

Myths & Evidence: EFCA v. Canadian First Contract Arbitration Experience

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EFCA, s. 3

- If no agreement within 90 days of commencing bargaining, then either party may request mediation from the FMCS
- FMCS duty to “promptly put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement”.
- If no agreement within 30 days of request, FMCS shall refer the dispute to arbitration.
- 2 year term for arbitrated FC (parties may agree to amend)
- Parties can agree to extend time limits

Main Objections

- Replaces collective bargaining
 - Chill / distortion
 - Imposed
 - Terms threaten business
- Too short qualifying period
- Too lengthy process
- Crutch for weak units
- No standards for arbitration
- No judicial review

First Contract Arbitration

- Approx. 85% of private sector covered
- Introduction & amendments inspired by specific disputes
 - Sandringham hospital
 - Eatons department store
 - Comox medical centre
 - Canadian Tire store
- Original targets: Female, service sector, health care
- Employers & unions initially imposed
 - Unions preferred strike,
 - feared government contract imposition
 - discourage true employer bargaining
 - contrary to free contracting

First Contract Arbitration: Four Models & Two Approaches

'Exceptional Remedy' - no prospect of settle in reasonable time	Quebec
	Federal
	Newfoundland
'Automatic Access' - Deadlines	Manitoba
'No Fault' - No ULP – but discrete reasons	Ontario
	Saskatchewan
'Mediation Intensive' - not remedy; support coll barg process	British Columbia

Development of FCA Models

	1974			1978			1982		1984	1985	1986					1993	1994	1995	...	Present
BC	Exceptional Remedy														Mediation Intensive					
QU				Exceptional Remedy																
Fed				Exceptional Remedy																
MB							Except. Remedy		Automatic Access											
NF										Exceptional Remedy										
ON											No-Fault									
SK																	No-Fault			

First Contract Arbitration

Jurisdiction	Year in Force
British Columbia	1974
Quebec	1978
Federal	1978
Manitoba	1982
Newfoundland	1985
Ontario	1986
Saskatchewan	1994
Prince Edward Island	1994*

* Passed, not in force

Ratio of FCA Applications Filed and Granted to Certifications Granted in Previous Year

Jurisdiction	Certifications	FCA Applications	Ratio: FCA App: Cert	FCA Granted	Ratio: FCA Granted: Cert
Federal (1986-2005)	1992	3	<0.001	1	< 0.001
BC (1986-2003/08)	5936	401*	0.07	32**	0.005
SK (1995-2008)	1754	-	-	43	0.02
MB (1986-2007)	1218	217	0.18	99	0.08
ON (1986-2007)	11298	377	0.03	102	0.009
QU (1986-2000)	15962	539	0.03	307	0.019
NF (1986-2005)	262	47	0.18	17	0.06
Total	38 422	1 584	0.04	601	0.016

*Data for 1986 to 2008 ** Data for 1986 to 2003

Canadian Experience

- **Non-controversial and wide-spread**
- **Infrequently sought; even less frequently applied**

Public & private sector

MB: 12.8% public admin

BC: Private sector: 88.7%

- services (23%); health & social services (18.6%); manufacturing (17.6%)

Public sector: 11.3%

- health & social services (69%); government services (23%); education (7%)

Relatively small units

- MB: Half from < 30 employees
- 20% from < 10.
- QU: 60% from < 30
- BC: Private: most < 30
- Public: most < 10

Relatively high rate of voluntary settlement

MB

- Voluntary agmt: 21 cases (44.7 %)
- Board-imposed contract: Voluntary agmt: 21 cases (44.7%)
- Withdrawn: 5 cases (10.6%)

QU

- Referred to arb: 151 cases (70.6%)
 - FC imposed (80 cases, or 53.0%)
 - Voluntary agmt (57 cases, 37.7%)
 - Union rep rescinded: 8 cases (5.3%)
- Denied arb: 57 cases (26.6%)
- Withdrawn: 6 cases (2.8%)
- Pending: 6 cases

- ON
 - Granted 26 (18.44%)
 - Dismissed 12 (8.51%),
 - Otherwise not granted 103 (73.05%)

- BC
 - Settled outright: (65 cases, 56.03%) (10 adopting mediator's recommended terms);
 - Agreed to med/arb or be bound by mediator's recommendations: (8 cases, 6.90%);
 - Resolved through med/arb: (10 cases, 8.62%);
 - Directed to exercise rights to strike or lockout: (12 cases, 10.34%);
 - Withdrawn: (6 cases, 5.17%);
 - Decertified during the FCA process: (3 cases; 2.59%);
 - Business closed during the FCA process: (2 cases; 1.72%);
 - FCA appointment rescinded: (2 cases, 1.72%); and,
 - First contract issued by an arbitrator or the Board: (8 cases, 6.90%) [Bd 1; Arber 7]

Relatively stable outcomes:

- decertification / renewal / business closure (high background rates)

MB: No decertifications.

Live agreements: 10/17 voluntary agreement cases

7/11 imposed FC cases

QU: Data not available post 1998

1978-1998 reports 47% of imposed FCs negotiated subsequent CA

BC:

72.3% of the 65 settled cases active

100% of voluntary med/arb or binding med recommendation cases active.

67% of cases where parties directed to med /arb, or arb or Bd imposed FC, active.

75% of permitted work stoppage cases active.

Reconsideration / judicial review rare :

4 BC

2 MB

2 ON

Fairly lengthy process

QU: 54d to arbitrator appointment

376 d from application to imposed FC

BC: Average time from Cert to FCA application:

All cases: 394 d

Settled cases: 377 d (half within 294 d)

Not settled cases: 377 d (half within 294 d)

Except: MB Average application to FC imposition: 60.7 d

Work stoppage prohibited once FCA application

Employers apply: strike avoidance?

- BC: 33%
- QU: 16 %
- ON: 7.8%

S. Johnson (2008): FCA legislation associated with lower strike incidence.

Subsequent work stoppages: facility or weakness?

BC: 0

ON: 0

MB: 1

British Columbia: “Mediation Intensive”

Apply To	Associate chair of Mediation Division.
Screens	Yes (Associate Chair Mediation Division)
Pre-Conditions	Certification granted; Parties have collectively bargained and failed to reach an agreement; and, Successful strike vote
Pre-Arbitration Processes	Mediation
Issues FC	Arbitrator or Board
Trigger for Imposed FC	Recommendation of mediator and/ or Associate Chair if mediation fails mediation
	<p>If no FC within 20 d of mediator appointment: mediator report to the associate chair recommending either or both:</p> <ul style="list-style-type: none"> (a) the terms of the first collective agreement for consideration by the parties; (b) a process for concluding the first collective agreement including one or more of : <ul style="list-style-type: none"> (i) mediation / arbitration (result in imposed FC if no agreement); (ii) arbitrator or Board impose FC. (iii) allow work stoppage. <p>If no agreement w/in 20 d Associate Chair direction under (b)</p>

British Columbia: “Mediation Intensive”

Factors to decide whether to refer to FC arbitration (non-exhaustive):

- (a) bad faith or surface bargaining;
- (b) employer conduct shows refusal to recognize the union;
- (c) party adopts uncompromising bargaining position without reasonable justification;
- (d) party fails to make reasonable or expeditious efforts to conclude a CA;
- (e) unrealistic demands or expectations arising from either the intentional conduct of a party or from their inexperience;
- (f) a bitter and protracted dispute unlikely to be voluntarily settled.

Decertification treatment Not specified.

Work stoppages Prohibited once a FCA application is filed, unless mediator or associate chair authorises.

Considerations in setting FC Guidelines for arbitrators to set FCA terms:

- 1.no breakthrough or innovative clauses;
- 2.Employ objective criteria (e.g. comparable terms and conditions paid to similar employees performing similar work);
- 3.Must be internal consistency and equity amongst employees;
- 4.Employer’s financial state, if sufficient evidence, a critical factor;
- 5.The economic and market conditions of the sector or industry in which the employer competes must be considered (*Yarrow Lodge*, 1993).

Manitoba: “Automatic Access”

Apply To	Board
Screens	No
Pre-Conditions	Appointed conciliator has notified Board or 120 d since appointment 90 d since certification (and any extension periods)
Pre-Arbitration Processes	Conciliation
Issues FC	Arbitrator or if parties refuse to select an arbitrator, then Board
Trigger for Imposed FC	<p>10d for parties to elect arbitration: <u>-60 d from date parties notified the Bd of election for arbitrator award</u></p> <p>If not elect arbitration: - If no agreement within 60 d of FC application, then Bd has 3d to impose a first contract, OR decline to make an award if opinion that might agree within 30d alone or with conciliation officer. - If no agreement within 30d, then Bd issues FC within 30 days</p>
FC Duration	1 year
Decertification treatment	Not specified.
Work stoppages	Must terminate when a FCA application filed.
Considerations in setting FC	<p>Present evidence and make representations to the Board or arbitrator</p> <p>Consider negotiated terms and conditions for comparable employment</p> <p>Consider other matters it considers “will assist in arriving at provisions of a first collective agreement ...which are fair and reasonable in the circumstances”</p> <p>Can agree to amend FC in writing</p>

Manitoba: Automatic Access - Outcomes

Study period	1 April 2001 to 31 Dec 2007 (assoc. cases to 1 May 2010; strike data to 22 July 2009)
No. applications	47 (incl. 1 pending)
Applicant	4 employer-filed cases & 1 jointly-filed case since 1992.
Sector / Industry *	Public administration 12.8% Service sector 31.9% Manufacturing 10.6% <10% from construction, trade, finance sectors combined
Applicant unit size*	Half from < 30 employees 20% from $\bar{\leq}$ 10.
Time to application	-
Outcomes	Voluntary agmt: 21 cases (44.7 %) Board-imposed contract: Voluntary agmt: 21 cases (44.7%) Withdrawn: 5 cases (10.6%)
Length of process	Average application to FC imposition: 60.7 d
Stability of Outcomes*	No decertifications. Live agreements: 10/17 voluntary agreement cases 7/11 imposed FC cases
Subsequent Work Stoppages	1

* Substantial proportion of data missing

Quebec: “Exceptional Remedy”

Apply To	Minister
Screens	Yes (Ministerial discretion)
Pre-Conditions	Exhaust conciliation
Pre-Arbitration Processes	Conciliation; Conciliation officer may continue to assist the parties even after FCA application filed.
Issues FC	Arbitrator (or panel including assessors)
Trigger for Imposed FC	Minister’s discretion to send to arbitrator Arbitrator must impose a FC where opinion parties unlikely to reach a CA within “reasonable time”.
FC Duration	1-3 years
Decertification treatment	Not specified.
Work stoppages	Must end if and when arbitrator announces necessary to impose FC
Considerations in setting FC	Parties may agree to amend FC terms
	Arbitrators must decide “according to equity and good conscience” May consider “conditions of employment that prevail in similar undertakings or similar circumstances and the conditions of employment that are applicable to the other employees of the undertaking”
	Parties may agree, at any time, on any of the issues in dispute, and any such agreed issues are to be included, without amendment, in FC

Quebec: Exceptional Remedy - Outcomes

Current model	Exceptional Remedy
Study period (strike data to 22 July 2009)	2002-08
No. applications	214
Applicant	Employer: 34 (15.9%) (including 1 joint application).
Sector / Industry	-
Applicant unit size	Average 48.2 60% from < 30
Outcomes	<p>Referred to arb: 151 cases (70.6%)</p> <ul style="list-style-type: none"> - FC imposed (80 cases, or 53.0%) - Voluntary agmt (57 cases, 37.7%) - Union rep rescinded: 8 cases (5.3%) <p>Denied arb: 57 cases (26.6%)</p> <p>Withdrawn: 6 cases (2.8%)</p> <p>Pending: 6 cases</p>
Length of process	54d to arbitrator appointment 376 d from application to imposed FC
Stability of Outcomes	Data not available post 1998 1978-1998 reports 47% of imposed FCs negotiated subsequent CA

Ontario: “No-Fault”

Apply To	Board
Screens	Yes (Board)
Pre-Conditions	(1) parties unable to effect a collective agreement; AND (2) MOL either issued a notice that it is not considered advisable to appoint a conciliation board or has released conciliation board report
Pre-Arbitration Processes	Conciliation exhausted Ministry may appoint a mediator to assist the parties
Issues FC	Board of Arbitration OR LRB if parties agree within seven days of Board’s direction
Trigger for Imposed FC	Two-steps: (1) Find an obligation to bargain and, in totality of circumstances, the process of collective bargaining has been “unsuccessful” (2) Failure due to one or more of: employer’s refusal to recognize the union’s bargaining authority; uncompromising nature of any bargaining position adopted by the respondent without reasonable justification; respondent’s failure to make reasonable or expeditious efforts to conclude a collective agreement; any other reason the Board considers relevant.
FC Duration	Two years
Decertification treatment	Priority if filed before FC application decided.
Work stoppages	Prohibited where Board has directed FC arbitration.
Considerations in setting FC	Must accept, without amendment, matters parties agree to in writing.
	Any FC term except length, may be retroactive to a date not earlier than date of notice to bargain.

Ontario: No-Fault - Outcomes

Current model	No-fault
Study period (strike data to 22 July 2009)	10 Nov 1995 to 31 Mar 2009 (assoc. Cases to 31 June 2009)
No. applications	141
Applicant	Employer: 7.8%
Sector / Industry	-
Applicant unit size	-
Time to application	371 d post-cert
	Cases granted FCA direction: 348 d post-cert Cases denied FCA direction: 376 d post-cert
Outcomes	Granted 26 (18.44%) Dismissed 12 (8.51%), Otherwise not granted 103 (73.05%)
Length of process	-
Stability of Outcomes	-
Subsequent Work Stoppages	17 of the 33 FC work stoppages during study period involved FCA applications. No work stoppages during subsequent bargaining rounds.

British Columbia: Mediation Intensive - Outcomes

Current model	Mediation Intensive
Study period	January 1, 2001 to December 31, 2008 (assoc. cases to 30 June 2009; strike data to 22 July 2009)
No. applications	116
Applicant	Employer: 32.8%
Sector / Industry	Private sector: 88.7% services (23%); health & social services (18.6%); manufacturing (17.6%)
	Public sector: 11.3% health & social services (69%); government services (23%); education (7%)
Applicant unit size	Private: most < 30 Public: most < 10
Time to application	Average time from Cert to FCA application: -All cases: 394 d -Settled cases: 377 d (half within 294 d) -Not settled cases: 377 d (half within 294 d)
Outcomes	<p>Settled outright: (65 cases, 56.03%) (10 adopting mediator's recommended terms);</p> <p>Agreed to med/arb or be bound by mediator's recommendations: (8 cases, 6.90%);</p> <p>Resolved through med/arb: (10 cases, 8.62%);</p> <p>Directed to exercise rights to strike or lockout: (12 cases, 10.34%);</p> <p>Withdrawn: (6 cases, 5.17%);</p> <p>Decertified during the FCA process: (3 cases; 2.59%);</p> <p>Business closed during the FCA process: (2 cases; 1.72%);</p> <p>FCA appointment rescinded: (2 cases, 1.72%); and,</p> <p>First contract issued by an arbitrator or the Board: (8 cases, 6.90%) [Bd 1; Arber 7]</p>

British Columbia: Mediation Intensive - Outcomes, cont.

Length of process	<p>Time from FCA application to Board direction:</p> <ul style="list-style-type: none"> - Overall average: 71 d (half within 41.5 d) - Settled cases, on average: 72.8 d (half within 36 d) - Not-settled cases, on average: 90.44 days (half within 72.5 d)
	<p>Time from Cert to Board direction</p> <ul style="list-style-type: none"> - Overall average: 465.93 days (half within 345 days). - Settled cases, on average: 448.48 days on average (half within 339 d) - Not-settled cases, on average: 649.89 days (half within 481.5 d)
Stability of Outcomes	<p>72.3% of the 65 settled cases active</p> <p>100% of voluntary med/arb or binding med recommendation cases active.</p> <p>67% of cases where parties directed to med /arb, or arb or Bd imposed FC, active.</p> <p>75% of permitted work stoppage cases active.</p>
Subsequent Work Stoppages	1