

Contradictions and Limitations of Final Offer Selection: The Manitoba Experience

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Résumé de l'article

En juillet 1977, le gouvernement NPD du Manitoba modifia la Loi des relations du travail de cette province de façon à permettre le recours à l'arbitrage des propositions finales (APF). Il s'agissait d'une solution de compromis à une revendication du mouvement syndical qui demandait l'adoption d'une mesure contre les briseurs de grève. La loi fut promulguée le 1er janvier 1988. En novembre 1988, un gouvernement minoritaire progressiste-conservateur proposa le projet de loi 41 en vue d'abroger cette mesure. Ce projet de loi est encore en suspens (sept. 89), mais il est presque assuré que l'APF sera aboli avant que ne se termine le mandat de ce gouvernement.

L'expérience de l'APF a soulevé bien des conflits et des controverses au Manitoba. Le monde des affaires s'y est opposé. De même, il a suscité des contestations de la part des grands syndicats et a entraîné des dissensions au sein du mouvement syndical.

Le présent article analyse l'expérience manitobaine en matière d'APF afin de clarifier les causes du conflit qu'il a généré. L'arbitrage des propositions finales visait à régler un problème réel, soit la nécessité d'aider les travailleurs de petites unités, dont le pouvoir de négociation est faible, dans les secteurs en forte croissance de l'économie. Les syndicats espéraient retirer un avantage potentiel d'un tel arbitrage en l'utilisant comme outil pour contrer le déclin des effectifs syndicaux résultant des changements dans la structure de la main-d'oeuvre. Mais cette législation comportait aussi un double risque: celui de miner leur volonté et leur capacité de mobiliser leurs membres en vue de la grève; celui de voir des gouvernements dans l'avenir modifier cette législation de façon à la dépouiller des avantages limités qu'elle pouvait apporter aux syndicats.

L'examen de la controverse au sujet de l'APF confirme que le déchirement qui s'est produit au sein du mouvement syndical provient de ses résultats contradictoires. Les syndicats qui le favorise se trouvent dans les secteurs de l'économie où la capacité de faire la grève est limitée par les conditions du marché du travail. Ils soutiennent que la crainte de l'arbitrage des propositions finales procurerait aux syndicats plus faibles les mêmes avantages que la menace de grève parmi les syndicats plus puissants: il forcerait les employeurs à négocier en vue d'en arriver à un règlement.

Les syndicats qui s'y opposent appartiennent au secteur public car ils redoutent l'intervention d'une tierce partie. Il en est de même des syndicats très militants, lesquels craignent que l'arbitrage des propositions finales affaiblissent leur capacité de maintenir le militantisme de leurs membres.

Les résultats du fonctionnement de l'APF pendant sa première année d'activité ont donné raison dans une certaine mesure à ceux qui le préconisaient. En premier lieu, la majorité des différends soumis ont été réglés avant la nomination ou les décisions des arbitres. Ainsi, des 42 demandes d'arbitrage réclamées jusqu'au 9 janvier 1989, 27 des différends se sont réglés avant l'intervention de l'arbitre, alors que deux seulement ont donné lieu à des décisions. En deuxième lieu, la majorité des requêtes provenaient d'unités de négociation relativement faibles, soit de petits groupes peu importants concentrés dans le commerce, les services, les collectivités locales et l'industrie manufacturière et situés à l'extérieur de Winnipeg.

L'analyse des tendances de la main-d'oeuvre au Manitoba démontre une concentration croissante des travailleurs, surtout les femmes, dans des emplois non syndiqués dans les entreprises commerciales, financières ou autres activités et services qui s'y rattachent. Ces travailleurs ont peu de pouvoir de négociation et sont extrêmement difficiles à syndiquer. C'est le groupe que l'APF voulait favoriser.

L'arbitrage des propositions finales est une pièce législative défectueuse qu'il faut abroger. Toutefois, cette législation répondait à un besoin évident, principalement à accroître la capacité du syndicalisme d'obtenir l'adhésion des travailleurs plutôt démunis et de défendre leurs intérêts. Ce besoin va s'intensifier dans l'avenir. Y répondre efficacement constitue sans doute un défi majeur pour le mouvement syndical au Manitoba.

Contradictions and Limitations of Final Offer Selection

The Manitoba Experience

**Errol Black
and
Jim Silver**

This paper analyses Manitoba's experiment with final offer selection for the purpose of clarifying the roots of the conflict it has generated.

In July 1987, Manitoba's New Democratic Party (NDP) government amended the *Labour Relations Act* to provide for the use of final-offer selection arbitration (FOS). The Act was proclaimed January 1, 1988. In November 1988, a minority Progressive Conservative (PC) government brought in a bill to repeal FOS. Bill 41 is currently on hold, but FOS is almost certain to be repealed before this government has run its course.

The short-lived experiment with FOS arbitration in Manitoba has evoked considerable conflict and controversy. Not only did business oppose FOS vociferously, but also the labour movement fought over and split on the issue. In this paper we argue that the split within the labour movement was, in large part, a reflection of the contradictory character of the legislation. FOS was addressed to a real problem now facing organized labour — and facing some unions more than others — namely the need to assist workers in the small, relatively weak-bargaining units found in the fastest growing sectors of the economy in order to counter the changing structure of the labour force, and the related decline in union membership. But FOS addressed this problem at the cost of creating a variety of other important problems — particularly by creating the risk that unions' willingness and capacity to strike would be eroded. Thus the impending repeal of FOS is both a gain and a loss for organized labour in Manitoba. It is a gain in that a flawed piece of legislation is about to be removed. But it is a loss in that the problem at which the legislation was directed remains unsolved.

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THE BACKGROUND

FOS arbitration was first proposed in Manitoba in a 1984 *White Paper* on labour law reform¹. It was one of a series of measures aimed at reducing the frequency of strikes and promoting «[...] further development of a co-operative, positive problem-solving approach to industrial relations»².

FOS is a form of arbitration by which company and union mutually agree to forego their right to strike/lockout, and to submit their final contract offers to a selector, who then selects one or other of the offers in its totality. FOS has previously been used in various jurisdictions, in some cases on a voluntary basis — i.e., when included in collective agreements — and in other cases on a statutory basis, but with application only to specifically targetted groups of public sector employees³.

The 1984 Manitoba proposal was innovative on two counts. First, the option of FOS would, for the first time in any jurisdiction, be extended to all bargaining units covered by the *Labour Relations Act*. Second, FOS could be invoked not just before, but also during a work stoppage. The intention was that FOS would function like a strike, without the attendant adverse consequences. It would:

spur both sides to reach their own agreement;

deter both sides from insisting on proposals which are clearly unreasonable⁴.

The 1984 FOS proposal encountered opposition from some unions, both in and beyond Manitoba, and from business organizations in Manitoba, especially the Chamber of Commerce, in response to which it was dropped.

But the issue didn't die. Delegates to the Manitoba Federation of Labour (MFL) Convention in Winnipeg in September, 1985, passed an FOS resolution submitted by the Manitoba Food and Commercial Workers (MFCW) Local 832. Not only had the MFCW lost strikes and locals involving small bargaining units in rural Manitoba (B.P. Kent Flour Mills in Virden; Superior Cheese in Souris) where employers used replacement workers; but also the union was losing locals where workers were reluctant

¹ Some of this background has been set out previously in, Errol BLACK, «In Search of 'Industrial Harmony': The Process of Labour Law Reform in Manitoba, 1984», *Relations Industrielles*, Vol. 40, No. 1, 1985, pp. 140-160.

² «Information Concerning Proposed Changes in Manitoba's Labour Legislation», *White Paper*, 1984, p. 9.

³ There is a concise and useful summary of these matters in Alton W.J. CRAIG, *The System of Industrial Relations in Canada*, Scarborough, Prentice-Hall, 1986.

⁴ *White Paper*, *op. cit.*, p. 10.

to strike because of a fear that they would be replaced (Eatons and the Red Oak Inn in Brandon). The resolution called on the government to proceed with the implementation of FOS:

- WHEREAS:** there must be an alternative to strike action to settle collective bargaining agreement disputes; and
- WHEREAS:** the right to strike must nevertheless be preserved; and
- WHEREAS:** more and more unions are losing strikes, resulting in people losing their jobs and creating hardship for their families; be it
- RESOLVED:** that the M.F.L. request the provincial government to enact Final Offer Selection procedure as an option to strike action, however only in combination with the unfettered right to strike as determined by the bargaining unit membership⁵.

Two months later, in November, 1985, the MFL included a demand for FOS in its annual legislative brief to the NDP government. In doing so, however, the MFL was careful to couple its call for FOS with a demand for anti-scab legislation. This was apparently an attempt to placate those trade unionists who argued that FOS would become a substitute for the anti-scab legislation which the movement wanted and needed. The MFL argued that both measures were needed to redress the imbalance in bargaining power which favoured employers and forced many unions into «suicidal strikes» or capitulation:

The M.F.L. has long struggled for legislative change, to give a more effective range of options to unions engaged in collective bargaining. First and foremost amongst these has been the call for anti-scab legislation [...].

[...] But we need more than that. We need options for those workers who are facing difficult negotiations, but are not in a good position to strike at a particular time. We need some recourse for unions which find themselves in a strike-or-capitulate situation, and face the prospect of a long and unproductive strike.

That is why we have helped this government develop a proposal for Final Offer Selection. But we have consistently made it clear that we view anti-scab legislation as the fundamental requirement, and Final Offer Selection as a useful and valuable bargaining option, as long as it remains just that — an option available for workers to accept or reject⁶.

In February 1986 the NDP government was re-elected, with support from the MFL and some major unions, including the MFCW. Sixteen months later, on June 5, 1987 the government introduced Bill 61, *An Act to Introduce Final Offer Selection*. This amendment to the *Labour Relations Act* established two opportunities for either party to apply for a vote on FOS:

⁵ MANITOBA FEDERATION OF LABOUR, *Report of Proceedings, 29th. Convention, 1985*, p. 158.

⁶ MANITOBA FEDERATION OF LABOUR, *Annual Legislative Presentation to The Government of Manitoba*, November 13, 1985, pp. 19-20.

94.1(1) Where there is a collective agreement in force, either party may apply in writing to the board for a vote to determine whether a dispute shall be resolved by the process of final offer selection, if the application is made not more than 60 days before the expiry of the collective agreement and not less than 30 days before the expiry of the term of, or preceding the termination of, a collective agreement.

94.1(2) Where the term of a collective agreement has expired and a strike or a lockout has continued for more than 59 days, the employer or the union may at any time after the 59th and before the 71st day of the strike or the lockout apply in writing to the board for a vote to determine whether the dispute shall be resolved by the process of final offer selection⁷.

If the board approved the application, the legislation required the union to conduct a vote of employees:

- (a) who were in the unit and on the employers' payroll at the time of the application or the strike or lockout began; and
- (b) who, in the opinion of the board, have a continuing interest in the outcome of the dispute [...] ⁸.

A majority vote in favour by those voting on the question ['Do you wish to use the final offer selection process?' (Yes or No)] invoked the FOS procedures: specifically, withdrawal of the right by the union to strike and the employer to lockout, appointment of a Selector, the submission of final offers, the convening of a hearing, and the selection of the final offer of one of the parties.

It is important to stress here, that, while the legislation allowed either the union or the employer to request a vote on FOS, the decision on whether to adopt FOS rested with the employees.

OPPOSITION TO BILL 61

Bill 61 generated renewed controversy. As expected, the Bill was opposed by employers and employer organizations, including the Manitoba Chamber of Commerce, which had obtained a legal opinion suggesting the legislation could be challenged under the *Charter of Rights and Freedoms*⁹, and the Winnipeg Chamber of Commerce, whose President, Dorothy Dobbie, summed up employers' views as follows:

⁷ L.R.M. 1987, c. L10.

⁸ *Ibid.*

⁹ Reported in Murray McNEILL, «Labour Bill Validity Questioned», *Winnipeg Free Press*, June 29, 1987.

What is the point of this legislation? When it was proposed a couple of years ago, it was objected to by both labour and management. It interjects two additional parties into collective bargaining. There used to be just the union and the company. Now, in addition, there will be the workers and the government. We have a nicely balanced labor-management system in this province at the moment. And, as they say, if it ain't broke, why fix it?¹⁰

The Bill also encountered vigorous, in some cases bitter, opposition from important segments of the trade union movement. Within Manitoba, the main opposition came from the Canadian Union of Public Employees (CUPE), the Manitoba Organization of Nurses' Associations (MONA), the International Ladies Garment Workers' Union (ILGWU), unions affiliated with the Confederation of Canadian Unions (CCU), and the Winnipeg Labour Council.

The central arguments against FOS were set out in a *Winnipeg Free Press* article by Paul Moist, a CUPE representative who had resigned as treasurer of the MFL over the issue. Moist charged that the legislation posed a threat to «free collective bargaining», and undermined trade unions as institutions, because: (i) it extended the scope for third-party intervention and the use of binding arbitration; (ii) it created a legal right for management to seek a vote of employees, not just once but twice, during the collective bargaining process, an option which unions have historically opposed, and which was not present in existing legislation; (iii) it usurped the power of trade union leaders, and undermined traditional democratic decision-making processes within unions, by identifying employees as an entity separate and apart from unions; (iv) it potentially enabled management to 'purchase' concessions on clauses relating to matters such as promotion, layoff, and seniority, by sweetening monetary offers; and (v) it made more difficult those legislative reforms aimed at correcting the pro-management imbalance in bargaining relationships — in particular, anti-scab legislation¹¹.

Similar arguments were advanced by the Winnipeg Labour Council. But the Council backed off early in the controversy when it received a

¹⁰ Frances RUSSELL, «Final Offer Selection Bill Opposed From All Sides», *Winnipeg Free Press*, July 8, 1987. Darlene Dobbie was somewhat less than frank in this interview, because the Chamber was on record as wanting the repeal of first-contract legislation, votes on certification applications, and the right for employers to oppose unions during organization drives.

¹¹ Paul MOIST, untitled, but published under the general caption, «Debating Arbitration», *Winnipeg Free Press*, July 5, 1987. See also, *Brief to the Industrial Relations Committee, Government of Manitoba, on Bill 61, An Act to Amend the Labour Relations Act*, Manitoba Division, Canadian Union of Public Employees, June, 1987.

warning from the Canadian Labour Congress that it was intruding in the jurisdiction of the MFL, and should therefore drop its opposition to the bill¹².

Wilf Hudson, President of the MFL, rejected the arguments of the Bill's opponents. He claimed that FOS would strengthen collective bargaining by protecting unions from employers bent on smashing them whatever the cost, that it would enhance the prospects of unionization in sectors where workers had little chance of making gains through the traditional routes of collective bargaining and strike action, and that it would discourage wasteful and unproductive strikes and lockouts. Hudson also attempted to deal with CUPE's concern that FOS would undermine unions by giving employers the right to ask for a vote of employees: «The final decision must rest with the employees. They are the ones who must live with the consequences. Besides, it accords with the democratic practices of the union movement to submit all significant options to a vote of the membership.» And he reiterated the MFL's intention to continue to pressure the government to bring in anti-scab legislation¹³.

The 1987 debate over FOS was intensified by the concurrent involvement of the MFCW — Bill 61's main proponent — in one of the most bitter and protracted strikes in Manitoba in the 1980s. On June 4, 1987, 1600 members of Local 832, MFCW, struck Westfair Foods in Winnipeg and Brandon. The company had demanded a reduction in starting wages, and in the proportion of employees guaranteed a minimum number of hours of work per pay period. The latter concession was especially important in an industry with a high proportion of part-time employees. Westfair responded to the strike by reopening its stores with bargaining unit members who crossed picket lines, and replacement employees recruited through newspaper advertisements. The predictable result was mass pickets and picket-line violence, court injunctions on picketing, police intervention, the use of «rent-a-cops» and picket line surveillance with video cameras, arrests, fines, the intervention of a mediator, and the use of arbitration to decide the fate of numerous workers who were suspended or dismissed by the company during the strike.

¹² Patrick MCKINLEY, «CLC Warns Labor Council of Bill Opposition», *Winnipeg Free Press*, June 19, 1987. Public hearings at the committee stage of the legislative process in late June were attended by Jeff Rose, national president of CUPE, and John Lang, secretary-treasurer of the CCU. Rose criticized both the bill and the NDP government, accusing the government of dividing «'...us as management has never been able to do...It is both sad and unforgivable.'» Patrick MCKINLEY, «National Groups Condemn Labor Bill», *Winnipeg Free Press*, June 24, 1987.

¹³ Wilf HUDSON, «Final Offer Selection Would Help to Prevent Strikes», *Winnipeg Free Press*, July 5, 1987.

Both the NDP government and the Conservative Party opposition used the strike as evidence of the merits of their respective positions on the FOS debate. When strikers organized a solidarity picket involving 500 workers at one of the Winnipeg stores, complaints from the company brought «[...] 20 police cruisers, several motorcycle officers, detectives and a paddy wagon» to the scene¹⁴. Before the picket ended, 12 participants had been arrested and charged with various offences. The next day the Minister of Labour, Al Mackling suggested that if FOS had been in effect the confrontation and picket-line violence may have been avoided¹⁵. For their part, the Conservative opposition alleged that FOS, if passed, would be used to bail-out Local 832 in its conflict with Westfair¹⁶. In response to this charge, Mackling felt compelled to delay proclamation of Bill 61, which passed third reading in July 1987, until January 1, 1988¹⁷. Consequently FOS played no part in the final settlement of the strike, except that Westfair and Local 832 agreed upon a selector in the event that negotiations in 1990 were referred through FOS.

Though less noisy, a second strike involving MFCW was more representative of the kind of problem that FOS was intended to resolve. Twenty-one workers at Smitty's Restaurant in Winnipeg struck in September 1986¹⁸. The strike, called in response to the employer's demands for abolition of a minimum hours guarantee and concessions on benefits (which had been included in a first agreement imposed by the Manitoba Labour Board) lasted for three months. The employer remained open using non-union members of the bargaining unit and newly recruited employees. The strike collapsed when full-time employees found alternative employment and abandoned the picket line and the local was decertified.

It had been expected that the bitter debate on FOS would be revived at the MFL Convention in Brandon in September, 1987. However, it was the appeal to precisely the kind of situation that had unfolded at Smitty's that enabled the labour movement to suppress its differences on the issue. Delegates focused instead on a resolution submitted by Local 832 of the

¹⁴ Shane MINKIN, «12 Arrested as Union Rally Turns Violent», *Winnipeg Free Press*, June 25, 1987.

¹⁵ Patrick McKINLEY, «Bill Touted in Wake of Clash», *Winnipeg Free Press*, June 26, 1987.

¹⁶ Bill 61 came to be referred to by many as the «bailout Bernie» bill, the reference being to MFCW President Bernard Christophe.

¹⁷ Arlene BILLINKOFF, «Final Offer Selection Angers Many, Pleases Few», *Winnipeg Free Press*, October 13, 1987.

¹⁸ MANITOBA LABOUR, *Manitoba Labour Relations Information Bulletin*, January, 1988, p. 74.

MFCW, which acknowledged the new legislation creating the FOS option, but called for a unified campaign to force the government to bring in anti-scab legislation.

RESOLVED: that the MFL request the provincial government [...] to bring about anti-scab legislation as they did with other recent labour relations legislation; and be it further

RESOLVED: that the MFL organize a campaign with all affiliates to convince the government to enact this legislation; and be it further

RESOLVED: that the MFL submit an anti-scab resolution to the next provincial NDP Convention and make every effort to make this resolution the number one priority within the convention labour panel¹⁹.

THE DEMISE OF FOS

However, as things turned out, not only was anti-scab legislation not introduced, but also Bill 61 will almost certainly soon be scrapped. In April 1988 a minority Conservative government was elected, and the NDP was reduced to third party status with 12 seats. On November 11, 1988, the new government brought in Bill 41, to repeal FOS. The Minister of Labour, Ed Connery, justified Bill 41 on the grounds that FOS «[...] is intrusive and one-sided [...] It clearly results in one side winning and one side losing.»²⁰. Repeal of FOS would restore «fairness and balance» to the rules governing industrial relations. Sharon Carstairs, leader of the Liberal Party, supported the repeal of FOS on the grounds that it helped «big unions», while the NDP opposed its repeal, arguing that while there had been 30 applications for an FOS vote since it was instituted, it had only been used twice.

Labour leaders objected as well, but without the vigour and passion which had characterized the debate in 1987. MFL president Wilf Hudson called the measure unfair, and suggested it would lead to an increased incidence of strikes. MFCW President Bernard Christophe also invoked the spectre of increased strikes and picket line violence. Pat McEvoy, a regional vice-president of the Canadian Association of Mechanical, Industrial and Allied Workers Union (CAIMAW), and one of the more vocal opponents of FOS in 1987, implied that while it might be the appropriate thing to do the Act was being repealed for the wrong reasons — an anti-union action by an anti-union government. CUPE had no comment²¹.

¹⁹ MANITOBA FEDERATION OF LABOUR, *Report of Proceedings, 30th Convention, 1987*, p. 125.

²⁰ Catharine MITCHELL and David ROBERTS, «Union Leaders Denounce Bill to Kill Labor Law», *Winnipeg Free Press*, November 12, 1988.

²¹ *Ibid.*

DISCUSSION: THE CONTRADICTIONS OF FOS

Organized labour's muted response to the demise of FOS, like the debate the legislation generated in 1984 and again in 1987, reflects the legislation's central contradiction: FOS arbitration is a flawed instrument, intended to resolve a real need. The specific problems with FOS, from labour's point of view, were expressed frequently during the controversy, and are exemplified by the comments of CUPE's Paul Moist, cited above²². The most significant concern was that the will to strike would be eroded, and/or the right to strike would be removed, as a consequence of FOS. The ready availability of arbitration would constitute a seductive alternative to strike action, thus eroding the real strength of the labour movement — workers' willingness to withdraw their labour. Or alternatively, in the hands of a government hostile to labour, Manitoba's FOS legislation could easily be modified to prevent unions from choosing strike action. What is more, the likelihood of such an outcome is considerable, because it could be effected in the name of «fairness» and «equity», on the grounds that management should be given a right equal to labour's to demand FOS without recourse to a vote by union members. Witnesses testifying before the Legislature's Standing Committee on Industrial Relations in support of FOS were repeatedly asked by Tory members of the Committee about Bill 61's unfairness — i.e., that union members could vote to prevent or end a lockout by invoking FOS, but management could not vote to prevent or end a strike. The implication was that a Tory government, acting in the name of fairness, would give management the same rights as labour²³. Some unions which opposed the Bill saw this risk to the right to strike. CUPE noted:

Bill 61 proposes a system which allows the Union membership the opportunity to remove management's legal right to «lock out». Union members are also able to vote down a management request to settle negotiations via the FOS route. Bill 61 is weighted in favour of the Union membership and it is not difficult to imagine that under another government, the FOS model might be similarly weighted in favour of management²⁴.

MONA added:

22 For a particularly aggressive attack on FOS, see Peter KENNEDY, «Final Offer Seduction», *Canadian Dimension*, Vol. 19, No. 6, January/February 1986, pp. 11 and 23.

23 Manitoba Standing Committee on Industrial Relations, Hearings on Bill 61, June 23, 1987.

24 *Brief to the Industrial Relations Committee, Government of Manitoba on Bill 61, An Act to Amend the Labour Relations Act*, by Manitoba Division, Canadian Union of Public Employees, June 1987, p. 7.

Giving the Union membership the right to take away management's right to lockout, may prompt a future government to even up the equation by granting an employer the right to remove a Union's strike option²⁵.

It is not surprising that opposition to FOS was led by public sector unions like CUPE, MONA and CUPW. They had already experienced the harsh hand of the state, not only at the federal, but also at the provincial levels, especially in B.C., Alberta, Saskatchewan and Québec²⁶. Their opposition to FOS was couched in terms of the sanctity of free collective bargaining, unhindered by the encroachment of a potentially dangerous third party. Public sector unions were also concerned that «the employers' ability to pay» could be taken into account by a Selector. They feared that this might allow Selectors to use government deficits as grounds to justify rulings in favour of public employers. Other unions who opposed FOS, like ILGWU, CAIMAW and CWC, did so for a variety of reasons — in the case of CAIMAN, for example, opposition to FOS may have reflected, in part, the rivalry between the MFL and the CCU, to which CAIMAW is affiliated — but particularly because of their concern that FOS, by eroding the will to strike, would push labour further in the direction of business unionism, and away from rank and file militancy. These are reasonable concerns, particularly if FOS is seen in the broader context of the restructuring of labour relations currently under way, a central feature of which is the use of the state to erode trade union rights, including the right to strike.

Yet the case made for FOS by those unions which promoted and supported it is more compelling than some of its critics have allowed. The need at which FOS is directed is real, and crucially important for the future of the labour movement. The legislation was intended to help smaller, weaker bargaining units, by offering them an alternative to strike action, which too often has proved to be suicidal. This has been stated clearly by the NDP's current labour critic, Steve Ashton, who has argued that:

Final offer selection is key to workers in certain sectors. Service sector employees, many of whom are women, may finally be able to achieve the right to organize and obtain fair working conditions without having to go through lengthy and costly strikes²⁷.

A similar view has been expressed by Paul Phillips. *Winnipeg Free Press* columnist Frances Russell wrote that:

²⁵ *Brief to the Industrial Relations Committee, Government of Manitoba, In Response to Bill 61, An Act to Amend the Labour Relations Act*, June 1987, p. 8.

²⁶ See Leo PANITCH and Donald SWARTZ, *The Assault on Trade Union Freedoms*, Toronto, Garamond Press, 1988.

²⁷ Steve ASHTON, «Final Offer Selection is Working», *Winnipeg Free Press*, January 9, 1989.

[Paul Phillips] speculates that one reason the Manitoba Federation of Labour wants final offer selection is the nature of Manitoba's economy. This province is dominated by small businesses, largely in the service sector. Final offer selection, like first-contract legislation, makes it easier for unions to organize small workplaces where the employees are usually low income, female and frightened of strike action.

'These types of employees are easily victimized by employers. Final offer selection makes it much more difficult for employers to break strikes and smash unions'²⁸.

Similar views were expressed by Len Stevens, USWA, and Bruno Zimmer, UFCW, in their testimony in support of Bill 61 before the Standing Committee on Industrial Relations²⁹.

The kinds of employees and bargaining units which are described by Phillips and Ashton, and at which FOS is aimed, are growing rapidly in Manitoba, as is the case almost everywhere. Most new jobs are being created by small businesses, and are disproportionately in the service sector, at low wages, and are increasingly likely to be part-time. These fastest growing segments of the labour force are the hardest to organize, and the hardest in which to negotiate collective agreements. FOS was intended to help such workers.

Thus the consequences of FOS are contradictory: while it is aimed at helping those smaller, weaker bargaining units in the most rapidly growing sectors of the economy, the cost of its implementation is a greater degree of government intervention in collective bargaining, and the risk that it might erode the willingness and capacity of workers to strike. The position adopted by particular unions on the question of FOS can be explained, to a considerable extent, by reference to this contradiction. Those unions supporting the legislation were more likely to be attempting to organize in the most rapidly growing, lower wage sectors of the economy, and/or to have lost membership in high wage sectors of the economy. Those unions opposing the legislation were more likely to be either public sector unions which had had experience with the dangers of the kind of third party intervention contemplated by the legislation, or more militant unions fearful of the risk that FOS would nudge organized labour further in the direction of business unionism.

²⁸ Frances RUSSELL, «Final Offer Selection Bill Opposed From All Sides», *Winnipeg Free Press*, July 8, 1987. In his comments to Frances Russell, Phillips also made the point that the public benefits from FOS by gaining added protection against the disruptive effects of strikes.

²⁹ Manitoba, Legislative Assembly, Standing Committee on Industrial Relations, *Minutes of Proceedings and Evidence*, June 23, 1987.

WHO HAS USED FOS?

That FOS is needed by smaller, weaker bargaining units in Manitoba is made evident by the disaggregated data on its usage. Table 1 provides data on FOS applications.

Table 1
Status of FOS Application
Received, January 1, 1988 to January 9, 1989

<i>Application Received</i>	42
By Unions	37
By Employers	5
Prior to expiry of Collective Agreement	36
Following strike	6
<i>Status of Application</i>	
Dismissed	3
Pending	1
Agreement reached prior to selector appointment/decision	27
Selector appointment/decision pending	7
Awaiting appointment of selector	2
Selector decisions filed	2

Source: Data provided by Janet Duff, Registrar, Manitoba Labour Board.

Table 2 provides additional detail on the specific situations for which FOS applications were made.

These data reveal that 34 of the 42 applications for FOS came from relatively small bargaining units in Trade, Manufacturing, Services and Public Administration. Moreover, 18 of the 34 applications in the four categories were from outside Winnipeg, in rural and northern Manitoba.

Such results support Ashton's observation that an important benefit of FOS is that it provides workers in small units in some industries an opportunity to organize and achieve «fair» working conditions without having to resort to the trauma and insecurities associated with «suicidal» strikes.

Table 2
FOS Applications by Industry and Size of Bargaining Unit

Industry	Number of Applicants			Size of Bargaining Unit		
	Total	Winnipeg	Rest of Manitoba	Average	Smallest	Largest
Mining ^a	3	—	3	223	168	323
Manufacturing ^b	9	6	3	79	9	167
Construction ^c	2	2	—	245	200	290
Transportation	1	1	—	21	21	21
Trade	11	6	5	22	4	50
Service	5	4	1	40	12	92
Finance	1	—	1	71	71	71
Public Administration ^d	9	—	9	9	3	30
Miscellaneous ^e	1	1	—	200	200	200
Totals	42	20	22	62	3	323

^a Includes two applications arising out of bargaining relationship between Fison Western Corporation and United Food and Commercial Workers, Local 111. The first application was made by the employer April 12, 1988 prior to negotiations. It was voted on and rejected by the employees. A strike ensued June 1, 1988. The Union applied for FOS after 60 days on strike — on August 21, 1988. This time the employees voted for FOS. A selector was appointed, but the two parties concluded an agreement prior to the hearings.

^b Includes a unit of office employees at the McKenzie Seeds Company in Brandon.

^c In these two cases the application covered locals of the Teamsters, Operating Engineers and Labourers unions.

^d The nine employers in these cases are Rural Municipalities.

^e The employer in this case is Associated Beer Distributors of Winnipeg, which handles distribution for the three Manitoba breweries.

Sources: The Manitoba Labour Board; Manitoba Labour, *Manitoba Labour Relations Information Bulletin*, various numbers; and United Food and Commercial Workers, Local 111.

SHIFTS IN THE STRUCTURE OF MANITOBA'S LABOUR FORCE

The structure of Manitoba's labour force is shifting in such a way that the fastest growing sectors of the economy are precisely those in which workers are most likely to be in need of the kind of assistance that FOS was intended to offer. At the same time jobs are being lost in those sectors of the economy most likely to be unionized.

One recent study found that 11,191 Manitoba jobs had been lost in the period 1976-1986 as a consequence of the closure of companies that employed 50 or more people³⁰. A disproportionate number of these jobs

³⁰ Jim SILVER, «Plant Closures in Manitoba: 1976-1986», in Jeremy HULL and Jim SILVER (eds.), *Essays on the Political Economy of Manitoba*, Regina, Canadian Plains Research Centre, forthcoming.

was in manufacturing: in 1986 12,9% of Manitoba's paid non-agricultural labour force were employed in manufacturing — a decline from 15,5% in 1976 — while 58,9% of the jobs lost due to closure in the 1976-1986 period were in manufacturing. Manufacturing employment suffered an absolute decline of 1,000 jobs during this period. And while 37,2% of the paid, non-agricultural labour force was unionized in 1986, 60% of the jobs lost due to closure were unionized jobs. Some of the unions which supported FOS were particularly hard hit: USWA lost 1086 members to large closures in the 1976-1986 period; UFCW lost 1378 members. The MFL lost a net total of 3000 members between 1980 and 1985. All of this suggests a shift in employment away from unionized, manufacturing jobs — i.e., jobs that are likely to be relatively well-paid.

The same conclusion is suggested by Table 3, which presents more detailed data on changes in the non-agricultural sector of the economy from 1982 to 1987.

Table 3
Changes in Employment in Manitoba, 1982 to 1987,
by Industry and Sex, and Showing the Average Hourly
Wage of Paid and Salaried Employees as of December, 1987

<i>Industry</i>	<i>Absolute Change in Employment</i>		<i>Hourly Wage Rate^a</i>	
	<i>Males</i>	<i>Females</i>	<i>Paid</i>	<i>Salaried</i>
Primary ^b	1,000	*	*	*
Manufacturing	0	-1,000	\$10.89	\$14.46
Construction	5,000	*	13.12	13.24
Transportation, Communication & Other Utilities	-5,000	2,000	12.49	15.87
Trade	4,000	3,000	8.24	11.51
Finance, Insurance & Real Estate	2,000	2,000	7.96	12.29
Community, Business and Personal Services	7,000	15,000	9.26	14.10
Public Administration	1,000	4,000	*	*
Total	17,000	27,000	10.10	14.03

* No data

^a Average hourly wage rates including overtime, reported for December, 1987.

^b Forestry, mining, fishing and trapping.

Sources: Statistics Canada, *The Labour Force* (71-001), various numbers and *Employment, Earnings and Hours* (72-002), December, 1987.

These data indicate that employment growth in Manitoba in the 1980's has been concentrated in four industry groups: Trade; Finance, Insurance and Real Estate; Community, Business and Personal Services; and Public Administration³¹. These are the same industry groups in which there is a disproportionate concentration of relatively low-wage jobs.

A further development which has emerged in the 1980s is that an increasing proportion of job creation is in very small firms. Table 4 reveals that 75% of net job creation in Manitoba's private sector over the period 1978 to 1985 was in firms with less than five employees, a further 19% in firms with 5 to 19 employees. In contrast, there was a net loss of jobs in firms employing 100 or more employees.

Table 4
Net Job Creation in the Private Sector
by Size of Firm, Manitoba, 1978 to 1985

Firm Size (Number of Employees)*	Distribution of Employees* 1985	Net Change in Employment*	
		Number	Percent
less than 5	8,9	23,100	75,2
5 — 19	13,0	5,900	19,2
20 — 49	9,2	700	2,3
50 — 99	7,6	1,300	4,2
100 — 499	61,2	200	0,6
500 and over		-500	-1,6
Total	100,0	30,700	100,0

* Full-year equivalent employees.

Source: Pat THOMPSON, *A Statistical Profile of Small Business in Canada and the Prairies*, Canadian Federation of Independent Business, 1988, pp. 31 and 48. (The Thompson study is based on taxation data obtained from Statistics Canada Business Microdata figures. The procedures used by Statistics Canada to calculate full-year equivalent employment obscures the pervasiveness of small-firm employment in the Canadian and Provincial economies. Data generated by Statistics Canada in the *Labour Force Survey* reveal that in 1986, 44,5% of men and about 40% of all women in Manitoba who held jobs at some time during the year were employed in firms with less than 20 employees. See Statistics Canada: *Canada's Men: A Profile of their 1986 Labour Market Experience* (71-206); and *Canada's Women: A Profile of their 1986 Labour Market Experience* (71-205).)

³¹ A report prepared by the federal department of Regional Industrial Expansion (*State of Small Business*, unpublished) suggests that 85% of employment growth in Manitoba over the period 1978-1986 was in community, business and personal services and trade. The comparable figure for Canada is 75 percent. These are, of course, the same industries in which the conversion of jobs to a part-time basis is most pronounced. A recent Statistics Canada Study (Jean-Marc LÉVESQUE, «The Growth of Part-Time Work in a Changing Industrial Environment», *The Labour Force* (71-001), May, 1987), revealed that in 1986 23,5 percent of the jobs in trade and 24,4 percent of the jobs in community, business and personal service industries were part-time.

The relationship between new jobs and wage rates is suggested by a recent Statistics Canada study³², which analyzes changes in the wage distribution of jobs from 1981 to 1986. The study finds a disproportionate growth in low-wage jobs. Full-time equivalent jobs paying a 1986 wage of \$5.24 or less increased by a remarkable 33,5 percent between 1981 and 1986. Table 5 compares the proportion of full-time equivalent employees in bottom level jobs in 1981 and 1986, by age and sex.

Table 5
Proportion of Full-Time Equivalent Employees in
Jobs Paying the 1986 Equivalent of \$5.24 or Less, Canada,
1981 and 1986 by Sex and Age

Age Group	Males			Females		
	1981	1986	Change in % points	1981	1986	Change in % points
16 — 24	13,4	26,1	12,7	19,8	39,6	19,8
25 — 34	4,7	5,4	0,7	10,0	12,5	2,5
35 — 49	4,3	3,9	-0,4	10,9	11,6	0,7
50 plus	6,7	4,5	-2,2	13,2	14,4	1,2
All age Groups	6,8	8,1	1,3	13,6	18,1	4,5

Source: I.J. MYLES, G. PICOT and T. WANNELL, «The Changing Wage Distribution of Jobs», Statistics Canada, *The Labour Force* (71-001), October, 1988.

There has been an increase in the proportion of both males and females at the bottom of the wage distribution, but the change is particularly significant for women. Moreover, the breakdown by age group reveals that the increasing concentration in low wage jobs is especially pronounced in the 16-24 age group. Indeed, the proportion of workers in this age group in the lowest paying jobs doubled for both males and females. In the case of females, the proportion of workers in low-wage jobs increased in every age group.

Comparable data are not provided for Manitoba, but a regional comparison indicates that the shift to the \$5.24 or less wage category was most

³² I.J. MYLES, G. PICOT and T. WANNELL, «The Changing Wage Distribution of Jobs», Statistics Canada, *The Labour Force* (71-110), October, 1988.

pronounced in Manitoba/Saskatchewan, where the proportion increased by 3,9 percentage points, as compared to a national average of 2,1 percentage points³³.

The increase in low-wage jobs was especially pronounced in consumer service industries (retail trade; accommodation, food and beverage; amusement and recreational services; personal and household services; and other services) where the change was 10,7 percentage points — an increase from 22,2 to 32,9 percent. In 1986, this industry group accounted for almost 20 percent of total full-time equivalent jobs and paid an average wage per hour which was 69 percent of the overall average³⁴.

It is not possible to obtain a precise correspondence between the published data on employment, and union penetration rates. However, the available data is suggestive of an inverse relationship between the fastest growing industry groups — in terms of employment — and the rate of unionization. Thus in 1984, wholesale trade, retail trade, finance, insurance and real estate, and services (exclusive of education and health and welfare services), which accounted for 37,5 percent of paid workers in Manitoba, had a combined unionization rate of 8,8 percent — substantially below the 34,5 percent for all Manitoba industries³⁵.

In summary, recent trends in Manitoba point to a decline in relatively high wage, manufacturing sector, unionized jobs, and an increasing concentration of employees, especially female employees, in low-wage — and increasingly part-time — jobs in largely non-unionized firms in trade, financial and related activities and services. Such employees are difficult to unionize, because labour market conditions leave them vulnerable to employer victimization if they seek to unionize, and with little bargaining power if they are successful in forming a union. This lack of power inhibits both their desire and their capacity to form unions³⁶. It was in response to this reality that FOS was introduced.

Yet FOS is a particularly contradictory piece of legislation. Though needed to help organize and bargain collectively in the fastest growing sectors of the economy, its provisions are such that it would likely have eroded workers' willingness and capacity to strike. Though needed to help organize and bargain collectively in those sectors of the economy most likely to

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Unpublished data from *Survey of Union Membership* conducted by Statistics Canada in December, 1984 and provided by T. Scott Murray of Statistics Canada.

³⁶ J. MYLES, G. PICOT and T. WANNELL, *op. cit.*, note that the unionization rate amongst workers age 16-24 is declining: «The percentage of unionized jobs held by young workers fell from 27% in 1981 to 18% in 1986.» (p. 126).

employ women, recent immigrants, and others most in need of the protections which a trade union can afford, the dynamics of FOS are such that unions would be deterred from putting forward the kinds of innovative demands that such workers frequently need³⁷. Though introduced as a substitute for anti-scab legislation, the data on the use of FOS — which show that it has been used disproportionately by relatively small, weak bargaining units most vulnerable to aggressive employers — confirm the need for anti-scab legislation³⁸.

CONCLUSIONS

Given its contradictory character, any conclusions about FOS must out of necessity be double-edged: though it is a flawed instrument, it is aimed at a real and important need. Its flaws are sufficiently dangerous to the trade union movement that its death at the hands of a Conservative, anti-labour government would almost certainly be beneficial to organized labour. Yet the demise of FOS will leave unsolved the problem at which the legislation is aimed, namely, the necessity to improve labour's capacity to organize, and to negotiate collective agreements for the relatively weak workers employed in the numerically most dominant and fastest growing sectors of Manitoba's economy. Anti-scab legislation would have been a better response — from labour's perspective — to this problem than FOS, but it would have occasioned even greater opposition from business than did FOS, and would have been repealed the moment the provincial Conservatives took office.

The consequence is that when FOS is repealed, unorganized workers in low-wage jobs will face substantial obstacles to their efforts to organize to improve their situation. For the trade union movement as a whole, the prospect seems to be for stagnation, perhaps decline, unless a better strategy can be developed than the ill-fated FOS.

³⁷ «Another concern with FOS is that any innovative proposals are likely to be seen as excessive. Who will suffer most from this? It is our view that women, minorities and low paid service personnel will be the most disadvantaged. Contract clauses referring to daycare, affirmative action, technological change and retraining, and professional responsibility are not common and therefore dangerous if presented to a selector.» *Brief to the Industrial Relations Committee, Government of Manitoba, In Response to Bill 61, An Act to Amend the Labour Relations Act*, June 1984, p. 6.

³⁸ CUPE was particularly emphatic in arguing that the need at which FOS was aimed would be better met by anti-scab legislation. «Anti-scab legislation, which prevents the legal use of replacement workers during a legal strike/lockout, evens up the labour/management power relationship which is so seriously out of kilter today. It does so by inflicting an economic penalty on employers equal to that currently felt by employees (only) during most work stoppages. It corrects the imbalance without altering either the Union's or Management's right to declare a strike or a lockout as the case may be.» *CUPE Brief*, June 1987, p. 22.

*Les contradictions et les limites de l'arbitrage
des propositions finales
L'expérience du Manitoba*

En juillet 1977, le gouvernement NPD du Manitoba modifia la Loi des relations du travail de cette province de façon à permettre le recours à l'arbitrage des propositions finales (APF). Il s'agissait d'une solution de compromis à une revendication du mouvement syndical qui demandait l'adoption d'une mesure contre les briseurs de grève. La loi fut promulguée le 1^{er} janvier 1988. En novembre 1988, un gouvernement minoritaire progressiste-conservateur proposa le projet de loi 41 en vue d'abroger cette mesure. Ce projet de loi est encore en suspens (sept. 89), mais il est presque assuré que l'APF sera aboli avant que ne se termine le mandat de ce gouvernement.

L'expérience de l'APF a soulevé bien des conflits et des controverses au Manitoba. Le monde des affaires s'y est opposé. De même, il a suscité des contestations de la part des grands syndicats et a entraîné des dissensions au sein du mouvement syndical.

Le présent article analyse l'expérience manitobaine en matière d'APF afin de clarifier les causes du conflit qu'il a généré. L'arbitrage des propositions finales visait à régler un problème réel, soit la nécessité d'aider les travailleurs de petites unités, dont le pouvoir de négociation est faible, dans les secteurs en forte croissance de l'économie. Les syndicats espéraient retirer un avantage potentiel d'un tel arbitrage en l'utilisant comme outil pour contrer le déclin des effectifs syndicaux résultant des changements dans la structure de la main-d'oeuvre. Mais cette législation comportait aussi un double risque: celui de miner leur volonté et leur capacité de mobiliser leurs membres en vue de la grève; celui de voir des gouvernements dans l'avenir modifier cette législation de façon à la dépouiller des avantages limités qu'elle pouvait apporter aux syndicats.

L'examen de la controverse au sujet de l'APF confirme que le déchirement qui s'est produit au sein du mouvement syndical provient de ses résultats contradictoires. Les syndicats qui le favorise se trouvent dans les secteurs de l'économie où la capacité de faire la grève est limitée par les conditions du marché du travail. Ils soutiennent que la crainte de l'arbitrage des propositions finales procurerait aux syndicats plus faibles les mêmes avantages que la menace de grève parmi les syndicats plus puissants: il forcerait les employeurs à négocier en vue d'en arriver à un règlement. Les syndicats qui s'y opposent appartiennent au secteur public car ils redoutent l'intervention d'une tierce partie. Il en est de même des syndicats très militants, lesquels craignent que l'arbitrage des propositions finales affaiblissent leur capacité de maintenir le militantisme de leurs membres.

Les résultats du fonctionnement de l'APF pendant sa première année d'activité ont donné raison dans une certaine mesure à ceux qui le préconisaient. En premier lieu, la majorité des différends soumis ont été réglés avant la nomination ou les décisions des arbitres. Ainsi, des 42 demandes d'arbitrage réclamées jusqu'au 9 janvier

1989, 27 des différends se sont réglés avant l'intervention de l'arbitre, alors que deux seulement ont donné lieu à des décisions. En deuxième lieu, la majorité des requêtes provenaient d'unités de négociation relativement faibles, soit de petits groupes peu importants concentrés dans le commerce, les services, les collectivités locales et l'industrie manufacturière et situés à l'extérieur de Winnipeg.

L'analyse des tendances de la main-d'oeuvre au Manitoba démontre une concentration croissante des travailleurs, surtout les femmes, dans des emplois non syndiqués dans les entreprises commerciales, financières ou autres activités et services qui s'y rattachent. Ces travailleurs ont peu de pouvoir de négociation et sont extrêmement difficiles à syndiquer. C'est le groupe que l'APF voulait favoriser.

L'arbitrage des propositions finales est une pièce législative défectueuse qu'il faut abroger. Toutefois, cette législation répondait à un besoin évident, principalement à accroître la capacité du syndicalisme d'obtenir l'adhésion des travailleurs plutôt démunis et de défendre leurs intérêts. Ce besoin va s'intensifier dans l'avenir. Y répondre efficacement constitue sans doute un défi majeur pour le mouvement syndical au Manitoba.

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