First Contract Arbitration in Ontario: An Evaluation of the Early Experience

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FOREWORD

The Industrial Relations Centre is pleased to include this study, First Contract Arbitration in Ontario: An Evaluation of the Early Experience, in its publication series **School of Industrial Relations Research Essay Series.** The series is intended to give wider circulation to selected student research essays, chosen for both their academic merit and their interest to industrial relations practitioners and policy makers.

A substantial research essay is a major requirement of the Master's Program in Industrial Relations at Queen's. The essay may be an evaluation of a policy oriented issue; a limited empirical project; or a critical analysis of theory, policy, or the related literature in a particular area of industrial relations.

The author of the essay, Diane Patterson, graduated from the School of Industrial Relations in October 1989.

I would like to express my appreciation to the author for granting permission to publish this excellent study.

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ABSTRACT

Unions continue to face difficulties in obtaining first agreements, due largely to the conduct of employers. Previously, bad faith bargaining complaints have been raised against such employers, but the detection criteria and remedial response used by the Board have been inadequate in dealing with first contract situations.

As a result, in 1986 Ontario adopted first contract arbitration to more effectively address first agreement cases. An early evaluation of this procedure suggests that the remedy of first agreement arbitration is more easily accessible than in bad faith bargaining inquiries. There seems to be, however, a reluctance to employ the procedure, partly due to the administrative burden and expense faced by the unions. Nevertheless, for those that do apply, there is a deterrent effect which encourages the parties to settle more quickly and voluntarily, without the involvement of the Board.

It is too early to know if the imposition of a collective agreement encourages long-lasting relationships, but this also represents a very small proportion of first contract cases. The deterrent impact, therefore, is the more critical factor. Based on the Ontario experience thus far, in at least some cases the remedy has effectively countered employer reluctance to recognize the union.

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INTRODUCTION

The legal regulation of first contract disputes continues to be a topical debate in Canadian industrial relations. Unions still face difficulties in obtaining a first agreement even though the achievement of such an agreement is essential to the survival of collective bargaining rights. While many factors may affect the union's ability to successfully negotiate a first agreement, the conduct of employers appears to be the principal barrier.

Previously, allegations raised against employers in this context have involved bad faith bargaining complaints. In these cases, the union accuses the employer of not bargaining in good faith and of not making every reasonable effort to conclude a collective agreement, (section 15, Ontario Labour Relations Act). If bad faith bargaining is established on the evidence, then the Board may issue a remedial order to deal with this breach of the Act.

This procedure, however, has been criticized for not addressing the first contract situations adequately. (1) As a result, some Canadian jurisdictions, including Ontario, have turned to first contract arbitration as an alternative remedy.

First contract arbitration became part of the Ontario Labour Relations Act in June, 1986. Paul Weiler lists three primary reasons for this type of legislation: to end the existing dispute enabling the parties to move ahead with an agreement; to provide a period during which the parties can develop a meaningful relationship (two years in Ontario); and to deter employers from avoiding and unnecessarily prolonging the settlement of a first collective agreement, (Weiler 1980, 53-4).

The Ontario Board has basically echoed this reasoning in its interpretation of the Act. For example, it has expressed the hope that imposing a first agreement can provide roots for a lasting relationship: "section 40a manifests an expectation that if the parties are able to transcend this initial hurdle in their relationship which prevents their reaching a collective agreement, they may be able to develop a healthy collective bargaining relationship," *(Mansour Rockbolting Limited,* [1986] OLRB Rep. Oct. 1354, para. 29). Accordingly, at the point of an unresolvable impasse, the imposition of a collective agreement can "leave the parties free to devote their energies to learning how to co-operate with each other," *(Mansour, supra*).

Furthermore, in *Nepean Roof Truss Limited,* [1986) OLRB Rep. July 1008, the Board reiterated the need for such a remedy and the role first agreement arbitration should play:

> It is clear from these provisions that the legislature has acknowledged the significance to the collective bargaining relationship of the first contract, and has given statutory recognition to the potential difficulties that may be encountered in achieving it. This remedy does not supplant the primacy of the free bargaining process; rather, it

> recognizes that the negotiation of the first agreement may sometimes be thwarted by unjustified intransigence. Although this is remedial legislation and should be given a liberal construction and interpretation, the scheme of section40a does not envision the automatically imposed settlement of a first collective agreement in all cases where the parties are unable to negotiate one. What it provides is access to this remedy where certain conditions precedent have been met (at para. 16).

Thus, the first contract situation is understood to be unique since it is the first building block to the collective bargaining relationship, yet often subject to "unjustified intransigence." However, the value of free collective bargaining is still paramount, such that the conclusion of a collective agreement is not seen as mandatory under the current regime.

This paper seeks to evaluate the effectiveness of first contract arbitration in Ontario. Specifically, does this procedure overcome the difficulties associated with section 15 (the duty to bargain in good faith) proceedings in first contract situations? Further, does this remedy encourage lasting relationships, and does it have a deterrent effect which promotes first agreement settlements.

To respond to these questions, Ontario Board decisions (reported and unreported) have been reviewed, interviews have been conducted with some participants of first contract negotiations, and some statistical information has been compiled and analyzed. Part II discusses the duty to bargain in good faith: the problems with its detection and in designing effective remedies. Part III looks at first contract arbitration and its effectiveness as a remedy for the parties, and Part IV assesses the deterrent effect of section 40a.

Based on this assessment, it appears that first contract arbitration has overcome some of the difficulties associated with section 15 proceedings, it has some deterrent effect, but it responds to a small percentage of first contract cases, such that it is not the entire solution to first agreement difficulties, nor is it the panacea that its advocates had proclaimed.

I. THE DUTY TO BARGAIN IN GOOD FAITH

i. Introduction

Section 15 of the Ontario Labour Relations Act requires the parties to "bargain in good faith and make every reasonable effort to make a collective agreement." In 1975 amendments were made to the Act which, in part, broadened the remedial powers available to the Board in its application of this duty. The amended section 79 (now section 89) enabled both employers and unions to seek remedies directly from the Board. As noted by the minister of labour on second reading of the bill, with the previously existing mechanism:

> allegations of bad faith bargaining could only be brought before the Board by the aggrieved party on an application for consent to prosecute in the Provincial Courts. Under the old Act, the Board could only screen such cases and was without power to develop any jurisprudence defining the ingredients of bargaining in good faith; nor did it have the power to grant any relief against the defaulting party, (Bendel 1980, 4).

The amendment, then, allowed the Board to directly define and enforce the duty, which has allowed the generation of case law on the subject, in place of a few isolated decisions from the courts (Bendel 1980, 4).

Since 1975, the most common understanding of the duty to evolve is the dual principle definition, which was described in *DeVilbiss* (Canada) Ltd., [1976] OLRB Rep. March 49:

> The duty reinforces the obligation of an employer to *recognize* the bargaining agent and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster *rational, informed discussion* thereby minimizing the potential for 'unnecessary' industrial conflict (at para. 15). [emphasis added]

These concepts of union recognition and rational discussion were not new to labour relations,(2) but were now confirmed to be essential components of good faith bargaining. In accordance with this definition, conduct that is intended to undermine the union and avoid a collective agreement or that frustrates the bargaining process is prohibited under section 15 of the Act (Sack and Mitchell 1985, 448).

The imposition of this duty exists within the free collective bargaining framework. In this scheme, the parties are free to fashion their own collective agreement, subject to statutory restrictions. Contractual freedom suggests that the pursuit of self-interest will predominate and, therefore, an adversarial exchange is inevitable. The duty to bargain in good faith is a statutory limitation which serves to promote harmonious relations and to counterbalance the conflict which naturally emerges from free collective bargaining. These two goals, industrial peace and

free collective bargaining, pose a challenge for the Board and the Legislature as they design an acceptable balance between duty and freedom. Contractual freedom is the paramount goal, yet the Board is at times faced with an employer who engages in improper conduct. To uphold the rights of the union, the Legislature has found it necessary to impose this section 15 duty and to regulate the process. The appropriate limits of this regulation is a debatable issue, driven by the extent to which contractual freedom is held as the singular objective. For example, some would believe that there should be no third party (government) intervention in order to maintain the freedom of contract. Most, however, would accept the premise that some moderate regulation is needed to help facilitate collective bargaining. In this manner, regulation serves to better enable the parties to peacefully and freely engage in collective bargaining. How far does labour policy go in dictating to the parties what the proper process should include?

As Michael Bendel suggests:

> Freedom of contract competes with industrial peace as a goal of labour policy, and an uneasy tension between them is inevitable. Neither of these goals can be conceived as absolutes, and it is particularly in relation to the duty to bargain that some difficult decisions have to be made in reconciling them (Bendel 1980, 14).

Bendel is representative of a significant voice which calls for a more substantive role of the duty at the expense of freedom of contract, but the importance of enforcing the duty to bargain in good faith has not always been recognized. The prevailing belief of the sixties was clearly doubtful that a fully developed concept of good faith bargaining could ever be compatible with the process of collective bargaining (Carter 1983, 36). Since then, however, the Legislature has chosen to enact such a duty that the Board has served to more fully define.

With this background, the following discussion will assess the Board's regulation of the duty to bargain in good faith.

Specifically, the following issues will be addressed: the problems with the detection of bad faith bargaining, the ineffectiveness of remedial orders and the importance of these weaknesses to first agreement cases.

ii. The Detection of Bad Faith Bargaining

The Board's approach to adjudicating section 15 complaints is very important to understanding the difficulties associated with the detection of bad faith conduct. The *DeVilbiss* case, which set out the basic definition of good faith bargaining, also enforced the emphasis which should be placed on voluntarism or freedom of contract:

> And thus it *can be said* that the parties are obligated to have at least *one common objective* - that of entering into a *collective* agreement ... but this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, *the legislation is based upon the* notion of voluntarism ... (at para. 13). [emphasis added]

This passage highlights the requirement that the parties each share an intention to conclude a collective agreement, and with this prerequisite the rules of free collective bargaining prevail, such that power in negotiations will determine the outcome.

The Board has also been clear about its role in the process of monitoring the parties, making the distinction between conduct and content:

> Given that 'voluntarism' is the touchstone, it is implicit that the Board's role pursuant to s.15 of the Act is one of monitoring the *process* of bargaining and not the *content* of the proposals tabled (*Royal Conservatory of Music* 11 CLRBR (NS) 219, at para. 31).

This procedural emphasis is paramount in all section 15 complaints and is particularly evident in first contract cases (see also, *Radio Shack,* [1979] OLRB Rep. Dec. 1220; *Canada Trustco Mortgage* Company, 8 CLRBR (NS) 275; *T. Eaton Company Limited*, [1985] OLRB Rep. March 491).

In this manner, the Board is interested in ensuring that the parties do intend to reach an agreement and that they make every reasonable effort to do so *(Royal Conservatory*, at para. 34). Thus, the conduct of the parties during negotiations is assessed to determine their true intentions. As the *Canada Trustco* case demonstrates, establishing the underlying motive behind negotiations is the primary objective:

> Under our statute their only obligation is to endeavour to conclude a collective agreement and if that is the true intent, neither the content nor the consequences of that agreement are of any concern to the Board (at para. 33).

In this particular context, the Board was removing itself from becoming involved in the subject matter where it believed the employer to be willing to conclude a collective agreement. The Board stressed the nature of the free collective bargaining system which rests "on the right of parties to resort to economic sanctions in pursuit of their own self-interest as they define it" (at para. 33).

Accordingly, the decision of the majority noted that the duty to bargain in good faith was not "designed to redress an imbalance of bargaining power" (at para. 34).

While this down plays the role of any substantive consideration, there has been an increased emphasis on content supervision. In particular, there are a few instances where the Board will take into account the content of proposals. For example, when the Board is trying to determine if the party does not intend to enter into a collective agreement (ie. but just goes through the motions of bargaining), then the content of proposals becomes relevant. Additionally, the substance will be examined if the Board suspects the employer to be trying to undermine the union by tabling an offer "tailor-made for rejection" (see *Radio Shack, supra).* Furthermore, the Board also considers the content when the items are "illegal". Illegal bargaining demands are those which are "in direct conflict with collective bargaining legislation, or at least considered to be inconsistent with the scheme of such legislation" (Carter 1983, 43). Where a party continues to insist on such demands during bargaining, their actions will constitute a violation of section 15. Apart from these situations, the Board prefers to remain distant from the content of negotiations allowing the relative bargaining strengths to dictate the process (see *Canada Trustco, supra, T. Eaton, supra).*

There are problems with this type of approach which focuses on the conduct of the parties. First, the Board considers the totality of the employer's conduct in assessing the bad faith bargaining complaint. In the case of *Radio Shack,* for example, the employer had engaged in unfair labour practices from the initial certification stage. The Board found that the company contravened section 58(a) by discharging two employees due to their association with the union and its organizing activity. After the employer was ordered to reinstate these employees, the company did not properly comply with this order. Also, section 7a (now section 8) was used to grant certification to the union for part time employees, indicating that the employer had interfered with the process. Furthermore, once bargaining began, the company directly communicated with its employees, infiltrated the trade union and maintained surveillance on employees. In the final four months of negotiations, before a lawful strike began and after new counsel was hired by Radio Shack, the company appeared to be engaging in meaningful bargaining with an intent to reach a collective agreement. However, throughout this stage, the employer firmly insisted on a minimal statutorily-required dues check-off clause. In light of the employer's past conduct, and viewed as a whole, this position was found to be in contravention of section 15, i.e. they were seeking to avoid a collective agreement.

In the *T. Eaton* case, the totality of the employer's behaviour did not constitute a contravention of section 15 in terms of their true intentions; it was believed that the employer did have every intention of concluding a collective agreement. To accommodate collective bargaining, the employer insisted on treating each work place separately which meant that separate negotiations were repetitive, long, tedious and delayed. Based on this approach, as well as the unwillingness to compromise their position, the union alleged that the employer was not

making every reasonable effort to conclude a collective agreement. In light of the evidence, the Board was not satisfied that when viewed as a *whole* the company conduct violated the Act. The Board did, however, find the company to be in a minor violation of section 15 by insisting on an illegal provision: "a blanket prohibition against employees soliciting each other with respect to union membership on company premises, but away from the sales floor, before and after work and during luncheon and rest periods" (at para. 52). The company was simply ordered to amend this proposal. It should also be noted that in the dissent decision, it was felt that the Board had not considered the totality of the employer's behaviour and that doing so would find their conduct to be in breach of section 15.

Both of these cases demonstrate the difficulty in determining the true intent of the employer, based on the negotiating conduct. Yet, the Board is hesitant to intrude into the substance of negotiations, in the name of contractual freedom. As earlier mentioned, the Board is faced with this struggle of encouraging free collective bargaining, yet having to regulate it. However, a focus on process, rather than content, makes it easier for an employer to disguise the fact that a collective agreement is being avoided. More specifically, the issue of distinguishing between 'surface bargaining' and 'hard bargaining' becomes critical when the underlying motive is in question.

'Surface bargaining' describes the act of going through the motions of bargaining without the intent of concluding a collective agreement. In contrast, 'hard bargaining' describes negotiations which may include the pursuit of self-interest through firm positions, but the party has the intention of reaching an agreement. In making a distinction between the two, the Board has stated that:

> This inference [of 'surface bargaining'] can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to the negotiations. It is only when the conduct of the parties on the whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of 'surface' bargaining can be made *(Radio Shack, supra* , at para. 89).

According to this definition, Radio Shack was found to be engaged in 'surface' bargaining, while T. Eaton and Canada Trustco were found to be engaged in hard bargaining.

Clearly, surface bargaining is not easy to detect and is subject to the Board's assessment of the employer's total conduct. In both the *T. Eaton* and *Canada Trustco* cases, the dissent opinion felt that the employer had no intention of concluding a collective agreement. The *T. Eaton* dissent, in particular, strongly stated the problems with detecting surface bargaining, as well as the tendency of the Board to rely on past anti-union animus to support a finding of bad faith

bargaining. In the *Radio Shack* case, the Board also stressed the difficulty associated with distinguishing between hard and surface bargaining and specifically drew attention to first contract situations:

> Experience has taught this Board that it must be particularly sensitive to this distinction in first contract situations. Few employers willingly embrace collective bargaining, but most accept the right of the employees to participate in that process and negotiate first agreements with duly certified bargaining agents without rancor or controversy. However, the Board and the Legislature of the Province are painfully aware of a number of situations where employers have resisted the organization of their employees by patently unlawful means ... Some employers are therefore tempted to continue the controversy over recognition in the knowledge that further delay in negotiating an agreement and the spectre of continued employer hostility will demoralize a sufficient number of employees that no collective agreement will need be signed ... The Board should not conclude lightly that an employer is merely engaging in hard bargaining in such situations ... *(Radio Shack, supra* , at para. 74).

In this case, the Board was forced to consider past flagrant behaviour in determining whether the employer was surface bargaining. Radio Shack had such a history. In *T. Eaton* and *Canada Trustco,* there was no such evidence such that their firm positions and delays during negotiations were not considered to be contraventions of the Act. Herein lies a weakness of the process: that in the absence of any obvious, anti-union animus or blatant behaviour intended to frustrate the process, bad faith intentions are too difficult to detect.

Michael Bendel also notes this dilemma and concludes that when unreasonable and predictably unacceptable proposals are presented in a manner which is not inconsistent with a desire to enter into an agreement, no breach of the duty will be found. He suggests that "one of the central problems with the concept of good faith bargaining [is that] a skilled employer can mask bad faith by going through the motion of genuine negotiating " (Bendel 1980, 30). Similarly, Anne Forrest finds that surface bargaining, though unlawful, is readily disguised as hard bargaining so difficult to detect (Forrest 1988, 277). Langille and Macklem also recognize the problem of distinguishing between hard and surface bargaining, particularly given the Board's approach of upholding the role of self-interest in free collective bargaining. Thus, where the employer is willing to sign a collective agreement, even when bargaining positions are designed to eliminate the union from the work place, no bad faith bargaining is found (Langille and Macklem 1988, 77).

While Bendel, Langille and Macklem call for an increased substantive content to the duty to bargain, both in detecting bad faith and in issuing remedies,(3) it is enough to conclude that the detection of bad faith bargaining is difficult. First, the Board's emphasis on conduct limits its ability to always detect bad faith. Secondly, bad faith is a motive which can easily be disguised

as good faith by "going through the motions." Thirdly, the onus is on the union to establish that the underlying motive is tainted by bad faith; the employer has no onus to show good faith. For the union, bad faith bargaining can be very difficult to demonstrate, as the first two points illustrate.

This problem of detecting a breach of section 15 has special relevance to first contract negotiations. It is here that the employer's refusal to recognize the union will occur most often, and where the employer may have the most success in weakening the union (e.g. by delaying the process), such that no collective agreement is ever reached. Indeed, the key cases which deal with good faith bargaining have been first contract situations (see *DeVilbiss, supra*, *Radio Shack, supra, Canada Trustco, supra*, *T. Eaton, supra).* This being the case, it is particularly important for the Board to be able to discern an improper motive. As the Board noted in Radio Shack, supra:

> Of course, difficulties may arise in trying to distinguish those actions of an employer that are properly characterized as "hard bargaining" from conduct designed to destroy the union. And first contract bargaining presents the Board with no greater challenge in this respect (at para. 68).

It is apparent, therefore, that the detection of bad faith bargaining is made difficult by an employer who is able to successfully engage in surface bargaining. Moreover, according to the standards which the Board has established to assess section 15 complaints, only patently contravening behaviour substantiates a breach of the Act.

iii. Remedial Enforcement: Its Purpose

As a tool used by the Board, remedial action is enacted to help fulfill the purpose of the OLRA.: to promote industrial peace and to encourage the practice and procedure of collective bargaining (preamble, OLRA). In relation to section 15, remedies should also encourage the parties to bargain in good faith, making every reasonable effort to conclude a collective agreement. In this light, the Board has taken an accommodative role such that remedial action is not intended to be punitive (see *Radio Shack, supra,* at para. 94; Adell 1980, 19), but rather helpful in improving the bargaining relationship. Thus, when a section 15 contravention occurs there is a strong goal of restoration, both of the bargaining relationship and of the union's status. The Board has stated that the focus of remedial authority vested in the Board ... should be on repairing the bargaining relationship " *(Royal Conservatory* of *Music, supra,* at para. 45; *Canadian Industries Ltd.,* [1976] OLRB Rep. May 199, 76 CLLC, at para. 16,014), and that:

> Any remedy should have the purpose of *redressing* monetary losses and providing the complainant with a reasonable opportunity to *recapture* the early momentum that sparked both certification applications *(Radio Shack, supra* , at para. 125). [emphasis added]

Thus, the status quo (relative strengths) prior to any misconduct is sought to be restored through remedial orders.

Further, it has *been* stated by the Supreme Court of Canada that "remedial powers must be exercised in such a way as to create a climate wherein the parties can themselves determine the various clauses," that is, a climate conducive to free collective bargaining, in good faith *(CUPE* and Labour *Relations Board* (Nova Scotia) (1983) 1 DLR (4th) 1 (SCC)). In this manner, the Board is encouraging the practice and procedure of collective bargaining.

To fulfill these objectives, it has been suggested that adequate compensation and the deterrence of future violations should result from effective remedies: "effective remedies should compensate the injured, deprive the offending party of the benefits of its unlawful conduct, and discourage further breaches of the law" (Forrest 1988, 286). On this latter point, the Board has noted that while remedies are not meant to be punitive, effective orders will likely have a deterrent effect *(Radio Shack, supra* , at para. 94). Furthermore, the Board has also stated that to be effective, remedies should:

> be equitable; take into account the economics and psychology of the given situation; take into account the reasons for the statutory violation; be sensitive to the interests of bystanders; and, be perceived as reasonable and fair to attract self-compliance, thereby acting as an "instrument of education and regulation " (Radio *Shack, supra* , at para. 93-94).

Accordingly, each situation should be treated specially, whereby the appropriate remedy is designed to meet the needs of the parties before the Board. Also, the educative function is particularly important in first contract situations where the parties are often inexperienced and ignorant of the full implications of the law.

Therefore, remedies are intended to serve the function of rectifying a situation, repairing the damage that results from a party's misconduct and putting the parties in a position to begin bargaining in good faith. Given these objectives, the actual effectiveness of remedial orders is crucial to the enforcement of section 15 of the Act.

iv. Remedial Enforcement: Its Effectiveness

Since 1975, when the Board was given broader remedial authority, the effectiveness of subsequent remedial action has been a very contentious issue. The most pressing debate which repeatedly confronts the Board are the limits of their authority as directed by the Act. Typically, the Board has refrained from becoming directly involved with the content of collective agreements, instead seeing its jurisdiction as the encouragement of the bargaining process. Also,

in light of the remedial objectives, it appears that Board orders may fall short in their overall effectiveness.

After a declaration that a breach has occurred, the most common remedy given by the Board has been an order to bargain in good faith (Bendel 1980, 34-5; Sack and Mitchell 1985, 468). However, as noted by the critics and the Board itself, this is merely the original requirement by law *(Radio Shack, supra,* at para. 115; Bendel 1980, 35). In some cases, where the parties have an established bargaining relationship and the process has simply been inadvertently frustrated, this type of order may be sufficient. But for situations where the employer is intentionally undermining the union or upsetting the process (e.g. first contract negotiations), it has been argued that this type of order does little to bring the parties into meaningful negotiations (Bendel 1980, 35).

In the *DeVilbiss* case (at para. 22-23), the Respondent (employer) was ordered to provide the wage data required for the Union to engage in an informed, rational discussion. Monetary compensation was also awarded to those employees participating in negotiations (who had incurred losses in benefits), and the respondent was finally ordered to bargain in good faith. Although the Board did not settle the issue in this decision, it did question its authority to direct a collective agreement as requested by the Union, particularly given the premise of voluntarism in free collective bargaining. Moreover, the Board believed that,

> in the circumstances the parties are quite capable of arriving at their own agreement provided the employer immediately commences to bargain in good faith and makes all reasonable efforts in the direction of making a collective agreement (at para. 23).

In this particular case, the parties never did conclude a collective agreement, nor were further complaints brought before the Board. It is difficult to ascertain, therefore, whether or not the remedies were sufficient in restoring the union to its original status and in encouraging the employer to properly engage in good faith bargaining. Given the Board's positive assessment of the bargaining relationship at the time, it is surprising that a collective agreement was not reached, which leaves doubt as to the true intentions of the employer and the effectiveness of the remedial orders.

The Board has maintained its position in its refusal to impose a collective agreement (or specific terms). This has been criticized as being a standard approach that is rooted in the freedom of collective bargaining and which is too often inappropriate (Bendel 1980, 39). In the *Radio Shack* decision, the Board provided an extensive discussion on the issue of imposing a collective agreement (at para. 116-124). In citing the *Ottawa Journal* case, the Board reaffirmed the limited jurisdiction of the Board's power: since it cannot be assumed that a collective agreement must result from good faith bargaining – the parties are not required by law to conclude a collective

agreement, only to make every reasonable effort and in good faith – it is not within the scope of its jurisdiction of impose a collective agreement. Furthermore, the Board believes that the Legislature never intended such remedial power, as evidenced by the language and design of the Act, including some specifically-detailed, statutorily-required, contractual terms. Thus, the Board has remained firm in its belief that it does not have the power, within the confines of the Act, to impose a collective agreement on parties where a breach of section 15 has occurred. Here again, the Board is faced with the tension between promoting free collective bargaining and regulating the adversarial process. Accordingly, the Board sees its role as a remedial administrator, but it is not willing to expand its regulative limits to include the intervention into the content of a collective agreement.

Oliver Hodges, in his dissent of the *Radio Shack* majority decision, disagreed with the Board's refusal to impose a collective agreement. He felt that not taking such an action would invite continued bad faith bargaining (at para. 3). Furthermore, he asserted that the imposition was both realistic and practical for an employer that wishes to be rid of the union (at para. 4). Hodges, therefore, felt that the Act could be interpreted in such a way so as to allow the Board to impose a collective agreement and that this would be the most appropriate action in this case.

The *Radio Shack* case is of particular importance since it is often cited as the landmark case for imposing more appropriate and effective orders on an unlawful employer (though still short of a collective agreement) (Adell 1980, 18). In its decision, the Board noted that employee support for the union had eroded over time, such that compensation and restoration were needed. Two significant remedies were a cease-and-desist order and compensatory damages -- that is, damages to the union for its loss resulting from misconduct, and to the employees for loss of opportunity. Through past conduct during the certification stage, in addition to misconduct during negotiations, it seemed apparent that the employer had no intent to conclude a collective agreement and was engaging in surface bargaining (even though the employer boasted a "change of heart"). Thus, the employer's refusal to go beyond the statutorily-required union security clause (dues check-off) was found to be in breach of section 15.

Specifically, it was found:

> to be part of a continuing scheme to divide the loyalties of its employees; to undermine the exclusive bargaining agent status of the trade union; and to coerce employees into withdrawing support from the complainant or from commencing to support their complainant (at para. 125).

As part of the order, then, the Board directed the employer to make a proposal which was acceptable to the company, without the inclusion of the position on union security (at para. 125). In effect, this order indirectly affected a term in the collective agreement, since the only option

available to the employer was a better union security clause than that which was legally required. This was as far as the Board would go in commenting on the content of the collective agreement.

The second order, compensatory damages, raises a number of issues. In light of the weakened position to which the union is usually lowered by employer misconduct, monetary compensation is deemed to be a reasonable remedy (Sack and Mitchell 1985, 470). Indeed, the Board elaborated on this point, noting the loss of opportunity felt by the union and employees when flagrant behaviour of an employer results in no contract. Furthermore, "the employer receives an unfair competitive advantage over those employers who do bargain in good faith, making the unlawful conduct attractive to other employers." Therefore, "the failure to consider any monetary relief seems to encourage these consequences" *(Radio Shack, supra* , at para. 100).

Thus, it seems that the Board's willingness to order such complete monetary awards (as compensation rather than penalties) was a major step forward in more appropriately addressing the real losses which result from section 15 violations. Accordingly, Bendel lauds the Board for "fashioning measured, effective remedies," thereby bolstering the duty to bargain in good faith (Bendel 1980, 40). There are, however, seriously valid concerns about the effectiveness of such remedies as they are exercised in Ontario. According to Forrest:

> Bad faith bargaining makes economic sense... The deterrent value of bargaining orders, notices, even the occasional damage award is minimal... Monetary compensation is rare. Only flagrantly unlawful behaviour warrants 'make whole' awards in Ontario (Forrest 1988, 286-87).

The *Radio Shack* case should probably be seen in this light, since the employer engaged in blatantly abusive behaviour which, over time, eroded the effectiveness of the union at the bargaining table. While the damages were the most extensive to date, *Radio Shack* was also an obvious case. Given that, these compensatory damages were meant to be full restitution for the losses suffered by the union and the employees, does it serve to bring the parties back to their original position and does it serve to deter future breaches, both by *Radio Shack* and other employers? This is an important question in determining the effectiveness of remedial orders.

Like Forrest, Adell also questions the effectiveness of compensatory damages – particularly when they can be viewed as a license fee by potential offenders – since the compensation makes up for what should have evolved from proper bargaining (Adell 1980, 19). But what are the alternatives? The dollar amount could be raised to make improper conduct too risky a proposition, but the dollar amount is determined by the need for compensation, rather than a penalty. Moreover, the Board plays an accommodative role which restricts it from issuing punitive remedies. Given the Board's accommodative mandate, Adell also agrees that remedial

orders should not be punitive (Adell 1980, 19). Besides, the notion of punishment also brings with it the issues of evidential procedures and on what basis to make judgments. If a party is to be accused under the rules of the criminal code, then one must also prove beyond a reasonable doubt that a breach has occurred. Therefore, it is clear that the Board is limited in its response to section 15 violations and it is difficult to arrive at a more effective solution.

The *Radio Shack* decision does warn future violators that the Board is willing to award more complete restitution with a high monetary value, but it is difficult to measure the deterrent effect of this remedy. *Radio Shack* and the Union did conclude two subsequent collective agreements, but on the third the union twice brought the company before the Board with unfair labour practice complaints (see *Radio Shack,* (1985) OLRB Rep. June 901; and *Radio Shack,* (19851 OLRB Rep. Dec. 1789). The cases were dismissed on both occasions and the Board felt that the parties had learned to work together. The dissent opinion, however, disagreed with the conclusion that the employer was bargaining in good faith. In this particular case, the remedy may have been basically effective to the extent that the relationship has lasted. However, although the employer was ordered to take several actions to restore the status of the union (e.g. postings and mailings of the employees rights, etc.), it is doubtful that after such an enduring set of negotiations, which included a long strike and destructive behaviour, the relationship could be fully restored without significant time to rebuild it (e.g. years).

There have been more recent cases dealing with section 15 complaints but none have been as serious as the *Radio Shack* case, nor have there been such extensive remedies. In *Royal Conservatory of Music, supra* the employer was directed to bargain in good faith and to provide a full package of proposals on all issues (at para. 45). This was to encourage good faith bargaining which could lead to an agreement. In the T. *Eaton* case, where only a minor violation was found, the employer was ordered to amend its illegal proposal. The Board did not even order the employer to bargain in good faith and to make every reasonable effort to conclude a collective agreement. Rather, it was suggested that "it would be useful for the parties to meet with a Ministry of Labour mediator to assess whether they might now be able to agree on the terms for their collective agreements" (at para. 53). Some agreements were reached with various store locations, but many stores have since been decertified.

In summary, while it is difficult to properly measure the outcomes of remedial orders, it appears that their effectiveness is limited. The deterrent value of remedies is questionable, since monetary damages compensate for what the employer should have encountered anyway with proper bargaining. Furthermore, it is doubtful that the relationship is actually restored; in terms of bargaining power and status, permanent damage can be done to the union and its members such that monetary compensation and orders to post notices may never restore the union to its position prior to the employer's misconduct. To its credit, the Board has been willing to be more

creative with apposite remedies. In *Radio Shack,* the remedies were relatively effective in putting an end to the situation and the relationship has lasted. However, the long process of section 15 proceedings, as well as the difficulty in making a determination, must be remembered. The effect is that the remedies are limited to blatantly, unlawful conduct, as in the *Radio Shack* case. Finally, breaches of the duty to bargain in good faith cannot be remedied with the imposition of a collective agreement, nor terms to be contained therein. Even though this may seem to be the more suitable response in some cases, it is not within the jurisdiction of the Board as set out by the Act. The Board is, therefore, restricted in its remedial authority over section 15 contraventions.

v. Conclusions

A breach of the duty to bargain in good faith is both difficult to detect and to effectively remedy. With the objective of maintaining free collective bargaining, the Board has, as much as possible, refrained from becoming involved with the content of negotiations, thus focusing on the conduct of the parties. Accordingly, the greatest challenge to the Board is discerning between hard bargaining and surface bargaining, that is discerning the true intent of the parties. In meeting this challenge, the Board has apparently developed very strict standards so that only very obvious breaches of the duty qualify as bad faith bargaining.

Similarly, remedies are restricted by the limitation of the Act which, according to Board interpretation, prevents the Board from directing any portion of or a whole collective agreement. Rather, remedial orders are limited to orders to bargain in good faith, monetary compensation, cease-and-desist orders and other various directives, such as the posting of notices. These remedies are not punitive but are designed to restore the union to its status prior to any misconduct, to restore and improve the bargaining relationship and to encourage good faith bargaining. In light of the remedial objectives, it is doubtful that such remedies have fully restored bargaining relationships or deterred parties from engaging in bad faith bargaining. Therefore, given the apparent inadequacy of the Board's remedial arsenal, some critics have called for greater content supervision and contract imposition.

First contract situations are particularly important in this respect. The union's primary goal is to institute a collective agreement and this is their usual request for remedial action in cases of bad faith allegations. While the Board has remained firm in its position not to impose a collective agreement, it has often noted the challenge of first contract negotiations. In these situations, it can be especially difficult to ascertain whether the employer has actually accepted the legitimacy of the union and is willing to sign a collective agreement. Long delays, for example, may be due to hard bargaining, surface bargaining or even inexperience which cannot be

labelled as bad faith bargaining. There may be other reasons which also frustrate the process but which do not strictly qualify as a breach of section 15.

It is in this light, therefore, that section 40a of the OLRA, first agreement arbitration, must be assessed. It specifically states that, "irrespective of whether section 15 has been contravened" the Board will make its decision on an application for first agreement arbitration.

II. FIRST CONTRACT ARBITRATION: A REMEDY FOR THE PARTIES

i. Introduction

The procedure of first contract arbitration is available to those parties who have reached an impasse in negotiations, but only where certain conditions have been met.

Specifically, section 40a (1) and (2) read as follows:

> (1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.
>
> (2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,
>
> (a) the refusal of the employer to recognize the bargaining authority of the trade union;
>
> (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
>
> (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
>
> (d) any other reason the Board considers relevant.

First, the conciliation route must be exhausted before the Board can receive an application from either party. Then, based upon evidence before a hearing, the Board must decide whether the "process of collective bargaining has been unsuccessful" because of the listed criteria (subsections (a) through (d)). If the Board is satisfied that this is true, then direction is granted to proceed to arbitration.

This initial stage is to be completed within thirty days to provide an expeditious process that will help prevent the typically long delays in first agreement negotiations.

The following discussion will evaluate the effectiveness of section 40a (first contract arbitration in Ontario) as a remedy for those parties who apply to the process. Specifically, does this procedure overcome the difficulties associated with section 15 proceedings (ie. the problems of detection and providing an appropriate remedy), and are lasting relationships encouraged through the imposition of a collective agreement? In this determination, an assessment will be made of the new standards that are being applied and the observable outcomes.

ii. The Standards Used in Granting Direction

A Causal Relationship Must Be Established

Through Board jurisprudence, some meaning has now been given to section 40a(2). The standards applied in section 40a cases are partly derived from the phrase, "where it appears to the Board that the process of collective bargaining has been *unsuccessful because of ...*" [emphasis added]. Once it is determined that the process of bargaining has been unsuccessful, then a causal relationship needs to be shown between one of the four conditions and this breakdown in negotiations.

Fundamentally, the Board has found it necessary to determine whether negotiations have even been unsuccessful, before considering the causation. In two cases where the applications for direction to arbitration were dismissed, it was concluded that negotiations were still incomplete and as such could not be declared unsuccessful. In Teledyne *Industries Canada Limited,* (1986) OLRB Rep. Oct. 1441, the Board claimed that "the collective bargaining process between the two parties has not been allowed to take its full course … we are not satisfied that bargaining is at an impasse " (at para. 25). This being the case, the Board would not venture any further to determine the reasons for the inability of the parties to effect a first agreement (at para. 26). Similarly, in *Juvenile Detention (Niagara) Inc.,*(1987) OLRB Rep. Jan. 66, the Board felt that there was room for further discussion, clarification and compromise on the non-wage items, issues which could not be considered "critical" or ***"strike issues".*** Also, successful negotiations had ensued in the time between the filing of the application and the hearing, and the union admitted that more time may have enabled greater progress. In each of these cases, the employer was found to be recognizing the union and making reasonable efforts to conclude a collective agreement. Thus, where it appears that the process of collective bargaining has not been fully utilized to the point of an impasse, and the employer has recognized the authority of the union as well as made reasonable efforts to conclude a collective agreement, the Board will not consider the process to be unsuccessful.

Where negotiations have been unsuccessful, the phrase "because of" has lead the Board to conclude that "section 40a contemplates a cause-and-effect oriented assessment", whereby the applicant must demonstrate that the reason for the unsuccessful process is due to one of the four conditions.(4) Otherwise, the Board is not entitled to impose a collective agreement *(Nepean Roof Truss Limited,* [1986] OLRB Rep. July 1005, at para. 17). In the third dismissal case, the unsuccessful negotiations could not be explained by one of the four conditions. The parties were unable to strike a deal, but the Board was not satisfied that the reason fell within sub-sections (a) - (b) of section 40a(2) *(Alma College,* [1987] OLRB Rep. Dec. 1453).

A Less Onerous Standard Applies than in Section 15 Decisions

With the focus on the cause-and-effect relationship in section 40a, the emphasis has been removed from discerning the true intentions of the employer, as in section 15 cases. The Board strongly stated this distinction in *Crane* Canada *Inc.,* [1988] OLRB Rep. Jan. 13, at para. 30:

> It is not a question of whether the company intended deliberately to harm the process - there is no prerequisite for an antipathetic animus in entitlement to access to section 40a directions. Nor is it a question of the company simply hard-bargaining in attempting to provide wage parity between union and nonunion employees - conduct which may not be violative of section 15 may nevertheless trigger first contract arbitration under section 40a.

This distinction was first made in Nepean, supra when the Board concluded that "the legislature has intended a different standard to apply in the determination of first contract disputes," such that "the absence of sufficient facts upon which to find a contravention of section 15 does not preclude the application of section 40a " (at para. 17). All that is required is that the employer's/respondent's conduct fall within subsections (a) -(d) of section 40a(2) and be deemed the cause for the unsuccessful negotiations. In fact, the employer in *Nepean, supra* had *not* been found in violation of section 15 in a previous hearing, but in the instant case was found to be maintaining an uncompromising bargaining position without reasonable justification, thereby satisfying section 40a(2)(b) (at para. 26), and direction to first contract arbitration was granted.

Therefore, it appears that different (ie. lower) standards are used such that the problems with making a distinction between hard bargaining and surface bargaining are no longer an issue. The Board is not concerned with the underlying motives of either party, whether or not there is a genuine intent to reach a collective agreement. The union does not have to show that the employer's conduct was tainted by bad faith. Rather, if the process of collective bargaining is simply found to be unsuccessful because of a precedent condition, then direction to first agreement arbitration is granted.

The Criteria used in Establishing a Causal Relationship

These precedent conditions contained within section 40a(2) are an important part of the new standards. Although only one condition needs to be fulfilled in order to invoke this direction, the Board has occasionally made its decision based on two or three. With this approach, subsections (a)-(c) have each been fulfilled fairly consistently, while part (d) has only once been satisfied. Out of 17 cases (5) where direction has been granted, at least 7 instances involved an employer who refused to recognize the bargaining authority of the trade union. In at least 5 cases, the respondent (employer) had adopted an uncompromising bargaining position without reasonable justification, and in at least 10 cases the respondent (employer) failed to make reasonable or expeditious efforts to conclude a collective agreement. In total, there might have been more cases to fall in each of these categories, but the Board did not discuss all of the possibilities in each decision (if they were satisfied that at least one condition had been met), and in a couple of decisions, full reasons were not given.

The Employer's Refusal to Recognize the Union's Authority

In subsection (a) cases (the refusal to recognize the union's authority), the employer has typically refused to even meet with the union.(6) In one situation, the employer's refusal to provide basic information about the employees (e.g. names, addresses, wages, etc.) was found to be a refusal to recognize the union's authority in bargaining. Interestingly, in two instances the employer had previously been guilty of unfair labour practices as alleged under section 89 (Walter Tool and Die Ltd., and Co-Fo Concrete Forming Construction Ltd.). In these examples, the behaviour was patently anti-union and there was little doubt that the employer's behaviour was a cause for unsuccessful bargaining.

An Uncompromising Bargaining Position Without Reasonable Justification

The second condition requires a more thorough inquiry since two points must be established: 1) a bargaining position has had an uncompromising nature; and 2) this position has been without reasonable justification. *(Nepean, supra* , at para. 18). Recognizing that "reasonable" is a relative term which also demands an objective evaluation, the Board has taken a case-by-case approach. In this manner, the Board has stated that "what is reasonable depends largely, if not entirely, upon the context in which such an examination is to be made" and this will "include both the general landscape of labour relations and the specific labour relationship between the parties." Furthermore, the Board has suggested that this will often require "the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions " (Formula Plastics *Inc.*, [1987] OLRB Rep. May 702, at para. 25-26). This approach to determining the reasonableness of a position represents a departure from the jurisprudence which has evolved under section 15. Now, the "intrinsic reasonableness" itself is under scrutiny,

rather than the intent behind a patently unreasonable bargaining position (Formula, supra , at para. 27).

In Nepean, supra, the Board did consider both the specific relationship between the two parties and the current labour relations climate. The employer refused, without Justification, to grant seniority rights to all bargaining unit employees and insisted upon its omission from the collective agreement. Yet prior to certification, it was company practice to acknowledge seniority of service with respect to terminations, lay-offs or promotions.

Furthermore, the Board acknowledged the significance of this basic principle to the labour movement and the fundamental part that the protection of seniority rights plays in modern collective bargaining. Accordingly, the Board was satisfied that the process of collective bargaining had been unsuccessful because of the uncompromising nature of the respondent's bargaining position without reasonable Justification.

Those uncompromising bargaining positions which directly oppose standard terms of agreement (e.g. union security and seniority) are obvious qualifiers for section 40a(2)(b). The Board has noted, however, that any bargaining position which is uncompromising in nature, without reasonable Justification, and is the cause for unsuccessful negotiations will satisfy the condition (Nepean, supra , at para. 18).

Indeed, *Co-Fo Concrete, supra* , is such an example where the employer insisted on a term which would prohibit an already existing practice (the use of company trucks by the employees), but had no justification. The Board was satisfied, therefore, that the precedent condition had been met.

The applicant in all cases has not been able to demonstrate that part (b) has been fulfilled. In *Alma College, supra,* the Board felt that the respondent (employer) did show a willingness to compromise its position by opening and encouraging discussion, by suggesting consultative committees to work towards a solution, and by suggesting changes. Furthermore, the reasons for insisting on a particular clause (a layoff provision with a "competition clause" format) were found to be justified in the context of the competitive environment in which the private boarding school operated (at para. 64). Thus, the Board did not find the process of collective bargaining to be unsuccessful because of the employer's conduct in this respect.

The Failure to make Reasonable or Expeditious Efforts to Conclude a Collective Agreement

The third condition strikes an interesting contrast to section 15. Section 40a(2)(c) refers to "the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement" while section 15 requires the parties to "make every *reasonable* effort to make a

collective agreement" [emphasis added]. The Board has not clearly made the distinction between "reasonable" and "expeditious" in its decisions, but the usage of the latter term suggests that any unnecessary delays will not be tolerated under section 40a. Moreover, by inserting the adjunct "or" between "reasonable" and "expeditious", the need to determine reasonableness is removed if it can be established that the respondent did not make expeditious efforts to conclude an agreement, which evidently hindered the collective bargaining process.

It seems relatively easy to find the respondent's conduct falling short of making reasonable or expeditious efforts to concluding a collective agreement, since many actions can cause the process to break down due to unnecessary delays.

Conduct which has satisfied subsection (c) include: a failure to read the union's "legally" drafted proposal and to follow with a response *(Mansour Rockbolting Limited,* [1986] OLRB Rep. Oct. 1346); the late addition of conditions critical to settlement (Alma *College,* [1988] OLRB Rep. July 641); and the refusal to negotiate at all *(643210 Ontario Inc.* operated by *M. Concrete Forming*, May 10, 1988 (unreported)). Additionally, in *Co-Fo Concrete, supra,* the refusal to provide employee information to the union (which prevented them from engaging in informed and meaningful negotiations) satisfied the Board (at para. 30). In Burlington *Northern Air Freight (Canada) Ltd.*, [1986] OLRB Rep. Dec. 1628, the employer had breached section 15 by engaging in surface bargaining and this also sufficed as a trigger to grant first contract arbitration (at para. 121). In five other cases the employer simply refused to meet with the union. In fact, out of 17 applications which were granted direction, at least 10 involved the respondent's failure to make reasonable or expeditious efforts to conclude a collective agreement.

Any Other Reason the Board Considers Relevant

Finally, the fourth condition under which the Board may grant direction to arbitration has only been officially defined once, although the Board has hinted at other potential reasons.(7) In *Burlington, supra* , the Board determined that the pervasive unfair labour practices had caused the process to be unsuccessful and that this was another reason which they considered relevant in granting direction. In this specific case, two other conditions had already been satisfied so that this declaration was superfluous. It also seems apparent that unfair labour practices will often fulfill any one of the conditions listed in 40a(2) (particularly where a breach of section 15 has occurred, as was the situation in *Burlington, supra).* Thus, subsection (d) still remains to be given any significant substance.

Therefore, based on the jurisprudence to date, it is clear that the standards used in assessing section 40a applications are lower than in section 15 inquiries. Moreover, out of 20 cases which have actually been heard by the Board, 17 have been granted direction to first contract arbitration. This suggests that this remedy is very accessible to those parties who appear before

the Board. Thus, with the lower standards, section 40a has overcome the problem of detection and qualification associated with section 15 proceedings.

iii. Beyond the First Stage: The Substantive Outcomes

Since the inception of first contract arbitration, the Board has only imposed five agreements. In the remaining thirteen cases, either the collective agreements were privately arbitrated (three cases), the parties settled on their own (six cases), the company is no longer in operation (three cases) or the union was decertified (one case). Because the legislation has only been in existence for three years, the more recent agreements have not yet come to term. Together, this means that it is difficult to determine whether the remedy actually encourages long-lasting relationships. It is possible, however, to reap some understanding and insight from the process itself and what has transpired from it.

The Board's Approach to Arbitrating First Agreements

First, the legislation has provided only two guidelines for the imposition of a collective agreement: 1) that the Board accept, without amendment, any "matters agreed to by the parties, in writing " (section 40a(17)); and 2) that the term of agreement be two years (section 40a(18)). The Board is expected to settle the remaining disputes between the applicant and the respondent. The actual process requires that both parties file a list of those matters agreed to in writing and a list of those which remain in dispute. Furthermore, each party must submit a collective agreement which they are prepared to sign. Then, the hearing before the Board elicits evidence to support the written submissions.

In arbitrating the first collective agreement, the Board has adopted a similar approach as Paul Weiler described in London Drugs Ltd., [1974] 1 Canadian LRBR 140, at page 147:

> As regards the language and structure of the collective agreement, the Board does not believe that s.70 [section 40a in Ontario] should be used to achieve major 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, ...[w]e intend to see that the collective agreements we settle under s.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.... *(Burlington, supra* , at para. 5).

This approach lends itself to very standard first agreements, yet hopefully attractive enough that the employees will not subsequently seek termination.

The Board has also noted its attempt to "use language that conforms with the framework and style of the provisions to which the parties have agreed, and where suitable, has adopted language proposed by one of the parties, or blended language from their respective proposals " (*Burlington, supra,* at para. 7). From this, it seems that the Board is trying to fashion an agreement suited to the parties, both to reduce the intrusive effect of imposing an agreement and to make an agreement to which the parties can attach ownership.

Moreover, in *Egan Visual Inc.,* [19861 OLRB Rep. Dec. 1687, at para. 4), the Board stated that the process is not one of final offer selection, since this would not be fair to both sides. Further, the Board does not feel that the agreement "ought to reflect the relative strengths of the bargaining positions of the parties." It appears, therefore, that the Board is playing an accommodative role to provide an acceptable, uniquely-tailored first agreement, rather than a judicial role to decide right from wrong. In fact, the Board has used words like "general acceptance", "fair", "appropriateness", "adequately compensate", and "fair counterbalance" in setting out the reasons for its arbitral decisions *(Egan, supra).* Finally, the Board has expressed its hope that a workable first collective agreement would be provided, which would prove to be fair and practical and which would enable the relationship to grow and mature *(Burlington, supra ; Egan, supra).*

The Promotion of Long-Lasting Relationships

The obvious question, of course, is whether or not first contract arbitration in Ontario has actually encouraged long-lasting relationships. Due to very limited information, this specific query is virtually impossible to answer. Of those that have had agreements arbitrated by the Board, Burlington Northern Air Freight and Mansour Rockbolting Ltd. are the only companies that have renegotiated their collective agreements. The collective agreement between Egan Visual and its union (United Brotherhood of Carpenters and Joiners of America) was terminated at the point of expiry (two years after the imposition). Nepean Roof Truss Ltd. burned down shortly after arbitration and never reopened.(8) Formula Plastics Inc. filed for bankruptcy shortly after arbitration and remained closed. Although Walter Tool & Die Ltd. was scheduled to appear before the Board for arbitration, the application was withdrawn after a employee vote was taken, which apparently showed 100% against the union's representation.

Based on the available information, the only other contracts to be renegotiated were with Co-Fo Concrete Forming Construction Ltd. and M. Concrete Forming, both of which settled their first agreements on their own, without arbitration. For the other parties, it appears that the collective agreements have not expired yet, or they simply never settled. (In the case of Alma College, the school has shut down due to low enrollment.)

Clearly, it is difficult to make an assessment as to the effectiveness of the imposed collective agreements. Of the five, only three became operational, two of which were renegotiated. It is a

small base from which to draw conclusions, but two of the three arbitrated contracts have been successfully renegotiated. The other two simply never entered into a relationship due to closed operations.

The Parties' Perceptions of the Imposed Collective Agreements

In reference to the arbitrated agreements, there have been some observations made by representatives of the labour relations community. According to one participant who has been counsel for management, the Board is not issuing any "Cadillac" collective agreements. Similarly, it was noted by an official involved with mediation, that management fears probably have not been realized since the union does not seem to gain anything through the process except a more readily settled collective agreement. With an even stronger emphasis, a representative of the Ontario Federation of Labour (OFL) stated that the Board jurisprudence has become more conservative and nothing has been gained apart from a first contract. Furthermore, the collective agreements imposed do not justify or validate the trade unions, rather they undermine any bargaining leverage. If unions are interested in "winning" contract arbitrations, it does not appear that the Board will bend to their wishes. The Board has made it clear that its role is to impose a contract which is fair and will afford the parties an opportunity to learn to tolerate each other. This, presumably, is the way in which the union's existence will be justified. However, given the Board's emphasis on imposing standard, non-breakthrough agreements may be possible for the Board to err on the conservative side, to the union's disadvantage.

iv. Conclusions

The process of first contract arbitration has established reasonable standards whereby the remedy is accessible to those who actually appear before the Board for direction. In this sense, section 40a has overcome the difficulty of detection associated with section 15 complaints, by developing lower standards for qualification.

It is less certain, however, whether this process of first contract arbitration promote long-lasting relationships. Few cases actually exist which can illustrate the longevity of imposed collective agreements. So far, only two arbitrated agreements have been renegotiated and one has been terminated. Yet, according to the OFL, even those contracts which have been directed raise doubts as to the justice being done to the union's status in their on-going collective bargaining relationship. Unions argue that, from the employees' perspective, the imposed contracts do not justify their union representation. Apart from being granted a collective agreement, they gain nothing for their constituents. If this is true and it results in dissatisfaction among the membership, then long-lasting relationships may not have a chance to develop – the contract will be terminated or the union will be decertified before it can be renegotiated a second time.

Two important questions arise out of this analysis. First, if so few cases actually utilize the process, are these perhaps rare or special? And second, if only 20 applications have appeared before the Board, does this support the theory that section 40a has a deterrent effect?

In response to the first question, it does appear that those cases which come before the Board generally represent a special group of employers: those employers which are more adamant than most about resisting a union. For instance, out of 17 applications, eight involved past or current unfair labour practice complaints; six of these were brought successfully against the employer. Interestingly, five of these allegations involved section 15 contraventions (three were successful).(9) This suggests that the bargaining relationships have often been strained by misconduct on the part of the employer. Even in some of the other cases where no complaint was filed, a section 89 complaint would likely have been successful: where the employer was refusing to recognize the bargaining authority of the union (four cases), the union simply filed for first contract arbitration in the hope of obtaining a collective agreement. Thus, given the nature of the cases which have come before the Board, it appears that those applications which make it this far involve employers which are more resistant to union representation of their employees. Therefore, these cases represent a special group and the more common first contract experience is unknown to section 40a proceedings.

This trend also suggests that section 40a is being used as an alternate remedy in cases where the employer has engaged in unfair labour practices. In some situations, the union was not able to prove that the employer had breached section 15, but was able to meet the criteria for the direction of first contract arbitration. Even in those cases where the employer was found in violation of the Act, the parties eventually appeared before the Board after unsuccessful negotiations. Again, for those cases which have progressed to the hearing stage, the resistant employer is met with a remedial order which was not possible under section 89. In this light, it seems that section 40a is useful for unions that are faced with especially uncooperative employers as an alternate remedy not available through any other avenue.

The question remains, then, as to whether section 40a has a deterrent effect on the parties engaged in first contract negotiations and for what reasons.

IV. FIRST CONTRACT ARBITRATION AS A DETERRENT

i. Introduction

Does section 40a deter employers from engaging in improper bargaining behaviour? Is there a tendency for the parties to settle in order to avoid the Board proceedings and the imposition of a collective agreement? One of the objectives of the legislation is to observe more settlements, without the long delays and improper conduct too often associated with first agreement negotiations. The extent of this deterrent impact can be measured by the negotiation behaviour of the parties and the number of first agreements settled.

ii. The Impact on the Parties: The Impetus to Settle

There are three potential stages at which the parties may be affected: 1) during negotiations, before an application for direction to arbitration is filed; 2) after an application is filed and before the first hearing; and 3) at the end of the hearings (where the application is either dismissed or direction is granted). The greatest number of cases fall in the first stage (all first contract scenarios), a much smaller, select group filters into the second stage (approximately 40 since June, 1986) and the final stage contains the least number of cases (20 since June, 1986).

Negotiations after First Contract Arbitration Hearings

This latter phase can be more easily assessed. Once the parties have been directed to arbitration, there is a strong impetus for the parties to settle without arbitration, to avoid an externally-imposed agreement as well as the time and money spent on such proceedings. Accordingly, it seems that more contracts are settled than arbitrated at this stage. For those applications which have been dismissed, the impact of section 40a is less obvious. In one instance, the parties went on to conclude a collective agreement (Juvenile Detention (Niagara) Inc.), while in the second, no contract was ever reached (Teledyne Industries Canada Ltd.). In the third case, the parties were granted direction to arbitration after a subsequent filing (Alma College). In these situations, the union may simply give up if no settlement is reached, or alternatively, the fear of facing the onerous task before the Board, a second time, may encourage the parties to settle. Given the few number of cases which have been dismissed, the impact is almost irrelevant. Regardless, for those parties who do have successful applications and receive direction to arbitration, it is more likely that they will settle on their own.

Negotiations after an Application for First Contract Arbitration

More significantly, the second phase of the process – after an application if filed but prior to a hearing – is where a powerful deterrent effect can occur. Again, the threat of having the Board

grant direction to arbitration can create an external deadline, before which the parties will aim to settle. Indeed, one lawyer stated that he would simply ask his clients (management) which they would prefer, their own collective agreement or one imposed by the Board. He feels that the threat is real, and that it creates an impetus to settle. Likewise, a union representative also noted the uncertainty which is felt from the prospect of having the Board impose an agreement, such that the parties will tend to settle themselves.

Accordingly, the Board recognizes that there is an excellent chance of a settlement being reached before the hearings, and it is also felt that the parties will be more amenable to such an agreement. Therefore, the first day is spent with an officer who tries to encourage a settlement:

> Such settlement discussions often occur during the first and sometimes subsequent days scheduled for hearing of such applications. Because it is always preferable in labour
>
> relations matters, particularly in first contract situations, for parties to resolve their differences themselves rather than litigating them, the Board encourages such discussions. The Board's officers have been very successful in assisting parties in such applications in reaching a resolution of the matters in dispute between them and the vast majority of such applications have been settled without it being necessary for the Board to adjudicate the dispute (*Del Equipment Limited, Del Hydraulics Limited* and *Edinburgh Electric Limited*, [1989] OLRB Rep. Jan. 19, at para. 4).

As of February, 1989, the Board reported that out of 70 applications received and disposed of, 39 were settled or withdrawn. Although the Board stated above that the vast majority settle without appearing before the Board, there is no published data to clarify that most of the 39 were actually settled. However, based on a review of 22 withdrawn applications (to date), at least 19 were the result of a settlement being reached.(10) Moreover, out of 11 cases which were adjourned sine die, at least 8 subsequently settled a collective agreement. Finally, three other applications were dismissed or terminated due to settlement. In total, based on a review of 38 cases, at least 30 (and possibly 36) settled without appearing before the Board. It does appear, therefore, that once an application has been filed, there is a strong impetus for the parties to negotiate a collective agreement, without participating in Board proceedings.

Negotiations Prior to an Application for First Contract Arbitration

Finally, the first stage, which includes all first contract negotiations, may also be subject to a deterrent effect. Here, the threat of arbitration first becomes apparent since either party (typically the union) can apply at any time.(11) Since the deterrent effect relates to the tendency to settle without misconduct (and in order to avoid Board proceedings), the number of certifications which actually result in first contracts is the relevant issue.

Due to a lack of data, it is difficult to provide an accurate assessment of first contract settlement, but some general trends can be illustrated. Table 4.1 characterizes the percentage of certifications which have resulted in first contracts since 1982-83. The total number of certifications and first contracts listed for each year is a net total. The count for hospitals, nursing homes and construction has been subtracted since these groups are either guaranteed first contracts or naturally fall under an existing one, (see Appendix A for the specific calculations). The certification figures are compiled by *fiscal* year (e.g. 1982-83) and the first contract figures are compiled by *calendar* year (year of ratification), such that 1982-83 certifications are compared with 1983 first contracts. Although this discrepancy exists, a staggered comparison may, in fact, be more appropriate since a lag time typically exists between certification and the settlement of an agreement. Unfortunately, the first contract data available from the Board is incomplete beyond 1987; therefore, only one period since 1986 (when section 40a was legislated) can be used.

Table 4.1 The Rate of First Contract Settlement in Ontario 1982 - 1987

	First Contracts* (calendar year)	Cert'ns* (fiscal year)	%First Contract Success
1983/1982-83	246	325	76%
1984/1983-84	288	350	82%
1985/1984-85	419	452	93%
1986/1985-86	414	505	82%
1987/1986-87	330	433	76%
1987-88**		440	

Source: Office of Collective Bargaining Information, Ontario Ministry of Labour

* These totals do not include construction, hospitals or nursing homes. See Appendix A for the derivation of these totals.
** The 1988 first contracts data is still unavailable.

As the percentage column indicates, the rate of 1987 first contract settlement (76%) was the lowest since 1983 (76%), down from 1986 (82%) and 1985 (93%). This suggests that, for some reason, a downward trend in first contract settlement is continuing. One might conclude, therefore, that first contract arbitration has had no effect on the parties at this stage. It is difficult, however, to link the existence of section 40a with this decline since there are many

factors which can contribute to this occurrence (e.g. economic power, an increasing number of small enterprises, etc.). It may actually be the case that first contract arbitration *has* had a positive effect on the rate of settlement, but that there are other important factors which continue to hinder first contract negotiations, resulting in a net reduction in the number of settlements. Clearly, a long-term trend analysis will provide a more definitive conclusion, in terms of the settlement rate trends. While it appears that the continued downward trend has not been stopped by section 40a, it might be true that the decline has been less acute with the presence of first contract arbitration. This detail cannot be accurately derived from the aggregate picture.

iii. The Employment of Section 40a

By February, 1989, the Board had received and disposed of only 70 applications since the inception of first contract arbitration,(12) compared to approximately 1200 certifications(13) over the same period. Furthermore, the number of applications has been decreasing each year: 34 in 1986-87; 20 in 1987-88; and 16 in 1988-89 (OLRB Annual Report 1988-89), while the number of certifications has remained roughly the same for 1986-87 and 1987-88, (see Table 4.1). There are two possible reasons for such a decrease: 1) the process is working successfully as a deterrent, such that more cases are being settled before coming to the Board; or 2) the process is being avoided for other reasons.

The first explanation has already been addressed in the preceding section: initially, there does not appear to be any improvement in first contract settlement rates, but this may be due to more overpowering factors which work against any deterrent effect from section 40a. The second explanation is still very relevant: is the process being avoided and why? With no change in the certification rate, but a continued decline in first contract settlements, it would seem logical that more parties would try the section 40a route, yet fewer applications are being made.

One of the complaints which has been raised by the unions is the "enormous" administrative burden imposed upon the parties before they appear before the Board. The written submissions and forms which must be filled, in addition to the involvement in the hearing process itself, can become very onerous and costly. In part, these requirements were initially intended to prevent an overflow of applications, (14) but as an OFL representative has claimed, the administrative burden is an "awesome" deterrent to using the process, such that the observed volume is just a small fraction of the number of applications that could be filed.

Before an application is filed, the applicant must then ask the question, "is it worth it?" Since virtually all of the applications are made by unions, the worth must be measured by the payback of a desirable collective agreement. This is another point of contention among

unionists, as mentioned in Part III. With respect to collective agreements, the OFL has criticized the Board's jurisprudence as being too conservative and effectively undermining the unions. Additionally, it is felt that the threat value is seriously diminished due to the non-threatening nature of the collective agreements being imposed. It seems, however, that the mere imposition of a collective agreement should still be a concern for most employers, such that the prospect of arbitration will influence their behaviour – provided that the union is prepared to instigate the procedure.

Indeed, those who are making applications seem to be using the threat of arbitration as a negotiation tactic. As noted earlier, the majority of cases settle before the scheduled hearings, which suggests that in these cases the pressure has been effective. The United Steelworkers of America are one example of a union using the application process in such a manner. Out of eight applications, seven were withdrawn due to the settlement of a collective agreement.(15) Therefore, the threat of arbitration can force the settlement of an agreement, but perhaps, only for those who are willing to initiate the application process.

Apart from these 70 cases where applications for direction to first contract arbitration were made, there still seems to be an avoidance of the section 40a procedure. Whatever the reasons for avoiding the process -- be it excessive effort, expense, dissatisfaction or something else -- these reasons are only meaningful if they encourage the parties to successfully negotiate a first collective agreement. Otherwise, the procedure is effective for a relatively small group of participants.

iv. Conclusions

It is difficult to assess the true deterrent effect of first contract arbitration, particularly in the early stages of negotiations. Overall, there is a decline in both first agreement settlements and in the usage of section 40a, yet there is no change in the rate of certification. Thus, there seems to be an on-going difficulty with settling first contracts, yet a low application rate for the first contract arbitration procedure continues to become even lower. For those parties who do apply for direction to arbitration, this tactic seems to provide an effective pressure such that a settlement is forced. In these cases, however, it is quite likely that many parties would have concluded a collective agreement anyway. In this light, the threat of arbitration may simply have sped up the process of settlement (by also discouraging improper conduct) and possibly helped to avoid a strike. To this end, the threat of arbitration is an effective deterrent.

In the remaining majority of cases, the parties (typically the union) may be hesitant to use the procedure due to the cost and effort. For some, this block may prompt both parties to work towards a settlement. But for many, It seems, a first contract is simply not concluded. In the years 1986-1987, 12%-16% of certifications did not result in a collective agreement. Of the 70

applications (almost 6% of all certifications) filed under section 40a, the majority resulted in a settlement. This means that there is a significant number of cases which do not settle and which do not bother applying for first contract arbitration.

Therefore, for those parties who actually make an application under section 40a, the deterrent effect of first contract arbitration is very prevalent; the parties tend to settle on their own. Beyond this group, it is not clear that the threat of arbitration is encouraging a settlement or discouraging improper conduct. It is also not clear what the reasons for non-settlement are in this larger sect.

V. SUMMARY AND CONCLUSIONS

In Ontario, prior to the institution of first contract arbitration (section 40a) in 1986, the regulation of first contract disputes has typically been handled through section 89 (unfair labour practice) complaints. Specifically, allegations of bad faith bargaining (or a breach of section 15) have often involved first contract situations.

In the past, the application of section 15 has had significant shortcomings which are particularly relevant to first agreement cases. First, the detection of bad faith is made difficult by employers who engage in surface bargaining with no intention of concluding a collective agreement. This problem is aggravated by the Board's emphasis on assessing the employer's conduct rather than the content of proposals, an approach which reflects the Board's struggle to regulate the process within a free collective bargaining framework. Moreover, the onus is on the union to demonstrate that the employer has engaged in bad faith bargaining, while there is no onus on the employer to prove good faith. The result has been that only patently contravening behaviour has qualified as bad faith bargaining.

Secondly, the Board's remedial arsenal has had limited effectiveness. The Radio Shack case was the landmark case for demonstrating the Board's willingness to more fully compensate the injured parties, short of imposing a collective agreement. There are criticisms, however, about the effectiveness of compensatory damages as a deterrent when they may be viewed as a license fee by a resistant employer. Furthermore, it is questionable that the damage done to a union's status and power can be restored by the typical remedial orders used by the Board. Also, while the union typically requests the imposition of a collective agreement as the appropriate remedy, the Board has resisted this type of order, feeling confined by the directives contained within the Act and remaining loyal to the notion of contractual freedom.

The enactment of first contract arbitration has opened a new avenue for unions to come before the Board in first agreement situations. In contrast to section 15 cases, a different standard is used in section 40a inquiries, such that the procedure of first contract arbitration is more easily accessible to those who actually apply and appear before the Board.

Of those cases that have come before the Board, many have involved employers that have engaged in unfair labour practices. This suggests that the employers which are more adamant about resisting a union are more likely to be brought before the Board. It also suggests that section 40a is being used as an alternate remedy in cases where the employer has engaged in improper conduct.

In terms of the remedial effectiveness, the issue of whether long-lasting relationships result from arbitrated agreements has yet to be determined in Ontario -- it is too soon to make such a

conclusion. Unions, however, criticize the imposed agreements as being too conservative and not providing the union with the basic justification it needs in the work place. In this respect, it is felt that the Board's approach will not encourage longevity, such that contracts will not be renegotiated. So far, the Board has only imposed five agreements of which three became operative. Two of the three renegotiated, the third was terminated. Clearly, more time is required to determine the actual effectiveness of imposed contracts in encouraging an on-going relationship. It should also be mentioned that other Canadian jurisdictions have had mixed results in this area, Manitoba and Quebec having the most noteworthy success (Macdonald, 1987). Since the Ontario legislation is a modified version of these two provincial variations, a similarly moderate level of success in Ontario may be a reasonable projection.

Because relatively few cases have been heard by the Board, the issue of deterrence becomes more relevant. Generally, it is difficult to know what the aggregate impact has been on first contract negotiations. The first contract settlement rate has continued to decline, the application rate under section 40a has also declined, while the rate of certification continues to remain stable. It seems, therefore, that there are still factors which hinder the first agreement settlement process that section 40a is not able to overcome. Moreover, there appears to be a reluctance to use the arbitration procedure due, in part, to the administrative burden and expense involved with appearing before the Board. Unions may not see the process as worthwhile in light of the outcomes.

The most favorable deterrent value has been realized among those parties who actually make an application for a direction to arbitration: most tend to settle on their own before appearing before the Board. In this way, the threat of arbitration serves as an effective impetus for the parties to settle more quickly. This phenomenon is also prevalent among those parties who actually participate in the hearing process and are directed to arbitration. They, too, tend to settle on their own without the efforts of the Board.

Overall, it appears that the presence of section 40a is having some impact on the parties: those who apply to the Board for direction to first contract arbitration tend to settle on their own. Whether the negotiated contracts lead to long-lasting relationships, however, remains to be seen. Although the presence of section 40a likely enters the minds

of negotiators at all stages, unless an application is actually made it does not seem that the parties significantly alter their behaviour. Another indicator which could be helpful in this determination is the level of strike activity and the typical duration of strikes among first agreement situations. Prior to the enactment of section 40a, Julian Walker's study found that first agreement strike frequency was increasing steadily over time in Canada. This paper has not

addressed the issue, but an updated study for Ontario would provide some more insight into the situation.

From a practical perspective, the decreasing utilization of the procedure is also an important issue which raises some questions. For example, are the administrative requirements so burdensome that the screening effect actually prevents a more realistic flow of applications from being filed with the Board? Are unions not seeing the process as valuable to them? This does not suggest that the Board should not require the written submissions, but the process may require modification if it is preventing its potential use. Again, with only three years experience, it is difficult to draw firm conclusions, but early indicators show some dissatisfaction with the procedure.

Finally, other factors seem to exist which hinder the settlement process. Research that deals with the changing Canadian industrial relations environment could probably address this more appropriately. Smaller work places, for example, has been identified by the OFL as an opposing force for unions in their organizing efforts and their ability to sustain employee representation beyond the first contract. The institution of first contract arbitration has not been able to overcome all of the structural problems faced by unions, nor should it be expected to. It has, however, addressed some of the problems faced by unions as they battle uncooperative employers, and at least in some cases has effectively countered employer reluctance to recognize the union.

NOTES

(1) Paul Weiler talks about the inadequacy of good faith bargaining provisions in dealing with first agreement situations in his book *Reconcilable Differences* (Weiler 1980). Also, Prof. Constance Backhouse, in his case study of the Fleck strike, supports the institution of first contract arbitration in light of the inadequacy of section 15 (Backhouse 1979).

(2) Bendel details Cox's description of the duty as understood in 1958, which was the forethought espoused in the *DelVilbiss* case (Bendel 1980, 6). See Cox, "The Duty to bargain in good faith" (1958) *71 Nary.* L.R. 1401, at 1407-9.

(3) Langille and Macklem argue that there should be a greater substantive content to the duty to bargain, specifically the requirement that all collective agreements should include seniority and just cause protections as well as fair and accessible grievance procedures.

Bendel supports greater content supervision under section 15, by the Board, such that the imposition of a collective agreement would be justifiable in some cases (Bendel 1980).

(4) There has been some question as to the effect of a strike in the Board's assessment. In *Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441, the Board noted that a strike or lock-out may be a factor relevant to the Board's considerations, but the mere existence is not determinative. The lack of success must be related to one of the listed conditions (a-d).

More recently, in Lau Division - *Philips Air Distribution Ltd.*, June 27, 1989, unreported, the Board clarified that a strike, lengthy or otherwise, does not constitute any other relevant reason for imposing a first contract (ie. it does not qualify 40a(2)(d)). Again, the causality link between the break down of the negotiations with a specific condition must be established.

(5) The cases where direction has been granted are as follows: Burlington Northern Air Freight, Dec. 1986; Nepean Roof Truss Ltd., July 1986; Egan Visual, Sept. 1986; Mansour Rockbolting Ltd., Oct. 1986; Formula Plastics Inc., May 1987; Walter Tool & Die Ltd., May 1987; Co-Fo Concrete Forming Construction Ltd., Sept. 1987; Crane Canada Inc., Jan. 1988; Nickey Holdings Ltd. and Maddalena Holdings Ltd., c.o.b. as Artistic Railings, Jan. 1988; 643210 Ontario Inc. operated by M. Concrete Forming, May 10, 1988 (unreported); Lincoln Carpentry Limited, May 16, 1988 (unreported); Alma College, July 1988; Agostino Cassavia Carpentry, Jan. 1989 (unreported); Atcost Soil Drilling Inc., Dec. 1988 (unreported); caddiford Investments Ltd., c.o.b. as **M.B.M.** Ceramics, July 1988 (unreported); Unidoor Company Limited, March 1989 (unreported); Wood Trim Carpentry Co., March 1989 (unreported).

(6) Examples of refusals to meet: Lincoln Carpentry Limited, May 16, 1988 (unreported); Nickey Holdings Ltd. and Maddalena Holdings Ltd., c.o.b. as Artistic Railings, Jan. 1988; Agostino Cassavia Carpentry, Jan. 1989 (unreported); Unidoor Company Limited, March 1989 (unreported); Wood Trim Carpentry Co., March 1989 (unreported).

(7) In Juvenile Detention (Niagara) Inc., [1987) OLRB Rep. 66, the Board hinted at a potential reason under 40a(2)(d):

And if Comsoc was prepared to play an active role as a strike-breaker, and absorb costs which in other contexts might prompt a settlement or might even exceed the costs of a settlement, that might very well highlight the union's argument under section 40a(2)(d)....Indeed on its face, section 40a(2)(d) could be construed as a rather extraordinary invitation from the Legislature to "break the log-jam" even when the respondent's conduct does not amount to bad faith bargaining, or otherwise does not fit squarely into items (a)-(c).

(8) Capital Roof Truss Ltd. is still operational in Nepean. This is the company to which Nepean Roof Truss Ltd. was compared during negotiations and shared the same principal.

(9) A few of the cases which involved section 15 complaints existed prior to the enactment of section 40a. Since that time, very few section 15 complaints have been made in first contract situations.

(10) During the research of the applications which have been made to the Board, it was not possible to track all of them. Therefore, some tabulations are minimal counts (e.g. "at least six cases ...").

(11) According to participants from all three groups (employer, union and Board mediation), during negotiations the parties are always aware of the possibility that an application for first contract arbitration can be made.

(12) An unpublished report from the Office of Collective Bargaining shows that 70 applications had been received and disposed of by February 1989.

(13) The number of certifications is a rough, conservative estimate taking 433 and 440 from 1986-87 and 1987-88, respectively (see Table 4.1). In 1988-89, there were 648 certifications in total, less 54 for hospitals and nursing homes (Office of Collective Bargaining Information).

Assuming another 200 to represent construction, that leaves approximately 394 net certifications for 1988-89. Therefore:

1986-87: 433 certifications
1987-88: 440
1988-89: 394

This totals 1267 certifications since the inception of section 40a. An approximate figure of 1200 has been used for the sake of comparison.

(14) The OFL representative specifically mentioned the intention to originally prevent an overflow of applications, but feels that the burden is stifling.

(15) Those companies with which the United Steelworkers of America settled contracts after an application was filed for first contract arbitration (but was withdrawn due to settlement) are as follows:

> Tecsyn Canada Ltd.; Terra Footwear Ltd.; The Daily Press, Thomson Newspapers; Canadian Feed Screws Manufacturing Ltd.; Allan & Marion Super Discount Marts Ltd.; Caddiford Investmnets Ltd. (M.B.M. Ceramics); Miller Fluid Power (Canada) Ltd.

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APPENDIX A

Calculations for
Net Certifications and Net First Contract Settlements
1982-1987*

Certifications	Total	Hosp. (a)	N.H. (b)	Const. (c)	Net Total
1982/83	511	0	36	150	32
1983/84	551	26	22	153	35
1984/85	677	49	20	156	45
1985/86	705	41	29	130	50
1986/87	649	34	23	159	43
1987/88	749	23	29	257	44

First Contracts	Total	Hosp. (a)	N.H. (b)	Const. (c)	Net Total
1983	321	40	29	6	24
1984	341	15	26	12	28
1985	480	35	23	3	41
1986	497	54	24	5	41
1987	399	44	22	3	33

Source: Office of Collective Bargaining Information, Ontario Ministry of Labour.

* Referenced from Table 4.1

a Hosp = Hospitals
b N.H. = Nursing Homes
c Const. = Construction

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