

**REMEDIES FOR BREACH OF THE DUTY TO BARGAIN IN
GOOD FAITH
UNDER THE MANITOBA LABOUR RELATIONS ACT**

Joy M. Cooper*

The Manitoba Labour Relations Act, C.C.S.M. c. L10, like virtually all Canadian and American legislation governing collective bargaining,¹ requires unions and employers to bargain in good faith, or, as expressed in the *Act*, to "make every reasonable effort to conclude a collective agreement."² This article will examine the scope of the Manitoba Labour Board's authority to remedy breaches of this duty. In addition, an attempt will be made to evaluate the effectiveness of the remedies now available under the *Act*, in particular their efficacy in dealing with the serious difficulties unions often encounter while attempting to negotiate their first collective agreement after certification.

**The Context: The Remedial Authority of
Canadian Labour Boards - Conventional Remedies
and New Developments**

Until relatively recently, provincial and federal legislation governing collective bargaining gave very limited remedial authority to labour boards. In some jurisdictions, the labour boards had no authority whatsoever to remedy breaches of the duty to bargain in good faith. In these jurisdictions, the only relief available to the aggrieved party was to prosecute the alleged offender in the courts.³ Labour boards were involved in this penal procedure only to the extent that their consent was a condition precedent to the initiation of the prosecution.⁴ In addition, a few other jurisdictions, including Manitoba, empowered their labour boards to issue mandatory bargaining orders, i.e., orders requiring the parties to meet to bargain collectively.⁵

However, the early 70's witnessed the beginning of a trend in many Canadian jurisdictions to expand the remedial authority of labour boards. The primary method by which this was accomplished was by legislative expansion of the general remedial powers of labour boards.⁶ In line with this general expansion of remedial authority, labour boards in several jurisdictions have reached beyond the conventional remedies for breaches of the duty to bargain in good faith and have introduced a variety of stronger measures in an attempt to provide employees with more effective relief, particularly in the first contract bargaining situation.

One technique employed has involved a more imaginative application of the mandatory bargaining order. Instead of simply ordering the offending employer back to the bargaining table, the board will order the employer to undertake certain specific "affirmative actions". In doing so, the boards are following established American practice. In the United States, the National

* Student-at-Law

1. M. Bendel, "A Rational Process of Persuasion: Good Faith Bargaining in Ontario", (1980), 30 *U.T.L.J.* 1 at 1.

2. *The Labour Relations Act*, C.C.S.M., c. L10, ss. 53,54.

3. E. Palmer, "The Myth of 'Good Faith' in Collective Bargaining", (1966) 4 *Alta. L.R.* 409, at 416; *supra* n. 1, at 2.

4. See e.g. *The Labour Relations Act*, C.C.S.M., c. L10, s. 125(2).

5. Palmer, *supra* n. 3., at 416.

6. D. Carter, *The Expansion of Labour Board Remedies: A New Approach to Industrial Relations*, (1976), p. 4.

Labor Relations Boards, in cases of flagrant unfair labour practices, has ordered employers to mail copies of remedial notices to employees, to make bulletin board space available to the union, to give the union company time to address employees, to read the notice to the employees and to include the notice in an appropriate company publication.⁷ In *Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America and the Ontario Labour Relations Board*, the Ontario Labour Relations Board, taking its cue from the American practice, ordered the employer, whom it had found breached the duty to bargain in good faith, to post a notice prepared by the Board in conspicuous locations on the company's premises. In the notice, the company acknowledged its employees' rights under the *Ontario Labour Relations Act*, declared that it would bargain collectively with the union, and asserted that it would "make whole" both the union and the employees for any losses suffered "by reason of the refusal to bargain in good faith" The company was also required to mail a copy of the notice directly to the employees' homes, to publish it in its newsletter, and to read it to them at a meeting convened especially for that purpose.

The company's undertaking in the notice to "make whole" the employees' and the union's losses referred to other specific orders of the board by which the company was required not only to reimburse the union for all its negotiating costs incurred to the date of the board's decision as well as all the union's extraordinary organizing costs, but also to compensate all bargaining unit employees for any economic losses that the union could establish resulted from the company's breach of the duty to bargain in good faith. In effect, the company was being ordered to pay damages to both the employees and the union.

Prior to the mid 1970's, this kind of compensatory monetary relief was unheard of in Canada, at least as a remedy for bad faith bargaining.⁹ The power of labour boards to award monetary relief was typically restricted to ordering payments to compensate individual employees for a loss of earnings incurred as a result of an unfair labour practice (e.g. illegal discharge).¹⁰ However, beginning with a decision of the British Columbia Labour Relations Board in 1976, both the B.C. Labour Board and the Ontario Labour Relations Board have in several cases awarded damages to unions to compensate them for their unusual negotiating and organizing costs incurred as a result of bad faith bargaining on the part of the employer. In making these damage awards,

7. D. McDowell and K. Huhn, *N.L.R.B. Remedies for Unfair Labour Practices*, (1976), pp. 73-78, 223. See also A. Goldman, *Labor Law and Industrial Relations in the United States of America* (1979), pp. 281,282.

8. [1980] 1 Can. L.R.B.R. 99, aff. 80 C.L.L.C. 12083.

9. In *Re Polymes Corp. & Oil, Chemical & Atomic Workers International Union Local 16-14* (1962), 33 D.L.R. (2d) 124, the Supreme Court of Canada decided that an arbitrator had the power to award damages even in the absence of express statutory authority.

10. See, e.g. *The Labour Relations Act*, C.C.S.M., c. L10, s. 22(6)(c).

11. In the U.S. where the valoric "make whole" originated, it initially referred only to the conventional remedy involving the "payment of monies to remedy situations in which an employee suffers a *loss of earnings* because of employment discrimination. The purpose of these monetary awards, known as "make-whole" orders, is to restore the discriminatee, as nearly as possible, to the economic position he would have enjoyed without the discrimination." (McDowell and Huhn, *supra* n. 7 at 81. Emphasis added. See also Goldman, *supra* s. 7 at 136). While more recently, the American authorities have also used the term to describe compensation for loss of economic opportunity (as in *Ex-Cello-O Corporation v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W.*, [1970] C.C.H.N.L.R.B. 22, 251), they have not applied it to remedies involving compensation to unions for litigation and organizing expenses. These are referred to as "extraordinary remedies" (see, e.g., McDowell and Huhn, *supra* n. 7, at 222).

characterized by the boards as "make whole" orders (perhaps somewhat inappropriately¹¹), the boards have relied on recent American authority.¹²

In the United States, the National Labour Relations Board and the courts, acting under the authority of s. 10(c) of the *National Labour Relations Act*¹³ which empowers the board to order an employer or union to "take such affirmative action including reinstatement of employees with or without back-pay, as will effectuate the policies of the Act," have developed a number of "extraordinary" remedies designed to deal with the "egregious conduct of the company or union."¹⁴ In *Tiidee Products, Inc.*¹⁵ the board ordered the company to reimburse the union "for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases ...", and this remedy was sanctioned by the U.S. Supreme Court (District of Columbia Circuit) in a subsequent case, *Food Store Employees, Local 347 (Heck's Inc.) v. N.L.R.B.*¹⁶ In *Tiidee*, the N.L.R.B. had also endorsed the notion of reimbursing the union for organizing costs in appropriate circumstances, and this remedy was again subsequently affirmed by the Supreme Court in *Heck's*.¹⁷

The first Canadian case in which the union was awarded this kind of monetary relief was *Robinson Little & Company Ltd. v. Retail Clerks Union, Local 1518*¹⁸. In that case, the B.C. board, acting under the recently enacted and high innovative *Labour Code of British Columbia*¹⁹, decided that, given the seriousness of the employer's violations of the *Act*,²⁰ the customary remedies were not sufficient, and accordingly ordered the company to "make whole the Union for the resources expended in its efforts to provide representation to the employees . . . , efforts which have been rendered fruitless by . . ." the employer's conduct. Similarly, in *Kidd Brothers Produce Ltd. v. Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers' Union, Local No. 351*,²¹ the board imposed a make whole order on the company by which it was required to compensate the union for that portion of its lawyer's fees, litigation and organizational expenses which were directly attributable to the employer's misconduct.²² Such an extraordinary remedy was justified, the board explained, as "the original choice by the majority of the employees, in favour of collective bargaining through trade union representation, has been totally aborted by the persistent illegal conduct of the Employer. In these circumstances, a cease and desist order which merely required the Employer to

12. *Kidd Brothers Produce Ltd. v. Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers' Union, Local No. 351*. [1976] 2 Can. L.R.B.R. 304 at 321; *Communications Workers of Canada v. Academy of Medicine, Toronto Call Answerly Service*. [1977] O.L.R.B. Rep. 783 at 794; *supra* n. 8 at 135.

13. 29 U.S.C. & 160(e). (1970).

14. *Supra* n. 7, at 222.

15. [1972] C.C.H.N.L.R.B. n. 23, 831.

16. 476 F(2d) 546 (D.C. Cir. 1973).

17. However, it should be noted that compensation for organizational costs was *not* awarded in either case for various reasons. See McDowell and Huhn, *supra* n. 7, at 227-230.

18. Unreported decision of the B.C. Labour Relations Board. April 15, 1976.

19. S.B.C. 1973, c. 122.

20. In *Robinson Little & Company*, the Board found the company guilty of a number of other unfair labour practices in addition to a breach of the duty to bargain in good faith.

21. *Supra* n. 12.

22. It should be noted that in this case, while the board concluded that the employer had breached the duty to bargain in good faith, it did not actually make a "finding of bad faith" for reasons unimportant here.

comply with the *Code* in the future would be of no more remedial value than the previous orders (of the Board)".²³

The Ontario Labour Relations Board, also acting under newly strengthened legislation, was quick to follow the B.C. precedent. In *The Ottawa Newspaper Guild and The Journal Publishing Company of Ottawa Ltd.*,²⁴ the Ontario board concluded that it had the power to award damages for a failure to bargain in good faith, and specifically, that it had the power to order the employer to recompense the union for any extra negotiating costs incurred as a result of the employer's conduct. While the board, finding that the remedy was precluded as the union was without clean hands due to a breach of the duty, did not award such damages in that case a "make whole" order was considered appropriate in a subsequent case. In *Communications Workers of Canada, (Complainant), v. Academy of Medicine, Toronto Call Answering Service, (Respondent)*,²⁵ the board ordered the employer to "reimburse the union for all reasonable organizational, bargaining, legal and other expenses associated with the efforts to acquire and pursue its statutory rights."²⁶

However, the Ontario board's decision in *Radio Shack*²⁷ represents the most radical application of the "make whole" concept in Canada to date. In *Radio Shack* the Ontario board went one step further, and, as noted previously, not only ordered the company to reimburse the union for its organizational and legal expenses, but also ordered the company to pay the employees' damages for the loss of the economic opportunity to improve their earnings through collective bargaining. As we have noted above, while damages to individual employees for the loss of wages incurred as a result of an unfair labour practice, for example, is a remedy conventionally available under most labour legislation, the "make whole" order in *Radio Shack* constitutes a significant departure from that standard remedy. The damages are not calculated on what the employee *would* have received had the illegal act not been perpetrated, but what the employee *might* have gained if a collective agreement had been concluded. While damages for wrongful loss of an economic opportunity, as both the board and (in its confirming decision) the Ontario High Court of Justice (Divisional Court) correctly pointed out, are clearly available in tort and contract law,²⁸ similar damages were unprecedented in Canadian labour law. However, the board could look to the United States for support for its view that the notion ought to be logically extended into the labour relations field.

Since the late 60's, some American academics and members of organized labour have argued that this kind of broad compensatory remedy should be available, especially in first contract situations.²⁹ In fact the scuttled *Labor*

23. *Supra* n. 12, at 324. The employer had refused to comply with a previous order of the board and in fact the B.C. Supreme Court had held it in contempt for non-compliance.

24. [1977] 2 Can. L.R.B.R. 183.

25. *Supra* n. 12.

26. *Id.* at 795. It should be noted that as Bendel correctly points out (*supra* n. 1, at 57.), the board's order was not based *per se* on a violation of the duty of good faith, but on other specific breaches of the *Act* resulting from the respondent's illegal closure of its business. The decision clearly indicates, however, that the board saw it as a flagrant case of bargaining in bad faith.

27. *Supra*, n. 8.

28. For example, both the board and the court pointed to the decision in *Chaplin v. Hicks*, [1911] 2 K.B. 786 where damages were awarded for loss of opportunity to compete in a beauty contest.

29. See, e.g., S. Schlossberg and J. Silard, "The Need for a Compensatory Remedy in Refusal-to-Bargain Cases", (1968), 14 *Wayne-L.R.* 1059; M. Yates, "The 'Make Whole' Remedy for Employer Refusal to Bargain: Early Experience Under The California Labor Relations Act", (1978), 29 *Lab. L.J.* 666.

Reform Act of 1977 contained a provision for a "make whole" remedy in cases of a failure to bargain in good faith. The relevant section stated that:

In a case in which the [National Labour Relations] Board determines that an unlawful refusal to bargain prior to the entry into the first collective-bargaining contract ... has taken place, the Board may award to the employee in that unit compensation for the delay in bargaining caused by the unfair labor practice which shall be measured by the difference between (i) the wages and other benefits received by such employees during the period of delay, and (ii) the wages and fringe benefits such employees were receiving at the time of the unfair labor practice multiplied by the percentage change in wages and other benefits stated in the Bureau of Labor Statistics' average wage and benefit settlement, quarterly report of major collective-bargaining settlements, for the quarter in which the delay began.³⁰

And while the N.L.R.B. ruled the remedy was not available under the legislation in the *Ex-Cell-O Corporation* case,³¹ legislation was enacted in California in 1975 which gave the Agricultural Labor Relations Board the power to issue "make-whole" orders.³² Section 1160.3 of the *California Agricultural Labor Relations Act* states that:

If ... the board shall be of the opinion that any person ... has engaged in or is engaging in any such unfair labor practice, the board shall ... issue ... an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and *making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain*, and to provide such other relief as will effectuate the policies of this part.³³

As Yates notes, "this unambiguously empowers the A.L.R.B. to order a monetary remedy when an employer declines to bargain in good faith."³⁴

In two subsequent decisions under the *Act* where the employer had failed to bargain in good faith in a first contract situation, the Agricultural Labor Relations Board issued "make whole" orders requiring the employer to compensate the employees for their lost potential earnings from the date of the first refusal to bargain up to the date on which the employer began to bargain in good faith. The amount of the damages was calculated on the basis of a formula similar to that contained in the proposed *Labor Reform Act*³⁵ and took into account not only wage rates negotiated elsewhere but also fringe benefits.³⁶

In *Radio Shack*, the Ontario board did not determine the precise quantum of damages the company was required to pay under the "make whole" order, preferring to leave that issue to a later board hearing when the union would have an opportunity to put together a claim. Nor did it decide on a method of calculating the damages, obviously feeling unprepared at the time to bind itself to any definitive formula. It did refer, however, to the approaches set out in the proposed *American Labor Reform Act*³⁷ and in the California cases decided under the *Agricultural Labor Relations Act*,³⁸ and stated that

30. H.R. 8410, 95 Cong., 2nd Sess., (1978), at 16-17.

31. *Supra* n. 11.

32. *California Labor Relations Act of 1975*, incorporated as Part 3.5 (ss. 1140 to 1166.3) of Division 2 of the *California Labor Code*.

33. *Id.*, s. 1160.3. Emphasis added.

34. Yates, *supra* n. 29, at 669.

35. *Supra* n. 30.

36. *Adam Dairy, (Rancho Des Dios)* (1977) A.L.R.B. Nos. 76-CE-15-M and 76-CE-36-M; *Perry Farms, Inc.*, (1977) A.L.R.B. No. 76-CE-1-S; Yates, *supra* n. 29, at 673-75.

37. *Supra* n. 30.

38. *Supra* n. 32.

Never having tried to value this loss, we are unable and unwilling to conclude that such losses cannot be established from relevant and statistically meaningful material available to the parties. The law of damages has recognized as probative the experience of others similarly employed and, with the plethora of collective bargaining data available to the parties, it would not seem rash to think that reasoned argument can be made on this issue too.³⁹

However, the importance of the *Radio Shack* "make whole" order lies not only in the fact that it expanded the scope of monetary relief available to employees, but also in the fact that, insofar as such a damage award does depend on the assumption that a collective agreement would have resulted had the employer bargained in good faith, the award can be seen as tantamount to the imposition of the terms of a collective agreement, or as Paul Weiler notes, as "a thinly-disguised form of compulsory arbitration."⁴⁰ Labour law in North America, based as it is on the fundamental principle of free collective bargaining, has traditionally regarded interference in the bargaining process by imposing on the parties a term or terms of a collective agreement as completely antithetical to this fundamental principle. Thus the system has traditionally shied away from remedies involving third party determination of a collective agreement, and even from remedies which might indirectly have such an effect. In granting the "make whole" remedy, the Ontario board were to an extent encroaching on this hitherto forbidden territory. And while the board categorically denied that the "make whole" order did amount to the "dictation of contract terms"⁴¹ (and certainly such a remedy does differ in several important ways from imposing a contract term), it is clear from other aspects of the *Radio Shack* decision that the board had come to the conclusion that encroachments on the principle could be justified in certain circumstances to ensure effective relief for employees. For the "make whole" order was not the only radical departure from conventional remedies in the board's decision in *Radio Shack*: the board also ordered the employer to drop the position it had previously taken on one important issue in the negotiating impasse, union security, in the new collective bargaining it was ordered to begin.

During the abortive contract negotiations, the union had at first proposed a union shop clause, but later it retreated to the Rand formula position for a compulsory check-off by the employer of union dues for all bargaining unit employees. The company, however, had refused to budge from its position that the most it would agree to would be a voluntary check-off of union dues which would require each employee to come forward and request the company to deduct union dues from their wages. While the board found that the company's position on this issue was not in itself illegal (i.e. in the absence of other factors the company was not obligated under the *Act* to agree to anything beyond this minimal position),⁴² it commented that "where an employer has acted as Radio Shack has and over so long a period of time, it may require a particularly courageous employee to make such a request. Therefore, when this same employer rigidly ties his position to voluntary revocable check-off,

39. *Supra* n. 8, L.R.B.R. at 136.

40. P. Weiler, *Reconcilable Differences* (Toronto Carswell, 1980), p. 55.

41. *Supra* n. 8, L.R.B.R. at 136.

42. *Labour Relations Act*, R.S.O. 1970, c. 232, s. 36(a).

his conduct is open to the inference that he is motivated by a desire to deter his employees from supporting the union in this manner.”⁴³ Thus the board found that, in the particular circumstances of this case, in particular the kind of “pervasive unlawful conduct”⁴⁴ the employer engaged in throughout the organizational and bargaining periods in an effort to undermine the position of the union, the company’s position in fact constituted a breach of the duty to bargain in good faith, or, as the Ontario High Court of Justice (Divisional Court) put it, “The company’s position on union security clearly constituted one of the significant elements of bad faith in the bargaining conduct of Radio Shack”.⁴⁵

However, it is clear that the board’s method of remedying this breach, by ordering the company to refrain from its insistence on the voluntary revocable check-off, in effect amounted to an order to the company to accede to the Rand formula (as this would be the next most desirable alternative in the range of methods for payment of union dues), and therefore the board’s order constituted in effect the imposition of a contract term on the employer. While the board did not openly concede this to be the case, pointing out only that they did not preclude the possibility that such orders could “have an indirect impact on the content of a collective agreement,”⁴⁶ the Ontario Divisional Court clearly recognized the implications of such an order and sanctioned the board’s authority to do it “even if the order has the indirect effect of imposing a term of a collective bargaining agreement upon the parties”.⁴⁷

In fact, in *Radio Shack*, the union had asked the board to go much further than this, and not simply indirectly impose one term on the employer, but a complete collective agreement. This the board declined to do. Given “both the fundamental nature of this kind of government intrusion into an otherwise free collective bargaining system and the basic value of voluntarism that underpins our political system”,⁴⁸ the *Act* would have to expressly permit this remedy before the board would feel free to employ it.

However, notwithstanding the deepseated aversion in the Canadian system to government interference in the collective bargaining process, several jurisdictions in Canada have concluded that the first contract situation warrants the kind of draconian remedy rejected in *Radio Shack* and have passed legislation providing for compulsory interest arbitration in first contract situations.

In 1973, such legislation was enacted in British Columbia as part of that province’s new *Labour Code*⁴⁹. Section 70 gives the B.C. Labour Relations Board the power to impose a collective agreement in first contract situations where negotiations have failed to result in an agreement. The section states:

(1) Where a trade union certified as bargaining agent and an employer have been engaged in collective bargaining to conclude their first collective agreement and have failed to do so,

43. *Supra* n. 8. L.R.B.R. at 127.

44. *Id.*, at 128.

45. *Id.*, C.L.L.C. at 12092.

46. *Id.*, L.R.B.R. at 142.

47. *Id.*, C.L.L.C. at 12092.

48. *Id.*, L.R.B.R. at 141.

49. R.S.B.C. 1979, c. 212.

the minister may, at the request of either party and after the investigation he considers necessary or advisable, direct the board to enquire into the dispute and, if the board considers it advisable, to settle the terms and conditions for the first collective agreement.

(2) The board shall proceed as directed, and if the board settles the terms and conditions, they shall be deemed to constitute the collective agreement between the trade union and the employer and binding on them and the employees, except to the extent they agree in writing to vary those terms and conditions.

In determining the terms of the compulsory agreement, section 71 directs the board to take into account "the extent to which the parties have, or have not bargained in good faith" and the "terms and conditions of employment negotiated through collective bargaining for comparable employees performing the same or similar functions in the same or related circumstances." It also requires the board to give the parties the opportunity to make representations before it. Section 72 limits the term of the compulsory agreement to a maximum of one year.

While the legislation clearly represents a very marked departure from the conventional pattern of remedies, it is not as drastic as it may first appear. For one thing, the board can only consider it on reference from the Minister of Labour. The reason for this, according to Paul Weiler, the principal author of the *Labour Code* and the first chairman of the B.C. Labour Relations Board after the enactment of the *Code*, was so that the Minister "who had access to the mediators in his department, could screen out any but the most serious cases for which the remedy was truly designed."⁵⁰ Secondly, as the *Code* does not define the circumstances in which the remedy should be applied,⁵¹ the board appears to have been given almost complete discretion as to the situations in which it feels such a remedy would be appropriate. In fact, since the enactment of the legislation, the board has taken a very restrictive view of the kinds of situations in which the remedy should be available. In the first case decided under the new provision, *Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers' Union, Local 351 v. London Drugs Ltd.*⁵², the board makes it clear that a mere break-down in negotiations, even one accompanied by a long strike, would not be sufficient to invoke the remedy. "It is not intended as a standard response to the break-down of bargaining, even in the case of first-contract negotiations."⁵³ Rather, the board explained, it was an "unusual device" intended to be used in certain situations where the employer is determined not to deal with a union and thus refuses to engage in meaningful negotiations.⁵⁴

The provision was designed by the Legislature, the board argued, to deal with the particularly problematic situation in first contract negotiations where a small bargaining unit, having succeeded in obtaining certification despite the

50. *Supra* n. 40, p. 53.

51. It should be noted that in *Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers' Union, Local 351 v. London Drugs Ltd.*, [1974] 1 Can. L.R.B.R. 140 at 142, the board, in ruling that the absence of bad faith bargaining is not a bar to the jurisdiction of the board in s. 70 applications, seemed to indicate that the extent of good faith bargaining and collective agreements negotiated for comparable employees were matters that the board was directed by the legislation to take into account in determining whether a first contract should be imposed. Notwithstanding the fact that Paul Weiler gave that opinion, a plain reading of the legislation indicates that the board is directed to consider these matters when determining the terms of the agreement to be imposed, *after* the decision to impose the contract has been made by the board.

52. *Ibid.*

53. *Id.*, at 143.

54. *Ibid.*

determined efforts of the employer to undermine the union, proceeds on the basis of its by then tenuous bargaining authority, to try to negotiate with the employer. The employer, recognizing the weak position of the union, drags out the negotiations, and continues in subtle and not so subtle ways to try to discredit the union with the employees.

Eventually, the union, unable to secure an agreement, calls a strike. However, some employees, both those originally opposed to the union and those now disenchanted by the lack of tangible results, refuse to go out. Those who do strike are easily replaced because of the small size of the unit and the fact that the employees are not highly skilled. In that situation, the union has no economic leverage to budge the employer, negotiations and mediation are futile, and the employer can wait the union out. Eventually a decertification application becomes timely and those who are then working may be a sufficient majority to achieve that result.⁵⁵

As Paul Weiler has commented:

We agreed that a party must be able to stick stubbornly to what might appear to an outsider to be an entirely idiosyncratic stance. What we were concerned about was a deadlock produced because the parties were incapable of bargaining at all, especially if one of the parties - typically, though not exclusively, the employer - had simply not accepted the principle of collective bargaining itself.⁵⁶

Moreover, the board has further restricted the application of the remedy to situations in which it feels there is a realistic expectation that the union will have enough support to represent the employees after the expiry of the imposed agreement. In other words, as the board pointed out in *Kidd Brothers*,⁵⁷ even if the union can satisfy the board that it meets all the technical requirements of s. 70 and that its case is the kind of situation described in *London Drugs*, the board may still not grant the remedy where there is little hope the union will survive, as to do so, would merely result in punishing the employer. In *Kidd Brothers*, the board refused to impose an agreement, stating that on the facts of the case:

The realization of meaningful collective bargaining is but an empty hope. The fact is that the Union no longer enjoyed any support among the employees in the bargaining unit, and there are no real prospects of a rejuvenation of this support. In these circumstances, the imposition of a first collective agreement would be a fruitless exercise, and would not be in keeping with the spirit of the remedy.

The board noted that:

In enacting s. 70, the Legislature did not intend that it would be used merely as a device to punish an employer who had been successful in fending off the onset of collective bargaining. Rather, what the Legislature had in mind was a positive remedy through which it was hoped that collective bargaining could put down roots that would enable it to survive. It was the expectation of the authors of the law that an enforced one-year trial marriage might erase enough of the bitterness and distrust between the parties so that meaningful collective bargaining directed at the real issues would be possible when the time for renewal arrived.⁵⁸

In fact the legislation has been used sparingly by the board. In the first four years after s. 70 was proclaimed in January, 1974, out of 27 applications

55. *Id.*, at 142.

56. *Supra* n. 40, at 53.

57. *Supra* n. 12, at 318.

58. *Ibid.*

referred to the board by the Ministry of Labour, only 8 collective agreements were actually imposed.⁵⁹

Both the *Quebec* and the *Canadian Labour Codes* have also been amended to provide for first contract arbitration. Section 93 of the *Quebec Labour Code*⁶⁰ which was enacted in 1977, contains a "double screening process"⁶¹ similar to the *B.C. Code*. It permits a party to apply to the Minister of Labour to submit the dispute to a "council of arbitration", but only after conciliation efforts have failed. The Minister may then refer the dispute to the council which has the discretion to impose a collective agreement. In determining whether this is the appropriate remedy, the council is to take into account the extent to which the parties have bargained in good faith, and in determining the contents of the agreement, the council is authorized to consider "the conditions of employment prevailing in similar undertakings or in similar circumstances." The agreement is to endure for at least one but not longer than two years, and the parties may amend it by mutual agreement at any time. In substance, then, the Quebec legislation is little different from s. 70 of the *B.C. Code*.

The federal legislation, proclaimed in 1978, is in most respects simply a carbon copy of the B.C. provision. The only differences between s. 171.1 of the *Canada Labour Code*⁶² and s. 70 of the *B.C. Code* are that (a) the Minister of Labour cannot refer the dispute to labour board until the parties have met all the statutory requirements for a strike or lockout,⁶³ and (b) the parties do not have the right to request the intervention of the Minister. Moreover, the Canada Labour Relations Board evidently intends to interpret the scope and intent of the legislation in a manner similar to that adopted by the B.C. board. In the first case to consider this section, *Radiodiffusion Mutuelle Limitée*,⁶⁴ the federal board stated that "when it refines the criteria [in applying s. 171.1], it will pattern itself significantly on the criteria established by the British Columbia Board."⁶⁵

The Manitoba Labour Relations Act

Before examining the specific provisions in the Manitoba *Labour Relations Act* respecting the duty to bargain in good faith and the remedies for a breach of that duty, it is important to note that a completely revised *Labour Relations Act* was enacted in 1972, and that this new *Act* was itself substantially amended in 1976. One of the objects of the 1976 amendments according to a discussion paper issued by the Minister of Labour in 1975 was to expand the remedial powers of the Manitoba Labour Board.⁶⁶ This policy objective was reiterated by the Minister when introducing the amendments in the Legislature for second reading.⁶⁷

59. S. Muthuchidambaram, "Settlement of First Collective Agreement". (1980). 35 *Relations Industrielles* 387 at 401.

60. R.S.Q. 1977, c. C-27.

61. *Supra* n. 51, at 141-142.

62. R.S.C. 1970, c. L-1 as am. S.C. 1977-78, c. 27.

63. These requirements are set out in ss. 180(1)(a) to Cd.

64. [1979] 1 Can. L.R.B.R. 332.

65. *Id.*, at 378.

66. Manitoba Department of Labour, *Information Concerning PO(1975)*, pp. 2,3; see also Manitoba Department of Labour, *Annual Report*, (1976), p. 9.

67. Manitoba Legislature, *Debates and Proceedings*, 3rd Session, 30th Legislature, p. 4453.

Specifically, the 1976 amendments included, a strengthened privative clause intended to limit judicial review of board orders, and a new remedy for unfair labour practices which gives the board the power to award what is in effect general damages (up to a maximum of \$500) to any person who has suffered "an interference with his rights" as a result of an unfair labour practice.⁶⁸ In addition, the 1976 bill provided for a new kind of relief to the union in first contract situations in the form of a "Code of Employment."⁶⁹ Significantly, however, neither the 1972 Act nor the 1976 amendments altered the existing statutory provisions concerning the duty to bargain in good faith and the board's remedial authority with respect to breaches of that duty. The relevant sections have remained virtually unchanged for at least the last 25 years.⁷⁰

Sections 53 and 54 of the *Act* require that once notice to commence collective bargaining has been given in accordance with the provisions of the *Act*, the parties must without delay meet and begin to bargain collectively and "make every reasonable effort to conclude" a collective agreement. A violation of this provision theoretically subjects the offender to the possibility of a prosecution in the courts under s. 126 of the *Act* which stipulates that any contravention of the *Act* constitutes an offence, and provides for fines of up to \$500 for corporations, unions, and employers' organizations, and of up to \$250 plus a maximum of one month's imprisonment for individuals. Further, s. 127 provides that contraventions of the *Act* subject the offender to civil liability for general and special damages. However, for reasons discussed later in this paper, such penalties rarely, if ever, are invoked in Manitoba.

The Labour Board's remedial authority for a breach of the duty to bargain is delineated in s. 57:

s.57(1) Where the *minister* receives a complaint in writing from a party to collective bargaining that any other party to the collective bargaining has failed to comply with section 53 or section 54 he *may* refer it to the board. S.57(2) Where a complaint from a party to collective bargaining is referred to the board under subsection (1), the board shall inquire into the complaint, and may dismiss the complaint or *may make an order requiring any party to the collective bargaining to do such things as, in the opinion of the board, are necessary to secure compliance with section 53 or 54 as the case requires.* (Emphasis added).

The scope of the remedies available to the Labour Board under this section is not altogether clear. On the face of it, it would appear to give the board at least the power to issue the standard declaratory order directing the parties to cease and desist from their previous unlawful practices and to bargain as required in sections 53 and 54, but the question is: does the section authorize the Labour Board to go further than this and order the kinds of affirmative remedies we have discussed previously in this paper, and in particular the "make whole" order?

Arguably, the plain language of the section, especially the phrase "to do such things as, in the opinion of the board, are necessary," is broad enough to encompass practically any remedy the board deems appropriate. Since there

68. *Labour Relations Act*, C.C.S.M. c. L-10, s. 22(6)(d).

69. *Id.*, s. 75.1.

70. *See, e.g.* *Manitoba Labour Relations Act*, R.S.M. 1954, c. 132.

are no Manitoba board or court decisions interpreting the scope of the board's remedial power under this section (and indeed no decisions in any Canadian jurisdiction with similar legislation), it would appear to be open to the board and the courts to construe the legislation broadly.

There are several problems, it is submitted, with this position. Firstly, it is equally arguable that the plain language of the section compels the contrary conclusion, that the board has only limited remedial authority with respect to the duty to bargain in good faith. The phrase quoted is followed by the limiting phrase "to secure compliance with section 53 or 54," which sections outline the duty to make all reasonable efforts to conclude a collective agreement. Therefore, it could be argued that all the section empowers the board to do is to order the parties to commence to bargain in good faith. Secondly, the contention that this latter interpretation is correct is reinforced by an examination of the relevant case law and other authorities. As we have pointed out, there is no case law interpreting this section in Manitoba,⁷¹ even though this section has been part of our labour legislation for at least the last 25 years.⁷² As well, legislation in other Canadian jurisdictions with the same or effectively the same wording, has similarly escaped judicial or board interpretation, at least in reported decisions.⁷³ In the literature in this area of labour law (which is only slightly more voluminous than the case law), the writers seem to have accepted without question the narrow interpretation that this kind of provision only provides for mandatory bargaining orders.⁷⁴

The main reason for the paucity of cases in this area appears to be that unions have rarely sought relief in bad faith bargaining situations under these provisions. The reasons for this reluctance are first, the difficulty of establishing a breach of the duty to bargain in good faith (as exemplified by the *Radio Oil* case⁷⁵), and, second, precisely because s. 57 only permits the limited remedy of a mandatory bargaining order and this kind of relief is considered practically useless. As one report noted, while some people feel the mandatory bargaining order is of some use in that at least the parties sit down together after receiving the board order, "since the parties are already obliged by law to (bargain in good faith), the board orders are considered by many to be superfluous."⁷⁶ And certainly, in Manitoba, it would appear from an examination of the statistics presented in the Department of Labour's Annual Reports, that parties have rarely initiated complaints under s. 53, and when they have

71. There are two reported decisions dealing with the duty to bargain in good faith under s. 53. One, *Leitold v. Canadian Gypsum Co. Ltd.*, [1976] 3 W.W.R. 215; 77 C.L.L.C. 14058 (Man. Prov. Ct.) examined whether or not failing to bargain collectively and failing to make every reasonable effort to conclude a collective agreement constitute two separate offences. The other, *Building Material Drivers, Warehousemen and Helpers' Local 914, International Brotherhood of Teamsters v. Radio Oil Refineries*, [1960] C.L.L.C. 849, did involve an application for relief under s. 53, but the board dismissed the complaint. No decisions concerning s. 57 *per se* have been reported.

72. *Supra* n. 70, s. 40.

73. The statutes currently in effect in Nova Scotia and New Brunswick contain the same or effectively the same language as the Manitoba Act. (*Industrial Relations Act*, R.S.N.B. 1973, c. 1-4, s. 107; *Trade Union Act*, S.N.S. 1972, c. 19, s. 34); and according to Palmer, *supra* n. 3, at 416, the *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152, s. 43 and the *Labour Relations Act*, R.S.N., 1952, c. 258, s. 44 were also similar to the Manitoba section.

74. See Palmer, *supra* n. 3, at 416; Task Force on Labour Relations (1968), *Unfair Labour Practices: An Explanatory Study of the Efficacy of the Law of Unfair Labour Practices in Canada*, Study No. 10, p. 55 (I. Christie et. al.); Task Force on Labour Relations, *Canadian Industrial Relations* (1968), p. 163.

75. *Supra* n. 71. In that case, the board found no breach of the duty to bargain even though the company's bargaining proposal had demanded that the union furnish a bond of \$500,000 to guarantee against breaches of the agreement by the union and that the agreement be binding for a term of 25 years!

76. *Unfair Labour Practices*, *supra* n. 74, pp. 55,56.

done so, they appear to do so only when the other party delays in commencing negotiations after notice has been given.⁷⁷

However, perhaps the most compelling argument emerges from a comparison of the Manitoba legislation with the legislative provisions in those provinces, such as British Columbia and Ontario, under which more broad kinds of relief, including the "make whole" order have been granted. The remedies ordered by the Ontario Labour Relations Board in *Radio Shack* as well as in *Academy of Medicine*,⁷⁹ were granted pursuant to a new remedial provision in the Ontario *Labour Relations Act* enacted in 1975. Section 79(4) of the Ontario *Act* reads:

... where the Board is satisfied that an employer ... has acted contrary to this Act it shall determine what, if anything, the employer ... shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,
 (a) an order directing the employer ... to cease doing the act or acts complained of;
 (b) an order directing the employer ... to rectify the act or acts complained of; or
 (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer ...

From the outset, the Ontario board viewed the amendment as adding "substantially to the remedial avenues open to the parties."⁸¹ In *Radio Shack*, the Board relied mainly on the "very open-ended wording"⁸² of the section in coming to the conclusion that its remedial powers were broad enough to embrace the remedies it granted, in particular the "make whole" orders. The board agreed that the language of the section, particularly the phrase, the board "shall determine what if anything, a party shall do or refrain from doing with respect thereto" and the introductory phrase to the enumerated specific powers - "without limiting the generality of the foregoing ..." - clothed the board with the "broadest power to provide relief"⁸³ and therefore gave the board the authority to make the damages award.

The section of the British Columbia *Labour Code* under which the B.C. board has issued "make whole" orders is similarly broadly worded. Section 28 of the B.C. *Code* reads:

(1) Where ... the board is satisfied that any person has contravened this Act ..., it may, in its discretion,
 (a) order a person to do any thing for the purpose of complying with this Act ..., or to refrain from doing any act, thing or omission in contravention of this Act ...;
 (b) order a person to rectify a contravention of this Act ...; ...
 (d) ... make an order determining and fixing the monetary value of an injury or loss suffered by a person as a result of a contravention of this Act ..., and directing a person to pay to the person suffering the injury or loss the amount of that monetary value; or

77. Manitoba Department of Labour (1976), *Annual Report*, pp. 25-26.

78. *Supra* n. 8.

79. *Supra* n. 12.

80. *The Labour Relations Act*, R.S.O. 1970, c. 232 as am. S.O. 1975, c. 76.

81. *United Electrical, Radio and Machine Workers of America v. De Vilbiss (Canada) Ltd.*, [1976] O.L.R.B. Rep. 49, at 61.

82. *Supra* n. 8, L.R.B.R. at 129.

83. *Id.*, at 131.

- (e) order an employer to reinstate an employee discharged in contravention of this Act ...; or
- (f) make another order or proceed in another manner under this Act ...that the board considers appropriate.

The B.C. board has made it clear that in its view the language of the section (in particular the sections expressly empowering the board to order rectification of violations, to award damages for injuries or losses suffered as a consequence of contraventions of the *Code*, and to make such other orders or proceed in any other manner as it deems appropriate and in furtherance of the objectives and policies of the *Code*) has significantly expanded the remedial powers of the board. "The legislative policy underlying the expansion of the Board's remedial authority has at least two dimensions: first, to establish a wider range of alternative remedies in the law and to eliminate any artificial restrictions on the type of remedy which may be ordered; and secondly, to provide the Board, which is the chief agency for giving effect to the law, with a general mandate to design and apply remedies which will respond to the needs of the particular labour relations dispute or problem in hand."⁸⁴

It is at once evident that the language of Manitoba's section 57 is nowhere near as comprehensive and definitive as the Ontario and British Columbia provisions. For example, it does not state, as the others do, that the board has the power to award money compensation, nor does it state, as the others do, that the board can make orders to rectify the contraventions. Furthermore, it is stretching credulity to suppose that the Manitoba board, or Manitoba's courts, given their historical tendency to interpret the Manitoba legislation narrowly⁸⁵ would sanction more drastic remedies such as the 'make whole' order in the absence of express legislative authority to do so.

If section 57 then appears to give the Manitoba board very limited remedial authority with respect to breaches of the duty to bargain in good faith in collective bargaining generally, the *Act* does contain another provision which appears to provide additional relief in first contract situations. Section 75.1, enacted in 1976, essentially provides that where a certified bargaining agent fails to achieve a collective agreement with the employer within a certain period of time after certification, and the employer unilaterally alters a term or condition of employment within that period, the employer may be obliged to prepare a written "code of employment". This "code of employment" will be as binding as a collective agreement, and, if the employer fails to prepare the code, the board itself may prepare the code. Section 75.1 reads:

75.1(1) Where

(a) within one year after the expiry of 90 days after the date on which a union is certified as the bargaining agent for a unit or the expiry of any period of extension that may be ordered ...;

(b) no collective agreement has been in effect between the bargaining agent and the employer since the date on which the union was certified as the bargaining agent of the unit; and

(c) *without the written consent of the bargaining agent, the employer increases the rate of wages or alters any other term or condition of employment of any employee in the unit which was in effect on the expiry of the periods mentioned in clause (a), the bargaining agent may, in writing, request the employer to prepare a written code of employment for the employees*

84. *Kidd Brothers Produce*, *supra* n. 12, at 322.

85. *e.g. Radio Oil*, *supra* n. 71.

in the unit setting out the rates of wages and the terms and conditions of employment of the employees in the unit as increased or altered, as the case may be, and the employer shall within 30 days after receiving the request prepare the written code of employment and deliver a copy thereof to the bargaining agent.

75.1(2) *Sections 68 [compulsory check-off provision mandatory] and 69 [arbitration provision mandatory] apply mutatis mutandis to a code of employment prepared under this section as though it were a collective agreement.*

75.1(3) A code of employment prepared under this section in respect of a unit is effective for a period of 1 year commencing on the date on which the request was made to prepare the code of employment.

75.1(4) *A code of employment prepared under this section in respect of a unit is enforceable by the bargaining agent for the unit and the employer as though it were a collective agreement.*

75.1(5) Where a code of employment prepared by an employer under this section in respect of the unit is in effect, the provisions of this Act apply in all respects as though a collective agreement were in effect between the employer and the bargaining agent in the terms of the code of employment ...

75.1(7) Where a dispute arises as to (a) whether the rate of wages of employees in a unit have been increased; or

(b) whether the terms and conditions of employment in a unit have been altered; or

(c) the date on which an increase in rate of wages or an alteration in any other term or condition of employment ... became effective; or

(d) what rate of wages are paid to employees in a unit; or

(e) what terms and conditions of employment apply to employees in a unit; or

(f) whether a code of employment prepared under this section accurately sets out the rate of wages and terms and conditions of employment ...; any party to the dispute may apply to the board to determine the dispute and the board shall determine the dispute and make such order as it thinks necessary to give effect to the determination.

75.1(8) *Where an employer who has been requested under subsection (1) by a bargaining agent to prepare a code of employment refuses or fails to comply with subsection (1), the bargaining agent may apply to the board to prepare the code of employment and the board may prepare the code of employment and any code of employment prepared by the board under this subsection has the same force and effect as though it were prepared by the employer. (emphasis added).*

Prima facie, this section appears to provide a similar kind of remedy to the first contract arbitration provisions contained in the B.C., Quebec and federal labour legislation.⁸⁶ Firstly, the "code of employment" looks like a collective agreement: it contains the terms and conditions of employment including wage rates, as well as the mandatory provisions respecting compulsory check-off and arbitration contained in sections 68 and 69 of the *Act*. Secondly, it has the force of a collective agreement. Thirdly, if the employer refuses or fails to prepare a "code of employment" as, and if, required under subsection 1, the board is authorized to prepare one and the document has the force of a collective agreement. In other words, the board can impose what is in effect a collective agreement on the employer.

However, there are also very important differences between the other legislation and the Manitoba provision. Firstly, the remedy is only triggered if the employer increases the rate of wages or alters any term or condition of any employee during the prohibited period. While this is certainly one technique employers often use to undermine a union seeking its first collective agreement, there are obviously a host of other perhaps more subtle methods employers can and do use to frustrate unions in the post-certification stage.

86. One commentator, S. Muthuchidambaram, *supra* n. 59 indicates in a passing reference to the Manitoba legislation that he believes it to be a generic equivalent of the other provisions.

These latter tactics, however, would be irrelevant under s. 75(1).⁸⁷ In contrast, under the B.C. type of legislation, the board can consider any factors which relate to the bargaining conduct of the employer, including a past history of anti-union conduct in the pre-certification stage.

Secondly, the contents of the Code of Employment are merely the employees' *existing* terms and conditions of employment as amended by any increase in wages or other change the employer has unilaterally implemented. And this is so even when the board itself writes the code. In contrast, the B.C. type of legislation gives the board a mandate to act as an arbitrator; although the board is required to listen to the positions of the parties, the board itself decides the appropriate terms and conditions, and does so by reference to wages and conditions negotiated elsewhere for similar employees.

Furthermore, it is abundantly clear that the Manitoba Government in enacting s. 75.1 never had any intention of providing the labour board with the kind of "big stick" handed to the B.C. labour board by their *Labour Code*. While the Department of Labour's *Annual Report* for 1976 referred to s. 75.1 in glowing terms as "one of the most significant and unique amendments to the *Act* ... intended to provide a possible solution to the difficulty some unions encounter in attempting to obtain a first collective agreement with an employer,"⁸⁸ the Government's statements in the Legislature were not so disingenuous. As the Hon. A.R. Pauley, the Minister of Labour, stated:

[While] Representations were made to the government to enact similar legislation here in Manitoba to that prevailing in British Columbia, we had always held to the basic principle that there should be no compulsion in collective bargaining, that the parties themselves should reach agreement after due negotiations ... we gave consideration to adopting similar legislation to that prevailing in British Columbia. And after that consideration, we felt there were different ways in which the same could be achieved without the full compulsory objectives of the British Columbia legislation. And you will find contained within the bill before you, a proposition which gives to the newly certified unions and the employer a slightly different approach in reaching an agreement; not the compulsory certified agreement, but a working code acceptable to management and to labour without being imposed upon them directly through legislation.⁸⁹

The Hon. Sidney Green was even more emphatic in disputing the notion that s. 75.1 provided anything more than minimal additional relief to unions:

... I don't know what group of employees is going to say that they are going to go on strike to obtain the same terms and conditions as they are then getting and merely get the employer to sign an agreement [the Code of Employment], *an agreement which does nothing else than recognize that the union is the bargaining agent*. It gives them a grievance procedure ..., and it gives them a check-off which the union has earned by getting the increased wages ... Now what does this *Act* do, Mr. Speaker? I say to you *there is no compulsion in this legislation whatsoever. This legislation merely extends the certificate ... it merely says that the certificate will extend if the employees want it to - at the option of the union - to any terms and conditions of employment, not that are set by a third party but that the employer himself*

87. S. Muthuchidambaram, *supra* n. 59 gives the following examples (at 390):

Effective use of captive audience, systematic interrogation of employees, promulgation and discriminatory enforcement of no-access, no-distribution and no-solicitation rules, threatened loss of existing benefits, either encouragement or revival of a grievance committee as union substitution, management-initiated pre-certification and paaalties or loopholes with a view to frustrate unionization or to kill an infant union by sheer war of nerves, conversion of management's right to discipline employees into a union-hunting license, employer's systematic pre-certification polling of employees regarding their union sentiments, and misuse of employees' freedom of speech prior to, during and after certification.

88. *Supra* n. 77, p. 10.

89. *Supra* n. 67.

sets. It merely takes away one sort of devious avoidance of *The Labour Relations Act* by an employer who could be ... emptied to say that I can get rid of this union by paying the wages and not signing the agreement.⁹⁰

Finally, the fact that not even one union has sought relief under this section in the five years since its enactment (a situation in marked contrast to the B.C. experience under their s. 70) in itself testifies to its relative impotence.

An Evaluation

The limited remedial powers of the Manitoba Labour Board with respect to the duty to bargain in good faith are consistent with the long-held view in Canadian labour relations that the basic system of free collective bargaining is best served by minimal interference in the collective bargaining process. The sentiments expressed by an American senator when the original National Labor Relations (Wagner) Act (1935) — upon which much Canadian labour legislation was modelled — are representative of the traditional approach to the duty to bargain in both Canada and the United States:

When employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not enquired into, and the bill does not seek to enquire into it.⁹²

As recently as 1968, this philosophy still dominated the labour scene in Canada. In that year, the National Task Force on Labour Relations stated:

The duty to bargain is not a duty to agree; nor does the right to bargain grant a right to a particular bargain. We see no reason why the subject matter of bargaining should not include anything that is not contrary to law. As to tactics, the highest duty that should reasonably be placed on either party to a bargaining situation, in which each has a claim to preserve its freedom respecting its bargaining position, is to state its position on matters put in issue. *But we cannot envisage such a duty being amenable to legal enforcement, except perhaps to the extent of an obligation to meet and exchange positions.*⁹³

As this passage indicates, the conventional wisdom was that mandatory bargaining orders were the only practical way of attempting to enforce the duty to bargain without unduly interfering with the free collective bargaining system. On the other hand, "consent to prosecute" provisions, although enacted in several jurisdictions including Manitoba, never appear to have been considered an effective tool for dealing with violations of the duty.⁹⁴ Unions and employers have rarely sought relief for breaches of the duty by seeking consent from the boards to prosecute in the courts,⁹⁵ and Professors Palmer and Carter have advanced several reasons for this. Palmer argues:

The initial problem ... lies in its *quasi*-criminal nature. In carrying out the function Boards technically are placed in a position equivalent to that of a magistrate at a preliminary hearing, i.e. their *role* is to decide if there is [sic] sufficient facts to establish a *prima facie*

90. *Id.*, at 4547. Emphasis added.

91. *Unfair Labour Practices*, *supra* n. 74, p. 92.

92. Industrial Relations Centre, Queen's University, *Labour Relations Law* (3rd ed., 1980), p. vi-34.

93. *Canadian Industrial Relations*, *supra* n. 74, p. 163.

94. *Unfair Labour Practices*, *supra* n. 74, p. 55.

95. Palmer, *supra* n. 3, at 417, quoted from another study which showed that in a ten-year period, the Ontario board only dealt with two such cases, and in a low-year period, the federal board only dealt with six, only one of which was successful. No comparable data exist for Manitoba but there is no reason to believe that the situation is any different.

case. In fact, probably due to the severity of criminal sanctions in an inherently civil situation [sic], the Boards have gone a long way towards whittling down the rights to a prosecution in these cases by the use of discretionary rules used in ordinary cases as well as ones developed specifically for "bargaining in good faith" cases ... In short, consents to prosecute have provided substantial procedural and psychological barriers to an applicant.⁹⁶

Another reason is that the criminal aspects of such a procedure are contrary to the accommodative goals of our labour relations system and to the complainant's primary goal of obtaining an agreement. As Carter observes "A criminal charge ... may have the effect of forcing the parties to adopt more rigid positions, making the chances of settlement even more remote."⁹⁷ The most cogent reason in my view, is simply the poverty of the remedy the successful complainant can gain. Of what possible use to a union seeking an agreement is a \$500 fine on the employer? Considerations such as these have prompted changes in the federal legislation to severely restrict the availability of criminal sanctions and, in the B.C. *Labour Code*, they were eliminated entirely.⁹⁸

While the mandatory bargaining order is not burdened with the vices of the criminal proceeding, it is similarly subject to the criticism that it is ineffectual. It is the standard remedy in both the U.S. and Canada, and commentators in both jurisdictions are seemingly unanimous in their opinion that it is virtually worthless.⁹⁹ All it can do is force the employer back to the bargaining table, but once he's there, the door is shut. There is no incentive whatsoever for him to alter his position which caused the impasse in the first place. As Bendel argues:

This remedy has obvious shortcomings. In reality, it is little more than a declaration of a breach of the Act, although it could in theory be used as a basis for contempt proceedings. It is only likely to be of value in cases where there has been some honest disagreement between the parties concerning the duty to bargain and where they share a genuine desire to arrive at a collective agreement. But if the employer has failed throughout to bargain in good faith and has no intention or desire ever to enter into a collective agreement with the union, of what practical use is a simple order that he comply with his statutory obligation?¹⁰⁰

Moreover, as the Ontario board pointed out in *Radio Shack*, by the time the employer comes back to the bargaining table, he is usually in a more advantageous position to bargain with the union, as the union has already been debilitated by the employer's illegal conduct on which the order was based.¹⁰¹

The ineffectiveness of these standard remedies is all the more obvious, and all the more unfortunate, in the first contract bargaining situation. All unions are in a relatively more precarious position in bargaining for the first contract: they must justify the employees' faith in the union by obtaining an agreement which is at least an improvement on the situation the employees were in without union representation, and if the union fails, they have no track record to fall back on to maintain the employees' confidence. This already uphill struggle is more difficult when the union faces a particularly recalcitrant employer and in situations where the circumstances increase the union's

96. *Id.*, at 416.

97. *Supra* n. 6, at 6.

98. *Id.*, at 6 and 8.

99. See e.g. *Supra* n. 1, at 35; C. Morris, "The Role of the N.L.R.B. and the Courts in the Collective Bargaining Process: A Fresh Look at Conventional Wisdom and Unconventional Remedies", (1977) 30 *Van. L.R.* 661 at 667; Palmer, *supra* n. 3, at 416; J. Gross et. al., "Good Faith in Labour Negotiations: Tests and Remedies", (1968) 53 *Corn. L.R.* 1009.

100. *Supra* n. 1, at 35.

101. *Supra* n. 8, L.R.B.R. at 138.

vulnerability as in the case of a small bargaining unit with minimally skilled employees who are easily replaced. In these situations, the employer simply drags out the negotiations, meanwhile engaging in various activities which further undermine the union's already vulnerable position. Once the union is successful in obtaining a bargaining order, it is too little and too late. The union is already dead. This typical situation was described in *London Drugs*¹⁰² and exemplified in *Kidd Brothers*.¹⁰³

However, it should be emphasized that the problem is not confined to these situations; it occurs, perhaps not as frequently, with larger employers as the classic American case of *Reed & Prince* illustrates.¹⁰⁴ In that case, the United Steelworkers of America made two attempts to obtain a first collective agreement, the first beginning in 1937; the second, in 1950. On both occasions, the determinedly anti-union employer carried out a successful campaign of attrition. By the time the union finally obtained judicially enforced N.L.R.B. rulings that the employer had bargained in bad faith and mandatory bargaining orders, (in the first case, in 1941, and in the second, in 1953), the union had been fatally weakened. Ultimately, as Gross *et al* note, "Each of the union's legal victories was followed by a substandard contract and the demise of the union as an active and representative entity."¹⁰⁵

In short, to quote Paul Weiler, "the standard remedies for breach of the duty to bargain — a cease-and-desist order which tells the employer not to do it any more, or even criminal prosecutions in the provincial court, which may produce a fine that is no more than a small fee paid by the employer to get rid of the union — prove as effective in that setting as a flyswatter against a swarm of angry bees."¹⁰⁶

These problems, it is submitted, would be ameliorated to a great extent if the remedial authority of the Manitoba Labour Board was expanded to give the board the power to grant the kind of affirmative remedies discussed above, in particular the *Radio Shack* "make whole" order. The purpose of the "make-whole" order is primarily compensatory; it recognizes that the loss of the opportunity to negotiate a collective agreement, if not precisely quantifiable, is nevertheless a very real economic loss to the employees. What they have lost is their reasonable "prospects ... of increased earnings from the exercise of the trade union's bargaining capacity."¹⁰⁷ When such a loss can be clearly attributed to an employer's failure to bargain in good faith, then the employer should have to bear the burden of his misconduct by compensating the employees to the full extent of their loss. The remedy also has a second advantage: it can deter the employer from further misconduct and other employers who are tempted to engage in bad faith bargaining.¹⁰⁸ "[E]mployers ... will have to bargain seriously at all times or risk possibly large financial losses."¹⁰⁹ As the board in *Radio Shack* argued:

102. *Supra* n. 51.

103. *Supra* n. 12.

104. See Gross, *supra* n. 97, at 1011-1023 for a description of the case.

105. *Id.*, at 1011.

106. *Supra*, n. 40, at 52.

107. *Supra* n. 8, L.R.B.R. at 136.

108. *Academy of Medicine*, *supra* n. 12, at 794.

109. Yates, *supra* n. 29, at 676.

Employees join a trade union with, in their minds at least, the reasonable prospect of obtaining an improvement in their working conditions. In fact, the [union] may be able to statistically document the reasonableness of such employee expectations. When an employer responds with flagrant unfair labour practices, he wrongly prevents his employees from realizing their expectations or delays having to deal with any of their demands. For example, an employer may be able to escape with no contract at all if the initial organizing strength of the union can be so eroded by unfair labour practices that a strike can be outlasted. Moreover, the employer receives an unfair competitive advantage over those employers who do bargain in good faith, making the unlawful conduct attractive to other employers. In labour relations terms these employee losses are real; the potential employer gains unjust; and both are accomplished by the violation of a fundamental duty imposed by the legislation - bargaining agent recognition. The failure to consider any monetary relief seems to encourage these consequences.¹¹⁰

The “make whole” remedy is not without its opponents, however. In refusing to apply the remedy, the American National Labour Relations Board has found two objections to be particularly persuasive. One is that the remedy is too speculative: it requires the board to assume that a collective agreement would have been reached, and that this agreement would have contained improved wages and benefits for the employees, and then it requires the board to arbitrarily decide the specific benefits that might have been obtained if not for the employer’s refusal to bargain. Secondly, it is argued that the award amounts to the imposition of a contract term upon the employer, or at least tends to establish the terms of any future agreement.¹¹¹

With respect to the first argument, while it is true that the quantum of the award must be based on an estimate of what the employees could have expected to gain from an agreement, the board does not have to pull the figure out of thin air. Because Canadian boards have ready access to all sorts of data on wages and benefits obtained through collective bargaining in all sectors of the economy, they are quite capable of predicting with reasonable accuracy what could be expected to have been agreed to in any particular industry or employment situation. By reference to such objective data, the element of arbitrariness or conjecture in the board’s award can be substantially reduced. Furthermore, as the Ontario board noted in *Radio Shack*, the mere existence of some uncertainty as to the exact amount of damage has never deterred the courts from ordering compensatory damages in ordinary civil actions.¹¹²

With respect to the second argument, the damage award is distinguishable from the imposition of a contract term in at least two important respects. Firstly, losses are only calculated from the time of the breach until the time the employer commences to bargain in good faith.¹¹³ Secondly, there is nothing to compel the employer to regard any additional amount awarded above the existing wage and benefit scale as a floor rate in the subsequent negotiations, just as there is nothing to compel the union to accept the award as a ceiling. As Schlossberg and Silard point out:

It [merely makes employees] whole for the wage gains which they reasonably *might or could have achieved* had their rights been respected. Far from writing a contract for the

110. *Supra* n. 8, at 134.

111. *See supra* n. 11, at 28673.

112. *Supra* n. 8, at 134.

113. In *Radio Shack, Ibid.*, the period over which the damages were to be payable ran from the date of the breach to the date of the first bargaining meeting that the board had ordered the employer to convene.

parties, the Board is simply making the workers whole for the injury caused when they were denied a statutory right which our labor relations experience demonstrates to have actual and substantial monetary value. Since a contract does not necessarily materialize in collective bargaining negotiations, the wrong which the Board is redressing is not the denial of the right to a contract, but rather the right to bargain collectively, in pursuit of a contract. ...¹¹⁴

A third objection to the "make whole" remedy is that it is punitive and therefore it conflicts with the basic accommodative role of labour boards in helping to resolve labour disputes. It has the effect of further exacerbating already poor relations between the employer and the union, thereby rendering the possibility of future amicable relations even more remote. This third argument (which apparently was not considered serious enough to warrant comment by the N.L.R.B. in the cases in which the remedy was considered)¹¹⁵ is not compelling as it could be equally argued that many other accepted labour board remedies (e.g. payment of loss of wages for unfair discharge) also have a punitive element. The essential thing, as the board in *Radio Shack* pointed out, is that the *purpose* of the "make whole" order is not to penalize the employer: rather its intent is to compensate the employees.¹¹⁶ Any incidental punitive effect must be weighed against its merits as a method of ensuring compensatory relief.

If the Manitoba Labour Board's powers are to be expanded to give it the authority to order more affirmative remedies, including the "make whole" order, it is submitted that the most effective way to do this would be to enlarge its general remedial powers rather than simply broaden s. 57. A section modelled on s. 28 of the B.C. *Labour Code* or s. 79 of the Ontario Act would avoid one of the major difficulties that apparently has precluded unions from seeking relief in bad faith bargaining situations, i.e. the need to prove a breach of the duty to bargain in good faith. Under such general remedial legislation, it would still be necessary for the union to adduce evidence sufficient to satisfy the board that the employer's conduct has been sufficiently grave to warrant the harsher remedies. While it would usually be necessary to establish bad faith bargaining to do this, the absence of evidence sufficient to meet that test would not be a bar to obtaining relief.

In recommending this legislation, it is recognized that the "make whole" order is not a panacea. While it can provide the aggrieved employees with just compensation, it does not provide them with a collective agreement, which is after all their main goal in unionizing. Indeed it is probably most appropriate in situations where the strength of the union has been so dissipated by the employer's illegal conduct that there is slight hope that a collective agreement will ever be reached. As Weiler observes, "Suitably used, that remedy is a sensible response to the injuries that have already occurred in such a heated struggle. Often, though, it will not be sufficient to settle down this contentious bargaining relationship for a reasonable period of time in the future."¹¹⁷ And I would agree with Weiler when he goes on to argue that "... the logic of this

114. As quoted in Yates, *supra* n. 29, at 672.

115. McDowell and Huhn, *supra* n. 7, pp. 230-234; Yates, *supra* n. 29, at 671.

116. *Supra* n. 8, at 130-131.

117. *Supra* n. 40, at 55.

limited "make whole" remedy points towards first contract arbitration as the broader solution for egregious bad faith bargaining"¹¹⁸

For this reason, it is further submitted that the present s. 75.1 providing for the Code of Employment be scrapped in favour of legislation modelled on B.C.'s s. 70, empowering the Manitoba board to impose a collective agreement in first contract situations. The application of this remedy should be restricted to situations in which the board feels that serious misconduct, rather than merely hard bargaining, is clearly responsible for the bargaining impasse, and to situations where the board feels that the union has managed to sustain sufficient employee support to warrant a reasonable expectation that the union will continue to represent the employees after the expiry of the compulsory agreement. This latter restriction is particularly important as the experience of B.C. has been that, despite the initial expectations of the authors of the legislation, many unions have still not been able to survive past the expiry of the compulsory agreement. For this reason, Weiler now argues that

... [S]pecial conditions are needed if first-contract arbitration is to be able to preserve long-range collective bargaining against the efforts of a recalcitrant employer. The unit must be fairly sizable, the union must retain a solid core of supporters who can act as an inside unit committee, and there should be a two-year agreement in which to engage in visible administration of the contract (that is grieving discharges, seniority cases, and the like) in order to demonstrate the value of collective bargaining in action. Only in this way will the union have the footing it needs to survive the expiry of the first contract, when it must negotiate a renewal on its own.¹¹⁹

The principal objection to this remedy, as we have previously noted, is that it is said to threaten the basic principle of free collective bargaining. The B.C. Federation of Labour were in fact initially opposed to the legislation as they thought it would be the "thin end of the wedge" leading to compulsory arbitration on a broader scale.¹²⁰ In the United States, the Supreme Court has refused to sanction any remedy under the *National Labour Relations Act* involving compulsory arbitration, even with respect to forcing an employer to accept one particular term of an agreement. In *H.K. Porter Co. v. N.L.R.B.*¹²¹, where the employer had continually refused to negotiate a union dues check-off clause, the court held that even though the National Labour Relations Board had the power to "... require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantial contractual provision of a collective bargaining agreement."¹²² The court reasoned that to allow the board the power to do so would violate the fundamental premise of the *Act* - "... private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."¹²³ Similarly, the Ontario board in *Radio Shack* rejected the union's request for the imposition of a collective agreement, and, while the board defended its position on the grounds such a drastic remedy required express statutory authority, it is clear, as Bendel notes, that their

118. *Ibid.*

119. *Id.*, at 54.

120. *Id.*, at 52.

121. (1970), 397 U.S. 97.

122. *Id.*, at 102.

123. *Id.*, at 108.

decision — “ was in reality a doctrinaire one, based, as it was, on a dogmatic acceptance of freedom of contract as the preeminent pillar of our labour relations system.”¹²⁴

On the contrary, it can be well argued that first contract arbitration can only serve to buttress the collective bargaining system, as it in effect forces the parties to comply with a basic principle of that system, the duty to bargain in good faith. As Weiler observes, the experience in B.C. has been that, since the enactment of the legislation, first contract confrontations within the provincial jurisdiction have died out in B.C.¹²⁵ The legislation in other words has had a preventive impact; in order to avoid the imposition of an agreement by the board, it appears that employers have been more willing to adhere to the principles of good faith bargaining.

In conclusion, it is submitted that the amendment of the *Manitoba Labour Relations Act* to permit these broader and more effective remedies, particularly in the first contract situation, is all the more justified when one considers the kind of employees who are effectively being denied the benefits of union protection by the weakness of the present remedies. Women in the retail, finance and service industries, and immigrants in small plants are the most obvious examples. Clearly this is not meant to imply that the ineffectiveness of the remedies is the only reason these groups remain unorganized. However, it is submitted, the availability of harsher and more comprehensive remedies would significantly encourage groups of employees once they have overcome the initial hurdle of certification.

124. *Supra* n. 1, at 39.

125. *Supra* n. 40, at 54.

