First Contract Arbitration: Evidence From British Columbia, Canada of the Significance of Mediator's Non-Binding Recommendations

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FIRST CONTRACT ARBITRATION: EVIDENCE FROM BRITISH COLUMBIA, CANADA OF THE SIGNIFICANCE OF MEDIATORS’ NON-BINDING RECOMMENDATIONS

BY: Melanie Vipond

One of the many problems facing the American labor movement is the fact that only one-half of its newly certified bargaining units are ever able to obtain first collective bargaining agreements. The value of third-party assistance in countering this trend has been recognized in the Employee Free Choice Act (“EFCA”), which proposes bringing in mediators and arbitrators to resolve first-contract disputes.

This paper is a study of the unique mediation-focused first-contract model available in British Columbia (B.C.), Canada. The B.C. first contract model has two key goals: (1) to facilitate the achievement of first collective bargaining agreements through voluntarily collective bargaining/mediation; and (2) to repair and foster the collective bargaining relationships. Therefore, the centerpiece of the model is non-binding mediation wherein the issued recommendations regarding the terms of the first collective bargaining agreement can be rejected by either party, but are then accorded considerable deference in any subsequent arbitration or litigation.

Through analysis of data made available by the B.C. Labor Relations Board (“BCLRB”) and the parties, and interviews with key participants in the B.C. labor-management community, this study empirically tests whether the B.C. first contract model has achieved its stated goals. The results reveal that the B.C. model is, indeed, effective in obtaining first collective bargaining agreements while avoiding binding arbitration, and in fostering enduring bargaining relationships. Only 12% of all parties who accessed the B.C. model resolved their bargaining agreements through binding arbitration. Parties who accepted the mediators’ non-binding recommendations were most likely to obtain first collective bargaining agreements (at 97.4%) and be in current bargaining relationships (at 82.1%). Moreover, the interview data reveal that the B.C. model has obtained considerable approval from all key participants.

Given its success in achieving these goals, the B.C. first contract model merits serious consideration as a viable model for the United States.

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I. INTRODUCTION ................................................................. 4

II. First Contract Arbitration ......................................................... 9
   a. Prevalence in United States and Canada ........................................ 9
   b. Different Forms of First Contract Arbitration Systems ....................... 10
      1. Automatic Access ........................................................................ 10
      2. Fault System .............................................................................. 11
      3. No-Fault System ......................................................................... 12
      4. Mediator Recommendations System (B.C. First Contract Model) ....... 13
   c. Goals .......................................................................................... 16
      1. End Labor Disputes (i.e. Avoid Strikes/Lockouts)............................... 16
      2. Establish First Collective Bargaining Agreements .......................... 16
      3. Deter Bad-Faith Bargaining and Avoid Arbitration ......................... 17
      4. Create Enduring Bargaining Relationships ...................................... 18
   d. Key Concerns .............................................................................. 18

III. OVERVIEW OF BRITISH COLUMBIA FIRST CONTRACT MODEL .... 20
   a. Historical Overview .................................................................... 20
   b. Dual Purpose ............................................................................... 21
   c. Policy Guidelines ......................................................................... 22
      1. Deference to Mediators’ Recommendations ................................. 22
      2. The Content of Imposed First Collective bargaining agreements ....... 23

IV. EVALUATION OF BRITISH COLUMBIA FIRST CONTRACT MODEL .... 25
   a. Research Goals ........................................................................... 25
   b. Research Methodology .................................................................. 26
      1. Data Analysis .............................................................................. 26
      2. Interviews .................................................................................. 26
   c. Results and Analysis .................................................................... 27
      1. Breakdown of Section 55 Applicants ............................................. 27
         a) Comparison of Certifications Granted vs. s. 55 Applications Granted ... 27
         b) Comparison of Private vs. Public Sector .................................. 28
         c) Comparison of Employer vs. Union ......................................... 28
         d) Comparison of Industry Type ................................................ 28
         e) Comparison of Bargaining Unit Size ........................................ 29
         f) Comparison of Unions ............................................................. 30
         g) Summary .............................................................................. 30
      2. Breakdown of Section 55 Cases by Method of Resolution ............... 31
         a) Comparison of Settled vs. Not Settled Cases .............................. 32
         b) Summary ............................................................................... 33
      3. Breakdown of Section 55 Cases where Mediator Issued Recommendations 33
         a) Acceptance by Both Parties vs. One Party .................................. 34
         b) Acceptance by Employer vs. Union ......................................... 34
         c) Summary ............................................................................... 35
      4. Breakdown of Section 55 Cases Involving Arbitration ....................... 35
         a) Settled vs. Arbitral Awards ..................................................... 36
         b) Comparison of Certification and Imposition Rates Across Canada .... 36
         c) Summary ............................................................................... 38
      5. Effect of Method of Resolution on Time from Certification to Disposition 39
         a) Summary ............................................................................... 39
      6. Effect of Method of Resolution on Obtainment of First Collective Bargaining 40
         Agreements
a) Summary................................................................................................................................41
7. Effect of Method of Resolution on Current Bargaining Relationship Status............41
   a) Breakdown of Current Bargaining Status.................................................................43
   b) Summary..................................................................................................................44
8. Comparison of Decertification Cases.................................................................46
   a) Decertifications During versus After Section 55 .........................................................46
   b) Decertifications Generally vs. After Section 55.......................................................46
   c) Summary..................................................................................................................47
9. Effect of Method of Resolution on Length of Bargaining Relationship for Parties No
   Longer Bargaining.................................................................................................47
   a) Summary..................................................................................................................48
10. Critique of Section 55 Process and Mediator’s Role........................................49
    a) Unions ....................................................................................................................49
    b) Employers ..............................................................................................................52
    c) Mediators ...............................................................................................................55
    d) Arbitrators ..............................................................................................................56
    e) Summary..................................................................................................................58
V. CONCLUSIONS AND RECOMMENDATIONS FOR THE UNITED STATES59
   a. Conclusions.............................................................................................................59
   b. B.C. First Contract Model: An Appropriate Model for the United States? .........60
VI. APPENDIX ...........................................................................................................62
I. INTRODUCTION

Without a collective bargaining agreement, a trade union is powerless.\(^2\) In the United States, while private-sector employers covered under the National Labor Relations Act\(^3\) ("NLRA") are obliged to negotiate in good faith with union representatives over the terms and conditions of a first collective bargaining agreement,\(^4\) there is no corresponding obligation on behalf of employers to reach an agreement.\(^5\) This deficiency, in combination with the National Labor Relation Board’s ("NLRB", or "the Board") inability to enforce and issue timely\(^6\) and comprehensive remedies for violations of this obligation to bargain in good faith, has been described as the most significant failure of the laws governing unions and collective bargaining in the United States.\(^7\) The Commission on the Future of Worker Management Relations similarly concluded:

The evidence reviewed by the Commission demonstrated conclusively that current labor law is not achieving its stated intent of encouraging collective bargaining and protecting workers’ rights to choose whether or not to be represented at their workplace. Rectifying this situation is important to insure that these rights are realized for the workers who wish to exercise them, to de-escalate

\(^2\) Certification only gives the union a license to bargain for the unit. As former NLRB Chair William B. Gould IV notes in *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 325 (2009), a union that is “unable to conclude a collective bargaining agreement, will have declining support within the bargaining unit, because in the United States, the collective bargaining agreement and protections contained in it are the sine qua non for effective representation.”


\(^4\) Or to impose a contract as a remedy for bad faith bargaining; 29 U.S.C. § 158(d); first collective bargaining agreement is to be interpreted synonymously with first contract agreement.

\(^5\) H.K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970); see also NLRB v. Am. Ins. Co., 343 U.S. 395, 404 (1952) ("the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements"), cited in CATHERINE FISK, *INTEREST ARBITRATION IN THE EMPLOYEE FREE CHOICE ACT: A TIME-HONORED AND TESTED METHOD TO ENSURE GOOD-FAITH BARGAINING, IN ACADEMICS ON EMPLOYEE FREE CHOICE* (John Logan ed., 2009).


workplace conflicts, and to create an overall climate of trust and cooperation at
the workplace and in the broader labor and management community.\(^8\)

The mechanisms for resolving duty to bargain cases under the current law are ineffective. Unions increasingly disfavor the use of strikes, partially because society no longer supports them\(^9\) but also because the current law allows employers to continue their operations during strikes through supervisors, non-union employees who cross the picket line, as well as temporary and permanent strike replacements.\(^10\) The alternative choice to proceed with duty to bargain litigation at the NLRB is also ineffective for several reasons. First, the law is fault-based, which requires the Board to police a subjective state of mind, which is very difficult to prove\(^11\). Consequently, the Board is forced to engage in detailed fact-finding in its attempt to ascribe fault. This task is extremely time-consuming and the notorious delays in litigation at the Board only exacerbate these difficulties.\(^12\) Second, it is virtually impossible for the Board to fashion meaningful remedies in duty to bargain cases after such a substantial delay. Third, the Board remedies are inadequate and confined to ordering a guilty party to resume bargaining in good faith and ordering an employer to post a notice in the workplace stating it will not bargain in bad faith again.\(^13\)

Delays in resolving first collective bargaining agreements solely disadvantage unions, not employers, for it is the unions who are seeking changes and improvements in the workplace.

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\(^12\) See Gould, LABORED RELATIONS, supra note 6, at 287–305.

Delays in bargaining allow for greater labor turnover, create employee dissatisfaction with the unions for failing to live up to promises made in the organizational drives and often lead to their decertification once the freeze period of twelve months has expired.\textsuperscript{14}

What further compounds the problem is the inherent difficulty of the actual task of first collective bargaining. The parties are confronted with the daunting task of codifying all the terms and conditions of employment for the first time in a new bargaining relationship, a difficulty only exacerbated by inexperience\textsuperscript{15} and residual hostility from the organizing campaign.\textsuperscript{16}

These legislative and bargaining setbacks have devastated the union movement. They have prompted the creation of a multi-million dollar industry of consultants and lawyers that informs employers “you haven’t lost until you sign a contract” and advises them to go through the motions of bargaining “to the point of boredom.”\textsuperscript{17} The research has revealed that only 56\% of newly certified bargaining units are successful in obtaining a first collective bargaining agreement, while only 38\% are able to achieve one within the first year.\textsuperscript{18} After two years, 30\% to 45\% of cases are still unresolved.\textsuperscript{19}

\textsuperscript{14} Id.; see also PAUL WEILER, RECONCILABLE DIFFERENCES 50 (1980). In Brooks v. NLRB, 348 U.S. 96 (1954), the U.S. Supreme Court held that the presumption of a union’s majority status remains irrebuttable for 12 months following certification, after which time the employees are free to decertify the union.

\textsuperscript{15} The majority of employers is small and has no experience in collective bargaining. Although many certifications are to large, international unions with experience in collective bargaining, local unions with minimal experience represent them in bargaining.


\textsuperscript{17} John Logan, Consultants, Lawyers and the Union-Free Movement in the USA Since the 1970s, 33(3) INDUS. REL. J. 209 (2002).


\textsuperscript{19} See Susan Johnson, First Contract Arbitration: Effects on Bargaining and Work Stoppages (Dec. 2008) (on file with author) (calculations were based on data available from the Federal Mediation and Conciliation Services Annual Report 2000 (p. 35) and 2004 (p. 18–19)).
Currently, with private-sector union-membership levels at a historic low of 7.2%, down from a peak in the mid-1950’s of between 35% and 37%, the need for both labor reform with third party assistance is stunning. The most recent legislative proposal, EFCA, provides for interest arbitration in first contract negotiation disputes. Despite obtaining a clear majority in the House of Congress in 2007, the Senate was nine votes short of the 60 votes needed to invoke cloture and prevent a Republican filibuster. EFCA was re-introduced in 2009 and is in the midst of Senate negotiations. While it is clear that EFCA will have to be modified from its current form in order to achieve majority support, Congress appears more likely to enact the first contract arbitration provision than other, more contentious, provisions such as card check.

Opponents of first contract arbitration question whether such a mechanism would actually restore dysfunctional collective bargaining relationships, rather than simply erode the voluntary bargaining process by encouraging the parties to maneuver, in uncompromising ways, in anticipation of arbitration. In order to assist the voluntary bargaining process, the proposed provision in EFCA requires the parties to use mediation services prior to arbitration. The consensus among Democrats, Republicans, management, unions, and scholars is that agreements voluntarily reached by the parties, even with the assistance of mediators, are more likely than imposed agreements to result in first collective bargaining agreements and enduring bargaining relationships.

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22 H.R. 800, 110th Cong. (2007). The House bill passed by a vote of 241 to 185 but was filibustered to death in the Senate.
25 See supra note 7 and note 9.
Nonetheless, to date, first contract arbitration remains relatively untested in the private sector of the United States. In Canada, which has first contract arbitration in most jurisdictions, empirical research has shown that most parties who access the first contract arbitration systems resolve their disputes without resorting to arbitration. However, minimal research has been conducted to determine whether avoiding arbitration for mediated settlements has benefited the parties in obtaining first collective bargaining agreements and enduring bargaining relationships.

This study empirically evaluates the success of the first contract arbitration system provided for in the province of B.C. The B.C. first contract arbitration model (hereinafter “B.C. first contract model”) was chosen as the target model because it was felt to best address the American concerns: first, the model is no-fault, which should eliminate many of the problems seen with the current fault-based system in place in the U.S.; and second, the B.C. first contract model provides for a powerful mediation procedure to encourage the parties to resolve their first contract disputes voluntarily with the assistance of mediators, which should prevent most parties from having collective bargaining agreements imposed on them and repair the dysfunctional bargaining relationships.

This study aims to provide a complete picture of the B.C. first contract model. The study categorizes the method of resolution chosen by the parties in the B.C. first contract model (i.e., mediated settlement with and without issuance of mediator recommendations, voluntary arbitration, arbitration after one party rejects the mediator recommendations, arbitration where mediator recommendations were not issued, strike/lockout) and tracks them to determine

whether they obtained first collective bargaining agreements and whether they are still in collective bargaining relationships. The objective of this research is to reveal if parties who mediated first contract settlements, particularly through the acceptance of a mediators’ recommendations, were more likely to obtain first collective bargaining agreements and be in current bargaining relationships than those who had resolved their disputes by strikes/lockouts or arbitrations. The study also collects and interprets personal information about the parties who accessed first contract assistance, including their bargaining size, industry, representative union and sector to determine whom the B.C. first contract model was most assisting.

Moreover, this study endeavors to gain insight into the subjective experience of key participants of the B.C. first contract model—mediators, arbitrators and unions/employers who had accessed the first contract process and had reached resolutions through different methods—through a series of personal interviews. Part II of this study summarizes the prevalence of first contract arbitration in the United States and Canada and describes the various forms of first contract arbitration. This part outlines the goals of first contract arbitration systems and the rationale for and against their use. Part III elaborates on the history, goals and policy guidelines of the B.C. first contract model. Part IV demonstrates that the B.C. first contract model has been successful in restoring collective bargaining relationships and obtaining management and union approval. Finally, Part V suggests that the statutory availability of first contract arbitration, including mandatory mediation in which the mediator is able to issue non-binding recommendations, is both well grounded and within the power of the U.S. Congress.

II. First Contract Arbitration

a. Prevalence in United States and Canada

The United States does not provide specifically for first contract arbitration in any jurisdiction, but rather has chosen to manage first contract disputes through bad faith bargaining
charges and voluntary mediation. However, interest arbitration\textsuperscript{28} is statutorily available in certain public sector industries, where there is a widespread acceptance of the intolerance of strikes/lockouts; in the agricultural industry in California;\textsuperscript{29} is commonly seen in the newspaper industry;\textsuperscript{30} and permissible if the parties voluntarily agree to its use.\textsuperscript{31}

On the other hand, Canada has extensive experience in interest arbitration both in the public and private sector. First contract arbitration is offered in eight of eleven Canadian jurisdictions (comprising of ten provinces and the federal jurisdiction) and covers more than 80\% of the labor force.\textsuperscript{32} Of those eight jurisdictions, British Columbia has the most experience with first contract arbitration, with its earliest version enacted in 1973.\textsuperscript{33}

\textit{b. Different Forms of First Contract Arbitration Systems}

1. \textbf{Automatic Access}

An “automatic access” system is one in which access to arbitration is permitted once certain time limits have been exceeded in the negotiation process. There is no need to provide evidence of dysfunctional bargaining. This system is found in the Canadian province of Manitoba\textsuperscript{34} as well as the current version of EFCA.\textsuperscript{35}

The rationale for this system is to increase access to the first contract arbitration system and the corresponding likelihood that the parties will obtain first collective bargaining

\textsuperscript{28} Arbitration over the terms of a collective bargaining agreement, available in first contract and renewal situations.
\textsuperscript{29} Hess Collection Winery v. Cal. Agric. Labor Relations Board, 45 Cal. Rptr. 3d 609, 616 (Cal. Ct. App. 2006) (upholding first contract arbitration under California’s Agricultural Labor Relations Act).
\textsuperscript{30} The Postal Reorganization Act, 39 U.S.C. §101 (197) (provides for interest arbitration in the Postal Service).
\textsuperscript{31} Parties may voluntarily negotiate a provision for interest arbitration to settle bargaining impasses; see \textsc{Arbitration Under Fire}, (James L. Stern & Joyce M. Najita eds., 1997) at 112–13 (American Airlines voluntarily used interest arbitration to end the negotiations impasse with its flight attendants just before Thanksgiving 1993 because of costly strike action, negative publicity, and the threat of federal intervention).
\textsuperscript{32} Alberta, Nova Scotia and New Brunswick are the three provinces without first contract arbitration; see Johnson, \textit{supra} note 19 at 4–5; see also \textsc{Daphne Taras, First Contract Arbitration: Alberta Requires an Amendment to the Labour Code} (Institute for Advanced Policy Research, Policy Brief No. 06002, Jan. 2006).
\textsuperscript{33} Labour Code of British Columbia, S.B.C., ch. 122, §70 (1973) (former legislation, which was replaced by B.C. Code in 1993).
\textsuperscript{34} Labour Relations Act, C.C.S.M., ch. L10, §87 (2004).
\textsuperscript{35} Either party is able to access mandatory mediation after 90 days of bargaining; if there is no settlement after 30 days of mediation, the dispute is referred to an arbitration panel.
agreements. The strongest criticism against the automatic access system is that the time certainty of pending arbitration will produce rigidity in the collective bargaining process, as both sides will see arbitration as highly probable and will adopt uncompromising and extreme bargaining positions in the hope that the arbitrator will split the difference in its favor. In other words, some argue that the first contract arbitration system will not encourage the voluntary resolution of first contract disputes.

2. Fault System

A more restrictive form of first contract arbitration is the “fault system,” which provides for a ‘double screen’, whereby the minister of labor must refer the application to the labor board in order for first contract arbitration to be accessed by the parties, and the labor board must refer the matter for arbitration. Referrals for arbitration are only made if the mediator or administrative agency finds that the parties are at bargaining impasse, that bargaining is not productive, or that there has been a pattern of conduct that obstructs collective bargaining thereby rendering it dysfunctional. This system is available in the federal jurisdiction of Canada, the provinces of Newfoundland and Quebec and was formerly available in the province of British Columbia.

The rationale of this system is to provide uncertainty as to the availability of first contract arbitration thereby decreasing the potential “chilling effect” (i.e. if the parties refuse to negotiate because they expect an agreement to be imposed in future arbitration and believe negotiating will harm their position in the arbitration process), while reserving arbitration as “punishment” for

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38 Labour Relations Act, R.S.N.L., ch. L-1, §§81.1–81.3 (1990); Telephone Interview with Newfoundland mediator, in Newfoundland (April 2010).
40 This system was in effect from 1974 to 1993; see Labour Code, supra note 30.
bad-faith bargaining. The system is often criticized for two reasons. First, critics object to the political discretion of the government to refer an application for government assistance and also for arbitration. Second, some object to the restriction of arbitration to only cases of bad-faith bargaining, when parties may legitimately be at a bargaining impasse and in need of arbitration. The fault-based system in Canada suffers from the same setbacks as the current American fault-based system (i.e. difficulty and delay in proving bad faith bargaining). Research has revealed its ineffectiveness in establishing meaningful bargaining relationships.

3. No-Fault System

The “no fault system” provides for a ‘single screen’ whereby parties apply directly to the labor board, rather than the ministry of labor, and must show evidence of dysfunctional bargaining. This system is available in the provinces of Ontario and Saskatchewan. Although there is less of a political element in the “no-fault system” than the “fault system”, the labor board still has the political discretion to refer the case to arbitration. Similar to the fault-based system, research has indicated little to no impact in establishing meaningful bargaining relationships.

41 Johnson, supra note 19 at 14.
43 Id.
44 Supra note 42.
45 Dysfunctional bargaining does not necessarily constitute bad faith bargaining.
46 Labour Relations Act, S.O., ch. 1, sch. A, §43 (1995) (this system was in place from 1989 to 1991 and from 1996 to present. From 1992 to 1995 the newly in power New Democratic Party amended the system to provide automatic access); Telephone Interview with Ontario mediator, in Ontario (April 2010).
47 Trade Union Act, R.S.S., ch. T-17, §26.5 (1978); Telephone Interview with Saskatchewan mediator, in Saskatchewan (April 2010).
48 See Diane L. Patterson, First Contract Arbitration in Ontario: An Evaluation of the Early Experience, in School of Industrial Relations Essay Series No. 30 (Industrial Relations Centre, 1990) and supra note 42.
4. **Mediator Recommendations System (B.C. First Contract Model)**

The B.C. first contract model has been coined the “mediation-supported” model because of its distinctive emphasis on resolving first contract disputes voluntarily through mediation. Either party may apply to the BCLRB for any first contract dispute if two pre-conditions are met: first, that the parties have “bargained collectively” and failed to conclude an agreement; and, second, that the union has obtained a strike mandate. A mediator must be appointed within five days of receiving an application and has 20 days with the parties in which to resolve the dispute. If the parties are unable to resolve their dispute in the mediation process, the B.C. mediator is able to recommend the terms of the collective bargaining agreement or a further process (strike/lockout, arbitration or med-arb) to resolve the dispute. The head of the mediation division (i.e., the Associate Chair) must be approve this further process but, in general, he or she must subsequently direct the same process suggested by the mediator unless there are strong reasons to do otherwise. The parties have a further 20 days to consider any recommendations made by the mediator.

The rationale in giving the mediator several options to resolve the dispute is to allow a more tailored approach to the particular first contract dispute; to create uncertainty over whether arbitration will be available and to reduce the availability of arbitration in most instances.

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49 For a more comprehensive review of the B.C. First Contract Model, please refer to Part III, Overview of British Columbia First Contract Model.
50 Johnson, *supra* note 19 at 15.
51 Unlike most other jurisdictions where mediation is under the jurisdiction of the government (i.e. ministry of labor), mediation in British Columbia is part of the administrative tribunal (i.e. BCLRB).
52 B.C. first contract model is not available outside the first contract context.
53 Test will be met if negotiating meetings have been held and the parties have discussed their respective positions on all the issues in dispute; see *Yarrow Lodge Ltd.* and *Bevan Lodge Corporation*, and *Louisiana-Pacific Canada Ltd.* and *Hospital Employees’ Union*, and *Communications, Energy and Paperworkers Union of Canada, Local 448*, [1993] B.C.L.R.B.D. No. 453 at 36 [hereinafter *Yarrow Lodge*].
54 Time limits set out in Section 55 are directory and not mandatory; *see id.*
55 If a strike or lockout occurs pursuant to s. 55(6)(b)(iii), the Associate Chair may subsequently direct either mediation-arbitration or arbitration but the circumstances in the dispute must have changed; *see id.*
56 The grounds for appeal of a decision of the Associate Chair (Mediation) under s. 55(7) are very limited; the BCLRB will only review such decisions if they are inconsistent with the principles in the Code; *see id.*
The mediator can only recommend the terms for first collective bargaining agreements if the parties have sufficiently disclosed their positions and interests and the recommendations would have a “reasonable likelihood of acceptance by both parties.” The mediator’s recommendations for settlement terms must be based on the replication principle and terms that are “fair and reasonable”.

If the mediator issues recommended first collective bargaining agreement terms, which are not accepted by both parties, the dispute normally proceeds to arbitration or mediation-arbitration (“med-arb”), a process whereby the arbitrator attempts to mediate a resolution prior to arbitration. A mediator’s recommendations may be used by either party in any subsequent hearings, either before the BCLRB or before an arbitrator. However, any other communications, verbal or written, between the mediator and one party in private caucus, or between a mediator and both parties in joint caucus, are confidential and inadmissible before the BCLRB or an arbitrator. The rationale in making the mediator’s recommendations disclosable is twofold: first, to allow the union members to exercise their right to ratify negotiated agreements; and, second, to encourage the parties to take both the mediation process, and the mediator’s recommendations, seriously. If the mediator’s recommendations were not disclosable to future arbitrators, parties would feel no pressure to accept the mediator’s recommendations (and resolve the dispute voluntarily) and would likely proceed to arbitration to attempt a “second kick at the can” in terms of obtaining more preferable collective bargaining agreement terms.

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57 Id. at 26.
58 Similar to the content of imposed first collective bargaining agreements; see Chapter II, subchapter C, subchapter 2, Content of Impose First Collective bargaining agreements.
60 Labour Relations Code, R.S.B.C., ch. 244 §157 (1996).
62 If the recommendations were kept confidential, the union representative would not be able to disclose them to the bargaining unit.
The mediator will recommend the strike/lockout option most commonly in situations in which each party has made a reasonable effort to come to an agreement but the parties’ bargaining positions are still considerably apart and what is at issue is simply hard bargaining.

The mediator will recommend arbitration as a further process (without the issuance of mediator recommendations) usually when one party has engaged in dubious conduct, including bad faith or surface bargaining; adopted uncompromising bargaining positions without reasonable justification; failed to make reasonable or expeditious efforts to conclude a collective bargaining agreement; made unrealistic demands, either intentionally or due to inexperience; or in the event that the parties are unlikely to be able to reach a settlement themselves. Further, mediators may make recommendations for limited issue arbitration or final-offer selection when only one issue is, or just a few issues are, in dispute.

Some concern exists that having the ultimate decision-maker perform dual roles as both a mediator and as a de facto arbitrator will reduce the likelihood of bringing about an agreement during mediation. For instance, some believe that the parties would be reluctant to retreat from extreme positions or to reveal the priority of their interests to a mediator who has the ability to recommend the terms of a first collective bargaining agreement. Such criticism ought to be mitigated however, by requiring that the mediator’s recommendations remain non-binding. Another concern is that mediators will risk losing their impartiality by issuing recommendations and that parties will, consequently, be less willing to divulge their final positions and priorities to the mediator. In other words, parties will be less willing to mediate. Further, if the parties

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64 For more on policy rationale, see Chapter II, subchapter C, Policy Guidelines.
66 Most, if not all, arbitrations for first contract disputes are “limited issue” since many issues are resolved in mediation.
67 This recommendation is rarely given.
68 Final-offer arbitration is rare in Canada and has not been used in British Columbia in first contract arbitration cases despite the authorization to do so.
69 This concern is most notably directed to the process of med-arb; see Goldberg, supra note 9 at 99.
perceive the mediator as a *de facto* ultimate decision-maker, given the deference accorded to their recommendations, the parties might maintain uncompromising bargaining positions during mediation. These concerns will be fully addressed in Part IV, which empirically evaluates the B.C. first contract model.

c. **Goals**

1. **End Labor Disputes (i.e. Avoid Strikes/Lockouts)**

   The immediate purpose of first contract arbitration is to put an end to the current bargaining dispute in an expeditious manner.\(^70\) In Canadian jurisdictions, once an application for first contract arbitration is filed, any work stoppage in progress must end. This provision is not explicitly included in EFCA; however, the goal of reducing work stoppages may not be a concern to Americans given the decline in the prevalence of strikes after *MacKay*.\(^71\) Empirical research from Canada has found that first contract arbitration systems reduce first agreement work stoppages by at least 50\%, even though first contract systems are rarely accessed. One scholar has argued that the reduction of strikes and lockouts alone probably justifies the existence of first contract legislation.\(^72\)

2. **Establish First Collective Bargaining Agreements**

   First contract arbitration systems do not guarantee that collective bargaining agreements are reached in every set of negotiations. In many cases, employers are prepared to go to great lengths to avoid signing collective bargaining agreements.\(^73\) However, one goal of first contract arbitration systems is to increase the number of first collective bargaining agreements obtained for workers who have chosen unionization. Research has indicated that many parties are able to

\(^{70}\) *Weiler*, *supra* note 14 at 53.
\(^{71}\) NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).
\(^{72}\) *Weiler*, *supra* note 14 at 53.
\(^{73}\) O’Brien, *supra* note 27 at 22.
achieve first collective bargaining agreements after accessing first contract arbitration systems who would not otherwise have been able to.  

3. Deter Bad-Faith Bargaining and Avoid Arbitration

Another goal of first contract arbitration systems is to prevent messy first contract confrontations through deterrence. A considerable level of policy debate in Canada and the United States has revolved around the issue of whether first contract arbitration systems actually encourage good-faith collective bargaining. Since the negotiation of first collective bargaining agreements is inherently difficult and particularly vulnerable to bad-faith bargaining by an employer who wants to resist unionization, some question remains as to whether the bargaining relationships can be salvaged.

Scholars and practitioners believe that first contract arbitration is less satisfactory than collective bargaining and mediation as a mode for achieving first collective bargaining agreements because it strips labor and management of control over their economic destiny, rather giving it to a third party. This loss of control over economic destiny has often led both unions and employers to oppose interest arbitration. Further, many believe it is impossible for an arbitrator to understand the parties’ motives, priorities, and potential trade-offs with the same depth as either the parties or a mediator would.

As stated by the Canada Industrial Relations Board, the worst agreement voluntarily reached is a hundred times more valuable than one that has been imposed.

In terms of measuring the success of first contract arbitration systems, the seminal Yarrow Lodge Ltd. Board states “…in policy terms, the success of the application of Section 55
will be how few collective bargaining agreements are actually imposed.”

However, another scholar disagrees and suggests that the success of the system will not lie in the number of occasions the agreements are imposed but rather the number of occasions when the presence of the system in the statute renders its use unnecessary.

4. Create Enduring Bargaining Relationships

One of the primary goals of first contract arbitration systems is to create the conditions for enduring collective bargaining relationships through a “trial marriages.” Few studies to date have comprehensively researched whether first contract arbitrations systems are achieving the goal of creating enduring bargaining relationships over a sizeable length of time. However, some studies suggest that first contract arbitration systems are only moderately successful in establishing enduring collective bargaining relationships, particularly “fault” or “no-fault” based systems; others suggest that they are a dismal failure by any measure.

d. Key Concerns

A central issue with first contract arbitration is its effect on the parties’ negotiating behavior. A concern with first contract arbitration is the potential “chilling effect” it might have on mediating or negotiating a settlement, whereby the parties perceive mediation to be a preliminary step before an inevitable arbitration hearing, and are consequently less willing to

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80 Paul Weiler, Speech at the Industrial Management Association of British Columbia, quoted in Cleveland, supra note 74 at 132.
81 WEILER, supra note 14 at 53.
82 See O’Brien, supra note 27.
83 See WEILER, supra note 14; Cleveland, supra note 74; Constance Backhouse, The Fleck Strike: A Case Study in the Need for First Contract Arbitration, 18(4) OSGOODE HALL L.J. 495.
84 Grant Mitchell, Private Sector Statutory Interest Arbitration: the Manitoba Experience in the Canadian Context—Imposed First Contracts and Final Offer Selection, 5 CAN. J. ADMIN. L. & PRACTICE 287; this study will empirically test whether this goal is met.
negotiate and compromise their bargaining positions, especially if they believe the arbitrator will simply split the difference between the parties’ last offers.\footnote{Carl M. Stevens, \textit{Is Compulsory Arbitration Compatible with Bargaining?}, 5 INDUS. REL. 38 (1965).}

Equally paramount is the concern that first contract arbitration creates a “narcotic effect” on bargaining, whereby parties become increasingly reliant upon arbitration to settle their first collective bargaining agreements rather than engaging in meaningful collective bargaining.\footnote{See \textit{LABOUR ARBITRATION UNDER FIRE}, supra note 31.}

Another concern is that, by eliminating the ability of parties to choose freely the first collective bargaining agreements into which they will enter, first contract arbitration has the potential to undermine the philosophical presumption of “freedom of contract.” However, some scholars respond that in the few cases that are referred to first contract arbitration, many are due to the unsavory behavior of one or both parties and labor law policy need not strive to preserve “freedom of contract” in such cases.\footnote{See Paul Weiler, \textit{Striking a New Balance: Freedom of Contract and the Prospects for Union Representation}, 98 HARV. L. REV. (1984).}

Opponents of first contract arbitration systems also argue that the system would only benefit labor, not management, and particularly smaller unions or bargaining units in which the union was unable to impose economic pressure in order to compel management to accede to its demands.\footnote{See, e.g., Littler Mendelson Report, \textit{The Employee Free Choice Act: Lessons from the Canadian Experience With Card Check Certification and First Contract Arbitration} (True North Cross-Border Views on North American Workplace Laws, July 2009).}

As well, opponents take issue with the role of arbitration in resolving first collective bargaining agreements. Some contend that labor arbitration is too time consuming;\footnote{Gould, \textit{ supra} note 6.} others claim that labor contracts are too complex for arbitrators to handle.\footnote{See Richard A. Epstein, \textit{The Case against the Employee Free Choice Act} 98 (John M. Olin L. & Econ. Working Paper, No. 452 (2d Series) (2009) at 64.) However, some scholars point to the absence of empirical data to support this latter assertion given its prevalent and
successful use for decades in the public sector in the United States\(^9\) and the private and public sectors in Canada.\(^1\)

### III. OVERVIEW OF BRITISH COLUMBIA FIRST CONTRACT MODEL

#### a. Historical Overview

Prior to the enactment of the B.C. first contract model in 1993 (i.e. section 55), the BCLRB rarely intervened in first collective bargaining agreement disputes under the “fault” system in place. When it did do so, it was only to compensate for bad-faith behavior in the form of unfair labor practices by one of the parties. Because first contract arbitration was reserved exclusively to punish one party for bad faith, it failed to foster collective bargaining relationships and, in every case in which a first agreement was imposed, the unions were subsequently decertified.\(^4\) Furthermore, with the enactment of the *Industrial Relations Act* in 1987,\(^5\) organized labor saw the legislative changes as designed to enable employers to rid themselves of unions, consequently proclaiming a boycott of the new legislation, which continued until the election of a new political party in 1991.\(^6\)

In 1992, the B.C. minister of labor appointed a Committee of Special Advisors with a broad mandate to recommend an overall industrial relations strategy for the province, which was intended to “…[address] the promotion of harmonious and stable labor/management relations to ensure that the Province maintains and enhances its competitive position in the world market

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\(^9\) Fisk & Pulver, *supra* note 7 at 75.

\(^1\) See, e.g., Johnson, *supra* note 19; O’Brien, *supra* note 27.

\(^4\) Stan Lanyon, Adjudication, Mediation and Alternative Dispute Resolution (ADR) at the Labour Relations Board of British Columbia at 2.3.19 (Given at Continuing Legal Education, November 1995).

\(^5\) Industrial Relations Act, R.S., ch. 112, (1979) (the Act brought mediators under the jurisdiction of the Industrial Relations Council).

\(^6\) JOHN BAIGENT, VINCE READY & TOM ROPER, A REPORT TO THE HONOURABLE MOE SHOTA MINISTER OF LABOUR: RECOMMENDATIONS FOR LABOUR LAW REFORM at 6 (Queen’s Printer for British Columbia, 1992).
place.” 97 A Sub-Committee of Special Advisors was appointed, which included a distinguished representative of labor, management and a third-party neutral. 98 The Sub-Committee engaged in an extensive consultation process internationally, throughout Canada but particularly in the province of B.C., prior to drafting its recommendations. The recommendations were accepted by all three advisors and formed the basis of section 55 of the B.C. Labor Relations Code. 99 A review of the new Code was conducted in 1997 but no changes were made to section 55. 100

b. Dual Purpose

The dual purpose of the B.C. first contract model, as set out in the seminal decision of the BCLRB, Yarrow Lodge, 101 and the recommendations of the Sub-Committee, 102 is first to facilitate the achievement of a first collective bargaining agreement by employing the processes of collective bargaining and mediation and second, to repair the collective bargaining relationship. It was believed that promoting collective bargaining and mediation would best achieve the fundamental and universal goals of all first contract arbitration systems: ending work stoppages, establishing first agreements, deterring bad faith bargaining/arbitration and creating enduring bargaining relationships. The purpose of section 55 was intended to complement one of the overall purposes of the Code: “to encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees.” 103

97 Id. at 4.
98 John Baigent, Tom Roper, Vince Ready respectively.
100 VINCE READY, STAN LANYON, MIRIAM GROPPER & JIM MATKIN, MANAGE CHANGE IN LABOUR RELATIONS—THE FINAL REPORT (Ministry of Labour, Government of British Columbia, 1998) (recommendations for the elimination of the strike vote requirement and the introduction of a discretionary element to access Section 55 were made but not established).
102 BAIGENT, READY & ROPER, supra note 96 at 37.
103 Labour Relations Code, R.S.B.C., ch. 244 §2 (1996).
c.  **Policy Guidelines**

1.  **Deference to Mediators’ Recommendations**

   Arguably the most significant guidance offered by the BCLRB in *Yarrow Lodge* regarded the appropriate weight to be given to a mediators’ recommended terms for first collective bargaining agreements:  

   …both the mediator and the resulting report occupy a significant statutory role in Section 55. The intent of the policy therefore is to give the recommended terms of settlement sufficient statutory weight that the parties do not simply use it as either a floor or ceiling for negotiating up or down. Indeed, once the recommended terms of settlement have been made, we do not, as a labor relations matter, see great discrepancies developing between recommended terms of settlement and what ultimately takes place in arbitration. Indeed, in many cases, little or no change may be the result. The effect of this is that the parties are forced to move to more reasonable and realistic positions in an attempt to persuade the mediator of the acceptability of their respective positions. This increases the leverage of the mediation process, forcing the parties to compromise and conclude their own collective bargaining agreement. This is also consistent with the principle that collective bargaining itself ought to be the vehicle for settlement of first contract disputes.

   The BCLRB has held that there is a very high onus on parties wishing to overturn mediators’ recommendations. Mediators, in fashioning their recommendations, know full well that some of them will be acceptable to the union, others will not be, and the same holds true for the employer. A party who simply does not like what the mediator decided and wants a “second kick at the can,” in order to improve its side of the compromise, will not meet that onus.

   Underlying these policy guidelines was the BCLRB’s concern that the that parties might view the mediation process as simply an interim step, after which first contract arbitration would inevitably follow. As a result, the Board worried that the parties would be less willing to

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104 No guidance was set out statutorily in section 55.
compromise, because to do so would prejudice their positions before the arbitrators. However, despite the high onus for overturning mediator recommendations, the BCLRB did see it fit to carve out three potential grounds for interfering with mediator recommendations, namely if (1) the decision is inconsistent with principles expressed or implied in the Code; and in particular the policy established in *Yarrow Lodge*; (2) there is a clear error or mistake of fact in the recommendation; and (3) new circumstances have arisen since the issuance of the mediator’s recommendations, and they have had a material impact on one of the parties.

In general, both arbitrators and courts have abided by this policy guideline and accord great deference to mediators’ recommendations regarding the terms of first collective bargaining agreements. The B.C. Supreme Court specifically approved of the BCLRB’s policy of encouraging deference to a mediator’s recommendations and held that “the rule that a decision-making authority may not fetter its discretion by the adoption of an inflexible policy cannot, in this context, mean that the interest arbitrator must disregard the mediator’s recommendations or view them as just another piece of evidence.”

2. The Content of Imposed First Collective bargaining agreements

Caselaw has exclusively developed the principles guiding arbitrators regarding the content of interest arbitration awards. The BCLRB in *Yarrow Lodge* emphasized that interest arbitrators must employ two principles: the replication theory and a determination of what is “fair and reasonable” in the circumstances. In applying the replication principle, an arbitrator’s objective is to replicate or construct a collective bargaining agreement which reflects as nearly as

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107 See *supra* note 94.
111 *Id.*
possible the collective bargaining agreement that conventional bargaining between the parties
would have produced had they themselves been successful in concluding a collective bargaining
agreement. This approach attempts to place both parties in the same position they would have
been in had there been no breakdown in negotiations. However, when they are employing this
approach, arbitrators do not simply want to mirror any great imbalances of power between the
parties in drafting the terms and conditions of employment. Consequently, they will attempt to
look at other objective criteria, such as the terms and conditions of employment of other
employees performing similar work, to ensure that the terms and conditions are “fair and
reasonable.”  

Although its the arbitrators who decide what is “fair and reasonable” in each case, the
Yarrow Lodge Board was clear that arbitration awards should not replicate the union-negotiated
rate in the industry (i.e., the industry-standard), which normally reflects the product of several
rounds of collective bargaining renewal negotiations. As subsequently described by one of the
drafters of Yarrow Lodge, “interest arbitration is a conservative exercise. As a general rule,
neither party should look for a major breakthrough from a third party neutral; that is reserved for
negotiations.”

The Yarrow Lodge Board was also clear that first collective bargaining agreements must
be realistic with respect to the current economic realities of both the employer and the industry in
which the employer operates, while at the same time being sufficiently attractive to employees so
as to foster the process of collective bargaining.

Lastly, the Yarrow Lodge Board decided that all first collective bargaining agreements
imposed by arbitrators, or recommended by mediators, must have a minimum term of two years,

113 Id.
114 Construction Labour Relations Assn. of British Columbia v. Operative Plasterers’ and Cement Masons’
commencing from the date of the award, unless the parties agree otherwise. This decision was based on academic evidence that one year collective bargaining agreements do not provide sufficient time to “heal the wounds of a fresh dispute” and that they fail, as a result, to accomplish the goal of establishing enduring collective bargaining relationships.116

IV. EVALUATION OF BRITISH COLUMBIA FIRST CONTRACT MODEL

a. Research Goals

This study strives to evaluate empirically whether the B.C. first contract model is accomplishing the fundamental goals of all first contract arbitration system (1) to end labor disputes in an expeditious manner; (2) to establish first collective bargaining agreements; (3) to deter bad-faith bargaining and avoid arbitration and its potential “chilling” and “narcotic” effects; and (4) to create enduring bargaining relations between the parties.117

This study will test the underlying assumption of these goals, namely that voluntary collective bargaining or mediation are preferred modes of resolution. Further, this study will specifically research whether the ability of mediators to issue recommendations assists the parties in achieving the above-stated goals.

This study will also break down the types of applicants that applied to B.C.’s first contract model. Finally, this study will evaluate the participants’ satisfaction with the system, in order to address the concern that first contract arbitration systems only help a narrow subset of potential applicants.

116 Weiler, supra note 14 at 54.
117 Since empirically research has strongly established that first contract systems reduce work stoppages, (see Johnson, supra note 19) the first contract arbitration goal “to end labor disputes” will not be researched.
b. Research Methodology

1. Data Analysis

In order to evaluate the majority of the research goals, quantitative data was gathered from the BCLRB records, annual reports and parties on all cases which accessed the B.C. first contract model from its inception in 1993 to the end of 2009, which totalled 407. This data includes the name of the participants, bargaining unit size, industry and sector type, method of settlement, certification and disposition dates. Due to an elimination of detailed records regarding the method of resolution,\textsuperscript{118} the method of resolution was verified in many instances with the Associate Chair’s reports, arbitral awards and parties. All cases that were initially referred to arbitration were researched to determine whether each case resulted in the imposition of a first collective bargaining agreement. In order to determine whether the participants of the B.C. first contract model from 1993 to 2009 obtained first collective bargaining agreements and were still in collective bargaining relationships (e.g. not decertified), an extensive telephone survey was conducted in which unions who had participated in the B.C. first contract model for that time period were contacted.\textsuperscript{119}

The variables of certification and disposition date, method of resolution, obtainment rate of first collective bargaining agreements and current bargaining status were analyzed using SPSS statistical software to determine any correlations between the variables.

2. Interviews

In order to evaluate the participants’ satisfaction with the B.C. first contract model, qualitative data was gathered through eighteen interviews of parties intimately involved with the B.C. first contract model. In particular, interviews were conducted with ten parties (five employer representatives and five union representatives), each of whom had participated in the

\textsuperscript{118} The BCLRB eliminated its Collective Bargaining Database in 2003, including any archived copies.
\textsuperscript{119} In order to reduce the number of phone calls, unions were contacted as opposed to management.
first contract model within the last two years, and had resolved their disputes at five different stages (mediated settlement, acceptance of mediator’s recommendations, arbitration, strike/lockout, business closed/union decertified). Four arbitrators who have experience arbitrating cases under the B.C. first contract model and four mediators with experience mediating first contract cases were interviewed.

In general, the interviews sought to reveal the interviewee’s perspective on the B.C. first contract model, particularly their satisfaction with the system generally and, in particular, with the role of the mediator. Since these interviewees represented four different group affiliations, it was anticipated that the interviewees would have a diversity of perspectives and levels of satisfaction with the B.C. first contract model.

c. Results and Analysis

1. Breakdown of Section 55 Applicants

In an attempt to assess concerns over the use of first contract arbitration systems, especially those relating to the type of applicants and the frequency of their use, a comprehensive analysis of the participants in the B.C. first contract model from 1993 to 2009 was conducted.

a) Comparison of Certifications Granted vs. s. 55 Applications Granted

The data reveal that in the overwhelming number of instances, newly certified parties did not resort to first contract assistance via the B.C. first contract model. Four hundred and seven participants were granted access to the B.C. first contract model from 1993 to 2009, which equals 10% of the overall 4244 representation certifications granted. Twenty-three applications to the B.C. first contract model, or 6% of all first contract applications from 1993 to 2009, were

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120 Interviewees were chosen from the last two years in order to increase their recollection of their experiences.
121 Stan Lanyon and Brian Foley, who authored the Yarrow Lodge decision; infra note 182.
122 See Appendix, Table 1, Comparison of Representation Certifications Granted and Section 55 Applications Granted.
withdrawn, either voluntarily by the applicant or successfully challenged by the corresponding party for failing to meet the two pre-conditions of the model.

b) **Comparison of Private vs. Public Sector**

Despite the fact that interest arbitration is largely available to public sector services through essential service legislation,\(^{123}\) it was anticipated that other public sector services would access the B.C. first contract model. The data indicate that 89% of applicants to the B.C. first contract model from 1993 to 2009 were from the private sector, as opposed to 11% from the public sector.\(^{124}\)

c) **Comparison of Employer vs. Union**

Prior to the enactment of the B.C. first contract model, there was some concern that the model would only assist unions, not employers. The data demonstrate that 31% of applications to the B.C. first contract model from 1993 to 2009 were from employers, while 69% of requests came from unions.\(^{125}\)

d) **Comparison of Industry Type**

The top five industries granted certifications from 1993 to 2009 were Health and Social Services (27% of total certifications granted), Construction (22%), Manufacturing (13%), Wholesale Trade (12%) and Retail Trade (6%).\(^{126}\) Based on their relatively high numbers, one might expect that these five industries would also be top applicants of the B.C. first contract model.

The data does not illustrate any association between the rate of certifications and the rate of access to the B.C. first contract model by industry type. The top industries granted access to the B.C. first contract model from 1993 to 2009 include both those industries that were granted

\(^{123}\) See *e.g.* Fire and Police Services Collective Bargaining Act, R.S.B.C., ch. 142 (1996).
\(^{124}\) See Appendix, Table 2, Comparison of Private and Public Sector.
\(^{125}\) See Appendix, Table 3, Comparison of Applicant Type between Employers and Unions.
\(^{126}\) See Appendix, Table 4, Comparison of Industry Type.
more certifications within the same time period and those that were not. For example, even though the industry of Fishing and Trapping was only granted 0.3% of total certifications, 25% of those certifications successively accessed the B.C. first contract model. However, both the industries of Retail Trade and Wholesale Trade, which were two of the top five industries granted certifications, were in the top five industries granted first contract access (23% and 19% respectively) from 1993 to 2009.


e) Comparison of Bargaining Unit Size

The data demonstrate that certifications granted between 1993 and 2009 were given primarily for bargaining units that contained less than 40 members, with 45% being granted for bargaining units between one and ten members in size.\textsuperscript{127} Based on these numbers, one may expect that bargaining units with less than 40 members would be granted the most access to the B.C. first contract model. Further, opponents of first contract arbitration systems argue that only small unions would benefit from their use because of their limited ability to invest sufficient resources into developing bargaining unit support. This argument would also suggest that most unions accessing first contract assistance would represent small bargaining units.

The data, however, suggest otherwise. Although bargaining units between one and ten members were granted 45% of all certifications from 1993 to 2009, only 5% of them gained access to the B.C. first contract model. In contrast, despite the fact that bargaining unit sizes with 61 to 70 members were granted only 2% of all certifications from 1993 to 2009, 21% of those certifications were granted access to the B.C. first contract model.

\textsuperscript{127} See Appendix, Table 5, Comparison of Bargaining Unit Size.
f) **Comparison of Unions**

One of critics’ main concerns with first contract arbitration systems is that only the weakest unions, without the ability to wield economic pressure, would apply to them.\(^{128}\) The data indicate that 48 different unions have been granted access to the B.C. first contract model from 1993 to 2009, which equates to 50% of the 96 unions that were granted certifications within the same time frame.\(^{129}\) The 48 unions granted access included the largest unions in the province of British Columbia.

g) **Summary**

The above data suggest that concerns over the type of applicants and the frequency of the use of the B.C. first contract model are without a great deal of merit. Regarding the fear of the system’s overuse, the data reveals that the B.C. first contract model was only used in 10% of all first contract negotiations from 1993 to 2009. The concern that only unions would apply to first contract arbitration systems, and would hence benefit alone from their use, is not accurate, for employers account for 31% of first contract applications. A likely reason for this considerable percentage is the ability of employers to use the B.C. first contract model to avoid or end labor stoppages in progress.\(^{130}\) The data also reveal that the B.C. first contract model assists a sizeable number of bargaining units and unions, both big and small, in many different industries. More specifically, participants have come from 40 different unions, from at least 18 different industries and with bargaining units ranging from one to 715 members in size.\(^{131}\) Finally, the data does not demonstrate any correlation between the number of certifications granted by industry and bargaining unit size and the number of first contract applications granted.


\(^{129}\) See Appendix, Table 6, Comparison of Unions.

\(^{130}\) See Labour Relations Code, R.S.B.C., ch. 244, § 55(2) (1996); this reason was also supported by interview evidence; see Chapter III, (10), Critique of Section 55 Process and Mediator’s Role.

\(^{131}\) Data obtained by the B.C. Annual Reports on industries is broken down into 17 industries and an “other” category, which includes at least one industry.
2. **Breakdown of Section 55 Cases by Method of Resolution**

In order to evaluate whether the B.C. first contract model is achieving its goal of promoting collective bargaining and mediation while avoiding the imposition of first collective bargaining agreements, it is necessary to determine the method used by the parties to resolve their bargaining disputes. Arbitration cases were divided into three categories: voluntary arbitration; arbitration after one party rejects the mediator’s recommendations; and arbitration where the mediator has not issued recommendations (referred to as “arbitration”).\(^{132}\) This three-part division was made because it was anticipated that there would be differences in obtainment rates of first collective bargaining agreements and current bargaining status among the three arbitral categories.

Finally, since participants can use several methods of resolution prior to resolving a dispute,\(^ {133}\) the below method of resolution indicates the *first* method of resolution chosen by the parties except for “arbitration after one party rejects the mediator’s recommendations”. The first method of resolution was chosen because the majority of cases were actually resolved at this stage and it was anticipated to be the most likely predictor of obtainment rates of first collective bargaining agreements and current bargaining relationship status.

The data show that the majority of participants from 1993 to 2009 resolved their first contract disputes through mediated settlements (54%), followed by acceptance of mediators’ recommendations (10%), referral to strike/lockout (10%), arbitration (where no mediator recommendations were issued) (7%), arbitration after one party rejected mediator recommendations (6%), decertification within the section 55 process (6%), and business

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\(^{132}\) All chart data referring to “arbitration”

\(^{133}\) For example, a case may initially be referred to strike/lockout or arbitration but the parties may later negotiate a settlement.
Although 18% of all cases were set for arbitration (either voluntarily, after one party rejected the mediator’s recommendations, or upon request by one party), the percentage must be interpreted with caution as many of these cases settled without the imposition of first collective bargaining agreements.

The fact that an overwhelming majority of parties (64%) resolved their first contract disputes through mediation (with or without mediator recommendations) suggests that the concern over a potential “chilling effect” is not substantiated.

a) Comparison of Settled vs. Not Settled Cases

Cases were categorized as “settled” or “not settled” with the aim of discovering any differences between cases in which both parties had voluntarily chosen the method of resolution (mediated settlements, acceptance of mediator’s recommendations and voluntary arbitration) and cases in which only one party had voluntarily chosen the method of resolution (arbitration after one party rejects the mediator’s recommendations, arbitration, referral to strike/lockout, decertification and business closures). It was anticipated that there would be an association between “settled” and “not settled” cases and the obtainment rates of first collective bargaining agreements and the current bargaining status.

The data show that 69% of participants who accessed the B.C. first contract model from 1993 to 2009 “settled” their dispute as opposed to 31% that did “not settle.” The numbers show that there were more “settled” cases in each of the 17 years except for 1999.

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134 Business closures include instances where a company’s contract for bargaining unit work was cancelled.
135 See Appendix, Table 7, Method of Resolution for First Collective bargaining agreement Disputes within Section 55 from 1993-2009.
136 Cases categorized as “arbitration” (where no mediator recommendations were issued) mainly include cases where one party requests arbitration after an unsuccessful mediation attempt.
137 See Chapter III, (C), (4), Breakdown of Section 55 Cases Involving Arbitration.
138 See Chapter II, (D), Key Concerns.
139 See Appendix, Table 7, Method of Resolution for First Collective bargaining agreement Disputes within Section 55 from 1993-2009.
Of the cases that “settled”, 78% settled by mediated settlements, 14% by acceptance of mediator’s recommendations and 8% by voluntary arbitration. Of the cases that were “not settled”, the union was decertified in 32% of the cases, in 24% the parties were referred to strike/lockout, in 19% the employer’s business closed and in 18% the parties were referred to arbitration or proceeded to arbitration after one of the parties rejected the mediator’s recommendations.

b) Summary

The above data suggest that the B.C. first contract model is achieving its goal of promoting collective bargaining through mediation. Notwithstanding the several methods of resolution available to the parties in the B.C. first contract model, of the 407 cases proceeding through the B.C. first contract model from 1993 to 2009, 64% were resolved through mediation or acceptance of the mediator’s recommendations. The numbers also indicate that in the majority of instances, both parties voluntarily agreed to the method of resolution (69%) as opposed to instances in which only one party agreed (31%). Of the “settled” cases in which both parties voluntarily agreed, most were settled through mediated settlements and the fewest by voluntary arbitration. The main reason a case was “not settled” was due to the unions’ decertification, followed by cases in which the parties were referred to a strike/lockout.

3. Breakdown of Section 55 Cases where Mediator Issued Recommendations

Given that the mediator’s ability to issue recommendations regarding the terms of a first collective bargaining agreement is a noteworthy power unique to British Columbia, it was imperative to break down the cases in which the mediators issued recommendations in order to

140 See Appendix, Figure 1, Settled Cases by Method of Resolution from 1993-2009.
141 See Appendix, Figure 2, Not Settled Cases by Method of Resolution from 1993-2009.
142 According to interview data, Saskatchewan has recently undertaken a similar process whereby mediators have the ability to issue recommendations for the terms of the first collective bargaining agreement; see Saskatchewan mediator, supra note 47; Sobeys Capital Inc., [2005] S.L.R.B.D. No. 34.
gain a better understanding of the frequency with which recommendations were being issued and the likelihood of their acceptance by either party.

a) **Acceptance by Both Parties vs. One Party**

According to the seminal case of *Yarrow Lodge*, mediators can only issue recommendations regarding the terms of first collective bargaining agreements when the parties have made sufficient disclosure of their positions and interests in order to permit the fashioning of recommendations that have a “reasonable likelihood of acceptance by both parties.” Cases in which recommendations were issued from 1993 to 2009 were evaluated in order to determine whether mediators were adhering to this mandate.

The data reveal that both parties accepted mediator recommendations in 61% of the cases in which mediators had issued recommendations from 1993 to 2009, as opposed to 39% of cases in which only one party accepted the recommendations. Of the 25 cases in which one party rejected the mediators’ recommendations, 23 such cases (92%) were referred to arbitration.

b) **Acceptance by Employer vs. Union**

The role of a mediator has traditionally been neutral and impartial. There is a concern among some scholars and practitioners that the mediator’s ability to issue recommendations for the terms of a first collective bargaining agreement may weaken a mediator’s neutrality and or impartiality. Given that recommendations are only to be issued in situations in which there is a “reasonable likelihood of acceptance by both parties”, it might be expected that the recommended terms would equally favor (or disfavor) labor and management. Thus, it was

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143 See Appendix, Table 8, Breakdown of Mediator Recommendations from 1993-2009.
144 See Appendix, Table 7, Method of Resolution for First Collective bargaining agreement Disputes within Section 55 from 1993-2009.
145 Presumably, the other two cases were referred to strike/lockout.
146 E.g. Telephone Interview with George H. Cohen, current Director of FMCS, Washington, D.C. (May 6, 2010).
essential to assess whether mediators’ recommended terms for the first collective bargaining agreements from 1993 to 2009 strongly favored a particular party.

The data reveal that, in cases in which only one party accepted the mediator’s recommendations, employers accepted the recommendations 33% of the time, while unions accepted the recommendations 67% of the time.\textsuperscript{147}

c) \textbf{Summary}

The above data show that mediators reserve their ability to issue recommendations for the terms of first collective bargaining agreements. In 16\% of all cases in the B.C. first contract model from 1993 to 2009, the mediator issued recommendations; in 61\% of those cases both parties accepted the recommendations. On the other hand, the data also reveal that, 39\% of the time, one party rejected the mediator’s recommendations. Whether the recommendations that failed to gain acceptance by both parties had a “reasonable likelihood of acceptance by both parties” at the time of issuance cannot be gleaned from this data.\textsuperscript{148} The data also suggest that employers reject the mediator’s recommendations at a higher rate (i.e., 67\% of the time) than the unions. Whether this difference constitutes a bias towards labor is beyond the scope of this data. Cases that were referred to arbitration after one party rejected the mediator’s recommendations are tracked in later sections of this study\textsuperscript{149} in order to determine their ability to obtain first collective bargaining agreements and maintain bargaining relationships.

4. \textbf{Breakdown of Section 55 Cases Involving Arbitration}

Because the overall goal of the B.C. first contract model is for the parties to resolve first contract disputes voluntarily, as opposed to involuntarily through the imposition of a first

\textsuperscript{147} See Appendix, Table 9, Breakdown of Cases where Mediator Recommendations are Rejected by One Party from 1993-2009.
\textsuperscript{148} See Part IV, (c), (10), Mediators.
\textsuperscript{149} See Table 12, Method of Resolution and Obtainment Rate of First Collective Bargaining Agreements of S. 55 Cases from 1993-2009 and Table 13, Method of Resolution and Current Bargaining Status of s. 55 Cases from 1993-2009.
collective bargaining agreement, it was anticipated that arbitrators would encourage the parties to consent to a process of med-arb\textsuperscript{150} whereby a certain percentage of cases would resolve themselves in the mediation stage of the arbitration hearing. Given that arbitral awards are published publicly, it was possible to research which cases resulted in the imposition of an arbitral award. It was assumed that cases referred to arbitration, which did not result in the issuance of an arbitral award, settled voluntarily.

a) \textbf{Settled vs. Arbitral Awards}

The data indicate that a sizeable percentage of cases (at least 27\%) set for first contract arbitration between 1993 and 2009 settled voluntarily, presumably through a med-arb process.\textsuperscript{151} Cases referred to arbitration (where no mediator recommendations were issued) were the most likely to have settled (38\%), as opposed to cases in which one party rejected the mediator’s recommendations (30\%) or in which the parties voluntarily agreed to arbitrate (27\%).

b) \textbf{Comparison of Certification and Imposition Rates Across Canada}

Although this empirical study focuses exclusively on the B.C. first contract model, it is useful to note that prior comparative research has shown “automatic access” first contract arbitration systems have the highest application rate, followed by “mediator recommendations”, “no fault” and “fault”. The relationship between the form of the first contract system and the application rate is understandable given the more stringent access requirements of “fault” and “no fault” systems, compared to “automatic access” systems.

Research has also shown that a higher application rate is associated with a higher rate at which first collective bargaining agreements are imposed through arbitral awards (i.e. imposition rate). In other words, the “automatic access” system (i.e. Manitoba) has the highest application

\footnotesize
\textsuperscript{150} This authority is specifically set out in Labour Relations Code, R.S.B.C., ch. 244, § 55(6)(b)(i) (1996).
\textsuperscript{151} See Appendix, Table 10, Percentage of Arbitration Cases that never resulted in an Imposed Agreement from 1993-2009.
rate and the highest imposition rate, compared to the “fault” system (e.g. Quebec), which has the lowest application rate and the lowest imposition rate. However, the “mediator recommendations” system (i.e. British Columbia) does not follow this pattern since it has a relatively high application rate but an extremely low imposition rate.\textsuperscript{152} In brief, this means that the imposition rate of first collective bargaining agreements is the lowest in the B.C. first contract model compared to the other first contract systems found in Canadian jurisdictions.

\textsuperscript{152} Johnson, \textit{supra} note 19 at 16; O’Brien, \textit{supra} note 27 at 46.
Figure 3 indicates that, while the application rate of the B.C. first contract model was high relative to other jurisdictions (10.1%), the imposition rate of first agreements was very low relative to other jurisdictions (1.2%).

c) Summary

Although the data from an earlier section indicated that 18% of first contract cases in B.C. first contract model from 1993 to 2009 were set for arbitration,\textsuperscript{153} the data from this section clarify that only 12% of cases actually resulted in the imposition of first collective bargaining agreements. The numbers indicate that at least 27% of arbitral cases were voluntarily resolved, with 38% being resolved in cases initially referred to arbitration (where no mediator

\textsuperscript{153} See Part IV, (c), (2), Breakdown of Section 55 Cases by Method of Resolution.
recommendations were issued). The data suggest that the ability of arbitrators to conduct med-arb has likely increased the voluntary resolution of several first contract disputes.\textsuperscript{154}

5. **Effect of Method of Resolution on Time from Certification to Disposition**

Given that one of the goals of first arbitration contract systems, including the B.C. first contract model, is to end labor disputes in an expeditious manner, it is necessary to evaluate the time it takes for cases accessing the B.C. first contract model to resolve their bargaining disputes. Cases in which the participants were abruptly forced to withdraw from the B.C. first contract model (i.e., when the union was decertified or the business closed within the s. 55 process) were not examined due to irrelevancy.

As illustrated in the data, the majority of cases within the B.C. first contract model was resolved within one and a half years of the union’s certification, irrespective of the method of resolution.\textsuperscript{155} However, there is a significant relationship between the method of resolution and the length of time from certification to disposition (F statistic for the oneway ANOVA is significant at p=.001). The average length of time from certification to disposition for first contract cases from 1993 to 2009 was significantly longer for cases set for arbitration (mean=16.4 months) than cases that resolved in mediation (i.e. mediated settlement or acceptance of mediator’s recommendations) (mean=12 months) or were directed to strike/lockout (mean=11.5 months) (post hoc test reveals significant differences at p<.05).

a) **Summary**

The data show that most first contract disputes are resolved within one and a half years, with cases resolved through mediation or referred to strike/lockout taking on average only one year. Compared to the United States, where 38\% of mediation cases with FMCS are resolved

\textsuperscript{154} This evidence is substantiated by information gleaned from arbitral interviews; see Part IV, (c), (10), Arbitrators.

\textsuperscript{155} See Appendix, Table 11, Length of Relationship from Certification Date to Section 55 Disposition Date from 1993-2009.
within one year and 30 to 40% of cases are still unresolved after two years, first contract disputes in British Columbia are resolved in a more timely fashion through the assistance of the B.C. first contract model.

6. Effect of Method of Resolution on Obtainment of First Collective Bargaining Agreements

One of the main goals of first contract arbitration systems is to establish first collective bargaining agreements. In order to assess whether the B.C. first contract model is achieving this goal, participants of the B.C. first contract model from 1993 to 2009 were contacted to determine whether a first collective bargaining agreement was reached.

Table 12

<table>
<thead>
<tr>
<th>Method of S.55</th>
<th>Obtain CBA?</th>
<th>CBA Achieved</th>
<th>No CBA Achieved</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediated settlement</td>
<td>Count</td>
<td>138</td>
<td>18</td>
<td>156</td>
</tr>
<tr>
<td>% within Method of S.55</td>
<td>88.5%</td>
<td>11.5%</td>
<td>100.0%</td>
<td></td>
</tr>
<tr>
<td>Acceptance of mediator’s recommendations</td>
<td>Count</td>
<td>38</td>
<td>1</td>
<td>39</td>
</tr>
<tr>
<td>% within Method of S.55</td>
<td>97.4%</td>
<td>2.6%</td>
<td>100.0%</td>
<td></td>
</tr>
<tr>
<td>Voluntary arbitration</td>
<td>Count</td>
<td>21</td>
<td>1</td>
<td>22</td>
</tr>
<tr>
<td>% within Method of S.55</td>
<td>95.5%</td>
<td>4.5%</td>
<td>100.0%</td>
<td></td>
</tr>
<tr>
<td>Arbitration after one party rejects mediator’s recommendations</td>
<td>Count</td>
<td>20</td>
<td>2</td>
<td>22</td>
</tr>
<tr>
<td>% within Method of S.55</td>
<td>90.9%</td>
<td>9.1%</td>
<td>100.0%</td>
<td></td>
</tr>
<tr>
<td>Arbitration</td>
<td>Count</td>
<td>24</td>
<td>4</td>
<td>28</td>
</tr>
<tr>
<td>% within Method of S.55</td>
<td>85.7%</td>
<td>14.3%</td>
<td>100.0%</td>
<td></td>
</tr>
<tr>
<td>Strike/lockout</td>
<td>Count</td>
<td>26</td>
<td>9</td>
<td>35</td>
</tr>
<tr>
<td>% within Method of S.55</td>
<td>74.3%</td>
<td>25.7%</td>
<td>100.0%</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>Count</td>
<td>267</td>
<td>35</td>
<td>302</td>
</tr>
<tr>
<td>% within Method of S.55</td>
<td>88.4%</td>
<td>11.6%</td>
<td>100.0%</td>
<td></td>
</tr>
</tbody>
</table>

a. The likelihood ratio chi-square statistic is significant at p<.05
b. Response rate of 74%

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156 Johnson, supra note 19.
157 Mediated settlements do not necessarily result in the obtainment of a first collective bargaining agreement. For example, parties may agree simply to go their own ways.
Irrespective of the method of resolution, at least 75% of parties accessing the B.C. first contract model from 1993 to 2009 obtained first collective bargaining agreements. Nonetheless, Table 12 indicates that the percentage of first contract cases that obtained first collective bargaining agreements is highest among those cases in which the dispute was resolved by acceptance of the mediator’s recommendations (97.4%), voluntary arbitration (95.5%) and mediated settlements (88.5%); the lowest among those cases referred to strike/lockout (74.3%) or arbitration (85.7%) (the associated likelihood ratio chi-square test statistically significant at p<.05).

a) Summary

The data indicate that the B.C. first contract model assists the majority of participants in reaching a first collective bargaining agreement, thus achieving the overall goal of all first contract arbitration systems to establish first collective bargaining agreements. The statistical tests reveal there is a significant relationship between the method of resolution and the likelihood of parties obtaining a first collective bargaining agreement. In particular, 97.4% of parties that accepted the mediator’s recommendations\textsuperscript{158} obtained a first collective bargaining agreement while only 74.3% of those that were referred to strike/lockout did.

7. Effect of Method of Resolution on Current Bargaining Relationship Status

A goal of first contract arbitration systems that has largely remained untested is whether the system assists the parties in establishing enduring bargaining relationships. As expressed in the seminal decision of \textit{Yarrow Lodge}, “A significant element of the first collective bargaining agreement legislation is the goal of establishing a long-term collective bargaining relationship.”\textsuperscript{159}

\textsuperscript{158} Only one case did not achieve a first collective bargaining agreement.

\textsuperscript{159} \textit{Yarrow Lodge Ltd.} and \textit{Bevan Lodge Corporation}, and \textit{Louisiana-Pacific Canada Ltd.} and \textit{Hospital Employees’ Union, and Communications, Energy and Paperworkers Union of Canada, Local 448}, [1993] B.C.L.R.B.D. No. 453.
Many would argue against the adoption of first contract arbitration systems should they merely allow the parties to delay the inevitable (i.e. decertifications). Consequently, it is imperative to ascertain the current bargaining status of parties who accessed the B.C. first contract model to see if the B.C. first contract model’s goal of promoting collective bargaining and enduring bargaining relationships was achieved.

Table 13

<table>
<thead>
<tr>
<th>Method of S.55</th>
<th>Current status</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Still Bargaining</td>
<td>Not Bargaining</td>
<td>Total</td>
</tr>
<tr>
<td>Mediated Settlement</td>
<td></td>
<td>86</td>
<td>107</td>
<td>193</td>
</tr>
<tr>
<td></td>
<td>% within Method of S.55</td>
<td>44.6%</td>
<td>55.4%</td>
<td>100.0%</td>
</tr>
<tr>
<td>Acceptance of Mediator’s Recommendations</td>
<td></td>
<td>32</td>
<td>7</td>
<td>39</td>
</tr>
<tr>
<td></td>
<td>% within Method of S.55</td>
<td>82.1%</td>
<td>17.9%</td>
<td>100.0%</td>
</tr>
<tr>
<td>Voluntary arbitration</td>
<td></td>
<td>8</td>
<td>10</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>% within Method of S.55</td>
<td>44.4%</td>
<td>55.6%</td>
<td>100.0%</td>
</tr>
<tr>
<td>Arbitration After One party rejects Mediator’s Recommendations</td>
<td></td>
<td>11</td>
<td>6</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>% within Method of S.55</td>
<td>64.7%</td>
<td>35.3%</td>
<td>100.0%</td>
</tr>
<tr>
<td>Arbitration</td>
<td></td>
<td>11</td>
<td>17</td>
<td>28</td>
</tr>
<tr>
<td></td>
<td>% within Method of S.55</td>
<td>39.3%</td>
<td>60.7%</td>
<td>100.0%</td>
</tr>
<tr>
<td>Strike/lockout</td>
<td></td>
<td>16</td>
<td>20</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td>% within Method of S.55</td>
<td>44.4%</td>
<td>55.6%</td>
<td>100.0%</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>164</td>
<td>167</td>
<td>331</td>
</tr>
</tbody>
</table>

a. The likelihood ratio chi-square statistic is significant at p<.001

b. Response rate of 81%

Table 13 reveals that there is a statistically significant relationship between the method of resolution and the parties’ current bargaining status (the associated likelihood ratio chi-square statistically significant at p<.001).

160 In most cases, this would be the union’s decertification.
The data provide evidence that the acceptance of the mediator’s recommendations, by at least one party, has a meaningful and positive impact on the parties’ current bargaining relationship status. In cases in which both parties accepted the mediator’s recommendations, 82% are still bargaining today. In cases that were referred to arbitration after one party rejected the mediator’s recommendations, 65% are still bargaining. This contrasts sharply with the low percentages among other types of cases. For instance, only 39% of the parties that were directed to arbitrate their first contract disputes are in current bargaining relationships. There is only a marginal difference between the current bargaining status of parties that resolved their first contract dispute through a mediated settlement (44.6%), voluntary arbitration (44.4%) and parties referred to strike/lockout (44.4%).

Although the response rate for this data was extremely high for a telephone survey (81%), it is likely that a sizeable number of the 19% of unions that could not be reached simply no longer exist, which would mean that the parties are no longer in bargaining relationships.

a) Breakdown of Current Bargaining Status

Most labor boards only track certification cancellations, not business closures. Given that business closures would likely constitute a measurable percentage of cases in which the parties are not in current bargaining relationships, this study attempts to differentiate between the decertifications and business closures.

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161 Because the BCLRB data does not distinguish cases where the parties accepted the mediator’s recommendations from mediated settlements before 2000, this percentage mainly reflects cases from 2000–09.
163 See British Columbia Labour Relations Board, B.C. Annual Reports, http://www.lrb.bc.ca/reports/ (last visited Sept. 9, 2010).
164 All unions that were parties to first contract cases from 1993 to 2009 were asked the reason why the bargaining relationship had ended.
The data reveal that 51% of all cases that accessed the B.C. first contract model are still in a current bargaining relationship, compared to 38% of cases in which the union was later decertified and 11% in which the employer’s business closed. Of the first contract cases that are no longer in a bargaining relationship, 77% of the time it was due to the union’s decertification and 23% of the time it was due to the employer’s business closure.

b) Summary

The data reveal that the majority, albeit slight, of parties that accessed the B.C. first contract model from 1993 to 2009 is still in a bargaining relationship. Some may have anticipated that fewer parties would still be in bargaining relationships given that many of the parties requiring first contract assistance are the “worst of the worst cases.”

Statistical tests indicate that current bargaining status is significantly related to the method used by the party to resolve their first contract dispute. Cases in which both parties accepted the mediator’s recommendations were exceptionally successful at maintaining bargaining relationships (82.1%), followed by cases in which one party accepted the mediator’s recommendations (64.7%). This latter statistic should alleviate concern over the relatively large percentage of cases (i.e., 39%) in which mediator recommendations were rejected by one party because it shows that many of those cases were able to achieve first collective bargaining agreements and enduring bargaining relationships. The data also tend to rebut earlier findings of higher decertification rates for cases in which settlements were reached by mediation or by the acceptance of the mediator’s recommendations.

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165 See Appendix, Table 14, Current Disposition of Section 55 Cases from 1993-2009.
166 See Part IV, (c), (8), Comparison of Decertification Cases.
167 See O’Brien, supra note 27 (O’Brien calculated the decertification rate for cases referred to arbitration at 11% compared to 17% for cases that resolved through mediated settlements or acceptance of mediators’ recommendations); O’Brien’s study was based only on seven years of data as opposed to 17 years of data used in the current study.
Somewhat surprisingly, research reveals a distinction between cases in which the parties reached mediated settlements without mediator recommendations and cases in which the mediator issued recommendations and both (or one) of the parties accepted them. Parties that accepted mediator recommendations were twice as likely to have maintained a bargaining relationship. The inevitable question is what is it about the mediator’s recommendations that impact the long-term bargaining relationship of the parties?

One possible, contributing factor may be that the content of the first collective bargaining agreements authored by mediators is superior to the content of agreements authored by the parties alone. In other words, mediators are better equipped to draft the terms of first collective bargaining agreements, or at least ones that resonate more strongly with both of the parties than collective bargaining agreements authored by the parties themselves. Similar to other forms of relationship counseling, it is probable that mediators (i.e., in the role of the specialist or therapist) are able to draft fairer first collective bargaining agreements that occupy more middle ground, and that are more likely to form the basis for enduring relationships, than the parties themselves, who may be pressured to concede to first collective bargaining agreements that are not in their best interests. Similarly, the fact that mediators recommended terms are adopted by arbitrators in most instances (i.e., the content of the terms remains the same) may also explain why parties who proceeded to arbitration after one party rejected the mediator’s recommendations were also more likely to be in current bargaining relationships than others who did not receive mediator recommended terms.

Another complementary factor may be that parties are more likely to buy into first collective bargaining agreements, and are less likely to second-guess them, when specialized, neutral third parties, who have been informed of the parties’ true interests and concerns, propose

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168 The psychological theory of Cognitive Dissonance may have some application.
them. The fact that parties who both accepted the mediator’s recommendations were even more likely to be in current bargaining relationships than cases in which only one party accepted them suggests that parties buy into first collective bargaining agreements even more readily when both parties accept the mediator’s recommendations. Further research is necessary to substantiate these theories.

8. Comparison of Decertification Cases

It would be helpful to gain better insight and understanding into the B.C. first contract cases in which the union was decertified. In particular, a better comprehension of the timing of the decertification (i.e., either during or after the first contract process) and the rate of decertification compared to general decertifications is vital.

a) Decertifications During versus After Section 55

The data indicate that the majority of decertifications (83%) affecting unions who accessed the B.C. first contract model from 1993 to 2009 occurred after the conclusion of the first contract process, as opposed to the 17% that occurred within the first contract process.\textsuperscript{169}

b) Decertifications Generally vs. After Section 55

The data reveal that, of the 407 cases that were granted access to the B.C. first contract model from 1993 to 2009, 136 resulted in decertifications (33% of all first contract cases).\textsuperscript{170} Of the 4244 cases that were granted certifications in the same time period, 1407 resulted in decertifications (33% of certifications granted). In sum, the same percentage of unions was decertified irrespective of whether they had accessed the B.C. first contract model.

\textsuperscript{169} See Appendix, Table 15, When Decertifications Occurred form 1993-2009.
\textsuperscript{170} See Appendix, Table 16, Comparison of Certification Cancellations Generally and Within Section 55; there were 12 decertifications with unknown dates that were not factored into the analysis.
c) Summary

One might expect that, similar to marital relationships that require spousal therapy, the divorce rate between unions and employers would be higher for cases that required first contract assistance to resolve their dispute, because these cases would represent the “worst of the worst”. Others would expect that the decertification rate would be lower for cases accessing the B.C. first contract model given that the unions had received a strike vote majority prior to accessing the model.

Given that the percentage of decertifications is actually the same as the general population, the data suggests that the B.C. first contract model might assist the parties in repairing their bargaining relationship, thus resulting in fewer decertifications than if left to their own devices. The data also reveal that most decertifications occur after the conclusion of the B.C. first contract model (83%).

9. Effect of Method of Resolution on Length of Bargaining Relationship for Parties No Longer Bargaining

The above data reveal that 49% of parties who accessed the B.C. first contract model between 1993 and 2009 are not in current bargaining relationships (i.e., union decertifications occurred in 38% and business closures in 11%). It is necessary to gain a better understanding of the length of the bargaining relationships for that cohort in order to assess adequately whether the B.C. first contract model has assisted in creating enduring bargaining relationships. In other words, even though the bargaining relationships have ended in those cases, did the B.C. first contract model assist in improving their bargaining relationship for at least a certain length of time?

The data reveal that the average length of the bargaining relationship of cases from the time the parties resolved their first collective bargaining agreements until their demise was 35.8
months (roughly 3 years), irrespective of how the parties resolved their first contract dispute.\textsuperscript{171} However, the average length of the bargaining relationship was considerably shorter for cases set for arbitration (mean=29.2 months) than in cases that resolved their first contract disputes in mediation (including after the acceptance of the mediator’s recommendations) (mean=38.3 months) or directed to strike/lockout (mean=32.2 months).

\textbf{a) Summary}

The data show that most cases in which the parties are no longer in a current bargaining relationship had a relationship that lasted three years. Many would say that this finding is significant because it constitutes three years more than the parties would have received if left to their own devices. What is interesting, however, is that the numbers indicate that most unions are not being decertified right after the expiration of the 10-month freeze period\textsuperscript{172} or after the expiration of the term of the first collective bargaining agreement.\textsuperscript{173} This would suggest that the B.C. first contract model may have assisted the parties in repairing their bargaining relationships for some period of time. Further, the data shows that, of the parties who are no longer in a bargaining relationship, parties who resolved their dispute through mediation (including after the acceptance of the mediator’s recommendations) achieved the longest bargaining relationships (mean=38.3 months).

\textsuperscript{171} See Appendix, Table 17, Length of Relationship from Section 55 Disposition Date to Current Date for Parties No Longer Bargaining fro 1993-2009.
\textsuperscript{172} Labour Relations Code, R.S.B.C., ch. 244, §33(3) (1996).
\textsuperscript{173} Yarrow Lodge Ltd. and Bevan Lodge Corporation, and Louisiana-Pacific Canada Ltd. and Hospital Employees’ Union, and Communications, Energy and Paperworkers Union of Canada, Local 448, [1993] B.C.L.R.B.D. No. 453 (according to the policy of the BCLRB, the majority of first collective bargaining agreements should contain a term of two years, unless agreed to otherwise by the parties).
10. Critique of Section 55 Process and Mediator’s Role

a) Unions

In terms of the timing in which unions are most likely to access the B.C. first contract model, several unions noted its usefulness in instances in which there had been “a pile of unfair labor practices” or instances in which there had been the “worst and true mean-spirited employer that…[has] maintained fighting the union from the get-go, and done everything under the sun to try and thwart it”. One union representative noted:

[B]ecause the bargaining that goes on for first contracts take months and years and the areas that I work in have such a high turnover it’s a continual process and the employers know that so they see that it works to their advantage to draw things out as long as possible because the union loses support the longer it goes on.

In terms of the B.C. first contract model’s ability to assist the parties in, and promoting, collective bargaining, some unions commented that, although in mediation both parties “might…not get what we want, people are focused on more the problem-solving and trying to find resolutions to issues and concluding a collective bargaining agreement.” Others stated, “there’s some pressure on the deal then to get parties to maybe climb off their positions that otherwise they might not want to climb off of” and “to do a little bit of soul-searching at that point to decide, ‘How far do we want to push certain issues? How relevant is it?’ And it probably forces them to probably have to really consider their positions maybe a little harder, than if it was straight mediation”. As one union member put it, “it helps ring the bell and the wake-up call”.

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174 All interviews followed a semi-structured format and ranged in duration from fifty minutes to three hours, with the average length being approximately one hour and fifteen minutes. Interviews were conducted between January and April 2010. Given the sensitivity of evaluating the B.C. first contract model, each interviewee was assured anonymity prior to his or her interview with direct quotations attributable only to the group affiliation (i.e., the unions, management, mediators, and arbitrators). Interview protocols encompassed a standard set of issues, but were refined for each interviewee’s group affiliation.
Unions also claimed that the B.C. first contract model facilitated collective bargaining by improving information-gathering, either by clarifying the intent behind the party’s bargaining position or pressuring the parties to make full disclosure.

[W]e don’t want the facility to go belly-up. If it goes belly-up, what advantage is it to use? Our members are out of work. There’s no advantage to us. So with the mediation and the process of putting all your cards on the table including your financials that you intend on relying on…its the best way to have a good understanding of where it’s at, the best way to get to a resolution and the best way for [the union] to be able to go and sell it to the membership.

Another advantage of mediation provided by unions was that it encouraged them “to package things…if you give me that on the sick leave, I’ll give you this on the wages…or, you give me this language and I’ll let that language go.”

Regarding the mediator’s ability to issue recommendations, all of the unions approved of this tool for numerous reasons. Some reasons included:

[T]here’s no one that understands the dispute better than the person that was engaged throughout the entire mediation process…lived the 14-hour days in the mediation sessions to try to find a result.

[I]t adds some sobriety to the parties because if a mediator’s trying to write a report that may form the foundation of what the contract’s going to be with an arbitrator, they’re going to have to make some sense of it all.

Unions also appreciated being able to save face with their bargaining unit in certain first contract disputes through the issuance of mediators’ recommendations. They disclosed that, in these circumstances, the bargaining unit was more likely to accept the terms of the collective bargaining agreement if they came from the mediator than if they had been drafted by the bargaining agent. Unions claimed that this situation often occurred when they were dealing with “unrealistic membership”.

With respect to the appropriateness of the potential disclosure of a mediator’s report to a subsequent arbitrator, one union representative commented, “[the reason] I like the report [is]
because it’s very clear, these are the outstanding issues. Nobody can backtrack. Whether I like it or not, I have to swallow it.”

Just as the employers had, unions understood that later arbitrators would likely defer to the mediators’ recommendations. They, too, approved of this approach: “if you re-argue all the same points before an arbitrator hoping there will be change…to then ultimately have the same agreement that was covered under the recommendations initially…is a time lag…an expense.”

Unions unanimously preferred to resolve disputes voluntarily through the acceptance of mediators’ recommendations than to resolve disputes involuntarily with arbitral awards. The unions explained:

[A]ny time that the parties agree, even if they’re agreeing with this big stick over their head knowing that the next step could mean the same terms ultimately get invoked, I think that any time that the parties are actually in agreement at that stage and whether they’re feeling pressure to agree or not, they’ve sucked it up and they’re shaking hands as they’re walking out of the room because both of them have accepted it.” Whereas in arbitration, “you’re looking for ways to crack the employer’s case…basically to prove that they’re liars. Well, what kind of relationship does that set up when your aim has to be to discredit the employer?

One union member commented, “arbitration’s always win-lose – there’s always a winner and there’s always a loser. Mediation, when you recommend a settlement, you may not like it…completely, but you’ve been a part of it and you feel that you’ve got at least a partial win from both sides.”

Unions offered several differing viewpoints as to the greatest advantage of the B.C. first contract model. Some agreed that the greatest advantage of the B.C. first contract model is its ability to “finalize the first collective bargaining agreement [which gives] the parties an opportunity to work on their relationship, because obviously there’s a problem with their relationship at that point. So at least it puts…a period of peace in…and gives the parties an opportunity to work on [their relationship].” Further, “if the employer’s committed several unfair labor practices or the worksite’s become toxic, at least now there’s a process in place [where] the
union’s got some basic fundamental rights …to be able to at least try to establish the relationship.” Unions agreed that having some workplace protections for their members is even more “advantageous right now in this day and age with tough employers”. One union believed the greatest advantage was “getting deals without job action where we wouldn’t have before”. Several unions believed that the strike/lockout option is not preferable in first contract disputes without protections in place for employees; further, some noted its inappropriateness in certain industries, such as healthcare, in which there was no “bright line test in terms of [distinguishing] private and public” sector.

b) Employers

In terms of the pre-condition of obtaining a strike vote majority, employers expressed their approval of this requirement for two reasons. First, they claimed, it demonstrated that the unions had full support (depending on the percentage) of the bargaining unit and it forced the employers to take the unions’ bargaining positions more seriously. Second, it prevented any labor stoppage since unions were required to provide the employer with a 72-hour strike notice, which allowed the employer to apply to the B.C. first contract model in sufficient time to prevent the impending strike.

In terms of the B.C. first contract model’s ability to assist the parties in, and promote, collective bargaining, one employer said the following:

I think…the advantage of the mediation and the recommendation process is it forces more and more [concessions] to happen. Because, if it’s just mediation, and there’s no teeth to it, and there’s no motivation to settle, and people think, “We’re going to arbitration anyway”, well then, that’s not serious bargaining, and you just hold things off. But I think that’s…maybe that’s the value of 55, is that you have to make concessions…it pushes you along the way. And most…particularly employers don’t want arbitration.

Another employer believed the following:

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175 These protections are found in collective bargaining agreements.
176 This was particularly important when there was considerable time from certification.
177 Labour Relations Code, R.S.B.C., ch. 244, §60 (1996).
[M]ediation forces you to try and agree, [which] I think is very…is helpful especially in a first agreement where everybody’s feeling…their oats, right? I mean, the union’s certainly feeling their oats because they’re the union and they have to be trying to set the precedent for their own members…[but] so does the employer—we’re not going to give away stuff that we’re going to be paying for, for the next 50 years or whatever, right? …[M]ediation is very, very helpful for groups who are feeling their oats and not knowing how to back down. It sort of teaches them…how to back down a little bit through a third person…So the fact that the mediator is forcing you to try and have a conversation with one another is a good thing, right? [The mediator] tests how firm your position is, and how much slippage there is, and how much slosh there is in your position.”

In another first contract dispute, an employer remarked:

[M]y sense was that the staff had boxed themselves in a little bit. They’d taken a position that was hard enough that if they changed their minds, it would look like they had just sort of caved…whereas if the mediator said, ‘I’m going to split the difference’ that would be cool.

One employer felt that the main benefit of mediation was “to have somebody just kind of say, ‘Okay, hold my hand and jump over this river, okay? Now, off you go.’” Another employer spoke of a case in which the exact terms of a collective bargaining agreement proposed by the employer in a final-offer vote, which were rejected, were later accepted by the employees simply because they came from the mediator. Another employer felt reassured because “most [mediators] aren’t going to make recommendations that you’re not going to accept”.

However, while one employer endorsed the idea of “an independent party [who takes] a disinterested look at everything that was still outstanding and makes a recommendation”, he nonetheless rejected the mediator’s recommendations because the mediator “gave away…something that was important to us”, “was trying to push us in a direction that we can’t go…instead of just letting it go wherever it might lead” and didn’t allow the parties to mediate enough before making recommendations, though he speculated that “it probably wouldn’t have resulted in anything different”. 
Just as the unions had, the employers understood that later arbitrators would likely defer to mediators’ recommendations. In approving this tactic, one employer noted that “if you thought it’s going to end up at arbitration, then the benefit of negotiation disappears, and you take a positions that’s sort of unreasonable and that’s not even close to your final decision because you’ve got to find somewhere to go.”

Many employers also possessed an immense respect for the “skills of the negotiators [at] trying to make an assessment of whether a deal is there, and how close [the parties] are to a deal.” One employer also noted the advantage of “an experienced negotiator…to get to know who [they’re] going up against…the willingness of that party to make moves [and] when they [will] start to drop stuff.”

The employers interviewed were unconcerned about the appropriateness of the potential disclosure of a mediator’s report to a subsequent arbitrator and the impact it might have on mediation.

In terms of resolving a dispute voluntarily through the acceptance of mediators’ recommendations, or involuntarily with arbitral awards, one employer observed:

[C]learly, from a relationship perspective, a negotiated agreement – even a recommendation from a mediator – is much better and more satisfying to all parties than an arbitrated agreement…I think if they end up at arbitration, it’s less likely that the relationship is going to be a stronger relationship and it would be less cooperative than the success of the parties meeting together, gaining an agreement, shaking hands at the end, going out for a drink or whatever, which is really part of the process and an important part of the process…because it ends as a win. With an arbitrator it’s a win-lose. And with a mediator, even with recommendations, both parties can say they’ve worked towards this, and they accept it and so they’re agreeing to it willingly [which] from a relationship perspective, which carries on until the end…it’s really important.

178 Although employers were new to the process, they usually hired bargaining agents with experience in the B.C. first contract model.
179 This employer was a commonly used bargaining agent for employers in the industry.
One employer remarked “most of us would rather get a deal at mediation with recommendations, than we would going to arbitration”; another called it “the lesser of two evils.”

c) Mediators

The four mediators all expressed the belief that first collective bargaining agreements voluntarily reached were better for the parties’ bargaining relationships than agreements imposed upon them. One reason provided was that “if somebody has to live with something that’s been rammed down their throats, that’s ...a lot less palatable than if they set the deal themselves.” Another felt that arbitration inevitably created a winner and a loser.

The mediators all approved of their authority to issue recommendations for the terms of first collective bargaining agreements, expressing relief that it allowed them to avoid being “a dummy or a Maytag repairman.” One mediator commented that “most parties now around the Board have no problem with mediation and adjudication” and have told us to “fill your boots.”

The mediators provided insight into the circumstance in which they issue recommendations. More specifically, recommendations are to be provided only in instances in which “the parties are pennies apart on salaries or a short distance apart on what to do with the benefit package” but should be restricted to cases in which the mediator “gets a reading from the parties” based on “a sniff test” on the probability of them being accepted.

The mediators did not substantiate the concern that parties would be less likely to divulge their deep, dark secrets to a mediator who is able to use that information to form the basis of a potentially publishable settlement. In the mediators’ experience, the parties do not hold back from divulging their bargaining positions and interests, likely because they understand that everything in mediation, including all conversations, remains confidential, except for the

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180 Comments from one arbitrator interviewed, pertaining to his mediator experience, were included in this section.
mediator’s recommendations for the terms of a collective bargaining agreement: “I’m not compellable to testify and you don’t get access to my notes, not even under FOI.”[^181]

Mediators noted that parties appreciate having the ability to divert any negative repercussions from their constituents over the terms of the draft first collective bargaining agreement to them. The mediators were told in many cases that the first contract dispute had become “too political” and that the only way to obtain voluntary agreements was for the bargaining agents to inform the constituents (i.e., the bargaining unit and employer’s executive) that the terms of the first collective bargaining agreements were recommended by the mediator and would likely be imposed on the parties later on if they did not accept them.

In terms of the Mediation Division’s preference between recommending med-arb or arbitration (where no mediator recommendations were issued), it was confirmed that med-arb was most likely to be recommended because the belief was that “arbitrators nowadays are going to … use med-arb even if the [Mediation Division] recommends arbitration.”

d) Arbitrators

Not only have the four arbitrators who were interviewed conducted first contract arbitrations in British Columbia, but two of them have played an integral role in the creation and development of the first contract arbitration policy found in the B.C. first contract model, including sitting on the renowned Yarrow Lodge Board.[^182]

All the arbitrators endorsed the ability of mediators to issue recommendations, which was referred to as “muscle mediation” because it prevented “messenger mediation” whereby the mediator simply travels from caucus to caucus relaying messages. The arbitrators advised that a mediators’ recommendations often have the “sobering” “effect of breaking the deadlock” between parties and moving them away from “their own tunnel vision.”

[^182]: Stan Lanyon and Brian Foley, who expressly consented to their name disclosures.
The arbitrators conveyed a mutual appreciation of the importance of deferring to a mediators’ recommendations for the terms of first collective bargaining agreements, not just for reasons relating to their personal career, but also because they believed it would preserve the mediation process and its unique ability to encourage the voluntary resolution of first contract disputes. However, they noted the importance of the three exceptions, set out in BCLRB caselaw, in which arbitrators are permitted to overturn the mediator’s recommendations, as a means to ensure that arbitrators don’t “rubber stamp” all mediators’ recommendations.

The arbitrators also conveyed a considerable level of respect for mediators and acknowledged that they are “seasoned veterans” who can often “save [parties] from themselves.” One arbitrator commented that other jurisdictions, in which mediators were not authorized to issue recommendations, were “missing the boat by not utilizing the talent of those mediators. They’re using the talent from the point of view of yes…they’re acting as catalysts, they’re acting as the go-between, the reality checker…but then ‘Bang!’ They should have the magic pen to write it down.”

All of the arbitrators expressed a strong preference for engaging in the process of med-arb for first contract disputes because of its ability to allow the arbitrator to gain a more insightful understanding of the parties’ interests and concerns and also because it encouraged the parties to budge from uncompromising positions and to resolve some or all of the issues voluntarily. One arbitrator noted that the ability to proceed by final-offer selection, although commonly not used in first contract arbitrations, was also helpful in preventing the potential “chilling effect”.

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183 I perceived a concern that arbitrators would be referred fewer first contract cases from the Mediation Division should they depart from the B.C. labor policy of according deference to mediator recommendations.
184 One arbitrator commented that “you’d be surprised how in mediation you find out what’s said in the arbitration has nothing to do with what’s at issue”…“especially if the parties have counsel.”
Lastly, the arbitrators agreed that, although B.C. mediators could be construed as *de facto* arbitrators, due to their ability to issue recommendations which are ultimately deferred to, there is a *perceived* value in disputes being resolved under the cloak of mediation (i.e., parties truly believed this method of resolution was superior), as well as an anticipated *actual* value to resolving the dispute in mediation (i.e., mediation would help repair the bargaining relationships).

e) Summary

All of the main parties (unions, employers, mediators and arbitrators) of the B.C. first contract model agree on the following:

(1) the ability of mediators to issue recommendations is “a good thing,” preferable to other first contract arbitration systems,\(^ {185}\) because it facilitates the mediation process and forces parties to budge from uncompromising positions;\(^ {186}\)

(2) perceptually, it can be easier for unions and employers to obtain voluntary first collective bargaining agreements\(^ {187}\) if neutral, third parties (i.e., mediators or arbitrators) author the recommended terms of first collective bargaining agreements especially during mediation in which the parties take on a lesser adversarial role;\(^ {188}\)

(3) resolving first collective bargaining agreements voluntarily (through mediation) is preferable and is more likely to result in better, longer bargaining relationships; and

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\(^{185}\) Parties constantly expressed a fear that mediation would become a “drive-by mediation” or a “messenger mediation” if the mediators did not have the power to issue recommendations that were later deferred to by arbitrators or courts.

\(^{186}\) The evidence suggests that neither a “chilling” or “narcotic” effect takes place in mediation because of the mediator’s ability to issue recommendations.

\(^{187}\) Bargaining agents for unions and employers must obtain approval from their constituents (i.e. bargaining unit and executives) prior to the adoption of a first collective bargaining agreement.

\(^{188}\) Often times, the bargaining agents assist the mediator in drafting the recommendations.
(4) arbitrators commonly engage in the process of med-arb to resolve first collective bargaining disputes and have found it to be successful in voluntarily resolving all or some issues in dispute.

V. CONCLUSIONS AND RECOMMENDATIONS FOR THE UNITED STATES

a. Conclusions

This study offers the most comprehensive, empirical analysis of a first contract arbitration system in North America.\textsuperscript{189} Scholars and practitioners alike agree that the success of first contract arbitration can be measured in two ways: first, by examining the effect of the availability of compulsory arbitration on bargaining outcomes; and, second, by examining the outcomes of the use of a first contract arbitration system.\textsuperscript{190} The data suggest that the B.C. first contract model is successful in restoring dysfunctional collective bargaining relationships and achieving the four main goals of a first contract system: (1) the B.C. first contract model resolves first contract disputes in an expeditious manner, particularly by encouraging parties to resolve their disputes in mediation (mean=12 months); (2) the majority of parties who accessed the B.C. model obtained first collective bargaining agreements, particularly those who resolved the dispute after accepting mediators’ recommendations (97.4%); (3) the B.C. first contract model encourages collective bargaining (64% of the parties resolved their dispute through mediation) while avoiding arbitration (only 12% of first collective bargaining agreements were imposed);\textsuperscript{191} and (4) by allowing mediators to issue recommendations, the B.C. first contract model resulted in enduring bargaining relationships\textsuperscript{192} for the cases in which both parties (82.1%) or at least one

\textsuperscript{189} To the best knowledge of the author.
\textsuperscript{190} Fisk & Pulver, \textit{supra} note 7 at 67.
\textsuperscript{191} Although this study does not compare the B.C. model to other first contract arbitration models found elsewhere in Canada, prior research has revealed that the B.C. model is less likely to result in an imposed agreement than other form; see Part IV, (c), (4), (b), Comparison of Certification and Imposition Rates Across Canada.
\textsuperscript{192} “Enduring bargaining relationships” is defined as greater than 50%.
party (64.7%) accepted the mediator’s recommendations. Further, the average length of the bargaining relationship for parties who are no longer in current bargaining relationships was roughly three years, which suggests that even the bargaining relationships that did not last were successful in achieving lengthy bargaining relationships. Interview data conveyed broad satisfaction on behalf of employers and unions, as well as mediators and arbitrators, for the B.C. first contract model, particularly the ability of mediators to issue non-binding recommendations for the terms of a first collective bargaining agreement.

b. B.C. First Contract Model: An Appropriate Model for the United States?

The above research findings provide compelling empirical evidence for the importance of allowing mediators to issue non-binding recommendations for the terms of first collective bargaining agreements. While the labor law system in Canada is not identical to that of the United States, several researchers have argued that it is similar enough for the Canadian experience to inform U.S. policy debate, particularly because Canadian labor law is modeled on U.S. labor law and thus shares many key features, and has experienced similar labor market shocks. Further, the ability of mediators to issue non-binding recommendations is not a

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193 “Lengthy bargaining relationships” is defined as a relationship longer than the 12-month freeze period.
194 The access requirement in the B.C. first contract model of a strike vote majority is not an essential requirement of the model; in other words, the mediator’s recommendations can be implemented alongside any access requirements. See Gary Chaison & Joseph Rose (1994), The Canadian Perspective on Workers’ Rights to Form a Union and Bargain Collectively, in RESTORING THE PROMISE OF AMERICAN LABOR LAW (Sheldon Friedman et al. eds., ILR Press, 1994); Johnson, supra note 19 at 4; Richard Freeman, Contraction and Expansion: The Divergence of Private Sector and Public Sector Unionism in the United States, 2(2) J. ECON. PERSP. 63 (1988); W. Craig Riddell, Unionization in Canada and the United States: A Tale of Two Countries, in SMALL DIFFERENCES THAT MATTER (David Card & Richard Freeman eds., University of Chicago Press, 1993).
195 Or fact-finders or arbitrators; see, e.g., NLRB unfair labor practice settlement program where settlement judges have the ability to issue non-binding recommendations; William B. Gould IV, Four-and-one-half Year Report by William B. Gould IV, Chairman, National Labor Relations Board 1994–1998, at 8 (National Labor Relations Board); Arup Varma, The NLRB’s Unfair Labor Practice Settlement Program: An Empirical Analysis of Participant Satisfaction, DISP. RESOL. J. (November 2004); see also Goldberg, supra note 9 (proposes a process of collective bargaining following the issuance of recommended settlement terms by an arbitrator or fact-finder).
foreign concept in the United States, nor is the concept of interest arbitration. Rather, U.S. mediators have employed these tools in both the labor context and in other situations.

The ability of the United States to statutorily allow the mediator to make non-binding recommendations is well within Congress’s power and the purview of the NLRA. The congressional policy statement on mediation in Section 201(b) of Title II of the NLRA reads:

It is the policy of the United States that: … the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate government facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and representatives of their employees to reach and maintain agreements…[emphasis added]

Moreover, the current form of EFCA statutorily demands that first contract mediators at FMCS “use [their] best efforts, by mediation and conciliation, to bring them to agreement.” This supports the introduction of mediator non-binding recommendations, which have successfully assisted the parties in voluntarily obtaining first collective bargaining agreements and enduring bargaining relationships.

To conclude, this study demonstrates the success of the B.C. first contract model and suggests its feasibility in the United States.

198 Family and small claims issues; see, e.g., Multi-Option ADR Project, A Partnership of the San Mateo Court, Bar & Community, available at http://www.sanmateocourt.org/adr (last visited Sept. 9, 2010).
199 National Labor Relations Act 29 U.S.C. 151–169, §201(b) (1988); see Simkin & Fidandis, supra note 197 at 32.
200 EFCA, supra note 23.
VI. APPENDIX

Table 1  Comparison of Representation Certifications Granted and Section 55

**Applications Granted**

<table>
<thead>
<tr>
<th>Year</th>
<th>Certifications Granted</th>
<th>Applications accepted under s. 55</th>
<th>Applications accepted as % of Certs Granted</th>
<th>Applications withdrawn under s. 55</th>
<th>Applications Withdrawn as % of s. 55 Applications Received</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>509</td>
<td>49</td>
<td>10%</td>
<td>3</td>
<td>7%</td>
</tr>
<tr>
<td>1994</td>
<td>437</td>
<td>38</td>
<td>9%</td>
<td>2</td>
<td>5%</td>
</tr>
<tr>
<td>1995</td>
<td>393</td>
<td>29</td>
<td>7%</td>
<td>1</td>
<td>3%</td>
</tr>
<tr>
<td>1996</td>
<td>430</td>
<td>33</td>
<td>8%</td>
<td>3</td>
<td>9%</td>
</tr>
<tr>
<td>1997</td>
<td>409</td>
<td>42</td>
<td>10%</td>
<td>2</td>
<td>5%</td>
</tr>
<tr>
<td>1998</td>
<td>348</td>
<td>35</td>
<td>10%</td>
<td>1</td>
<td>3%</td>
</tr>
<tr>
<td>1999</td>
<td>363</td>
<td>28</td>
<td>8%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>2000</td>
<td>263</td>
<td>30</td>
<td>11%</td>
<td>2</td>
<td>6%</td>
</tr>
<tr>
<td>2001</td>
<td>181</td>
<td>24</td>
<td>13%</td>
<td>3</td>
<td>11%</td>
</tr>
<tr>
<td>2002</td>
<td>88</td>
<td>15</td>
<td>17%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>2003</td>
<td>75</td>
<td>9</td>
<td>12%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>2004</td>
<td>88</td>
<td>6</td>
<td>7%</td>
<td>1</td>
<td>14%</td>
</tr>
<tr>
<td>2005</td>
<td>266</td>
<td>14</td>
<td>5%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>2006</td>
<td>89</td>
<td>20</td>
<td>22%</td>
<td>5</td>
<td>20%</td>
</tr>
<tr>
<td>2007</td>
<td>121</td>
<td>9</td>
<td>7%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>2008</td>
<td>96</td>
<td>13</td>
<td>14%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>2009</td>
<td>88</td>
<td>13</td>
<td>15%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>4244</td>
<td>407</td>
<td>10%</td>
<td>23</td>
<td>6%</td>
</tr>
</tbody>
</table>

a. Applications withdrawn include applications successfully challenged for not meeting requirements of s. 55(1) as well as applications voluntarily withdrawn by union  
b. Five separate certification applications for the same employee bargaining unit were granted and simultaneously consolidated resulting in the issuance of a single certification; thus the total number of certifications granted in 2003 amounts to 71  
c. In 2005, 266 certification applications were granted resulting in 249 certifications being issued

Table 2  Comparison of Private and Public Sector

<table>
<thead>
<tr>
<th>Type of Sector in s. 55 from 1993-2009</th>
<th>SECTOR</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PRIVATE</td>
</tr>
<tr>
<td>TOTAL</td>
<td>361</td>
</tr>
<tr>
<td>% Total</td>
<td>89%</td>
</tr>
</tbody>
</table>

Table 3  Comparison of Applicant Type between Employers and Unions

<table>
<thead>
<tr>
<th>Type of Applicant in s. 55 from 1993-2009</th>
<th>EMPLOYER</th>
<th>UNION</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL</td>
<td>120</td>
<td>264</td>
</tr>
<tr>
<td>% Total</td>
<td>31%</td>
<td>69%</td>
</tr>
</tbody>
</table>
Table 4  Comparison of Industry Type

<table>
<thead>
<tr>
<th>Industry Classification</th>
<th>% of Total Certifications</th>
<th>S.55 as % of Certifications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accommodation, Food and Beverage Services</td>
<td>5%</td>
<td>24%</td>
</tr>
<tr>
<td>Agricultural and Related Services</td>
<td>1%</td>
<td>17%</td>
</tr>
<tr>
<td>Business Services</td>
<td>1%</td>
<td>7%</td>
</tr>
<tr>
<td>Communication and other Utilities</td>
<td>0.3%</td>
<td>0%</td>
</tr>
<tr>
<td>Construction</td>
<td>22%</td>
<td>1%</td>
</tr>
<tr>
<td>Education Services</td>
<td>2%</td>
<td>13%</td>
</tr>
<tr>
<td>Finance and Insurance</td>
<td>1%</td>
<td>18%</td>
</tr>
<tr>
<td>Fishing and Trapping</td>
<td>0.3%</td>
<td>25%</td>
</tr>
<tr>
<td>Government Services</td>
<td>2%</td>
<td>11%</td>
</tr>
<tr>
<td>Health and Social Services</td>
<td>27%</td>
<td>6%</td>
</tr>
<tr>
<td>Logging and Forestry</td>
<td>2%</td>
<td>6%</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>13%</td>
<td>16%</td>
</tr>
<tr>
<td>Mining (including Milling), Quarrying and Oil Wells</td>
<td>1%</td>
<td>12%</td>
</tr>
<tr>
<td>Other Services</td>
<td>0.1%</td>
<td>13%</td>
</tr>
<tr>
<td>Real Estate Operators and Insurance Agents</td>
<td>5%</td>
<td>0%</td>
</tr>
<tr>
<td>Retail Trade</td>
<td>6%</td>
<td>23%</td>
</tr>
<tr>
<td>Transportation and Storage</td>
<td>2%</td>
<td>10%</td>
</tr>
<tr>
<td>Wholesale Trade</td>
<td>12%</td>
<td>19%</td>
</tr>
</tbody>
</table>

Table 5  Comparison of Bargaining Unit Size

<table>
<thead>
<tr>
<th>Bargaining Unit Size</th>
<th>% of Total Certifications</th>
<th>S. 55 Apps as % of Certifications</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 10</td>
<td>45%</td>
<td>5%</td>
</tr>
<tr>
<td>11 to 20</td>
<td>21%</td>
<td>12%</td>
</tr>
<tr>
<td>21 to 30</td>
<td>11%</td>
<td>16%</td>
</tr>
<tr>
<td>31 to 40</td>
<td>6%</td>
<td>15%</td>
</tr>
<tr>
<td>41 to 50</td>
<td>3%</td>
<td>13%</td>
</tr>
<tr>
<td>51 to 60</td>
<td>3%</td>
<td>12%</td>
</tr>
<tr>
<td>61 to 70</td>
<td>2%</td>
<td>21%</td>
</tr>
<tr>
<td>71 to 80</td>
<td>1%</td>
<td>13%</td>
</tr>
<tr>
<td>81 to 90</td>
<td>1%</td>
<td>10%</td>
</tr>
<tr>
<td>91 to 100</td>
<td>1%</td>
<td>14%</td>
</tr>
<tr>
<td>101 to 200</td>
<td>4%</td>
<td>16%</td>
</tr>
<tr>
<td>Over 200</td>
<td>1%</td>
<td>15%</td>
</tr>
</tbody>
</table>
Table 6  Comparison of Unions

<table>
<thead>
<tr>
<th>Number of Unions Accessing s. 55 from 1993-2009</th>
<th># of Unions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certifications Granted</td>
<td>96</td>
</tr>
<tr>
<td>s. 55 Applications Granted</td>
<td>48</td>
</tr>
<tr>
<td>s. 55 Apps as a % of Certifications Granted</td>
<td>50%</td>
</tr>
</tbody>
</table>

Table 7  Method of Resolution for First Collective bargaining agreement Disputes within Section 55 from 1993-2009

| Method of Resolution for First Collective Agreement Disputes within s. 55 from 1993-2009 |
|-----------------------------------------------|-----------|
| **METHOD OF RESOLUTION: SETTLED**           | TOTAL % of TOTAL |
| Mediated Settlement                          | 220       54%|
| Acceptance of Mediator’s Recommendations     | 39        10%|
| Voluntary Arbitration                        | 22        5% |
| **Total Settled**                            | **281**   **69%**|
| **METHOD OF RESOLUTION: NOT SETTLED**        | TOTAL % of TOTAL |
| Arbitration After One Party Rejects Mediator’s Recs | 23        6% |
| Arbitration                                  | 30        7% |
| Referral to strike/lockout                   | 40        10%|
| Decertification                              | 25        6% |
| Business Closed or Contract Cancelled        | 8         2% |
| **Total Not Settled**                        | **126**   **31%**|
| **TOTAL CASES**                              | **407**   **100%**|

a. Cases from 1993 to 1999 rarely distinguished “acceptance of mediator’s recommendations” from “mediated settlements”; thus the number of mediated settlements is higher during this time period
Table 8  Breakdown of Mediator Recommendations from 1993-2009

<table>
<thead>
<tr>
<th>Breakdown of Mediator Recommendations from 1993-2009</th>
<th>TOTAL</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceptance of Mediator's Recommendations by Both Parties</td>
<td>39</td>
<td>61%</td>
</tr>
<tr>
<td>Rejection of Mediator's Recommendations By One Party</td>
<td>25</td>
<td>39%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>64</td>
<td>100%</td>
</tr>
</tbody>
</table>

a. In one case, both parties rejected recommendations

Table 9  Breakdown of Cases where Mediator Recommendations are Rejected by One Party from 1993-2009

<table>
<thead>
<tr>
<th>Breakdown of Cases where Mediator Recommendations are Rejected by One Party from 1993-2009</th>
<th>TOTAL</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party Accepting</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employer</td>
<td>8</td>
<td>33%</td>
</tr>
<tr>
<td>Union</td>
<td>16</td>
<td>67%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>24</td>
<td>100%</td>
</tr>
</tbody>
</table>

a. Value is 24, not 25, because in one case both parties rejected recommendations

Table 10  Percentage of Arbitration Cases that never resulted in an Imposed Agreement from 1993-2009

<table>
<thead>
<tr>
<th>Percentage of Arbitration Cases that never resulted in an Imposed Agreement from 1993-2009</th>
<th>% No Awards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary Arbitration</td>
<td>27%</td>
</tr>
<tr>
<td>Arbitration after one party rejects mediator's recommendations</td>
<td>30%</td>
</tr>
<tr>
<td>Arbitration</td>
<td>38%</td>
</tr>
</tbody>
</table>
Table 11  Length of Relationship from Certification Date to Section 55 Disposition

Date from 1993-2009

<table>
<thead>
<tr>
<th>Method of Resolution</th>
<th>Number of Cases</th>
<th>Mean Relationship Length (Months)</th>
<th>Standard Deviation (Months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediated</td>
<td>260</td>
<td>12.0</td>
<td>9.3</td>
</tr>
<tr>
<td>Arbitration</td>
<td>74</td>
<td>16.4</td>
<td>10.6</td>
</tr>
<tr>
<td>Strike/lockout</td>
<td>40</td>
<td>11.5</td>
<td>6.3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>374</strong></td>
<td><strong>12.8</strong></td>
<td><strong>9.5</strong></td>
</tr>
</tbody>
</table>

a. F statistic for the oneway ANOVA test is significant at \( p = .001 \)

b. Response rate of 100%

Table 14  Current Disposition of Section 55 Cases from 1993-2009

<table>
<thead>
<tr>
<th>Current Disposition of S. 55 Cases from 1993-2009</th>
<th>Sample Total</th>
<th>% of Sample Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Still bargaining</td>
<td>164</td>
<td>51%</td>
</tr>
<tr>
<td>Union decertified</td>
<td>123</td>
<td>38%</td>
</tr>
<tr>
<td>Business closed</td>
<td>37</td>
<td>11%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>324</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

Table 15  When Decertifications Occurred from 1993-2009

<table>
<thead>
<tr>
<th>When Decertifications Occurred from 1993-2009</th>
<th>Total</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decertifications during S. 55</td>
<td>25</td>
<td>17%</td>
</tr>
<tr>
<td>Decertifications after S. 55</td>
<td>123</td>
<td>83%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>148</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>
Table 16  Comparison of Certification Cancellations Generally and Within Section 55

<table>
<thead>
<tr>
<th>Year</th>
<th>Certification Granted</th>
<th>Decertifications Granted</th>
<th>% of Certifications that are Decertified</th>
<th>Section 55 Applications Granted</th>
<th>Section 55 Decertifications</th>
<th>% of Section 55 Cases that are Decertified</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>509</td>
<td>53</td>
<td>10%</td>
<td>49</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1994</td>
<td>427</td>
<td>248</td>
<td>57%</td>
<td>38</td>
<td>12</td>
<td>32%</td>
</tr>
<tr>
<td>1995</td>
<td>393</td>
<td>85</td>
<td>22%</td>
<td>29</td>
<td>10</td>
<td>34%</td>
</tr>
<tr>
<td>1996</td>
<td>430</td>
<td>107</td>
<td>25%</td>
<td>33</td>
<td>10</td>
<td>30%</td>
</tr>
<tr>
<td>1997</td>
<td>409</td>
<td>76</td>
<td>19%</td>
<td>42</td>
<td>2</td>
<td>5%</td>
</tr>
<tr>
<td>1998</td>
<td>348</td>
<td>84</td>
<td>24%</td>
<td>35</td>
<td>8</td>
<td>23%</td>
</tr>
<tr>
<td>1999</td>
<td>363</td>
<td>107</td>
<td>29%</td>
<td>28</td>
<td>11</td>
<td>39%</td>
</tr>
<tr>
<td>2000</td>
<td>263</td>
<td>119</td>
<td>45%</td>
<td>30</td>
<td>19</td>
<td>63%</td>
</tr>
<tr>
<td>2001</td>
<td>181</td>
<td>85</td>
<td>47%</td>
<td>24</td>
<td>13</td>
<td>54%</td>
</tr>
<tr>
<td>2002</td>
<td>88</td>
<td>128</td>
<td>145%</td>
<td>15</td>
<td>10</td>
<td>67%</td>
</tr>
<tr>
<td>2003</td>
<td>75</td>
<td>91</td>
<td>121%</td>
<td>9</td>
<td>10</td>
<td>111%</td>
</tr>
<tr>
<td>2004</td>
<td>88</td>
<td>49</td>
<td>50%</td>
<td>6</td>
<td>7</td>
<td>117%</td>
</tr>
<tr>
<td>2005</td>
<td>266</td>
<td>40</td>
<td>15%</td>
<td>14</td>
<td>4</td>
<td>31%</td>
</tr>
<tr>
<td>2006</td>
<td>89</td>
<td>42</td>
<td>47%</td>
<td>20</td>
<td>5</td>
<td>25%</td>
</tr>
<tr>
<td>2007</td>
<td>121</td>
<td>38</td>
<td>31%</td>
<td>9</td>
<td>6</td>
<td>67%</td>
</tr>
<tr>
<td>2008</td>
<td>96</td>
<td>31</td>
<td>32%</td>
<td>13</td>
<td>5</td>
<td>38%</td>
</tr>
<tr>
<td>2009</td>
<td>88</td>
<td>24</td>
<td>27%</td>
<td>13</td>
<td>5</td>
<td>38%</td>
</tr>
<tr>
<td>TOTALS</td>
<td>4244</td>
<td>1407</td>
<td>33%</td>
<td>407</td>
<td>136</td>
<td>33%</td>
</tr>
<tr>
<td>ANNUAL AVERAGE</td>
<td>250</td>
<td>83</td>
<td>44%</td>
<td>24</td>
<td>8</td>
<td>45%</td>
</tr>
</tbody>
</table>

a. Decertifications may reflect certifications from a different year

b. There were 12 s. 55 decertifications with unknown dates

Table 17  Length of Relationship from Section 55 Disposition Date to Current Date for Parties No Longer Bargaining from 1993-2009

<table>
<thead>
<tr>
<th>Method of Resolution</th>
<th>Number of Cases</th>
<th>Mean Relationship Length (Months)</th>
<th>Standard Deviation (Months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediated</td>
<td>84</td>
<td>38.3</td>
<td>41.2</td>
</tr>
<tr>
<td>Arbitration</td>
<td>23</td>
<td>29.2</td>
<td>24.7</td>
</tr>
<tr>
<td>Strike/lockout</td>
<td>15</td>
<td>32.2</td>
<td>45.4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>122</strong></td>
<td><strong>35.8</strong></td>
<td><strong>39.1</strong></td>
</tr>
</tbody>
</table>