

Settlement of First Collective Agreement: An Examination of the Canada Labour Code Amendment

La conclusion de la première convention collective : analyse d'une modification au Code canadien du travail

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Résumé de l'article

La conclusion d'une première convention collective de travail donne souvent lieu à un conflit prolongé. Il en a toujours été ainsi au Canada comme aux États-Unis. Le remède traditionnel des injonctions a été jugé tout à fait inefficace: c'est trop peu et trop tard. Reconnaisant cette situation, quatre gouvernements canadiens — La Colombie Britannique, le Manitoba, le Québec et l'État fédéral — ont modifié leur Code du travail respectif. Le présent article analyse les raisons qui sous-tendent et justifient cette modification au *Code canadien du travail*.

Selon ce changement, quand les parties aux négociations d'une première convention collective de travail sont incapables d'en venir à une entente et qu'elles ont suivi tout le processus juridique préalable à la grève et au lock-out, le Ministre peut ordonner au Conseil d'enquêter sur le conflit et, s'il l'estime opportun, de fixer les dispositions de la convention collective.

Suite à cette requête du Ministre, le Conseil peut déterminer les dispositions d'une convention collective qui régit les parties et devient exécutoire, sauf si celles-ci sont subséquemment modifiées par écrit par les parties elles-mêmes. Cette convention restera en vigueur pendant une année à compter de la date de sa détermination par le Conseil.

La modification à la loi prévoit aussi certaines lignes directrices et certains critères que le Conseil doit suivre lors de l'établissement de la première convention collective. Celui-ci doit donner aux parties l'occasion de présenter une preuve et de faire des représentations. Le Conseil doit, entre autres choses, tenir compte de ce qui suit: a) de la mesure dans laquelle les parties ont ou n'ont pas négocié de bonne foi dans un effort pour s'entendre entre elles sur le contenu de la première convention collective; b) s'il en existe, des conditions de travail négociées collectivement pour des salariés remplissant des fonctions identiques ou similaires dans des situations identiques ou similaires à celles dans lesquelles se trouvent les salariés de l'unité de négociation; c) de tout autre sujet que le Conseil estimera de nature à l'aider à mettre au point des conditions équitables et raisonnables dans les circonstances.

La substance de cette modification indique une orientation nettement différente de ce qui se faisait jusqu'ici. Le CCRT, à l'initiative exclusive du Ministre, a maintenant le pouvoir d'exercer juridiquement sa compétence en vue de régler un conflit d'intérêts en autant qu'il s'agisse d'une première convention collective.

Étant donné que la stipulation du *Code de travail de la Colombie Britannique* concernant la première convention collective est le prototype de la modification du *Code canadien*, l'expérience de cette province en la matière depuis 1974 témoigne que la modification au *Code canadien du travail* peut atteindre son objectif sans dissuader de la libre négociation collective. La lettre et l'esprit de la décision du CCRT dans l'affaire de *Radio Mutuel* confirme en partie cet optimisme prudent. Il est cependant quelque peu prématuré de prédire l'efficacité à long terme de cette politique touchant l'arbitrage de la première convention collective. Une telle prédiction devrait se fonder sur une étude approfondie de ce qui est advenu à ces syndicats à l'expiration des premières conventions imposées par des tiers.

Les provinces canadiennes qui n'ont pas adopté de législation en matière d'arbitrage de la première convention collective devraient songer à d'autres mesures en lieu et place de ces conventions imposées par une tierce partie. L'une d'entre elles serait de voir s'il ne serait pas possible de renforcer les syndicats par une plus grande flexibilité en matière d'accréditation de façon à permettre aux petits syndicats de s'allier et de donner naissance à des unités de négociation plus réalistes et plus viables, ce qui pourrait empêcher un employeur donné de faire échec aux négociations ou de détruire les syndicats nouvellement accrédités. Si de telles mesures ne sont pas possibles, ces provinces devraient songer sérieusement à insérer dans leur législation du travail les dispositions relatives à l'arbitrage de la première convention collective.

Settlement of First Collective Agreement

An Examination of the Canada Labour Code Amendment

S. Muthuchidambaram

The purpose of this paper is to examine the rationale behind and provisions of a recent amendment to the Canada Labour Code, where the parties negotiating a first collective agreement are unable to reach agreement and have met all the legal requirements precedent to a strike or lockout, the Minister of Labour may direct the Labour Relations Board to inquire into the dispute and if advisable settle the terms and conditions of the first collective agreement. That agreement will be binding on the parties and in force for one year. The reactions of the organized labour and employers to this amendment are also discussed.

According to a recent amendment to the *Canada Labour Code*, where the parties negotiating a first collective agreement are unable to reach agreement and have met all the legal requirements precedent to a strike or lockout, the Minister of Labour may direct the Labour Relations Board to inquire into the dispute and if advisable settle the terms and conditions of the first collective agreement. That agreement will be binding on the parties and in force for one year.

The purpose of this paper is to examine the rationale behind and provisions of this amendment. The reactions of the organized labour and employers to this amendment are also discussed. Due consideration is given to the U.S. experiences regarding first agreement in the light of certain similarities in the legal framework of industrial relations statutes in Canada and the U.S. Since the *British Columbia Labour Code* provision on first agreement is the prototype for the *Federal Code* amendment, the efficacy of B.C. experience is analysed. A digest of the first case in which the Canada Labour Relations Board has applied this new amendment is also incorporated. On the basis of these discussions certain conclusions regarding the *Federal Code* amendment are arrived at.

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THE LEGAL FRAMEWORK HITHERTO

Industrial relations law in every Canadian jurisdiction requires in general that employees be free to engage in three kinds of activity; to form themselves into unions, to engage employers in good faith bargaining, and to invoke meaningful sanctions in support of the bargaining.¹ To achieve these objectives the law requires and promotes certain conduct of employers, unions and individual employees and proscribes certain other activities on their part which would nullify these objectives. Such prohibited activities are the unfair labour practices. There is the following purposive time-dimension in law with respect to employer unfair labour practices: At the time prior to the organization of the union, during the organization of the union, at the time when the union seeking recognition through certification, and during the time of bargaining after certification.²

The public policy choice for prohibiting employer's unfair labour practices is based on the realization that the individual employee and union organizer are vulnerable to employer influence or intimidation. The following section 4⁴ of the federal Industrial Relations and Disputes Investigation Act reveals this intent and purpose:

“No employer and no person acting on behalf of an employer shall seek by intimidation, by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to refrain from becoming or to cease to be a member or officer or representative of a trade union...”

This section regulates the conduct of employer in the time-dimension previously mentioned with the exception of the time of bargaining after certification. To cover this aspect the law imposes a duty on both parties to bargain in good faith. That duty contains two ingredients, which are technically and conceptually separable but functionally and behaviourally so blended as to lose their separate identities; the one “to bargain in good faith” and the other to make “every reasonable effort to make a collective agreement”.³

1 CARROTHERS, A.W.R., *Collective Bargaining Law in Canada*, Butterworths, Toronto, 1965, p. 3 and 4.

2 *Ibid.* p. 171.

3 This basic legal framework is based on the Wagner Act of 1935, which is North America's first comprehensive industrial relations statute. Section 7 of this Act, guaranteed to employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing”. By Section 8(a) (1), it was made an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in S.7.

The recent amendment to the *Federal Code* is based upon the realization that these provisions have not achieved the intended purposes, particularly so far as first collective agreements are concerned.

PROBLEMS RELATED TO FIRST AGREEMENTS

The magnitude of the problems related to the first agreement and the necessity for statutory remedy can be better appreciated through a review of the law in operation hitherto and of its effectiveness in regulating the conduct of the parties.

Uniting employees into labour associations is an uphill task, negotiation is a sluggish machine, and application of sanctions, though considered as bargaining by other means, is costly in monetary as well as human terms. How the parties behave and what strategies they apply at the time prior to the organization of the union, during the organization of the union, and at the time when the union seeking recognition through certification have all the borebodings of the catastrophe at the bargaining table for the first agreement. This problem has escalated in the recent past in certain sectors of the economy.

The unorganized are mainly among white-collar workers, women, and those in small establishments, employing from 10 to 100 employees. Wholesale and retail trade, finance, insurance and real estate and service industries and major part of communication industries are the least organized sectors. There are also plants in big urban centers which prefer to employ new immigrants and minority groups, not because of the employer's cosmopolitan catholicity and humanitarianism, but because they know that these employees would serve as an insurance against unionization in the near future. Strategically, in these establishments, the employers have an upper hand over the situation. It is not surprising that the union organizers consider this sector as industrial ghetto where they have to exercise their statutory right to association in a stealthy underground fashion.⁴

Further, this sector is fascinated and to some extent benefited by the mushroom of consulting firms across the boarder specializing in the fine art of union-avoidance and union-bursting. They conduct seminars for these

⁴ LIST, Wilfred, "Unions Wage An Underground Struggle to Organize the Small Plants", *The Globe and Mail*, April 13 and 14, 1970.

employers in all the major urban centers across Canada⁵ and at times with tempting titles such as: *UNIONS? ARE YOU AFRAID OF THEM? DO YOU WANT TO AVERT THEM? BEAT THEM? UNLOAD THEM? WANT TO KEEP YOUR ORGANIZATION CLEAN?*⁶

There is another factor which complicates the situation still further; that is the existence of growing numbers of specialized law firms whose trade-mark is keeping unions out of an employer's plant or destroying them if they come in; this is something which is simply unknown in most other democratic industrialized countries.⁷

This kind of industrial guerrilla warfare has been carried out by those employers who are opposed to unionization and collective bargaining either on ideological grounds or for pragmatic reasons. The following are the various tactics subtly used by them, in spite of the fact that most of these conducts are prohibited by the law on the basis of the total context: Effective use of captive audience, systematic interrogation of employees, promulgation and discriminatory enforcement of no-access, no-distribution and no-solicitation rules, threatened loss of certain existing benefits, either encouragement of formation or revival of a grievance committee as union substitution, management initiated pre-certification and post-certification litigations based on legal technicalities or loopholes with a view to frustrate unionization or to kill an infant union by sheer war of nerves, conversion of management's right to discipline employees into a union-hunting license, employer's systematic pre-certification polling of employees regarding their

⁵ *Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration*, House of Commons, Thirtieth Parliament, 1977-78, Issue No. 8, March 9, 1978, 8:42. This source is cited hereafter as: *LMI, Proceedings and Evidence*. Mrs. Shirley G.E. Carr, Executive Vice-President of the Canadian Labour Congress, made the following statement before LMI regarding these seminars: "I might say for the record that as long as Canada allows outside people from the U.S. to come into Canada and teach Canadian businessmen how to stay away from a trade union, we are always going to face that problem (union recognition and first collective agreement). In addition to that, to allow those people to collect on their income tax the registration fees is a disservice to the people of Canada who are paying for it." *Ibid*.

⁶ Here is one example: *HOW TO KEEP THE UNION OUT! EMPLOYER PREVENTIVE LABOR RELATIONS*: Two and a half day course on strategies to fight unions and maintain non-union status. This was organized by the Canadian Management Centre of the American Management Associations/International; held December 5-7, 1977, Toronto: Fees AMA Members \$375: Tax Deductible.

⁷ KASSALOW, E.M., "Industrial Conflict and Consensus...: A Comparative Analysis", *Proceedings of the Thirtieth Annual Winter Meeting*, I.R.R.A. Series, University of Wisconsin, Madison; 1978, p. 120. Also refer *L.M.I. Proceedings and Evidence*, Issue No. 3, Feb. 16, 1978, 3:31.

union sentiments, and misuse of employer's freedom of speech prior to, during, and after certification.⁸

Under these circumstances it is easier for a union to hunt and catch a ghost than to charge the employers of these unfair labor practices and establish them with the necessary proof.⁹ The complexity involved in these cases has been well expressed by learned Judge Hand in the following classic passages regarding the employer's bitter opinion of unions:¹⁰

"No doubt an employer is as free as anyone else in general to broadcast any argument he chooses against trade-unions; but it does not follow that he may do so to all audiences. The privilege of "free speech", like other privileges is not absolute; it has its seasons... Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power... Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart."

This conflict situation is the midwife of almost all new unions. "It is little wonder, in the face of this recognition struggle, that unions and management typically 'square off' as adversaries from the day the union begins to organize. This process, as well as past labour-management history and tradition, sets them into fixed adversary positions even if the union wins the election and they begin negotiations."¹¹

⁸ For more details on these and related matters refer: B.L. ADELL, *Employer "Free Speech" in the United States and Canada*, Reprint No. 8, Industrial Relations Centre, Queen's University at Kingston, 1966; Bernard T. KING, "Pre-Election Conduct-Expanding Employer Rights and Some New and Renewed Perspectives", *Industrial Relations Law Journal*, Vol. 2:185, 1977; and *Report on the Labor Reform*, Committee on Education and Labor, House of Representatives, 95th Congress, 1st Session, Report No. 95-637.

⁹ Hon. John Munro, Minister of Labour, made the following statement before the Standing Committee on Labour:

"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 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."

LMI Proceedings and Evidence, Issue No. 2, Feb. 14, 1978, 2:22.

¹⁰ *N.L.R.B. V. Federbush Co.*, (1941) 121 F.2d 954, p. 957 (2nd cir.).

¹¹ KASSALOW, E.M., *op. cit.*

The inadequacy or ineffectiveness of existing legal remedies regarding union recognition as well as negotiation of first agreement boils down to a cost-benefit matrix of compliance with the law. "If the benefits from a certain action are greater than the costs, that action will be pursued by a firm. Since the potential benefit from engaging in unfair labor practices appears to exceed the costs to the violator, unfair labor practices occur."¹² The irony of this matrix is that the law-abiding employer is at a competitive disadvantage relative to the law breaker; the former cannot be judged too harshly if he falls prey to the irresistible temptation of looking for subtle ways and means of evading the law without being caught. In this sense the whole process seems to move in a vicious circle.¹³

The evidence that more than fifty percent of the working hours lost because of strikes and lock-outs happening in connection with the first collective agreement shows the magnitude of the problem and the need for statutory intervention.¹⁴

SIMILAR EXPERIENCE IN THE U.S.

The experience in the United States regarding the first collective bargaining situation, the ineffectiveness of the existing legal remedies and the direction of needed policy change is similar to the Canadian one given the similarity of certain basic legal framework in industrial relations between these two countries.

The following statement by McCulloch, former chairman of the N.L.R.B. illustrates this point:

"The losses to employees, especially in first bargaining situations, who are deprived for 1, 2 or sometimes many more years of their right to be represented are palpable. The weakening of their bargaining agent's status is admitted. The savings to respondent employers from delaying the onset of bargaining for these long periods can be enormous. Until this basic profit from unfair practices is removed, the incentive to mock the statute's premises with lengthy delays is apparently compelling.

¹² Prof. B.R. SKELTON reached this conclusion on the basis of his empirical study which he presented before the Committee on Education and Labor. *Report on Labor Reform*, *op. cit.*, p. 9.

¹³ FANNING, John H., Chairman, NLRB, "Reforming the National Labor Relations Act", *Proceedings of the Thirtieth Annual Winter Meeting*, Industrial Relations Research Association, (ed: Barbara D. Dennis), University of Wisconsin, Madison, 1978, p. 154.

¹⁴ *L.M.I. Proceedings and Evidence*, Issue No. 3, Feb. 16, 1978, 3:32; Issue No. 8, March 9, 1978, 8A:19.

Moreover, to limit such a remedy to "clear and flagrant" violations,..., would tend to make these Board remedies punitive and would ignore the losses equally suffered by employees in cases involving closer legal or factual issues. I would prefer that Congress,..., emphasize the vindication of employees' rights, a majority having so chosen, to be represented and not make the remedy depend upon the often difficult question of the degree of wilfulness of a particular respondent."¹⁵

NEW STATUTORY REGULATIONS ON FIRST AGREEMENTS

One of the policy objectives of the *Canada Labour Code Amendment* is to rectify the problems identified in the preceding sections regarding the first collective agreement.¹⁶

Under this amendment¹⁷, where the parties negotiating a first collective agreement are unable to reach agreement and have met all the legal requirements precedent to a strike or lockout, the Minister may direct the Board to inquire into the dispute and if advisable settle the terms and conditions of the collective agreement.

Upon such a referral, the Board settles the terms and conditions of a first collective agreement which constitutes the agreement between the parties and is binding on them, except to the extent that such terms and conditions are subsequently amended by the parties by agreement in writing.¹⁸ This agreement will be effective for a period of one year from the date on which the Board settles it.¹⁹

The amendment also prescribes certain guidelines and criteria to be followed by the Board in settling the first collective agreement.²⁰ The Board must 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 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

¹⁵ Cited in *Report on Labor Reform*, *op. cit.*, p. 40-41; For a summary of NLRB Task Force Report refer FANNING, J.H., *op. cit.* The *U.S. Labor Reform Act* of 1978 based on these recommendations was defeated at the Senate level.

¹⁶ *Bill C-8* was passed during the Third Session of the Thirtieth Parliament and given royal assent on May 12, 1978, with the majority of the Bill including the provision on first agreement, having been proclaimed in force on June 1, 1978; Chapter 27 of the *Statutes of Canada*, 1977-78.

¹⁷ Section 171.1(1) of *Bill C-8*.

¹⁸ *Ibid.*, 171.1(2).

¹⁹ *Ibid.*, 171.1(4).

²⁰ *Ibid.*, 171.1(3).

as the employee 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 in the circumstances.²¹

The sum and substance of this amendment is a clear departure from the hitherto existing practice. The CLRB, at the exclusive initiative of the Minister, is now statutorily empowered to exercise jurisdiction over interest dispute settlement so far as first agreement is concerned. Obviously the concerned parties — organized labor and employers — are bound to react to this amendment on the basis of their perception of the new balance of power introduced by this change in policy.

ORGANIZED LABOUR'S REACTION

Since the newly certified unions, under this amendment, have a better chance of withstanding the onslaught of those employers who prolong the negotiation of first agreement primarily as a tool of union extermination, the Canadian Labour Congress has taken the following stand regarding this change:

“We fully agree with...[the amendment]... The first agreement is of particular concern to us. The Canadian Labour Congress (CLC) prefers to limit government intervention into collective bargaining matters to a strict minimum, including the negotiations of the first contract. However, the experience of past many years has convinced us that there is a class of employers who intend systematically to avoid any collective bargaining and thus to conclude a first agreement which would set a pattern. As a matter of fact, more than one half of the time lost through strikes and lockouts is due to the employer's attitude described above.”²²

Having endorsed the general intent and purpose of the amendment, the CLC proposed that Subsection 171.1(1) be modified in a way that the setting up of the arbitration board should not solely rest with the Minister but should be done on the request of either party involved. In addition, the CLC suggested, that if some terms and conditions have already been agreed

²¹ The aborted *American Labor Reform Act* of 1977 (S.8 of H.R. 8410) has the following provision regarding first agreement: The NLRB is authorized, in cases where the employer has unlawfully refused to bargain for an initial contract, to award the employees compensation for the delay in bargaining. The workers would receive an amount based on the average wage settlements negotiated by workers at plants where collective bargaining proceeded lawfully. They would receive these wages retroactively from the time of the unlawful refusal to bargain until the bargaining begins.

²² *Proceedings and Evidence, LMI*, Issue No. 8, March 9, 1978, 8A:19: Submission by the CLC.

upon between the parties, the board should not be given powers to alter such a partial agreement.²³

But neither of these suggestions have been incorporated in the amendment. Nor the CLC, either in its written submission to or oral evidence before the Standing Committee on Labour, Manpower and Immigration, did elaborate and justify the rationale behind and the operational implications of granting the right to initiate state intervention to either party involved. Since the amendment requires the CLRB to give the parties an opportunity to present evidence and make representations, nothing prevents them from impressing upon the Board to leave the already agreed upon terms and conditions between them unaltered. Given its expertise and experience in resolving industrial disputes, it is highly improbable that the Board would go against such a unified wish of the parties regarding the already resolved problems.

EMPLOYER'S REACTION

Given the adversary nature of our industrial relations system, it is not surprising that the organized labor's qualified 'Yes' to the amendment is fittingly followed by employers' emphatic 'No' to it.²⁴ The employers' associations have opposed this amendment on the ground that it would undermine the basic principles of collective bargaining. The following statement by the Canadian Association of Broadcasters elaborates this contention:

"It must be first recognized that the new provision will, in almost every instance, lead to compulsory arbitration in first agreement situations. It is true that the reference to the Board is only after the parties have been given opportunity to negotiate voluntarily a first collective agreement... However, should the amendment be brought into effect, all negotiations for first agreements would thereafter be conducted in the light of the prospect of interference by the Minister in the dispute.

²³ *Ibid.*

²⁴ For complete details of employers' reactions refer: *LMI Proceedings and Evidence*, Issue No. 3, Feb. 16, 1978, The Canadian Manufacturers' Association and Chamber of Commerce; Issue No. 4, Feb. 24, 1978, The Canadian Grain Handling Industry; Issue No. 5, Feb. 28, 1978, The Canadian Association of Broadcasters; Issue No. 6, March 2, 1978, The Railway Association of Canada; Issue No. 7, March 8, 1978, Bell Canada; Issue No. 9, March 14, 1978, The Canadian Trucking Association; and Issue No. 10, March 15, 1978, The Canadian Bankers' Association.

Negotiating positions would be established with a view to a party's position before the Labour Relations Board."²⁵

The employers' submissions uniformly question the appropriateness and adequacy of the criteria by which the Board is to determine the first agreement.²⁶ In their view, the Board has been given extremely broad discretionary authority as evidenced by a provision in the amendment which reads: "such other matters as the Board considers will assist it in arriving at terms and conditions that are fair and reasonable in the circumstances."²⁷ The following submission made by the Canadian Manufacturers' Association sums up their concerns:

"The discretionary power conferred upon the Minister and the Board would create uncertainties for the parties. The employer, especially, would be in a difficult position as he would have lost an important element of control over his labour costs...

While bad faith bargaining is regrettable, it should not be the basis for determining wages and benefits, which are essentially economic issues, and other conditions of employment...

Although the Board may consider provisions formed in other collective agreements, it should also consider the comparable rates of pay and working conditions provided by union-free employers...

Failure to conclude first agreements is not so often related to the respective demands and offers of the parties, as it is to the representative character of the newly certified union."²⁸

In addition to these objections, the efficacy of British Columbia (B.C.) experience with a similar provision on first agreement has been seriously questioned by the employers.²⁹

AN EVALUATION OF THE FEDERAL CODE AMENDMENT IN THE LIGHT OF B.C. EXPERIENCE WITH A SIMILAR LAW

Since the *British Columbia Labour Code* provision on first agreement is the prototype in letter and spirit for the *Federal Labour Code* amend-

²⁵ Issue No. 5, *op. cit.*, 5A:10. There are about 400 private broadcasting stations, out of which only 62 (15%) are unionized. At the time when the Broadcasters' Association made its submission before the LMI, there was a prolonging two and half years strike over negotiating a first agreement in a Lethbridge station. Issue No. 5, *op. cit.*, 5:17.

²⁶ *LMI Proceedings and Evidence*, *op. cit.*, Issue No. 3, 3A:13; Issue No. 5, 5A:11; Issue No. 6, 6A:16, and Issue No. 10, 10A:69.

²⁷ Section 171.1(2) (c) of *Bill C-8*.

²⁸ *LMI Proceedings and Evidence*, Issue No. 3, 3A:12 f.

²⁹ *LMI Proceedings and Evidence*, Issue No. 10, 10A:66 f.

ment, the B.C. experience in this matter warrants elaboration.³⁰ Further, such an elaboration would partly serve as a means to assess the validity of the various objections and concerns raised by the employers' associations regarding the *Federal Code* amendment.

Under Section 70 of the *Labour Code of British Columbia*³¹, when the parties negotiating a first agreement have failed to reach agreement the Minister may, at the request of either party and after investigation, direct the Board to inquire into the dispute and, if advisable, settle the terms and conditions of the collective agreement. The imposed agreement will be binding except to the extent that the parties mutually agree to amendments.³² The agreement will remain in force for one year from the date of its imposition by the Board.³³

30 Manitoba and Quebec are the other Canadian jurisdictions having statutory regulation regarding first agreement; these are not evaluated in this paper because of space limitations:

Manitoba, *Labour Relations Act*, S. 75.1

For a year after 90 days following certification, if an employer increases the rate of wages of any employee or alters any other term or condition of employment, and this is done without permission of the bargaining agent while no collective agreement is in effect, the bargaining agent may request a code of employment from the employer. This code of employment is to be prepared and a copy given to the bargaining agent within 30 days. The board will determine any dispute relating to the contents of the code.

Automatic check-off and grievance arbitration provisions of the *Labour Relations Act* will apply to the code. The code will be in effect for one year following the request for its preparation and during this time the Act will apply as if a collective agreement were in effect.

If the employer refuses to prepare a code of employment the board may prepare it and it will have the same status as if prepared by the employer. The board will determine any dispute relating to the contents of the code.

Quebec, *Labour Code*, Ss. 81a-81i

After the intervention of a conciliator has been unsuccessful either party negotiating a first agreement may apply to the Minister to submit the dispute to a council of arbitration. Where referred to arbitration the council of arbitration will be composed as provided for in the legislation. After investigation the council of arbitration may decide to determine the contents of the collective agreement and there upon any strike or lockout in progress must end. Any matter upon which the parties agree shall be included in the collective agreement unaltered by the council of arbitration. The arbitration award shall be binding for not less than one year nor more than two but may be modified, in whole or in part, by agreement of the parties.

31 *Labour Code of British Columbia* (Replacing Chapter 205, R.S.B.C. 1960), 1973 (2nd sess.), c. 122, S. 70.1.

The author would like to thank Prof. Paul C. Weiler, former Chairman, Labour Relations Board of British Columbia, for his kind and prompt co-operation in sending me the necessary information regarding B.C.

32 *Ibid.*, S. 70.2.

33 *Ibid.*, S. 72.

There is a procedural difference between the *B.C. Code* and the *Federal Code*: Under the former, either party can request the intervention of the Minister, while the *Federal Code* does not confer such a right upon the parties. But it should be emphasized that, even under *B.C. Labour Code*, it is not obligatory on the Minister to grant that request; the Minister "may" intervene if he considers it "necessary or advisable". In that sense, this procedural difference is not very significant.

The common and fundamental assumptions behind these legislations are twofold: First, the terms and conditions of employment should be settled by mutual agreement of the parties concerned, not to be imposed from the outside; second, only on rare occasions and for valid and urgent reasons settlement must be imposed from without. These assumptions are vindicated through a statutorily built-in double screening procedure. First, the Minister must decide whether a particular dispute warrants action under this provision. Second, upon referral, the Board itself is required to "inquire into the dispute" in order to determine the advisability of imposing an agreement or taking an alternative course action.

The Labour Relations Board of B.C. has explained the purpose and scope of S.70, in *London Drugs Ltd.* (1974) 1 Canadian L.R.B.R. 140, in these words:³⁴

"The government had a very different problem case in mind when it enacted s.70. A union has made its first appearance with an employer and has organized a relatively small unit. The employer opposed certification by one device or another, perhaps making veiled threats about the consequences of unionization or even going to the lengths of firing a union supporter. Notwithstanding this opposition, the union received certification from the Board, but its bargaining authority is tenuous. From that position it must try to negotiate a first contract. The employer may drag these negotiations out, consenting to talk only about the language and structure of the agreement, and refusing to put any monetary offers on the table until all these details are settled. Meanwhile, some members of management may have hinted to employees that they could receive a substantial pay increase without the union. Eventually, the union, unable to secure an agreement, calls a strike. However, some employees, both those originally opposed to the union and those now disenchanted by the lack of tangible results, refuse to go out. Those who do strike are easily replaced because of the small size of the unit and the fact that the employees are not highly skilled. In that situation, the union has no economic leverage

³⁴ This is the first case decided by the Board under the first Collective agreement provisions of the *B.C. Labour Code*. In this case the Board has interpreted S. 70 and S. 71 in the light of the total ambit of the *B.C. Labour Code* and since then these interpretations have been consistently used by it in other cases.

to budge the employer, negotiations and mediation are futile, and the employer can wait the union out. Eventually, a decertification application becomes timely and those who are then working may be a sufficient majority to achieve that result.

This basic scenario, with variations in some of the details, is a very familiar one. It constitutes a persistent flaw in the actual working-out of the labour relations policy of the legislation. The fundamental premise of the statute is that collective bargaining is to be facilitated when it is the choice of the majority. The reality is that a large number of small units, although organized and certified, never succeed in reaching a collective agreement. There is a specific requirement in s.6 of the Code that parties should bargain in good faith but experience has shown that this does not cast a fine enough net to deal with the variety of methods by which *bona fide* and reasonable collective bargaining may be frustrated. What the Legislature has proposed in s.70 is a positive remedy which it is hoped will do a better job than the standard device of cease and desist orders.

The logic of that remedy is clear enough. Some employers are unwilling to engage in meaningful negotiations because, despite the statute, they won't permit their hands to be tied by a union or a collective agreement. This provision should be a considerable disincentive to that effort, because it deprives such a party of the fruits of those tactics. A collective agreement will be imposed on it nonetheless."

In settling the terms and conditions for a first collective agreement under Section 70, the Board must give the parties an opportunity to present evidence and make representation and may take into account, among other things, (a) the extent to which the parties have bargained in good faith and (b) the terms and conditions of employment, if any, negotiated through collective bargaining for comparable employees performing the same or similar functions in the same or related circumstances.³⁵

Interpretation and application of these criteria are bound to raise certain question: Is "good-faith-bargaining" test a valid and relevant one for imposing a first agreement? Will a finding of bad faith in either party be reflected in the terms and conditions of the first agreement imposed by the Board as a punitive measure? Does the phrase "among other things" (the *Federal Code* equivalent: "such other matters") confer too broad a discretion upon the Board? In summary terms, does the settlement of first agreement by the "third party" discourage the fundamental spirit and purpose of "free collective bargaining" as we have known it hitherto?

In fact, such are the questions raised by the employers with reference to the *Federal Code* amendment which is identical to S.71 to *B.C. Labour*

35 *B.C. Labour Code*. S. 71. The *Federal Code* criteria are identical, supra S. 171.1(3).

Code.³⁶ One way of ascertaining at least a partial answer to these questions is to identify the interpretation of this Section by the B.C. Labour Relations Board.

“In *London Drugs Ltd.* the Board has observed that the absence of bad faith is not a bar to the existence of the Board’s jurisdiction; nor a breach of good-faith-bargaining requirement is a sufficient condition precedent to settling a first contract. The Board has taken the entire pattern of the conduct of the applicant as well as the respondent into consideration prior to the break down of negotiation. In this sense, the imposition of first agreement has been recognized by the Board as a remedial measure and not a punitive one.”³⁷

The purpose of this exercise is not just “finding” one party “guilty” and the other “not-guilty” but to resolve an initial deadlock—arising out of inexperience in and ignorance of industrial relations or of a conscious effort to keep away from the four corners of the existing public policy—between the parties through an imposition of a temporary (one year) remedy with the intention that the parties will learn to live with each other afterwards. Thereafter the parties are outside the scope of these provisions. In this sense the B.C. Board has described the first agreement as a form of “trial marriage” imposed upon the parties for a limited period.

Given the jurisdiction, composition and procedure of the Board and the fluidity and volatility of industrial relations, the Board may not be able to achieve the total statutory goal without sufficient discretionary power at its disposal; the translation of public policy into practice requires flexibility, innovation and experimentation.³⁸ Therefore, the discretion granted to the Board in the phrase “among other things” is an enabling one to achieve the policy objective imposed on it in S.70 of the *B.C. Labour Code*. The phrase “such other matters” in the *Federal Labour Code* serves the same purpose.

So far as the terms and conditions of the first agreement are concerned the B.C. Board has given due weight to union security without sacrificing employer viability. The following is the logic applied by this Board in *London Drugs Ltd.*, which in fact is in tune with the intent and purpose of the overall objective of the *Labour Code* itself:

“As regards the language and structure of the collective agreement, the Board does not believe that Section 70 should be used to achieve ma-

³⁶ *Supra* Employers’ Reaction.

³⁷ *London Drugs Ltd.*, (1974) 1 C.L.R.B.R. 140; at 144.

³⁸ For an excellent analysis of these issues see WEILER, Paul C., “The Administrative Tribunal: A View From the Inside”, 26, *University of Toronto Law Journal*, 193, (1976).

job breakthroughs in collective bargaining. Instead, we will try to settle on terms which reflect a fairly general consensus of what should be in a collective agreement, as tailored to the requirements of the operation before us. We will leave it to future negotiations between these parties to develop any innovations in that language. However, as regards the monetary settlement, we do not consider ourselves constrained to adopt a modest award simply because this is a first contract. The procedure in Section 70 is intended to be used sparingly because of a troubled history of negotiations and with the definite objective of getting a collective bargaining relationship underway. The background which produces a Section 70 intervention from the Board also poses the danger of decertification applications by employees who are dissatisfied with the experience they have had with collective bargaining. We intend to see that the collective agreements we settle under Section 70 are sufficiently attractive to the employees affected by them that they will think twice before applying to rid themselves of their union representatives and thus forfeiting the agreement... By the same token, we intend to write union security provisions which will not prove distasteful to the employees during this very important first year of a collective agreement."³⁹

The various methods by which the Board has disposed of the applications seeking for imposition of a first agreement dispel the employers' concern that this law would discourage the fundamental spirit and purpose of free collective bargaining and that every first agreement dispute might result in the imposition of an agreement from the outside. Since January 24, 1974, when the provisions relating to the settlement of first collective agreements were proclaimed, 27 such applications have been referred to the British Columbia Labour Relations Board by the Minister of Labour. The number of referrals by year and the distribution of cases by method of disposal applied by the Board are as follows:⁴⁰

Year:	1974	1975	1976	1977	1974-77
Applications:	17	9	0	1	27
Disposition:					
	Contract Imposed:				8
	Application Rejected:				6
	Settled with the assistance of the Board:				16
	Withdrawn:				2

On the basis of the preceding discussion regarding the B.C. experience with the statutory intervention in settling first agreement the following conclusion is reached: The intervention of the Board has occurred sparingly, since it is subject to double screening procedure. Intervention in a dispute

³⁹ *London Drugs Ltd.*, (1974) 1 C.L.R.B.R. 140; at 147.

⁴⁰ *Annual Report of the Labour Relations Board of British Columbia, 1977*, pp. 51-54, *LMI Proceedings and Evidence*, Issue No. 10, March 15, 1978, 10-A:66-67.

does not guarantee the imposition of a first agreement not only because the Board has used its discretion to promote the overall objectives of the *Labour Code* but it did not hesitate to use other means at its disposal to persuade the parties to settle the dispute by themselves with its assistance. In this sense, the Board has used mediation-cum-arbitration procedure. The Board has been more interested in "resolving the problem" than "rendering a verdict" on it. The remedial aspect of the law is as important as its deterrent value. The B.C. Board has summed up its experience in these words:⁴¹

"As a practical matter, this power is designed as a remedy for those cases where there were difficulties between the parties at the representation stage and they have not been able to engage in serious, goodfaith bargaining following certification... However it should be noted that the Board does not automatically impose a first collective agreement on the parties, even where a persuasive application is made. Instead, it makes a determined effort to secure a voluntary settlement of the agreement. The objective of Section 70 is to foster an enduring collective bargaining relationship. In the Board's view, a solution agreed to by both parties is a much better foundation for such a relationship than an order imposed by the Board."

CLRB'S DECISION ON *RADIOMUTUEL*⁴²

The imposition of a collective agreement in this case by the Canada Labour Relations Board applying this amendment for the first time has brought an end to a two year old industrial dispute of an extraordinary kind.⁴³ The purpose of this section is to identify the jurisprudence developed by the Board in the light of the preceding section.

⁴¹ *Annual Report - 1977, op. cit.*, p. 32 and 33.

⁴² The author would like to thank Mr. Marc Lapointe, Q.C., Chairman, CLRB, for his kind and prompt co-operation in sending me a copy of this decision in which the *Federal Code* amendment has been applied for the first time.

⁴³ *Radiomutuel: CLRB Reasons For Decisions*, No. 675/78 of 20th, October, 1978; unreported. A retroactive provision made the amendment applicable to the parties in this case. Parties to the dispute: Syndicat général de la radio (CJMS) (CNTU); Syndicat des travailleurs de l'information de la Mauricie (CJTR) (CNTU); Syndicat des employés de CJRS (CNTU); Syndicat général de la radio (CJMS) (CNTU), parliamentary correspondents; Syndicat général de la radio (CJMS) (CNTU);

certified bargaining agents,

- and -

CJMS Radio Montréal Limitée Montréal, Québec; CJTR Radio Trois-Rivières Limitée Trois-Rivières, Québec; CJRS Radio Sherbrooke Limitée Sherbrooke, Québec; Radiodiffusion Mutuelle Limitée Montréal, Québec; Radiodiffusion Mutuelle Limitée Montréal, Québec;

employers

When the CLRB, at the initiative of the Minister of Labour, began to inquire into this dispute the employer sought a writ of prohibition. The Board successfully challenged the jurisdiction of the Court to hear the application. It was concluded that in the light of the recent amendment to the *Canada Labour Code*, a writ of prohibition could not be granted even if the Board were exceeding its jurisdiction in arranging to conduct an inquiry and establish the terms of a first agreement.⁴⁴

The behaviour of both the parties during this prolonged and agonizing struggle as well as their behaviour during the hearing has been appropriately described by the Board in its one-hundred page decision in these terms: "a holy war"; a "'Beirut' of Labour Relations";⁴⁵ "a plague on both your house";⁴⁶ "guerilla warfare";⁴⁷ "dialogue of the deaf".⁴⁸

It was between the beginning of May 1977 and the Spring of 1978 the parties conducted their "negotiations"(?). These negotiations were always accompanied by press statements, ultimatums, prerequisites, threats, violence, distrust, disdain and avowed hatred on the part of both parties and recourse to all manner of tribunals.⁴⁹ In the bellicose, political and highly vernacular language of which the Board has quoted a number of passages, the two sides exchanged accusations of bad faith. The union accused the employer of being anti-union, feudalistic, capitalistic, exploitative and even fascist. The employer accused the CNTU and the National Federation of Communication Workers of being irresponsible, Marxist, anarchistic, Leninist and vandalistic.⁵⁰

In terms of the evidence submitted by both sides, the Board received written representations amounting to nearly 2000 pages of main positions, exhibits, documents, replies and additional replies.⁵¹ The quality of these massive submissions has been characterised by the Board as "MUCH ADO ABOUT NOTHING."⁵²

44 *C.J.M.S. Radio Montreal (Quebec) Limited V. Canada Labour Relations Board, Syndicat général de la Radio C.J.M.S. (CNTU) et al.* (1978) CLLC 14, 163 (Federal Court Trial Division).

45 *Radiomutuel, op. cit.*, p. 86.

46 *Ibid.*, p. 87.

47 *Ibid.*, p. 32.

48 *Ibid.*, p. 28.

49 *Ibid.*, p. 10. The Board has illustrated at length the accusations and counter accusations between the parties. See pp. 10-25.

50 *Ibid.*, p. 55.

51 *Ibid.*, p. 45.

52 *Ibid.*, p. 56.

On the basis of a thorough analysis of these documents and representations and of the whole history of the dispute, the Board has identified the following causes for the failure of "negotiation":

"But these representations have also convinced the Board that the negotiations which took place were, to say the least, unusual and certainly unlikely to lead to a fruitful result.

(a) A basic rule followed by any informed negotiator in industrial relations is to never or almost never lay down any prior conditions whatsoever. In this case, both parties were proceeding by constantly stipulating prior conditions.

(b) A second rule is that negotiations should be conducted with the greatest discretion in order not to embarrass the spokesmen and to leave them some margin for compromise. In this case, even print and broadcasting media were sometimes felt at the bargaining table.

(c) One should never discredit the official spokesmen of a party publicly. Here, the contrary practice was followed.

(d) Collective bargaining is a very complex, subtle art, but it may be summarized as obtaining whatever is possible in given circumstances rather than trying to force the other party to accept integrally one's desired objectives. In this case, the file is full of proposed clauses which either one party or the other declared untouchable.

(e) Bargaining techniques vary infinitely and reflect the individual personality of each negotiator. It is important that each negotiator respect the other's individuality; otherwise, everything becomes rapidly unbearable and paralysed. In this case it was the opposite. If one rereads some of the passages quoted, one cannot help but conclude that the mentality revealed was deplorable."⁵³

In the light of these facts the Board has reached the inevitable conclusion of imposing a collective agreement upon the parties.

The Board has interpreted the relevant sections of the *Federal Code* in the light of the jurisprudence developed by the LRB of B.C. and the principles established by the latter have been generally endorsed by the CLRB.⁵⁴

The CLRB has determined the terms and conditions of the first collective agreement in this case not only on the basis of the extracts from collec-

⁵³ *Ibid.*, pp. 25 and 26.

⁵⁴ *Ibid.*, pp. 60-62; 75-77; 80-84. The decisions of the B.C. LRB cited by the CLRB are: *London Drugs Ltd.*, (1974) 1 Canadian LRBR 140.; *Victor Registry Services* (1974) 1 Canadian LRBR 440.; *M & H Machinery & Iron Works Ltd.*, Decision No. 114/74 of August 1974, Unreported; *Bond Brothers Sawmill Ltd.*, Decision No. 155/74 of November 1974, Unreported; *Dominion Directory Company Ltd.*, (1975) 2 Canadian LRBR 345.; *Century Plaza Hotel Ltd.*, Decision No. 68/75 of October 1975, Unreported; *Vancouver Island Publishing Co. Ltd.*, (1976) 2 Canadian LRBR 225.

tive agreements cited by the parties but also on the basis of a study of seventeen collective agreements in existence in this industry.⁵⁵

The following are the salient features of this agreement⁵⁶: To begin with the Board has made a deliberate decision against imposing an elaborate and complete collective agreement and hence the agreement contains only the essential clauses. The intent of this brevity is to allow the parties to draw up clauses relating to details hoping that during which time the parties may learn the art of dialogue and of achieving the "possible". The Board has accepted certain clauses on which the parties agreed and has added entirely new clauses and dealt particularly with union recognition, union security, grievance, arbitration and seniority.

With regard to grievance arbitration, the Board has coupled a tight grievance clause with a system of arbitration under which the arbitrators (five in number) will be required to work in rotating order. The Board has consulted the parties individually and in secret in order to determine the wishes of the parties regarding the selection of arbitrators and then it has asked them to provide it with other lists of names of arbitrators. It should be noted that the five arbitrators selected by the Board are not necessarily the parties' first choices but the parties have unknowingly agreed on a number of the names which now appear in the collective agreement.

Moreover, before finalizing the list of arbitrators the Board has spoken with these arbitrators and has specifically encouraged them to explore the possibility of using certain new techniques which are currently being tested in an attempt to expedite grievance arbitration.⁵⁷

Though the CLRB is in fundamental agreement with and has closely followed the jurisprudence developed by the B.C. LRB on first collective agreement, it does not accept the "trial-marriage" analogy of the latter to describe this type of agreement. The reasons are as follows:

"As we have just seen, in *London Drugs* supra, the Chairman of the British Columbia Board used the expression "trial-marriage" to describe the imposition of a first collective agreement. After careful consideration,

⁵⁵ *Ibid.*, pp. 90-92.

⁵⁶ *Ibid.*, pp. 90-99.

⁵⁷ Regarding this technique the Board has made reference to the proceedings of a conference held at McGill University, Montreal, entitled *Expedited Arbitration-An Alternative*, 1977. *Ibid.*, p. 93.

The Board has made the back-to-work agreement an integral part of the collective agreement and as of November 1, 1978 that agreement has come into force.

this Board cannot agree with this image which, in its opinion, incorrectly conveys the nature and scope of this new concept. In a trial-marriage, the two parties are consenting. We fail to see how, in the majority of cases, the two parties can be considered to be consenting when a first collective agreement is imposed. One thing is certain: In the cases under study by this Board, it certainly cannot be said that one of the two parties is consenting, and when the other has read this decision, we are not sure it will be consenting either. However, they will be obliged to apply the terms and conditions laid down by the Board.’’⁵⁸

“We believe that there is a better way to characterize the imposition of a first collective agreement than as a “trial-marriage”; rather the Board may be said to be acting as is done in medicine when a transplant operation is performed on a patient.

Yet, in medicine we know the risks involved in transplants; we are particularly aware of the phenomenon of rejection: This occurs when a human being’s own genetic structure accepts a transplant either poorly or not at all. The transplant is foreign body, and patient’s defence mechanisms will be mobilized to reject it. The terms and conditions of the collective agreement which we have inserted are also susceptible to rejection.’’⁵⁹

“In medicine, the possibility of rejection is minimized by means of medicines that act to neutralize the patient’s defence mechanism, which attempt to reject the transplant. We have attempted to insert “medicine” clauses into the terms and conditions of the collective agreement.

...It will be up to the parties – the employers and the unions – to train their “nurses” and “doctors” to use the best techniques in sound, efficient and honest labour relations, so as to not exacerbate the situation during the year to the point of rejection, that is, failure to renew the agreements at the end of the year.’’⁶⁰

So far as how the CLRB will interpret and apply this new provision in the future, the Board has made the following observation:

“The Board is anxious to repeat this for the edification not only of the union members and the employer involved in the present dispute but of all union members and employers who might appear before it. The law as a whole is intended to make irresponsible individuals aware that they may be obliged to pay the price for their lack of restraint and common sense.’’⁶¹

“...The insertion of Section 171.1 in the Federal Code creates an exception to the general system and its general thrust, an exception that does not relieve the parties of their obligation to continue to make the efforts normally expected of them with a view to freely reaching an

58 *Radiomutuel, op. cit.*, pp. 83 and 84.

59 *Ibid.*, p. 88.

60 *Ibid.*, p. 89.

understanding and to negotiating their own collective agreement. Intervention by this Board will be the exception rather than the rule and the possibility of such an intervention does not absolve parties of their obligation and duty to do all in their power to conclude a collective agreement. It might also happen that owing to an error in judgement a party will resort to a work stoppage which will not in fact suffice to convince the Board that it should intervene, and one or both parties will therefore pay the price for their lack of judgement or restraint."⁶²

"But of itself the hard fact of a strike that has been going on for a long time is not the crucial criterion that will persuade the Board to intervene... The parties would be sadly mistaken if they believed for one minute that this Board will without fail find it "*advisable*" to intervene in such circumstances.

The Board also firmly believes that the worst settlement that might be agreed by a party is worth a hundred times as much as an imposed settlement...

Furthermore, the Board sincerely believes that Parliament has provided itself with a remedy against bad faith and *intransigence*, and we stress this second term.

Finally, this Board also trusts that the main virtue of section 171.1 rests much more with the dissuasive effect of its existence in the Code than with its repeated application."⁶³

CONCLUSION

Negotiation of a first collective agreement frequently results in prolonged industrial conflict. This has been the case in Canada as well as in the United States. The hitherto existing standard remedy of cease and desist orders have been found to be either completely ineffective or too little and too late. Recognizing this fact, four jurisdictions — B.C., Manitoba, Quebec and Canada — have accordingly amended their respective labour codes.

Given the fact that the *British Columbia Labour Code* provision on first agreement is the prototype for the Federal amendment, the B.C. experience with it since 1974 provides the necessary evidence to suggest that the *Federal Code* amendment might achieve its remedial objective without discouraging free collective bargaining. The letter and spirit of the decision

⁶¹ *Ibid.*, p. 59.

⁶² *Ibid.*, p. 60.

⁶³ *Ibid.*, p. 63.

of the CLRB on *Radiomutuel* partly confirms this cautious optimism. But it is somewhat premature to predict the long run efficacy of this policy on first agreement. Such a prediction should be based on a detailed study of what has happened to those unions after the expiry of the externally imposed first collective agreements.

Those Canadian jurisdictions which currently do not have first agreement provisions should consider other alternatives to externally imposed agreements. One such alternative is to look to means of strengthening unions through greater flexibility of policy on certification which would permit small unions to combine and force into existence more realistic and viable bargaining units which could withstand a determined employer from stone-walling negotiations or destroying the newly certified unions. If such alternatives are found to be not feasible, these jurisdictions must give serious consideration for first collective agreement amendment to their respective labour codes.

La conclusion de la première convention collective: analyse d'une modification au *Code canadien du travail*

La conclusion d'une première convention collective de travail donne souvent lieu à un conflit prolongé. Il en a toujours été ainsi au Canada comme aux États-Unis. Le remède traditionnel des injonctions a été jugé tout à fait inefficace: c'est trop peu et trop tard. Reconnaissant cette situation, quatre gouvernements canadiens — La Colombie Britannique, le Manitoba, le Québec et l'État fédéral — ont modifié leur Code du travail respectif. Le présent article analyse les raisons qui sous-tendent et justifient cette modification au *Code canadien du travail*.

Selon ce changement, quand les parties aux négociations d'une première convention collective de travail sont incapables d'en venir à une entente et qu'elles ont suivi tout le processus juridique préalable à la grève et au lock-out, le Ministre peut ordonner au Conseil d'enquêter sur le conflit et, s'il l'estime opportun, de fixer les dispositions de la convention collective.

Suite à cette requête du Ministre, le Conseil peut déterminer les dispositions d'une convention collective qui régit les parties et devient exécutoire, sauf si celles-ci sont subséquentement modifiées par écrit par les parties elles-mêmes. Cette convention restera en vigueur pendant une année à compter de la date de sa détermination par le Conseil.

La modification à la loi prévoit aussi certaines lignes directrices et certains critères que le Conseil doit suivre lors de l'établissement de la première convention collective. Celui-ci doit donner aux parties l'occasion de présenter une preuve et de faire des représentations. Le Conseil doit, entre autres choses, tenir compte de ce qui suit: a) de la mesure dans laquelle les parties ont ou n'ont pas négocié de bonne foi dans

un effort pour s'entendre entre elles sur le contenu de la première convention collective; b) s'il en existe, des conditions de travail négociées collectivement pour des salariés remplissant des fonctions identiques ou similaires dans des situations identiques ou similaires à celles dans lesquelles se trouvent les salariés de l'unité de négociation; c) de tout autre sujet que le Conseil estimera de nature à l'aider à mettre au point des conditions équitables et raisonnables dans les circonstances.

La substance de cette modification indique une orientation nettement différente de ce qui se faisait jusqu'ici. Le CCRT, à l'initiative exclusive du Ministre, a maintenant le pouvoir d'exercer juridiquement sa compétence en vue de régler un conflit d'intérêts en autant qu'il s'agisse d'une première convention collective.

Étant donné que la stipulation du *Code du travail de la Colombie Britannique* concernant la première convention collective est le prototype de la modification du *Code canadien*, l'expérience de cette province en la matière depuis 1974 témoigne que la modification au *Code canadien du travail* peut atteindre son objectif sans dissuader de la libre négociation collective. La lettre et l'esprit de la décision du CCRT dans l'affaire de *Radio Mutuel* confirme en partie cet optimisme prudent. Il est cependant quelque peu prématuré de prédire l'efficacité à long terme de cette politique touchant l'arbitrage de la première convention collective. Une telle prédiction devrait se fonder sur une étude approfondie de ce qui est advenu à ces syndicats à l'expiration des premières conventions imposées par des tiers.

Les provinces canadiennes qui n'ont pas adopté de législation en matière d'arbitrage de la première convention collective devraient songer à d'autres mesures en lieu et place de ces conventions imposées par une tierce partie. L'une d'entre elles serait de voir s'il ne serait pas possible de renforcer les syndicats par une plus grande flexibilité en matière d'accréditation de façon à permettre aux petits syndicats de s'allier et de donner naissance à des unités de négociation plus réalistes et plus viables, ce qui pourrait empêcher un employeur donné de faire échec aux négociations ou de détruire les syndicats nouvellement accrédités. Si de telles mesures ne sont pas possibles, ces provinces devraient songer sérieusement à insérer dans leur législation du travail les dispositions relatives à l'arbitrage de la première convention collective.