board decides to impose an agreement. The parties are free to indulge in work stoppages until a board imposes a contract. At that point, a board imposition of a contract does seem to work. The parties end the dispute and resume operations. One of the most dramatic results of the first contract arbitration remedy has been to put an end to bitter and usually protracted disputes and to get the parties back to work.

The most serious philosophical argument against compulsory arbitration remains to be considered. Critics loudly decry the infringement upon freedom of contract that compulsory arbitration creates. Ernest Steele, President of the Canadian Association of Broadcasters, told the Standing Committee that first contract arbitration was an intervention contrary to the principles of free collective bargaining.<sup>171</sup> The Bell Canada brief claimed that the unilateral aspect of this decision-making process was a prime example of unwarranted interference with collective bargaining.<sup>172</sup> Even the trade union representatives who appeared before the Committee repeated much of this sentiment.<sup>173</sup> One is tempted to counter this freedom of contract refrain with the quick response that first contract arbitration legislation typically provides that, although a board may impose a first contract, the parties are free to revise any of the terms and conditions upon their mutual agreement. Does this not meet

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<sup>170</sup> Williams, *supra* note 166, at 651-52; Stanford, *supra* note 167, at 474-79.

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

<sup>171</sup> *Supra* note 153, Issue No. 5, February 28, 1978 at 5:5.

<sup>172</sup> *Id.* Issue No. 7, March 8, 1978 at 7A:14.

<sup>173</sup> *Id.* Issue No. 8, March 9, 1978 at 8:40. Although the representatives of the trade union movement approved of the first contract remedy, (their reaction is discussed more fully below), they were at pains to point out that the Canadian trade union movement remained uniformly opposed to compulsory arbitration.



the freedom of contract argument? Steele refused to accept this response, stating persuasively before the Standing Committee: "To suggest that the parties in subsequent negotiations are free to alter inappropriate terms and conditions imposed by the Labour Relations Board is unrealistic. The difficulty of 'negotiating down' from a first agreement is appreciated by persons familiar with the collective bargaining process."<sup>174</sup> Related arguments can be made that first contract arbitration infringement of freedom of contract is minimal because the compulsory arbitration affects only the first agreement and lasts for only one year. These arguments are similarly unconvincing because the Board-imposed terms and conditions clearly tend to set the floor upon which future negotiations will be based.<sup>175</sup>

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

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

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

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

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

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

<sup>174</sup> *Id.* Issue No. 5, February 28, 1978 at 5A:12.

<sup>175</sup> *Id.* Issue No. 6, March 2, 1978 at 6A:14. The brief presented to the Standing Committee by the Railway Association of Canada met this argument head-on:

The first agreement signed by the parties is always the most important since in effect it determines the basic parameters that the parties see in their collective bargaining relationship, and it is from these parameters that subsequent collective agreements are developed.

<sup>176</sup> Cohen, *The Basis of Contract* (1933), 46 Harv. L. Rev. 553 at 558.

<sup>177</sup> *Id.* at 558-59.



employers and unions are required to bargain in good faith. Labour legislation compels even a reluctant employer to negotiate with a union whose presence is detested. The employer is allowed to disagree with the union as to terms and conditions, but there must be *bargaining*. Where an employer is involved in the breach of this duty to bargain in the vulnerable first contract context, there is no real contracting in the sense that society wishes to protect. In fact, through such actions the employer is attempting to prevent employees from exercising their rights to bargain collectively, to engage in a process of free contracting, which is a right that society wishes to support.

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

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

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



remedy itself. One argument was that the situation was not serious enough to justify such a drastic remedy. Rather ironically, this argument was articulated by Ernest Steele, from the Canadian Association of Broadcasters. The federal government, it will be recalled, when introducing the new remedy, attributed the need to first contract problems within the broadcast industry. Steele contradicted this premise, denying that the broadcasting industry was anti-union, and pointing out that approximately 15 per cent of the industry was unionized. He noted that over the previous seven years first contract situations had created "real difficulties" on only five occasions—a "not very frequent" pattern.<sup>179</sup> He asserted that first contract arbitration would violate the most basic principles of free collective bargaining "in an effort to overcome a problem which has not yet shown a seriousness which would justify such drastic action."<sup>180</sup>

To the contrary, Jacques Olivier, Parliamentary Secretary to the Minister of Labour, responded: "We must remember that 60% of the working hours lost because of strikes and lockouts happen in connection with the first collective agreement."<sup>181</sup> The brief presented by the Canadian Labour Congress also stated: "As a matter of fact, more than one-half of the time lost through strikes and lockouts is due to the employer's [anti-union] attitude [in first contract negotiations]."<sup>182</sup> This is erroneous information. In fact the work-days lost across Canada during first contract negotiations approximate only 5 per cent of the total work-days lost due to collective bargaining work stoppages.<sup>183</sup> However, the argument that the problem involves only a small proportion of labour work stoppages can be just as easily used to support the remedy as to oppose it. If the number of first contract work stoppages are few, the labour board will have to use the remedy less often. It therefore will involve a less drastic intervention into the collective bargaining system. Further, although the numbers of employees involved may be low, for the individuals caught up in an acrimonious, protracted first contract dispute, the seriousness of the situation can hardly be denied.

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

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<sup>179</sup> *Supra* note 153, Issue No. 5, February 28, 1978 at 5:5.

<sup>180</sup> *Id.* at 5A:12.

<sup>181</sup> *Id.* Issue No. 3, February 16, 1978 at 3:32.

<sup>182</sup> *Id.* Issue No. 8, March 9, 1978 at 8A:19.

<sup>183</sup> In 1976 out of 11.6 million work days lost due to collective bargaining work stoppages in Canada, 262,800 were related to the negotiation of a first contract, or 2.3%. *Strikes and Lockouts in Canada, 1976*, (Ottawa: Supply and Services, 1977) at 16. In 1977 out of 3.3 million work days lost, 186,290 were due to first contract negotiations, or 5.6%. *Strikes and Lockouts in Canada, 1977*, (Ottawa: Supply and Services, 1978) at 24. In 1978 out of 7.4 million work days lost, 187,340 were due to first contract disputes or 7.4%. *Strikes and Services in Canada, 1978*, (Ottawa: Supply and Services, 1979) at 19.



bership, the trade unions must organize in these growing sectors of the economy. As they do, they will increasingly run up against employers who are unfamiliar with collective bargaining and who may prove to be intransigent, ideologically-motivated adversaries. Shirley Carr, a Vice-President of the Canadian Labour Congress, recognized this explicitly:

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

Finally, the remedy is important irrespective of the proportion of work-days lost attributable to first contract strikes. This kind of conflict is very damaging to the general climate and tone of industrial relations.<sup>185</sup> The nature of first contract battles can create an impact far beyond the effect that would normally be created by a less ideological work stoppage. The Fleck strike is an excellent case in point. Although the strike involved less than two hundred employees and a small manufacturing plant, it became so emotional and so visible that long-term relationships between management, labour and government were severely damaged.

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

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<sup>184</sup> *Supra* note 153, Issue No. 8, March 9, 1978 at 8:42.

<sup>185</sup> Weiler, *supra* note 160.

<sup>186</sup> *Supra* note 153, Issue No. 10, March 15, 1978 at 10A:65-66. The Association's Brief continued:

These same techniques are applied by conciliators and mediators who deliberately stage posturing and confrontation by the parties in order to generate pressures that bring about a settlement. They also utilize various other techniques including that of deciding when, if at all, a changed position by one party will be communicated to the other. Within this context, in virtually any set of negotiations, both parties are susceptible to the allegations during certain stages of negotiations of "bad faith", if their actions are considered in isolation and out of context. . . . [A] labour tribunal's intervention, particularly with the delays inherent in such a process, can seriously frustrate the bargaining process as it is regularly carried out.

<sup>187</sup> *Id.* Issue No. 3, February 16, 1978 at 3A:12.



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

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

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

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

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

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

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

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<sup>188</sup> Weiler, *supra* note 160.

<sup>189</sup> *Supra* note 153, Issue No. 3, February 16, 1978 at 3:45.

<sup>190</sup> Weiler, *supra* note 160.

<sup>191</sup> *Supra* note 153, Issue No. 10, March 15, 1978 at 10A:66.

<sup>192</sup> *Id.*



the parties are reluctant to apply for the remedy out of a sense of its ineffectiveness. Instead, he claims that the deterrent effect is real. He points to the fact that not only have there been few applications, but also that there has been a virtual elimination of the bitter first contract "cause célèbre" labour dispute in the provincial jurisdiction.<sup>193</sup>

The criteria to be used in compulsory arbitration have always been a matter of contention. Although a series of guidelines have been proposed—the history of prior negotiations and wage decisions between the parties, intra-industry wage comparisons, competitive wage surveys in related industries, government statistics on the cost of living, productivity tables, balance sheets on a company's ability to pay<sup>194</sup>—neither labour academics nor the parties themselves have been able to agree on which criteria should be used and how they should be applied. The criteria set forth in the legislation for first contract arbitration, both in the British Columbia legislation and in the proposed federal legislation, were specifically designed to provide a maximum of flexibility. The Labour Boards were given the discretion to consider the extent to which the parties had bargained in good faith, the terms and conditions of employment negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances, and such other matters as the Board felt would assist it at arriving at fair and reasonable terms and conditions.

This invoked a storm of protest from employer organizations appearing before the Standing Committee. The Canadian Manufacturers' Association pointed out that, under the new section 117.1(3) of the Code, the Board was authorized to consider whether or not bargaining in good faith had occurred. Including this in the criteria implied that one party might be treated more favourably in the imposed agreement if the other was found by the Board to have bargained in bad faith. The Association argued that while bad faith bargaining was regrettable, it should not be the basis for determining wages and benefits, which were essentially economic issues.<sup>195</sup> The Association also viewed the criteria in the new section 171.1(3)(b) as too restrictive. Although the Board might consider provisions found in other collective agreements, the Association argued that it should also consider the comparable rates of pay and working conditions provided by union-free employers. "The Board should be required to take account of the total compensation provided by employers in the related industry and/or area, irrespective of whether they are unionized or not."<sup>196</sup> The logical result of taking such account would be to undermine collective bargaining; an employer would not have to worry about any imposed agreement if it lasted only a year and reflected non-union terms and conditions.

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

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<sup>193</sup> Weiler, *supra* note 160.

<sup>194</sup> Keel, *supra* note 162, at 13; Holly and Hall, *Dispelling the Myths of Wage Arbitration* (1977), 28 Lab. Law J. 344 at 351.

<sup>195</sup> *Supra* note 153, Issue No. 3, February 16, 1978 at 3A:12-13.

<sup>196</sup> *Id.*



that both union and non-union wage scales should be used for comparison. He points out that the reason why people embrace collective bargaining is that they wish to make a move from non-union wages to union scales of compensation. In addition, he has asserted as follows:

By setting out rigid criteria, you are prejudging the whole issue. There are serious problems in finding standards of comparability. Are you talking about the comparability of employees with respect to their background and skills, or are you talking about the comparability of industries? We didn't want the Board to be seen as putting its stamp of approval on any one standard, saying "that is the valid comparison." To have done this would have been to say to the world at large—bad faith or not—"here's what the Labour Board thinks is reasonable."<sup>197</sup>

Weiler noted that this would inevitably have expanded the reach of the provision. If the Legislature had tried to lay down strict principles of comparability it would have caused a harmful effect on collective bargaining. As a result, while the Board looked for points of comparison in each case, as a matter of policy it stated that it would not publicly disclose the terms of the contracts imposed. "None of our decisions laid down principles of valid reasonable comparison. What we were explicitly adopting was a policy of 'ad hocery'," noted Weiler.<sup>198</sup>

The Railway Association of Canada raised an additional objection to the specific first contract legislation proposed. They took issue with the use of the Labour Board as the appropriate arbitration forum for first contracts. They argued that the Canada Labour Relations Board was not the proper vehicle for the arbitration of interest disputes. As an alternative, they recommended that the legislation should provide for individual arbitrators, experienced in arbitrating interest disputes, to handle such cases.<sup>199</sup> Weiler has taken issue with this objection.<sup>200</sup> The only virtue he sees in using *ad hoc* arbitrators is that it might encourage a more searching examination of true comparisons in setting the terms and conditions of wages and other benefits. However, he points out that the negative factors far outweigh the positive features. He assumes that such an *ad hoc* arbitration system would involve the initial Ministerial and Board determination that a first contract should be imposed, and then the transfer of the case to an outside arbitrator for determination of the contract terms. Such a system would create greater time delay. It would also sacrifice the Board's mediation-arbitration ability. In addition, he points out that it is preferable to have a single tribunal administer all aspects of labour legislation. A single tribunal such as the Labour Board can develop an overview of the process when it deals with all facets of collective bargaining, such as certification, unfair labour practices, strike votes, bargaining duties, decertification, etc. From this vantage point, the Labour Board can develop the most realistic policies about when and how the remedy of first contract arbitration should be used.

The trade union organizations that appeared before the Standing Com-

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<sup>197</sup> Weiler, *supra* note 160.

<sup>198</sup> *Id.*

<sup>199</sup> *Supra* note 153, Issue No. 6, March 2, 1978 at 6A:15-16.

<sup>200</sup> Weiler, *supra* note 160.



mittee also had several suggestions for alteration of the proposed legislation. The Canadian Labour Congress recommended that the decision to set up the arbitration board should not rest solely with the Minister, but should be initiated on the request of either party involved.<sup>201</sup> The Confédération des syndicats nationaux (CSN) went a step further and recommended that the arbitration procedure should be initiated only at the request of the union.<sup>202</sup> The reasoning behind the built-in safeguards of the screening process of Ministerial review and the Board discretion to intervene has been dealt with earlier.<sup>203</sup> Although the Ministerial screening device has proved to be capable of subversion, it remains clear that it is necessary to build in review procedures before the arbitration procedures are initiated. To allow the parties to initiate the process as of right results in a negative effect on collective bargaining.

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

Failure to conclude first agreements is not so often related to the respective demands of the parties as it is to the representative character of the newly certified union. The real solution to this problem is to protect the rights of individuals by requiring a government-supervised secret ballot prior to the granting of bargaining rights.<sup>204</sup>

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

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

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<sup>201</sup> *Supra* note 153, Issue No. 8, March 9, 1978 at 8A:19-20.

<sup>202</sup> *Id.* Issue No. 10, March 15, 1978 at 10A:25.

<sup>203</sup> See discussion of "First Contract Arbitration in British Columbia" above at text accompanying notes 18 *et. seq.*, *supra*.

<sup>204</sup> *Supra* note 153, Issue No. 3, February 16, 1978 at 3A:13-14.